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The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

Arbitration in Motion

— by Michael P. Coakley

Arbitration is probably one of the most dynamic dispute resolution processes in use today. For some classes of disputes arbitration is virtually the only game in town. The prime example is securities arbitration for retail securities customers and their brokers. Not that securities arbitration hasn't been influenced by developments in other lines of arbitration and vice versa, but securities arbitration, primarily through the National Association of Securities Dealers ("NASD"), has been in the vanguard of change in arbitration over the past few years. This article will review some of the changes both emanating from and impacting on securities arbitration.

"Securities arbitration...has been in the vanguad of change in arbitration over the past few years."

I. THE ONLY CONSTANT IS CHANGE

Pressure from litigants and from the Securities and Exchange Commission ("SEC") caused the NASD to commence in 2003 a rewrite of its code of arbitration procedure. Some of the changes are codifications of current practices, some are substantive modifications and some were the result of reorganization and the desire to present rules in "plain English."[1] These changes continued and accelerated a trend toward more court-like proceedings that was evident in developments in arbitration at the beginning of this decade. Coverage of all of the developments is beyond the scope of this note and the practitioner, consequently, would be well advised to familiarize him or herself with the current version of the rules and case law applicable to the particular forum in which the arbitration will be conducted before commencing the claim or response.

II. CLAIM AND RESPONSE

Increasingly the simple demand for arbitration is becoming a thing of the past. For the simplest claims, perhaps the demand to which no response is formally required may still be enough to commence an arbitration before the American Arbitration Association or a similar private forum. However, if the arbitration involves a matter of modest complexity or amount in controversy, increasingly arbitrators and the rules that they operate under are requiring more from the claimant in the way of a claim and from the respondent in the way of a response. Securities arbitration rules have long required that the statement of claim specify the claims and remedies sought and that the response specify the defenses. See New York Stock Exchange, Inc. ("NYSE") Arbitration Rule 612 and NASD Arbitration Code § 3120. What is changing with respect to these requirements is the governing forums' policies on enforcement of the requirements by the arbitrators. For example, the NASD in its newsletter to arbitrators (The Neutral Corner) is advising arbitrators that they have the authority to impose sanctions for failure to comply with these requirements. This could include dismissal of the claim or barring presentation of defenses. While these enforcement mechanisms

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have long been in the rules, recently the NASD has been reminding arbitrators of their powers in this regard.

III. FEDERAL RULES DISCOVERY COMES TO ARBITRATION

Discovery under the NASD Code of Arbitration Procedure and Discovery Guide now looks a lot like Federal Rules discovery. For example, on September 2, 1999, the SEC approved the NASD's use of its Discovery Guide for customer disputes with firms and associated persons. See NASD Notice to Members 99-90 - November, 1999.[2] The Discovery Guide provides lists of presumptively discoverable documents and information for the various types of disputes. While the guide itself states that it is only a guide and is not intended to remove flexibility from the arbitrators or the parties in dealing with discovery issues, because the guide also states the parties should produce documents listed by the earlier of the date the answer is due or is filed, some litigants are taking the position that the failure of a party to initiate production of listed documents is a violation of the rules for which sanctions should be imposed. The combined list and sanction process, then, looks a lot like FRCP 26 and 11. When this is coupled with the NASD's advice to arbitrators that in order to enforce compliance with information requests, the arbitrators should admonish, and in appropriate cases, sanction the non-complying party, the arbitration discovery process begins to look a lot like Federal Court discovery. (See The Neutral Corner, October 2004, NASD). The wisdom of this is yet to be shown, especially in light of the fact that arbitration is supposed to be a more efficient and expeditious alternative to court litigation.

