The ADR Quarterly

Alternative Dispute Resolution Section of the State Bar of Michigan

Vol. 23
No. 2
April, 2015

TABLE OF CONTENTS

The Chair's Corner

by Marty Weisman

I cannot believe that my term as Chair of the Section is half way completed. It seems as if it had just begun. But in assessing this first half, I can tell you all that we are making great strides. We are now approaching 1,000 members, which is an increase of nearly 300 from the start of the year and our financial position is the best it has been in several years. We have begun many new programs for our members such as the luncheon get together meetings to network and discuss issues with fellow ADR providers, the lunch and learn telephone seminars for which our members are charged a mere $10.00 for wonderful educational programs which are being provided quarterly, the March ADR Summit which was designed to replace ICLE's March Advanced Dispute Resolution Institute, when ICLE abandoned the program, and posting links to Section Members' ADR content blogs on the Section website. In order to keep all of you informed on what is going on in the section, we are also posting our Council meeting minutes on the website which will include reports from all our Action Teams and Tasks Forces. We have launched a blue ribbon task force to explore various alternatives for making mediation automatic or mandatory. We have just launched a mentoring program where novice mediators and/or arbitrators can be mentored by an experience provider in the field. If you are interested in being a mentor or mentee please contact Earlene Baggett Hayes at erbhayes@sbcglobal.net. We are bringing our programming and Annual Meeting and Conference to Traverse City on Friday, October 2, and Saturday, October 3, 2015, with not only our Annual Meeting and Conference dinner program and business meeting, but also a fantastic line up of "home grown" presenters providing 8 hours of CLE/SCAO credit which will include Eugene Driker presenting on his experiences in acting as a mediator in the Detroit Bankruptcy and Grand Bargain.

With all these good things happening, there is still room for more. The biggest issue that we are facing is the lack of participation by our general membership in the activities of the Section. Our Action Teams are open to all who are members of the Section; yet, the conference calls for these teams are sparsely attended.

Continued on Page 2

Continued from Page 1

These Action Teams are generally comprised of a hand full of members, many of whom are participants in multiple Teams. This means that only a few are providing the direction for all of us. We will all be better served with a broader cross section of the ADR community providing input and action. The list of our task forces and Action Teams can be found on the Section's website. http://connect.michbar.org/adr/reports/teams. I urge you all to take a look and see what interests you and to join in by either contacting me or the chair of that Action Team or task force. I also urge all of you to attend the lunch and learn telephone conferences, and especially our Annual Meetings and Conferences where officers and Council members are elected and great educational programming is included. You do not have to be a Section Council member or officer to participate and make a difference.

I know that many of our Section members are also members of other State Bar Sections. Almost every other Section may have a need for input and/or collaboration with our Section. We have recently designated Wayne County Probate Judge Milton Mack to be our liaison to the Probate Section. We have worked together with the Family Law Section to support the adoption of the Collaborative Law legislation and a court rule changing the use of joint divorce petitions to one without designation of a Plaintiff or Defendant. We have joined with the Labor and Employment Law Section to provide content and presenters on the status of the Michigan Uniform Arbitration Act and how to craft ADR contract provisions. We would like to also collaborate with other Sections. If you have any ideas on how to do so, and what could be done, we could use your input and help. The Chair of our Section to Section Action Team is Peter Kupelian, pkupelian@clarkhill.com, and he would love to hear from you.

Finally, Doug Van Epps, the Director of the Office of Dispute Resolution of the Supreme Court Administrative Office (SCAO) is convening a task force to suggest a roadmap for moving forward with all things ADR. We are looking for suggestions of possible areas of study to suggest to Doug. This is very timely since 2015 marks the 15th anniversary of the adoption of the ADR court rules and the 25th year of the Community Dispute Resolution Program. Please send your suggestions to me at mweisman@wyrpc.com. We look forward to your support and participation.

Cognitive Science and Effective Mediation and Settlement Advocacy

by Barry Goldman
Arbitrator and Mediator

Most of us, even those who have been negotiating settlements for decades, do it more or less by the seat of our pants. In recent years, however, psychologists, economists and others have made significant progress toward a more rigorous and scientific understanding of human judgment and decision making. By studying what they have learned we can improve our own understanding of the negotiation process and become more effective dispute resolution practitioners.

I. Anchoring

Anchoring is our tendency to overweight certain ideas and to allow them to have undue influence over subsequent reasoning.

The classic experiment involved a wheel of fortune and the number of African countries who are members of OPEC. Participants were asked to spin a wheel rigged to stop either at a low number or a high one. Then in what they thought was an unrelated task, they were asked to guess how many countries in Africa are members of the Organization of Petroleum Exporting Countries. The subjects who spun a high number guessed higher than the ones who spun a lower number.

