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Betty R. Widgeon, ADR Section Chair

Erin Archerd, Editor • Lisa Okasinski, Associate Editor

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Betty Widgeon

The Chair's Corner

by Betty Rankin Widgeon

For the second year in a row, we held an exciting and informative virtual Conference, Awards Presentation, and Annual Meeting. As I did regarding last year's events, I am extending hearty thanks to Mike Leib, Ed Pappas, Zena Zumeta, Bob Wright, Mary Anne Parks, and their entire team of behind-the-scenes support members for skillfully effectuating this year's program.

This year the Section implemented two first-of-a-kind events at our Conference: we (1) engaged leading conflict resolution scholar Robert H. Mnookin for our Conference keynote speaker, and (2) presented a *Lifetime Achievement Award* to recently retired Director of the Office of Dispute Resolution for the Michigan Supreme Court, Doug Van Epps. Credit is due to our incoming Section Chair, Erin Archerd – who facilitated arrangements for Professor Mnookin's address – as well as to former Section Chair Dale Iverson and former Council member Anne Bachle Fifer for designing and presenting the excellent audiovisual show highlighting many of Doug's outstanding achievements.

Because all of our Council meetings this past year were held via Zoom, we missed the before-meeting, lunchtime, and after-meeting conversation times when new and veteran Council members could get to know each other, and new members could feel more at ease participating as the "new kids on the block." For this reason, I decided to make a practice of finding ways to ensure that everyone who wanted to speak had the chance to do so. This included paying careful attention to the timing of people unmuting themselves or displaying the raised-hand reaction. The Council held an early-year ZOOM ice-breaker with new members, Action Team chairs, and co-chairs, and judging from the activity level of new members during the year, those efforts seemed to be very helpful.

It is important for me to take this opportunity to recognize those newer, unsung Council heroes. Lisa Okasinski, Kisha Chaney, Larry Saylor, Richard Kerbawy, Chris Gilman, Judge Christopher Yates, and Zeina Baydoun jumped into the action from the start of their Council years. In addition to participating in other activities, Lisa, Richard, Chris, Judge Yates, Zeina, and Larry contributed by chairing, co-chairing, or joining an Action Team. Lisa designed and implemented *ZOOM 101* hands-on mini sessions for Section members and co-chaired the Publications Action Team. Kisha immediately teamed up with the Skills Action Team as a webinar moderator and served as a member of the Awards Committee. Richard served as a Member-at-Large on the 2020-2021 Executive Committee. Larry served on a sub-committee to research and sift through financial questions with Treasurer James Darden II, Erin, and me. Zeina, Kisha, and Larry have also agreed to serve as 2021-2022 Executive Committee members for the Section. Your work and dedication have strengthened the Section, and we appreciate your contributions.

I also want to thank several Section and Council members who, for nearly a year, have been involved in assisting newer arbitrators and mediators via *Drop-in Office Hours*, as part of a Diversity and Inclusion initiative titled *Project Next Generation (PNG)*. While PNG started holding informal office hours for hands-on experience on Zoom-related questions, it eventually morphed into regular drop-in sessions for broader information sharing. Section member John Obee, the 2020-2021 recipient of the Section's Diversity and Inclusion Award, spearheads this effort. Section members Earlene Baggett-Hayes, Sam McCargo, O'Neal Wright, James T. Ellis, Elaine Frost, and Section Treasuer James Darden II have assisted John in this effort. Their dedication and consistency have achieved long-lasting results.

Finally, I must express sincere gratitude to incoming Chair Erin Archerd, former Chairs Scott Brinkmeyer and Lee Hornberger, Treasurer James Darden II, Secretary Zenell Brown, and Section Administrator Mary Anne Parks. Thank you all for your behind-the-scenes availability when I sought objective sounding boards as I worked through specific actions and responses. Your candor and wisdom have proven invaluable.

My Top 10 Quotes of the Year:

1. "Good leadership requires you to surround yourself with people of diverse perspectives who can disagree with you without fear of retaliation." - Doris Kearns Goodwin
2. "If you hire only those people you understand, the company will never get people better than you are. Always remember that you often find outstanding people among those you don't particularly like." - Soichiro Honda
3. "Let's stop believing that our differences make us superior or inferior to one another." - Don Miguel Ruiz
4. "We must not only learn to tolerate our differences. We must welcome them as the richness and diversity which can lead to true intelligence." - Albert Einstein
5. "A diverse mix of voices leads to better discussions, decisions, and outcomes for everyone." -Sundar Pichai
6. "Strength lies in differences, not in similarities." - Stephen R. Covey
7. "Many conversations about diversity and inclusion do not happen in the boardroom because people are embarrassed at using unfamiliar words or afraid of saying the wrong thing — yet this is the very place we need to be talking about it. The business case speaks for itself — diverse teams are more innovative and successful in going after new markets." - Inga Beale
8. "Diversity: the art of thinking independently together." - Malcolm Forbes
9. "Diversity is a fact, but inclusion is a choice we make every day. As leaders, we have to put out the message that we embrace and not just tolerate diversity." - Nellie Borrero
10. "You have a responsibility to make inclusion a daily thought, so we can get rid of the word 'inclusion.'" - Theodore Melfi

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About the Author

Betty R. Widgeon is a retired Michigan District Court judge and the 2020-2021 Chair of the SBM ADR Section. She is the founder and president of Widgeon Dispute Resolution, PLC, which specializes in arbitration, mediation, factfinding, and consulting, focusing specifically on labor, employment, and consumer cases. She also serves as a member of the Special Master Hearing Officers' Roster for the Michigan Supreme Court. She has over 25 years of experience resolving civil and criminal disputes. Her practice is now national in scope and covers a wide variety of issues and industries. Judge Widgeon is a member of the National Academy of Arbitrators and the National Academy of Distinguished Neutrals.

Harshitha Ram

"You Don't Look Like a Lawyer: Black Women and Systemic Gendered Racism" - a Speech Analysis

By Harshitha Ram

It is with immense pleasure that I share the Diversity and Inclusion Action Team's new venture called the "Michigan Dispute Resolution Journal Initiative." This is my maiden article in my capacity as Chair of the DIAT Michigan Dispute Resolution Journal Initiative.

The DIAT sponsored a speech on September 09, 2021 by Dr. Tsedale M. Melaku on the topic "You Don't Look Like a Lawyer : Systemic and Gendered Racism." Dr. Melaku is a Sociologist, Author, and Postdoctoral Research Fellow with the Institute for Research on the African Diaspora in the Americas & the Caribbean (IRADAC) at The Graduate Center, City University of New York. Her recent book, *You Don't Look Like a Lawyer: Black Women*

and Systemic Gendered Racism (2019), reflects her scholarly interests in race, gender, class, workplace inequities, systemic racism, intersectionality, organizations, and diversity.

Dr. Melaku delivered a well-organized presentation. In her speech addressing our members and the legal community at large, she opened her presentation by explaining the acronym BIPOC ("Black and Indigenous People of Color") drawing in the audience instantly and moving on by instituting a framework around the subject of ally-ship and systemic racism which are the core concepts in her book.

She wisely noted that systemic racism is not just about individuals but includes businesses and organizations. There is no one sector that is included or excluded but every organization falls under the purview including but not limited to media, finance, and tech companies. Even though the organizations claim they do not discriminate, in practice they all do.

There are racial and gender aggressions of a serious (not micro) kind that need adequate attention at an institutional level. She repeatedly referred to the deep roots of American racism and how whites are privileged over non-whites by quoting the "White racial frame" by Joe R. Feagin, which privileges the white point of view and no one is exempt from that frame. She added that anyone can be working and not even be recognized for their work and or contribution. She mentioned the idea of systemic gendered racism by Asia Harvey Wingfield as well as the theories of Eduardo Bonilla -Silva and applied them to organizations.

Dr. Melaku referred the audience to the "invisible labor clause," a concept that is mentioned in her book. Some of you may look at this and say it sounds familiar, and I felt that too. This aspect of intersectionality in both invisible and visible forums offers advantage, privilege, or even oppression. Invisible labor is usually unrecognized labor or emotional cognitive labor. One example is when certain standards of beauty are perceived as not professional. This is disheartening to workers, and she indicated how enthusiasm and energy levels can drop in such situations. Moreover, the boundary of perceived whiteness also expands and contracts, and there are situations where wealthy whites benefit and not working-class whites.

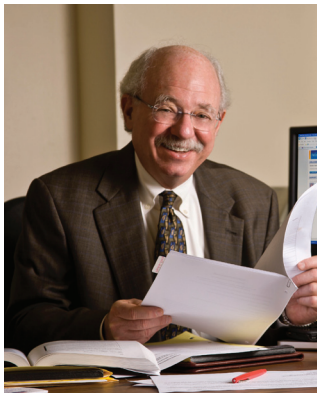
She then moved on to making her overt connection between the audience and the topic asking us, "Can we deploy our privilege to bring about change?" The simple answer was that we need to be more than allies. This makes the message more prominent as it gets personal. She insisted that we as individuals must learn to name the problem and let people know what the problem is, so it is addressed effectively. I agree that we must insist on improving our ally-ship. In my understanding, the problem of systemic and gendered racism cannot just vanish on its own. It requires a series of efforts from people to recognize the core issues and come up with solutions. We need people to speak up and we need people to join hands and help. I believe her standards of ally-ship can only be achieved by the efforts of many enthusiastic allies.

I hope to be one.

I take this opportunity to thank our beloved Betty Rankin Widgeon (Former Judge), 2020-2021 Chair of the Alternative Dispute Resolution Section and Lee Hornberger and Shawntane Williams, Co-chairs, Diversity and Inclusion Action Team, for putting together this wonderful event with Dr. Melaku.

About the Author

Harshitha is an International Disputes Attorney and Arbitrator. She is the Founder of Lex Apotheke offering legal and dispute resolution services and has a global practice. Besides being the Fellow of the Chartered Institute of Arbitrators (CIArb), London, she is on the panel of commercial arbitrators at the American Arbitration Association (AAA); Chair, The Michigan Dispute Resolution Journal Initiative of the Diversity & Inclusion Action Team (DIAT); Affiliate, ADR Section - State Bar of Michigan; and a Panelist, Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top ADR professionals. She serves as both Fellow and Panelist in numerous national and international arbitration panels and is a globe-trotter. She is frequently invited as a guest speaker, lecturer & ADR trainer by universities and ADR service providers in the UK, USA, Europe, and Asia. Ram has an extensive experience in international arbitration, mediation, pre-contentious negotiations, risk management and avoidance. She is currently leading an international program on accreditation of ADR professionals worldwide. She can be reached at harshitha@lexapotheke.com; (516) 655-9848.



Sheldon J. Stark

Negotiation 101: What Parties Should Know about Negotiations at the Mediation Table

By Sheldon J. Stark

INTRODUCTION

For many, especially those new to the process of settling legal disputes, negotiations across the mediation table are like nothing the parties have ever experienced before. The purpose of this article is to better prepare participants in mediation for what to expect and to suggest ways they might take full advantage of their participation in the process.

ANTICIPATE A TROUBLESOME START

Lacking prior experience, many parties arrive at the mediation table only to find themselves shocked, disheartened, and frustrated when the opening settlement offer from the other side is received. As every mediator knows, whether hyper-inflated or low ball, opening offers can result in outrage, pessimism, discouragement, consternation, threats to bring the process to a crashing halt, or all the above.

Emotional reactions to hard ball openings do not necessarily mean the mediation is over. Mediators can move the process forward and get past such hurdles by listening to participants vent, bringing calm into the room, and encouraging consideration of a longer perspective. What is that longer perspective? (1) The first settlement offer is merely an opening figure; not the last. (2) Mediation is frequently an all-day process; the first proposal is only a start. (3) No one actually expects the first offer to be accepted, certainly not the offeror. (4) Opening offers are rarely a true reflection of what a party is willing to offer or accept. And (5) the other side's top or bottom line – which does predict whether settlement is possible - is unlikely to become evident until several offers and counteroffers back and forth throughout the day. If parties knew what to expect in advance, perhaps this time consuming and emotionally challenging effort wouldn't be needed.