Fortunately, the NASD is maintaining its guidance on information requests, in which it distinguishes information requests under Rule 10321(b) of the Code from the type of interrogatories that are used in Federal and State courts. (Id.) Unlike interrogatories, information requests pursuant to the Discovery Guide are limited to the identification of individuals, entities and time periods related to the dispute, and are not to require exhaustive answers or fact finding. (NASD Notice to Members 99-90, Exhibit 1, §I, p. 689). For certain types of disputes, however, the American Arbitration Association ("AAA") procedures come closer to the Federal Rules and allow interrogatories and depositions upon order of the arbitrator(s) "for good cause shown." (See AAA Commercial Arbitration Rules for Large Complex Commercial Disputes, L-4). These and other developments in the arbitration process may call to mind the old adage, "Be careful what you ask for, you may get it."

"[T]he arbitration discovery process begins to look a lot like Federal Court discovery. The wisdome of this is yet to be show.n.."

IV. MEDIATION

All of the major arbitration forums have well developed mediation processes. For example, as part of the script for the initial prehearing conference under the NASD rules, the chair of the panel will remind the parties that the NASD has a mediation process available, which is relatively inexpensive, well developed and successful. In fact, cases can go directly into mediation at the NASD without the filing of a claim, and the fees associated with direct mediation are lower. The NYSE and the AAA have similar programs. And, the process is effective for low-cost expeditious resolution of disputes. The NASD estimates that approximately 80 percent of its mediated cases settle within a few weeks to a few months of the parties' formal agreement to mediate. (See NASD.com, Mediation) So, mediation has become an integral part of the arbitration process and those who participate in it overwhelming agree that it saved them time and costs in getting the dispute resolved. (NASD.com, Mediation, Mediation Myths & Realities).

V. THE INITIAL PRE-HEARING CONFERENCE

Developments in the initial prehearing conference procedures at the major arbitration forums continue in the same vein as other process developments that are moving toward a federal rules model, i.e., the pre-hearing conference is designed to result in a pre-hearing order similar to a federal court pre-trial order. At the conference parties can expect to receive any additional disclosures from the arbitrators and confirm the composition of the panel; identify any issues that may require attention prior to the hearing; set discovery, motion and hearing brief deadlines; and set a final pre-hearing conference at which any remaining outstanding disputes or issues would be resolved prior to the hearing. As mentioned above, mediation will also be discussed. The parties should expect that the hearing dates will be scheduled at the initial pre-hearing conference and, accordingly, prior to the conference should have consulted with their clients and prospective witnesses about availability for the arbitration hearing. The arbitrator or the chair of a multi-arbitrator panel will issue a scheduling order following the initial pre-hearing conference that is intended to govern the pre-hearing proceedings going forward from the initial pre-hearing conference through the hearing.

V. THE HEARING

The conduct of arbitration hearings has remained relatively the same with respect to the general process, presentation of evidence and the like. The

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rules of evidence still are not binding on the arbitrators, but remain an important guide to the weight to be given to evidence proffered, if not so much its admissibility.

One thing, however, has changed and, again, has changed towards a court model. The arbitration hearings themselves are becoming longer and the presentation of evidence more extensive and exhaustive. So much so, that arbitrators are beginning to do something the courts have done for some time, and that is impose time limits on the parties' presentations of their cases. Although not explicitly provided for in the rules, there is enough flexibility in the rules that the arbitrators likely have the general authority to do this without jeopardizing the finality of their award. For example, the NASD Code of Arbitration Procedure Rule 10315 says that the arbitrators determine the time and place for all meetings of the arbitrators and parties; the arbitrators also determine the materiality and relevance of any evidence (NASD Code Rule 10323); the arbitrators interpret and determine the applicability of all provisions under the code; and such determinations are final and binding upon the parties (NASD Code Rule 10324). In combination, these rules give the arbitrators the authority to define the amount of time the parties may have to present their proofs. Similar rules can be found in the AAA and NYSE Rules.

