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Table of Contents

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Ed Papas

The Chair's Corner

By Ed Pappas

It is my privilege to serve as Chair of the ADR Section of the State Bar of Michigan this year and to advance its mission to help people resolve their differences in a respectful and peaceful manner. The Section's mission is an honorable one to encourage conflict resolution by:

1. Providing training and education for ADR professionals;
2. Giving professionals the tools to empower people in conflict to create optimal resolutions;
3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and
4. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

The members of the ADR Section all play an important role in advancing our mission. If you want to become more active in our Section, I encourage you to join one of our committees, which we call action teams. There are currently eight action teams for the Section: (1) the Skills Action Team chaired by Zena Zumeta and Nakisha Chaney; (2) the Legislation and Court Procedures Action Team chaired by Lisa Taylor; (3) the Publications Action Team chaired by Lisa Okasinski; (4) the Community Dispute Resolution Centers Action Team chaired by Susan Davis and Christine Gilman; (5) the Judicial Action Team chaired the Honorable Christopher P. Yates; (6) the Diversity and Inclusion Action Team chaired by Lisa Timmons and Phil Schaedler; (7) the Membership Outreach Action Team chaired by Richard Kerbawy; and (8) the Social Media Action Team chaired by Jennifer Grieco. Please contact our Administrator, Mary Anne Parks, or me, if you want to join or need more information about any of our action teams.

I want to thank Erin Archerd for her leadership as Chair of our Section last year. I look forward to working with this year's officers of the Section, Jennifer Grieco as Chair-Elect, Larry Saylor as Secretary, and James Darden as Treasurer. These officers serve on our Executive Committee together with the Honorable Christopher P. Yates, Lisa Okasinski, and Nakisha Chaney.

The Section has two outstanding virtual programs scheduled for the 2023 ADR Summit. On March 21, 2023, Tracy Allen will talk about managing negotiations in mediations, and on March 28, 2023, Bernie Mayer and Jacqueline Font-Guzman will be presenters on the topic "Good Trouble" and Mediation: Where the Search for Justice Meets the Neutrality Trap. These are webinars that you do not want to miss, and many more are in the works.

The ADR Section is working on a number of important educational programs and projects this year, and you will be hearing more about these programs and projects as the year progresses. If you have any ideas, educational programs, or projects that you believe the Section should consider, or if you have any questions about current projects or the Section's activities, please do not hesitate to email your thoughts to me.

Lee Hornberger

Michigan AFSCME Council 25 v. Wayne Co: the Steelworkers Trilogy, Michigan Family, and Gavin Epic

by Lee Hornberger

This article examines ***Michigan AFSCME Council 25 v. Wayne Co***, unpublished opinion of the Court of Appeals (COA), issued April 21, 2022, Docket Nos 356320 and 356322, lv app pdg, in light of the *Steelworkers Trilogy* [*Steelworkers v. Warrior Gulf Navigation Co*, 363 US 574 (1960); *Steelworkers v. Am Mfg Co*, 363 US 564 (1960), *Steelworkers v. Enterprise Wheel & Car Corp*, 363 US 593 (1960)], *Michigan Family Resources, Inc v. SEIU*, 475 F3d 746 (6th Cir 2007), *Detroit Auto Inter-Ins Exch v. Gavin*, 416 Mich 407 (1982), and Michigan case law concerning court review of labor arbitration awards.

Michigan AFSCME Council 25 v. Wayne Co

Michigan AFSCME is a COA split decision which affirmed the vacatur of a labor arbitration award. On the verge of discharge, the employee took a cash-in retirement. The employee applied for retirement while awaiting the outcome of a disciplinary action. The retirement application required the employee to agree to a "separation waiver." The "waiver" stated he was terminating his employment and not seeking reemployment. The employer discharged the employee the following day. The employee allowed his retirement application to proceed. He filed a grievance pursuant to the collective bargaining agreement (CBA), seeking reinstatement. The County Retirement System approved the retirement. The employee then transferred his retirement funds to a private IRA. The grievance proceeded to arbitration. The arbitrator found there was no just cause for the discharge and reinstated the employee with a suspension in spite the waiver issue. The Circuit Court vacated the award. **The COA majority decision affirmed the Circuit Court applying the arbitration award review standard stated in *Gavin*.**

The COA dissent stated that because the arbitrator did not exceed the arbitrator's authority in issuing the award the Circuit Court should have confirmed the award.

The union filed an application for leave to appeal. On September 28, 2022, the Supreme Court ordered oral argument on the application. The oral argument will address: (1) whether the standard set forth in *Gavin*, applies to labor arbitration cases, see *Bay City Sch Dist v. Bay City Ed Ass'n, Inc*, 425 Mich 426, 440 n 20 (1986), and *Port Huron Area Sch Dist v. Port Huron Ed Ass'n*, 426 Mich 143, 150 (1986); and (2) whether the Circuit Court erred in vacating the arbitrator's awards.

***Detroit Auto Inter-Ins Exch v. Gavin*, 416 Mich 407 (1982)**

Gavin involved an arbitration conducted pursuant to an arbitration clause in an insurance policy. The issue was whether the arbitrator erred by finding that automobile no-fault insurance policies could be stacked to allow the insured party to receive the maximum benefit under all policies, contrary to anti-stacking provisions in the policies. The Supreme Court framed the issue as whether an arbitrator's plainly erroneous contractual interpretation was subject to correction by the courts.

> *Gavin* said,
>
> The character or seriousness of an error of law which will invite judicial action to vacate an arbitration award **under the formula we announce today** must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise. *Id*. at 443. Emphasis added.
>
> *Gavin* stated "[J]ust as a judge exceeds [the judge's] power when [the judge] decides a case contrary to controlling principle of law, so does an arbitrator." *Id*.
>
> Interestingly, *Gavin* footnote 11 and related language stated:
>
> **While we announce today a broader role for the judiciary in statutory arbitration cases than is generally assumed in other jurisdictions**, [fn **11**] we are confident that in doing so we not only properly define the function of courts of

equity in such cases, but we secure to litigants who come to the courts for judicial confirmation and enforcement of arbitration results, that which we believe they agreed to: an arbitration award rendered according to the law which governs their dispute.

[fn **11**] There is a large body of case law from other jurisdictions, including the federal courts, construing the federal arbitration act a statute substantially the same as our statute and court rule which professes a very limited judicial review of arbitration awards. … *Raytheon Co v. Rheem Mfg Co*, 322 F2d 173 (CA 9, 1963) (arbitration award cannot be set aside for misinterpretation of law); … ; *Associated Teachers of Huntington, Inc v Huntington Bd of Ed*, … 306 NE2d 791 (1973) (even where arbitrators state intention to apply correct law and then misapply it, award will not be set aside). *Id.* at 445.

In *Michigan AFSCME*, the union argues that *Gavin* applies only to statutory arbitration and not to public sector labor arbitration. Arguably, if *Gavin* had involved a CBA rather than an insurance contract, the award would not have been vacated. *Gavin* discussed the importance of insurance anti-stacking provisions. *Gavin* did not discuss labor arbitration or Supreme Court decisions that have reviewed labor arbitration.

***Bay City Sch Dist v. Bay City Ed Ass'n, Inc*, 425 Mich 426 (1986)**

In ***Bay City***, the Supreme Court, regardless of its allusion to *Gavin*, held that the pendency of MERC unfair labor practice charges does not preclude arbitration of breach of contract claims where the statutory claims submitted to MERC and the contractual claims submitted to arbitration arise out of the same controversy. *Bay City* is a pro-labor arbitration case.

***Port Huron Area Sch Dist v. Port Huron Ed Ass'n*, 426 Mich 143 (1986)**

Port Huron, while reversing a decision upholding an award on the specific facts, restated the narrow grounds for setting aside an award. *Port Huron* stated,

The United States Supreme Court expressed the federal policy of judicial deference in the context of labor arbitration in the celebrated *Steelworkers' Trilogy*. This Court expressed its general acceptance of such a policy, similarly, in … *Kaleva-Norman-Dickson School Dist v. KND Teachers' Ass'n*, 393 Mich 583 (1975).

U.S. Supreme Court 1960 *Steelworkers Trilogy*

In 1960, the United States Supreme Court issued the *Steelworkers Trilogy* decisions concerning labor arbitration awards. See Elkouri & Elkouri, *How Arbitration Works* (8th ed), pp. 2-9 to 2-13 ["… [T]here is a discernible trend toward upholding labor arbitration awards so long as it appears that the award is the product of an arbitrator's at least 'plausible' interpretation of the terms of the agreement." *Id.* at 2-21.]; and Abrams, *Inside Arbitration* (2013), pp. 13-18.

Steelworkers v. Am Mfg Co, 363 US 564 (1960), held that, if the CBA provided that a dispute should be submitted to arbitration, the underlying "question of contract interpretation [is] for the arbitrator," even though the claim appears to be "frivolous." "The courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim."

Steelworkers v. Enterprise Wheel Car Corp, 363 US 593 (1960), considered the role of the federal courts in enforcing awards. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under" CBAs because the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.* at 596.

Commercial arbitration is a substitute for court litigation. Labor arbitration is a substitute for industrial strife, strikes, and work stoppages. Labor arbitration is the result of collective bargaining. In labor arbitration, there is an ongoing relationship between the parties. Commercial arbitration and labor arbitration serve completely different purposes. Abrams, pp. 17 and 333.