This and many other anchoring experiments suggest an answer to the age-old negotiator's question: Should I or shouldn't I make the first offer? Yes, you should.

II. Cognitive Load

Cognitive load is the amount of mental work it takes to perform a task. Loading up negotiations with demanding mental work reduces the likelihood of success.

Participants in an experiment are randomly divided into two groups. One group is asked to remember a 7-digit number, the other to remember a 2-digit number. Then all participants are invited to select a snack — either a piece of chocolate cake or a bowl of fruit salad. The subjects who were trying to remember a 7-digit number — the ones with the greater cognitive load — took the cake. They simply didn't have sufficient rational capacity left to remember to eat healthy food.

Continued on Page 3

Continued from Page 2

Cognitive load experiments suggest negotiators should avoid loading up the parties with mental work.

III. Cognitive Fluency

Cognitive fluency is summed up in the rule: What is easy to understand is true. Stocks with pronounceable ticker symbols perform better on their IPOs than stocks with unpronounceable or "disfluent" ticker symbols. Propositions printed in complex fonts or printed in poorly contrasting colors are less likely to be agreed to than the same propositions printed in clearer fonts or better contrasting colors. Lawyers with fluent names make partner more often and sooner than those with disfluent names.

So: Make proposals as clear and understandable as possible.

IV. Embodied Cognition

Embodied cognition is the idea that we don't think with our brains alone. The body also has an important role in the judgment and decision making process.

Experimental subjects holding warm coffee cups are better disposed to interviewees than subjects holding cold coffee cups. Subjects holding heavy clipboards judge the conversational topic weightier than those with light clipboards. Candidates interviewed for medical school admission on sunny days are more likely to get in than candidates interviewed on cloudy days. Students cheat less on tests in brightly lit rooms than in dimly lit ones.

So: Make negotiation opponents comfortable. Keep them warm and feed them.

V. The Peak-End Rule

Human beings make hedonic judgments — judgments about pleasure and pain — according to a rule that blends how good or bad the experience was at its peak and how good or bad it was at the end.

Colonoscopy patients were divided randomly into two groups. One got the regular procedure; the other got the regular procedure plus an additional 30 seconds during which the device remained in place but was not moved around. When surveyed about how unpleasant the experience was and how willing they would be to have it repeated, the subjects in the condition with the additional 30 seconds of discomfort rated the experience less unfavorably and reported that they would be more willing to repeat it.

So: If you want your negotiation opponent to return and do business with you again, arrange for your side to make the final concession.

VI. Recommended Reading

Ariely, D. (2008)
Predictably Irrational: The hidden forces that shape our decisions. New York: Harper

Cialdini, R. B. (1993)
Influence: The psychology of persuasion. New York: Quill (William Morrrow)

Goldman, B. (2008 and 2013)
The Science of Settlement: Ideas for negotiators. Philadelphia:
ALI-ABA Amazon: http://tinyyyrl.com/kr37z8p

Kahneman, D. (2011)
Thinking, Fast and Slow. New York: Farrat, Straus and Giroux

Malhotra, D. and Bazerman, M. H. (2007)
Negotiation Genius: How to overcome obstacles and achieve brilliant results at the bargaining table and beyond. New York: Bantam

---

Barry Goldman is an arbitrator and mediator practicing out of the Detroit area. He is a member of the National Academy of Arbitrators and a Fellow of the College of Labor and Employment Lawyers. He serves on the part-time faculty at Wayne State Law School and is the author of "The Science of Settlement: Ideas for Negotiators."

How Mediation Can Get the Job Done

by Chief Judge Gerald E. Rosen and Eugene Driker

The Detroit bankruptcy, which many feared would drag on for years while the city's citizens suffered, was completely resolved in 16 months on a fully consensual basis.

Many have asked how this was achieved and what can be learned from the Detroit experience. Although there are no doubt numerous lessons, we believe that the most significant takeaway is that mediation — the resolution of disputes through confidential negotiations led by a neutral facilitator — can produce faster, more satisfying and less rancorous resolution of disputes, and that such an approach can and should be used in other public policy disputes.

Indeed, in our media-saturated age of cable TV shout shows and politicized polarization, we believe that quiet, facilitated negotiation may hold the key to unlocking the gridlock and dysfunction that all too often seem to paralyze our body politic. Detroit is Exhibit A for this proposition.

In the Detroit bankruptcy, a group of mediators, which included both of us, devoted thousands of hours in confidential negotiations with all the main parties to the case — including the State of Michigan, the City of Detroit and metro Detroit counties — helping them come to agreements on virtually all of the claims involving the city. Those consensual agreements allowed the city's plan of adjustment to be immediately implemented following its approval by U.S. bankruptcy Judge Steven Rhodes, and Detroit is now on an expedited road to recovery that few would have thought possible when the bankruptcy began in July 2013.