This is an important consideration to be factored in when determining at the initial pre-hearing conference how much time the parties set for the presentation of the case at the hearing. Scheduling three days for a hearing, for example, may mean that the arbitrators hold the parties to three days when it comes time to conduct the hearing. It will then be up to the parties and their counsel to figure out how to accomplish this within the time allotted. As the parties themselves set the amount of time at the initial pre-hearing conference (and presuming they did nothing to try to change this prior to commencement of the hearing), they will not likely be heard to complain later that they did not have enough time to present their case.

VI. AWARDS

The process and form of awards in commercial cases has remained relatively the same. Standard AAA rules do not require a detailed award and none will be provided unless the parties agree otherwise. The number one rule in AAA arbitration procedures, however, is still that the parties can by agreement modify the rules. One thing to keep in mind with respect to this power is that the AAA has various supplementary procedures that apply to different types of disputes. For example there are supplementary procedures for securities disputes under the AAA rules that will govern if the parties agree to conduct the arbitration under them. (AAA Supplementary Procedures for Securities Arbitration, No. 1) And, while the supplementary rules do not require a "detailed" award, they do impose additional requirements on the award, such as requiring that the arbitrators state the disposition of any statutory claims. (AAA Supplementary Procedures for Securities Arbitration, No. 6). The arbitrator selection process is also different under the AAA supplementary rules. Both the NYSE and the NASD have developed formats of awards that they generally require be followed by the arbitrators and, for certain issues such as an award of expungment, have developed preferred language for the award.

"[A]rbitrators are beginning to...impose time limits on the parties' presentations of their cases."

CONCLUSION

As the arbitration forums continue to absorb more and more of the disputes that arise, it's likely the pace of change in arbitration processes will continue to accelerate. This article has touched on a few of the changes afoot, and the trend is obvious. To paraphrase William O. Douglas, as nightfall does not come at once, neither do these changes. Rather, in the twilight when everything seemingly remains unchanged we should be aware of change in the air, lest we be caught unawares of a coming darkness. It remains to be seen, whether the changes coming to arbitration will lead to imposition of an oppressive and burdensome process, or lead to the light of new and improved arbitrations.

"...[W]e should be aware of change in the air, lest we be caught unawares of a coming darkness."

[1] The Arbitration Code Re-Write, Securities Arbitration Commentator, vol. 2004, no. 2, February, 2004.

[2] The far reaching effect of SEC approval of arbitration processes can be seen in the recent decision of U.S. Court of Appeals for the 9th Circuit, Credit Suisse First Boston v Grunwald, Case No. 03-1595 (March 1, 2005) in which the Court held that California's new ethics rules for neutral arbitrators are preempted by conflicting "NASD Rules approved by the Securities and Exchange Commission." Id. at 2270.

Tracy Pic

Tracy bio info...

BOOK REVIEW

Ripples from peace Lake, Essays for Mediators and Peacemakers, by Eric Galton.

A Message of Love to Mediators: Eric Galton's *Ripples from Peace Lake*

— by Tracy Allen

On the eve of a months-long, out-of-town mediation, in an Applebee's, the journey began. Being already somewhat familiar with Mr. Galton's purpose and passion in creating this work, it was with great anticipation that I could finally begin reading it. With a seemingly bottomless marguerita at hand, I plunged into what would become a mediator's oasis.

Three hours later, ice long ago diluting the cerebral effects of tequila, I asked myself this etiquette question: What is the proper way to respond to the receipt of an unexpected love letter from a near perfect stranger?

This is a book about art, jazz musicians, bartenders and chefs. It is practical and it is thought provoking. It is transparent and honest. It is magical and sobering. You may thus ask yourself, is it worth my time? Suspend any disbelief. Let go of yourself. Mr. Galton did. Read beneath the surface and you will re-discover qualities in yourself and in the power of the mediation process that will make your next case your best work to date.

"His mission is to open our eyes...to free us to acknowledge and face our fears..."

