The Michigan
FALL 2023 | VOL. 33 NO. 2

Dispute Resolution Journal

A PUBLICATION OF THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE STATE BAR OF MICHIGAN

Alternative Dispute Resolution Section Council (813300)

As of November 1, 2023

Chair

P55501 Jennifer M. Grieco
Altior Law PC
401 S Old Woodward Ave Ste 460
Birmingham MI 48009-6622
Phone: (248) 372-9884
Fax: (248) 792-2838
e-mail: jgrieco@altiorlaw.com

Vice Chair

P77752 Lisa Whitney Timmons, Detroit

Secretary

P75818 Zeina Baydoun, Dearborn

Treasurer

P73149 James Earl Darden, II, Westland

Council Member

Term Ending: 2024

P75818 Zeina Baydoun, Dearborn
P82657 Alex Green, IV, Lathrup Village
P27700 Richard A. Kerbawy, Lansing
P78470 Lisa M. Okasinski, Detroit
P77752 Lisa Whitney Timmons, Detroit
P29816 O'Neal O. Wright, West Bloomfield
P41017 Hon. Christopher P. Yates, Grand Rapids

Term Ending: 2025

P73149 James Earl Darden, II, Westland
P45391 Mathew Kobliska, Bloomfield Hills
P34884 Denise Langford Morris, Detroit
P39389 E.R. Scales, Southfield
P20449 Edmund J. Sikorski, Jr., Saline
P72248 M Marie Walker, Traverse City
P72828 Shawntane Williams, Farmington Hills

Term Ending: 2026

P39401 Dennis M. Barnes, Canton
P24052 Stanley T. Dobry, Warren
P39787 Hon. Patricia P. Fresard, Detroit
P45430 Christine P. Gilman, Grand Rapids
P48768 Michelle C Harrell, Southfield
P28165 Larry J. Saylor, Detroit
P70608 Shawndrica Nicole Simmons, Pontiac
P65918 Marc M. Stanley, Jackson

Commissioner Liaison

P43773 Thomas P. Murray, Jr., Grand Rapids

ADR Section Chair's Corner

Jennifer Grieco, Chair

Jennifer Greico, Chair

It is my honor to step into the role as Chair of the ADR Section and to follow in the footsteps of the distinguished list of prior Chairs of the Section. https://connect.michbar.org/adr/council. I am thankful for our former Chairs' service and dedication to the Section. I am especially thankful for the service of our immediate Past Chair, Ed Pappas. I've had the privilege of following in his footsteps as former Presidents of both the Oakland County Bar Association and the State Bar of Michigan. In every role, Ed has led with thoughtful insight, professionalism, and humor. These traits are what make him a sought-after mediator, arbitrator, and bar leader. We were lucky to have his years of service on the ADR Section Council and I'm grateful that he will continue to serve the Section in his role as Immediate Past Chair. Thank you, Ed, for a job well done – again.

I also want to thank the members of our Council that rotated off this year: Erin Archerd, Susan Davis, Nakisha Chaney, Edward Sikorski, and Justice (Ret.) Kurtis Wilder. We were fortunate to have each of them on the Council and are grateful for their dedication to the Section over the years. And we welcome our new Council members: Judge Patricia Fresard, Chief Judge of the Wayne County Circuit Court, Dennis Barnes from Barnes ADR, Michelle Harrell from Taft, and Marc Stanley, Executive Director of SEDRS. We look forward to their contributions in the coming years.

By way of introduction, I'm a business litigator, who also handles professional negligence claims. As I have said a few times lately, I'm a full-time litigator, who has the privilege of mediating and arbitrating disputes for other litigants in my "free time". Like many, after practicing for 26 years, I find myself enjoying the opportunity to step away from the role of advocate to serve as a neutral. Many of my contemporaries who have been litigating for "far too long" feel the same way. Having completed the 40-hour mediator's course, they are eager for opportunities to serve in this role as the profession transitions to the next generation of neutrals.

While our Section consists of many members who are full-time neutrals, I'd like to see our Section increase membership among these full-time litigators who are up and coming neutrals. There is much that this Section has to offer new or future ADR professionals. In fact, there is much this Section can offer all litigators who utilize mediation and arbitration services. By way of example, the Section can provide litigators with tools and insight to best utilize dispute resolution for a quicker and, hopefully, more beneficial outcome for their clients. Considering the high percentage of cases that are resolved without trial,[1] our Section can and should be a resource to all who utilize alternative dispute resolution, which goal aligns with the Section's Mission Statement.[2] We should expect that the number of disputes sent to mediation or arbitration will only increase in the future and that new lawyers, learning to practice law in the Zoom environment, will rely heavily on neutrals to resolve their cases because they have not learned to settle cases by talking with opposing counsel at the courthouse or simply picking up the phone. I am hopeful that membership in this Section will appeal to a broader audience as we work together to train and educate for the increase in alternative dispute resolution. As noted by a recent interview with former Chief Justice Bridget McCormack, who now serves as the President and CEO of the American Arbitration Association, "The Future of Dispute Resolution is Here."[3]

And, along those lines, I'd like to encourage more members to get involved in our Section. We have several Action Teams (committees) that could use your ideas and insight. You don't have to be a member of the Council to serve on an Action Team or to provide feedback. Our Skills Action Team develops excellent programming throughout the year with Lunch and Learns, the ADR Summit and the Annual Conference. Do you have suggestions for future programming for seasoned neutrals, new ADR professionals and/or litigators? Please share those ideas with the Skills Action Team, currently chaired by Larry Saylor and Alex Green, IV. In addition to the Skills Action Team, you can provide your voice to proposed changes to court rules that impact mediation or arbitration through input to the Legislative and Court Procedures Action Team. You can support efforts to increase the use of diverse neutrals by joining our Diversity & Inclusion Action Team. You can also support the efforts of the Community Dispute Resolution Centers Action Team, the Membership Outreach Action Team, the Judicial Action Team, or the Publications Action Team. More information about each of the Action Teams can be found on our webpage. https://connect.michbar.org/adr/teams

The ADR Section is also privileged to be sponsoring the July 2024 ADR theme issue of the Michigan Bar Journal. For this special issue, the ADR Section will be selecting and submitting four articles to the State Bar (up to 2,500 words each, including

footnotes).[4] The deadline to submit a proposal for an article topic is January 12, 2024. Please submit proposals to either Lisa Okasinski lisa@okasinskilaw.com or me, jgrieco@altiorlaw.com. Articles of interest to the wider Bar (as opposed to only ADR practitioners) and articles about cutting edge topics are highly encouraged. We look forward to putting together another informative ADR themed Bar Journal.

Finally, if you were unable to attend the Section's Annual Conference on September 29 and 30, 2023, or missed any of the sessions that you wanted to attend, they are now available to all Section members on the SBM ADR Section webpage.[5] We are thankful for all the speakers and their excellent and informative presentations.

Endnotes

1 According to the information provided by the Michigan Supreme Court, less than 1.5 percent of civil cases filed in Michigan's circuit courts are resolved through trial. https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/guide-to-adr-processes/

2 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 mediator bias; and,
4. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

3 Corporate Counsel Business Journal, The Future of Dispute Resolution is Here, (October 5, 2023), The Future of Dispute Resolution is Here (ccbjournal.com)

4 The authors must closely follow the submission requirements outlined in the State Bar's article guidelines, in the attached link: http://www.michbar.org/file/journal/about/artguidelines.pdf. Only academic articles with proper citations (using the Michigan Appellate Opinion Manual) will be considered for publication.

5 Look under Resources, Section Library, Annual Conference, 2023.

Supreme Court Holds District Court Proceedings Must be Stayed During Appeal of Order Refusing to Enforce an Arbitration Agreement

By Matthew Allen, Sarah Reasoner, and Tom Cranmer


Matthew Allen


Sarah Reasoner


Tom Cranmer

On June 23, the Supreme Court held that proceedings in federal district court must be stayed during an interlocutory appeal from an order declining to enforce an arbitration agreement. Such an order can be appealed immediately under section 16(a) of the Federal Arbitration Act (FAA), 9 U.S.C §16(a). *Coinbase, Inc. v. Bielski*, 600 U.S. ____, No. 22-105.

