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The ADR Newsletter

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Some Reflections on Mediation

by Lee Hornberger

This article will review some reflections based upon this writer's experience as a civil mediator. This will include suggestions on how the advocate can most effectively use mediation for the best interests of the client. Strategies and techniques for acclimating and preparing the client for mediation, written submissions, opening statements, settlement agreements and creative endings for mediations are suggested.

ACCLIMATING THE CLIENT

It is crucial that the advocate prepare and acclimate the client for mediation from the very beginning because the mediation might be one of the most important stages of the litigation, regardless of whether or not settlement is reached.

The advocate should educate the client to litigation realities. This includes acclimating the client regarding the time, expense, and unpredictability of litigation. The client should understand that newspaper articles reporting California jury verdicts might not be applicable in Michigan and that bad things do happen to good people.

In addition to acclimating the client to the realities of the civil justice system, the advocate should cooperate with the mediator in scheduling. If there is a scheduling problem, the advocate needs to let the mediator know. The mediator should not be left swaying in the wind and the recipient of silence. Communication is the key to building trust and a good relationship.

LOGISTICS

The logistics concerning the mediation can help insure a healthy environment for productive discussions. The advocates should cooperate early on with the mediator in arranging the time and location of the mediation. Some believe that the mediation has to take place at a completely neutral site such as bar association facilities

or the mediator's office. However, it has been this writer's experience that most mediations can be effectively conducted at one of the advocate's offices, if the facilities are adequate.

"The mediation might be one of the most important stages of the litigation, regardless of whether or not settlement is reached."

MEDIATION SUBMISSIONS

Written pre-mediation submissions to the mediator are usually helpful.

A successful submission should contain bullet points, key facts, and key cases. The submissions can have attached to them a copy of the most favorable cases with the pertinent passages highlighted. Jury verdicts in similar cases in the geographic area can also be helpful.

It should also be decided whether the submissions are to be confidential or served on the other side. Service on the opposing party is generally preferable. If the submission is confidential, it can candidly list the strengths and potential weaknesses of the case. Furthermore, the advocates might consider whom the submission is attempting to convince. Is it the mediator, the other advocate, the other party, the client, oneself, or all of the above?

The mediator does not necessarily memorize the written submissions and may ask questions at the mediation that

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Lee Hornberger, www.leehornberger.com, is an arbitrator and mediator in Traverse City. Lee is an Ohio State Bar Association Board Certified Specialist in Labor and Employment Law. He is President-Elect of the Grand Traverse-Antrim-Leelanau Bar Association, a mediator with Circuit Courts, Equal Employment Opportunity Commission, Michigan Department of Civil Rights, and community mediation services, and an arbitrator with the American Arbitration Association, NASD, National Arbitration Forum, National Futures Association, and New York Stock Exchange.

"The client should not be learning the mediation process for the first time at the mediation session."

are covered by them. Sometimes the mediator wants to create discussion or thought on the topic.

The Equal Employment Opportunity Commission mediation procedure does not utilize written submissions. The mediator receives only a copy of the discrimination charge.

The parties should consider the exchange of information during the mediation. This might include information concerning new employment, destitute defendants, medical information, new important evidence, or new legal authority and cases.

PREPARING THE CLIENT FOR MEDIATION

The advocate should prepare the client for the mediation almost as if preparing the client for a deposition. The client should not be learning the mediation process for the first time at the mediation session.

The advocate should meet with the client ahead of time and prepare a first proposal as well as private goals and alternatives. A determination should be made as to whether the client has a drop-dead number and what are the best and worst alternatives to a negotiated settlement. Although many clients may have drop-dead numbers, the advocate should work with the client prior to mediation to develop a range of possibly acceptable resolutions rather than a hard and fast drop-dead figure.

The advocate should carefully explain mediation basics to the client. This includes mediator neutrality and impartiality, confidentiality, collaborative effort, lack of a mediator decision or maybe even recommendation, respect for the process, the mediator's role to help the parties communicate with each other, the importance of

being open with the mediator in private caucus, and letting the mediator get to know the client. Possibly only the advocate talks dollar figures.

The advocate should develop a credible strategy and know the case, including its strengths and weaknesses. It is the rare case that has no weaknesses. The advocate should prioritize goals and try to create possible options, and the advocate and parties should be open to considering multiple options. Consideration should be given ahead of time to whether some type of an apology would help the mediation process. If so, of what magnitude, by whom, when, and what is the wording for an apology?

ATTENDEES AT THE MEDIATION

Careful consideration should be given to determining who will attend. Should a spouse or significant other be

either at the mediation or immediately available? From an employer's viewpoint, should the immediate supervisor and other management people be there? Do the attendees have the authority to settle the case?