***Michigan Family Resources, Inc v. SEIU*, 475 F3d 746 (6th Cir 2007)(en banc)**

Michigan Family discussed the standard for reviewing labor arbitration awards in light of the *Trilogy*. *Michigan Family* leaves the parties to what they bargained for. This is an arbitrator's decision, not a COA decision, unless the arbitrator (1) committed fraud or other dishonesty, (2) resolved a dispute the parties did not submit to the arbitrator, or (3) did not arguably interpret and apply the

CBA. *Id.* at 751–52. As long as the arbitrator does not go against these requirements, the request for judicial intervention should be denied even though the arbitrator made serious, improvident, or silly errors. **It was the "arbitrator's construction," not three layers of Federal judicial review, that the parties "bargained for," and that delegation of decision-making authority must be respected even when time and further review show that the parties in the end have bargained for nothing more than error.**

How Michigan appellate courts have viewed labor arbitration

Lichon v. Morse, 507 Mich 424 (2021), involved an agreement to arbitrate in an employee manual. *Lichon* stated,

… Michigan's public policy favors arbitration. … In *Kaleva* [… 393 Mich 583 (1975)], in the context of [CBA]s, we held that it was appropriate to apply United States Supreme Court precedent regarding the National Labor Relations Act (NLRA) … to contracts entered into under the state's public employment relations act … . ... This is not a rule we have adopted outside of the context of collective bargaining agreements, and we decline to do so now. *Id.* at 467-468.

Beck v. Park West Galleries, Inc, 499 Mich 40 (2016), considered whether arbitration clauses in invoices applied to disputes arising from prior purchases when the invoices for prior purchases did not refer to arbitration. *Beck* held the arbitration clause contained in later invoices cannot be applied to disputes arising from prior sales. *Beck* recognized the policy favoring arbitration of disputes arising under CBAs but said this does not mean an arbitration agreement between parties outside of the collective bargaining context applies to any dispute arising out of any aspect of their relationship. *Beck* is an example of the Supreme Court treating an arbitration issue within the collective bargaining process differently from outside the collective bargaining process.

In ***36th Dist Ct v. Mich Am Fed of State Co and Muni Employees***, 493 Mich 879 (2012), the Supreme Court said MCR 3.106 does not preclude reinstatement and back pay where the CBA has a just cause standard for discharge.

Kentwood v. POLC, 483 Mich 1116 (2009), affirmed the COA's reversal of the vacatur of a labor arbitration award. The arbitrator held grievant was to be assigned a take-home vehicle because of a past practice.

Kaleva–Norman–Dickson School District No 6 v. Kaleva–Norman–Dickson School Teachers' Ass'n, 393 Mich 583, 591 (1975), stated,

The policy favoring arbitration of disputes arising under [CBA]s, as enunciated by the United States Supreme Court in the *Steelworkers' Trilogy*, is appropriate for contracts entered into under the PERA.

Rembert v. Ryan's Family Steak Houses, Inc, 235 Mich App 118, 163 fn 35 (1999), stated "… judicial review of an arbitral award under a [CBA] is very limited." *Rembert* recognizes that labor arbitration awards are given more deference than other arbitration awards.

Ferndale Education Ass'n v. School Dist for the City of Ferndale, 67 Mich App 637, 642–643 (1976), stated,

Questions concerning the scope of judicial review of … awards made by arbitrators in labor disputes have been almost a plague on both state and Federal courts for years, but the eminently proper attitude that we have taken is one of 'hands off'. The party that ends up holding the short end of an arbitrator's award may try desperately to fit the facts within the narrow doorway to the courts, but the judicial policy is clear. **In the *Steelworkers Trilogy*, the United States Supreme Court held that the merits of … the arbitration award are irrelevant when a Federal court is asked to enforce an arbitration … award … .** Judicial review is limited to whether the award 'draws its essence' from the contract, whether the award was within the authority conferred upon the arbitrator by the collective bargaining agreement. Once substantive arbitrability is determined … judicial review effectively ceases. The fact that an arbitrator's interpretation of a contract is wrong is irrelevant. Emphasis added.

Conclusion

Michigan courts have held that labor arbitration awards are to be given more deference than other arbitration awards. The *Michigan AFSCME* split decision was incorrect in applying the *Gavin* standard rather than the *Trilogy* standard in reviewing a labor arbitration award.

About the Author

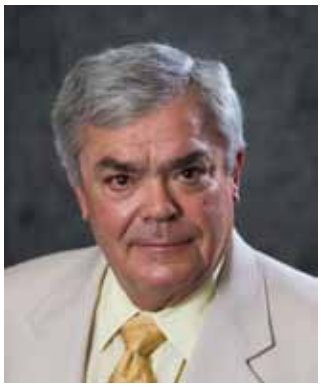
Lee Hornberger *is a former Chair of Alternative Dispute Resolution Section of State Bar of Michigan, Editor Emeritus of* The Michigan Dispute Resolution Journal*, former member of State Bar's Representative Assembly, former President of Grand Traverse-Leelanau-Antrim Bar Association, and former Chair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

He has received Distinguished Service Award from ADR Section in recognition of significant contributions to field of dispute resolution. He has received George N. Bashara, Jr. Award from ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from ADR Section.

He is included in Best Lawyers of America *2018 and 2019 for arbitration, and 2020 to 2023 for arbitration and mediation. He is in 2016 to 2022 Michigan Super Lawyers for alternative dispute resolution. He has received First Tier ranking in Northern Michigan for Mediation by* U.S. News – Best Lawyers® *Best Law Firms in 2022 and 2023; Second Tier ranking in Northern Michigan for Arbitration by* U.S. News – Best Lawyers® *Best Law Firms in 2022 and 2023; Second Tier ranking in Northern Michigan for Mediation by* U.S. News – Best Lawyers® *Best Law Firms in 2020; and First Tier ranking in Northern Michigan for Arbitration by* U.S. News – Best Lawyers® *Best Law Firms in 2019.*

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

He holds his B.A. and J.D. cum laude *from University of Michigan and his LL.M. in Labor Law from Wayne State University. He can be contacted at 231-941-0746 and leehornberger@leehornberger.com. His website is https://www.leehornberger.com/ .*



Ed Sikorski

Randolph T. Barker

Teresa A. Killeen

Mediators' Perspectives on Probate and Trust Resolution

Edmund J. Sikorski, Jr. and Randolph T. Barker

When probate and trust issues arise, mediation is superior to litigation for resolving disputes. Mediation affords clients more control and involvement in the dispute resolution process; is more cost-effective; and the mutually negotiated outcomes are generally more satisfactory to clients than the imposition of a third-party decision.

This article is intended to build upon a previous article enumerating the benefits of mediating probate and trust disputes by discussing the process from a mediator's viewpoint, noting both best practices and common pitfalls on the part of the litigants.

A. Early Case Resolution

The longer the conflict rages, the more likely that the victor will in fact be the vanquished. The emotional, financial, and physical commitments necessary to pursue this type of litigation is enormous. It is accurate to say that the acrimony generated by the litigation process is a death sentence for any sense of family for ensuing generations.

More complex cases (such as capacity and undue influence cases) are less capable of early resolution because they are fact-intense and thus require substantive discovery. Discovery gamesmanship not only precludes early case resolution, but it also substantially interferes with the process, regardless of the stage of the litigation. Court intervention may be needed to compel the production of records and other relevant information, particularly when the information is potentially adverse to one or more litigants.

B. Avoidance of Trial Expense and Imposition of a 3rd Party Decision (usually not a solution)

The expense of proceeding down the litigation track is enormous. When you consider the time spent preparing for, taking, and then reviewing and summarizing the testimony, a single witness deposition could cost more than $3000. In cases alleging incapacity or undue influence, for example, the fees for expert reports can easily exceed $5000 per litigant.

A decision imposed by a third party is always unpredictable, whether it be by judge or jury. What is predicable about a 3rd party decision is that it will not come until long after the parties have respectively spent tens of thousands of dollars on attorney fees, experts, and discovery.

Suffice it to say that litigating a matter to its bitter end – with a judge, jury and possibly an appellate court deciding the outcome – serves no meaningful purpose and depletes the financial and emotional resources of the parties. It is true even when a litigant simply wants to "have their day in court."

C. Management of Malpractice Claims and Charges of Ethics Violations

Litigated claims can include the estate planning attorneys (if the decedent consulted an estate planning attorney). The facts of the case, developed in part by the discovery responses of the estate planning attorney(s) (who often become witnesses in the proceeding), increase the likelihood that a claim of malpractice and/or professional ethics charges will arise. See *Managing Risk: Estate Planning Work – Not for the Timid,* Wisconsin Lawyer, Vol.84 N.12, December 2011. http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=84&issue=12&articleid=2238. The participation of estate planning counsel, and perceptions regarding their testimony and work product, are potential hindrances to the mediation process because it invites additional litigation within or separate from the proceeding the parties are trying to resolve.

D. Satisfied Clients

The data is overwhelming and conclusive: Clients who are involved in crafting a mediated resolution are more satisfied clients. See *Settle and Sue Again: Strategies and Snares* http://www.settlementperspectives.com/wp-content/uploads/2013_04_25-Settle-and-Sue-with-Exhibits.pdf

See also *Why Facilitative Mediation Produces better ADR Results*, Res Ipas Loquitur, Vol 45 No.5, p.4, September/October 2016

E. Effective Mediation Produces Practical Outcomes

There are 6 core principles that both the mediator and counsel for the litigants must understand and convey in every estate and trust-related mediation:

1. Deeper understanding. The purpose of mediation is to help people consider another perspective; develop a better understanding of the situation; and recognize what they really need from the conflict so that they can move on with their lives. The mediator's ability to identify issues and educate the litigants is critical to a successful process. The parties must learn to overcome the distractions of trivial matters in order to see the bigger picture.

2. Effective common goal. The focus must always be on finding an effective agreement – a common vision - that satisfies most of the participants' needs (not necessarily what they want) in the best manner available.

3. Mutual problem solving. The task in mediation is to help solve the other side's problem as a means of solving your own problem. Stated differently, your client(s) are their primary problem and vice versa. Mediators must help the parties identify

possible solutions to common and less significant problems to establish a framework for resolving complex issues where they might have more divergent interests.