The appellant, Coinbase, Inc., is an online platform on which users can buy and sell cryptocurrencies. Coinbase requires its customers to sign a user agreement mandating arbitration of disputes arising out of the agreement. Bielski, a Coinbase user, filed a putative class action complaint in the U.S. District Court for the Northern District of California, alleging that Coinbase failed to replace funds fraudulently taken from his and other users' accounts. The district court denied Coinbase's motion to compel arbitration, and Coinbase filed an appeal to the Ninth Circuit under §16(a). Coinbase filed motions in the district court and in the Ninth Circuit requesting a stay of proceedings during the appeal, but both motions were denied.

In an opinion for the Court authored by Justice Kavanagh, the five-justice majority noted that §16(a), signed into law by President Reagan in 1988, is one of the rare statutes that allows an immediate appeal from a non-final district court order. While §16(a) does not say whether district court proceedings must be stayed during the appeal, several other circuits had held that §16(a) requires a stay of proceedings during an interlocutory appeal on the issue of arbitrability. The majority found the question was resolved by its earlier decisions holding that the filing of a notice of appeal generally divests the district court of jurisdiction, notably *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The Court reasoned that absent a stay, the right to an interlocutory appeal granted by Congress "would be largely nullified," as "many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost—even if the court of appeals later concluded that the case actually had belonged in arbitration all along." Indeed, the parties could even "be forced to settle to avoid the district court proceedings they contracted to avoid through arbitration," a risk that is particularly significant in a class action. Finally, allowing a case to proceed in district court during an appeal risks the "waste [of] scarce judicial resources." Expressing confidence that Coinbase's interlocutory appeal could be handled with "appropriate expedition," the Court reversed and remanded.

Justice Jackson dissented, joined by Justices Sotomayor and Kagan, and in substantial part by Justice Thomas. The dissent pointed to other statutes in which Congress explicitly allowed for a stay of proceedings during an interlocutory appeal, emphasizing that such language is missing from §16(a).

Discovery Disputes Resolved

How to Effectively Use the Discovery Mediation Court Rule

By Edmund J. Sikorski Jr., JD & Laura Goderis, JD

Perhaps the most vexatious part of any litigation occurs in the process of discovery. The words 'unduly burdensome' are the bane of every judge's existence. The frustrations with discovery are not a secret and are not limited to just the judge. The discovery process is continually a 'work in progress' as reflected in the staff comments found in subchapter MCR 2.300 of the Michigan Court Rules.[1]

MCR 2.411(H), Mediation of Discovery Disputes, states as follows:

> The parties may stipulate to or the court may order the mediation of discovery disputes (unless precluded by MCR 3.216[C][3]). The discovery mediator may by agreement of the parties be the same mediator otherwise selected under subrule (B). All other provisions of this rule shall apply to a discovery mediator except:
>
> (1) The order under subrule (C)(1) will specify the scope of issues or motions referred to the discovery mediator, or whether the mediator is appointed on an ongoing basis.
>
> (2) The mediation sessions will be conducted as determined by the mediator, with or without parties, in any manner deemed reasonable and consistent with these rules and any court order.
>
> (3) The court may specify that discovery disputes must first be submitted to the mediator before being filed as a motion unless there is a need for expedited attention by the court. In such cases, the moving party shall certify in the motion that it is filed only after failure to resolve the dispute through mediation or due to a need for immediate attention by the court.
>
> (4) In cases involving complex issues of ESI, the court may appoint an expert under MRE 706. By stipulation of the parties, the court may also designate the expert as a discovery mediator of ESI issues under this rule, in which case the parties should address in the order appointing the mediator whether the restrictions of MCR 2.411(C)(3) and 2.412(D) should be modified to expand the scope of permissible communications with the court.

In 2020, a special committee of the State Bar of Michigan submitted a proposal with changes to the Michigan Court Rules, which were ultimately approved for submission to the Court by the Bar's Representative Assembly. The proposals take into consideration that the discovery process is getting more complicated and arduous. MCR 2.411 (Mediation) was expanded to add a subsection (H) allowing for the mediation of all discovery disputes by consent, or by Court order.

The Committee Notes following the new rule recite, in material part:

> …that a small number of cases are particularly complex and generate an inordinate number of discovery disputes requiring the Court's attention. As such, in order to best serve the parties and the interests of justice, the discovery mediation may provide enhanced case management without causing undue expense, delay, or burden and without prejudice to a party's right to have all discovery disputes adjudicated by the Court. In no circumstance may a Court delegate its judicial authority to the discovery mediator.[2]

However, the use of MCR 2.411 should not be limited to just those small number of 'complex cases,' but can be used in all cases where a party has flouted their discovery obligations, created unnecessary delay in the discovery process, failed to promptly communicate with opposing counsel and repeatedly lodged baseless boilerplate objections to discovery requests.[3] In short, MCR

2.411(H) moves toward a more collaborative approach to resolving discovery issues.[4] Since the adoption of MCR 2.411(H), there appears to be little, if any, articles written or guidance given addressing the practical implications of implementing the rule so this article is intended to provide that needed guidance.

By MCR 2.411 joining discovery conflicts with ADR, the parties and the Court have the ability to craft more concrete discovery orders, processes and parameters. The use of MCR 2.411(H) by the Court is usually activated when a Motion to Compel Discovery has been filed. The use of MCR 2.411(H) does not alleviate the Court from being the sole arbiter of unsettled discovery disputes, but it allows for a discussion 'at the table' versus an argument in the courtroom.

MCR 2.411(H)(4)*addresses cases involving complex issues of ESI (electronically stored information). With ESI issues, the court may appoint an expert under MRE 706.* That person serves in the dual role of expert and mediator. The subrule reminds the parties to consider the limitations placed on mediator by MCR 2.411(C)(3) and MCR 2.412(D) and to include any necessary modifications regarding those limitations in the Court order appointing the mediator.**

Crafting discovery mediation orders needs to take into consideration the pitfalls of leaving parties to their own devices. Tight parameters, limited choices, and equal financial responsibility are all good starts. The following is a typical order issued in the Washtenaw County Circuit Court, by the Hon. Archie C. Brown:

1. *Per MCR 2.411, the parties are ordered to mediation regarding all discovery disputes.* Any discovery related motions shall not be filed until after the parties have completed Discovery Mediation as to that particular issue.*

   Reasoning: The parties are now required to mediate all discovery issues prior to filing a motion. The courtroom is no longer used as a revolving door for tattling and complaining.

2. The parties shall agree, in writing, on a Discovery Mediator (DM) on or before ____(a date usually 7 days from the date of the order). If they are unable to agree on a mediator _____shall act as the DM

   Reasoning: Precludes unnecessary delay in 'agreeing' on the DM. If the parties cannot agree, the parties are well informed on who will be ordered to act as their DM.

3. The Discovery Mediation shall occur on or before _____ (usually 3-4 weeks form the date of the order)

   Reasoning: Precludes unnecessary delay in scheduling. Limits the parties to a specified period of time to complete mediation.

4. The parties shall share equally the cost of the DM.

   Reasoning: Both parties become financially responsible for the decisions made in their cases. However, this does not preclude the mediator from recommending, or the Court ordering, at the conclusion of DM that one party should be responsible for a higher percentage of the cost, or the cost in its entirety.

5. The current Scheduling Order shall remain in full force and effect.

   Reasoning: DM is not an excuse for adjourning substantive dates. Issues with discovery need to be articulated sooner, rather than later.

6. The parties may stipulate to broaden the powers of the DM to include all aspects of ADR.**

   Reasoning: The DM should not be limited to mediating 'just discovery issues.' Discovery Mediation often gives momentum to the parties resolving the entire case.

7. The parties are put on notice, that if it is determined that any party has failed to produce discovery, the Court shall impose appropriate sanctions, including, but not limited to, barring the offending party from using any such evidence or any evidence that may have flowed therefrom, dismissal, or default.

Reasoning: There is no misunderstanding that failure to cooperate with discovery has dire consequences.

Each discovery mediation order that follows should be individualized to the at-issue case. However, it is imperative that the parties understand the ramifications of their decisions regarding discovery and that discovery mediation is not used as a delay tactic.

The DM may also have additional requirements/parameters. In cases where this co-author (Edmund Sikorski) has been appointed the DM, the parties execute a mediation agreement that specifies the DM procedure, protocol, fee arrangements AND the following stipulation:

> "The parties stipulate that the mediator is authorized to communicate to the Court matters provided for in MCR 2.411(H)"

The DM may then conduct pre-mediation telephone conferences with the parties, request pleadings, documents, and correspondence regarding the issues, set a time, date, and place for a formal mediation session. The parties (and mediator) need to understand that Discovery Mediation is not where compromise and "split the baby" approaches are utilized. Instead, the DM is determining the *discoverability* of types of information, per the Michigan Rules of Evidence, Michigan Court Rules,[5] statutory authority and case law. Just because something is discoverable does not automatically make it admissible.