In this his third book, Mr. Galton chose to address 22 notable topics that new and highly experienced mediators face in almost every dispute. His approach is abridged and pointed, yet useful and from the heart. In the early chapters, he returns to the basics. In the later essays, he relies on the reader's experience to comprehend the surface and deeper meanings he shares on topics like loneliness, despair and hope. Mediators with significant "time in the chair" will likely receive Mr. Galton's deepest messages more clearly than newer peacemakers, but in all the essays, Mr. Galton's words sing many songs of truth about what we do.

There is no doubt Mr. Galton is passionate about mediation and probably life. His opening acknowledgments to his family and closest colleagues alert the reader that *Ripples* is no ordinary book about mediation. The introduction clearly reveals Mr. Galton's primary motivation for writing *Ripples* - to speak of things mediators intuitively understand but often do not vocalize; and to remind us that in this world of endless troubled times, we as peacemakers have an obligation and opportunity to make a difference.

Using carefully selected musical and movie metaphors throughout, *Ripples* begins with a discussion of the art of mediation. But it is a deeper chapter. It challenges us to ask ourselves from time to time, "Who are you? Who? Who? Who?" The theme of the essay calls to light our early revelations as new mediators of the subtleties of the process, the exhilaration of such discoveries and the way they hit our hearts. We often forget the inexact science and mystery of the mediation process that perhaps drew us initially, and which is often lost in the 100th or 1000th case. Yet, it is ever present, ever powerful and ever seductive.

With honesty, humility and humor, Mr. Galton creates a list of reminders - a "how to" guide to read before every mediation - so we don't get caught on the road to impasse when we impose our clearly all-knowing assumptions on participants in mediation. He also calls a spade a spade when he reviews the laundry list of stupid things people say in mediation. But he goes even further, and gives us some mediation analysis and responses to even the most irritating, unproductive use of words which unnecessarily create positions mediators must then hurdle.

For readers who seek concrete answers or solutions to typical mediation challenges, *Ripples* is not the book. At best, Mr. Galton recognizes and raises issues we cannot ignore. He discusses things all mediators feel, but don't necessarily talk about. He does not provide the answers or impose a "right way" method of tackling a problem in mediation. He does not set out to tell us how or what to think about the 22 topics. His mission is to open our eyes, to begin our collaborative dialogue, to free us to acknowledge and face our fears, to recognize the greatness in our colleagues and in people, and to answer the call -- the call each one of us received one memorable day, to engage in the mystical world of peacemaking.

Mr. Galton's book may be ordered through the publisher at **http://www.trafford.com**.

Tracy L. Allen is a full-time mediator and ADR service provider. She is currently the President-elect of the International Academy of Mediators and Co-chair of the Mediation Committee of the Dispute Resolution Section of the ABA. She is a frequent national and international ADR lecturer, trainer and author. She lives in Southeastern Michigan and works throughout the world.

Upcoming Mediation Trainings

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of the mediation court rules, MCR 2.411 (general civil) or MCR 3.216 (domestic relations). Participants must attend all of the dates listed for each training session. For more information, visit the SCAO web-site at **www.courts.michigan.gov/scao/dispute/odr.htm.**

General Civil

Training sponsored by The Resolution Center

Mt. Clemens: **April 6, 8-9, 13, 15-16**

Contact: Craig Pappas, 586-469-4714, theresolutioncenter@mediate.com

Training sponsored by Dispute Resolution Center of Washtenaw County

Ann Arbor: **April 8-10, 15-17**

Contact: Kaye Lang, drc@mimediation.org

Training sponsored by Institute for Continuing Legal Education:

Troy: **May 19-21, June 17-18**

Register online at www.icle.org/mediation, or call 1-877-229-4350.