4. Positions vs. Interests. Positions must be differentiated from interests. Positions reflect what we assert we want as outcomes. The more we defend them, the stronger we seem to hold on to them. Interests reflect what is important to us as outcomes. Interests are the reason why the position is important to the person. Interests reveal hopes, needs, values, beliefs, and expectations. They can get lost in the fight for positions and do not necessarily reflect what the conflict is about. DO NOT CONFUSE THE TWO.

Consider the classic example of the "Orange Quarrel":

Two children were arguing over who should be allowed to have the last orange in the kitchen. Both children wanted the orange and took the position that they should have the whole to the exclusion of the other. Through this adversarial process, both were heading toward either a win-lose situation (where only one may have the orange) or a lose-lose situation (where neither could have it).

A mediator became involved and suggested that the orange be cut in two, and even suggested that if one child cuts the orange, the other child would choose their portion. Although this seemed to be a fair, win-win solution, each party would receive only half of what they wanted.

The mediator then applied an interest-based approach to the dispute. Through this process, the mediator learned that one child wanted to use the orange zest to bake a cake, while the other child wanted to drink the orange juice and would otherwise have thrown the peel in the trash. The optimal win-win solution satisfying the interests of each child was found: give one child the peel, and give the other child the fruit.

Unfortunately, most real-life disputes are much more complex and are not always likely to achieve 100% satisfaction for the parties to that conflict. Applying an interest-based approach, however, allows mediators and the parties to identify the interests underlying their respective positions. Shifting the focus of mediation from positions to interests is more likely to identify more optimal, win-win solutions that do not necessarily "split the baby" and lead to a resolution that the parties will accept and adhere to.

5. It's business. Mediation is fundamentally about cutting a business deal. You may not get what you think you want, but you will be better off than if there were no deal at all.

Making a "business" decision about the conflict may be a foreign concept at first because, from the beginning, the dispute is principled, emotional, and difficult to mold into a reasoned risk assessment. But, risk assessment is at the heart of an informed business decision.

6. Experience equals realism. The mediator selected should have subject matter knowledge in this area of the law. Such experience/expertise allows a systematic analysis of the conflict and management of the unrealistic expectations of the parties.

Here are three things a mediator expects from the parties prior to the mediation conference to ensure a successful mediation:

First: Prepare and exchange a mediation brief.

Mediation briefs tell the mediator in advance the essence of the factual and legal issues in dispute, as well as the issues not in dispute.

Do everything within your power to objectify the claim, position, or defense. Make the content **EASY** and **SIMPLE** to understand**. Brevity** is best.

Just like an Opening Statement, a mediation brief should tell a story that starts with a theme that is well thought out in advance. The theme should be one sentence or phrase that appeals to the moral force of the "jury" and captures the essence of the party's story. A good theme should be easy to remember, useful in decision-making, supported by the evidence, and consistent with the "juror's" concept of fairness and justice.

There are four (4) magic word that introduce a theme: "THIS CASE IS ABOUT…"

The theme should be expressed in a single opening paragraph that combines an account of the facts and the law in such a way as to lead to the conclusion that you will prevail if the matter proceeds to and concludes in trial.

Second: Cut to the chase with the mediator.

If the mediator understands "where you are coming from" and recognizes wiggle room in the outcome, they are in a better position to relay that to the other side (and vice versa).

Third: **PREPARE.**

Every primer on mediation exhorts the participants to prepare. However, this is like telling your kids to "go clean their rooms."

What does this mean and how do you do it?

Preparation requires negotiators to pre-plan and prepare an intensely thoughtful, scripted plan that offers the other side a reason to accept one of a variety of alternative proposals. It might start with an ambitious proposal that does not automatically alienate the other side. The plan should be flexible and progress toward a final settlement position that weighs the client's best interests against the risks associated with a solution imposed by a third party.

From our point of view as civil mediators, failure of a party to come to the mediation session with such a scripted plan is *fatal* to the mediation process.

There are three substantive matters that the mediation participants should expect from the mediator in probate and trust mediation proceedings:

1. Knowledge of the law. Review and discuss the elements of the cause of action and the proofs necessary to establish the relief sought and the standard of review if appellate action might ensue.

The causes of action will fall into one of the following categories:

1) Tortious Interference with a Prospective Advantage
2) Tortious Interference with an Expected Inheritance
3) Intentional Infliction of Emotional Distress
4) Negligent Infliction of Emotional Distress
5) Fraud and/or Duress
6) Unjust Enrichment
7) Creation of an Express Oral Trust
8) Conversion
9) Constructive Trust, Undue Influence, and Breach of Fiduciary Duty
10) Incapacity (grantor, beneficiary, fiduciary)

The elements, proofs, and standards of review for many of these causes of action are set out in exceptional detail in: *In re Estate of Helen Bandemer et. al. v. Martin Bandemer et. al.* Unpublished COA October 20,2010 No. 293033.

CAVEAT: As to the theory of Tortious Interference with an Expected Inheritance, there is an apparent conflict between *In Re Green* No. 173335 Mich Ct. App (1996) (unpublished) recognizing the cause of action, and *Dickshott v. Angelocci* No. 241722 Mich Ct. App (2004) (unpublished) refusing to recognize the cause of action in the absence of Supreme Court or legislative recognition. Cert. den. 474 Mach 712 (2005). *Bandemer* assumed without deciding that a cause of action existed for tortious interference with an expected inheritance or gift. Citing to *Green, Bandemer, and Dickshott*, a recent Court of Appeals decision again refused to recognize this cause of action. *Barretta-Biondo v. Shellenberger*, Unpublished COA July 28, 2022, No. 356890.

2. Knowledge of attorney's fees. When the subject of attorney fee shifting is involved in the litigation (almost always in light of statutory provisions allowing probate courts to grant them), entitlement to those fees from a source other than the asking party will be a subject of mediation caucus.

I urge mediation participants who have such claims involved in their matters to carefully digest the extensive discussion of that subject contained in *In re Clarence Temple et.al. v. Clinton Probate Court et.al.*, 278 Mich. App. 122, 278 N.W. 2d 265 (2008)

The standards for an award of attorney fees are different in estate litigation than in trust litigation.

You should expect to revisit these cases and their common subject matter in caucus with your mediator.

3. Discussion of probable outcomes using decision tree analysis. A mediator having extensive knowledge and experience with contested probate proceedings is in the best position to help the litigants identify the possible consequences of their decisions as they relate to their interests in the case. Using decision trees in caucus allows the mediator to offer each party a perspective on the uncertainties of litigation, including the economic and psychological costs. It also allows for a logical analysis of those decisions and a greater sense of predictability regarding possible outcomes – removing the impact of counsel's posturing that litigants might not fully understand. The result is greater confidence and credibility in the chosen solution.

Conclusion:

Be prepared but be flexible. Mediation is ultimately about working to realize *common* goals. Bring an adaptive and educated mind set to your negotiations.

You can get closer to the goal of juicing oranges and baking cakes.

About the Author

Edmund J. Sikorski, Jr., J.D. *is an attorney and civil mediator residing in Ann Arbor He is a member of the State Bar of Michigan Alternative Dispute Resolution Council and a member of its Skills Action Team and past Co-Chair of the Washtenaw County Bar Association ADR Section and an approved Washtenaw County Civil Mediator. He is a recipient of the 2016 National Law Journal ADR Champion Trailblazer Award and a past member of the Board of Directors of the Florida Academy of Professional Mediators (2014-2015) and a Florida Supreme Court Civil Circuit and Appellate mediator (2011-2016). He has litigated in Michigan and federal trial and appellate courts at all levels including the United States Supreme Court for more than 50 years. He has published more than 40 articles relating to civil mediation practice in Journals of the ABA, SBM, and other professional publications and has earned in excess of 250 hours of advanced mediation training, is FINRA Dispute Resolution Arbitrator and holds ACEDS eDiscovery Executive Certification, ACEDS eDiscovery Advanced Certification, and a Harvard PON Negotiation and Leadership Certification. He can be contacted at (734) 845-4109 email: edsikorski3@gmail.com Web: www.edsikorski.com*

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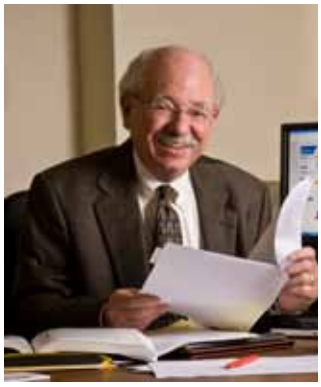

Sheldon J. Stark

A Litigator's Guide to Mediation Advocacy: Reflections on Effectively Achieving Client Goals at the Mediation Table

By Sheldon J. Stark
Mediator and Arbitrator

Part I

This is the first of a two-part article describing the differences between effective mediation advocacy and more traditional zealous advocacy characteristic of other stages in the litigation process. Part II will focus on ways advocates and parties can maximize results by understanding these differences and adjusting their approach accordingly.

I. Introduction

Litigators too often approach the mediation process with the same tool they employ in every other aspect of the litigation process. We call that tool traditional zealous advocacy. Zealous advocacy is expected of lawyers and does the job well in almost every aspect of our civil justice system. Because mediation offers a unique opportunity to take a step back from the conflict and search for mutually beneficial solutions, however, a very different tool is necessary if client goals and objectives are to be achieved. This paper will explore how mediation advocacy differs from traditional principles of zealous advocacy; and suggest an approach to mediation advocacy designed to maximize the opportunity for resolution afforded by mediation.

II. Mediation is an Assisted Negotiation

What is "mediation?" Plugging the word "mediation" into an internet search engine brings up over 155,000,000 results. When boiled down to its least common denominator, mediation is nothing more than an assisted negotiation. As we know, a negotiation is completely voluntary. Negotiations result in resolution, therefore, if but only if both sides voluntarily decide to manage their risk, recognizing that the available terms of settlement are better than spending the money and risking a dispositive motion or trial. Unlike a trial, arbitration or dispositive motion, no judge, jury, or arbitrator decides the outcome. No one determines who is or is not telling the truth, who is right and who is wrong, and no one imposes a result on the parties. The parties are totally free to decide for themselves whether to settle and on what terms.[1]

Since parties to a dispute may readily negotiate on their own, what is the assistance offered by a mediator? In my view, mediators are most helpful when they manage the exchange of information and perspective, making certain each party has all the information available so as exercise good judgment about settlement.