Because the mediator controls the process, he or she ultimately determines the attendees' roles. Just because a person is an attendee does not necessarily mean that person is an equal participant in all phases of the mediation session. For example, a significant other might not have a speaking part in the joint session for opening statements but would be permitted to speak and vent when the parties go into separate caucus with the mediator.

MEDIATOR'S OPENING STATEMENT

The mediator's opening statement is a crucial part of the process. Some mediators give a long fifteen to twenty minute opening while others may give a more limited five minute opening. While there is a virtue to conciseness, a more comprehensive mediator opening has several advantages. The mediator's opening statement gives everyone a chance to settle down, relax, and become a part of the process. The mediator's opening statement also fills in the gaps or reinforces the procedures where the advocates may have failed to do this. In addition, the mediator's opening statement helps the mediator establish control and earn the participants' trust.

The participants should neither look nor be bored during the mediator's opening statement. The other participants will be gauging and ultimately reacting to how others act and react during the opening statements.

PARTIES' OPENING STATEMENTS

Consideration should be given to the length, detail, and tone of the party's opening statement. Egos and emotions should be left at the door.

The client's portion of opening statement is crucial. The client might be the most articulate and knowledgeable person at the mediation. On the other hand, maybe exactly the opposite is the case. Splitting the opening statement between the client and the advocate is sometimes very helpful because it allows some venting by the client. The client should stick to the essential facts if presenting in front of the other side. Allowing the client to speak directly to the other side in the mediation opening statement can sometimes meet both parties' emotional needs and feelings, and can provide catharsis. Just being heard and respected sometimes goes a long way towards settlement.

Often a direct presentation by a party in the opening stage can go a long way towards ultimate resolution of the situation. It should be remembered that, absent resolution

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or surrender, the client will eventually have to tell his or her own viewpoint in deposition and at trial. The clients' opening statements can help set the tone. They should not be pro forma. A good opening statement from the client precludes hiding the client. For example, it allows an employee, maybe for the first time, a chance to listen to the supervisor. However, the advocates have to consider the other side's reaction to the opening statement and tailor the statement accordingly. The opening statement can help the opposing party gauge the client's sincerity.

ADVOCATE ROLE AT MEDIATION

The role of the advocate in the mediation session is different from the role of the advocate in other litigation phases. The advocate should come to the mediation with an open mind. The advocate should not use threatening language. The advocate should thank the other side for attending. The edge should be taken off the advocate's remarks.

Advocates and their clients should appreciate that the process is an important factor in mediation. In mediation slower is usually faster in the long run. Patience, curiosity, and imagination are important. All the participants have to be willing to listen. In addition, both parties must be willing to compromise and be reasonable. It is very rare that either side will settle for either fifty cents or a million dollars. Both parties have an interest in settlement which should be recognized. The ultimate focus is on the future, not on the past, and on thinking outside of the box. It is important that the participants keep the momentum going even if by small increments in their offers and counteroffers.

In essence, the parties are at the mediation to listen to each other. They are not necessarily there to get the facts to match. The facts might not ever match.

The parties should consider putting right and wrong in a corner. This results in a discussion of the future rather than an analysis of the perceived rights and wrongs of the past.

SEPARATE MEETINGS WITH THE MEDIATOR

The parties should understand, anticipate, and plan for caucuses or separate meetings with the mediator and the greater degree of confidentiality that these separate meetings provide. It is in these separate meetings that additional venting can occur. In addition, the mediator can conduct reality checks. The client needs to hear from others, not just his or her own attorney, about potential problems with the case. Options can be developed during the separate meetings, and bonding between the mediator and the participants can be fostered.

The mediator is not the font of all knowledge. The advocates should be prepared to provide creative suggestions in order to enhance the mediation process.

WRITTEN SETTLEMENT AGREEMENT

It is important prior to the mediation that the participants anticipate and prepare for the drafting of a written settlement agreement, or at least a comprehensive tentative outline of an agreement, as part of the last stage of a successful mediation. The parties should bring a proposed release and other "boilerplate" language to the mediation.

Since the mediator is not a party to the settlement agreement, usually the mediator would not sign the agreement. Issues may arise as to who will draft the agreement. Consideration should be given to all of these things ahead of time.

Sometimes, since the agreement is more in the mediator's memory than anyone else's at that stage, it can be useful for the mediator to transcribe the agreement while reading it out loud to the parties for concurrence. In this situation, the mediator is serving as a scribe, not a drafter.

"They are not necessarily there to get the facts to match. The facts might not ever match."