While there has been much media attention given to the individuals who participated in the mediation process, scant credit has been given to the process itself and to the communal benefits flowing from its use. Mediation works, and can produce great benefits much more efficiently and expeditiously than other approaches.

It has been more than 30 years since Harvard professors Roger Fisher and William Ury wrote the book "Getting to Yes," their classic guide to what they labeled "principled negotiation." Their suggested techniques on how to achieve agreements between contesting parties emphasized focusing on interests, not on personalities or positions. And those techniques have been employed with great success in mediations that resolved seemingly intractable public policy disputes, such as the 1998 Good Friday Agreement that former Sen. George Mitchell of Maine brokered between Northern Ireland and Great Britain, ending a conflict that had lasted for generations.

Such agreements confirmed that negotiated settlements, rather than battles in courtrooms or elsewhere, can yield far better outcomes for the disputants and, in many cases, for society at large.

We believe this is the most important lesson to be learned from the Detroit bankruptcy. Parties that, at the outset, held vastly different views on how creditor claims should be dealt with in the bankruptcy were able, through months of negotiations led by the team of mediators, to overcome strongly held initial positions and achieve results that were both good for their constituencies and good for the city, region and state.

As we steered the many negotiations that were proceeding simultaneously, we were continuously struck by how four ingredients were consistently the key to success: candor, cooperation, creativity and courage. Until the parties put aside preconceived notions and candidly dealt with the facts surrounding Detroit's finances and decline, nothing could be accomplished. But once a common set of facts was recognized, paths to agreement opened. Going down those paths required cooperation, and here the parties and their effective professionals moved away from firmly held starting points and sought ways to reach common ground. Often that outcome depended on coming up with creative solutions, many never tried before.

The most obvious, of course, is the so-called grand bargain, which brought to the bankruptcy desperately needed new sources of revenue from foundations, corporations, individuals and the state to save the Detroit Institute of Arts' iconic art collection and to dramatically reduce proposed cuts to employee pensions, thereby providing the core of the fully agreed upon plan of adjustment. Numerous other settlements within the bankruptcy also resolved disputes that could have had public policy ramifications.

Continued on Page 5

Continued from Page 4

There were no instruction books or road maps to guide the parties or the mediators on how to solve many of the unique issues in this unique bankruptcy, but the creative juices flowed and produced agreements that benefited everyone. Finally, cooperating with the "other side" and looking for creative solutions required a healthy dose of courage on the part of many to move away from entrenched positions and try novel concepts, courage that was on full display and contributed greatly to the outcome that Judge Rhodes in his confirmation decision called "miraculous." Those same ingredients should regularly be employed in other high-stakes disputes that involve the public interest.

We applaud and thank all those who participated with us in the mediated negotiations in the Detroit case. Their work was heroic. The success they achieved together can and should set the stage for using mediation to resolve other issues in the public sphere well before they reach the crisis state. Rather than waiting for the filing of lawsuits or the collapse of efforts to achieve needed regional cooperation, the parties should be encouraged to utilize mediated negotiation. States and municipalities may well consider developing a team of experienced mediators with a range of expertise who could be available on short notice to step into such situations.

Just as in Detroit, state and municipal governments around the nation have witnessed how difficult public-policy issues can fester, contributing to regional discord and impeding economic growth. If the experience of the Detroit bankruptcy is any guide, the early and committed use of mediated negotiation is likely to produce benefits that otherwise might never be achievable.

This op-ed was originally published in the *Detroit Free Press*.

Gerald E. Rosen is chief judge of the Eastern District of Michigan and served as chief judicial mediator in the Detroit bankruptcy. Eugene Driker is an attorney who also served as a mediator in the Detroit bankruptcy.

Ten Mediation Dos and Don'ts

by David B. Calzone

1. DO evaluate whether the time is ripe for mediation.

In mediation, timing can be a critical component for success, particularly when you are considering mediation early in the litigation or pre-litigation. There are no absolute rights or wrongs in terms of evaluating whether the timing is right for mediation. Early mediation in an appropriate case can be a useful tool for resolving litigation without the significant monetary and personal costs of protracted litigation. For early mediation to be successful, however, the parties must have a reasonably clear preliminary vision of the facts, important legal principles and strengths and weaknesses of their respective cases. If the parties jump into mediation before they know enough about the facts and law in their respective cases to conduct a preliminary assessment of their and their opponent's strengths and weaknesses, early mediation becomes the litigation equivalent of football's Hail Mary – exciting and unpredictable, but nearly always unsuccessful.