Specifically, mediators explore, *inter alia*:

- What is the other side's story and is it plausible? If the other side's story is plausible, of course, there is risk the court, decision-maker, or jury will be persuaded and rule in their favor. When parties hear the story as spun by a zealous advocate, however, they are often antagonized. They perceive themselves under attack, they escalate, experience consternation. In other words, they respond emotionally, perhaps even lashing out or responding in kind. They do not process what they hear. Mediators help parties process important information and all the consideration due by reframing in neutral language.
- Where is the other side coming from; what is their perspective? Knowing how each side is viewing the conflict increases the

[1] Indeed, Standard I of Michigan's Mediator Standards of Conduct is party "Self Determination." https://www.courts.michigan.gov/4aa077/siteassets/court-administration/standardsguidelines/dispute-resolution/med-soc.pdf

likelihood proposed offers and counteroffers can be tailored to meet a party's underlying needs and interests. If a party's underlying needs and interests are met, the likelihood of a favorable response to a settlement proposal increases significantly.

- Are the parties assessing their strengths and weaknesses realistically? In my experience, parties (and their lawyers) fall in love with their claims and defenses. What happens when we are in love?[2] We focus only on our strengths and downplay or ignore the warts, challenges and risks, sweeping them under the rug where they are easy to minimize. Parties are often stubbornly convinced there is only one way to look at the salient facts. They strenuously resist seeing even the possibility of good faith alternative perspectives. A major role for mediators, therefore, is to sow the seeds of doubt by bringing out the risks presented and weighing the magnitude of such risks realistically.

- Are the parties aware of the economic costs of continuing the litigation? In my experience, parties rarely arrive at the mediation table fully informed with a detailed written litigation budget. If provided with any range of numbers, they have been given only a rough estimate, discussed mostly at the time the litigation began. In fact, a realistic and timely cost estimate is essential. Why? Business judgment is typically a choice between various available options. Good judgment requires a cost/benefit analysis to determine which option best serves a party's interest. Assume a party can settle for $25,000, for example, while the price tag on continuing the litigation is likely to be $50,000 or more with no guarantee of a positive result. Sound business judgment might dictate acceptance of a $25,000 settlement regardless of liability or risk. [3]

- Have the parties considered potential collateral consequences? Will the litigation disrupt management's focus on business operations and contributing to the bottom line? Alternatively, does continuing the litigation risk exposure of confidential, sensitive, private facts? Litigation today is intrusive and may result in disclosure of embarrassing allegations of sexual harassment, corporate mismanagement, flawed engineering, medical malpractice, incompetence and the like. Customers, suppliers, lenders and vendors important to the success of a business enterprise may potentially retreat from a continuing business relationship if they find themselves and their employees sucked into the vortex of someone else's litigation. Key employees of the enterprise may feel forced to take sides. Members of the leadership team may resign rather than become embroiled in the litigation process. Sometimes collateral consequences can be more costly than direct economic ones.

- What do the parties expect to happen if the case doesn't settle? How likely is the court to grant a dispositive motion? What is the judge's track record in similar disputes? Are there other parties whose interests might be affected if a precedent is set?

- Has everyone examined their Best Alternative to a Negotiated Agreement (BATNA) or Worst Alternative to a Negotiated Agreement (WATNA)?[4]

- What evidence – documents, testimony, exemplars - are the litigators relying on to support their claims and defenses; and what are the risks a court will grant a motion to exclude? How does the value of a dispute change if key evidence is excluded? If the evidence comes in? How does an evidentiary ruling impact the chances of success if an appeal is taken?

- Do the parties know what to expect from the trial process? Many lay persons and individuals unaccustomed to litigation have a distorted view of trials – in part because we try so few cases today[5]. Sometimes painting the courtroom picture can remove impediments to resolution: What are the chances of getting a realistic trial date and keeping it? How many times might they need to prepare for a trial only to be adjourned long enough that preparation must be started over each time virtually from scratch? What does a real trial look like as contrasted with the dramas they see on TV or in the movies? A party cannot simply turn to the jury and tell their story. That is not allowed. The story can only be developed through plain, non-leading questions often painstakingly prepared and rehearsed. After direct examination, parties then face relentless, sometimes withering cross examination. If they thought they'd been "beaten up" and abused in their discovery deposition, their discomfort at trial is likely to be worse. What rational actor wants to go through that experience again?

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2 In "The Merchant of Venice," Shakespeare reminds us of an important truth: "love is blind."

3 Coming from the world of litigating and mediating employment disputes where plaintiff is typically represented on a contingency fee basis, I welcome commercial disputes because both parties are paying their counsel by the hour. Somehow writing monthly checks for attorney fees helps parties better focus the mind at the mediation table.

4 See "Getting to Yes," by Roger Fisher and William Ury.

5 In both state and federal court, no more than 1% of cases result in a trial on the merits.

- How likely is a losing party to seek an appeal? What are the chances of overturning an adverse decision on appeal? How much will it cost, and how long will an appeal take? What are the risks the decision of an appellate court will be made public establishing a precedent and perhaps, stirring up additional litigation?

- What are the party's goals and objectives for the mediation process? What do they hope to gain from engagement in an assisted negotiation? Are their goals and objectives realistic? Have the parties considered what might be required of them in the back-and-forth of a negotiation to achieve their goals? Parties must make reasonable proposals to settle in order to receive reasonable counterproposals in return. Parties are often surprised at the competitive/reciprocal nature of negotiations. Unreasonable demands are inevitably met with equally unreasonable replies; productive proposals often stimulate productive counterproposals in response.

As the answers to these kinds of concerns are heard, considered, weighed, and processed, the parties – with the advice and recommendations of counsel – are ready to make good, business-like judgments concerning resolution. Whether to settle and on what terms is *their* decision to make, not the mediators, not counsel.

III. Distinguishing Features of Mediation Advocacy

a. Persuade the Decision-maker on the Other Side

The single most important distinction between the mediation process and litigation is that the decision-maker in litigation is a third-party neutral. The decision-makers in mediation are the parties themselves. It only makes sense, therefore, that all efforts to persuade should be directed to the decision maker on the other side. The goal is to persuade the other side to manage their risk and settle, rather than roll the dice. Again, this is because mediation is a voluntary process, even if court ordered[6]. The mediator cannot impose a resolution. Only the parties make that decision. While obvious, too many advocates nonetheless draft their written materials and tailor their oral advocacy to moving the mediator into their corner not the decisionmaker.

The obvious question is "why?" Advocates believe persuading the mediator will cause them to take their side and be their advocate in the other caucus room. Depending on the mediator, their belief may be well-founded. However, mediators are trained to resist such efforts. Most of the mediators I know at least try to maintain the appearance of neutrality if not neutrality itself. Mediators are trained to make one side's arguments in the other room, but translated or reframed into more neutral terms, while maintaining their distance at the same time. "As I understand the argument they're making …." Perversely, the very arguments made to influence the mediator cause resentment and escalate emotions in the other room, making the mediator's job that much more difficult. Parties on the receiving end of overly aggressive written advocacy, for example, often start the mediation by threatening to leave.[7]

Mediation is a dispute resolution process, not a justice process where right and wrong are adjudicated, where a decision-maker determines the truth. The emphasis, therefore, needs to be on the 1) benefits of resolution; and 2) the risks of litigation. Parties will rarely agree on the facts or the inferences to be drawn from those facts. They might very well agree, however, on what the risks are. Risk assessment creates doubt. Doubt creates fertile soil to plant the seeds of resolution. When the risks and perspective are presented with civility and respect in a rational dialog, parties are better able to incorporate important concerns and make rational decisions.

In my practice to lay the foundation for a civil and respectful exchange, I ask parties and counsel to set aside their zealous advocacy and approach the mediation process as "joint problem solvers," recognizing that everyone has precisely the same challenge: is there an off ramp to the present dispute? Joint problem solvers agree to make reasonable concessions, don't try to score every point, listen respectfully, attempt to understand the other side's perspective, and employ the language of diplomacy.

For instance, accusing the other side of lying will generally antagonize the accused, causing a reaction and a likely counterattack in kind, charges of "mudslinging" or both. By contrast, far more effective is the advocate who calmly pulls together the impeachment evidence and presents it this way: "Most cases are won or lost based on who the jury believes is most credible. Here's the evidence

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6 Parties may be ordered by a court to participate in mediation, but no court can force a party to settle if they choose not to do so.

7 For advice on drafting an effective written mediation summary, see https://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/

we expect to present to demonstrate that (our client) is more likely to be believed than yours." A respectful presentation

highlighting the risk to good name and reputation can move the needle. On the receiving end, good trial lawyers welcome the opportunity to hear such a presentation in order to learn what they're up against. Even if mediation doesn't resolve the dispute, the parties receive value in being better able to prosecute and defend the claims. That said, most disputes do settle at mediation. The very process of a respectful exchange of views plants the seeds of doubt leading to recognition that a good settlement is better than a good case: you can always lose a good case.