The next goal of the process is to further identify and clarify the disputed issues, facilitate the discovery process and exchange of appropriate materials, documents, and other sources of discoverable material, agree on the method and format of production, and set a time for compliance. Discovery Mediation is a structured process.

After the conclusion of formal discovery mediation session(s), the DM files a Mediation Status Report (SCAO form MC 280) identifying the outcome of the case. If the settlement is as to discovery issues only, the title of MC 280 should be modified to indicate that it is a ***Discovery*** Mediation Status report. If the parties have stipulated to broaden the powers of the DM to include all aspects of ADR and the entire case settles, the title of MC 280 does not need to be modified.

If the discovery mediation is unsuccessful, regardless of whether ADR powers have been broadened, the DM files MC 280 checking Box 3b. In addition, the DM submits a ***confidential*** report to the Court regarding the discovery issues only. The report will add significant cost to the process.

The report should include, but is not limited to, identifying the unresolved discovery issue, identifying the claims of the parties regarding the issues in relation to the criteria required by MCR 2.302(B) and the DM's written recommendations to the Court. The DM provides the written recommendations to the Court only. The report is NOT shared with the parties as it only contains recommendations.

The Court then issues its Order regarding the discovery dispute.

If the Court orders substantial discovery sanctions, such as shifting the entire cost of the mediation fee charged by the mediator, it is absolutely astounding to see how quickly the cases seem to settle in their entirety!

Currently, many of the limitations to using Discovery Mediation revolve around the limited number of mediators willing to participate as a DM. In Discovery Mediation, the DM is required to review volumes of documents. A task that many are not willing to volunteer for. In addition to the usual mediation requirements, it is also recommended that the DM have additional discovery training and certification, especially when discovery demands call for production of documents and other ESI data, such as emails. Such training and certifications are available through The Association of Certified e-Discovery Specialists (ACEDS).

The use of MCR 2.411(H) is a positive opportunity to remove the negative connotations of the words 'unduly burdensome' from the legal vernacular. MCR 2.411(H) starts the mediation process early in the case and allows mediation to become an integral part of the entire case; unlike waiting until the day of the final settlement conference to ask for a trial adjournment so the case can 'mediate.'

About the Authors

Edmund J. Sikorski

Edmund J. Sikorski Jr. *is an attorney and civil mediator 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, 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 State Supreme Court for more than 45 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 200 hours of advanced mediation training. Sikorski is a FINRA Dispute Resolution Arbitrator and holds ACEDS eDisovery Executive Certification, ACEDS eDiscovery Advanced Certification and a Harvard PON Negotiation and Leadership Certification. He can be reached at:* edsikorski3@gmail.com , www.edsikorski.com, *or 734-845-4109.*

Laura Goderis

Laura K. Goderis *has been an attorney for almost 30 years. Starting her career as a private practitioner in family and criminal law, she made the move to working for the Washtenaw County Trial Court as a judicial attorney for the Hon. Archie C. Brown handling domestic, criminal, business and general negligence cases. She has served as the chairperson of the Alternative Dispute Resolution Committee of the Family Division of the Washtenaw County Trial Court, and has completed training in divorce mediation and domestic violence screening. Ms. Goderis has also served as an adjunct professor in Eastern Michigan University's paralegal program since1999. She holds a JD from Michigan State University (f/k/a Detroit College of Law) and an MBA from Michigan State University.*

Endnotes

1 Staff Comment to 2020 Amendment

> These amendments are based on a proposal created by a special committee of the State Bar of Michigan and approved for submission to the Court by the Bar's Representative Assembly. The rules require mandatory discovery disclosures in many cases, adopt a presumptive limit on interrogatories (20 in most cases, but 35 in domestic relations proceedings) and limit a deposition to 7 hours. The amendments also update the rules to more specifically address issues related to electronically stored information and encourage early action on discovery issues during the discovery period.
>
> The amendment of MCR 2.309(A)(2) sets a presumptive limit of 20 interrogatories for each separately represent party. Several commenters suggested that the term "discrete subpart" be more explicitly defined. But the rule's reference to "a discrete subpart" is intended to draw guidance from federal court construing FR Civ P 30(a)(1). Generally, subparts are not separately counted if they are logically or factually subsumed within the necessarily related to the primary question. In upholding the limit, parties and court should also pragmatically balance the overall goals of discovery and the admonition of MCR 1.105. Further the intent of the discovery requests have the full time period to do so as provided under these rules prior to the expiration of the discovery period.

2 SBM Civil Discovery Guidebook effective 1/1/202 at pages 70-71

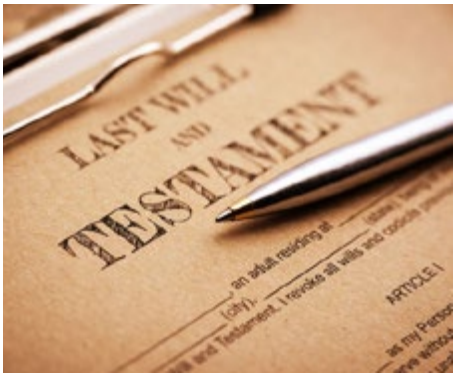
3 As summarized from, *Bursztein v. Best Buy, No. 20-cv-00076 (AT) (KHP) (S.D.N.Y. May 17, 2021)*

4 The SCAO publication "Michigan Judges Guide to ADR Practice and Procedure" (2015) contemplated the evolution of ADR.

> "The processes outlined in this Guide are not meant to be exhaustive of the growing array of flexible dispute resolution processes attorney, parties, and ADR practitioners are designing to meet the needs of particular disputes.
>
> Judges, court administrators, attorneys, and ADR practitioner are invited to share with the SCAO any novel ADR processes that are not discussed in this Guide for potential inclusion in subsequent updates."

5 The scope and limitation of discovery is found in MCR 2.302(B).

Binding Non-participating Interested Persons Under a Mediation Settlement Agreement in Probate Litigation



By David Skidmore

On February 9, 2023, the Michigan Court of Appeals rendered its decision in *In re Estate of Terry Broemer*, Docket No 360571, 2023 Westlaw 1871496 (Mich Ct App Feb 9 2023) (unpublished). The decision is significant not only because it involved an unsigned will, but also because it addressed how to make a mediation settlement agreement binding on interested persons who declined to participate in the mediation.

At Terry's death, he was single and had no descendants. Initially, Terry's stepdaughter opened an intestate estate, giving notice to one known heir. Subsequently, Terry's unsigned will and trust were discovered. Laura, a beneficiary of the unsigned trust, petitioned to admit the unsigned will to probate as a writing intended as a will under MCL 700.2503. No objections were filed, and the probate court granted the petition. The problem was that Terry had a number of heirs who did not receive notice of the proceeding. Some of the non-noticed heirs retained counsel and objected to admission of the unsigned will to probate. The probate court sent the contested proceeding to mediation.

Prior to mediation, the attorney for the personal representative of the estate sent a notice to those heirs who were not represented by counsel as required by Michigan Court Rule 5.120, advising them that each of them had the right to participate in the mediation, but that those who opted not to participate would be bound by the actions of the personal representative. Virginia was an unrepresented heir who opted not to participate in mediation. The parties who did participate in mediation reached a settlement agreement, which provided for a payment to the heirs, in exchange for the heirs withdrawing their objection to admission of the unsigned will to probate. All parties received notice of the hearing to approve the settlement agreement. Virginia did not object to the settlement agreement or attend the hearing, and the probate court approved the settlement. Virginia did not file any timely appeal of that order.

Subsequently, an acquaintance of Virginia's filed an objection to the settlement on behalf of Virginia. The acquaintance engaged in oral argument at the hearing, which Virginia did not attend. The probate court found that the acquaintance was engaging in the unauthorized practice of law, and that Virginia's objection to the settlement was time-barred. On appeal, the Michigan Court of Appeals affirmed.