ENDING THE MEDIATION

If the mediation results in a final written settlement agreement, that would be a good place to end the mediation. But what if the mediation does not presently result in an agreement? The decision then has to be made as to how and when to end the mediation session. A mediation session should end with a clear understanding of what will happen next. This might be another mediation session, a partial agreement, a reconsideration period, or selection of a third-party or other method to decide some or all of the remaining issues.

Sometimes the decision to end the proceedings is imposed upon the mediator by the parties. Other times it can be a mutual decision of all participants. It is usually best to have a final joint session to discuss whether and how to proceed further. The parties should anticipate that the mediator may request that they keep their most recent proposals on the table for a period of time.

After a mediation that does not result in a settlement agreement, it can be helpful for the mediator to follow up with the parties to further explore reaching agreement at a later date. Sometimes after further reflection parties who ended a mediation at seeming loggerheads can reach a settlement if given a face-saving means by the mediator.

CONCLUSION

This article has reviewed reflections from what this writer has experienced in civil mediations. In addition, the article has provided suggestions on how the advocate can best use mediation for the best interests of the client. The article has reviewed the basic principles for the participants of

(1) keeping an open mind and being flexible, (2) taking sufficient time to let the process work, (3) giving the client an appropriate opportunity to vent and bond with the mediator, and (4) using the opportunity to directly convince the other side of the merits of the case while keeping an open mind to the other sides's viewpoint. ❄️

SBM Has Practice Management Module

by Thomas W. Cranmer

As President of the State Bar of Michigan, I am proud to introduce a new membership benefit: the Practice Management Resource Center (PMRC). This new program will assist members in effectively and efficiently managing the business component of practicing law. It is designed to help attorneys manage everything from outfitting an office with the latest software that integrates time accounting, billing, and account management, to effectively marketing one's practice.

The PMRC is accessible through the State Bar's website at <http://www.michbar.org/pmrc/content.cfm>.

The PMRC contains different sections of information. The Resources section provides electronic access to articles, features, and forms on a variety of topics, such as business development, financial management, and calendaring and docket control. The Legal Software Directory contains links to dozens of vendors offering software applications to assist members in the day-to-day management of a law practice. And in the near future, a lending library will be available for members to search law practice management publications, tapes, CDs, and other resources. Those resources can then be requested online or at the State Bar of Michigan Building in Lansing.

The PMRC also includes a Helpline, which is accessible by phone at 1.800.341.9715 or via email at pmrcHelpline@mail.michbar.org. The PMRC Helpline is a confidential, informal service designed to quickly assist SBM members with practice management issues. Those accessing the Helpline can get practical guidance, suggestions, referrals, and information about a variety of practice management topics from a practice-management advisor.

In addition to the website, the PMRC has an onsite Educational Center located in the State Bar of Michigan's headquarters at 306 Townsend in Lansing. The Educational Center offers programs on a variety of topics, including "hands-on" software demonstrations on an informal, individual basis. For example, members and their staff can test drive legal software in areas such as case

management, time accounting, billing, and calendaring functions. We have made efforts to ensure that members statewide can avail themselves of this new service by taking the programs on the road in both Grand Rapids and Marquette. Bar associations interested in scheduling a program in their area should contact the PMRC Helpline.

The State Bar strives to be responsive to its members' needs. The PMRC was established in direct response to lawyers asking for help in keeping up with changes in technology, streamlining the way they practice, and enhancing the service they provide their clients. Many members in larger firm settings are simply trying to keep abreast of what tools are available. Others have undertaken career moves as a result of market changes or quality of life choices, placing many in the position of beginning solo and small firms midway through their legal careers. The PMRC is designed with both sets of needs in mind, providing practical guidance and useful resources.

I invite you to visit our website, and call or send an email to let us know what you think. ❄️

Florida Court Orders Alternative ADR

A recent court order proves that some judges are really thinking outside the box. Ruling on a motion to designate the location for a deposition, a Federal judge in Florida ordered the parties to appear on the front steps of the federal Courthouse in Tampa at 4:00 pm on June 30, 2006; "At that time and location, counsel shall engage in one (1) game of 'rock, paper, scissors.' The winner of this engagement shall be entitled to select the location for the deposition." The court noted in its order that this motion was only "the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts." The attorneys who could not agree on the location of the deposition both have offices in the same building, although on different floors. The case is *Avista Management v Wausau Underwriters Ins Co* (MD Fla, 2006)

Upcoming Mediation Trainings

General Civil

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a):