About the Author

Sheldon J. Stark *offers mediation, arbitration case evaluation and neutral third party investigative services. He is a Distinguished Fellow 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 past Chair of the council of the Alternative Dispute Resolution Section of the State Bar and formerly chaired the Skills Action Team. Mr. Stark was a distinguished visiting professor at the University of Detroit Mercy School of Law from August 2010 through May 2012, when he stepped down to focus on his ADR practice. Previously, he was employed by ICLE. During that time, the courses department earned six of the Association for Continuing Legal Education's Best Awards for Programs. He remains one of three trainers in ICLE's award-winning 40-hour, hands-on civil mediation training. Before joining ICLE, Mr. Stark was a partner in the law firm of Stark and Gordon from 1977 to 1999, specializing in employment discrimination, wrongful discharge, civil rights, business litigation, and personal injury work. He is a former chairperson of numerous organizations, including the Labor and Employment Law 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 is also a former co-chairperson of the Lawyers Committee of the American Civil Liberties Union of Michigan. In addition, Mr. Stark is chairperson of Attorney Discipline Panel #1 in Livingston County and a former hearing referee with the Michigan Department of Civil Rights. He was a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010 and was listed in "*The Best Lawyers in America*" from 1987 until he left the practice of law in 2000. Mr. Stark received the ACLU's Bernard Gottfried Bill of Rights Day Award in 1999, the Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan in 2009, and the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. In 2015, he received the George Bashara, Jr. Award for Exemplary Service from the ADR Section of the State Bar. He has been listed in "*dbusiness Magazine*" as a Top Lawyer in ADR for 2012, 2013, 2015, 2016, 2017, 2018, 2019 and 2020.*

Prof. (Dr.) J. Mahalakshmi

Is Conciliation in the Resolution of Labour Disputes a Waiting Room Before Adjudication? - An Indian Perspective

By Prof. (Dr.) J. Mahalakshmi, Professor of Law
Head, Department of Labour Law and Administrative Law
The Tamil Nadu Dr. Ambedkar Law University
Chennai.

Traditionally, the concept of dispute resolution has been associated with the judiciary because disputes have always been resolved in the place of courts. In ancient India panchayat played a crucial role wherein the community elders decided the dispute by making the parties enter into an agreement. In addition to the settlement of disputes, the panchayat enforced the customary law for preserving harmony and peace in the villages. In the level of social development, the role had extended and developed to deviate from traditional informal dispensation of justice. With the passage of time, administration of justice by elderly persons of the village became unused by switching over to formal adjudication. The Courts have been established with formalities and technicalities. The pleadings, technical rules of evidence and hierarchy of appeal make the judicial adjudicatory mechanism

time consuming as well as costly. This has resulted in large number of cases pending for disposal. The conventional legal procedures, along with incurring of Court and advocate fees, delay delivery of justice and impact the efficiency of administration of justice delivering system.

Equal justice for all is a cardinal principle in the administration of justice. At the same time, access to justice to everyone is a basic requirement of human rights. Therefore, to redress the grievances or settle the disputes expeditiously at the minimal cost there is a need for a mechanism to address these problems in the legal system. To protect the interest of the working community and also to promote the employer-employee relations, the Industrial Disputes Act was passed in 1947 with an intention to provide numerous mechanisms for investigation of industrial disputes, as well as to provide by compulsorily referral of matters involving industrial disputes to settle or adjudicate. Those mechanisms are namely conciliation, court of inquiry, voluntary arbitration and adjudication. Conciliation is one of the modes of settling industrial disputes. It is a persuasive process by which the disputants are the ultimate decision makers.

CONCEPT AND CHARACTERISTICS OF CONCILIATION

According to Alfred Stanger, "conciliation implies a compromise. It is a voluntary process in which the success depends on the citizen's willingness to relinquish certain individual liberties as part of his duty to and respect for his fellowmen and to accept the other party as equal partner in conciliation proceedings. The characteristics of conciliation are flexibility, informality and simplicity".[1] In India, as industrial law is concerned, there is no prohibition in conciliation for intervention of a third person.

An industrial dispute may arise when one party makes demand and other party refuses to accept the same. When the expectations of employee do not fit in to the pecuniary interest or desire of the employers, there will be failure of bilateral negotiations.[2] To channelize the pressures on one or both of the parties to a dispute for getting settlement of their industries, an attempt is made to reconcile the views of both parties of the dispute, with intervention of board of conciliation or conciliation officer, as the case may be, to amicably adjust their claims. They are required to be patient and they are required to be persistent and to provide confidence to the disputants and to impress upon them that their problems are deeply understood. Conciliation is widely used technique in many countries as mediation. The concept of conciliation in India is mediation, as it is in the labour matters under foreign laws.[3]

HISTORICAL PERSPECTIVES ON CONCILIATION

In the beginning, Trade Disputes Act of 1929 was passed to provide conciliation machinery at the center. Section 6 of the Act, provided for constitution of a board of conciliation which comprises of a chairman who is an independent person and two or four other members appointed equal in numbers. Section 18A of the same Act, was inserted "authorizing the central and provincial governments to appoint conciliation officers to act as mediators in trade disputes" which was incorporated in Section 4 of the Industrial Disputes Act.

APPOINTMENT OF CONCILIATION AUTHORITIES

Section 4 of the Industrial Disputes Act, provides that "the appropriate Government may, by notification in the Official Gazette, appoint such number of persons as it thinks fit, to be conciliation officers, charged with the duty of mediating in and promoting the settlement of industrial disputes. A conciliation officer may be appointed for a specified industry in a specified area or for one or more specified industries and either permanently or for a limited".

The appropriate Government has discretionary powers "to appoint conciliation officer for a specified area or a specified industry either permanently or for a limited period for the purpose of mediation and promotion of the settlement of industrial disputes".

CONCILIATION – AN EFFECTIVE MODE FOR RESOLVING INDUSTRIAL DISPUTES

Conciliation is the most used method in the settlement of disputes both in public and private enterprises.[4]

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1 Kumar P.,"The working of conciliation machinery in Rajasthan",2 IJIR 34(1966).

2 E. Euwema et al. (eds.), Mediation in collective Labour conflicts, industrial relations and conflict management, 281, available at: https://doi.org/10.1007/978-3-319-92531-8_18 (Accessed on 28th September, 2022).

3 G.M. Kothari, A Study of industrial law76 (Wadhwa and company, New Delhi, 2000).

4 Venugopalan K.V., "Settlement machinery in public and private enterprises in Kerala", 47 IJIR 383 (2011).

Role of Conciliator

The conciliation officer does not discharge the function in an adjudicative manner. He induces the parties during the conciliation proceedings and makes efforts to reach a settlement fairly and amicably and takes a role as mediator. He plays the role as a guide while actively taking part in the discussion and guiding the disputants for settlement. He cannot coerce the parties but he takes the role of the advisor by facilitating the persons to understand the reasonableness and ground for compromising with a view to suggest settlements.

Duties of Conciliation Officer

The conciliator, depending upon the circumstances of each case, tries to induce the parties to negotiate by impressing upon them the advantages of settlement and binding decisions. The conciliation machinery provides time for the parties to reconcile by allowing adjournments for possible resolution of industrial disputes.[5] Even after sending failure report, he is not debarred from making efforts to settle the industrial disputes.

Conciliation officer is not competent to hear and decide any of the issues between the opposing parties to industrial disputes. In this regard, his role is limited to the purpose of inducing the parties to mediate and reach a fair and amicable settlement.[6]

Section 12(2) deals with the duty of conciliation officer to investigate disputes expeditiously and empowers him to "do all such things as it thinks fit for the purpose of the inducing the parties to arrive at a fair and amicable settlement".[7]

Powers of Conciliation Officer

The powers of the conciliation officer under Section 11 of the Industrial Disputes Act, 1947 are:

After giving a prior notice the conciliation officer is empowered to enter into the premises of the industrial establishment to inquire an industrial dispute which is existing or an apprehending.

The conciliation officer is vested with power to call for and inspect any relevant document relating to the dispute.

Conciliation officer may compel the parties to appear and produce all the relevant documents relating to the dispute as same powers as of the Civil Courts.

A conciliation officer is deemed to be a "public servant" as per Section 21of the IPC.

Duties of the Board of Conciliation

Board of Conciliation has duties which are enumerated under Section 13 of the Act. The Board is charged with the duty of bringing about a settlement of the industrial disputes referred to it and adopt any method as it thinks fit to minimise the conflict and patch up for arriving at an amicable settlement of the dispute.[8] If the effort of the Board is successful, it shall submit a memorandum of settlement duly signed by the parties to the dispute. Along with a memorandum of settlement a report shall be sent by the Board to the appropriate Government.[9] If no settlement is arrived by the parties, then the Board have to close the investigation and send complete report to the Government. The facts, findings, and the reasons of the disputes have to be stated as a failure report from the Board and further recommendations can also be given by the Board.[10]

Powers of Board of Conciliation

The Board of Conciliation has the power of a Civil Court, while trying a dispute on matters defined under the Act. "Every inquiry or investigation by a Board shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the IPC". The Board is empowered to investigate matters that affect the merits and rights without any delay an it has to do everything that promotes a fair and amicable settlement.

5 *Supra* note 2.
6 Madhavan Kutty v. Union of India, (1982) II LLJ 212.
7 Sasamusa Sugar Mills Limited v. State of Bihar, AIR 1955 Pat. 49.
8 Sub-section (1) of Section 13 of the ID Act, 1947.
9 Sub-section (2) of Section 13 of the ID Act, 1947.
10 Sub-section (3) of Section 13 of the ID Act, 1947.

Settlement

The conciliation officer is required to submit the report within 14 days of conciliation proceedings, however the time limit may be extended as may be agreed upon in writing by the parties subject to the approval of the conciliation officer. The memorandum of settlement is deemed to have to come to operation as per its term. In case of a Board, the report should be submitted within two months from the date on which the dispute was referred or within a short period as may be fixed by the appropriate government.

When a settlement is arrived privately that is otherwise than in the course of conciliation proceedings, it binds only the parties to the agreement. But when the settlement is reached with the help of the conciliation officer, the presumption is that the settlement is to be just and fair and has a far-reaching binding effect than a private settlement.[11] This shows that the government is motivating the parties involved i.e. the employer and employees to use the conciliation mechanism.

