The ADR Quarterly

Alternative Dispute Resolution Section of the State Bar of Michigan

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The Chair's Corner

by Marty Weisman

This coming year will be a very exciting one for the ADR Section with many opportunities for Section members to make a difference.

We were advised late last year that ICLE will not offer in March of 2015 the Advanced Dispute Resolution Institute (ANDRI) that it co-sponsored with the ADR Section for the past 13 years. As a result, your Section has undertaken an alternative. On March 17, 2015, at Western Michigan University Cooley Law School's Auburn Hills Campus, the Section will present renowned ADR trainer, author, and practitioner, Kimberly Kovach, for an eight hour advanced mediation training. Additionally, the Section, in partnership with the American Arbitration Association, is in the process of developing, and will be offering sometime in 2015, a basic arbitration training course. No such training course has ever been offered before in Michigan. The Section is also sponsoring Lunch and Learn webinars on various topics throughout the year. So far, the topics have included the Revised Uniform Arbitration Act, the Business Court and Bullying with new programs on tap for Effective Techniques for Mediators, Mediation for Never Marrieds and one involving Mediating Elder Law Disputes.

Training and education are only a small part of what we do. We also have a Task Force of volunteers researching and developing a program for mandatory or automatic mediation and perhaps other forms of ADR. This may require extensive lobbying efforts or attempts to modify Court Rules. We are also working on a court rule which will allow Joint Petitions for Divorce without having to have a Plaintiff or Defendant identified as such. We advocated for the passage of the Uniform Collaborative Law Act and are now supporting a court rule which will allow for judgments of divorce to include post-judgment binding arbitration provisions for unresolved personal property issues.

New ideas and programs are being worked on to develop ways to assist our members and to build relationships within our community. We are investigating the implementation of an ADR "hotline" where

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our members who have issues or questions about ADR can make contact with other experienced ADR practitioners who will respond to the inquiries similar to the way the State Bar Ethics hotline works. We are looking to develop an ADR mentoring program or just opportunities for ADR professionals to get together and "kibitz" about the practice and exchange views and stories.

These activities all start with our Action Teams and Task Forces. You do not have to be a member of the Council to participate. I urge all of you to take a look at our Action Teams and get active. These include:

(a) Effective Practices and Procedures, Marc Stanley, Chair (mstanley@uwjackson.org), whose goals are to improve ADR practices and procedures and review pending or proposed legislation or court rules that impact ADR and make recommendations to the Council.

(b) Outreach, Erin Hopper, Chair (ehopper@whiteschneider.com), whose goal is to increase the awareness of ADR, its forms, uses, and benefits.

(c) Government Task Force, Brian Pappas, Chair (pappasb@law.msu.edu), whose purpose is to educate governmental agencies about the benefits of ADR and urge its use.

(d) Judicial Access, Hon. William Caprathe, Chair (bcaprathe@netscape.net), who advances ADR goals as they pertain to courts throughout the State.

(e) Diversity, Earlene Baggett-Hayes, Chair (erbhayes@sbcglobal.net), who has the goal of promoting and supporting diversity in the field of ADR and increasing the cultural competence of ADR providers.

(f) Membership, Celeste McDermott, Chair (celestemcdermott@hotmail.com), who raises awareness in the ADR community of all that the Section has accomplished and seeks to increase the number of members and affiliates in the Section.

(g) Publications, Lee Hornberger, Chair (leehornberger@leehornberger.com), who solicits, reviews, and publishes articles for our quarterly newsletter, is responsible for postings to the Section's e-mail list serve and web site, and otherwise keeps our members up to date on Section's activities.

(h) Section to Section, Don Gasiorek, Chair (dgasiorek@gmgpc.com), who strives to increase collaboration with other sections of the state, local, and specialty bar associations in the understanding and use of ADR by sponsoring joint programs and activities.

(i) Skills, Sheldon Stark, Chair (shel@starmediator.com), who is responsible for planning skills enhancement programs in ADR throughout the year such as our Annual Meeting and Training Conference scheduled for October 2 and 3, 2015 in Traverse City. Our March 17, 2015 Advanced Mediation Training Program, Lunch and Learn Series and the Basic Arbitration Course.

(j) Mandatory Mediation Task Force, William Weber, Chair (williamlouisweber@msn.com), who is responsible for exploring, developing and recommending possible legislative or court rule changes to provide for the mandatory use of ADR in various types and sizes of disputes.

If you have an interest and want to work on any of these Action Teams or Task Forces, feel free to e-mail me at mweisman@wyrpc.com and I will see to it that the appropriate chair gets the information and will contact you. I urge you to get involved. It is a very rewarding experience.

My Ten Biggest Mistakes as a Mediator

by Jon G. March, Miller Johnson

INTRODUCTION

The earliest experience I can recall about learning from mistakes came when I was in seventh grade in Ann Arbor. The junior high school I attended had a new swimming pool, so once a week in gym class we were required to have swimming lessons. I never liked it very much. The water was cold and overly chlorinated. One day, at the start of the class, the instructor called out my name and told me to jump in the pool and swim to the other end and back using the breast stroke. Thinking that I had heretofore greatly underestimated my swimming talent, and the instructor's ability to appreciate it, I complied, giving everything I had to what I understood was the breast stroke. I surfaced just in time to hear the instructor say, "And that's a perfect example of how not to do the breast stroke."

In my now 40 plus year career as a trial lawyer, I have found that most of the things I have learned have come as a result of analyzing my mistakes. One of my responsibilities at our law firm is to train our litigation associates. I tell them that I am well qualified for that role because I have made most of the mistakes there are to make, so by listening to me, they should be better able to avoid their own. That may or may not be true, but they seem to believe me.

When I started my more recent career as a facilitative mediator, back in the mid1990's, there were not many of us mediating on the west side of the state, so it was largely learning by doing. Once again, there were plenty of mistakes to learn from, and I made my share.

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So, maybe I can provide some help for those of you more recently trained as mediators by learning from my mistakes.

A mediation is, of course, confidential, but in order to properly illustrate my errors, it is necessary to put them in the context of the cases I mediated. While I will not use the names of the cases, the parties, the counsel, or any clearly identifying facts, some of you may nevertheless recognize a matter and, in fact, some of you may have been involved. I will have to rely, therefore, on the assumption that there is some sort of mediator's educational privilege, and that all of you will respect the confidentiality of that privilege.

CASE NO. 1: THE GUARDIAN ANGEL

One of my first cases as a mediator involved a plaintiff with horrific injuries. The liability theory asserted by plaintiff's counsel – an excellent lawyer, one of the best I have ever seen – was both novel and imaginative, characteristics that did not deter him from making an eight-figure settlement demand. There were substantial liability defenses. As I say, it was early in my career as a mediator, and I was picked because I knew both counsel in my role as a litigator, they presumably thought I would be fair, and not because of any reputation I had as a great mediator. The lawyers for both sides were passionate advocates. Most of the day was spent skirmishing in caucuses, with the plaintiff's counsel indicating that "my astronomical demand is probably too low" and defense counsel saying "I will win this case on motion, and if I don't, I will no-cause the plaintiff, and if I don't, I will win it on appeal." They didn't have much in common other than confidence. But finally, shortly after 5:00 p.m., I got authority from the defense to convey an offer comfortably into seven figures. With some plaintiff's lawyers, the offer was so good the case would be over. With this plaintiff's counsel I knew the offer would not settle the case, but under any definition it was a good offer, and it was not made on a take it or leave it basis. I was elated that my hard work had paid off. A great career as a mediator was clearly before me.

I went into the plaintiff's room to announce the offer. There was the plaintiff, horribly injured, along with his wife who had stayed by his side through his entire ordeal. They were a small town working couple, and the number I was about to give them would be several multiples of what each of them combined could have expected to make over a lifetime. So I gave the number with some pride. It had barely escaped my lips when the plaintiff's lawyer exploded, saying something like the following:

— "That is the most insulting thing I have ever heard in the 20 years I have been practicing law. It rivals the original injury in the amount of psychological harm it does to my client."

From that starting point he began escalating his diatribe against the defendant and the defendant's counsel, gathering steam as he went. Then he turned on me.

— "How you could ever agree to communicate such an insulting number at this late hour is beyond my comprehension. I am very disappointed in you. And I thought you were fair."

Well, that was it for me. He had pushed me over the brink. All the mediation training I had received flashed before my eyes. (Have you ever noticed how mediation trainers are exceedingly calm and never raise their voice?) But all that training was insufficient to overcome my temper. It all went right out the window. My certificates of completion were worthless. My jaw clenched, my face reddened, my blood pressure skyrocketed, as I quickly processed all the epithets I had learned in Air Force basic training, settling on one that dealt with a dark and inaccessible place.