As they say, "it takes two to Tango." Before deciding whether to jump into an early mediation, do your best to determine whether the other side has sufficient information at an early stage to participate responsibly in a mediation. In employment cases, the employer often has considerably more information at its disposal than the plaintiff(s). If the plaintiff lacks critical information at an early stage of the litigation, mediation may be premature, and it may be necessary to allow some discovery to occur – an exchange of documents or a deposition or two – before mediation becomes meaningful.

2. DON'T mediate without adequately preparing your client for the mediation process.

Although the need to prepare the client for mediation may seem like a "no-brainer," this is an area that often causes mediations to begin to unravel before they get started. It is critical that you and your client develop a clear view of what the client hopes to achieve in mediation. "Settlement," standing alone, is a meaningless objective unless you and your client develop a mutual understanding of what a satisfactory settlement may look like. Meet with your client to reach agreement on mediation objectives. Keep in mind that it is not enough merely to discuss monetary terms. Non-monetary issues frequently derail mediations when counsel has not adequately prepared and reached agreement with his/her client on such issues. If you are a plaintiff's attorney and surmise that an employer is likely to want a settlement agreement to include provisions on confidentiality, no-rehire and non-disparagement, make sure you discuss such provisions and reach agreement with the plaintiff on the plaintiff's position before you ever get to the mediation.

Continued on Page 6

Continued from Page 5

I keep talking of "agreement" with your client for a reason. The negotiations in any successful mediation should always begin between the respective attorneys and their clients, *before* moving to the center stage of mediation.[1] Make no mistake, you as counsel are engaging in a negotiation process with your client in order to reach agreement on mediation positions. Without engaging in such pre-mediation negotiations with your client, you will start the mediation largely adrift, floating – in the words of former Secretary of State Dean Acheson – hither and yon until bounced about by more purposeful craft.

As part of these pre-mediation negotiations, discuss with your client potential problems and weaknesses with the case in an open and frank manner. Do not leave it to the mediator to be the first person to point out possible flaws in the client's case. If you do, you will undercut your own credibility with your client, and you will run the risk of having a client bolt from the mediation in anger or erect impenetrable emotional barriers to a reasonable assessment of the weaknesses in his/her case. The same holds true for the monetary value of the case. If the client has unrealistic expectations, it is critical that you do your best in pre-mediation negotiations to educate your client about possible realistic outcomes and potential costs of the litigation. The mediator will ultimately be an important tool in addressing and, if need be, modifying these expectations, but his/her job will be facilitated if you have laid the groundwork ahead of time.

In cases where a client is particularly emotional, feels abused or betrayed, believes (as is often the case with management) that an important principle needs to be supported and wants his/her "day in court," make sure that the client understands that his/her best opportunity to have a "day in court" may well be at the mediation. As everyone knows, an incredibly small percentage of litigants in employment cases ever actually have their "day in court." There are many hurdles that must be passed before a client will ever see the inside of a courtroom. The belief that many litigants have that they will be "vindicated" at trial is often a hollow one. Educate the client about those hurdles and about the fact that settlement can be a form of vindication. They will have ample opportunity in mediation to express their strong beliefs, concerns or emotions to the mediator, and through the mediator and written summaries, to the other party. Settlement and compromise do not equate to capitulation. If your client does not understand this going into mediation, your likelihood of success at mediation is greatly diminished.

Try to avoid letting your client draw rigid lines in the sand during these pre-mediation negotiations. Encourage your client to approach the mediation with an open mind, to recognize that settlements always require flexibility and compromise. Make sure your client understands that his or her pre-mediation "last best offer" may well be impacted by information learned as a result of the give and take of mediation.

3. DO prepare a concise written summary that you are willing to share with your opponent and that outlines important litigation risks.

As you draft mediation summaries, keep in mind that mediators are not fact-finders. They will not decide issues of credibility or fact; they will not make any legal determinations; they will not award any damages. The best mediation summaries highlight the salient facts supporting your claims or defenses, the weaknesses in the arguments that will likely be advanced in opposition and the litigation challenges that should persuade the other side to settle. Keep them concise – no more than ten pages – and avoid long, rambling discussions of case law. The mediators likely know the law, as do your opponents. Pick one or two cases that effectively illustrate your legal theories, and if you are fortunate enough to have the "brown cow" case, make sure the mediator and your opponent are aware of it.

If you feel the need to discuss economic damages in detail, resist the temptation. Such arguments are rarely helpful and are often counterproductive in that they appear to unduly inflate or deflate the settlement value of a case. Stick to the basic economic facts – how much was the plaintiff earning when terminated, how long has the plaintiff been out of work, what was the value of the plaintiff's benefits, what mitigation efforts were undertaken if any, has the plaintiff secured other employment and, if so, at what earnings rate?