FACTORS AFFECTING THE EFFECTIVENESS OF CONCILIATION

1. Inordinate delay in disposal of cases.

2. Lack of sufficient awareness of the Conciliation officer about the conditions of industry.

3. Lack of faith by the parties in the integrity and skills of the conciliation officers.

4. Absence of commitment of conciliation officers.

5. Inadequate background and training of the conciliation officers.[12]

CHALLENGES

The absence of commitment and lack of faith shown by the employer and workers in the conciliation proceeding drive them with no option but to refer the industrial dispute for adjudication.[13] Further, Section 2A of the Industrial Disputes Act, 1947 allows the "individual workmen" to directly approach the labour courts instead of taking it to the conciliation proceedings. It would reduce the role of conciliation authorities and making the dispute resolution more costly for the labour.

The conciliation authority needs to make an objective analysis and assessment of the strength and weakness of each party to the industrial dispute and then exert the pressures on the manner in which they will be most effective. His tasks is the toughest one which would always depend on the nature of the industrial dispute before him and other related circumstances.[14]

CONCLUSION

The conciliation machinery could discharge its functions effectively in the post economic reform period, as numbers of cases were settled through conciliation machinery. Conciliation process provides a chance to rethink and compromise to arrive at settlement. Conciliation is a cheap and quick process in resolving industrial disputes. This has resulted in decreasing of number of references to adjudication.[15] Therefore, conciliation machinery has played an important role by inducing the parties to arrive at an amicable settlement. During 2015-2016, the Central Industrial Relations Machinery (CIRM) has intervened in 582 threatened strikes and its conciliation proceeding has succeeded in avoiding 579 strikes. This shows the success rate of around 99.48%.[16] similarly In the year 2016-2017, the Industrial disputes handled by machinery has intervened in 635 threatened strikes and its conciliation procedure has succeeded in avoiding over 608 strikes, which gives a success rate of 95.74%.[17] Similarly, in all the years, leading

up to 2021, approximately 461, 698, 89 threatened strikes have been avoided respectively.[18] Hence, it is crystal clear that the success rate of conciliation machinery at Central level is extremely high. Various studies have shown that working of conciliation

11 Britannia Biscuits Company Ltd. Employees Union v. ACL, (1983) LLJ 181.
12 B.S. Murthy, D.V. Giri & B.P. Rath, "Conciliation machinery in Orissa: A Study", 21 IJIR, available at: http://www.jstor.org/stable/27768906 (Accessed on - 29th September 2022).
13 *Supra* note 2.
14 G.M. Kothari, *A Study of industrial law* 77 (Wadhwa and company, New Delhi, 2000).
15 N. Krishnamurthy, "Industrial Relations scenario in textile industry in Tamil Nadu", 40 IJIR 476 (2005).
16 Government of India, Ministry of Labour and Employment, Annual Report, 2016-17, Pp. 47-48.
17 *Ibid.*
18 Government of India, Ministry of Labour and Employment, Annual Report, 2020-21, P. 29.

machinery is disappointing in resolution of industrial disputes.[19] These studies have discussed that failure of conciliation is due to the following reasons:

- lack of proper personnel with adequate training,
- frequent transfers of conciliation officers,
- lack of adequate powers of conciliation authorities, and
- inordinate delay in conclusion of conciliation proceedings.

When these defects are rectified, the conciliation method will be one of the most successful methods to avert work stoppages. This also will decrease the number of cases to be referred for adjudication. In addition to that, conciliation officer has to make honest and conscious efforts to maintain impartiality and objectivity in order to win the confidence of the parties. The services of eminent persons such as retired judges, outstanding public leaders, retired civil servants, professors of industrial relations, economists, trade union leaders, enlightened businessman and experienced personnel officers on an ad hoc basis are to be secured to make the conciliation proceedings more effective.[20] In light of the above discussion, it may be concluded that conciliation method is not a waiting room, but it is a best option as a winning place that provides guidance and chances to arrive at settlement free of cost. .

19 Debasish Biswas, "Effectiveness of Conciliation Resolving Industrial Disputes in West Bengal", PP 5-6 available at: https://www.researchgate.net/publication/352413470 (accessed on 3rd October 2022).

20 Kumar P. (1966), the working of conciliation machinery in Rajasthan, Indian Journal of industrial relations, 2(1), P. 47

About the Author

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Legal News Updates

Lee Hornberger

Michigan Arbitration and Mediation Case Law Update

By Lee Hornberger, Arbitrator and Mediator

I. INTRODUCTION

This update reviews appellate decisions issued since October 1, 2022, concerning arbitration and mediation. This update uses short citation style for COA unpublished decisions.

YouTube of 2021-2022 update presentation: https://www.youtube.com/watch?v=kZpATRmGCcQ

YouTube of 2020-2021 update presentation: https://www.youtube.com/watch?v=9Q7deVlExDI

YouTube of 2019-2020 update presentation: https://www.youtube.com/watch?v=I0TkP8zs-A8

II. ARBITRATION

A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning arbitration during review period.

B. Michigan COA Published Decisions

There were no COA published decisions concerning arbitration during review period.

C. Michigan COA Unpublished Decisions

COA affirms Circuit Court denying motion to compel arbitration

Schmidt v. Bowden, 360454 (January 5, 2023). After parties closed on sale of property, plaintiff commenced arbitration proceedings regarding sales commission with Board of Realtors. Defendant argued plaintiff was not entitled to commission and commission dispute not subject to arbitration. Circuit Court denied motion to compel arbitration. COA affirmed. Plaintiffs conceded parties did not contract to arbitrate issue of commission. Plaintiffs presented no written agreement regarding commission, with or without an arbitration clause. There was no arbitration clause for the court to review. Plaintiffs argued that even though parties did not agree to arbitrate, they are compelled to arbitrate because both plaintiff and defendant, as real estate professionals, voluntarily belonged to real estate organizations that require arbitration of disputes. Plaintiffs assert that defendant belonged to North Oakland County Board of Realtors and plaintiff belonged to Ann Arbor Board of Realtors, both of which have rules containing mandatory arbitration provisions. Plaintiffs asserted that Michigan 2021 Code of Ethics and Arbitration Manual applicable to real estate professionals, as well as MLS where defendant listed her home, also compel arbitration. Plaintiffs theorized that because parties are members of real estate associations, rules of those associations impute to parties' agreement to arbitrate a disputed commission. Plaintiffs did not support this theory with Michigan authority.

https://www.courts.michigan.gov/48dc08/siteassets/case-documents/uploads/opinions/final/coa/20230105_c360454_31_360454.opn.pdf

COA rules court, not arbitrator, to decide validity of arbitration agreement

Domestic Uniform Rental v. Custom Ecology of Ohio, Inc, 358591 (December 22, 2022). Reversing Circuit Court, COA held court, not arbitrator, must decide validity of arbitration agreement. Party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration. Existence of arbitration agreement and enforceability of its terms are judicial questions for court, not arbitrator. MCL 691.1686(2).

https://www.courts.michigan.gov/4b02a7/siteassets/case-documents/uploads/opinions/final/coa/20221222_c358591_32_358591.opn.pdf

Legal malpractice case

Lam v. Do, 354174 (November 22, 2022). Following binding domestic relations arbitration, Do was displeased with results. He cited errors in arbitrator's calculation of Lam's income for child support purposes and sought credit in property division for supporting Lam in her postdoctoral work. Arbitrator rejected these points and a final divorce decree entered. COA affirmed in part but remanded for recalculation of child support based on Lam's previous three years of income pursuant to 2017 Michigan Child Support Formula (MCSF) 2.02(B).

https://www.courts.michigan.gov/4b0373/siteassets/case-documents/uploads/opinions/final/coa/20221122_c354174_67_354174.opn.pdf

COA affirms confirmation of award

Clark v. Suburban Mobility Auth for Reg Transp, 359204 (November 10, 2022). In matters involving arbitration, it is purview of arbitrator to decide substantive issues between parties and court's role is limited. Whether dispute is subject to arbitration is for court to determine. MCL 691.1686(2). Award for PIP benefits not basis for reversal of Circuit Court's order.

https://www.courts.michigan.gov/4b01cc/siteassets/case-documents/uploads/opinions/final/coa/20221110_c359204_34_359204.opn.pdf

III. MEDIATION

A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning mediation during review period.

B. Michigan COA Published Decisions

COA affirms Circuit Court modification of consent JOD

Brendal v. Morris, ___ Mich App ___, 359226 (January 12, 2023). Courts are permitted to modify child support orders when changed circumstances demand, even if child support award was negotiated as part of consent JOD. Parties agreed to one-time lump-sum child support payment in consent JOD. Before payment could be made, recipient stopped exercising most of his parenting time. This change of circumstances warranted review of child support award. Circuit Court agreed with this principle. COA affirmed. Transfer requirement clearly was a child support award, and consent JOD provided for equal parenting time of alternating weeks.

https://www.courts.michigan.gov/48e2f2/siteassets/case-documents/uploads/opinions/final/coa/20230112_c359226_33_359226.opn.pdf

C. Michigan COA Unpublished Decisions

There were no COA unpublished decisions concerning mediation during review period.

About the Author

Lee Hornberger *is a former Chair of SBM ADR Section, Editor Emeritus of The Michigan Dispute Resolution Journal, former member of SBM Representative Assembly, former President of Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of Traverse City Human Rights Commission. He is member of Professional Resolution Experts of Michigan and Diplomate Member of The National Academy of Distinguished Neutrals. He is Fellow of American Bar Foundation and Fellow of Michigan State Bar Foundation. He has received Distinguished Service Award in recognition of significant contributions to field of dispute resolution and George Bashara Award from ADR Section in recognition of exemplary service. He is Best Lawyers of America for arbitration and mediation. He received First Tier ranking Northern Michigan for Mediation Best Law Firms 2022 and 2023; Second Tier ranking Northern Michigan for Arbitration Best Law Firms 2022 and 2023; Second Tier ranking Northern Michigan for Mediation Best Law Firms 2020; and First Tier ranking Northern Michigan for Arbitration Best Law Firms 2019. He is Michigan Super Lawyers for alternative dispute resolution.*

From the Field

Sheldon J. Stark

If You Had a Super Power, What Would Your Super Power Be?