Yes, the mediation would end. The poor plaintiff and his wife would go home empty handed. The defendants' representatives in the next room would be bewildered as to how I could turn something so positive into such a disaster. And my career as a mediator would end just as it was getting started.

But then I was saved by a guardian angel. You see, there was one other person in the room: the plaintiff's lawyer's wife, who was herself a lawyer. Just as I was ready to blast away, she beat me to the punch.

"Now dear, now dear, now dear," she repeated, softly touching him on the shoulder, and with each touch his bluster and volume decreased slightly, like a balloon slowly being deflated.

"I have an idea," she said. "Let's go back to the hotel. We'll have a nice drink and a nice dinner, and we'll get a good night's sleep, and we'll all come back tomorrow." Without another word she gathered up their things and led her husband and their clients out of the room. The clients' eyes were wide with amazement. They had no idea what had just happened, but knew that whatever it was it had been dramatic.

I watched them leave, took a deep breath, actually several deep breaths, adopted my best air of nonchalance, straightened my tie, and I went into the defense room and calmly told them that the plaintiffs had decided to consider the offer overnight and would come back tomorrow. Everyone did come back the next morning, there was some more negotiation, and the case settled before noon.

Lessons Learned:

1. Never lose your composure;

2. Always stay calm;

3. Never take it personally;

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4. Always have a guardian angel present.

Case No. 2: Knowing We're Done

I was mediating a minority shareholder case involving a Michigan company. The plaintiff minority shareholder had had a falling out with his business partners and was now making a substantial claim for a variety of damages. He was represented by a lawyer whose office was in Wisconsin, but who also practiced in Michigan. The plaintiff's lawyer's demands were such that I had to check when reading the briefs to be sure that his client was in fact a **minority** shareholder, not a sole owner.

During an early caucus, the plaintiff was telling his client – and me – about all of the client's rights as a minority shareholder, little of which comported with my understanding of the law. So I simply pointed out – in what I would have sworn was a self-effacing and deferential manner, liberally using rhetorical questions – that maybe a minority shareholder had more rights under Wisconsin law than under Michigan law. He quickly assured me that any notion I might have in that regard was erroneous, and he demanded that I return to the defendants and extract a much better offer than what they had given the first time. Or more accurately, he suggested I would do that if I knew what I was doing.

Having learned from Case No. 1 above, I smiled politely and said I'd try. I then left to go to the defendant's conference room on another side of our building, facing Monroe Avenue. I was in the defendant's room for about 15 minutes, trying without success to get an offer from the defense that would be a step toward meeting plaintiff's counsel's understanding of what his client was entitled to. Unfortunately, defense counsel did not share plaintiff's counsel's view of the law, and so I was left making arguments to the effect that the majority shareholders might want to increase their offer just for old times' sake in honor of the early days of the company when they all got along.

As I did so, I looked out the window and there, walking north on Monroe Avenue, briefcases all packed and being pulled behind them, was the plaintiff's lawyer, his young associate, the plaintiff, and his wife. And thus I learned that the mediation had ended. And they didn't even leave a goodbye note.

Lessons Learned:

1. Don't do anything to undermine the attorneys for the parties;

2. Especially, don't do it in front of their clients.

Fortunately, this has been an easy lesson to follow because with very few exceptions, the lawyers I see in mediations do an excellent job. I love to see good lawyers at work, and mediation regularly affords me that opportunity. But even excellent lawyers sometimes need a reality check. The timing of doing so, however, is critical. I always try to respect the attorneys, and I always try to convey a sense of fairness and evenhandedness. On this occasion, however, I failed at doing so.

Case No. 3: "That's All You'll Pay"

I was mediating an employment case. The plaintiff was a long time employee who had been terminated, and as is true in many employment cases, there were a lot of hard feelings that went back many years. The attorneys involved were both good, and importantly, I knew from personal experience that each had practiced employment law and employment litigation for some time. The employer's representative did not want to do anything for the former employee plaintiff, but after a full day of bargaining, he begrudgingly started to give and we were very close to an agreement. I took what the plaintiff's lawyer said was their final, "take it or leave it" offer into the defendant, and the employer's representative asked me, "If I agree, that's all? There'll be nothing more? Because I'm telling you I won't do anything more." "Yes," I responded, "that's right. Take this offer and that's the deal, there will be no other demands, no other payments. This is all you'll pay." "**This is all you'll pay**." The defendant employer accepted the demand and we wrote up an agreement that was signed. There was, of course, a payment to the former employee plaintiff, and some of it was attributed to wages, subject to FICA withholding taxes.

Three weeks later I received a telephone call from the two lawyers who were both on the line. Under the law, of course, there is both an employer's share of FICA and an employee's share of FICA. The employer was refusing to pay the employer's statutory share. Why was the employer taking that position? Answer: because I had told the employer representative that the employer wouldn't pay anything more than what was in the demand. "That's all you'll pay."

What I should have said in response during the telephone conversation was something like this: "Oh dear. I see there's something we didn't consider, and that we have a misunderstanding. Let's talk about how we might compromise this and figure out a way to salvage this settlement." Instead, I said, "You've got to be kidding me. Everyone knows the employer pays the employer's share of FICA. That's the law. That's a ridiculous position to take." The telephone conversation ended abruptly, I don't know if the settlement was salvaged, and I've never been asked to mediate again by those lawyers.

Lessons Learned:

1. Be thorough and be sure any resolution is covering all issues that might arise;

2. Don't assume others know what you know;

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3. Don't make sweeping general promises to the parties; and

4. Most importantly, always keep mediating.

Case No. 4: Trick or Treat

It's Halloween, and it's a Friday. I am mediating a difficult business dispute. Both sides are sticking very close to their initial positions. Movement is slow and miniscule. Finally, after an entire day of pushing and prodding we start to get some movement and about 5:30 we have a deal.

It is my practice to document a settlement with a signed memorandum of settlement that incorporates the bullet points of the agreement. It is not intended to be the final form of the agreement, but I make sure it is specific enough to be enforceable in court. But in this case, since the deal involved more than a simple payment, and since the deal had just emerged, it will take me at least a half an hour to get the bullet points down on paper. But, everyone is feeling good, the earlier air of hostility has evaporated, and everybody wants to get home to their kids to go trick or treating. Okay, I say, I'll draft up the memorandum of settlement over the weekend and email it out to everybody on Monday. On Monday, I get a call from counsel for one of the parties: his client won't do the deal, and in fact he never did. The case was resolved in court.

Lessons Learned:

1. Always get the settlement in writing and signed, even on Halloween;

2.Especially on Halloween.

Case No. 5: Just Let Me Say A Couple Of Words

I get a telephone call from a lawyer who is going to mediate a case with me in a couple of days. He is by anybody's measure an outstanding lawyer, an extremely persuasive advocate. He also happens to be a great mediator, one of the best. His problem here: he's the plaintiff's lawyer on a slip-and-fall case and his client has allegedly suffered life changing injuries. Those are very tough cases in which to get a good settlement. But he thinks he's got a very good case, and he wants the chance to sell it to the insurance adjuster directly. Thus, he wants to make an opening statement.

When I first started out as a mediator, I called for opening statements in nearly every case. I did that for several reasons, but the most important is that I have long felt that the litigation process deprives parties of the chance to have their day in court. Cases are settled through case evaluation where the parties don't even participate. Some mediators mediate by fiat, essentially telling everyone what the settlement will be. But I think it is very important in mediation that the parties participate and have the opportunity to say what happened and how it has affected them. And initially, I always did that through opening statements, at the beginning of the mediation, with everyone present. I came to learn, however, that despite all precautions and warning measures on my part, most lawyers simply cannot take off their adversarial hats, and after opening statements it would take me at least two hours to get everybody's blood pressure back down to the level at which they first entered the conference room.

But, as I say, the lawyer making the request here was a good one and was also a mediator, so I assumed that he would make his pitch with sensitivity. But, I told him that the defense lawyer – who I did not know – would thus also be given a chance to make his own opening statement. "Sure, that's fine," he responded, "I doubt he will say anything anyway."

So, the appointed day arrived, I got everybody together to make my usual opening remarks, the thrust of which is that it is my goal – our goal – to reach a settlement, and all the reasons that makes good sense. Then, I turned it over to the plaintiff's lawyer, who does pretty much what I expected and what he wanted to do: a sensitive, understated, yet effective presentation. What I should have foreseen, but did not, was that very few lawyers have sufficient self-confidence that they could let a presentation like that, in front of their client, go unanswered. And this defense lawyer was certainly not in that select group. Twenty-five minutes later, when I finally had to call for a recess, the defense lawyer had reviewed, in great detail, every bump and valley in the plaintiff's past life, all well documented and all to make the point, it seemed to me as an embarrassed observer, that if the plaintiff had died in the slip and fall, it would have been a merciful and just end to her sorry existence. The case did ultimately settle, but the quality of the settlement process certainly was not what it could have been and should have been. And a participant in the litigation process – our process – was unnecessarily victimized.