I always recommend that the parties exchange mediation summaries, even when mediation occurs near the outset of a case. If you are early in the case and do not want to "tip off" your opponent about a fact or document that may, for example, be used to test credibility, leave that out of the summary and send it to the mediator in a side letter.

Why exchange? As I said earlier, the mediator is not a fact-finder. He/She cannot impose a settlement. Therefore, convincing the mediator of the merits of your position, while helpful, will not settle the case. The only way you are going to achieve a satisfactory settlement is if you can convince the other side that the settlement you ultimately propose in mediation is in their best interest. The best way to start that process is to provide the other side with a cogent, well-reasoned summary that gives them pause about the strength of their case. Use the summary to illustrate the challenges they will face in litigation and the risks of an undesirable outcome. You are never going to persuade the other side that their claims or defenses are unmeritorious, but you can use the mediation summary to provide them with reasons for why a reasonable settlement makes sense. Advocates who insist on "confidential" mediation summaries lose an important opportunity to speak to the other side about the case and its potential outcome and settlement value (or lack thereof).

Continued on Page 7

Continued from Page 6

Keep in mind that shrill, overly aggressive and threatening arguments in mediation summaries are counter-productive. You will likely be tuned out by your opponent's client. Likewise, do not substitute exaggeration for zealous advocacy. You will lose credibility with the mediator and your opponent if you exaggerate without sufficient support. Make sure your client understands this concept. The client should not make "all, none, every time or never" assertions during the mediation unless they are in fact true and amply supported. Credibility is critical to the success of any mediation. Even though you will likely never persuade the other side that your claims or defenses have merit, you must at least convince them that you will make credible arguments in support of those claims or defenses. If you fail to do that by overstating your case or making shrill arguments, your settlement proposals will likely fall on deaf ears.

4. DON'T insist on argumentative opening statements in evaluative mediations.

The most common form of mediation is evaluative mediation, where the mediator meets separately with the parties in caucuses to discuss strengths and weaknesses of the case and the merits of settlement proposals. Facilitative mediation is a process in which the parties remain together for much, if not all, of the mediation and engage in an exchange of ideas and arguments, facilitated by the mediator. This form of mediation is used far less than evaluative mediation by practitioners in Michigan.

In evaluative mediations, however, attorneys sometimes want an opportunity to present opening statements in introductory meetings with all parties present. Resist that temptation. Use an exchanged mediation summary as your opening statement. I have spent too many hours undoing the damage done by an overzealous advocate's opening statement which had the effect of alienating the other side. If your client insists on an opening statement, be brief and respectful. Don't inadvertently close the door to meaningful compromise by the zealousness of your advocacy.

5. DO develop your negotiation strategy, with input and agreement from your client, before the mediation.

This once again seems like "no-brainer" advice. Too often, however, litigants and even experienced counsel enter mediation without a clear idea of where they want to end up and how to get there. I once started a mediation at 9:00 a.m. and did not receive an initial settlement proposal from the plaintiff until late in the afternoon. The pre-mediation negotiations I talked about earlier did not start until the first caucus of the mediation. Most of my time was spent waiting patiently for each side to reach a consensus on initial settlement proposals following my efforts to steer them in a productive direction. When they finally did – not long before the end of the business day – they were nearly a million dollars apart. It ended up being a late night, although a settlement was ultimately reached.

You should conduct a risk analysis with your client as you develop your negotiation strategy. What is your likelihood of success in percentage terms given a realistic assessment of strengths and weaknesses on each side of the "v"? What are the likely damages that will be awarded in the event of a successful trial? Discount those damages by the realistic percentage risk of success or failure posed by the litigation. Remember to advise your client to keep an open mind in terms of your risk assessment when you reach the mediation. The mediator may offer a risk assessment that differs from your own based on information that comes out during the course of the mediation.

Once you have realistically evaluated your case and its settlement value, then craft a strategy with that settlement value in mind. As a plaintiff, if you realistically believe your case to have a settlement value of $150,000 after you conduct a risk assessment, an opening offer of $750,000 is not going to move the process forward in a productive way. Conversely, in the same case, if the defendant has evaluated the case as likely having settlement value in the high five figures, an opening offer of $5,000 is equally unrealistic. Anticipate and factor in the likely response of your opponent when you fashion an opening settlement demand and any subsequent demands. The hypothetical exorbitant $750,000 settlement demand discussed above would likely be met with an equally ridiculous $5,000 response from defense counsel, who will undoubtedly discount the credibility of the opening offer. Even though the parties end up incrementally closer, settlement is actually harder to achieve because each side now believes the other to be unrealistic, incompetent or – worse – both.