By Sheldon J. Stark, Mediator and Arbitrator (retired)

It is said that all successful people can answer the question that begins this article. For mediators, the answer typically will address what qualities or approaches they bring to the mediation table when they are most successful in assisting participants in finding a resolution for their dispute. Here are three examples of mediator "super powers" from the field:

From Earlene Baggett-Hayes:

Asking questions is a basic skill for mediators and a super power. It has been estimated that over 85% of the mediator's work involves asking questions. While the mediator's responsibility is neither to conduct an investigation nor a cross-examination, the mediator's abilities to ask timely, carefully- crafted, intentional and appropriate questions prior to and during mediation sessions is critical.

Questions that I pose during mediation generally fall into a few overlapping categories. Understanding the categories of results-oriented questions maximizes successful outcomes in Mediation. If the mediator's goal is to obtain additional factual information, she can ask exploratory questions to receive more particulars, or clarifying questions to narrow in on certain points. Or, the mediator may desire additional input from a party. In these instances, motivational questions which encourage or stimulate new ideas, and participatory questions that induce input may be asked. During the mediation, questions may be posed to cause a party to self-reflect, self-evaluate, or self-assess, such as reality-checking questions, hypothetical questions, or rhetorical questions. If it appears that the parties have reached an impasse, leading questions, which generate movement and encourage parties to respond to certain ideas, and focusing questions, which keep parties directed at the core of their concerns, may also be effective in driving the mediation toward a resolution. Questions that encourage parties to express their feelings, hostilities, or emotions in instances of discord and dissension, and calming questions that allay anger and reduce anxiety may be utilized in high conflict situations.

During the mediation process, questions may vary depending on whether they are posed during joint or separate sessions. Whenever asked, robust and thought-provoking questions may assist in developing movement between and among the parties.

From Paul F. Monicatti

People are my superpower. The mediations I conduct are client oriented. My guiding principle is that mediations are about clients, not attorneys, and certainly not mediators. However, I'm not minimizing the attorney role in mediation because they are important to their clients for many reasons such as analyzing the relative merits and value of both sides' cases, persuasively presenting their client's story and evidence in a light most favorable to them, offering them legal and practical advice, designing and implementing negotiation strategy and tactics, and providing moral support. But, in the final analysis, success in mediation depends mostly on the clients.

Thus, a lot of what I do during mediation from start to finish is performed in that spirit. In opening remarks, I remind clients that no one, including judges and jurors, will ever know more or care more about their dispute than the clients present in the mediation. If given the latitude, I then gradually work at finding personal connections with the clients, which usually leads to rapport with them, earning their trust and confidence, and building a relationship of sorts. To me, mediation success is about cultivating and managing relationships, primarily with and between clients and secondarily with and between their attorneys.

Before mediation, I learn about attorneys from their websites, LinkedIn, or Google, and about clients during mediation from icebreaking small talk about common interests and life experiences. On the other hand, in personal injury mediations, I can actually learn a lot about clients personally before mediation from the progress notes and narrative reports by their treating physicians and therapists which usually are contained in their attorneys' pre-mediation statements.

In the latter stages of mediation, I tend to focus more on uncovering the often-hidden, intangible, non-monetary client interests, needs, concerns, and aspirations underlying their legal positions, the risks they face in litigation, and the alternatives to a mediated settlement agreement. I accomplish this by asking strategic open-ended, non-judgmental questions designed to raise tough issues touching on matters of consequence to them, yet being careful so that they don't offend or prompt defensiveness.

In the closing stages of mediation, if I've executed my plan well enough, I will have a good sense of what clients are really looking for from mediation and the clients will feel comfortable with me and confident that I will do everything possible to help them reach "the promised land" - - meaning, the widely publicized rate of success in mediation.

From me:

My super power is to be a calm, confident presence in the room. I can be calm and confident because I am well-prepared: I read the written summaries with care, developing a neutral, written timeline setting out the sequence of significant events in the dispute as I do so. This helps me understand how the dispute unfolded; and places new information coming out at the table in proper order. I also draft a series of questions and marshal them strategically to bring out important points from each side, raising questions of risk and the magnitude of risk a party faces if settlement is not achieved. I ask the lawyers privately and confidentially on an *ex parte* basis about their clients and what I can do to help them with their clients. I *want* to understand the parties, their perspective, and their emotional make up. When I meet the parties my questions, designed to draw them out, show my level of preparation and grasp of the issues. I try to get them talking, comfortable with me and the process. I ask for their goals and objectives. I listen with all my powers of concentration and experience; following up with additional questions to be certain I have heard and understood. If someone escalates or becomes emotional – parties *and* lawyers alike – I remain calm, reframing in neutral terms to show I recognize the importance of what they have disclosed but at the same time turning down the heat and neutralizing the poison. Indeed, no matter how difficult the material, the fire of righteous indignation, the painfulness of the process, or how stubborn the impediments, I make every effort to remain calm, cool and collected, empathetic but neutral. When the mediator remains calm and collected, people open up, share what is in their hearts and on their minds, respect the process and trust the mediator's commitment to objectivity and fairness. When the mediator remains calm managing a rational discussion of risks, costs – economic and non-economic - along with the potential rewards of closure, parties give serious consideration to understanding each other's proposals and ultimately recognize that a good settlement is always better than a good case.

I hope these comments will assist you, the reader, in identifying and strengthening *your* super power and enhance your skill set to assist participants in your mediation to peacefully resolve conflicts.

Legislation and Court Procedures Action Team Update

The ADR Section through its Legislation and Court Procedures Action Team ("LCPAT" - formerly, "EPP") continues to be quite active. LCPAT is responsible for drafting proposals for legislation, court rules, and other initiatives to benefit Michigan ADR, and for offering comments and recommendations concerning any proposals which impact Michigan ADR. Some of LCPAT's recent work:

- **Creating a Procedure for Submitted Proposals.** Zena Zumeta suggested to LCPAT that a procedure be created for when a proposal will be submitted that creates a substantive change affecting ADR. LCPAT created a procedure and presented it to the ADR Council for approval. The Council approved the procedure as follows: "When LCPAT recommends a major, substantive change to a statute, court rule, or to the Standards of Conduct for Mediators, subject to preliminary ADR Section Council approval, LCPAT will circulate the proposal to the full ADR Section for comment before submitting it to the Council for final approval. LCPAT will have discretion to determine whether a change is major and substantive, how and whether to use comments received, and the language of proposals submitted to Council. LCPAT shall forward comments received in writing to council with the submitted proposal." In addition, LCPAT will likely use articles (such as this one) in the ADR Journal, on the section website, and through Constant Contact to disseminate proposals and receive comments.

- **Possible Changes to Michigan Requirements for Mediation Training**. LCPAT supported, and the ADR Council approved, creating a task force combining LCPAT and the Skills Action Team ("SAT), that will join with the Michigan Community Mediation Association, to explore creating a common basic mediation training before specialized mediation training is given. Any such changes would need to be approved by SCAO.

As explained by Zena Zumeta and Bob Wright:

> Currently, MCR 2.411(F) (for General Civil mediators) and MCR 3.216(G) (for Domestic Relations mediators) each require mediators to complete 40 hours of basic mediation training in order to be listed on a court roster of approved mediators for each category. (Domestic mediators must also complete an additional 8 hours of training on screening for domestic violence.)
>
> For years, some mediators who wish to mediate and be listed on court rosters for BOTH General Civil and Domestic Relations mediation have complained about having to take the full 40 hours for both fields of practice and asked if there aren't some "basic training" components which could be eliminated from their second training to qualify for either field.
>
> MCMA has been considering the concept of creating a basic mediator skills module which would provide foundational support for any type of mediation the student wishes to pursue, and adding advanced training components to qualify them for specific types of disputes and areas of law, such as domestic relations, employment, complex civil litigation, probate, elder law, negligence, etc. This is a concept that Ohio has used for many years, with a Fundamentals of Mediation component of about 20 hours (including an online component) and the Specialized Trainings including Family Mediation, Elder Mediation and others.
>
> An exciting aspect of this concept is that courts could have specialized rosters with mediators trained to resolve the specific type of dispute courts encounter and the training can be tailored to fit those types of disputes with a reduction in time commitment required to qualify for listing on more than one specialized roster. Also, if a student is not interested in appearing on any court rosters, perhaps only wanting to mediate non-litigated or small claims matters for a CDRC, they may only need the basic skills module to do so with or without an additional module for such disputes.

Zena will co-chair a small task force with Dr. Jane Millar, MCMA President. It is also contemplated that an Advisory Committee will be formed as the process moves forward that will include all SCAO-approved trainers and other interested parties.

Eldercaring Coordination Forms. Zena Zumeta proposed forming a committee including the ADR, ELDRS, and Probate sections to review proposed Eldercaring Coordination court forms, hoping a coordinated effort will ultimately result in SCAO approval for the forms. LCPAT formed a sub-committee, to coordinate with other interested SBM sections, to review these court forms. Zena will chair this subcommittee.

Follow-Up to Michigan Judicial Council Submission. The Michigan Judicial Council ("MJC") published an Operational Plan ("OP"). LCPAT formed a subcommittee to review the OP and compare it with the items of concern/interest the ADR Section submitted to the MJC on January 31, 2022 (previously discussed in the April 2022 ADR Journal), to see where ADR Section concerns may fit into the OP. The subcommittee consists of Dale Iverson, Kris Arnett, and me; anyone one else interested is welcome.