Lessons Learned:

1. Opening statements are to be strictly reserved for complex cases, where mediation occurs at a very early stage, where the parties truly don't understand each other's position, and there are not personal disputes involved.

2. In all other cases, opening statements are fraught with danger. Do not use them.

If as a mediator I think something needs to be said directly, face to face, I can always arrange for that to be done later, where I have a better chance of controlling the content and the process.

And I do give each party a chance to tell his/her story – it's just to me.

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Case No. 6: Deal Or No Deal: Who's The Advisor?

Do you remember the old TV quiz show, Deal or No Deal, starring Howie Mandel? I'm not sure it's still on the air, but if it is, or it's being rerun on one of the several hundred cable channels, I highly recommend it. The show provides an entertaining lesson in the psychology of settling for less than you might get if you continue with the process. For the contestants, the process is the quiz game, and for the parties to a mediation, it is a trial.

Here's how the game is played. There are 25 metal briefcases, each marked with a number 1 through 25 on the outside. Each briefcase contains a dollar amount, ranging from $1 up to $1,000,000. The briefcases are all brought on stage, each carried by a beautiful young woman. The contestant then picks one case which becomes his or her own. If the contestant continues throughout the entire course of the game, the contestant gets whatever amount is in that case, which could be as little as $1 or as much as $1,000,000, or specified amounts in between. Then, the remaining cases are opened, one at a time, in groups of five. Of course, the dollar amounts in the opened cases necessarily cannot be in the contestant's case. After five cases have been opened, a mysterious banker offers to buy the contestant's case for a sum certain. If many large dollar amounts remain unopened, meaning one of them could be in the contestant's case, the banker's offer is higher, and vice versa if the open cases have revealed high dollar amounts. After another five cases are opened, the banker makes another offer, which could be higher or lower than the first. So, the contestant has to choose between a bird in the hand (the banker's offer) or two or more in the bush (the amount that might be in his or her case).

At some point after the first five cases are opened, three relatives or friends of the contestant come on stage to advise the contestant to either take the banker's offer or go on. The advice from these people range from the extremely optimistic, so as to be almost reckless (e.g., "don't settle for anything, the million dollars is surely in the case you've picked"), to the arch conservative pessimist (e.g., "take the banker's offer and run"). Time after time you see a contestant who wants to choose a course of action – either keep going or take the banker's offer and stop, that is contrary to a trusted advisor's advice, usually that of a parent, and the contestant can't make a decision. They cannot go against a close advisor.

The lesson of the show for us as mediators is who needs to be present in the mediation as an advisor to the parties in order to assure there's a settlement? Who needs to be present to help assure that the plaintiff does not go the whole route to see what's in his or her closed case?

Example: I am mediating an employment case. The plaintiff is a long time excellent employee - still employed with the employer - who has suffered a series of position reassignments and shift changes sufficient to upset anyone. This plaintiff is clearly very unhappy, but it is also clear to me that nothing illegal happened, and the one possibly viable claim is time barred. The chances of summary judgment on the claims she has made is so high that I think it is possible that we might not even get a defense offer. But to my surprise, we do. The offer is more in recognition of her being a good long term employee than it is of the validity of her claim. And the dollar amount, while only a fraction of her claimed loss, is enough to allow her to pay off some student loans and get a fresh start. It's an absolute no brainer for her to take the "banker's offer" and not continue with her case. Her lawyer thinks so. I think so, too, and have told her that, which is, of course, an important role for a mediator to sometimes play. But the one advisor she needs to talk to is not there: her mother. She has told her mother over the months and years all the bad things that have happened to her at work, and her mother has supported her unequivocally, **so now she cannot settle this case without her mother's blessing.** We adjourn, so she can talk to her mother. The plaintiff talks to her mother. Her mother, who doesn't know the full extent of the risk of loss because she wasn't there to hear it from the neutral, tells her to refuse, and the mediation fails.

Lessons Learned:

1. Get the right people to the mediation;

2. All the right people.

We always worry about having the person with actual settlement authority present. But we also want to make sure in our pre-mediation telephone conference that we explore who has the real influence over the decision-maker, so you have a chance to persuade that person that settlement is the right thing to do.

Case No. 7: "The Bottom Line"

A couple from Chicago purchase a beautiful Southwest Michigan lakefront cottage with a sizeable mortgage. For whatever reason or cause, the couple default on the mortgage. The defendant bank, no doubt inundated with similar defaults, allegedly engages in some of the mortgage foreclosure shortcuts we have been reading about nationally. Here, those shortcuts included declaring a seasonal cottage to have been abandoned in January and alleged substantial damage by the company that had taken possession of the cottage for the bank, all resulting in substantial claims against the bank. The form of the possible resolution was for the couple to purchase the cottage from the bank, with a negotiated discount in the purchase price to reflect the alleged damages.

Present at the mediation was the husband, himself a Chicago businessman, and his friend, a Chicago realtor. Their joint pronouncements on the amount of damage that had been done to the cottage; the cost of repairs for those damages; and the real estate market values were delivered with much vehemence and gusto. I make it a habit never to ask for anyone's bottom line, so that they don't have to later retreat from it, but they let me know in no uncertain terms what their bottom line was. But try as I might, I could not

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get any Bank offer even close to it. Yet, every time I returned to their room with an insufficient offer, they would send me back with a slightly higher offer and a new argument, one I had never heard before, but their bottom line never changed. Finally, I was exhausted, and I told them that this was all a waste of time and money, that I thought we should just call it quits, that I had just told the Bank the same thing, and the Bank folks were packing to go. The Chicago guys immediately flew into a panic, gave me a significantly increased offer, and told me to get it to the opposition pronto. The case settled a couple of hours later, with the plaintiffs agreeing to pay the bank substantially above their stated "bottom line" price to repurchase the cottage.

Lessons Learned:

1. All mediators get played;

2. A bottom line is seldom a bottom line;

3. Especially in Chicago.

Case No. 8: Use The Phone

When I first started mediating, I always held a pre-mediation telephone conference. For one reason, back then most people didn't know what mediation was, and regularly confused it with the old "Michigan mediation," which is what we used to call case evaluation. But, as facilitative mediation became more common, first in federal court and then in the state courts, the need to explain it became less and less necessary. In addition, I have always trusted the attorneys' judgment as to when to mediate. And, trying to schedule a telephone conference can itself be time consuming and aggravating, so over time the pre-mediation telephone conference became more the exception than the norm. I stopped holding pre-mediation telephone conferences in every case. As a result, the following:

— The personal injury case where parties, counsel, and claims representatives came from all over the state to learn simply that the plaintiff would not make a demand.

— The employment case where the defendant's in-house counsel grandly announced – but only after a very confrontational and adversarial opening session – that his company refused to settle any employment case as a matter of principle. I told him I was all in favor of principle, but why involve me?

— The large number of cases, of every subject matter, where the parties are miles apart and refuse to budge, and when I ask why they mediated, both parties point across the table and say it was the other person's idea to mediate.

— The court-ordered mediation, to be completed by a certain date, and I find that there has not been any exchange of even the most rudimentary documents such as medical records.

Lesson Learned:

1. Always hold a pre-mediation telephone conference.

2. Always.

A pre-hearing telephone conference is again a pre-requisite in every case I mediate. In almost every case, counsel and I find something that needs to be discussed in advance of the mediation.

Case No. 9: Whose Mediation Is It, Anyway?

I had mediated a contentious pre-litigation/pre-arbitration construction dispute between an owner and a general contractor without success. Now, many months later, after both arbitration and litigation had commenced, and an insurance carrier was now involved, the parties decided to try to mediate again. Two consecutive days have been agreed upon, and I am in the middle of a pre-mediation conference call with multiple defense counsel. During that call, a defense counsel retained by the insurance carrier suggests that we invite all of the subcontractors and materialmen to the mediation. I tell him that in my experience that's not wise at this stage of the process and that I don't want to do that. He then tells me that he has already done so, because that was the only way the general contractor's insurance carrier would agree to mediate; that all the subs had to be there. So, I rounded up every available conference room in our four floors of office space, and on the appointed day more than a dozen subs and about 50 people showed up, most all of them for the apparent purpose of telling me that they did not intend to contribute one dime to a settlement. What the cost in terms of attorneys' fees, travel expense, and time away from task was for that mediation I shudder to think, and I take the cost of mediation very seriously. Whatever that cost was, it was a total waste.