6. DON'T discuss attorney's fees and tax consequences for the first time at the mediation.

Plaintiff's attorneys need to clearly explain recoverable costs to date and the implications of their fee agreement on any settlement before the client arrives at the mediation. After a tentative settlement is reached, don't be in the position of explaining to your client for the first time that an additional $7,500 is going to come out of a settlement to pay the mediator and certain costs that have been incurred for filing fees, expert fees, etc. Defense counsel should be equally vigilant in giving their clients a clear picture of likely costs and fees through summary judgment, then trial, and finally appeal. Be sure to include the possibility of paying plaintiff's attorney fees, where applicable.

The same is true for the tax consequences of settlement. Make sure that your client understands how settlement amounts can be allocated and the reasons for doing so. If tax advice is needed, get that advice ahead of time. Mediators are not tax attorneys and do not dispense tax advice.

Continued on Page 8

Continued from Page 7

7. DO develop a crib sheet of settlement terms before the mediation.

In mediations involving both monetary and non-monetary terms, the parties will often want to reduce an agreement reached to a term sheet that will later be superseded by a formal settlement agreement and release. Either bring a template containing standard agreement terms that can be completed in full at the end of a mediation or a crib sheet containing abbreviated examples of such terms to facilitate the creating of a term sheet. Make sure you discuss the important non-monetary terms before you reach final agreement on numbers. Advising a party of a strong non-disparagement provision after the party thought a settlement was reached, for example, can derail the mediation.

8. DON'T muzzle your client.

Too often, attorneys monopolize the discussion during mediation caucuses. Clients relegated to bystander status can feel alienated by the process and subconsciously (or consciously) harden their positions. Allow the mediator to engage the client. The mediator is often trying to see the case from the client's perspective and assess the client's true needs and objectives in an effort to fashion a settlement that speaks – at least to some degree – to those needs and objectives.

9. DO address summary judgment both in your mediation summaries and at the mediation.

In mediations that occur before summary judgment is decided, make sure you address this critical step in the litigation process. As a plaintiff, you want to be able to explain how you are going to withstand the inevitable motion for summary judgment by the defendant. As a defendant, you want to illustrate how the plaintiff's factual arguments will not raise a question of fact sufficient to defeat summary judgment. At the end of the day, if a plaintiff can convince the defendant that it has a significant risk of losing the summary judgment motion, the defendant's willingness to settle will often increase. Even if the defendant believes it can win at trial, most defendants recognize that juries can be ever fickle, and they know that the cost of the litigation increases exponentially if summary judgment is lost. They also know that the cost of a post-summary judgment settlement will also increase considerably. Conversely, for the plaintiff, a loss at the summary judgment stage can be devastating. A year or two of an often draining and costly emotional investment has come to naught with only a slim hope of redemption on appeal, another year or two down the road.

Summary judgment risks – on both sides – often drive settlements. Make sure you evaluate those risks and that you are prepared to address them at mediation.

10. DON'T forget to negotiate with your opponent before you get to mediation.

Although this may not be a popular concept with those of us who make a living mediating cases, lawyers too often jump straight to mediation without attempting to settle their case on their own. You do not need a mediator to negotiate. Explore settlement with your opponent – after you have done your pre-mediation/settlement negotiations with your client – before engaging a mediator. Even if you cannot get the case settled during these discussions, you will often gain a better understanding of your opponent's position, the weapons in his/her arsenal and the value of the case for settlement purposes. You may also be able to narrow the gap between your two positions before you engage the mediator. Finally, pre-mediation negotiations will help you determine whether the time is ripe for mediation. Are the parties too far apart and firm in their positions to make mediation useful at this stage? Is it necessary to conduct some limited discovery before mediation will be meaningful because one or both parties lack critical information that might allow them to better evaluate the strengths and weaknesses of their cases? Can you reach agreement on non-monetary terms?

(Endnotes)

1 I commend to your review Shel Stark's and Greg Murray's excellent chapter on "Negotiations and Settlement" in Calzone, Bogas & Kopka, *Employment Litigation in Michigan, 2d Ed.* (ICLE 2003), p. 13-3, where Shel Stark elaborates on these concepts, likening settlement negotiations to a "three-ring circus. In the center ring, the two opposing advocates negotiate with each other. In the left ring, plaintiff's counsel negotiates with the plaintiff, often to lower unrealistic expectations stemming from media accounts of million dollar results in other people's cases. In the right ring, management counsel negotiates with corporate executives either to obtain more authority to contribute to a settlement offer or to calm the emotional outbursts that often interfere with a rational approach to the litigation." For his part, Greg Murray adds that "[u]nless defense counsel understands his client's goals and objectives (the right ring) and has some feel for the plaintiff's objectives (the left ring), he is unlikely to have much success in the main event." *Id.* At 13-37.