Mt. Clemens: **August 9, 11-12, 16, 18-19**

Training sponsored by The Resolution Center

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

Plymouth: **October 5-7, 27-28**

Plymouth: **February 8-10, 23-24, 2007**

Training sponsored by Institute for Continuing Legal Education

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

Bloomfield Hills: **October 24, 26, 28, 31, November 2, 4**

Training sponsored by Oakland Mediation Center

Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

Ann Arbor: **November 3-5, 10-12**

Ann Arbor: **February 12-16, 19-20, 22, 2007**

Training sponsored by Dispute Resolution Center

Contact: Kaye Lang, 734- 222-3745, drc@mimmediation.org

Lansing: **March 8-10, 29-30, 2007**

Training sponsored by Dispute Resolution Center of Central Michigan

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

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):

Ann Arbor: **August 7-11**

Ann Arbor: **December 6-8, 13-14**

Training sponsored by Mediation Training & Consultation Institute

Register online at www.learn2mediate.com or call 1-734-663-1155

Grand Rapids: **November 1-3, 8-9**

Training sponsored by Dispute Resolution Center of West Michigan

Contact: Jon Wilmot, 616-774-0121, www.drcwmich.org

Plymouth: **January 23-27, 2007**

Training sponsored by Institute for Continuing Legal Education

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

Bloomfield Hills: **April 10-11, 24-25, 27, 2007**

Training sponsored by Oakland Mediation Center

Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

Advanced Mediation Training

Mediators on court rosters are required to obtain 8 hours of advanced mediation training every two years. MCR 2.411(F)(4); MCR 3.216(G)(3).

Lansing: **October 13, 8:30 am – 12:30 pm**

“Breaking the Logjam: Apology and Other Impasse Busters,” Anne Bachle Fifer & Bob Wright

Training sponsored by Dispute Resolution Center

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

Ann Arbor: **October 15-17**

Adult Guardianship/Family Caregiver Mediation Training

Training sponsored by The Center for Social Gerontology and Peace Talks Mediation Services

Contact: www.tcsog.org

Petoskey: **November 3**

“Mediator Tools and the Reflective Practice,” Anne Bachle Fifer

Training sponsored by Northern Community Mediation

Contact: Jane Millar, 231-487-1771

Ann Arbor: **January 19, 2007** “Parent-Teen Mediation”

January 20, 2007 “Kinship Care Mediation”

Trainings sponsored by Dispute Resolution Center

Contact: Kaye Lang, 734- 222-3745, drc@mimmediation.org

Bloomfield Hills: **January 26, 2007, 8:30 am – 6 pm**

“Advancing Your Mediation Skills,” Zena Zumeta

Training sponsored by Oakland Mediation Center

Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org ✪



ADR Section 2006 Annual Meeting and Conference

Friday – Saturday, September 8-9, 2006 at St. John's Golf and Conference Center,
44045 Five Mile Road, Plymouth, Michigan 48170.

Exploring the Science of Negotiation: whether you serve as an advocate or a neutral this conference will provide information and practical skills that you can utilize immediately. Our faculty of experienced theoreticians and practitioners will challenge our understanding of negotiation strategy and the psychology of negotiation. We will explore real world examples of negotiation, both in and out of mediation, and develop practical strategies and skills to enhance negotiation outcomes. Additionally, we will hear from a panel of Judges, favoring ADR, who will explain the needs and interests of the Judiciary in ADR.

Join your colleagues at an outstanding program of professional development and networking.

Your Faculty:

Cliff Hender: rated a Senior Mediator by Mediate.com, Cliff is President of Dispute Resolution Resources of Toronto, one of Canada's oldest and largest providers of ADR services. Having served for many years in senior positions in major insurance companies, Cliff developed his expertise as a mediator in personal injury, workplace, malpractice and insurance litigation. Cliff trains mediators and presents often at international conferences. He is a founding Fellow and past President of International Academy of Mediators (IAM).

Tracy L. Allen: after many years as a business, tax, and probate attorney, Tracy now specializes in conflict resolution and ADR providing neutral services in a broad range of processes including mediation, early neutral evaluation, and litigation support analysis. She is one of Michigan's preeminent trainers of mediators and has trained mediation, arbitration, negotiation and advocacy on three continents. Tracy is the current President of IAM.

Barry Goldman: after many years in the City of Detroit's Human Rights Department, Barry now serves as an arbitrator on local and national labor arbitration panels, and as a mediator both privately and for agencies. Barry is Adjunct Faculty for Wayne State University's MADR program and WSU Law School. He is a regular contributor to *Lawnotes*, the publication of the SBM Labor and Employment Section.