Two aspects of this case are worthy of note. First, MCL 700.2503 permits a writing intended as a will, which does not satisfy the formalities of a formal will, to be admitted to probate. Perhaps the most important requisite of a formal will is that it be signed by the testator. Here, the unsigned will was admitted to probate (first, without objection; subsequently, pursuant to the parties' settlement) without the testator's signature. The proofs "showed that around September 3, 2019, [decedent] indicated that he approved of the final estate planning documents and that he died two weeks later, before he had the opportunity to meet with the attorney and execute the documents." 2023 WL 1871496 at *1, fn 3. This case therefore stands for the proposition that an unsigned will, which the testator approved but failed to sign due to his intervening death, may be admitted to probate as a writing intended as a will under MCL 700.2503.

Second, this case illustrates the significance of the fiduciary providing the notice required by Michigan Court Rule 5.120 to unrepresented interested persons in probate litigation. That rule provides in relevant part: "The fiduciary must inform the interested persons that they may file a petition to intervene in the matter and that failure to intervene shall result in their being bound by the actions of the fiduciary." Here, the probate court and appellate court interpreted this rule to mean that an interested person who opted not to participate in mediation, after receiving the MCR 5.120 notice, was bound by the settlement agreed to by the personal representative at mediation. That is a significant power for the personal representative.

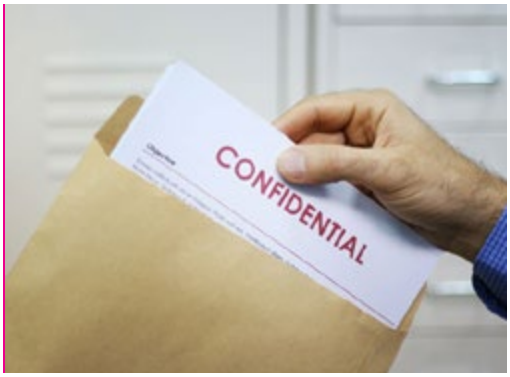
About the Author

David L.J.M. Skidmore i*s a partner in Warner Norcross + Judd LLP, where he has practiced for 25 years. Based in Grand Rapids, he has a statewide probate litigation practice, serving as both an advocate and a mediator. He is a Fellow in the American College of Trust and Estate Counsel; a former Chair of the Probate and Estate Planning Section of the State Bar of Michigan; and recognized by The Best Lawyers in America for probate litigation.*

If you desire a consultation regarding a disputed Probate Court matter, contact David Skidmore at 616.752.2491 or dskidmore@wnj.com.

Michigan Case Law Concerning Mediation Confidentiality

By Lee Hornberger



Introduction

Tyler v Findling[1] is an important Michigan Supreme Court decision enforcing mediation confidentiality.

Mediation is an effective tool for resolving disputes. Confidentiality is an important principle of mediation. Mediation can provide a confidential and informal process that serves the parties' interests. All involved with the mediation process, including the advocates, the parties, and other participants should understand the importance of confidentiality. "In a confidential setting, the parties and their lawyers will convey to the mediator much of what they believe is important about the case." J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* (ABA 2007), p. 20. "Maintaining confidentiality is critical to the integrity of the mediation process. Confidentiality encourages candor, allows a full exploration of the issues, and increases the likelihood of settlement. It also minimizes the inappropriate use of mediation as a discovery technique." Douglas E. Noll, *Peacemaking: Practicing at the Intersection of Law and Human Conflict* (Cascadia Publishing House 2003).

There are several sources which impact upon and inform us concerning mediation confidentiality in Michigan. These sources include the State Court Administrative Office (SCAO) Mediator Standards of Conduct (February 1, 2013), the Michigan Court Rules, the parties' contractual agreement to mediate document, the rules of the host forum, and case law.

This article will explore Michigan case law concerning mediation confidentiality.

Findling protects mediation confidentiality

Findling was a defamation case arising from statements made by Attorney Findling, serving as a receiver, to another attorney (Attorney W) before meeting with the mediator to start a court-ordered mediation. Attorney W secretly recorded the statements of Attorney Findling. Attorney Findling made allegedly defamatory statements concerning plaintiff Tyler. This resulted in Tyler bringing a defamation complaint against Findling based upon Findling's statements made at the mediation venue.

Circuit Court Rulings

Asserting mediation confidentiality, the defendant filed motions in limine and motions to strike the allegedly defamatory communication. The Circuit Court granted the motions. Defendant subsequently filed a motion for summary disposition. Defendant argued under MCR 2.116(C)(10), that once the Circuit Court struck the audio recordings and related testimony, there was no material question of fact regarding defamation. The Circuit Court agreed with the defendant and dismissed the defamation case. The basis of the Circuit Court's decision was that the statements were made within a confidential and privileged environment under MCR 2.412. Without the statements, the plaintiff could not prove up defamation.

Court of Appeals decision in Tyler v Findling

Tyler appealed the Circuit Court decision dismissing his defamation case to the Court of Appeals. In the Court of Appeals, the plaintiff argued that the Circuit Court was wrong in granting defendant's motion to strike the affidavit concerning the recorded statements and his motion in limine to preclude testimony concerning the statements. The Court of Appeals agreed with the plaintiff and the lower court's decisions on his motions.

According to the Court of Appeals,

1. Findling was a nonparty mediation participant, not a "mediation party,"
2. Findling merely attended the mediation to be informed of the progress of the case,
3. Findling's statements were made outside the mediation process, and
4. Merely sitting in the room designated for the plaintiff neither made Findling a party plaintiff nor did his presence start the mediation.

Supreme Court decision

The defendant filed an application for leave to appeal to the Supreme Court. The State Bar of Michigan's Alternative Dispute Resolution Section filed an amicus curiae brief in support of defendant's Application for Leave to Appeal. The amicus brief stated, in part, as follows.

> By its terms, the confidentiality protection extends to statements made by all mediation participants … . It is also vitally important to afford confidentiality protections to communications made throughout the mediation process, whether by mediation parties or other participants. … The Court of Appeals' insistence that Findling's statements were not protected from disclosure sets a dangerous precedent because it introduces uncertainty into when mediation participants' statements will be kept confidential as MCR 2.412(C) intends.

The Supreme Court, in an unanimous per curiam opinion, in lieu of granting leave to appeal and without hearing oral argument, held that the Court of Appeals erred when it held that a cause of action for defamation existed based on these communications. The Supreme Court held that these statements were MCR 2.412(B)(2) "mediation communications" and therefore confidential under MCR 2.412(C). According to the Supreme Court, the phrase "mediation communications" is defined broadly to include statements that "occur during the mediation process" and statements that "are made for purposes of … preparing for … a mediation." MCR 2.412(B)(2).

The conversation between Findling and Wright took place in the mediator's designated "plaintiff's room" while parties to the mediation were waiting for the mediation session to start. This conversation was part of the "mediation process." Findling's statements to Wright were made while "preparing for" the mediation session and were within the definition of "mediation communications." The conversation between Findling and Wright concerned the credibility of a witness, which could have affected the decision to settle the case being mediated or go to trial.

The Supreme Court rejected the Court of Appeals' interpretation of the court rule as requiring a mediator to meet with the parties and attorneys before the protections of MCR 2.412(C) become effective.

MCR 2.412(C) generally provides that mediation communications are.

1. confidential,
2. neither discoverable nor admissible in a proceeding, and
3. not to be disclosed to anyone but the "mediation participants."

The confidentiality protections cover "[m]ediation communications." MCR 2.412(C). These communications are not limited to communications made by a "mediation party." The communications extend to, among other things, any statement "made for purposes of … participating in … a mediation." MCR 2.412(B)(2). This includes statements made by a "mediation participant." MCR 2.412 does not require that a "mediation communication" be made by any particular party or participant. All mediation communications made by participants have confidentiality protections. The only exceptions to the confidentiality provision are listed in MCR 2.412(D). None of those exceptions were applicable in the *Tyler* case.

The Supreme Court found that because Findling was acting as a court-appointed receiver with settlement authority with regard to the subject of the mediation, he was a "mediation participant" within the definition found in MCR 2.412(B)(4). The Court of Appeals erred by vacating the Circuit Court's grant of defendants' motion to strike and reversing and remanding the Circuit Court's grant of defendants' motion for summary disposition under MCR 2.116(C)(10). On that basis, the Supreme Court reversed and remanded the case to the trial court, reinstating its dismissal with prejudice.

Findling is applicable to domestic relations mediation because MCR 3.216(H)(9) provides that confidentiality in domestic relations mediation is governed by MCR 2.412.

What if *Tyler v Findling* had been an out-of-court pre-suit mediation and MCR 2.412 did not apply? In such a situation, "The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate." Standard V(A)(2), SCAO, Michigan Standards of Conduct for Mediators (effective February 1, 2013).