Inevitably, unrealistic opening proposals lead to equally unproductive, unrealistic and reactionary counter proposals which in turn cause outrage and dismay back in the room where it started. Sometimes it helps to point out that they've just received the mirror image of their own unrealistic opening offer, or that the other side matched an unproductive number with its own unproductive number to create "book ends". But such reminders are not always heard or processed. Even for parties with experience negotiating legal disputes, opening rounds in the negotiation process can be disturbing and painful. Hardball tactics designed to achieve an advantage – especially when unexpected – generally result in the opposite of what was intended. Instead of sending a message about the true value of a claim or the appropriate ballpark, hard ball unproductive numbers prolong the negotiation process, increase costs, impair businesslike thinking, cloud judgment, and reduce the chances of reaching resolution.

HARDBALL TACTICS ARE NOT UNCOMMON

Once past the challenge of frustrating opening proposals, the negotiations may continue at a glacial pace for several more rounds. Competitive and incremental, barely noticeable movement can be maddening. For many advocates and their clients, the negotiation "dance" itself becomes the source of grievance. There are many reasons even experienced negotiators do this, including:

- Some negotiators were trained to negotiate aggressively with hardball proposals to start.
- Some believe an aggressive, negative opening offer sends the right opening message: "Don't get your hopes up."
- Some seek to establish a favorable negotiation range before the other side can do so.
- Some believe in the power of anchoring, i.e., that the final number in a negotiation is generally closer to the first offer than the first counteroffer.
- Some believe an unproductive number can help lower the other side's expectations about the value of the dispute.
- Some actually believe that discouraging the other side early is an important step in the softening up process.

Whatever the motivation, aggressive, hardball proposals reduce the other recipient's ability to exercise good judgment. No matter what message or encouragement accompanies an offer, the number itself is such a loud message it tends to drown out all other signals. Unproductive early numbers confirm a party's worst fears, crank up their emotions, foul their mood, and darken their vision of where things are headed. Good will generated as the parties prepare for mediation is dissipated.

In my experience, when parties know what to expect, arrive at the mediation with a realistic perspective and a robust understanding of the process they will be better able to exercise patience, take hard ball tactics in stride, limit the power of emotions to cloud their judgment, and make good decisions about whether to settle and on what terms.

IMPATIENCE IS NOT YOUR FRIEND – THE OTHER SIDE IS COUNTING ON IT

Parties should not be discouraged by unrealistic, unproductive opening numbers. Proposals offered or demanded in Round One rarely predict where a dispute may settle. Parties get the most out of mediation when they listen, maintain an open mind, and place trust in the process to achieve their goals and objectives. Good settlements require patience. Mediations are scheduled for the entire day for a reason. There may be as many as five, six, or seven rounds back and forth before the process is complete. Some disputes require a second day. In addition, there are structural reasons for optimism:

- *The process is generally voluntary.* People put their money where their mouth is. Rarely is someone willing to invest in a mediation process if they have no intention of settling. When mediation is court ordered or encouraged by the judge, most participants willingly engage nonetheless to take full advantage of the unique opportunity mediation offers to participate in a conflict resolution process.

- *Decision-makers are seated at the table.* Who is in the room for the other side? Have they sent a low-level place holder simply to make a show of participation? Or is the other side's representative a decision maker, company owner, officer or official? Are multiple people participating? The more people attending, the greater the commitment to seeing the process through. High level officials have other things to do. They generally come to the table with authority to settle. They are attending mediation for a reason: to reach agreement.

- *Statistics are cause for optimism.* Less than 1% of all lawsuits go to trial today. Less than 1%! The percentage of cases that resolve at the mediation stage is very high. That said, a high percentage of lawsuits are dismissed by the judge as not appropriate for trial. Mediators often help parties assess the risk of that happening in any given case. Weighing and examining the risks at mediation settles cases, and often settles them early before substantial fees and transactional costs are incurred. Mediation brings results, and results are the reason mediation has become so popular.

- *Patience is a virtue.* Being patient is a strategic advantage. Some competitive negotiators believe impatience on the other side is a vulnerability to exploit which, in turn, drives their hard ball tactics. No one should start feeling discouraged before Rounds Four, Five, or Six. Of course, negotiations are a two-way street. Generally, a party must make a significant move to receive a significant move back. It's called reciprocity. Experienced negotiators are likely to reply to an unproductive offer with their own unproductive offer. Fortunately, reciprocity works the other way also: just as a dinner invitation from a friend encourages us to invite that friend to our house for a payback dinner, a good move at the mediation table encourages the other side to reply in kind.

- *Mediators have the right tools for the job.* Mediators have experience managing the process in even the most intractable, difficult and high conflict disputes. They are trained for it. They have time-tested tools, techniques and interventions that work. Even in late rounds where the gap between the parties is not narrowing appreciably, mediators have ways to move the process forward and help the participants find an off ramp.

- *Information learned at mediation has value.* Sometimes cases do not settle. That happens. Sometimes two competent advocates reach very different conclusions about the value of a case. Sometimes parties don't have enough information to know whether they should settle and on what terms. Sometimes parties are simply not ready to settle. The mediation process nonetheless provides value and generally makes the return on investment worthwhile. Mediation is, of course, a unique opportunity to step back from the conflict and engage in serious problem solving. Good faith efforts at peacemaking are rarely a mistake. More to the point, mediation is a powerful vehicle for the exchange of

information. For a party willing to listen and listen with an open mind, the process often brings forward critical information such as the other side's perspective; their strongest evidence; their best legal arguments; and what their number is to settle the case. Information exchanges at the mediation table provide each side with fresh insight and critical information to better prosecute or defend their positions.

HOW PAST EXPERIENCE CAN MISLEAD

Many people arrive at the mediation table with some general experience negotiating. What's for dinner? Which movie will we see? Shall we vacation in the mountains or at the seashore? Who's responsible for the kids this weekend?

Party experience negotiating monetary issues is generally more limited. Experience negotiating lawsuit settlements is particularly limited, more often on the plaintiff side. Limited experience leads to unrealistic expectations; and unrealistic expectations lead to resentments.

Most parties have experience purchasing an automobile, new or used. Their experience is that the asking price or manufacturer's "sticker" price is rarely far from the final sale price. If a purchaser saves $1750 to $2500, for example, he or she feels good about the outcome.

Experience buying or selling a home, is not dissimilar. The gap between the list price and the final sale price at closing is rarely greater than 10-15%. If a seller receives an acceptable offer a few thousand dollars below the asking price, he or she might pat themselves on the back even if they initially dreamed of an offer above list. Low ball offers in real estate are so unusual, they are often flatly rejected, undignified with a counterproposal.

In commercial litigation, parties often have had experience negotiating money. Examples include salary negotiations, the size of a bonus or raise, the price per part of a production contract, the size of a volume discount, or the purchase of a business. Here, too, experience tells the negotiator that the opening number and the final number will not be far apart. As a result, many participants expect the opening offer in their lawsuit will be a short distance from their top or bottom line.

Not so. In litigation this happens only rarely. In fact, the opposite is true. Initial proposals are often in different "ballparks"; and sometimes the ballparks aren't in the same city. Thus, parties are sadly disappointed. Expectations are resentments under construction. When expectations are dashed, the response is outrage, frustration, and resentment. Resentment poisons the well, smothers good will, and roils the calm atmosphere generally required for settlement.

LOVE IS BLIND TO RISK

An additional cause of party frustration arises when the Mediator starts asking risk assessment questions. Even mediators who approach risk in a facilitative, non-judgmental mode risk losing party trust and confidence. Has the mediator lost his neutrality and taken sides? "Why is the mediator talking about my weaknesses and risks? Why isn't he in the other room beating up on them?" As it happens, mediators are nothing if not symmetrical. If they're "shaking the tree" to sow the seeds of doubt in one room, parties can count on mediators doing the same in the other. Mediators must start somewhere, however. It's traditional to start with the plaintiff.

Mediators do not spend time on risk assessment without good cause. Risk assessment is essential to the process of finding an off ramp from the dispute. Risk does and should have an impact on evaluation of the claim. The greater the risk, the more parties should be flexible. Does the claim have evidentiary support? Do the contentions make sense? Are the stories each side tells plausible? Are some claims stronger than others? Are the defenses persuasive? What is the legal foundation on which the claims and defenses rest? What are the weaknesses each side faces? Is there documentation? Are the parties and their witnesses credible? What are the risks presented? What's the likelihood of getting past summary judgment with this judge? Will the judge or jury be sympathetic?

Why do mediators explore these questions? There are multiple reasons:

- Opening numbers are generally developed and agreed upon by advocates and their clients well before arrival at the mediation table. Participants look at the strengths of their claims and defenses, and, sometimes, they look at their weaknesses – but generally not as skeptically as they should. Typically, the valuation process includes an assessment of exposure, i.e., the potential value of damage or loss. In preparing to make an opening, parties

generally review the legal foundations, engage in some risk analysis and formulate a litigation budget to estimate attorney fees and costs. Regrettably, many participants fall in love with their claims and defenses, thereby coloring the numbers. What do we know about love? Shakespeare taught us that love is blind. Accordingly, valuations brought to a negotiation may be unrealistic, the result of someone sweeping the weaknesses and risks under the rug without giving them proper weight.

- Claim valuation is more realistic after critical weaknesses and risks have been examined. Why? The mediator's job is to sow the seeds of doubt by shining light on those risks. If participants listen carefully with an open mind, their valuation of the case will and should necessarily change and change in the right direction. A top or bottom line at 9:30 in the morning, therefore, is rarely of any relevance. The top or bottom line at 3 o'clock after time spent examining weaknesses is very relevant.
- Fault and risk conversations soften the parties up and encourage flexibility.
- Settlement numbers that take risk into account and are communicated with the offeror's rationale are generally better received, more seriously considered, precipitate more productive counterproposals, and ultimately result in mutually agreeable settlement agreements.
- The parties are in mediation because they couldn't arrive at a settlement on their own. Fault and risk conversations led by a neutral mediator can assist participants in arriving at a better informed and more realistic understanding of risk and value.

CONCLUSION

If parties know what to expect, are patient and flexible, keep an open mind, plan strategically, listen carefully, make constructive and reciprocal proposals using an understandable rationale, the mediation process will bear fruit.

About the Author

Sheldon J. Stark is a member of the National Academy of Distinguished Neutrals, a Distinguished Fellow with the International Academy of Mediators, and an Employment Law Panelist for the American Arbitration Association. He is also a member of the Professional Resolution Experts of Michigan (PREMi). He is a former chairperson of numerous organizations, including the Labor and Employment Law Section and the Dispute Resolution Section of the State Bar of Michigan, the Employment Law and Intentional Tort Subcommittee of the Michigan Supreme Court Model Civil Jury Instruction Committee, the Fund for Equal Justice, and the Employment Law Section of the Association of Trial Lawyers of America, now the American Association for Justice.

He has extensive teaching experience, including with ICLE and as a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010. In 2015, he received the George Bashara, Jr. Award for Exemplary Service from the ADR Section of the State Bar. He can be reached at shel@starkmediator.com.

Rich Glaser

Mediation in Motion Through Tai Chi

By Rich Glaser

I have studied and served as a neutral in facilitative mediation for over 25 years. I have been practicing and learning Tai Chi for only seven months.

A committee of our local federal court invited a group of West Michigan trial attorneys to be trained as the inaugural panel of facilitative mediators in 1996. Facilitative mediation was the next cool thing in Alternative Dispute Resolution (ADR) on the heels of arbitration and case evaluation. Coming from the Court, it was an offer you couldn't refuse.

The offer to join a Tai Chi class was serendipity. My body had turned on me with idiopathic peripheral neuropathy – of unknown origin or cure – losing stability and balance while stripping sensation from my lower extremities. Tai Chi is recognized as therapeutic for neuropathy, as well as an array of other maladies and conditions. See, Peter M. Wayne, M.D. and Mark Fuerst, Harvard Medical School Guide to Tai Chi – 12 Weeks to a Healthy Body, Strong Heart and Sharp Mind (2013).[1]

It seemed inevitable that Tai Chi would intersect with facilitative mediation. A more experienced classmate described Tai Chi as an antidote for type-A personalities. Since most of our federal court mediators are trial attorneys, we all had to find our own methods to suppress, at least episodically, our type-A impulses in dealing with intransigent parties and their aggressive attorneys. Tai Chi would have been so helpful back then – plus the visual of a roomful of my esteemed colleagues harmoniously performing Master Chen's 60 postures brings a smile.