Lesson Learned:

1. Run your own mediation.

I have been doing this long enough to have some pretty good idea of what I'm doing, what works for me, and when it works. Yes, I know that the parties and their counsel have the right to help formulate the mediation process, and I afford them that right. But ultimately as the mediator you have to feel comfortable with the process being used. If you don't, then maybe the parties will be better served by using another mediator.

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Case No. 10: The Jolly Good Fellow Co-Defendants

This is another case from early in my mediation career. Plaintiff, a husband and father in his thirties, had become ill, sought treatment at two different locales, and four separately insured medical providers had attempted to help him. Unfortunately, each provider's efforts to assist had gone horribly wrong, and the young man was left with substantial and permanent injuries. The plaintiff's lawyer had an arguably good case against each defendant, and the initial collective demand was breathtakingly high. I met with the defendants as a group, and my first question was, do I talk to you each separately or all together? "Oh, together," they all agreed. "We all know we have a problem," said one adjuster, "and if you can get us a reasonable number from plaintiff, we'll be able to figure how to split it." They then gave me an acceptable settlement range, which was miles from the demand. Gee, I thought to myself, it's really nice when people cooperate like this. It makes my job a lot easier.

Well, it took all day, but I finally got the plaintiff's demand into the defendants' agreed upon range of reasonableness, just barely, but within it. One of my strongest arguments to plaintiff was that it could all be wrapped up today, not only no need for a trial, but no need for protracted negotiations with each defendant.

So, I take the number back into the defendants' room and everyone is very happy. They never thought it could be done. I'm a miracle worker. I bask in their praise. "OK, folks, how would you like me to split this up, equally I presume?" Silence. Then from one: "you'd better talk to each of us alone." An hour and a half later the wetness behind my ears has been joined by massive perspiration all over my body. They each had been able to figure out how to split it, all right: the other three would pay.

It's now after six, and I remember the plaintiff's group, who had been expecting me to quickly return with a signed agreement. So I go back to the plaintiff's room. "What's going on?" the plaintiff's lawyer asks with irritation. "Well, we're having a little problem with the split," I say. "I thought so," said the plaintiff's lawyer. "Tell those guys we're done, we're leaving, and our demand is off the table." Maybe he was bluffing, but he didn't look like it. "Wait," I said. "Give me fifteen minutes. Please." Without waiting for an answer, I rushed back and gathered all the defendants in one room and told them what had just happened. My disheveled appearance, my sweat stained shirt, the look of panic on my face, convinced them that I, at least, wasn't bluffing. I begged them to take the number, each pay a fourth now, and arbitrate the ultimate split. And tell me yes, right now. They did, and we were done.

Lessons Learned:

1. Multiple defendant cases are always harder to settle;
2. There will usually be at least one freeloader;
3. If the defendants say to get one number and they'll split it, ask how and get it firmly understood, preferably in writing, at the outset. If you can't, then the split becomes a big part of the mediation negotiation.

SO, WHAT HAVE I LEARNED?

I think I have learned from my mistakes. All cases are to some extent different, but after several hundred mediations, there are a few rules I try to follow in each case. They are:

1. Be Prepared: Know the Case.
2. Convey Confidence: In Yourself and the Process.
3. Convey Fairness and Impartiality.
4. Build Rapport and Trust.
5. Let People Talk, Get Them To Talk.
6. Listen To What They Say and Observe How They Say It.
7. Put Yourself In Their Position.
8. Stay Calm and Be Patient.
9. Remain Optimistic.
10. Keep At It.

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Ethical Deception in Negotiation and Mediation

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Abraham Lincoln advised prospective lawyers to "resolve to be honest at all events."[1] A worthy sentiment as far as it goes, but Honest Abe left the details of what it means to be an honest lawyer to the American Bar Association *Model Rules of Professional Conduct* ("MRPC").[2] Under the MRPC, lawyers may and should—in some circumstances—practice deception. This certainly is so when it comes to negotiation and mediation. Professor James J. White wrote: "I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions."[3]

Deception

Let's define *deception*. What better source for doing so than the *Department of Defense Dictionary of Military and Associated Terms*.[4] After all, the Anglo-American adversary system substitutes for trial by combat, and "going to war" is a ubiquitous, if not quite apt, metaphor for going to court. In military terms, deception is action "to deliberately mislead adversary … decision makers, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment" of the practitioner's "mission."[5]

Deception comes with the lawyer's "mission." The adversary system requires it. A "lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force." MRPC 3.3 Comment [2]. This obligation often requires misleading the adjudicator—judge, jury, or arbitrator. Professor Stephan L. Carter provides one example:

> In cross-examination, a lawyer will try to make even a witness he knows to be telling the truth appear to be at best confused and at worst a liar. In a system that relies on the adversity of the parties to discover the truth, a lawyer can do nothing else. Still, this conveying of a false impression—trying, in effect, to fool the jury into disbelieving a truthful witness—is nothing but an expedient lie.[6]

Similarly, lawyers are obligated to bring "persuasive force" to bear for clients in negotiation and mediation, where the lawyer's "mission" is to get the other side to put its best offer on the table. Then lawyer and client can assess their BATNA (best alternative to a negotiated agreement). Deception may be essential to getting the other side's best offer.

Professor White likens negotiators to poker players:

> Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.[7]

Professor White summarizes: "To conceal one's true position, to mislead an opponent about one's settling point, is the essence of negotiation."[8] To conceal and mislead is to practice deception.

Deception is "designed to gain an advantage for the practitioner." It relies on "disinformation." It may entail *fabrication*—the creation and use of false information, presented as truth—or *manipulation*—the use of truth to create a false impression, by presenting it out of context, or in misleading part, or without significant details—or both fabrication and manipulation.[9] Deception may be *active*—misleading about objectives, capabilities, and intentions—or *passive*—concealing true objectives, capabilities, and intentions.[10] Deception may vary in specificity, creating ambiguity, uncertainty, or confusion ("'A' Type Deception") or directly misleading the adversary ("'M' Type Deception").[11]

Legal Latin adds to the typology of deception, and lends a certain elegance to the discussion. Beyond the overt lie there are the *suggestio falsi*—the false suggestion—and the *suppressio veri*—the concealment of truth. And there is the advice that *suppressio veri, expressio falsi*, that suppression of the truth is the equivalent of false expression.[12]

The full gamut of deception may be warranted if you are engaged in the siege of Troy, planning the Normandy invasion, or infiltrating terrorist cells to protect the homeland. Your ethical options are narrower, however, if you are negotiating a contract or a lawsuit settlement. As Professor White puts it, the lawyer-negotiator's responsibility is "paradoxical": "On the one hand the negotiator must be fair and truthful; on the other hand he must mislead his opponent."[13] This is where the MRPC come into play.

Ethical Deception

MRPC 8.4(c) declares: "It is professional misconduct for a lawyer to…engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Other rules address the lawyer's obligation to the truth in the litigation process—within the "tribunal" and in "ancillary" discovery—and beyond—in negotiation and mediation. Under the MRPC, a lawyer must tell the truth—sometimes.[14]

The lawyer's obligation to the truth in negotiation and mediation is governed by MRPC 4.1(a), discussed in ABA Formal Opinion

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06-439 at 2.[15] It is a qualified obligation.

MRPC 4.1 Comment [1] affirms the lawyer's obligation to the truth, but quickly moves to the qualifications.

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

So, *generally* a lawyer has *no affirmative duty* to inform an opposing party of *relevant* (much less marginal) facts. If the other side is ignorant, *c'est la guerre*. The truth, but not the whole truth, right? Maybe not. Comment [1] continues:

> Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

So, *generally* there is *no affirmative duty* to inform an opposing party of *all* the relevant facts, *but* there may be a duty to tell *more* of the truth, *if* partially true but misleading statements, or omissions, would *the equivalent* of affirmative false statements. The *equivalent*. Clear? Maybe clear enough. When it comes to the correct path, like Justice Potter Stewart we know it when we see it. But it's *not us* we have to worry about. It's *them*. It's *other* lawyers. *Caveat emptor*.

More qualifications. MRPC 4.1 Comment [2] makes it explicit that the rule "refers to statements of fact." When is a statement a "statement of fact" and when is it something else? The comment answers: "Whether a particular statement should be regarded as one of fact can depend on the circumstances." There's more. The rule covers statements of *material* fact. The comment recognizes: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." For example: "Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category." Lawyers, like other people, when pursuing their interests will "posture" and "puff" and exaggerate and spin. These are "generally accepted conventions in negotiation."[16]

> ABA Formal Opinion 06-439 also recognizes these conventions:
>
> It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming.[17]

"Less than entirely forthcoming" is a delicate euphemism. To illustrate what "less than entirely forthcoming" means in practice, the Opinion offers the example of those in settlement negotiations who "understate their willingness to make concessions to resolve the dispute."[18] This is ethical deception. Here is how it might work.