The SCAO Mediator Standards of Conduct are serious guidelines for those who are conducting mediations under the Michigan Court Rules. These Standards provide concerning confidentiality that, consistent with MCR 2.412, a mediator shall maintain the confidentiality of information acquired by the mediator in the mediation process.

Standard V concerns confidentiality. Standard V provides that the mediator "should"

1. inform the participants of the mediator's obligations regarding confidentiality;
2. discuss with the parties their expectations of confidentiality;
3. discuss confidentiality of private sessions with the parties or the participants prior to those sessions occurring; and
4. include a statement concerning the obligations of confidentiality in a written agreement to mediate.

MCL 691.1557 provides an additional layer of confidentiality for mediations conducted at any of Michigan's Community Dispute Resolution Centers. It provides in relevant part:

> … communications relating to the subject matter of the dispute made during the dispute resolution process by a party, mediator, or other person are confidential and not subject to disclosure in a judicial or administrative proceeding … .

Prior Michigan appellate decisions concerning mediation confidentiality

Prior to ***Findling***, Michigan appellate courts issued several decisions concerning mediation confidentiality. Those decisions are discussed below.

Detroit Free Press Inc v Detroit, 480 Mich 1079; 744 NW2d 667 (2008), upheld disclosure of a deposition transcript disclosed in mediation where such disclosure was not specifically objected to.

Kitchen v Kitchen, 231 Mich App 15; 585 NW2d 47 (1998), attaching an opponent's mediation summary to a motion for sanctions was improper under confidentiality rule, resulting in motion for summary disposition being stricken. *Kitchen* was about "case evaluation" summaries, not mediation summaries. *Kitchen* was before the Court Rule on mediation. Kitchen cites MCR 2.403, which is the rule on case evaluation that at the time was called "mediation." The same confidentiality principle is applicable.

In ***Hanley v Seymour***, unpublished per curiam opinion of the Court of Appeals, issued October 26, 2017 (Docket No. 334400), disclosure of financial information obtained after mediation by a non-party was not a violation of MCR 2.412(C) confidentiality of mediation communications.

The contractual agreement to mediate

In addition to and separately from the Michigan court rules, the parties can put confidentiality language into their Agreement to Mediate. The SCAO Mediator Standards recommends this be done. The confidentiality language in such an Agreement to Mediate might indicate as follows.

> 2. **Confidential Nature of Mediation Proceedings**. In order to encourage communications designed to facilitate settlement of disputed claims, the parties agree that all proceedings in connection with this mediation shall be subject to MCR 2.412. This rule provides that anything said or any statement made in the course of the mediation, or any documents prepared for or introduced in the course of the mediation may not be used in any other proceeding, including trial. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its disclosure or use during the mediation. Evidence that the parties have entered into a written settlement agreement during the course of the mediation may be disclosed and is admissible to the extent necessary to enforce the agreement.
>
> 3. **Exclusion of Mediator Testimony and Limitation of Liability.** The Mediator shall not be subpoenaed or otherwise compelled to testify in any proceeding relating to the subject matter of the mediation and shall not be required to provide a declaration or finding as to any fact or issue relating to the mediation proceedings or the dispute which is the subject of said mediation proceedings. The Mediator and any documents and information in the Mediator's possession

will not be subpoenaed in any proceeding and all parties will oppose any effort to have the Mediator or documents subpoenaed. Any party to this Agreement who violates this clause will pay the Mediator's legal fees in opposing such efforts to compel the Mediator's testimony or disclosures of confidential information.

Conclusion

Tyler v Findling is an important decision. *Findling* means that mediation confidentiality is alive and well in Michigan. There is robust protection of statements made by those involved with the mediation endeavor and documents submitted within the mediation process.

About the Author

Lee Hornberger

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

He has received the Distinguished Service Award from the State Bar's ADR Section in recognition of significant contributions to the field of dispute resolution. He has received the George Bashara Award from the ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from the ADR Section.

He is included in The Best Lawyers of America *2018 and 2019 for arbitration, and 2020 to 2024 for arbitration and mediation. He received a First Tier ranking in Northern Michigan for Mediation by* U.S. News – Best Lawyers® *Best Law Firms in 2022 to 2024; and he received a Second Tier ranking in Northern Michigan for Arbitration by* U.S. News – Best Lawyers® *Best Law Firms in 2022 to 2024. He received a Second Tier ranking in Northern Michigan for Mediation by* U.S. News – Best Lawyers® *Best Law Firms in 2020. He received a First Tier ranking in Northern Michigan for Arbitration by* U.S. News – Best Lawyers® *Best Law Firms in 2019. He is on the 2016 to 2023 Michigan Super Lawyers lists for alternative dispute resolution.*

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

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

Endnotes

1 *Tyler v Findling*, 508 Mich 364; 972 NW2d 833 (2021), reversing *Tyler v Findling*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2020 (Docket No. 348231, 350126).

Professionalism and Civility:

You cannot have one without the other

By Edward H. Pappas

***This article originally appeared in the June 2023 issue of the* Michigan Bar Journal.**

In 2022, the State Bar of Michigan Board of Commissioners formed a new special committee — the Professionalism and Civility Committee, whose members and chair are appointed by the president of the State Bar of Michigan.

The committee intends to contribute articles to the Michigan Bar Journal *focusing on professionalism and civility, and the well-earned honor of writing the first column rightfully belongs to Edward H. Pappas. There is no one in Michigan more influential in promoting attorney professionalism and civility, instituting educational programs, contributing to the creation and adoption of the Professionalism Principles for Lawyers and Judges, and helping to develop the Professionalism and Civility Committee, whose mission he describes in this article.*

For the title of this article, I adapted a saying from the University of Michigan Marching Band to describe the connection between professionalism and civility. These two concepts are often used synonymously, but professionalism is a much broader concept that, at a minimum, encompasses competence, integrity, honesty, and civility.

The importance of professionalism and civility to the legal profession, our justice system, and society as a whole cannot be over- stated. In fact, with incivility at a crisis level in our government and society, professionalism and civility are more important now than ever before.

Lawyers and judges play an important role in society and have a responsibility to safeguard our constitutions, protect human rights, advance the rule of law, and ensure access to justice for everyone. As former United States Supreme Court Justice Warren Burger stated in a 1971 speech:

> "Lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset to the administration of our justice … I suggest the necessity for civility is relevant to lawyers because they are the living exemplars — and thus teachers — every day, in every case, and in every court; and their worse conduct will be emulated more readily than their best."[1]

Lawyers and judges have the opportunity to teach the leaders and citizens of our great nation that you cannot have the dialogue necessary to resolve important issues without civility and respect.

The State Bar of Michigan has actively promoted professionalism and civility in the practice of law. My first Bar Journal column as State Bar president in October 2008 dealt with professionalism.[2] In 2009, during my presidency, the State Bar created a Professionalism in Action program that was incorporated into the orientation programs at all five Michigan law schools to emphasize to students the importance of professionalism and civility in the practice of law.

In October 2018, the State Bar sponsored a summit entitled, "Promoting Professionalism in the 21st Century."[3] Among the recommendations that emerged from that summit was adopting civility guidelines that would apply to all Michigan lawyers and judges.

As a result of the summit, the State Bar formed a Professionalism Workgroup which I had the privilege of chairing. Among other things, the workgroup drafted proposed professionalism principles[4] which were approved by the State Bar Representative Assembly and submitted to the Michigan Supreme Court. On Dec. 16, 2020, the Supreme Court adopted 12 principles of professionalism which, combined with their comments, provide guidance to lawyers and judges on how to conduct themselves professionally. In adopting these principles, the Supreme Court stated, in pertinent part:

> In fulfilling our professional responsibilities, we, as attorneys, officers of the court, and custodians of our legal system, must remain ever mindful of our obligations of civility in pursuit of justice, the rule of law, and the fair and peaceable resolution of disputes and controversies. In this regard, we adhere to the following principles adopted by the State Bar of Michigan and authorized by the Michigan Supreme Court.
>
> - We show civility in our interactions with people involved in the justice system by treating them with courtesy and respect.
> - We are cooperative with people involved in the justice system within the bounds of our obligations to clients.
> - We do not engage in or tolerate conduct that may be viewed as rude, threatening, or obstructive toward people involved in the justice system.
> - We do not disparage or attack people involved in the justice system or employ gratuitously hostile or demeaning words in our written and oral legal communications and pleadings.
> - We do not act upon or exhibit invidious bias toward people involved in the justice system and we seek reason- ably to accommodate the needs of others, including lawyers, litigants, judges, jurors, court staff, and members of the public who may require such accommodation.
> - We treat people involved in the justice system fairly and respectfully notwithstanding their differing perspectives, viewpoints, or politics.
> - We act with honesty and integrity in our relations with people involved in the justice system and fully honor promises and commitments.
> - We act in good faith to advance only those positions in our legal arguments that are reasonable and just under the circumstances.
> - We accord professional courtesy, wherever reasonably possible, to other members of our profession.
> - We act conscientiously and responsibly in taking care of the financial interests of our clients and others involved in the justice system.
> - We recognize ours as a profession with its own practices and traditions, many of which have taken root over the passing of many years, and seek to accord respect and regard to these practices and traditions.
> - We seek to exemplify the best of our profession in our interactions with people who are not involved in the jus- tice system.[5]

These principles are all encompassing, but the essence of the principles is acting with integrity and honesty and treating people with civility and respect.