Taking it to a higher level, some practitioners see the Yin and the Yang as opposing natural forces in an eternal struggle that neither can win. Either one, upon reaching its highest power, gives way to the other. Because nothing is gained by resistance, we should strive to live in harmony with the Yin and the Yang. Tai Chi teaches a non-interference approach to human interaction. In a conflict, rather than meeting force by tensing up with opposing force, learn to go softly, deflect, and redirect.

As mediators, that is what we strive to do. We usually enter a conflict at the stage of a full-blown dispute, then work to deflect the parties' attacks against one another and redirect their energy from combat toward resolution. Sometimes we enter the fray before the parties become deeply invested in discovery, which generally serves only to harden the parties' resentment and anger. At such an early stage, we can help the parties understand that they already have the necessary knowledge and information to settle their dispute. If more is needed, then exchange as much factual information as the situation permits to set the table for exchanging settlement offers and counter-proposals.

When I searched the internet for connections between Tai Chi and mediation, the results came back "Tai Chi and meditation." Tai Chi often is described as "meditation in motion." But for a single consonant, that phrase would capture what we as mediators work to do: keep the parties and the mediation in motion toward settlement.

Some of the hits were helpful.[2]

The term "Intimate Tai Chi" was applied to help couples navigate conflict (the metaphor in the excerpt below is figurative):

> "In Intimate Tai Chi, you listen for where your partner's energy is coming from and instead of reacting with a block, you receive and redirect the punch, neutralizing the conflict. ... If we only hear and attempt to rationally respond to the words we are hearing, we miss the true source of our partner's reaction." Jamie Elizabeth Thompson, *Intimate Tai Chi – Turning Conflict into Connection*, Thrive Global, Jan. 16, 2019.

The focus here is on alertness and active listening – mediators understand how exhausting a day full of passive energy can be. Tai Chi teaches relaxation through proper breathing, posture, and grounding energy (chi) through the feet to keep the body aligned and in harmony. This can help when the mediator is in the midst of parties under pent-up stress and their anxious attorneys ready for argument. You can feel trapped within the construct of their debate, just as they have entrapped themselves. Think of this as another opportunity to focus on the source of the problem and deflect, then redirect to another playing field.

For the mediator to allow the parties to engage and escalate the battle wastes precious time and energy that should be devoted instead to deflection and redirection. There is no formula for how and when deflection and redirection are best employed. That said, there is no upside to deflection in mediation without a well-considered plan for redirection. This can involve relatable examples of how an arbitrator's or judge's endorsement of a rock-solid litigation strategy can be unexpectedly reversed years and tens of thousands of dollars later with no closure then in sight. Or, how the time and emotional investment required to see the current conflict to its bitter end can be put to more productive use. Identify the opportunities the parties have already missed by obsessing over this dispute, then redirect to how not to miss similar opportunities today or in the future. Are there missing players or stakeholders to this mediation who have not been duly accounted for? If so, can they be recruited to support momentum toward resolution?

Marcus Edwards, a top executive with a leading defense contractor, wrote recently about Tai Chi's impact on negotiation skills.

> "By studying the Tai Chi lessons on health, meditation and self-defense, a well-trained negotiator will be able to repeatedly redirect, influence and control interactions with a lesser skilled opponent. Tai Chi's health training imbues a negotiator with the ability to free the body and mind from the physical effects of stress. Tai Chi's meditation training empowers a negotiator with the ability of directed calm and focus. Tai Chi's self-defense training prepares a negotiator to adapt proactively in response to evolving external forces … to diffuse and redirect an incoming attack in lieu of trying to meet it with an equally opposing force."[3]

If negotiators in an adversarial posture can employ deflection and redirection against an opponent who is naturally suspicious of their motives, then imagine its potency in the hands of a neutral who has already gained a quantum of trust with the parties.

Consider, for a moment, the reference above to "a lesser skilled opponent." A party's presumption of superiority over its opponent can complicate the mediator's objective to find resolution. If one party feels superior to the other, then its expectation of an acceptable mediation result will be disproportionately inflated. Plus, the other side will sense this superior attitude, adding to its resentment. The mediator should view this conflict as an opportunity to deflect and redirect, engage with both parties, and put the mediation in productive motion. If the parties have a continuing relationship or it is not beyond repair, then explore alternative opportunities for mutual benefit as context for deflection and redirection. The parties may have explored and abandoned this path soon after the conflict materialized, but circumstances can change, unnoticed by the parties as the dispute absorbed them. So, go softly, deflect and redirect.

CONCLUSION

Like Tai Chi, facilitative mediation is a work in progress. Each movement can be examined and improved for the next exercise. I invite mediators and other readers to share experiences where this tactic of "deflect and redirect" has been implemented. Send me an email. Having semi-retired to the mountains of North Georgia, I'd enjoy hearing from you. Plus, the feedback might be organized for a later article or other medium to benefit the Michigan ADR community.

About the Author

Rich Glaser specialized in product liability and complex commercial litigation, and as a mediator and arbitrator, for 35 years with Dickinson Wright PLLC. In 2012, Rich formed Richard A. Glaser PLLC to assist small to mid-size businesses and individuals resolve disputes with minimal litigation interference while continuing his ADR practice. He can be reached at rich@raglaserlaw.com or (616) 648-7874.

Endnotes

[1] P.S. From personal experience, it takes longer than that; I'll let you know when.

[2] Other hits were intriguing. With the lack of sensation in my feet, I thought maybe to give John Luang's following recommendation a try: "I can think of no example that more graphically illustrates the power of free will in the arbitration of conflict than the ritual of firewalking." Fortunately, Tai Chi has helped with my neuropathic symptoms, so I'll leave well enough alone.

[3] Marcus Edwards, The Art of Negotiation and Tai Chi, https://www.linkedin.com/pulse/art-negotiation-tai-chi-trilogy-part-1-marcus-edwards/ (2019).

John Lande

How You Can Solve Tough Problems in Mediation

By John Lande

The State Bar of Michigan ADR Section and Washtenaw County Bar Association ADR Section recently sponsored my presentation, "Help Your Clients Make Good Litigation Decisions with LIRA."[1] I summarized key points from *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, co-authored by Michaela Keet, Heather Heavin, and me.[2] Ed Sikorski previously provided an excellent summary of the book in this Journal.[3]

In my presentation, I asked the audience to describe what was frustrating in their mediations. Many complained about lawyers' and parties' lack of preparation for mediation, their unrealistic expectations, and their emotional behavior. This article suggests techniques described in the LIRA book to address these problems. It is primarily directed to mediators, though mediation advocates can benefit from some of these techniques as well. It assumes that all parties are represented by counsel, but these suggestions can be adapted if some or all parties are self-represented.[4]

DEALING WITH LACK OF PREPARATION

Communication Before Convening Mediation. Mediators should contact lawyers well before the scheduled mediation date and specify what lawyers need to do.

Instead of asking lawyers to provide everything in writing, you may get better responses by asking them to provide a concise summary of basic matters in writing and also discuss important issues confidentially by phone or video.

It might make sense to get a written summary before talking with lawyers. Unfortunately, some lawyers don't provide written statements at all or they provide them so soon before the mediation that they aren't helpful. So it may be more effective to talk with the lawyers first, which may stimulate them to provide timely and useful written statements.

You can decide how far in advance to initiate the call, which can focus lawyers' attention when there is enough time to take action in response to your questions. You might talk with lawyers about how you could be most helpful in mediation, strengths and weaknesses of the legal case, potential barriers to agreement, issues that are or are not negotiable, and intangible interests that might prompt parties to accept a less favorable financial settlement.[5]

You might ask lawyers to provide in writing information such as the identity of all important individuals or entities involved (especially those expected to attend mediation), nature and amount of damages, key legal issues, disputed and undisputed facts, status of discovery, and prior negotiation efforts, if any.[6]

In smaller cases, it may not make sense for lawyers to invest the time to prepare written statements. If you talk with lawyers, you can discuss whether it would be useful to do so and, if so, what to include.

For parties to be fully prepared, lawyers should have thorough conversations with their clients before the mediation. The conversations should describe the mediation process, issues to be discussed, mediator's role, and mediation strategy. Many clients have not been in a mediation and thus won't know what to expect, so you may need to have more detailed conversations in these cases.

The American Bar Association Section of Dispute Resolution developed helpful guides to help prepare parties generally[7] as well as guides specifically for family cases[8] and complex civil cases.[9] You can provide these guides to lawyers and encourage them to use them to prepare with their clients before mediation. This should be a process of mutual education between clients and their lawyers about the facts, clients' interests, range of plausible court outcomes, and mediation strategy.

Using Multiple Mediation Sessions. Despite mediators' best efforts to stimulate effective preparation, some lawyers and parties will not be well prepared when they arrive at mediation sessions. So you might experiment by planning for multiple video mediation sessions.

You can plan for the possibility of two-session mediations, using the first session to prepare for a second session if needed. If parties settle at the first session, they don't need a second session.

If people need more information and time to be ready to settle than in a single mediation session, you could use the first session to help them identify what they would need to be ready. Based on an initial mediation session, the lawyers could plan "homework" before the second session to (1) complete specifically-needed discovery; (2) obtain expert opinions, narrowly-focused arbitration awards, or court rulings on critical legal issues; and/or (3) consult with important individuals or entities relevant to the dispute.

If the parties participate in a second mediation session, it is likely to be more productive, efficient, and consensual than typical mediation sessions. People would not need to repeat all the work from the first session and they could start by focusing on the pivotal issues.

To maximize the benefits of two-stage mediation, participants need to change their expectations about how mediation would work. You should provide information to parties and lawyers when you schedule mediations – and preferably well before then. Indeed, if you have a website, you could post information on your website explaining the process.

Many savvy parties and lawyers would be happy to take a little more time before resolution to get a more deliberate, predictable, and possibly more efficient process. Indeed, you might enjoy managing a two-stage process and providing these benefits to clients.[10]

Now that mediators and lawyers have become accustomed to mediating by video because of the Covid pandemic, you can take advantage of the convenience of video to break mediation into multiple sessions. You can schedule a series of conversations with particular individuals in a sequence that would be most helpful. In consultation with the parties and/or lawyers, you can plan several steps that might unfold over a specified period, such as a week. For example, you might plan to talk with one side on Monday and the other side on Tuesday, and then plan later conversations as appropriate. This process avoids having parties wait for long periods while you are caucusing with the other side. When parties and lawyers are not meeting with you, they can collect information and consult with others so that they can be more effective when they do meet with you and/or the other side.

Using a multi-stage process also can help solve the frequent problem of lack of participation by decision-makers in large organizations. People with authority to settle, such as high-level executives, usually aren't willing to invest the time to travel to a mediation and endure a lengthy process where their input isn't needed for most of the time. In a multi-stage process conducted by video, you could engage these decision-makers for the limited, critical times when their input is necessary. This would be especially helpful toward the end of the process when parties need to make hard decisions, though it might also be helpful at early stages to help them understand the context.[11]

MANAGING UNREASONABLE EXPECTATIONS

Lawyers routinely use a counteroffer negotiation process in which each side starts with extreme positions and makes grudging concessions trying to end up with a favorable settlement. They base their positions on disingenuous claims about the likely court outcome. Everyone knows that these stories are exaggerations at best and fibs at worst. If you gave truth serum to the lawyers, they would admit that they don't fully believe their own arguments.[12]

Unfortunately, mediators don't have truth serum to give to lawyers, who can convince themselves of the merits of their arguments. Part of the problem is that court outcomes are hard to predict and may be affected by many factors such as the personalities of parties, lawyers, and witnesses; availability of persuasive evidence; and attitudes of judges and juries.