Lawyer A says: "My client will pay nuisance value to avoid the aggravation of this baseless lawsuit. But nuisance value stops at $10,000. Not a penny more. This offer is open today only. I sincerely recommend that you take advantage of my client's generosity."

At the same time, Lawyer A is thinking: *I'm worried about this lawsuit. A jury could do anything. We could even lose on summary judgment with this judge. I convinced the client to pay $50,000. I better settle this. I'll create some pressure with the today-only gambit. This lawyer badly wants his "sunk costs" paid. Let's see how far below $50k I can get this bozo.*

Lawyer B responds: "Ten grand!? Are you nuts! With what I can blackboard on wages and benefits, plus emotional distress and the humiliation and misery your client caused, we're talking a significant verdict. Get real. Get into six figures and we'll have a starting point. Otherwise, don't waste our time!"

Lawyer B is thinking: *Thank heaven they have money on the table. I do not want to try this dog. It looks like they don't know my client got a new job, with 25% more compensation. I've been meaning to look up that Rule 26(e) duty to supplement. I need to get this lawsuit done before next week's depositions. My client says she'll take $30,000 and be thrilled. Let's see how much more I can get out of this arrogant SOB.*

Posturing, Puffing, and Reasonable-Reliance

ABA Formal Opinion 06-439 states: "A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position." The Opinion refers to (1) "remarks, often characterized as 'posturing' or 'puffing'" and (2) "statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely." Such unreliable statements, the Opinion instructs, "must be distinguished from false statements of material fact."[19]

There seems to be a definition of what it means to make a "false statement of material fact" in here somewhere. It is not "posturing" or "puffing." It's not even lying about one's strengths and weaknesses and the parameters of acceptable settlement. The standard seems to be reasonable-reliance. Indeed, the more hyperbolic or evaluative the lie, the more likely it is to be recognized as unreliable and, therefore, ethically acceptable.

The Restatement (Third) of The Law Governing Lawyers (emphasis added) endorses a reasonable-reliance standard:

> Certain statements, such as some statements relating to price or value, are considered non actionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would *reasonably regard* the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.[20]

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Here's how the reasonable-reliance standard might work.

Lawyer A says: "I'll get my client to go to $15,000. That is it. That's the maximum. The well is dry. If I were you, I'd take the money and run." **Lawyer B thinks:** *I'm not relying on this hogwash. They've got way more than $15,000.*

Lawyer B responds: "My client is not interested in talking at this insulting level. Bottom line, get into six figures or we'll see you in court." **Lawyer A thinks:** *I'm not relying on this hogwash. They'll settle for way less than six figures.*

Both the $15,000 "maximum" and the six-figure "bottom line" are false. The *Restatement* seems to assume that any lawyer who didn't just fall off the hay truck would discount these statements as mere "hyperbole" or expressions of the speaker's "state of mind." The statements are not just hyperbole, however. Hyperbole is extravagant exaggeration, like: "This is the strongest/flimsiest case I've seen in 30 years of law practice." Nor do these statements reflect the lawyers' "state of mind." Lawyer A doesn't believe that the well is dry at $15,000; to the contrary, he knows his client will pay $50,000. Lawyer B doesn't believe that six figures is what it will take to settle; to the contrary, Lawyer B has authority to settle at $30,000. The "state of mind" of both lawyers is that they *know* they are making false statements. They consciously are "less than entirely forthcoming." They are using deception to influence their opponent's settlement position. They are actively fabricating. *Expressio falsi*. They are lying and they know it. Under "generally accepted conventions in negotiation," however, these may be tolerated lies. There it is again: *caveat emptor*.[21]

To sum up, in negotiation it is acceptable to posture and puff and spin and exaggerate and even lie about things like your settlement position and your assessment of claims and defenses. Just don't out-and-out lie about material facts, *e.g.*, facts that the other side can look up. Indeed, under "generally accepted conventions in negotiation" your prudent opponent *expects* you to be "less than entirely forthcoming." Reasonable lawyers—far removed from the hay truck—*know* that other lawyers—ethical lawyers—do not always tell the truth, the whole truth, and nothing but the truth.[22]

The same rules apply to mediation, whether you are communicating with the other side directly or through the mediator. ABA Formal Opinion 06-439 concludes:

> ... the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts....Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.[23]

In the above example, no doubt a mediator—facilitating the parties' negotiation—would say to each side in caucus: "The other side seems resolute. You do not want to risk a jury trial. You have too many vulnerabilities. You do not want the other side leaving today without a deal. Why don't you adjust your position. Then I'll see if I can get some flexibility from the other side." Mediators, too, are not above a little ethical deception.

"Rarely Pure and Never Simple"

So, lawyers in negotiation and mediation have an obligation to the truth—within limits. Lawyers should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, but this does not rule out ethical deception. Some deception is to be expected. See *UAW v. General Motors Corp.*, 497 F.3d 615, 628-629 (6th Cir. 2007):

> Yes, the car companies and the UAW told the retirees...that the settlement agreements were being offered on a take-it-or-leave-it basis. But there is no way of knowing whether they meant it. Surely this would not have been the first time that a party insisted that it would never consent to additional changes to a proposed bargain—and then consented.

Lots has been written on the lawyer's obligation to the truth. Some of it is of the angels-dancing-on-the-head-of-a-pin genre. Some of it, however, is interesting and useful and thought-provoking and practical. If you want to read more, you might begin with ABA Formal Opinion 06-439 and the authorities cited in the Opinion and its 22 footnotes. Remember in the meantime, to paraphrase Sun Tzu, that all negotiation is based on deception (mostly).[24] So, when you are negotiating and being mediated-upon, protect yourself with the principle of *caveat emptor* and by heeding Oscar Wilde: "The truth is rarely pure and never simple."[25]

ENDNOTES

1 Abraham Lincoln, "Notes from a Lecture" (circa 1850), quoted at www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm.

2 The American Bar Association *Model Rules of Professional Conduct* ("MRPC") are available at www.abanet.org/cpr/mrpc/mrpc_toc.html. The Michigan *Rules of Professional Conduct*, based in large part on the ABA MRPC, are available at www.michbar.org.

3 James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *American Bar Foundation Research Journal* 921, 927 (1980).

4 *Department of Defense Dictionary of Military and Associate Terms* ("*DOD Dictionary*"), Joint Publication 1-02 (8 Nov 2010, as amended through 15 Aug 2014), available at www.dtic.mil/doctrine/dod_dictionary.

5 *DOD Dictionary* at 166, definition of "military deception," also called MILDEC.

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[6] Stephen L. Carter, *Integrity* (Harper-Perennial 1996) at 112.

[7] "Machiavelli and the Bar" at 927.

[8] *Id.* at 928.

[9] Joseph W. Caddell, "Deception 101—Primer on Deception," (Strategic Studies Institute December 2004), at 1-2, 17, monograph available at www.strategicstudiesinstitute.army.mil/pdffiles/PUB589.pdf.

[10] "Deception 101" at 6, 17.

[11] "Deception 101" at 6-7, 17.

[12] Legal Latin also advises that *suppressio veri*, *suggestio falsi*, that suppression of the truth is the equivalent of false suggestion. See *Black's Law Dictionary* (Rev. 4th ed. 1968). This echoes the Yiddish proverb, *a halber emez iz a gantzer leegen*—a half truth is a whole lie—popularized by advice columnist Ann Landers in her still-cited December 26, 1978 column.

[13] "Machiavelli and the Bar" at 927.

[14] Under MPRC 3.3(a), a "lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." MPRC 1.0(f) provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." See Stuart M. Israel, "The Lawyer's Obligation to the Truth in Litigation, Negotiation, and Mediation" Vol. 16, No. 3 *Labor and Employment Lawnotes* 6 (Summer 2006), revised in ICLE course materials (March 2008 and April 2012), portions adapted here, discussing, *inter alia*, the MRPC governing the lawyer's obligation to the truth in litigation, in the "tribunal" and in "ancillary" discovery, including the obligations set by MRPC 3.3. See note 15.