David Calzone of Calzone Mediations LLC has more than 30 years of experience practicing in the areas of mediation, employment discrimination, labor litigation, labor arbitration, appellate litigation, and complex/class action litigation. A Fellow of the College of Labor and Employment Lawyers, Mr. Calzone was previously a Director and founding Shareholder of Vercruysse Murray & Calzone, P.C. He is also co-editor and co-author of Employment Litigation in Michigan (ICLE 1999) and Employment Litigation in Michigan, 2nd Edition (ICLE 2003).

Connect With Us

The Alternative Dispute Resolution Section has launched a new website and interactive online community for its members—SBM Connect. This private community will enhance 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 ADR Quarterly
- FIND upcoming Section events
- NETWORK via a comprehensive member directory
- SHARE knowledge and resources in the member-only library
- PARTICIPATE in focused discussion groups

SBM Connect will eventually replace the current section website. Both websites will run concurrently to allow you time to discover the new tools and features available to members.

ADR Section Mission

The Alternative Dispute Resolution Section provides members of the State Bar of Michigan and the general public with creative leadership in the dispute resolution field. The Section fosters diversity in the profession; develops and offers educational programs; promotes access to dispute resolution alternatives; monitors legislative and judicial activity; and provides policy guidance, information, and technical assistance on ethical issues, dispute resolution techniques, and training design. The Section produces publications which promote wider use and excellence in the provision of alternative problem-solving techniques and dispute resolution services.

Join the ADR Section

The ADR Section of the State Bar of Michigan is open to lawyers and other individuals interested in participating.

The Section's annual dues of $40 entitles you to receive the Section's Newsletter, participate in programming, further the activities of the Section, receive Section listserv announcements, and participate in the Section's discussion listserv.

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.

The membership application is at:

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/19aeea9e-4ffe-48f5-91af-5059bc9b29bb/UploadedImages/pdfs/sectionapp.pdf .

ADR Section Member Blog Hyperlinks

The SBM ADR Section website now 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 ADR Quarterly Editor Lee Hornberger at leehornberger@leehornberger.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/home/memberblogs.

Michigan ADR Marks 25th Anniversary

by Doug Van Epps

This year marks the 25th anniversary of the State Court Administrative Office's (SCAO) awarding grants to Community Dispute Resolution Program (CDRP) centers, and the 15th anniversary of the Michigan Supreme Court's adoption of court rules that established the framework for ADR practice in the trial courts. With the proliferation of courts now referring cases to CDRP centers and private mediators, it seems fitting to ask if ADR is still the "alternative" dispute resolution process in Michigan's trial courts.

With the general civil trial rate now inching downward toward one percent of court filings, it might be most appropriate to altogether relegate the "Alternative" in ADR to the past; resolving disputes through mediation and other processes is now far more frequent than resolving disputes through bench and jury trials. Quite clearly, trials are now "alternative" to settlement in Michigan. "Dispute resolution" is the main business of Michigan's courts.

The 18 CDRP centers annually help parties in over 7,500 disputes reach settlements, and more than 30,000 people use the centers' services annually. While data on the extent to which private mediators similarly help parties reach agreements is unavailable, anecdotally, court staff report that increasing numbers of litigants are turning to mediation as a preferred means of resolving their case.

Mediation is now used in virtually all general civil and domestic relations case types, and through the CDRP centers, mediation is being used in:

- schools, to help resolve student conflicts that prevent suspensions and expulsions and reduce truancy, and to resolve disputes over special education services;
- child protection cases, to decrease the time children remain in an impermanent setting;
- divorce, to help parents resolve disputes related to raising their children; and
- prisons, to help reduce the number of in-prison infractions that lead to extended incarceration.

Many people and organizations deserve credit for the rapid growth of ADR practice in Michigan. Among them are members of the SCAO's early advisory committees that created the structure of the CDRP initiative, and the early mediators who took on the role of mediator trainers and mentors at a time when there were virtually no mediators in the state. Later task forces recommended court rules for general civil and domestic relations actions, as well as for developing a domestic violence screening protocol that is widely considered the best domestic violence screening tool for mediators in the country.

The ADR Section of the State Bar of Michigan has been at the forefront of promoting ADR best practices among attorneys and mediators, and the Michigan Judicial Institute has routinely provided judges with training opportunities to learn how ADR helps both parties in reaching early dispositions of their cases, and courts in helping them achieve performance objectives. All Michigan law schools

Continued on Page 11

Continued from Page 10

now offer ADR courses and even 40-hour mediation training programs.

The pioneering champions of mediation who created local dispute resolution programs in the late 1980's also deserve recognition. With few or no funds yet available, boards of directors at 12 locations across the state organized to form dispute resolution programs that became the first to be financially supported by the SCAO. The premise then, and remains today, that with the help of a mediator, many people in conflict could resolve their own problems to their mutual satisfaction.