After the principles were adopted, the Professionalism Workgroup continued to develop strategies to promote professionalism and civility and keep these concepts at the forefront of the practice of law. Based on the workgroup's recommendation, the State Bar last year formed the Special Committee on Professionalism and Civility with the mission of being "a resource to lawyers, judges, and those involved in the administration of justice to help promote the highest standards of personal conduct of lawyers and judges in the practice of law as articulated in"[6] the principles of professionalism.

The principles of professionalism and the commentary on those principles offer nuts-and-bolts guidance to lawyers and judges on professionalism and civility but as I wrote in my first President's Page 15 years ago, every Michigan lawyer need only adhere to the Lawyer's Oath[7] he or she took when admitted to practice law:

> I will maintain the respect due to courts of justice and judicial officers[.]
>
> * * *
>
> I will employ for purposes of maintaining the causes confided to me such means only as are consistent with truth and honor[.]

* * *

I will abstain from all offensive personality[.]

* * *

I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed upon members of the Bar as a condition to practice law in this State.

It is a privilege to be a lawyer and a judge and with that privilege comes the responsibility to act professionally, act with integrity and civility, and act with truth and honor. I encourage all lawyers and judges to maintain the highest levels of professionalism and civility in the "pursuit of justice, the rule of law, and the fair and peaceable resolution of disputes and controversies."[8]

About the Author

Ed Pappas

Edward H. Pappas, *a leading business litigator, mediator, arbitrator, and former State Bar of Michigan president, has led efforts focusing on professionalism and civility. He is a past recipient of the Roberts P. Hudson Award, the State Bar's highest honor.*

Endnotes

1 *Excerpts From the Chief Justice's Speech on the Need for Civility,* New York Times (May 19, 1971) p 28 <https://www.nytimes.com/1971/05/19/archives/excerpts-from-the-chief-justices-speech-on-the-need-for-civility.html> [https://perma.cc/C2TS-BS4F]. All websites cited in this article were accessed May 16, 2023.

2 Pappas, *Professionalism Under Siege,* 87 Mich B J 14, 14-15 (October 2008), available at <https://www.michbar.org/journal/Details/Professionalism-and-civility-You-cannot-have-one-without-the-other?ArticleID=4660> [https://perma.cc/KB5L-4Y98].

3 *Promoting Professionalism in the 21st Century,* SBM (October 18, 2018), available at <https://www.michbar.org/file/professional/pdfs/Professionalism-Summary.pdf> [https://perma.cc/6ZQE-F8JZ].

4 Administrative Order No 2020-23 (2020), available at <https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/administrative-orders/aos-responsive-html5.zip/AOs/Administrative_Orders/AO_No._2020-23_%E2%80%94_Administrative_Order_Regarding_Professionalism_Principles_for_Lawyers_and_Judges.htm?rhtocid=_261> [https://perma.cc/EBU8-FS98].

5 *Id.*

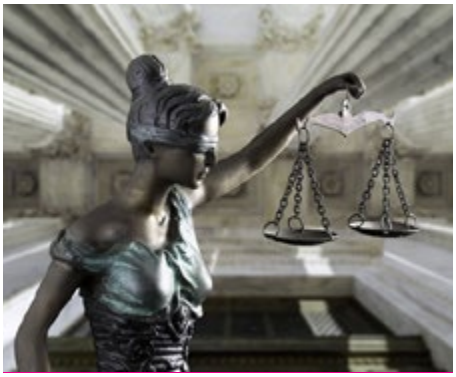
6 *Professionalism and Civility Committee*, SBM <https://www.michbar.org/generalinfo/professionalism> [https://perma.cc/C4CG-9MGR].

7 Lawyer's Oath, SBM <https://www.michbar.org/generalinfo/lawyersoath> [https:// perma.cc/6NYV-CY4C].

8 Administrative Order No 2020-23.

Michigan Arbitration and Mediation Case Law Update

By Lee Hornberger, Arbitrator and Mediator



Arbitration

Michigan Supreme Court Decisions

Supreme Court orders oral argument on COA reversing Circuit Court order denying arbitration.

Saidizand v GoJet Airlines, LLC, 355063 (Sep 23, 2021), **app lv pdg, oral argument to be scheduled.** Plaintiff brought claims against employer and a supervisor under Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Defendants requested summary disposition, citing arbitration agreement signed by plaintiff when he completed job application. Agreement stated he and GoJet agreed to resolve all claims arising out of application, employment, or termination exclusively by arbitration. Circuit Court denied defendants' motion for summary disposition as to plaintiff's ELCRA claims. Court of Appeals reversed holding Circuit Court erred by determining whether ELCRA claims were subject to arbitration because under terms of agreement plaintiff and GoJet agreed that arbitrator had authority to determine whether plaintiff's claims subject to arbitration. On June 23, 2023, Supreme Court ordered oral argument on application to address **whether ELCRA discrimination claims may be subjected to mandatory arbitration as condition of employment**.

Michigan COA Published Decisions

COA reverses Circuit Court order not to arbitrate with Board members.

Steward v Sch Dist of the City of Flint, ___ Mich App ___, 361112 and 361120 (May 11, 2023). Plaintiff hired to be Superintendent of schools. She worked under written employment agreement that had broad arbitration clause. Signatories to contract were Plaintiff and "Board of Education of the School District of the City of Flint." Plaintiff complained Board members created hostile work environment. Dispute resulted in plaintiff's removal. After plaintiff filed suit against Board members, they moved for summary disposition based on arbitration provision. Circuit Court granted relief to entity defendants, but not Board members because they were not parties to agreement that contained arbitration provision. COA reversed denial of summary disposition because **obligation to arbitrate disputes extended to Board members as well as School District**.

Michigan COA Unpublished Decisions

COA reverses MERC concerning definition of "teacher."

Kalamazoo Public Schools v Kalamazoo Education Association, 363573 (August 10, 2023). Issue was whether MCL 423.215(3)(j) of PERA, MCL 423.201 *et seq*, prohibits arbitration of parties' disagreement. MERC agreed with Union that demand for arbitration was not prohibited by PERA. In split decision, COA disagreed and reversed MERC's order dismissing ULP charge against Employer. Employer argued word "teacher" in MCL 423.215(3)(j) of PERA is defined by MCL 38.71(1) of TTA or MCL 380.1249(8) of Revised School Code (RSC), MCL 380.1 *et seq*, or both, and MERC erred by disregarding both of these statutory definitions in favor of dictionary definitions of the word "teacher." COA agreed with Employer that TTA definition of "teacher" is controlling.

Judge Yates dissent stated COA should accept MERC ruling that employee, as a guidance counselor, was not "teacher" for purposes of placement under MCL 423.215(3)(j).

COA affirms Circuit Court order denying arbitration in dentist non-compete case.

Paine v Godzina, 363530 (July 27, 2023). Appellants argued Circuit Court erred because plain language of contractual agreement required arbitration of parties' dispute regarding non-compete clause. Based on word "and" in arbitration agreement, COA affirmed Circuit Court's denial of motion to compel arbitration. COA agreed with Circuit Court that language, "[a]ny dispute, controversy or claim between the Associate and the Employer concerning questions of fact arising under this Agreement and concerning issues related to wrongful termination … shall be submitted … to the [AAA]," means arbitration is required for cases that involve **both** questions of fact arising under Agreement and issues related to wrongful termination.

COA affirms Circuit Court confirmation of labor arbitration award.