To address these problems, you can cite scientific evidence that many people take huge risks going to trial and often get bad results. Although most cases are settled, people who do go to trial generally do a poor job of anticipating trial results, often getting a worse result than if they had settled. A series of studies showed that in at least 69% of cases, one side got a worse result at trial than the other side's last offer. Researchers found that plaintiffs made these "decision errors" in at least 50% of trials and defendants made decision errors in at least 19% of trials. In some studies, the error rates were as high as 65% for plaintiffs and 29% for defendants.[13] Although defendants made these errors less frequently than plaintiffs, defendants' errors – the amount that trial verdicts exceed the plaintiffs' last demand – are much bigger than the comparable plaintiffs' errors.[14]

When lawyers make unrealistic claims about the likely court outcome, you can cite this research and ask some, or all, of the following questions:

- Research shows that many parties and lawyers are overly optimistic and so they get worse results at trial than they could have settled for, with less time and expense. I assume that you want to make the most realistic assessment you can of your client's interests and the risks of going to trial so that you don't lose the opportunity to reach a good settlement. Is that right?
- How would you and your client feel if you got a worse result at trial than the other side's offer in mediation?
- To win at trial, you would need to establish certain facts and defeat the other side's arguments. You may be virtually certain that you can convince a judge or jury about some issues and much less certain about others. Which elements of your case do you think that there is some risk of losing? This might be because of the way the law is interpreted or the availability and strength of the evidence supporting your argument.
- Realistically, what is the percentage probability that the judge or jury would decide against you on XYZ issue?
- Parties often struggle to prove XYZ. In your case, do you think that you might have a problem with this issue? What do you think that the other side will argue about XYZ? How would you address that?
- At trial, many judges or juries would have questions about XYZ. What makes you think that the judge or jury will see this issue the same way that you do?
- How sure are you about your assumptions about what would happen in court? What would you need to do to increase your confidence that you would win?[15]

Some mediators and lawyers use decision analysis to quantify trial risks, producing "decision trees." Decision analysis involves: (1) identifying all the significant uncertainties in a legal case that may affect the finding of liability and the amount of damages, (2) determining the reasons for the finding for each uncertainty, and (3) estimating the probability of the outcome for each identified uncertainty. Decision trees produce an expected court outcome. They graphically display this analysis, showing the various contingencies, probabilities, and expected outcomes of the contingencies.[16] T*he Litigation Interest and Risk Assessment* book provides a simplified framework for calculating the expected court outcome using a similar logic.[17]

Consider whether using decision analysis would help lawyers and parties make more realistic assessments of likely court outcomes. Some find it very helpful in systematically analyzing the issues. Others don't like to use it because they are skeptical about the assumptions they need to make, and they worry that this analysis may cause people to entrench their positions rather than become more flexible.[18]

The counteroffer process often focuses only on expected court decisions without considering the tangible and intangible litigation costs of going to trial. This is problematic for two reasons. First, the parties actually experience the net results after deducting these costs, not just the trial decision. Second, it may be easier to reach agreement by explicitly including calculations of these costs. For example, if a plaintiff believes that the likely trial decision would be a $100,000 verdict but it would cost an extra $15,000 in litigation costs to get the verdict, she would benefit by any settlement more than $85,000. She may feel that it's worth accepting $10,000 less to avoid the stress, risk, and time of continuing to trial. If so, her bottom line really is $75,000 as she would be better off accepting any settlement more than that amount.[19] So you might focus more on bottom lines than just the component of the expected court outcome.

Mediators and lawyers often consider these costs at the end of the process to "close the gap." You might find it helpful to start discussing these factors early in the process. Your clients might respond better to this approach than if you raise it only at the end, which they may experience as your trying to pressure them to settle.

If both sides make only slow, small concessions over a long period, you might have a conversation about the process to "change the game." You might describe the process and ask the lawyers if they would like to use a more efficient and realistic approach. You might discuss this with lawyers individually or together (but possibly not in the presence of the parties).[20]

DEALING WITH STRONG EMOTIONS

Mediators often struggle when parties and lawyers express strong emotions.[21] Sometimes parties or lawyers cannot process information and communicate effectively or make reasonable decisions. If they cannot perform these functions, you should end the mediation.

If you determine that parties can perform these functions, you should try to figure out why they are expressing strong emotions. These are important clues about what's important to them. Use good listening techniques to understand, empathize, and acknowledge parties' feelings and concerns. If parties feel that they are being heard and their concerns are valued, they are less likely to have disturbing emotional outbursts in mediation. This is especially true for parties who are mediating for the first time but also for some "repeat players" and lawyers.

Causes and Consequences of Litigation Stress. Conflict and the litigation process almost always are stressful for parties. Accusations by the other side can be extremely painful to hear and can undermine people's self-image. Parties are supposed to disclose sensitive information, which may damage their case. They may be asked to provide detailed accounts of traumatic events, which they may have had to recount many times. This can keep them focused on the past and prevent them from moving forward. Parties may feel stuck in a process that they can't control. Lack of control of the time itself can be very stressful. Some parties feel the process takes too long and others feel that it moves too fast. Their lawyers may have given optimistic assessments at the outset of their case, and the lawyers' assessments often become more pessimistic and uncertain over time.

Litigation stress can impair people's cognitive functioning because it depletes mental resources, stimulates fight-or-flight reactions, and increases the risk of cognitive biases. This can reduce the quality of parties' decision-making especially when they are emotionally exhausted over an extended period. When people have strong emotions, they may act impulsively, deciding to go to trial rather than settle a dispute. In particular, when people feel angry or emotionally threatened, they may be more likely to go to trial even when it may harm their interests.[22]

When organizations are parties, their representatives may experience similar and additional stresses. As a result of litigation, their organizations may suffer organizational dysfunction, reputational damage, and lost opportunities. The representatives may worry about threats to their status, job, career, and personal finances.[23]

In mediation, mediators and lawyers often focus primarily or exclusively on the likely court decision and pay little, if any, attention to the emotional costs of litigation, which can be quite substantial. Failure to acknowledge parties' concerns can, in itself, trigger strong emotional reactions because the parties feel that mediators are ignoring important concerns.

Parties may feel great pressure to reduce their expectations as they repeatedly make concessions that seem unrelated to the facts and that seem unfair. After an extended struggle, they may grieve the loss of their hopes for a satisfying outcome. If parties seem to have these reactions, you might ask them how they are feeling about the process and what might be done to help them. You might validate their feelings, telling them that their reactions are common and understandable. This acknowledgment may help them work through the process, making the best decisions they can to achieve their goals under the circumstances.

Preventing and Managing Problematic Expressions of Emotion. Obviously, it would be helpful to address parties' concerns from the outset so that they are less likely to make problematic outbursts such as raising their voices, using inappropriate language, or taking threatening actions. The techniques for doing so are consistent with good mediation techniques generally.

You should start by developing a good rapport with parties. Show that you want to help them deal with their conflict, not just terminate their case.

In initial caucuses, ask about their experiences, goals, and concerns about their case. Parties generally find legal procedures more satisfying when they feel they have some control over the process. Educate them so they know what to expect, which can give them a sense of control. Some mediators rush through introductions because they and the lawyers have mediated many times. However, it's generally a good idea to have a careful conversation with clients about the process, especially for first-time parties but also for repeat-players.

You might ask about some or all of the following issues, which can reveal issues that might trigger strong responses in mediation. Some questions are more appropriate in early caucuses, and you might ask others later in mediation. You might ask about the cause of the dispute and past efforts to resolve it, if any. You should ask what's most important to the parties, which may not be getting the most favorable financial outcome. Ask about parties' goals that might be affected by continued litigation and trial. This might include effects on relationships and reputations, time constraints, and distraction from other activities. You might ask how much it is worth to avoid the risk and stress of trial. For example, you might ask a plaintiff if he might get $X at trial but might also get nothing, how much would he accept now to avoid the risk of losing. Or if a defendant is willing to pay a trial verdict of $X in a year, how much would she be willing to pay now to avoid the stress and distraction of continued litigation.[24]

When working with organizational representatives, you should ask about how litigation would affect the organization. You might ask how it would affect the organization's ability to focus on other goals and opportunities. How much time and energy will be required of directors, executives, and employees in litigation? How might litigation affect the organization's reputation and relationship with stakeholders such as customers, suppliers, contractors, or lenders? How much it would it be worth to avoid these problems? Would a favorable or unfavorable trial outcome affect the representative's position in the organization or career?[25]

CONCLUSION

Mediation is hard. Conflict is stressful for everyone. Litigation aggravates stress and can stimulate counter-productive reactions. Lawyers are busy. They may not have the time or inclination to prepare themselves or their clients to mediate productively.

So it's completely foreseeable that you will confront challenging situations due to lack of preparation, unrealistic expectations, and strong emotions. The techniques described above can help you successfully manage these challenges.

About the Author

John Lande is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law and former director of its LLM Program in Dispute Resolution. He earned his J.D. from Hastings College of Law and Ph.D in sociology from the University of Wisconsin-Madison. He began practicing law and mediation in California in 1980, and he directed a child protection mediation clinic in the 1990s. The American Bar Association published his book, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money, and Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions (co-authored with Michaela Keet and Heather Heavin). His website, where you can download his publications, is www.law.missouri.edu/lande. *Thanks, with the usual disclaimers to Dan Berstein, Brian Farkas, Lisa Okasinski, and Spencer Punnett for comments on an earlier draft.*

Endnotes

[1] Help Your Clients Make Good Litigation Decisions with LIRA, available at http://indisputably.org/wp-content/uploads/Lande-Mediating-with-LIRA-Michigan-Washtenaw-final.pdf.

[2] MICHAELA KEET, HEATHER HEAVIN & JOHN LANDE, LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS (2020).

[3] Edmund J. Sikorski, Jr., *Book Review: Litigation Interest and Risk Assessment, Michigan Dispute Resolution Journal* (Spring / Summer 2020), at 8.

[4] Unlike book-length references, this article cannot provide a comprehensive guide to address these issues. The American Bar Association has published excellent practical guides including GARY FRIEDMAN, INSIDE OUT: HOW CONFLICT PROFESSIONALS CAN USE SELF-REFLECTION TO HELP THEIR CLIENTS (2014); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE TECHNIQUES TO RESOLVE CASES, (2d ed. 2021); J. ANDERSON LITTLE, MAKING MONEY TALK: HOW TO MEDIATE INSURED CLAIMS AND OTHER MONETARY DISPUTES (2007); RONDA MUIR, BEYOND SMART: LAWYERING WITH EMOTIONAL INTELLIGENCE (2017); BENNETT G. PICKER, MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES (2d ed. 2004); SPENCER PUNNETT, REPRESENTING CLIENTS IN MEDIATION: A GUIDE TO OPTIMAL RESULTS BASED ON INSIGHTS FROM COUNSEL, MEDIATORS, AND PROGRAM ADMINISTRATORS (2013).

[5] Keet et al., *supra* note 2, Appendix H.

[6] ID.

[7] American Bar Association Section of Dispute Resolution, Preparing for Mediation, available at http://indisputably.org/wp-content/uploads/ABA-Mediation-Guide-general.pdf.

[8] American Bar Association Section of Dispute Resolution, Preparing for Family Mediation, available at http://indisputably.org/wp-content/uploads/ABA-Mediation-Guide-family.pdf.

[9] American Bar Association Section of Dispute Resolution, Preparing for Complex Civil Mediation, available at http://indisputably.org/wp-content/uploads/ABA-Mediation-Guide-complex-civil.pdf.

[10] John Lande, *Planning for Good Quality Decision-Making in Mediation Using Two-Stage Mediation*, INDISPUTABLY BLOG (May 9, 2019), http://indisputably.org/2019/05/planning-for-good-quality-decision-making-in-mediation-using-petsm/.

[11] John Lande, *The Evolution To Planned Early Multi-Stage Mediation*, KLUWER MEDIATION BLOG (Aug. 28, 2020), http://mediationblog.kluwerarbitration.com/2020/08/28/the-evolution-to-planned-early-multi-stage-mediation/?doing_wp_cron=15986.

[12] John Lande, *BATNAs and the Emotional Pains from "Positional Negotiation*," INDISPUTABLY BLOG (July 8, 2020), http://indisputably.org/2020/07/batnas-and-the-emotional-pains-from-positional-negotiation/.

[13] KEET ET AL., *supra* note 2, at 3-4.

[14] *See, e.g.*, Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES 551, 566 (2008), https://www.blakemcshane.com/Papers/jels_settlement.pdf (defendants' average error was $1,140,000 compared with plaintiffs' average error of $43,100).

[15] KEET ET AL., *supra* note 2, Appendix G.

[16] Id. at 86-89, Appendixes D, E. For a detailed guide to decision trees, see MARJORIE CORMAN AARON, 'RISK AND RIGOR: A LAWYER'S GUIDE TO ASSESSING CASES AND ADVISING CLIENTS (2019), https://www.riskandrigor.com/risk-and-rigor-the-book.