There would be no community mediation, of course, without the volunteer mediators who have contributed so much time and effort to helping members of their own communities resolve their differences. The mediators, many of whom have served for a decade or more, deserve our most heartfelt gratitude.

What might the future hold for ADR? During this anniversary year, the SCAO will be convening a task force that will be charged with identifying lessons learned and best practices over the past quarter century, as well as identifying challenges that remain in expanding dispute resolution services. Most importantly, the task force will be invited to develop a future vision for the continued integration of ADR processes into judicial system services.

While courts will increasingly include mediation as part of parties' experience in the judicial system, there is growing concern over the long term sustainability of community mediation. Because CDRP centers are supported by revenue from court filing fees, the more effective the centers are in helping parties resolve their dispute before filing a court case, the less funds are generated to support the program and the more CDRP. Centers and state government constituents will need to find new solutions to address declining funding levels if the statewide program is to be maintained and expanded.

The resolve of mediators 25 years ago to help their neighbors find solutions to their conflicts appears continually reinforced by their success in resolving increasingly complex cases. Conflict is inevitable; litigation is not. Hopefully, the next quarter century will bring even greater opportunity for Michigan citizens to discover that mediation can be a productive and economical way to reach a mutually satisfactory resolution for everyone.

Doug Van Epps is Director of the Michigan Supreme Court's Office of Dispute Resolution, and would like to take this opportunity to thank the ADR Section for its extraordinary efforts to implement and promote ADR services across the state. He can be reached at vaneppsd@courts.mi.gov.

MCR 3.216(A)(1) Clarified to Cover Property Issues

The Michigan Supreme Court has amended MCR 3.216(A)(1), effective January 1, 2015, to clarify that property issues are subject to mediation, as well as children's and spousal support issues outlined in MCL 552.502(m).

The new MCR.3.216(A)(1) says:

"All domestic relations cases, as defined in MCL 552.502(m), and actions for divorce and separate maintenance that involve the distribution of property are subject to mediation under this rule, unless otherwise provided by statute or court rule."

The amendment clarifies that distribution of property in divorce or separate maintenance actions is subject to domestic relations mediation.

Continued on Page 12

Upcoming Mediation Trainings

General Civil Mediation Training

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

Petoskey: **April 29-30, May 1, 6-8**
Training sponsored by Northern Community Mediation
Contact Jane Millar, jane@northernmediation.org

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

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

Plymouth: **October 8-10, 23-24**
Trainings sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Domestic Relations Mediation Training

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

Dearborn: **April 16-18, 23-25**
Training sponsored by Wayne Mediation Center
To register, call (313) 561-3500.

Grand Rapids: **April 24-25, April 27-29**
Training sponsored by Dispute Resolution Center of West Michigan
To register, call 616-774-0121 or go to www.drcwm.org

Lansing: **June 11-13, 18-20**
Training sponsored by Resolution Services Center
To register, call 517-485-2274

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

Advanced Mediation Training

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

Dearborn: **April 27**
Domestic Violence Screening Training for Mediators
Training sponsored by Wayne Mediation Center
To register, call (313) 561-3500

Grand Rapids: **May 7**
Taking it to the Next Level
Trainers: Anne Bachle Fifer and Dale Iverson
Training sponsored by Dispute Resolution Center of West Michigan
To register, call 616-774-0121

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

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

Traverse City: **October 2-3**
ADR Section Annual Meeting
Training sponsored by ADR Section
To register, go to http://www.michbar.org/adr/

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

How to Find Mediation Trainings Offered in Michigan

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

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

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

The ADR Quarterly

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

The ADR Quarterly 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 ADR Quarterly seeks to explore various viewpoints in the developing field of dispute resolution.

For comments, contributions or letters, please contact:
*Lee Hornberger - **231-941-0746***
*John L. Tatum - **248-203-7030***
*Kevin Hendrick - **313-965-8315***
*Toni Raheem - **248-569-5695***
*Stephen A. Hilger - **616-458-3600***
*or Phillip A. Schaedler - **517-263-2832***

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

Editor's Notes

The ADR Quarterly is looking for articles on ADR subjects for future issues. You are invited to send a Word copy of your proposed article to The ADR Quarterly Editor Lee Hornberger at leehornberger@leehornberger.com .

Articles that appear in The ADR Quarterly 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 ADR Quarterlies are at **http://connect.michbar.org/adr/newsletter** .

SAVE THE DATE

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

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

Hotel Registration. Reduced rates based on availability until August 20, 2015. Contact Park Place Hotel directly at 231-946-5000 and reference "Alternative Dispute Resolution Section/State Bar of Michigan."