AFSCME Council 25 Local 1690 v Wayne County Airport Authority, 360818 (June 29, 2023). Union requested vacatur of award. Award denied wage increase where one provision of CBA provided for wage increase and arbitrator authority provision of CBA specifically said arbitrator could not grant any wage increase. Circuit Court denied vacatur. COA affirmed.

COA affirms Circuit Court dismissal because of arbitration clause.

Zora v AM & LN, 360224 (June 29, 2023) **app lv pdg**. COA affirmed Circuit Court ruling that Zora's lawsuit barred by arbitration agreement. Zora argued that *Lichon v Morse*, 507 Mich 424 (2021), resulted in change in law of arbitration that affected Circuit Court's ruling. Zora asserted *Lichon* held that expansive interpretation of an arbitration agreement, which is how Circuit Court construed arbitration clause, only applies in context of CBAs. COA held *Lichon* does not undermine or conflict ruling. *Lichon* ruled that while parties are bound to arbitration if disputed issue is "arguably" within arbitration clause in the context of CBAs, the principle does not apply outside that context, in which case arbitration agreements are to be read like any other contract.

COA affirms Circuit Court entry of JOD based on DRAA arbitration.

Weaver v Weaver, 361752 (June 15, 2023). COA held Circuit Court did not err by entering JOD which reflected award that failed to value and divide marital portion of plaintiff's 401(k) plan without first holding hearing.

COA affirms Circuit Court confirmation of award.

Leczel v Intrust Bldg, Inc, 362855 (June 15, 2023), **app lv pdg**. COA affirmed confirmation of award concerning apportionment of liquidated damages.

COA reverses Circuit Court vacatur of award.

Certainty Construction, LLC v Davis, 361276 (May 25, 2023). Circuit Court vacated award of attorney fees and determination that construction lien was valid. COA held Circuit Court erred by vacating attorney fees award.

COA affirms Circuit Court ordering arbitration.

UAW v 55th Circuit Court, 361366 (May 11, 2023). COA held issue of whether Union timely invoked arbitration under CBA to be decided by arbitrator.

COA affirms Circuit Court confirmation of remanded clarified award.

Soulliere v Berger, 359671 (April 27, 2023), **app lv pdg**. COA affirmed Circuit Court denying defendants' motion to vacate award and instead confirming arbitrator's award as clarified by arbitrator pursuant to COA's previous remand.

Mediation

Michigan Supreme Court Decisions

Supreme Court orders oral argument on COA affirming Circuit Court that no settlement agreement.

Citizens Ins Co of Am v Livingston Co Rd Comm'n, ___ Mich App ___, 356294 (Sep 15, 2022), **app lv pdg, oral argument to be scheduled.** COA held local government can be bound by settlement agreement entered into by its attorney if (1) government later ratifies agreement or (2) attorney had prior special authority to settle claim.

On March 31, 2023, Supreme Court ordered oral argument on application. Briefs will address: (1) whether material question of fact exists regarding whether parties entered into binding settlement agreement; (2) **whether material question of fact exists regarding whether defendant's former attorney had authority to approve settlement agreement**; and (3) whether defendant waived attorney-client privilege as to documents related to its former attorney's authority to settle.

There are no Michigan COA Published Decisions

Michigan COA Unpublished Decisions

COA affirms Circuit Court concerning settlement agreement.

In re Edmund Talawanda Trust, 360789, 360790 (June 29, 2023). After mediation, parties consented to mediator making proposal for resolution of remaining issues, and that proposal became settlement agreement. Parties emailed mediator inquiring as to who would be responsible for cost of replacing roof. Mediator provided a response. COA did not address whether mediator's interpretation of settlement agreement was binding because interpretation of agreement is subject to de novo review, and COA agreed with mediator's interpretation.

About the Author

Lee Hornberger

Lee Hornberger *is 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), and Diplomate Member of The National Academy of Distinguished Neutrals. He is Fellow of American Bar Foundation. He is also 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 holds his B.A. and J.D. cum laude f*rom University of Michigan and his LL.M. in Labor Law from Wayne State University.*

Action Team Updates

The Diversity and Inclusion Action Team (DIAT)

The Diversity and Inclusion Action Team (DIAT) had an exciting year filled with engaging programming.

- The State Bar of Michigan American Indian Law Section and DIAT co-sponsored its 3rd Annual Virtual Diversity Lunch on the application of ADR disciplines and the principles of diversity and inclusion in the context of American Indian Law. DIAT Co-Chair Phillip A. Schaedler and Stacey L. Rock of the American Indian Law Section, moderated a discussion around peacemaking and how it can be utilized in various settings, featuring panelists Hon. David D. Raasch (Ret.), Belinda Dulin, and Hon. Timothy J Connors. The panel provided insight on how to utilize the concepts of peacemaking in any setting, takeaways from peacemaking for ADR providers, and how peacemaking differs and complements other forms of ADR.
- DIAT hosts a book club that meets quarterly to discuss media that intersects with the themes of diversity and law. In August, book club Chair Margaret Costello led the group through a thoughtful discussion that reflected on the twentieth anniversary of "*The New Jim Crow: Mass Incarceration in the Age of Colorblindness*," by Michelle Alexander. On November 14, 2023, the club will discuss "*South to America*," by Imani Perry.
- Author Dan Berstein (mhmediate.com) presented on behalf of DIAT for the section's Annual Meeting on September 29, 2023. DIAT Co-Chair Lisa Timmons moderated a discussion with Berstein on "Discrimination in Dispute Resolution." Berstein candidly detailed the impact of mental health discrimination, and how ADR practitioners can recognize and prevent mental health discrimination during dispute resolution. Berstein offered a wealth of resources for the ADR "toolkit" to notice disparities, address them, and prevent them in the future.
- DIAT circulated the 2023 Directory of ADR Providers of Women in Dispute Resolution, created by the Women in Dispute Resolution (WIDR), a subcommittee of the ABA Section of Dispute Resolution, and encouraged its membership to download the directory as a concrete step for fostering diversity in the ranks of arbitrators and mediators.
- Lastly, DIAT will award Attorney Zenell Brown with the section's 2023 Diversity and Inclusion Award at the ADR Section's Annual Award Dinner on October 24, 2023 at the Saint John's Resort in Plymouth. Lisa Timmons will have the honor of recognizing Brown's focus on DEI initiatives and activities that have enriched the members of the SBM's ADR Section and Michigan's legal community through her roles as a consultant, court executive, Detroit Bar President, and chair and member of numerous DEI committees and initiatives.

CDRC Action Team Update

Want to give back to your community? The Sixteen Community Mediation Centers that comprise the Michigan Community Mediation Association (MCMA) and cover all 83 counties of Michigan are accepting new volunteers. The Centers work to make mediation and restorative practices available to ALL Michiganders by using volunteer mediators and facilitators to provide services on a sliding scale. Consider volunteering to not only help make your community more peaceful, but also to gain valuable mediation experience.

The Michigan Community Mediation Association has renewed their federal contract to provide agricultural mediation services statewide. Under this program, free mediation services are provided to growers anywhere in the state of Michigan in disputes with federal agencies. As with any type of mediation, participants have an opportunity to engage in meaningful conversations to resolve their agency disputes. If resolution is not reached, they can continue to pursue their remedies at law.

Behavioral Mental Health Mediation Services have also been renewed statewide. Services are available for free to individuals receiving services from a Community Mental Health or Prepaid Inpatient Health Plan, or contracted provider. For questions or to request services recipients can call 1-844-3 MEDIATE or click here.

The Centers also provide resolution services via MI-Resolve. This online platform allows the Centers to provide a free, quick and easy means of resolving disputes that are typically filed as a small claims or landlord/tenant case in the district court and parenting time disputes.

To connect with a Center to volunteer or for services click here.

By Christine Gilman
Executive Director
Dispute Resolution Center of West Michigan
678 Front Ave NW Ste 250
Grand Rapids, MI 49504

Legislation and Court Procedures Action Team Update.

The ADR Section through its Legislation and Court Procedures Action Team ("LCPAT" - formerly, "EPP") 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. LCPAT continues to be active. Some of LCPAT's recent work:

- **Proposed amendment to MCR 3.602, Arbitration.** LCPAT proposed an amendment to MCR 3.602 because the Michigan Uniform Arbitration Act and MCR 3.602 contain different time limits for seeking to vacate, modify, or correct an arbitration award. With one exception, the MUAA provides filing within 90 days of receiving notice of the award, and in contrast, MCR 3.602 provides two different deadlines, depending on whether there is already a pending civil action. The opinion from a recent case, *Walker v. Blue Cross Blue Shield of Michigan*, Ingham County Circuit Court No. 17-005454-CZ (February 3, 2022) demonstrates the confusion caused by these conflicting provisions, and *Waller v BCBSM*, No. 360392 (March 23, 2023), notes that the MUAA controls with respect to arbitrations after its effective date.