[15] American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-439 (April 12, 2006) at 2. MRPC 4.1(a), not MRPC 3.3, governs the lawyer's obligation to the truth in negotiation and mediation. MRPC 3.3 is titled "Candor Toward the Tribunal." "Tribunal" is defined in MRPC 1.0(m) as "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." The Opinion, at note 2, explains that although MRPC 3.3 "prohibits lawyers from knowingly making untrue statements of fact" it is "not applicable in the context of a mediation or a negotiation" because MRPC 3.3 "applies only to statements made to a 'tribunal.'"

[16] MRPC 4.1 Comment [2]. See note 20 and the accompanying text.

[17] ABA Formal Opinion 06-439 at 1.

[18] *Id.*

[19] *Id.* at 1-2. An "example of a false statement of material fact," the Opinion offers, "would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee."

[20] The American Law Institute, *Restatement (Third) of the Law Governing Lawyers* (2000), sec. 98, comment c (emphasis added). This reasonable-reliance standard seems to be identical to an element of the tort of misrepresentation. See *e.g. Nieves v. Bell Industries, Inc.*, 204 Mich. App. 459, 464 (1994) ("A misrepresentation claim requires reasonable reliance on a false representation."). Regarding the eternal mysteries of the concepts of *knowing* and *believing*, see note 14, and see MRPC 1.0, which provides the following pertinent definitions of MRPC terms:

> (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
>
> ***
>
> (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
>
> (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
>
> (j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

[21] While, as noted above, MRPC 8.4(c) prohibits "conduct involving dishonestly, fraud, deceit or misrepresentation," that broad prohibition is compatible with the "less than entirely forthcoming" standard applicable to conduct in negotiation and mediation under MRPC 4.1. ABA Formal Opinion 06-439 states that Rule 8.4(c) "does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1." The Opinion continues: "Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that

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would not even run afoul of Rule 4.1." The Opinion concludes that "whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a)." Opinion at 2-3, note 2. So, we need not interpret MRPC 8.4(c) literally. And, consistent with MRPC 4.1(a), in negotiation and mediation we may make, and must expect from others, statements that are "less than entirely forthcoming."

22 Professor White, predating ABA Formal Opinion 06-439, suggested that the following are "easy cases" of deception which should not be ethically barred: (1) presenting partisan "plausible interpretations of cases and statutes which favor his client's interests," although not consistent with the lawyer's private "true interpretations"; (2) "distortion concerning the value of one's case or of the other subject matter involved in the negotiation," akin to "mere puffing" under UCC 2-313; and (3) presenting "false demands," like a party building "negotiating currency" in collective bargaining by joining important demands with "a series of demands about which it cares little or not at all." Professor White explained at 934:

> I suggest they are easy cases because the rules of the game are explicit and well developed in those areas. Everyone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of his opponent. No one is surprised by that, and the system accepts and expects that behavior. To a lesser extent the same is true of the false demand procedure in labor-management negotiations where the ploy is sufficiently widely used to be explicitly identified in the literature. A layman might say that this behavior falls within the ambit of "exaggeration," a form of behavior that while not necessarily respected is not regarded as morally reprehensible in our society.
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> * * *
>
> In a sense rules governing these cases may simply arise from a recognition by the law of its limited power to shape human behavior. By tolerating exaggeration and puffing in the sales transaction, by refusing to make misstatement of one's intention actionable, the law may simply have recognized the bounds of its control over human behavior.

23 ABA Formal Opinion 06-439 at 8. The hypothetical lawyers depicted above may be crossing the line between tolerable deception and knowing false statements of material fact. ABA Formal Opinion 06-439 at 8 illustrates that words matter:

> We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

24 Sun Tzu's *The Art of War* advises that "All warfare is based on deception" and, as well, that "Supreme excellence consists of breaking the enemy's resistance without fighting."

25 Oscar Wilde, *The Importance of Being Earnest* (1895), act I.

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Awards Presented at ADR Section Annual Meeting

At the ADR Section Annual Meeting in October 2014 in Ann Arbor, the ADR Section presented its annual awards. Richard Hurford received the Distinguished Service Award, the Marquette-Alger Resolution Service received the Nanci S. Klein Award, and Lee Hornberger received the George N. Bashara, Jr. Award.

Mr. Hurfold provided the following insightful comments on receiving the Distinguished Service Award.

The Long and Winding Road

by Richard Hurford

I have always relished preparing for and going to trial and, unlike many full time neutrals, I do not describe and will never describe myself a "reformed litigator." Trials play a critical role in our dispute resolution tradition. The collective wisdom of jurors is really something to behold -- they usually do "get it right."

If the truth be known, I was probably considered by some as a very aggressive trial lawyer. In fact, during the summer of 1987 after I tried a case in Wayne County my opposing counsel wrote an opinion piece in the Michigan Bar Journal bemoaning the rise of the "Rambo" lawyer and sharp litigation tactics. I would be less than honest if I suggested the tactics described in this article were totally unfamiliar; I simply dismissed his complaints as no more than sour grapes.

After 13 years at Dykema trying a significant number of cases, I agreed to accept a position in house for one of my clients. When I arrived at Masco Corporation in my new role, it did not take a rocket scientist to determine that limited corporate resources were not well spent by taking every case to trial.

This was the first of my many epiphanies and over time I was struck with the thought that the Masco Dick Hurford, who now oversaw how legal services were delivered to Masco, would not be particularly impressed or enamored with the "Ramboesque" Dick Hurford of earlier years.

With that in mind, and with the help and patience of many of the ADR professionals in this room, who I can't thank enough, I began my journey to learn more about and ultimately embrace the wisdom, beauty, subtlety and benefits of ADR in all of its forms and permutations.

This journey was not easy and I did not really begin to grasp all the concepts until I obtained an MBA and became certified in legal process improvement principles. What drove me to obtain an MBA, embrace ADR and pursue process improvement was a matter of simple economics and a desire to serve Masco in the most cost effective and efficient way possible with all available dispute resolution tools at the Company's disposal.

Upon reflection, the drive to ADR was also spurred by some truisms given to me by my father. Please permit me to be nostalgic for just a moment and share those truisms.

My father, who was a true hero to me, passed away when I was relatively young. Although he was not a lawyer, in the short time we had together he imparted essential kernels of wisdom that have stood me in very good stead as I was increasingly drawn to and became enamored with the potential of ADR.

"Dickie" he would say, "life's problems are not like fine wine – you can't put your problems on the shelf and simply trust they will get better with time." That truism became meaningful to me as I managed more and more litigation – "Litigation is not like fine wine, it does not get better with time." The longer a case is open the more expensive and costly it becomes and Murphy's law controls: the longer the litigation the greater the potential for things to go wrong.

Let me share one more truism when my father caught me doing something I probably should not have been doing. Shaking his head he said to me, "Dickie, just because you can do something doesn't mean you should do it." He then admonished me to always ask myself, "What is the right thing to do."

Many times as counselors we evaluate whether the law and the facts may be on the side of a particular client. I am not certain the true counselor's job ends with that evaluation. Sometimes the true counselor may need to ask their client what is the "right thing to do" that best serves the client's long term strategic interests and business objectives? Oftentimes, the "right thing to do" is the search for a voluntary resolution of the dispute that best serves those long term strategic interests and objectives.

These truisms, and simple economics, drove me to build the business case for the wisdom and benefits of ADR in all aspects of Masco's relationships with its four critical stakeholders: its employees, vendors, customers, and shareholders and to always ask "what is the right thing to do" in the context of Masco's long term business interests and objectives with these stakeholders.

We all stand on the shoulders of the innovators, pioneers, and trail blazers who preceded us and continue to instruct us and nurture us in this endeavor, experiment and journey we call ADR. As I have matured, and hopefully continue to mature in this profession, I am

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struck by the generosity, professionalism, tolerance, and patience of my many mentors and teachers.

It is truly a generous and altruistic profession for those who have a true calling and I can think of no greater compliment one can give than saying "he or she is a true mentor or teacher."

So, if not abundantly clear already, unlike my Rambo days I no longer think it is all about me – it is all about those clients and practitioners who are desperately searching for and in need of a fair, speedy and economical resolution of their unique problems and disputes. In many respects, all we do is help set the table and get out of their way. To be certain, some litigants may on occasion become a little confused or lose sight of which fork or spoon to use at the table, but once those issues are talked through, they almost invariably seek a resolution with a robust appetite.

The litigants who really "get it" become a de facto settlement team and it can be really exciting to see the team's creative juices work. In those instances, we are merely team leaders who hopefully encourage the team to keep working on developing options that will assist in achieving the team's goals and interests.