Meeting and Activity Schedule:

Friday, September 8, 2006

- 2:30 – 3:00 P.M. Registration
- 3:00 – 5:30 P.M. The Science of Negotiation Part 1
- 5:30 – 6:30 P.M. A Panel of Judges
 - Considering Judicial needs and interests in the use of ADR.
- 6:30 – 7:30 P.M. Networking and Cocktail Hour
 - Sponsored by AAA
- 7:30 – 8:30 P.M. Dinner in St. John's Michigan Grill
- 8:30 – 10:00 P.M. Award Recognition and Theatre
 - Award Presentations
 - Distinguished Service Award
 - George Bashara Award
 - Nanci S. Klein Award
 - Preview of the Judiciary Access Action Team's production of *Mediation and Mediator's at Work* – an educational piece to benefit Michigan's judiciary.

Saturday, September 9, 2006

- 8:00 – 9:00 A.M. Annual Meeting
 - Annual Report and Financial Report of Section
 - Election of Officers and Section Council
- 9:00 – 10:30 A.M. The Ultimate Negotiation Simulation
- 10:30 – 12:30 P.M. The Science of Negotiation Part 2
- 12:30 – 2:00 P.M. Lunch (on your own at St. John's or in the lovely neighboring communities of Plymouth or Northville)
- 2:00 P.M. Golf at St. John's

Fee Information: register at www.michbar.org/adr/events

Registration Fee: \$75.00 (\$37.50 for law students, waived for Judges)

Dinner Friday: \$40.00 /ea (not included in Registration Fee)

Hotel Registration deadline for reduced rates: August 9
www.theinnatstjohns.com

ADR Section 2006 Annual Meeting and Conference

Meeting and Conference Registration

Fees:

P # (if applicable) _____
 Name _____
 Firm _____
 Street Address _____
 City/State/Zip _____
 Phone _____
 Fax _____
 E-mail _____

Category	Amount
Meeting and Conference Registration only*	\$75.00
Dinner Friday, Sept. 8 th @ \$40.00/ea # of people _____ (not included in Registration fee.)	
Golf Registration	See below
TOTAL:	

Payment Method:

Please make check payable to State Bar of Michigan and mail with registration form to:

State Bar of Michigan
 Attn: Seminar Registrations
 Michael Frank Building
 306 Townsend Street
 Lansing, MI 48933

*Registration Fee only is \$37.50 for law students and is waived for sitting Judges.

Or charge my credit card and mail or fax to Becky at 517.346.6365.

Please charge my: VISA Mastercard Am Ex
 Card # _____
 Expiration Date: Month _____ Year _____

 Name as it appears on the card (please print)

 Signature of authorized individual

Registration for Golf: No pre-payment for golf. Golfers will pay on Saturday at the course. To ensure St. John's holds adequate tee-off times, please reserve below. Note: we will be responsible to pay for the number of golfers registered.

Golf @ \$55.00/each
 # of people _____

 Print Name

 Print Name

Registration can be completed on-line at the link within the ADR Section website and registration forms can be downloaded from the ADR Section website at: www.michbar.org click on Sections, click on ADR, click on Upcoming Events.

Room Reservations:

A block of rooms is being held for conference attendees at The Inn at St. John's until **August 9, 2006**. The reduced room rate is \$139.00 per night (plus sales, use and occupancy tax). Reserve early as the number of rooms being held is limited. You must make reservations directly with the resort

at:
 44045 Five Mile Road
 Plymouth, MI 48170-2555
 734.414.0600

or register on-line at
www.theinnatstjohns.com

For other specific meeting questions contact:
 Craig R. Hupp at 313.393.7599 or
 Barbara A. Johannessen at 248.375.9411

The ADR Newsletter 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. This newsletter seeks to explore various viewpoints in the developing field of dispute resolution.

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

<http://www.michbar.org/adr/newsletter.cfm>



Annual Meeting and Conference of the ADR Section

Friday - Saturday, September 8 - 9, 2006
St. John's Golf and Conference Center, Plymouth, Michigan

Program: Focus on negotiation, the science of negotiation theory, what clients tell us of their negotiation beliefs, what advocates and neutrals can do to improve the negotiation experience. Engage in a group negotiation exercise, and view and discuss real world negotiation demonstrations. Our talented international and local faculty includes Cliff Hendler (past President of International Academy of Mediators), Tracy Allen, and Barry Goldman.

we will recognize the significant contributions of three important individuals in the ADR community with the Sections' service awards.



Networking, Cocktails, Dinner and Golfing

Register early! Use the form on page 7 to register for the meeting, golf, and hotel. *Note: the deadline to register at St. John's Inn at the reduced conference rate is **August 9, 2006.***

From our panel of judges: Challenges and benefits that ADR has brought to court. Plus,