  To solve this problem, LCPAT proposed the following language to amend MCR 3.206 (new language underlined):

  > **(A) Applicability of Rule. Courts shall have all powers described in MCL 691.1681 et seq., or reasonably related thereto, for arbitrations governed by that statute. <u>Unless otherwise provided by statute, an action or proceeding commenced on or after July 1, 2013, is governed by MCL 691.1681 et seq., and not this rule.</u> The remainder of this rule applies to all other forms of arbitration, in the absence of contradictory provisions in the arbitration agreement or limitations imposed by statute, including MCL 691.1683(2).**

  The ADR Section Council approved this proposed amendment to MCR 3.602, the SBM approved submitting the Public Policy form with the proposal to SCAO, and the proposal has been submitted to SCAO.

- **Mediator Fees During Pendency of a Court Proceeding**. Michigan Court Rules, primarily MCR 2.410, MCR 2.411 (D), and MCR 3.216 (J) (hereinafter the "Rules") afford mediators of court ordered mediations, the ability to apply to the court for, and obtain an order for payment of mediator fees during the pendency of the circuit court action ("Action"). Mediators are appointed pursuant to an Order for Mediation, typically set forth in a SCAO approved form MC 274 (hereinafter referred to as the "Form"). While the Rules specifically recognize the possibility of multiple mediation sessions during the course of an Action, the current Form only contemplates that a mediation will be initiated and completed within a short period of time specified by the court.

  To support a mediator's right to apply for and obtain compensation for conducting multiple mediation sessions, the ADR Section proposes three modifications to the Form.

  1. Adds provisions to allow the court to set deadlines for *commencement* of mediation to existing provision for setting deadlines for *conclusion* of the mediation.
  2. Incorporates the deadlines for payment of a mediator's compensation provided in the Rules into the Order.
  3. Permits the court to enter an order to pay compensation to the mediator on notice and opportunity to object.

  The proposed modified Form continues to address all required information presently included, with the addition of language specifically incorporating the Rules as the basis for the court to order payment of mediation fees and expenses. LCPAT is preparing a summary of this proposal and will submit this summary with the proposal to SCAO.

- **Possible Changes to Michigan Requirements for Mediation Training**. As reported in the February ADR Journal, 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. This committee is working diligently, with plans to survey the CDRP centers and mediation trainers to gather their opinions about merging civil and domestic training and what ideas they might have to do so. Any proposal will be submitted to both SAT and LCPAT for review and comment, and once finalized, will be sent to ADR Section Council.
- **Eldercaring Coordination Forms**. Also previously reported, LCPAT formed a sub-committee, to coordinate with ADR, ELDRS, and Probate sections, to review and revise proposed Eldercaring Coordination court forms, hoping a coordinated effort will ultimately result in SCAO approval of the forms. This coordinated committee continues to work on these forms, and will submit them to LCPAT for further review and comment before they are finalized for submission to ADR Section Council.
- **Follow-Up to Michigan Judicial Council Submission**. LCPAT drafted, and ADR Section Council approved, a letter submitted to the MJC on April 25, 2023. This letter reminded the MJC that on January 31, 2022, the ADR Section submitted to the MJC some concerns and some ideas to remedy those concerns that fit well with the MJC Project Abstract of "implement[ing] a statewide strategic plan, creating a unified vision for the future, and making system-wide improvements that coordinate innovations from recent reforms." Then went on to encourage that now that the MJC has put that abstract into action, creating the 2022-2023 Operational Plan, we will see that improvements in court-connected mediation are incorporated in the Operational Plan now and going forward. The letter restated the previous ideas/concerns and how they fit into the Operation Plan, namely: Create and maintain a statewide roster of court-approved mediators; Insist on adherence to MCR 4.211(B) and 3.216(E), limiting judicial involvement in mediator selection; Implement uniform adoption/use of consent judgment provisions of MCR 3.222 and 3.223, with appropriate training and oversight; Develop a data collection plan for court-connected mediation in Michigan courts; and Support change in Michigan courts to consistently use appropriate terminology for mediation under the Michigan Court Rules. In addition, Ed Pappas spoke at the MJC forum on May 11, 2023, referenced our letter and emphasized why ADR should be a part of the MJC's discussions to achieve its stated values and goals. So far, we have not had any contact from MJC. The letter is posted on the ADR Section website, in the LCPAT folder.

  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 Training Dates

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.

Advanced Mediator Training

Elevate Your Mediation Practice (8 Hours)
Date: February 7, 2024
Location: Online
Trainers: Anne Bachle Fifer, Dale Ann Iverson, Robert E. L. Wright
Registration and Additional Information (Eventbrite.com)

Elevate Your Mediation Practice (8 Hours)
Date: June 7, 2024
Location: Online
Trainers: Anne Bachle Fifer, Dale Ann Iverson, Robert E. L. Wright
Registration and Additional Information (Eventbrite.com)

40-Hour General Civil Mediator Training

Dates: November 6-8, 13-16, & 20-22, 2023
Location: Online
Hosted By: Oakland Mediation Center
Registration and Additional Information (Constantcontact.com)

Honorable Mentions

Lee Hornberger, a Traverse City arbitrator and mediator, has been inducted for membership into the National Academy of Arbitrators.

The National Academy of Arbitrators was founded in 1947 to "establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management and employment disputes on a professional basis …; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes prepared by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service;" and similar worthy purposes. The Academy is generally recognized as the preeminent organization of labor arbitrators in the United States and Canada.

Harshitha Ram – chair of the new ADR Section for the Detroit Bar Association. The mission of the Detroit Bar Association is to serve its members and the legal community in Southeastern Michigan by supporting the ethical and successful practice of law and the fair administration of justice.

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

Thank you ADR Annual Conference Sponsors

PLATINUM SPONSORS

DICKINSON WRIGHT PLLC

WIDGEON
DISPUTE RESOLUTION, PLC

Mediation Tribunal Association

GOLD SPONSORS

ALTIOR LAW
Higher. Business. Judgment.

JAMS Local Solutions. Global Reach.

LEWIS & MUNDAY

LEE HORNBERGER
Arbitrator & Mediator

STEPHENS LEGAL SOLUTIONS:
THE LAW OFFICES OF CYNTHIA DIANE STEPHENS PLLC

SILVER SPONSORS

SHELDON J. STARK
Mediator and Arbitrator

American Settlement Centers

KITCH
Attorneys & Counselors

KOBLISKA
LAW + MEDIATION

LeibADR LLC

MARIE WALKER, PLLC

AMERICAN ARBITRATION ASSOCIATION

MILLER CANFIELD

BRONZE SPONSORS

William D. Gilbride, Jr.

ABBOTT NICHOLSON PC
ATTORNEYS AT LAW

Celebrating over 40 years of service to our clients and the legal community

PREMI

Non-Attorney Affiliate Membership Application

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. Annual dues are $40.00. There is no proration for dues and membership must be renewed on October 1 of each year. Dues are due between October 1 and November 30. Affiliate memberships are subject to Council approval.

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 SBAMConnect discussions, and receive documents prepared by and for the ADR Section.

NAME: _____ FIRM: _____

ADDRESS (CITY/STATE/ZIP)_____ PHONE:_____

E-MAIL: _____

State Bar No. (if applicable) _____

Have you been a Member of this Section before: _____

Have you been a Member of any other Bar in Michigan or any other jurisdictions: _____

What is the status of that membership_____

What experience do you possess in the area of ADR_____

_____

_____

Why are you interested in membership in the ADR Section_____

_____

Are you currently receiving the Dispute Resolution Journal_____

All applications must be accompanied by payment. Prices are subject to change without notice. Non-members must submit payment by check. Make check payable to: STATE BAR OF MICHIGAN. Mail 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.

Affiliate members must not claim membership in the State Bar of Michigan and only identify themselves as a "Non-Attorney Affiliate Member of the State Bar of Michigan Alternative Dispute Resolution Section".

Editor's Note Page

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://www.instagram.com/sbmadrsection/
- https://twitter.com/SBM_ADR
- 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.