The field of ADR is so exciting and evolving and is so much more than just arbitration, case evaluation and mediation as wonderful as those processes may be. We might all do a better job collectively in educating the bench and the bar on how to best exploit all of the various ADR tools and processes that are at our disposal as well as the new and improved tools that are constantly evolving. However, let us never forget our clients are always in control of the dispute resolution process that is right for them – we all recognize the need for a certain amount of humility to understand it is not about us and how smart we are. If a mediation fails to end in a resolution, it does not always mean there was a failure in the process. Sometimes the parties may have simply concluded that a trial was the most effective dispute resolution mechanism for them. They have the right to engage in that self-determination.

When acting as a neutral I try never to lose sight of a variation of one of my favorite quotes attributed to Albert Einstein that, once again, my father shared with me:

"If we find ourselves thinking we are the smartest person in the room and not willing to learn, we are probably in the wrong room."

We are not the smartest person in the mediation room and can always learn. If fortunate we are simply invited by the parties to help them find the wisdom of what they already instinctively know: a voluntarily resolution is often better than facing the risks, uncertainty and incurring the costs of a trial.

Thank you once again for this most kind and overly generous recognition.

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Hanging Up the Robe: A Transition to Mediation

by William J. Caprathe
Bay County Circuit Court Judge Retired

Making the transition from almost any occupation to becoming a skilled mediator can be a challenging yet exhilarating process. The examples in this article are based on my recent move from being an experienced judge to becoming a mediator. For the most part, however, these examples can be applied, with minimal variance, to transitions from other backgrounds.

LEARNING TO BE A MEDIATOR

After thirty years on the bench, I recently made the transition to the mediation practice. The change has been a revelation. As a judge, when I tried to help people resolve their cases, there were techniques and approaches that simply were not available to me. For example, mediators can help the parties invent solutions that are in the best interest of both sides, even if the solution is not the correct legal answer. Early in my judicial career, I presided over a nonjury land-use case. I rendered a verdict that I thought was a win-win resolution, but one side disagreed and appealed. The Court of Appeals reversed and remanded the case, with the directive to change my verdict to one winner and one loser, period.

Another case where my hands were tied as a judge involved a young boy who was hit in the head and suffered a severe brain injury. Because of the conflicting versions of what occurred, there was a significant question of liability. The amount of the defendant's offer was substantial, but much lower than it would have been had the liability been clearer. During the settlement conference, I—as the judge—could not overstep my bounds to help the plaintiff's mother or their young attorney take a reality check and see that it might be acceptable to consider settling the matter in the range of the offer. Ultimately, the case went to trial and the jury returned a no-cause verdict.

To make the situation worse, because the defendant had accepted the "Court Rule" case-evaluation amount, while the plaintiff rejected

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it, I had to order the boy's mother to pay the defendant's attorney fees, which came out of her paychecks for several years. As a mediator I certainly could have helped her consider the options more thoroughly, and I may have been able to help her see the possibility that the offer was reasonable in view of the liability problems and possible sanctions. I will never forget that case. It helps me remember that in my mediator's role, I can help people see a neutral point of view.

Despite my many years of experience on the bench, I nevertheless went through mediation training to help make the transition to the mediator's role. For example, I took a forty-hour Civil Mediation course and an Alternative Dispute Resolution course at the National Judicial College, along with a forty-plus-hour Family Law Mediation course through the State Court Administrator's Office. I joined Professional Resolution Experts of Michigan, through which I collaborate with other ADR practitioners; and I participate in the mediation and arbitration conferences that we conduct. I also volunteer as often as possible with the Community Resolution Centers, to apply the training principles to practical experience. The combination of experience and training contributes to the mediator's skills, including when and how to use them.

In my mediation training, I heard over and over the statement, "You have to hang up the robe." The statement makes sense because a mediator's role is definitely different. For example, mediators are obviously not allowed to rule for or against either side. However, I believe that judges should hear the rest of the story, which is this: do not throw the robe away; keep it figuratively hanging up close by, and conscientiously use it when appropriate.

Below are some tips based on what I've learned on my journey from the bench to the mediator's table.

HOLD EXPERTISE IN ABEYANCE

Holding experience in abeyance applies to any particular skill or area of expertise that a mediator brings to the table. The most effective mediators keep those assets in check until the right moment. When I mediate a case regarding damages, because of my many years of experience with settlements and jury trials, I can usually form an opinion about a reasonable resolution by merely reading the pre-mediation submissions or hearing opening statements. But I suppress the urge to divulge such an evaluation. Instead, I try to understand the participants' interests and help them understand each other's points of view and interests before considering whether to reveal my perspective.

The general rule is to start the process being facilitative, enabling the disputants to reach what they perceive to be a reasonable settlement. I only disclose my opinion about the settlement terms if and when it is absolutely necessary. One way to do this is by asking, in caucus, questions that result in a reality check. For example: "How do you think the liability issue affects the value of the case?" If requested, I may tell them outright my opinion of the reasonable settlement value of the case.

START WITH A PLAN

To discipline ourselves to follow a consistent approach, we should start each mediation with a plan, checklist, or outline of how we are going to proceed. I use a two-sided card that was given to me by a retired judge at the National Judicial College's ADR training. Unless we agree to a different plan, I review and use the card for each mediation. One side of the card describes "Mediator's Guidelines," and the other side, "The Process":

Mediator's guidelines

1. Introduce self and Qualifications
2. Explain role of Neutral: No Legal/Financial Advice or Decision
3. Explain Mediation Process
4. Pledge Confidentiality with Statutory Exceptions
5. Settlement Not Mandatory
6. Duty of Good Faith
7. Impasse/Effect of Agreement

The Process

Steps in Mediation

1. Mediators Opening Statement
2. Parties' Opening Statements
3. Joint Discussions
4. Caucus Jointly and Severally
5. Reconvene Joint Session
6. Closure/Agreement

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However, mediation plans or guidelines are subject to interpretation. For example, Number 6 of the Mediator's Guidelines, "Duty of Good Faith," appears to be inconsistent with the concept that mediation is voluntary and that the parties are not obligated to participate if they choose not to. My interpretation is that "Good Faith" during mediation is similar to "Good Faith" during a court proceeding. That is, the participants shall refrain from disrupting or undermining the process.

Yet if a person does not want to compromise his or her position, that person is not required to make an effort to settle. After all, Mediator's Guideline 5 states, "Settlement Not Mandatory." For example, I mediated a case where custody- and parenting-time discussions went on for two hours. The parties communicated their interests politely, and the mother conceded to several of the father's demands. In the final caucus, the father revealed to me that he would not settle for anything less than 100%. That, of course, was his prerogative. In my mind I thought, "I wish I was the judge hearing this case. I would give him a quick lesson in reasonableness." Instead, I took a deep breath and said to him, "If she makes those concessions in her argument to the judge, who do you think the judge is likely to find more reasonable?" He responded, "I don't care." And my report to the court merely stated that the case did not settle.

In another court-ordered mediation, my co-mediator and I worked hard with the parties and attorneys for most of a day. After much give and take, the parties reached a reasonable resolution. As I began to write up the terms of the agreement, the attorney for the defendant stated that he had a plane to catch and needed to get authority from the home office before we could finalize the settlement. This was alarming because the attorney led us all to believe that he had actual authority. So as he stood up to leave, I stood up as well and said, "Before you leave, I want you to call your home office and find out whether you have authority to settle this case as negotiated." He went out to make the call and came back stating that the individual with the authority was not available. I then told him to "call back and tell them that I wanted to talk to whoever was in charge of the office." He went out again, apparently made another call, and came back saying that he found the person he needed to get authority from, and the settlement was approved.

I stepped out to obtain some further paper work. As I returned, my co-mediator announced loudly for the whole room to hear, "All rise"— reminding me that I had temporarily re-adorned my robe. Everyone laughed and went home happy. If the attorney would have refused to contact his office, I believe I would have been obligated to report his behavior to the court. But if a mediator is uncomfortable with telling the participants that they have a "duty of good faith," it should not be included in their plan or guidelines. It is also important to remember that mediation plans or guidelines are not written in stone. Have a plan, but be flexible in its execution.

MEDIATOR'S FLEXIBILITY

One of the strongest, most powerful tools a mediator can use is "flexibility." The type of case, facts, parties, and attorneys are crucial in determining the flow and path of the mediation. This principle hit home for me when I attended an ICLE Advanced Negotiation and Dispute Resolution Institute a couple of years ago. One of the sessions was a mediation role play. I expected the mediator to be more assertive, but eventually I realized that I was missing the point. An effective mediator maneuvers the mediation much like a sailor navigates a boat. Instead of sailing directly into the wind, the sailor tacks, harnessing the power of the wind to advance in small increments. That doesn't mean that the mediator never takes affirmative action. Sometimes we sail with the wind, but sometimes sailing directly into the wind is necessary. The figurative robe, or any expertise, can be helpful in using this important tool of flexibility.