Domestic Relations

Training sponsored by Oakland Mediation Center:

Bloomfield Hills: **April 11-12, 14, 18-19**

Contact: Denise Rugg, 248-338-4280, deniserugg@ameritech.net

Training sponsored by Mediation Training and Consultation Institute:

Ann Arbor: **August 1-5**

Ann Arbor: **November 30, December 1-2, 7- 8**

Register online at www.learn2mediate.com, or call 1-800-535-1155

Advanced Mediation Training

Training sponsored by Dispute Resolution Center of Central Michigan

Lansing: **May 13, 8:30-12:30** -
"Am I the Mediator I Want to Be?"

Lansing: **June 21, 8:30-12:30** -
"Becoming the Mediator I Want to Be"

Trainer: Anne Bachle Fifer

Contact: Karen Beauregard, 517-485-2274, drccm.beauregard@tds.net

Training sponsored by Institute for Continuing Legal Education:

Troy: **June 7, 8:00-5:30** -
"Round Table Mediation Forum."
Limited enrollment for very experienced mediators only.

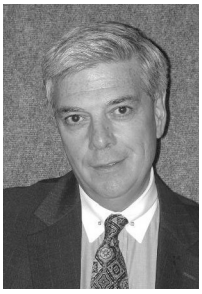
Facilitator: Tracy Allen

Contact: Kelly Miller, 1-877-229-4350.

New on the Section Website!

The ADR Section web page now has a reference listing of all Michigan Court Rules that refer to alternate dispute resolution and all Michigan statutes that refer to mediation. This page will be updated quarterly. We hope you will find this resource to be useful. To access the site, navigate to the ADR Section from the State Bar of Michigan site- http://www.michbar.org/ --and then click on "Michigan Statutes and Court Rules." Or, you can go directly to **http://www.michbar.org/adr/statutes.cfm.**

The Effective Practices and Procedures Action Team of the ADR Section maintains this list and welcomes suggestions to make this service more useful to you . Send comments or suggestions to Susan Hartman at **susandh@umich.edu.**



Formerly a litigator with Dykema Gossett, Dick Hurford is now chief counsel for the Masco Corporation, where he has integrated ADR into all aspects of the company's legal affairs.

COMMENTS FROM THE CHAIR

Remembering Nanci Klein

— by Richard Hurford, Section Chair

As one of more than 250 participants in the Advanced Negotiating & Dispute Resolution Institute (ANDRI 4), held on March 15, 2005, jointly co-sponsored by the ADR Section of the Michigan State Bar, ICLE and MJI, I had the good fortune to learn and listen to the best and the brightest address all aspects of ADR; yet there was someone missing. Our national speaker, Dr. Bernard Mayer, explored the dynamics of dispute resolution and how to effectively deal with conflict, yet there was someone missing. Judges David Lawson, Edward Sosnick, Amy Hathaway, and Gerald Lotracco engaged in a candid and fascinating dialogue with their fellow judges on the ten best practices in diverting cases to facilitative mediation; yet there was someone missing. Although ANDRI 4 offered an extremely diversified menu of thought provoking sessions on a multitude of aspects concerning ADR, virtually all who attended or participated knew there was someone missing. We all left ANDRI 4 a little less satisfied than we should, as we all knew there was someone missing.

At some point in the day, all of us realized the void was caused by the absence of Nanci Klein. The "whirling dervish" that was Nanci, always thinking and in constant motion, was not there to challenge, engage and make us smile. We all missed the grace, the wit, and the indomitable passion for ADR that was Nanci Klein.

There have been so many comments made and words printed about Nanci, I pause to cover the ground that has been so ably traveled by others. What more can I say about the long time Executive Director of the Oakland Mediation Center that has not been better said by others. I shall not try. But, the ADR Section believes it is most appropriate to share with you a few thoughts so that you might appreciate what Nanci meant to all of us in the ADR Section.

Nanci was the consummate interest-based negotiator who lived what she preached. Suggesting that Nanci was interest-based, however, should not suggest that Nanci was less than tenacious in her negotiating style. For example, Nanci did love to cook and to that end purchased apples from her local grocery to make apple pies. After baking several pies, she sampled her baking and much to her horror realized the apples were simply no good. Nanci packaged up the pies and returned to the store to advise the grocer that the apples were bad. The grocer intimated that the fault might lie with the cook rather than the ingredients. Nanci insisted that the grocer sample the pie and ultimately obtained the requested refund and replacement apples to boot.