The OP states as its vision "Michigan's Judicial System is accessible to all and trusted by all." It also lists core values, such as "free from external influences," "Timely," "Consistent," "Fair and impartial," and has goals such as 'Unified Technology Infrastructure" and "The Public's Experience & Effective Problem Resolution." It is evident that the issues we submitted to them fit nicely, to highlight a few:

- Our suggestion of a statewide mediator roster - requires a unified technology infrastructure, and allows the public access to diverse mediators from all over the state.
- Pointing out that Judges sometimes choose mediators for parties in contravention of the court rule - may give the perception that the process is not fair and impartial and free from influences, and limits selection of diverse mediators.
- Uniform court procedures when parties file joint domestic relations' petitions per court rules adopted in 2019 - some courts are not following the new rules, causing unnecessary delays, paperwork, and court appearances, damaging the experience of members of the public who have employed effective problem resolution in an effort to streamline their court process.
- More available information given on the availability of pro bono mediators - allowing the judicial system to be accessible to all.

The MJC formed work groups to tackle their stated goals. Our subcommittee is working to put together material to provide to these work groups to show how mediation, and perhaps other ADR processes, can help them achieve their vision and goals, and why the ADR Section must be included in these discussions.

LCPAT's members care deeply about legislation and court procedures that affect ADR Section members and do not hesitate to take action when appropriate. Our meetings are usually quite interesting and often filled with lively discussion. Any section member who shares this interest would be most welcome to join our action team.

Upcoming Mediation Trainings

The following training programs have been approved by the State Court Administrative Office. The list is updated periodically as new training dates become available. Please contact the training center for further information.

https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/

Advanced Mediator Training

Elder Law Mediation Training (16 Hours)

ONLINE DATES: March 8-9, 2023
Hosted By: Resolution Services Center

https://www.rsccm.org/events/elder-law-mediation-training

Using Apologies in Mediation - The Good, the Bad & the Ugly (8 Hours)

Date: May 1, 2023
Location: Lansing
Hosted By: Resolution Services Center

https://www.rsccm.org/events/8-hour-mediator-update-training-may-1-in-person

Elevating Your Mediation Practice (8 Hours)

Date: June 7, 2023
ONLINE DATE: June 7, 2023
Hosted by: Trainers Anne Bachle Fifer, Dale Iverson, Bob Wright

https://www.eventbrite.com/e/elevate-your-mediation-practice-amt-for-all-michigan-mediators-registration-450914717057

48-Hour Domestic Relations Mediator

ONLINE DATES: April 26-28 & May 1-3, 2023
Hosted By: Conflict Resolution Services

https://crsmediationtc.org/product/domestic-relations-mediation-training/

Dates: May 8-12 & 15, 2023
Location: Lansing, MI
Hosted By: Resolution Services Center

https://www.rsccm.org/events/domestic-relations-mediation-training-may-2023

How to Find Mediation Trainings Offered in Michigan

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

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

https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/

MICHIGAN PLEDGE TO ACHIEVE DIVERSITY AND INCLUSION

WE CAN,
WE WILL,
WE MUST

Diversity creates greater trust and confidence in the administration of justice and the rule of law, and enables us to better serve our clients and society.

We believe that diversity and inclusion are core values of the legal profession, and that these values require a sustained commitment to strategies of inclusion.

Diversity is inclusive. It encompasses, among other things, race, ethnicity, gender, sexual orientation, gender identity and expression, religion, nationality, language, age, disability, marital and parental status, geographic origin, and socioeconomic background.

Diversity creates greater trust and confidence in the administration of justice and the rule of law, and enables us to better serve our clients and society. It makes us more effective and creative by bringing different perspectives, experiences, backgrounds, talents, and interests to the practice of law.

We believe that law schools, law firms, corporate counsel, solo and small firm lawyers, judges, government agencies, and bar associations must cooperatively work together to achieve diversity and inclusion, and that strategies designed to achieve diversity and inclusion will benefit from appropriate assessment and recognition.

Therefore, we pledge to continue working with others to achieve diversity and inclusion in the education, hiring, retention, and promotion of Michigan's attorneys and in the elevation of attorneys to leadership positions within our organizations, the judiciary, and the profession.

SBM
State Bar of Michigan

Sign the Michigan Pledge to Achieve Diversity and Inclusion in the Legal Profession at https://www.michbar.org/diversity/pledge

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ALTERNATIVE DISPUTE RESOLUTION SECTION

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SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION 2022-2023

The ADR Section of the State Bar of Michigan is open to lawyers and other individuals interested in participating. To comply with State Bar of Michigan requirements, lawyer applicants to the ADR Section are called Members and non-lawyer applicants to the ADR Section are called Affiliates. The mission of the Alternative Dispute Resolution Section is to encourage conflict resolution by:

1. Providing training and education for ADR professionals;
2. Giving professionals the tools to empower people in conflict to create optimal resolutions;
3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and,
4. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

Membership in the Section is open to all members of the State Bar of Michigan. Affiliate status is open to any individual with an interest in the field of dispute resolution. *(Section membership is free for sitting judges)*

The Section's annual dues of $40.00 entitle you to receive the Section's *Michigan Dispute Resolution Journal*, participate in programming, further the activities of the Section, receive Section announcements, participate in the Section's SBMConnect discussions, and receive documents prepared by and for the ADR Section.

In implementing its vision, the ADR Section is comprised of various Action Teams. You are encouraged to participate in the activities of the Section by joining an Action Team. Information on Action Teams will be forwarded upon processing of this Application.

Note: Dues are due between October 1 and November 30.

APPLICATION TYPE:_____Member_____Sitting Judge_____Affiliate *(Affiliate memberships are subject to Council approval.)*

NAME:_____

FIRM:_____

ADDRESS: _____

_____

CITY:_____STATE:____ ZIP CODE: _____

PHONE:_____

E-MAIL: _____

State Bar No._____(if applicable)

Have you been a Member of this Section before:_____

Are you currently receiving the *Dispute Resolution Journal*? _____

Annual dues are $40.00, or $48.00 if Member or Affiliate certificate is requested. There is no proration for dues and membership must be renewed on October 1 of each year.

All orders must be accompanied by payment. Prices are subject to change without notice.

Non-members must submit payment by check.

Please make check payable to:
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Enclosed is check #_____

Mail your check and completed membership form to:

Attn: Dues Dept., State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933

Members using a Visa or MasterCard must join online at e.michbar.org

Revised 10/2022

SBM Connect
State Bar of Michigan

Connect With Us

The Alternative Dispute Resolution Section has a website and interactive community for its members - SBM Connect. This private community enhances the way we communicate and build relationships through the Section. Log in to SBM Connect today and see what the buzz is all about!

The ADR Section SBM Connect hyperlink is:

http://connect.michbar.org/adr/home

- ACCESS to archived seminar materials and *The Michigan Dispute Resolution Journal*
- FIND upcoming Section events
- NETWORK via a comprehensive member directory
- SHARE knowledge and resources in the member-only library
- PARTICIPATE in focused discussion groups

ADR Section Mission

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1. Providing training and education for ADR professionals;
2. Giving professionals the tools to empower people in conflict to create optimal resolutions;
3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and,
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Join the ADR Section

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The Section's annual dues of $40 entitles you to receive the Section's *The Michigan Dispute Resolution Journal*, participate in programming, further the activities of the Section, receive Section ListServ and SBMConnect announcements, and participate in the Section's SBMConnect and the Section's Discussion ListServ. The Section's ListServ and SBMConnect provide notice of advanced training opportunities, special offers for Section members, news of proposed legislative and procedural changes affecting your ADR practice, and an opportunity to participate in lively discussions of timely topics.

In implementing its vision, the ADR Section is comprised of several Action Teams. You are encouraged to participate in the activities of the Section by joining an Action Team. The Action Teams include the Skills Action Team, responsible for advanced ADR training provided at the annual ADR Summit, annual ADR Meeting and Conference, and Lunch and Learn teleseminars; Effective Practices and Procedures Action Team, responsible for monitoring and initiating judicial and legislative changes affecting ADR in Michigan; Judicial Access Team, charged with assisting courts to provide ADR to litigants; and the Publications Action Team, providing this *Journal* and Listserv and SBMConnect announcements concerning meetings, conferences, trainings and other information related to ADR.The membership application is at: http://connect.michbar.org/adr/join.

Editor's Notes

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.

Prior ***Journals*** are at http://connect.michbar.org/adr/journal.

ADR Section Member Blog Hyperlinks

The SBM ADR Section website contains a list of blogs concerning alternative dispute resolution topics that have been submitted by members of the Alternative Dispute Resolution Section of the State Bar of Michigan.

The list might not be complete. Neither the State Bar nor the ADR Section necessarily endorse or agree with everything that is in the blogs. The blogs do not contain legal advice from either the State Bar or the ADR Section.

If you are a member of the SBM ADR Section and have an ADR theme blog you would like added to this list, you may send it to Editor, Lisa Okasinski @ Lisa@Okasinskilaw.com with the word BLOG and your name in the Subject of the e-mail.

The blog list link is: http://connect.michbar.org/adr/memberblogs.

ADR Section Social Media Links

Here are the links to the ADR Section's Facebook, Instagram and Twitter pages.

You can now Like, Tweet, Connect via LinkedIn, Comment, and Share the ADR Section!

https://www.facebook.com/sbmadrsection/

https://twitter.com/SBM_ADR

https://www.instagram.com/sbmadrsection/

https://www.linkedin.com/groups/12083341

ADR Section Homepage

The ADR Section website Homepage is at http://connect.michbar.org/adr/home . The Homepage includes the Section Mission Statement, Who We Are, Why You Should Join the ADR Section, and Let Litigants Know that MEDIATION Really Works. The Homepage also provides access to the Section calendar, events, and ADR Section publications.

Dispute **Resolution** Journal

State Bar of Michigan
306 Townsend St.
Lansing, MI 48933

The Michigan Dispute Resolution Journal is published by the ADR Section of the State Bar of Michigan. The views expressed by contributing authors do not necessarily reflect the views of the ADR Section Council. The Michigan Dispute Resolution Journal seeks to explore various viewpoints in the developing field of dispute resolution.

For comments, contributions or letters, please contact:

*Lisa Okasinski - lisa@okasinskilaw.com – **313-355-3667***

http://connect.michbar.org/adr/newsletter