[17] KEET ET AL., *supra* note 2, Chapter 5.

[18] See John Lande, LIRA @ CPR (April 7, 2020), Indisputably Blog, http://indisputably.org/2020/04/lira-cpr/.

[19] *See* John Lande, What's a Bottom Line? (August 26, 2020), Indisputably Blog, http://indisputably.org/2020/08/whats-a-bottom-line/.

[20] *See* Lande, supra note 12.

[21] Litigation also is very stressful for lawyers and you may need to ask them about the causes of their reactions. John Lande, *Canaries in the Litigation Coal Mine*, (August 17, 2021), INDISPUTABLY BLOG, http://indisputably.org/2021/08/canaries-in-the-litigation-coal-mine/. Although lawyers express strong emotions at times, this discussion focuses on parties' emotions. When lawyers express such emotions, you should generally use similar techniques to understand and address lawyers' concerns.

[22] KEET ET AL., *supra* note 2, Chapter 3.

[23] ID., Chapter 4.

[24] ID., Appendixes A, G.

[25] ID.

Lee Hornberger

Michigan Arbitration and Mediation Case Law Update

By Lee Hornberger, Arbitrator and Mediator

I. INTRODUCTION

This update reviews Michigan cases issued since October 2020 concerning arbitration and mediation. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals (COA) unpublished decisions.

An earlier review covering 2008 to 2020 is at: https://www.leehornberger.com/files/ADR%20Update%20--%2010-7-2021.pdf .

The YouTube video of the author's 2019-2020 update presentation is at: https://www.youtube.com/watch?v=I0TkP8zs-A8 .

The following three important cases are among those covered in this update.

Tyler v Findling, ___ Mich ___, MSC 162016 (August 4, 2021), reversed COA 348231, 350126 (June 11, 2020), concerning confidentiality in mediation. The ADR Section filed a brief amicus curiae in support of the application.

Lichon v Morse, ___ Mich ___, MSC 159492 and 159493 (July 20, 2021), vacated and remanded 327 Mich App 375 (2019), to the Circuit Courts for reconsideration of whether plaintiffs' claims are subject to arbitration.

Pohlman v Pohlman. 344121 (January 30, 2020), **lv app pdg**, involving having a domestic relations mediation without doing an MCL 600.1035 and MCR 3.216(H)(2) domestic violence protocol, has an application for leave to appeal pending in the Supreme Court. The Family Law Section and the ADR Section filed briefs amicus curiae in support of the application.

During the review period, the COA upheld 16 arbitration awards in the 16 cases where confirmation or vacatur of an award was directly at issue. The COA enforced seven mediated settlement agreements (MSAs) in the eight cases where enforcement or nonenforcement of an MSA was directly at issue.

II. ARBITRATION

A. Michigan Supreme Court Decisions

Supreme Court vacates COA and remands cases to Circuit Courts for reconsideration of whether plaintiffs' claims are subject to arbitration.

Lichon v Morse, ___ Mich ___, MSC 159492 and 159493 (July 20, 2021), vacated and remanded 327 Mich App 375 (2019), to the Circuit Courts. In *Lichon*, the Supreme Court majority decision (Cavanagh, McCormack, Bernstein, and Clement) reviewed whether plaintiffs' claims fell within the scope of arbitration agreements limited to matters that are "relative to" plaintiffs' employment. Whether plaintiffs' allegations of sexual assault, and the claims stemming from those allegations, are relative to plaintiffs' employment is resolved by asking whether the claims can be maintained without reference to the contract or relationship at issue. *Doe v. Princess Cruise Lines, Ltd*, 657 F.3d 1204, 1218-1219 (11th Cir., 2011) (**"If the cruise line had wanted a broader arbitration provision, it should have left the scope of it at 'any and all disputes, claims, or controversies whatsoever' instead of including the limitation that narrowed the scope to only those disputes, claims, or controversies 'relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company.' "** [Emphasis added]). Because the Circuit Courts did not have the benefit of this framing, the Supreme Court vacated the decision of the COA and remanded these cases to the Circuit Courts for reconsideration of whether plaintiffs' claims are subject to arbitration. Because plaintiffs also did not have the benefit of this framing when filing their claims, plaintiffs may seek to amend their complaints before the Circuit Courts make this determination.

The Supreme Court dissent (Viviano and Zahra) said the Court must interpret contractual language to determine whether the parties meant to assign plaintiffs' present claims to arbitration. According to the dissent, the majority takes a standard from out-of-state caselaw and imposes it upon the parties. A proper interpretation of the contract's language shows that plaintiffs' claims against the defendant law firm are arbitrable under the contract. The dissent would reverse the COA decision. The claims against defendant Morse individually are also arbitrable under the contract if he can invoke the arbitration clause. Because the COA did not determine whether Morse has the authority to enforce the agreement, which he did not sign, the dissent would remand on that issue.

Justice Welch did not participate in the disposition of the case because the Court considered it before she assumed office.

Previously, in the now vacated *Lichon v Morse,* 327 Mich App 375 (2019), COA split decision, the COA held a sexual harassment claim was not covered by the arbitration provision in an employee handbook. Because the arbitration provision limited the scope of arbitration only to claims related to the plaintiffs' employment, and because a sexual assault by the employer or supervisor cannot be related to employment, the arbitration provision was inapplicable to the claims against Morse and the law firm. "[C]entral to our conclusion … is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." The O'Brien COA dissent said the parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and claims that arguably fell within the scope of the arbitration agreement.

I discuss issues relating to pre-dispute mandatory arbitration of statutory employment claims in the following articles:

> Hornberger, "Due Process Protocol Influence on Statutory Claims Employment Arbitration in Michigan," *The General Practitioner* (January/February 2017).
>
> https://www.leehornberger.com/media/Protocol-GP--JanFeb2017.pdf
>
> Hornberger, "Overview of a Pre-Dispute Employment Resolution Process," *ADR Newsletter* (February 2005).
>
> https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Feb05.pdf

B. Michigan Court of Appeals Published Decisions

There were no COA published decisions concerning arbitration during the period covered by this update.

C. Michigan Court of Appeals Unpublished Decisions

COA reverses not ordering arbitration.

In ***Barkai v VHS of Michigan, Inc***, 354587, 355607 (August 12, 2021), defendants argued the Circuit Court erred by determining that there was not a binding arbitration agreement between the parties. Defendants also argued the FTP covered plaintiffs' statutory WPA claims and non-statutory claims of wrongful discharge, intentional or reckless infliction of emotional distress, and conspiracy to intentionally or recklessly inflict emotion distress. The COA agreed with defendants and remanded the case for the entry of an order compelling arbitration.

COA affirms confirmation of DRAA award.

In ***Dixon v Dixon***, 355445 (August 12, 2021), plaintiff appealed the Circuit Court denying plaintiff's motion to vacate a DRAA arbitration award which granted the parties an equal interest in their former marital home and granting defendant's motion to confirm the award. The COA affirmed.

COA affirms order to arbitrate.

Webb v Fidelity Brokerage Services, 354691 (July 29, 2021). COA affirmed Circuit Court that the parties' brokerage contract contained an enforceable agreement to arbitrate.

COA affirms confirmation of clarified award.

Advanced Integration Technology, Inc v Rekab Industries Excluded Assets, LLC, 354302 (July 15, 2021). The arbitrator granted a motion for summary disposition. In response to a motion to vacate the award, the Circuit Court remanded the award to the arbitrator for clarification. The arbitrator issued a clarified award. The Circuit Court confirmed the clarified award. The COA

confirmed the Circuit Court's confirmation of the clarified award. Plaintiffs argued the Circuit Court should not have remanded the case to the arbitrator for clarification, but rather, the Circuit Court should have vacated the award. MCL 691.1700(4) allows the Circuit Court to remand to the arbitrator "[t]o clarify the award." The Circuit Court was not required to vacate the award on the basis that it was unclear or appeared the arbitrator may have erred.

COA affirms confirmation of award.

Sean D Gardella & Assoc v Sieber, 354556 (June 17, 2021). Darcy, along with Jonathan, owned property on which the plaintiff did improvements pursuant to the contract. Darcy did not sign the contract. The agreement identified both defendants as contracting parties. The written agreement could be considered an offer. Although Darcy did not sign the contract, this was not dispositive. Darcy could be said to have accepted the plaintiff's offer and assented to the terms of the contract by accepting the plaintiff's performance of the contract; specifically, improvements to her home, which the plaintiff completed in accordance with the agreement. The arbitrator said Darcy "was familiar with the terms and conditions of the work to be performed, the cost of the work[,] and . . . participated in decisions regarding the work." It was not improper for the arbitrator to find Darcy jointly and severally liable for damages resulting from the defendants' breach of contract and award attorney fees, as authorized by the contract. The COA affirmed the Circuit Court's confirmation of the award.

COA affirms confirmation of award.

Centennial Home Group, LLC v Smith, 353854 (April 15, 2021). COA affirmed confirmation of an award concerning retaining wall construction.

COA reverses not ordering arbitration.

Wieland Corp v New Genetics, LLC, 353484 (April 15, 2021), **lv app pdg**. This case concerned whether the defendants could compel arbitration of Wieland's claims and claims of the subcontractors related to the construction project. Wieland is a construction company and New Genetics cultivates medical cannabis. The Circuit Court erred by not ordering arbitration of the contractor claim. The sub-contractor claims were not subject to arbitration. The Circuit Court was not required to keep all the claims in one forum.

COA affirms Probate Court asking arbitrator for clarification.

Dina Mascarin Living Trust v Adkinson, 352816 (April 15, 2021). The COA held the Probate Court did not err when it referred the matter back to the arbitrator for correction or clarification. MCL 691.1700(4)(c).

COA affirms confirmation of no-fault award.

Lewis v IDS Property Casualty Ins Co, 351108 (March 25, 2021), lv den ___ Mich ___ (2021). The arbitrator issued an award for $50,000. Thereafter, plaintiff mistakenly signed and returned a release to defendant stating award was $40,000. The defendant issued a pay-off check for $40,000. Plaintiff refused to accept checks and filed a motion to confirm the $50,000 award which the circuit court did. The COA affirmed the Circuit Court's confirmation of the award. There was nothing on the face of the award that would justify vacating the award and defendant failed to file a motion to amend or correct the arbitration award by deadline set forth in court rules.

COA affirms confirmation of award.

Prospect Funding Holdings v Reifman Law Firm, PLLC, 352808 (March 11, 2021), **app lv pdg**. The arbitrator declined to consider the defendant's arguments because the defendant failed to pay associated filing fees. The COA affirmed the Circuit Court's confirmation of the award.

COA affirms refusal to reopen attack on old award.

Asmar Constr Co v AFR Enterprises, Inc, 350488 (March 11, 2021) **lv app pdg**. In this unusual business dispute, which involved two arbitration hearings which took place ten years ago regarding a project from more than twenty years ago, and allegations that the arbitrator was bribed, plaintiffs appealed the Circuit Court denial of a motion for relief from judgment. MCR 2.612(C)(1)(f). The judgment was entered in February 2011 as a result of the arbitration between the plaintiffs and the defendants which confirmed the second award. The Circuit Court held plaintiffs' motion for relief from judgment was untimely. The COA affirmed.

COA remands case to labor arbitrator.

AFSCME Council 25 Local 1690 v Wayne Co Airport Auth, 352500 (March 11, 2021). The arbitrator followed one section of the CBA in granting a grievance but completely ignored arguably applicable Art 34.07 of the CBA. The Circuit Court confirmed the award, recognizing the limited scope of its review of labor awards. The COA reversed, vacated the award, and remanded the case to the same arbitrator for further review. According to the COA, because the arbitrator never considered Art 34.07, the award was not final or complete, nor was the award rendered on the merits of the case, and remand to the same arbitrator is appropriate.

COA affirms Circuit Court in complicated benefits case.