Nanci was tenacious and passionate, but extremely insightful and caring as well. Nanci and a colleague were traveling out of town on a business trip and Nanci called her colleague to advise the colleague of a delay. The colleague, who was anxious to depart, inquired as to the cause of the delay. Nanci indicated that she had not yet prepared all the meals Coleman, her husband of nearly four decades, would need during Nanci's absence. The colleague suggested that Coleman was more than capable of preparing his own meals. Nanci's reply was quick and sincere. "Don't you know that in all good relationships there exists a covenant of need?" Regardless of the reality, this "covenant of need" helps fulfill the give and take of the relationship. "My part of the covenant of need is to prepare meals for Coleman; he meets my covenant of need in so many other ways. While the needs may not be real, they do form our covenant."

Several years ago, Nanci attended an ADR Council meeting with her granddaughter, just a toddler at the time. She handled the child, as well as the ADR meeting, like a pro. While discussing the fine points of the topic at hand, Nanci plied her granddaughter with treats, juice and a toy, without missing a beat or failing to make her point during the course of the meeting. Showing patience without measure, Nanci kept both her commitment to the ADR Council and her family. Every Friday Nanci had committed to baby-sit her granddaughter and this commitment could not be set aside for the business of the ADR Council.

Nancy was a frustrated actor at heart who, at times, could not resist the temptation to change the script. Nanci provided training to literally thousands of individuals and would always carefully script the training with her fellow trainers. In scripting one exercise on active listening, Nanci's role was to play the physically abused girlfriend. When the training commenced, however, Nanci, who always resisted type casting, launched into an aria abandoning the carefully crafted script. The male co-trainer, not Nanci, was suddenly the individual who was physically attacked and required emergency room treatment. Nanci's point was underscored. To be a

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true active listener one must cast aside your preconceived notions and beliefs and truly listen to what is being said and the interests that are being articulated. Only then, can we begin the dispute resolution process in earnest.

A few months back, the Oakland Mediation Center was conducting a training session sponsored by SCAO regarding a pilot program for mediating post-judgment parenting disputes through the Friend of the Court. As the training commenced, questions were being asked at a feverish pace focusing on the needs of the parents. Nanci was seen drawing something on her note pad. Someone sitting next to Nanci soon saw the details of the figures of children emerging from Nanci's drawing. When asked, "What are you doing," Nanci replied, "It's about the children, I don't want to forget this - ever!"

Each life Nanci touched has a different, vivid memory. These shared memories underscore why we will all miss Nanci and her contribution to the richness of our lives. We extend our deepest sympathies to Coleman and Nanci's two sons, Michael and Jeffrey. We all have missed and will continue to miss Nanci but can share with each other the memories that are now Nanci. Thank you for sharing your memories with me.

Ask the Neutral

Dear Neutral:

We finished a grueling mediation in the wee hours of the morning. The terms of the agreement were reduced to writing by the mediator and signed by both parties and their attorneys. The agreement states that it resolves all the issues.

It turns out that a provision specifically agreed upon was not included in the written settlement. In addition, one of the parties believes a statement in the agreement applied to all assets but the other party believes it applied to only one asset. (The written settlement is somewhat vague and could support either interpretation.) Subsequent to the session, the mediator wrote both counsel regarding the inadvertent omission of the one settlement term specifically addressed in the session. Counsel are now embroiled in conflict over whether the court order based upon the settlement will 1) include the omitted term or 2) will include the omitted term and also resolve the ambiguity or 3) include neither . At a hearing under our court rules, what can the Court be made privy to and what must be kept confidential? The written settlement agreement? The mediator's letter regarding the omitted term? Testimony from the parties regarding the ambiguous term? Thanks for your assistance.