CONCLUSION

Our experience and training guide us in determining how and when to apply our expertise. As mediators, we can use our skills to help the parties communicate with each other, help them understand one another, and, perhaps most importantly, affirm for them that they have been understood. Our expertise can also help us, as mediators, know when the parties need suggestive direction. But we must be careful to restrain ourselves from taking over and controlling the party's decision-making prerogatives.

If having judicial experience or any other experience could help facilitate the mediation, I believe it should be used carefully, without pressure, at the right time. Our objective should be to learn from each and every matter in which we participate, regardless of the outcome. This will help us grow and improve our skills, including our ability to plan, to be flexible, and to use our background and expertise at opportune moments.

Hang up the robe, yes, but keep it handy for use when necessary and appropriate.

William Caprathe spent 15 years as a successful trial attorney before being elected to the Bay County Circuit Court in 1980, where he served as Chief Judge from 1984 through 1997. In 1998 he became President of the Michigan Judge's Association and later chaired the State Bar of Michigan's Judicial Conference. He is a FINRA arbitrator, Community Resolution Centers Mediator, and graduate of the National Judicial College's Dispute Resolution Skills Program.

After serving 30 years on the bench, Judge Caprathe retired at the end of 2010. Since then, he continues to sit on assignment, and he conducts mediations and arbitrations. His experience involves all the types of cases that come before Michigan Courts and which includes conducting many settlement conferences and trials, both jury and non-jury. He focuses his mediation and arbitration services on torts, product liability, malpractice, contracts, securities, employment, and domestic relations disputes.

This article previously appeared in the Oakland Legal News and is being reprinted with permission from the Publisher.

Upcoming Mediation Trainings

General Civil Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a). For more information, visit the SCAO Office of Dispute Resolution web-site, and select "Mediation Training" then "Upcoming Trainings": http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/Mediation-Training-Dates.aspx.

Bloomfield Hills: **January 30, February 6, 13, 20, 27**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Plymouth: **February 12-14, March 6-7**
Trainings sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Grand Rapids: **February 25-27, March 2-3**
Training sponsored by Dispute Resolution Center of West Michigan
Register online at www.drcwm.org or call 616-774-0121

Bloomfield Hills: **May 21, 28, June 4, 11, 18**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Bloomfield Hills: **July 23, 30, August 6, 13, 20**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Domestic Relations Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Ann Arbor: **January 29-31, February 5-7**
Training sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com
or call 1-734-663-1155

Bloomfield Hills: **September 11, 18, 25, October 2, 9, 16,**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Advanced Mediation Training

Mediators listed on court rosters must complete eight hours of advanced mediation training every two years.

Auburn Hills: **March 17**
ADR Summit: Elevate Your Mediation
and Negotiation Skills to the Next Level
Trainer: Kimberlee Kovach
Training sponsored by ADR Section
To register, go to http://www.michbar.org/adr/

Bloomfield Hills: **May 29, 2015**
Facilitation Skills from Mediations to Meetings
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Bloomfield Hills: **September 25, 2015**
Domestic Violence Screening Training for Mediators
Friday, from 8:30am - 5pm
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Bloomfield Hills: **December 3, 2015**
Mediator Wisdom: Reflections, Imitation and Experience
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

How to Find Mediation Trainings Offered in Michigan

Mediation trainings are regularly offered by various organizations around Michigan. Mediators who wish to apply for court mediator rosters must complete a 40-hour training approved by the State Court Administrative Office. Courts maintain separate rosters for general civil and domestic relations mediators, and there are separate 40-hour trainings for each. In addition, domestic relations mediators must complete an 8-hour course on domestic violence screening. Mediators listed on court rosters must complete eight hours of advanced mediation training every two years. MCR 2.411(F)(4)/3.216 (G)(3).

Most mediation trainings offered in Michigan are listed on the SCAO Office of Dispute Resolution web-site:

http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/Mediation-Training-Dates.aspx

The ADR Quarterly

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*Toni Raheem - **248-569-5695***
*Stephen A. Hilger - **616-458-3600***
*or Phillip A. Schaedler - **517-263-2832***

http://www.michbar.org/adr/newsletter.cfm

SAVE THE DATE

for October 2 and 3, 2015, SBM ADR Section Annual Meeting, Conference, and Training in Traverse City.

The State Bar of Michigan Alternative Dispute Resolution Section 2015 Annual Meeting and Conference, including 8 hours of advanced mediator training, is scheduled to be Friday, October 2, and Saturday, October 3, 2015, at the Park Place Hotel in Traverse City.

SBM
State Bar of Michigan

ALTERNATIVE DISPUTE RESOLUTION SECTION

LUNCH & LEARN REGISTRATION

Our Favorite Things: Effective Techniques For Mediators

Telephone Seminar, February 10, 2015, Noon-1:30 p.m.

P #:_____

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City:_____ State: ____ Zip: _____

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Enclosed is check # _____ for $ _____

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Please do not send credit card information by e-mail.

Cancellation Policy: Registration and Payment must be received at the SBM on or before 3PM on Tuesday, February 3, 2015. Refunds will be provided only for Cancellations received in writing at the SBM by 3PM on Tuesday, February 3, 2015. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.)

Details

REGISTRATION DEADLINE: February 3, 2015

From techniques for helping parties reach the mediation table in the right frame of mind, to fostering a productive negotiation; from building trust and gaining confidence, to closing the "deal" or even continuing to find resolution after the parties leave the table; this seminar promises you more than a DOZEN proven tools to add to your mediator tool kit! Gain new approaches to remove impediments to settlement. Become a better mediator. Sign up today!

The Panel: **Robert E. Lee Wright**, Moderator
The Peace Talks PLC, Grand Rapids

Richard A. Hooker, Varnum LLP, Novi

Edward H. Pappas, Dickinson Wright PLLC, Troy

Antoinette R. Raheem, Law & Mediation Offices of Antoinette R. Raheem PC, Bloomfield Hills

Sheldon J. Stark, Mediator & Arbitrator, Ann Arbor

Bonus: An mp3 and transcript of the discussion will be made available to registrants after the program.

Information on how to access the dial-in instructions and written materials will be provided on your seminar confirmation.

Cost

❑ ADR Section Members.....$10
❑ All Other Registrants.....$40

Note for non attorneys

Non attorneys MUST register for this event online to access the seminar materials. Create a non-member account if you do not already have one. Check to see if you have an account here. (Or paste: https://e.michbar.org/eCommerce/login/emailreset.aspx into your web browser.)

Questions

For additional information regarding the seminar contact Shel Stark at shel@starkmediator.com.

Register One of Three Ways

Online: **visit http://e.michbar.org to register online**

Mail your check, or debit/credit card information, and completed registration form to:

State Bar of Michigan
Attn: Seminar Registration
306 Townsend Street, Lansing, MI 48933

Fax (ONLY if paying by debit/credit card) the completed form and credit card information to: Attn: Seminar Registration at (517) 372-5921

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ALTERNATIVE DISPUTE RESOLUTION SECTION

ADR Summit: Elevate Your Mediation & Negotiation Skills to the Next Level!

March 17, 2015 ■ 9 a.m.-5 p.m.

Western Michigan University, Cooley Law School
2630 Featherstone Road, Auburn Hills, MI

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Please do not send credit card information by e-mail.

Cancellation Policy: Registration and Payment must be received at the SBM on or before 3PM on Friday, March 13, 2015. Refunds will be provided only for Cancellations received in writing at the SBM by 3PM on Friday, March 13, 2015. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.)

Details

REGISTRATION DEADLINE: March 13, 2015

Our presenter **Kimberlee K. Kovach** is a star in the ADR world: lawyer, mediator, author & Trainer. Kim was a founder and Chair of the ABA Section of Dispute Resolution, and she created and conducted the first mediation training in the State of Texas, where she lives with her husband, mediator Eric Galton. Ms. Kovach received the prestigious Lifetime Achievement Award from the International Academy of Mediators.

Learn to recognize barriers to settlement; rewire destructive negotiations to get the mediation process moving forward; take home ways to maximize use of the joint session and caucus; increase participant understanding; and take on problematic tactics to turn them around!

EXTRAS: Continental breakfast, lunch on premises, a networking reception, and a binder of course materials are all included in the registration fee.

Cost

❑ ADR Section Members.....$155
❑ All Other Registrants.....$195

Note for non attorneys

Non attorneys MUST register for this event online to access the seminar materials. Create a non-member account if you do not already have one. Check to see if you have an account here. Or paste: https://e.michbar.org/eCommerce/login/emailreset.aspx into your web browser.)

Questions

For additional information regarding the seminar contact Shel Stark at shel@starkmediator.com.

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