Michigan Spine & Brain Surgeons v Citizens Ins Co of the Midwest, 350498 (March 4, 2021). Ford and Citizens agreed to dismiss with prejudice litigation between them regarding PIP benefits, including an action filed by Ford, and to submit the case to arbitration. The parties agreed the award would represent resolution of all claims for PIP benefits and for all monies owing to Ford related to the accident. The agreement provided, with exception of Provider Plaintiffs that have either intervened, settled privately, or filed independent causes of action at time of the agreement, the arbitration shall include all medical billings known to either party. When Ford assigned to MSBS his right to payment by Citizens for his surgery, he had already agreed to submit all claims for PIP benefits that stemmed from the accident to an arbitrator and had stipulated to dismissal of his lawsuit against Citizens with prejudice. At the time Ford assigned his right to payment of PIP benefits to MSBS, he had no right to assert legal action against Citizens for these claims, He could not assign to MSBS more rights than he possessed. The Circuit Court did not err by holding MSBS did not have standing to assert a claim against Citizens for payment of PIP benefits for the medical care rendered to Ford.

COA affirms confirmation of DRAA award.

Davidson v Davidson, 348788 and 348808 (January 28, 2021), lv den ___ Mich ___ (2021). The plaintiff argued the arbitration was void for lack of authority. The arbitrator derives authority from the arbitration agreement. The arbitration agreement, entered into while there was an active case, was not affected by dismissal of the divorce action. The plaintiff failed to show the arbitration was void or without authority. The plaintiff did not show from the face of the award how the arbitrator exceeded its authority or committed an error of law.

COA affirms that arbitration agreement forecloses court case.

Gray v Yatooma, 351360 (December 17, 2020). The plaintiff had a compensation agreement and a non-compete with a broad arbitration agreement. The COA affirmed the Circuit Court order that the arbitration agreement prevented a court suit.

COA affirms denial of vacatur of award.

Rahaman v Ameriprise Ins Co, 349463 (November 24, 2020). The appellant argued the award should be vacated because the attorney, not the party, signed the agreement to arbitrate. The COA held that the attorney can enter into a binding arbitration agreement on behalf of the client. MCR 2.507(G).

COA affirms denial of vacatur in disclosure case.

Wilson v Louis D. Builders, 351560 (November 19, 2020). The plaintiffs moved to vacate the award because of the arbitrator's alleged bias toward a party and the party's attorney. The plaintiffs also alleged that the arbitrator and opposing counsel held municipal positions together, worked on township matters, and interacted socially. The plaintiffs asserted these interactions were substantial and material relationships. The Circuit Court denied the motion to vacate and the COA affirmed. MCL 691.1962.

COA affirms confirmation of award.

Kada v Nouri, 351402 (November 19, 2020). The plaintiffs appealed the Circuit Court confirmation of an award, and the Circuit Court denial of attorney fees and costs. The COA held the Circuit Court did not abuse its discretion in confirming the award and denying attorney fees.

COA affirms confirmation of award.

Soulliere v Berger, 349428 (October 29, 2020). The COA affirmed the confirmation of an award because the defendants' disagreement with the award implicates the arbitrator's resolution of the evidence and the defendants did not demonstrate an error of law apparent from the face of award.

Waiver of arbitration.

Wells Fargo Bank, NA, v Walsh, October 29, 2020 (350960). The COA affirmed the Circuit Court order finding the defendant waived his right to compel arbitration. Defending the action without seeking to invoke arbitration, constituted waiver of the right to arbitration.

Settling case with help of arbitrator.

Estate of O'Connor v O'Connor, 349750 (October 15, 2020). In this dispute over enforcement of a settlement agreement, the defendant appealed the Circuit Court order granting the plaintiff's motion for entry of judgment. The defendant argued the parties agreed to arbitration and the arbitrator lacked the authority to broker a settlement agreement. The COA held that the defendant contributed to the alleged error by seeking settlement, participating in the settlement negotiations, and signing the settlement agreement. The COA affirmed the Circuit Court.

III. MEDIATION

A. Michigan Supreme Court Decisions

Supreme Court protects mediation confidentiality.

Tyler v Findling, ___ Mich ___, MSC 162016 (August 4, 2021), reversed COA 348231, 350126 (June 11, 2020). ***Tyler*** is a defamation case arising from statements made by one attorney acting as a receiver to another attorney before meeting in person with the mediator at the start of a court ordered mediation. The Supreme Court said the COA erred when it held that a cause of action for defamation existed based on these communications. The Supreme Court held that these statements were MCR 2.412(B)(2) "mediation communications" and therefore confidential under MCR 2.412(C). The phrase "mediation communications" is defined broadly to include statements that "occur during the mediation process" and statements that "are made for purposes of … preparing for … a mediation." MCR 2.412(B)(2). The conversation between the two attorneys took place within the "plaintiff's room" while the parties to the mediation were waiting for the mediation session to start and were part of the "mediation process." See ***Hanley v Seymour***, 334400 (October 26, 2017). **What if this were pre-suit mediation and arguably MCR 2.412 did not apply?** "The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate." Standard V(A)(2), SCAO, Michigan Standards of Conduct for Mediators (effective February 1, 2013).

The SBM ADR Section filed an amicus brief.

Supreme Court remands case in domestic violence protocol case.

Pohlman v Pohlman. 344121 (January 30, 2020), **lv app pdg**. In a split decision, the COA affirmed the Circuit Court's enforcement of a domestic relations MSA **even though no domestic violence protocol was done**. Because the plaintiff did not allege or show she was prejudiced by the mediator's failure to screen for domestic violence, any noncompliance with MCR 3.216(H)(2) was harmless. MCL 600.1035.

Judge Gleicher's **dissent** said the Circuit Court was obligated to hold a hearing to determine whether the wife was coerced into a settlement. Only by evaluating the proposed evidence in light of MCL 600.1035 and MCR 3.216(H)(2) could the Circuit Court make an informed decision regarding whether relief was warranted. When there is a background of domestic violence, the reasons for the presumption against mediation when there is domestic violence do not go away because the parties used "shuttle diplomacy." That may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment.

The ADR Section and the Family Law Section filed amicus briefs.

The Supreme Court on November 25, 2020, requested oral argument and additional briefing concerning the application for leave to appeal.

On April 23, 2021, the Supreme Court remanded the case to the Circuit Court to hold an evidentiary hearing and report its findings back to the Supreme Court. The Circuit Court findings and transcript were filed with the Supreme Court on July 2, 2021.

B. Michigan Court of Appeals Published Decisions

There were no COA published decisions concerning mediation during the period covered by this update.

C. Michigan Court of Appeals Unpublished Decisions

COA affirms nonenforcement of settlement agreement.

Jones Lang LaSalle Mi, LLC, v Trident Barrow Mgmt 22, LLC, 353367 (June 17, 2021). Although the parties apparently agreed to some terms of the settlement agreement, they did not reach an agreement on the scope of the release clause. Because the parties did not reach a meeting of minds over essential terms, there was no enforceable settlement agreement. This was not an MSA or a "mediation term sheet." **LESSON: In the MSA, provide for a method to resolve post settlement technical issues.**

COA reverses Circuit Court refusal to accelerate.

CIGL Properties, LLC v CM Renovation Services, LLC, 353595 (May 27, 2021). The MSA provided for a payment plan with acceleration and attorney fees if payment were missed. Because of "undergoing surgery" the party missed one payment. In light of the surgery, the Circuit Court refused to order acceleration. The COA reversed.

Waiver of right to appeal.

Zyble v Michael Fischer Builders, LLC, 352681 (May 27, 2021). The defendant appealed the Circuit Court order denying an ex parte motion to stay enforcement of the judgment in favor of the plaintiffs. The plaintiffs cross-appealed the portion of an order concerning the award of attorney fees. The COA concluded the repairs considered in inspection company's calculation of damages were within the scope of the settlement agreement, the COA affirmed the portion of the order that denied the defendant's motion to stay enforcement of the judgment. The COA remanded the matter to reconsider the plaintiffs' motion for attorney fees. The defendant waived appellate review of the settlement agreement and judgment by signing a provision in the settlement agreement that stated: "In consideration of Dream Maker's agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment."

COA affirms enforcement of settlement agreement.

Drake v Auto Club Ins Assoc, 353942 (May 13, 2021). In a no fault case, the facilitator issued a written Facilitator's Recommendation. The plaintiff accepted the Recommendation and then had a change of heart. The COA enforced the accepted Recommendation and the COA affirmed. The plaintiff admitted both parties accepted the Recommendation. The plaintiff argued the agreement was unenforceable because of illusory promises, mutual mistake, fraudulent misrepresentation by facilitator, and unconscionability.

COA partially affirms JOD entry incorporating MSA.

Kohl v Kohl, 353686 (May 13, 2021). The defendant argued the Circuit Court erred in entering a Judgment of Divorce ("JOD") because it did not conform to the parties' MSA. The COA agreed, in part, and remanded for further proceedings. The COA remanded to address two items in the JOD that either did not conform to the MSA or were not addressed by the MSA. The COA affirmed the remainder of the JOD, including certain objections by the husband regarding the parties' marital home. The COA noted that the MSA addressed the marital home at length and that the MSA was intended to fully resolve issues surrounding the marital home: "**The parties have both faithfully and truthfully participated in mediation with their attorneys and have arrived at the following resolution meant to be full and final and binding. It will be incorporated into the [JOD]."**

COA reverses default judgment.

Nalcor, LLC v Condom Sense, Inc, 351764 (January 21, 2021). Kahn (guarantor) argued good cause to set aside the default judgment existed because his failure to appear at the mediation and status conference was inadvertent. Kahn claimed his counsel was retained just before the mediation and status conference and was not provided a copy of the scheduling order. Kahn and his counsel failed to appear at the mediation and status conference because they were unaware the mediation and status conference were scheduled. The COA held it was not an abuse of discretion for the Circuit Court to conclude Kahn failed to establish good cause to set aside the default judgment. A lesser showing of good cause is required if the moving party can demonstrate a strong meritorious defense.

COA affirms dismissal for failure to post bond.

Neff v Chapel Hill Condominium Ass'n, 349444, 349976 (January 14, 2021), lv den ___ Mich ___ (2021). The plaintiff argued the Circuit Court, by ordering mediation, deprived her of her right to a jury trial and wrongfully reopened discovery only as to Chapel Hill and Mixer. The plaintiff said the Circuit Court order, which required her to post a security bond and $4,426 in mediator fees deprived her of her right to a jury trial. The COA held the plaintiff was wrong. Damages was not the only issue to be decided. The Circuit Court denied summary disposition on plaintiff's contract claim, leaving open the question of liability. Discovery was not reopened only for Chapel Hill and Mixer; the court made no discovery order and the mediator sought inspection of property only for purposes of conducting mediation. Mediation is a form of ADR that all civil cases in Michigan are subject to, unless otherwise directed by statute or court rule. MCR 2.410(A). In the event mediation fails, jury trial is available. The mediation failed and, on Chapel Hill and Mixer's motion to dismiss for refusal to participate in the mediation, the court entered a security bond in lieu of dismissal. When the plaintiff did not post bond, her case was dismissed. The court's decision to order mediation did not deprive her of her right to a jury trial. The plaintiff's actions led to imposition of bond and the plaintiff's failure to post security ultimately led to the dismissal.

COA affirms enforcement of MSA concerning carpet.

Mauch v Lambert, 349443 (December 17, 2020). Plaintiffs live below defendants in a condominium. Defendants installed hardwood floors, which violated the bylaws and caused noise in plaintiffs' unit. Pursuant to a MSA, defendant agreed to install "attached" carpeting to reduce noise in plaintiffs' unit. Defendant did not glue/staple the carpet, but instead placed carpet over nonslip pad. The Circuit Court held the carpeting as installed was consistent with the MSA. The COA affirmed.

COA affirms enforcement of probate MSA.

Tewel v Stoll, 352730 (December 10, 2020), **lv app pdg**. In this estate-related dispute, the plaintiff appealed the Circuit Court order finding the MSA valid, based on a previous order denying the plaintiff's motion to set aside the MSA or for an evidentiary hearing. The plaintiff argued that the Circuit Court abused its discretion when it refused to set aside the MSA because it was entered into based on fraudulent or innocent misrepresentation, and the Circuit Court should have conducted an evidentiary hearing on these issues. The COA affirmed.

Apparent oral agreement to mediate not enforced.

Kuiper Orlebeke, PC v Crehan, 348315 (November 12, 2020). Summary disposition was entered in favor of plaintiff on a claim for account stated. The defendant argued the agreement to mediate precluded Circuit Court grant of summary disposition in favor of the plaintiff. The defendant provided no case law in support of the argument that the option of mediation precluded summary disposition. The appellant may not merely announce its position and leave it to the COA to discover and rationalize the basis for its claims, nor may it give issues cursory treatment with little or no citation of supporting authority.