From: We Only Thought We Were Done

Dear "We Only Thought:"

Your question addresses the "uncompleted settlement" problem, one of the most troubling areas of mediation. You don't mention whether this was a court-ordered mediation under the Michigan Court Rules or an independent process conducted privately. Under the court rules, no statements made during a mediation, including written statements, can be used in other proceedings. Any communication between the parties or counsel and the mediator relating to the mediation may not be disclosed unless all parties agree in writing. MCR 2.411 (C)(5) and MCR 3.216(H)(8). The mediator may not disclose anything to the court except that the mediation was conducted on a certain date, who participated, whether settlement was reached and whether further ADR proceedings are contemplated. MCR 2.411(C)(3) and MCR 3.216(H)(6). Without agreement of both parties, I think these provisions bar consideration of all the evidence you mention in your question.

If it was not a court ordered mediation, you may try to fashion an argument that parol evidence should be admitted to resolve the ambiguities of the agreement; but I think the court is likely to follow the confidentiality guidelines of the court rules that all mediation statements, including those in writing, are confidential and may not be disclosed without consent. If one of the parties to your dispute objects, the evidence may not be heard.

Sometimes when I know there is a complex agreement to be drafted at the conclusion of a settlement and all the terms may not be refined until later, I suggest an ADR process to resolve disagreements that arise once the final agreement is presented. This avoids the necessity of going to court to try to enforce a disputed settlement. It's too late for that in your case, so you could first try to obtain the written consent of all parties to admit the evidence of negotiations to establish the agreement. If this proves impossible (as it likely will) I think the mediator should probably advise the Court that no settlement has been reached and then should encourage the parties to get back together to resolve the disputed issues. It may be hard to go back to negotiations after you thought you had a settlement, but it still beats the alternative of going to trial after you've gotten so close to settlement.

—Laurence D. Connor

New Model Standards of Conduct for Mediators Proposed

— by Anne Bachle Fifer

Anne Bachle Fifer is a mediator, arbitrator, and mediation trainer based in Grand Rapids.

In 1994, Model Standards of Conduct for Mediators were developed by representatives from three national ADR organizations: the American Arbitration Association, the American Bar Association, and what was then known as the Society for Professionals In Dispute Resolution, now part of the Association for Conflict Resolution. More than a dozen states, including Michigan, adopted these Standards as the basis for their own state Standards of Conduct for Mediators[1].

The mediation landscape has changed in the years since the Standards were first adopted. As Prof. Joseph Stulberg, Reporter for the Joint Committee on the Model Standards of Conduct for Mediators, notes, the use of mediation has grown exponentially in the last ten years; there are now more than 2200 statutes or court rules on mediation, and mediation is now used in a wide array of contexts from peer mediation programs in schools, to mediation systems within organizations, to mediation of public policy disputes, to courts at the federal and state levels.

The three original organizations decided in 2002 that some revisions to the Model Standards of Conduct were warranted, and two representatives from each organization met for over two years to develop revisions. Their process included meeting in executive session; conducting public sessions at various meetings of the sponsoring organizations; and publishing the Committee's work through a website. Two different revised versions of the Standards were posted to the website last year for public comment. In December 2004, the Joint Committee approved the revised Standards and has submitted them to its constituent organizations for approval.

While the Revision contains multiple changes to the current Model Standards, it retains its fundamental features, including the nine distinct standards of the original. It continues to serve as ethical guidelines for persons mediating in all practice contexts, while recognizing that mediation practice in selected contexts might require additional standards in order to insure process integrity (e.g., family mediation, environmental disputes). The Revision avoids the somewhat confusing "Comment" format of the original, incorporating those provisions into the Standards themselves.