About the Author

Lee Hornberger is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Michigan, Editor Emeritus of The Michigan Dispute Resolution Journal, former member of the State Bar's Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation.

He has received the George Bashara Award from the ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from the ADR Section.

He is included in The Best Lawyers of America 2018 and 2019 for arbitration, and 2020 to 2022 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for alternative dispute resolution. He received a Second Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2020. He received a First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019.

While serving with the U.S. Army in Vietnam, he was awarded the Bronze Star Medal and Army Commendation Medals. The unit he was in was awarded the Meritorious Unit Commendation and the Republic of Vietnam Gallantry Cross Unit Citation with Palm.

He holds his B.A. and J.D. cum laude from the University of Michigan and his LL.M. in Labor Law from Wayne State University.

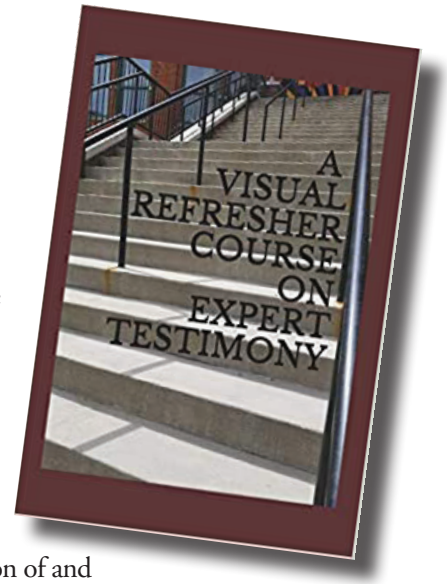
Dale Ann Iverson

BOOK REVIEW

Mediator Tools: When a Battle of Experts Threatens Productive Negotiation

By Dale Ann Iverson

"If there's something you really want to believe, that's what you should question the most." ***Penn Jillette***



A Visual Refresher Course on Expert Testimony, David C. Sarnacki, 2020. ISBN:97986741651

WHY DOES THIS BOOK MATTER FOR MEDIATORS?

David C. Sarnacki's new book focuses on how to analyze expert testimony of all kinds. I would have killed to have this book as a trial lawyer. It would have been my go-to reference to prepare for expert discovery depositions, prepare interrogatories, and design direct and cross-examination of ANY expert. I would have used it as a guide to select my experts and to outline their investigation, document review, and preparation of opinions.

As a full-time mediator now, I'm especially reassured that this book is on my desk but for different purposes.

Expert opinions can play a major role in the parties' legal positions, including their calculation of and defenses to damage claims. Expert opinion can be a critical ingredient fueling cognitive biases of different kinds and overwhelm the ability of both sides to evaluate their case productively. What's a mediator to do when the battle of the experts shuts down negotiation flexibility? In mediation preparation, ***"A Visual Refresher Course on Expert Testimony"*** can quickly ground a mediator on how we analyze expert opinion and experts, and equip her to "reality test" with each side, whether a mediator uses a facilitative or evaluative approach.

Sarnacki concentrates his practice in the areas of family law, mediation, and collaborative divorce. He is a past chair of the Grand Rapids Bar Association's Family Law Section (2003) and of the State Bar of Michigan's Family Law (2006-2007), Litigation (2000-2001), and Law Practice Management (1995-1996) sections. A frequent commentator on trial advocacy, family law, and mediation, he has served on the faculties of the National Institute of Trial Advocacy/Hofstra University School of Law and the U.S. Attorney General's Advocacy Institute. In addition to his numerous professional articles, Mr. Sarnacki has published another book, with a third on the way: *"Cry, Smile, Wonder: poems"* (2018); and the forthcoming *"A Visual Refresher Course on Courtroom Persuasion."* He has been selected as one of "The Best Lawyers in America," designated a "Michigan Super Lawyer," and accepted as a fellow in the Michigan State Bar Foundation.

A NOVEL APPROACH AND QUICK REFERENCE TO EVIDENTIARY ANALYSIS OF EXPERT OPINION

Learning to think like a lawyer is no small feat, but the law and logic of evidence made intuitive sense to many of us right from the start. And the law and logic of expert opinion is just as intuitive. The building blocks to selecting credible, qualified experts; conducting credible investigations; and crafting admissible, persuasive opinions are many, and the absence or weakness of any of those building blocks can play a critical role in negotiation as long as the negotiators and their mediator are up-to-speed on the legal analysis and where each side is likely to encounter hurdles like admissibility, evidentiary objections, and jury instructions and judicial cautions on the weight and nature of the expert opinions. The challenge for a mediator is to efficiently equip themselves

in advance of a mediation session wherever they sense that a battle of experts could play a significant role in derailing a productive negotiation.

In his introduction to "A Visual Refresher Course", David offers:

> *This Visual Refresher Course provides a quick overview of how to think about expert testimony. … Expert testimony presents a whole host of challenges to even the seasoned attorney and experienced judge. Finding a practical approach to analyzing expert opinions will simplify the process. …To keep it simple, we need to understand how experts master their fields, how experts argue, how the legal principles frame expert testimony, how to map an expert's opinion, and how to analyze the opinion.*

The book consists of a series of 117 "Figures" on 136 pages. Many of the figures most useful to me are "SmartArt"-type graphic charts and tables that quickly detail elements of expert analysis. For example, Figure 56 titled "Experts Should be Trustworthy Messengers," depicts the three broad areas that contribute to trustworthiness (qualifications, credibility, and integrity of sources of information), and under each lists its elements. For example, the elements of credibility are honesty, independence, diligence, and thoroughness.

In addition to "Figures" that depict broad general analysis applicable to all types of experts, the book also has Figures that analyze specific areas of expert opinion including professional liability, medical decision-making, mental health diagnosis, child custody evaluation, DNA identification, standardized field sobriety, real estate appraisal, business valuation, lost personal income, lost business profits, and present value of defined benefit pension interest.

"A VISUAL REFRESHER COURSE" SHOULD BE PART OF A MEDIATOR'S TOOLBOX

Imagine a case where counsel has alerted the mediator to the fact that an important element of how they value their case is their expert's opinion on economic damages. Opposing counsel has broadly critiqued the expert and you can anticipate they will have more to say at the first in-person mediation session. In your preparation, you can quickly refer to figures in this book to formulate questions that could be part of your "reality testing," e.g., Figure 58, highlights three major areas where an expert might fall short of expectations (qualifications in particular field, diligence in the case, and integrity in profession and life), and breaks each down into areas the mediator can use for questioning.

This same questioning would have a different feel in a case going through mediation pre-suit or early in discovery. Much of it would motivate everyone to reflect on the costs associated with developing and finalizing expert opinion for and against plaintiff's claims that isn't ready at the time of the mediation.

The book is available for purchase on Amazon.

About the Author

Dale Ann Iverson, J.D. provides services in conflict engagement including court-connected mediation. She trains mediators and teaches negotiation and mediation in undergraduate and law school settings. She's a past President of the Grand Rapids Bar Association and past Chair of the ADR Section, State Bar of Michigan. She has been named a Super Lawyer in mediation annually since 2015, and a Best Lawyer in mediation and arbitration annually since 2012.

Erin Archerd

I don't know why you say, "Goodbye," I say, "Hello."

By Erin R. Archerd

It is usually a good day when I start it with the Beatles, so enjoy this little ear worm as you read the rest of this column.

Five or so years ago, when I had just moved to Detroit to teach ADR at the University of Detroit Mercy School of Law, Shel Stark pulled me aside after a alumni board meeting and encouraged me to become involved in the State Bar of Michigan ADR Section. Little did I know then where my involvement would lead.

After a few trips to Lansing for Council Meetings – at which Shel made sure the coffee and bagels were plentiful – Lee Hornberger approached me to ask if I would be interested in joining him as an Editor on the Section Newsletter, which we now call the *Michigan Dispute Resolution Journal*. As an old-time student newspaper editor from college and law school, and the former EIC of a boutique law review, it was an opportunity too good to pass up, and I had the pleasure of working with Lee on the Journal for a year before he became the Section Chair.

As a law professor and a mediator, it is my job to never stop learning, and serving as an Editor in this publication has allowed me to keep abreast of ADR developments here in Michigan, but, more importantly, it has allowed me to meet and learn from so many of our tremendously talented practitioners. Every issue brings new connections and new discoveries for me and allows me to spotlight the knowledge and accomplishments of our ADR community members.

One thing I especially love about the Journal is the way we take the time to celebrate the lives of those we have lost. It is sad when one of our brothers or sisters passes, but it also gives me hope that ADR as a profession has longevity as older generations pass down their wisdom to a younger generation eager to learn from seasoned practitioners. Memorializing those who have gone before is an important step in continuing to grow as ADR professionals.

We are also growing through the work of our Section's many active members, who take the time to mentor and support new individuals entering the field and purposefully work to engage new people through trainings and opportunities to learn new skills and practice them. I have been involved in many practitioners' groups during my career as a lawyer and mediator, but I have never seen a group in which so many leaders are actively mentoring, and thinking about ways to reach out to, new members.

As I begin my transition to the 2021-2022 Section Chair and leave this journal in the capable hands of Lisa Okasinski, its new Editor, I am so grateful to the many Chairs I have had the privilege of working with over the years, Shel and Lee, Dale Iverson, Joe Basta, Bill Gilbride, Scott Brinkmeyer, and Betty Widgeon. I'm grateful too to the countless other Section members who have inspired me through their dedication to ADR here in Michigan, especially my co-trainer Zena Zumeta.

I know I will be learning in a new way as I spend a year as Chair, but already I feel nostalgia for my time editing this journal. As I pass the pen to Lisa, I want to encourage anyone who is reading this and thinking, "I have a great idea for something I want to write," to follow that instinct. Put those words down on a page and email them to Lisa. Even the barest idea can become a beautiful article. You just need to start.

About the Author

Erin R. Archerd is the incoming 2021-2022 Chair of the ADR Section. As a mediator, she likes to think that "outrageous parties" are her specialty.

Michigan Supreme Court
Lansing, Michigan

Syllabus

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

TYLER v FINDLING

Docket No 162016. Decided August 4, 2021.

Plaintiff, B. A. Tyler, brought an action in the Oakland Circuit Court against David M. Findling; the Findling Law Firm, PLC; and Mekel S. Miller, alleging that David Findling had published defamatory statements to attorney Anna Wright by telling her that plaintiff and plaintiff's client (Samir Warda, for whose estate Findling had been appointed as a receiver) might have engaged in inappropriate or illegal activities. Findling made the allegedly defamatory statements to Wright, Warda's attorney in a personal protection insurance (PIP) lawsuit, who recorded the conversation, in a room reserved for the plaintiffs' side at the outset of a court-ordered mediation in the PIP matter. Wright subsequently shared this recording with plaintiff. Findling and his law firm (hereafter "defendants") moved for summary disposition, and plaintiff responded with an affidavit by Wright. Defendants moved to strike Wright's affidavit and to preclude her testimony at trial. On October 31, 2018, the court, Martha D. Anderson, J., granted the motion under MCL 2.412(C), which governs the confidentiality of mediation communications, and on March 8, 2019, the court, Jeffery S. Matis, granted defendants' motion for summary disposition under MCR 2.116(C)(10) and denied plaintiff's motion to file an amended complaint. Judge Matis also granted defendant Miller's separately filed motion for summary disposition. The Court of Appeals, LETICA, P.J., and STEPHENS and O'BRIEN, JJ., in an unpublished per curiam opinion issued June 11, 2020 (Docket Nos. 348231 and 350126), vacated the circuit court's order granting defendants' motion to strike Wright's affidavit and find her testimony inadmissible, reversed the order granting defendants summary disposition, affirmed the order denying plaintiff's motion to amend his complaint, and remanded for further proceedings. Defendants sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, in lieu of granting leave to appeal and without hearing oral argument, the Supreme Court *held*:

The Court of Appeals erred by reversing the circuit court because Findling's statements were "mediation communications" under MCR 2.412(B)(2) and were therefore confidential under MCR 2.412(C). MCR 2.412(B)(2) defines "mediation communications" expansively to include statements that occur during the mediation process as well as statements that are made for purposes of preparing for a mediation. The conversation between Findling and Wright took place within the mediator's designated "plaintiff's room" while parties to the mediation were waiting for the

mediation session to start and were thus part of the mediation process for purposes of the court rules. The alleged defamatory statements involving plaintiff were relevant to the mediation of the underlying case because the conversation between Findling and Wright concerned a party's credibility, which could have affected the decision to settle the case or go to trial. The court rule does not require a mediator to meet with the parties and attorneys before the definition of "mediation communications" under MCR 2.412(B)(2) and the mediation confidentiality provision in MCR 2.412(C) both attach. Further, the plain language of the court rule does not limit the expectation of confidentiality to the mediation parties themselves. MCR 2.412(C) provides that mediation communications are generally confidential, neither discoverable nor admissible in a proceeding, and not to be disclosed to anyone but the "mediation participants." These confidentiality protections extend to any statement made for purposes of participating in a mediation, which encompasses statements made by a mediation participant. In this case, Findling, as a court-appointed receiver with settlement authority, was a mediation participant as that term is defined in MCR 2.412(B)(4). Therefore, the Court of Appeals erred by vacating the circuit court's grant of defendants' motion to strike and by reversing and remanding the circuit court's grant of defendants' motion for summary disposition under MCR 2.116(C)(10). Parts II(A)(2) and II(B)(2) of the Court of Appeals opinion were reversed, the circuit court's October 31, 2018 order granting defendants' motion to strike the affidavit and motion in limine to preclude testimony was reinstated, and the circuit court's March 8, 2019 order granting summary disposition to defendants under MCR 2.116(C)(10) was also reinstated in light of the plaintiff's admission that, without Wright's affidavit or testimony, he had no evidence to support the relevant defamation allegations. In all other respects, the application for leave to appeal was denied.

Court of Appeals judgment reversed in part; circuit court orders reinstated; leave to appeal denied in part.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED August 4, 2021

STATE OF MICHIGAN

SUPREME COURT

B. A. TYLER,

Plaintiff-Appellee,

v No. 162016

DAVID M. FINDLING and THE FINDLING LAW FIRM, PLC,

Defendants-Appellants,

and

MEKEL S. MILLER,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

PER CURIAM.

This is a defamation case arising from statements made by one attorney to another before actually meeting with the mediator at the start of a court-ordered mediation. We

conclude that the Court of Appeals erred when it held that a cause of action for defamation existed based on these communications because they were subject to MCR 2.412, the confidentiality rule covering mediation proceedings. We therefore reverse the Court of Appeals judgment in part and reinstate the two relevant circuit court orders in this matter.

I. BACKGROUND

This case involves several attorneys and their communications regarding lawsuits filed on behalf of Samir Warda. Warda suffered severe injuries in two automobile accidents. As a result of Warda's severe injuries, David Findling of the Findling Law Firm, PLC, was appointed to act as the receiver for Warda's estate. Mekel Miller, an attorney with the Findling Law Firm, acted as counsel for receiver Findling as he accounted for the estate's assets, which included two personal protection insurance (PIP) automobile no-fault cases filed on Warda's behalf. The PIP cases were first handled by Fieger, Fieger, Kenney & Harrington PC (the Fieger Firm), but then were subsequently handled by attorney Anna Wright of Atnip & Associates, PLLC. Plaintiff B. A. Tyler was retained to handle Warda's legal-malpractice action against the Fieger Firm relating to the PIP cases.

According to Miller (as detailed in her deposition in this case), while investigating Warda's suit against the Fieger Firm, she spoke with Fieger Firm attorney Stephanie Arndt. Miller shared with Arndt that Tyler had been hostile toward Findling. Miller could not recall her conversation with Arndt word for word, but she could confirm that she was left with the impression that Warda had engaged in illegal activity. Miller conveyed this information to Findling.

Thereafter, court-ordered mediation was held in one of Warda's PIP cases. Findling attended the mediation as the receiver for Warda's estate with authority to settle the case. Upon arriving at the mediator's office, Findling was placed in the "plaintiff's room" with Wright, the attorney for the Warda PIP lawsuit. Wright and Findling had a conversation, which Wright recorded without Findling's permission or knowledge. In that conversation, Wright specifically asked about illegal activities and whether other attorneys were involved. Wright also noted that she needed to find out about Warda's criminal history. During this conversation—and key to the issue now decided by this Court—Findling disclosed to Wright that plaintiff Tyler and Warda may have been associated with inappropriate or illegal activity.

Wright subsequently shared the recording with Tyler. Thereafter, Tyler filed the instant lawsuit against Findling, the Findling Law Firm, and Miller, alleging that Findling had published defamatory statements to Wright by indicating that Tyler was engaged in these activities.[1] To support his claims, Tyler provided an affidavit from Wright. The Findling defendants moved to strike Wright's affidavit and testimony, asserting that the conversation involved communications during mediation that are confidential and inadmissible under MCR 2.412(C). The trial court agreed and granted the motion. Defendants also moved for summary disposition, arguing that, absent Wright's recording, affidavit, and testimony, Tyler could not establish a defamation claim. The trial court again agreed and granted the motion.

[1] Miller moved separately for summary disposition, and the trial court granted her motion. Tyler never appealed that order, so Miller is no longer a party to this litigation. For the purpose of this opinion, when we refer to defendants, we are not referring to Miller.

Plaintiff appealed by right. The Court of Appeals vacated the trial court's order granting defendants' motion to strike, reversed the order granting summary disposition to defendants under MCR 2.116(C)(10), and remanded for further proceedings. *Tyler v Findling*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2020 (Docket Nos. 348231 and 350126), pp 1, 13. In finding that the communication was not subject to the MCR 2.412 confidentiality requirement, the Court first reasoned that the expectation of confidentiality, pursuant to MCR 2.412(C), belongs only to the mediation parties and that Findling, as a receiver, was not a party. *Id*. at 4-5. Second, the Court held that Findling's statements to Wright were not "mediation communications" covered by MCR 2.412(B)(2) since the communication did not occur during the actual mediation process but rather before mediation had begun. *Id*. at 5-6, citing MCR 2.411.[2] Finally, the Court determined that the conversation at issue did not relate to the mediation itself or the process of the mediation. *Id*.

[2] The Court of Appeals relied on two provisions in MCR 2.411. MCR 2.411(A)(2) defines "mediation" as "a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power." MCR 2.411(C)(2) states:

> Conduct of Mediation. The mediator shall meet with counsel and the parties, explain the mediation process, and then proceed with the process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. The mediation will continue until a settlement is reached, the mediator determines that a settlement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears that the process may result in settlement of the case.

II. DISCUSSION

Whether the lower courts properly interpreted MCR 2.412 is a question of law, which we review de novo. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 343; 654 NW2d 315 (2002). We apply principles of statutory interpretation to the interpretation of court rules. *Id*. Therefore, when the language is unambiguous, we will enforce the plain meaning of the rule. *Id*.

MCR 2.412, which is titled "Mediation Communications; Confidentiality and Disclosure," provides:

> (A) Scope. This rule applies to cases that the court refers to mediation as defined and conducted under MCR 2.411 and MCR 3.216.
>
> (B) Definitions.
>
> (1) "Mediator" means an individual who conducts a mediation.
>
> (2) "Mediation communications" include statements whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.
>
> (3) "Mediation party" means a person who or entity that participates in a mediation and whose agreement is necessary to resolve the dispute.
>
> (4) "Mediation participant" means a mediation party, a nonparty, an attorney for a party, or a mediator who participates in or is present at a mediation.
>
> (5) "Protected individual" is used as defined in the Estates and Protected Individuals Code, MCL 700.1106(x).
>
> (6) "Vulnerable" is used as defined in the Social Welfare Act, MCL 400.11(f).
>
> (C) Confidentiality. Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and

> may not be disclosed to anyone other than mediation participants except as provided in subrule (D).
>
> (D) [setting forth exceptions to confidentiality].

We conclude that the Court of Appeals erred by reversing the trial court. Findling's statements were "mediation communications" under MCR 2.412(B)(2) and were therefore confidential under MCR 2.412(C). The term "mediation communications" is defined expansively to include statements that "occur during the mediation process" as well as statements that "are made for purposes of . . . preparing for . . . a mediation." MCR 2.412(B)(2). The conversation between Findling and Wright took place within the mediator's designated "plaintiff's room" while parties to the mediation were waiting for the mediation session to start and were thus part of the "mediation process."

Even if we were to agree with the Court of Appeals' restrictive reading of MCR 2.411 as to when the "mediation process" begins, there's no dispute that Findling's statements to Wright were made while "preparing for" the mediation session and are therefore expressly encompassed within the definition of "mediation communications." Contrary to plaintiff's insistence that the alleged defamatory statements involving him were irrelevant to the mediation of Warda's PIP case, the conversation between Findling and Wright concerned Warda's credibility, which could have affected the decision to settle the PIP case or go to trial.[3] We reject the Court of Appeals' reading of the court rule as requiring a mediator to meet with the parties and attorneys before the definition of

[3] Consequently, we do not need to decide whether statements made before meeting with the mediator must be related to the mediation in order to receive protection under the court rule.

"mediation communications" under MCR 2.412(B)(2) and the mediation confidentiality provision set forth in MCR 2.412(C) both attach.

We also reject the Court of Appeals' conclusion that "[t]he expectation of confidentiality belongs to the mediation parties." *Findling*, unpub op at 5. The plain language of the court rule contains no such limitation. Thus, the Court of Appeals erred and its judgment must be reversed. *Hinkle*, 467 Mich at 343. MCR 2.412(C) provides that mediation communications are, generally, (1) confidential, (2) neither discoverable nor admissible in a proceeding, and (3) not to be disclosed to anyone but the "mediation participants."[4] The confidentiality protections cover "[m]ediation communications," MCR 2.412(C), which are not limited to communications made by a "mediation party" but extend to, among other things, any statement "made for purposes of . . . participating in . . . a mediation." MCR 2.412(B)(2). This clearly encompasses statements made by a "mediation participant." Put differently, and contrary to the Court of Appeals' analysis, there is no requirement in MCR 2.412 that a "mediation communication" be uttered by any particular party or participant.[5] Rather, the rule simply explains *to whom* confidential mediation communications can be *disclosed*. All mediation communications made by participants are afforded confidentiality protections.

[4] The only exceptions to the confidentiality provision are listed in MCR 2.412(D); none applies here.

[5] We decline to address whether Findling, as the court-appointed receiver for Warda, could also be considered a "mediation party" because it is unnecessary for the disposition of this case.

In this case, Findling was a mediation participant as that term is defined in MCR 2.412(B)(4). Findling was acting as the court-appointed receiver with settlement authority for Warda, the party to the PIP action that was the subject of the mediation.

III. CONCLUSION

In sum, we hold that defendant Findling's statements were confidential under MCR 2.412(C) because his comments were "mediation communications." Therefore, we conclude that the Court of Appeals erred by vacating the trial court's grant of defendants' motion to strike and reversing and remanding the trial court's grant of defendants' motion for summary disposition under MCR 2.116(C)(10). With respect to that part of the Court of Appeals' opinion addressing Docket No. 348231, we reverse Part II(A)(2) of the opinion and reinstate the Oakland Circuit Court's October 31, 2018 order granting defendants' motion to strike the affidavit and motion in limine to preclude testimony. We also reverse Part II(B)(2) of the Court of Appeals' opinion and reinstate the circuit court's March 8, 2019 order granting summary disposition to defendants under MCR 2.116(C)(10), because plaintiff has admitted that, without Wright's affidavit or testimony, he has no evidence to support the relevant defamation allegations. In all other respects, the application for leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Bridget M. McCormack
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch

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SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

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The Michigan Dispute Resolution Journal is looking for articles on ADR subjects for future issues. You are invited to send a Word copy of your proposed article to ***The Michigan Dispute Resolution Journal*** to Editor, Lisa Okasinski at Lisa@Okasinskilaw.com.

Articles that appear in ***The Michigan Dispute Resolution Journal*** do not necessarily reflect the position of the State Bar of Michigan, the ADR Section, or any organization. Their publication does not constitute endorsement of opinions, viewpoints, or legal conclusion that may be expressed. Publication and editing are at the discretion of the editor.

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