One set of changes is in response to the growing use of mediation as a market-oriented, fee-based service. The Revision specifically notes that how a mediator's fee is paid could conflict with the mediator's duty to remain impartial, and it addresses practices such as giving and receiving gifts. Recognizing that it is not uncommon in some sectors for one party to pay the mediator's full fee, rather than have it divided equally among the parties, the Revision explicitly approves of a mediator's fee being paid in unequal amounts by the various parties; however, it adds cautionary guidelines for the mediator, such as disclosure requirements, to make certain that such unequal payments do not undermine a mediator's actual or perceived impartiality.

The Revision provides more specific guidance regarding maintaining confidentiality, such as when both parties want the mediator to reveal something, and when the mediator is describing a mediation for teaching purposes. It also specifies circumstances under which a mediator should discontinue the mediation. The Revision adds new provisions identifying a mediator's duty when conducting a mediation with persons with recognized disabilities, and in cases involving allegations of domestic abuse.

The full text of the final draft of the proposed revisions to the Model Standards of Conduct for Mediators can be read at the Ohio State College of Law's web-site, **http://moritzlaw.osu.edu/dr/**.

[1] http://www.courts.michigan.gov/scao/resources/standards/odr/conduct.pdf

SBM
State Bar of Michigan

ADR Section Affiliate Application

The ADR Section of the State Bar of Michigan has adopted a by-law providing affiliate status to ADR professionals who are not members of the Michigan State Bar. All ADR professionals may now participate in furthering the vision of the Section. The Section's vision is:

> The ADR Section continues to be a primary resource within the State Bar of Michigan providing education, advise and policy guidance on ADR issues. The Section works in tandem with the Supreme Court Administrative Office (SCAO) and the courts in the implementation of the ADR court rules on issues supporting the wider use of alternative dispute resolution strategies and promoting access to ADR for those who cannot afford it. The Section's programs and activities have positioned it as the voice for information on ADR across the state. Made up of diverse practitioners, the Section is recognized by SCAO, the courts and the bar as a source of unbiased, high quality expertise. We are recognized as the primary resource for information on ADR policy and ethical issues, techniques and practice, and training design.

The Section's annual dues are $30.00 that will entitle you to receive the Section's Newsletter, participate in programming, further the activities of the Section, and receive Section listserv announcements.

In implementing its vision, the ADR Section is comprised of various Action Teams:

Action Team Name	Chair	Purpose
Section-to-Higher Education	Robert Tremp (231) 932-9500 **rptpc@traverse.com**	Coordinate with the law schools and graduate programs in the state to identify common efforts
Publication Action Team	Benjamin Kerner (313) 965-1920 **benkerner@aol.com**	Publication of the Section's Newsletter
2005 Annual Mtg. Action Team	Charles Clippert (248) 433-7212 **cclippert@dickinson-wright.com**	Replicate the success of the 2004 Annual Meeting
SCAO Action Team	Richard Hurford (313) 792-6306 **richard_hurford@mascohq.com**	Coordinate with SCAO to identify common priorities, provide resources to meet those priorities
Access Action Team	Jonathan Moody (248) 331-0414 **jmoody@winstarmail.com** Tony Braun (313) 223-3575 **braun@dickinson-wright.com**	Working with the Community Dispute Resolution Centers and other entities to extend the availability of ADR
Skills Action Team	Dale Iverson (616) 988-9623 **daleiverson@justmediation.org**	Coordinate with ICLE to develop programming for ANDRI, and develop other Section programming
Effective Practices and Procedures	Susan Hartman (734) 623-8255 **susandh@umich.edu**	Identify ADR practices locally and nationally, publish those practices, and coordinate implementation

We encourage your participation in the activities of the Section and the Action Team that is of interest to you. Please contact the appropriate Action Team Chair for further information.

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For comments, contributions or letters, please contact:

Benjamin Kerner at (313) 965-1920, fax: (313) 965-1921 or Anne Bachle Fifer: at (616) 365-9236, fax: (616) 365-9346

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