

The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

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Rush to Closure

— by Asher N. Tilchin

A rush to closure in a mediation will sometimes cause impasse - and, even worse, harden positions, thus increasing the odds against eventual settlement. Until recently, the conventional wisdom was that a mediator should keep the disputants' feet to the fire by refusing to adjourn the first mediation session until settlement was reached. Mediators believed (and some still do) that if the parties weren't pressed to make a deal before they parted, the lawyers would return to their office and refuel the litigation engine¹ with more discovery, more motion, and lots of other litigation stuff. The mediation session was considered to be a one-time interlude while the litigation train engine was temporarily idling. The antagonists wanted it done - now - but if not, they reboarded the train until someone won, lost or capitulated. All too often the pressurized atmosphere backfired, resulting in an exit by a party in a huff; or a declaration of impasse by a party or the mediator; and sometimes "buyer remorse" surfaced soon after a settlement agreement was signed on the grounds of alleged coercion.

With the advent of mediation mandated by court rule, my concern over the negative impact of a pressured mediation has increased, because reluctant parties to a court-ordered mediation are likely to quit without much provocation. The parties may not feel willing or ready to resolve the case when they are ordered to mediate and many litigants still don't fully understand its positive

benefits. In this new litigation environment, the mediator should not only focus on facilitating a settlement, but should attend to the preparatory work of getting the parties to the settlement discussions with the proper attitude. The "do it today or forget it" approach will doom many court-ordered mediations to failure. If the disputants are disabused of this notion and understand that they are engaged in an evolving process, the chances of success will be increased.

"[M]y concern over the negative impact of a pressured mediation has increased."

Now that mediation is a likely component of litigation in Michigan, many mediators, myself included, have refined our approach to the process. I now approach mediation as an evolutionary process. I realize that parties will often require time to adapt and orient themselves to the process; and that as a mediator, I should assist them in this acclimation. I have come to understand that mediation isn't best served by the "big bang" approach. It is the mediator's job to assist the parties to work through the process of orientation and implementation. In this article I share my experiences in some recent court-ordered mediations that required multiple sessions and ex parte contacts to reach closure. These experiences informed the theories I posit in this article.

Three of these cases were assigned to mediation at an early litigation stage, each having gone through limited discovery. Defining motions were pending in all three matters. I pointed out to all counsel that one party faced the risk of losing their

Continued from Page 1



Asher Tilchin, a principal with Tilchin, Hall & Reynolds in Farmington Hills, is a mediator, author, lecturer, and ADR Section Executive Committee member.

bargaining leverage if the judge ruled against them; and the converse if the motion were granted. I suggested that a ruling on a key issue would make settlement more difficult. I also suggested that judges sometimes reserve judgment on dispositive motions to a later indeterminate time, i.e., take the motion under advisement. In these recent cases, the desire to increase the possibilities of settlement outweighed the inclination to play a trump card, thus enabling the parties to talk, listen, informally exchange information and engage in productive settlement conversations. The motions were adjourned for thirty days during which time the process developed momentum, and the cases settled.

In one of the recent cases, after many mediation sessions (joint and ex parte), the parties arrived at the water's edge of settlement, but one party remained uncertain as to how the judge would rule on a particular major issue. Not willing to speculate, I urged the parties to reschedule a settlement conference with the judge. The judge, without ruling on the critical issue, was able to persuade the parties to accept the settlement terms that were developed over a month of mediation.

I have come to understand that mediation isn't best served by the "big bang" approach.

Another case was close to trial. It involved a litigant whose expectations had been deflated when the court dismissed a deep-pocket defendant. In this case, at plaintiff's counsel's request, I communicated with the plaintiff directly, one-on-one, while keeping the defendant on hold. The plaintiff adjusted to the realities of the case and the case settled.

The concept of "impasse" should be removed from the ADR lexicon. To me that word suggests that the light of reason has been darkened by the heat of litigation. When settlement conversations come to an apparent dead end, the parties should adjourn with unfinished business assigned to one or both of the parties by the mediator. This can be more information gathering or a revisit to a higher authority, which can be a board of directors, a colleague, or simply self-reflection. And if all else fails, the mediator should offer to consider and present new and perhaps innovative solutions.

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In sum, I have concluded that mediation (court-annexed mediation in particular) is an evolutionary process. As a mediator, my first job is to prepare the parties for the process and then to facilitate their efforts to settle.

I have also concluded that my control of the process is not threatened by discourse between the

parties outside of my presence. In fact, I sometimes encourage discourse, nevertheless urging the parties to keep me informed and to remain open to my assistance in getting them over a hump or two. While success rates are important to all of us, some perspective is important. Too many mediators declare, "I settled the case." It should be, "The case settled."

The words "evolution" and "evaluation" have a similar look and sound - albeit different meanings. The current philosophical breakdown of mediation techniques falls into the camps of "evaluative" and "facilitative." I submit that another philosophy--"evolutionary"--should be added to the mix. The complete mediator should apply all three philosophies to her/his work - not always together in the same case, and not always in the same combination, but always recognizing the possibilities of all of them. ❄️

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Suite 100, Bloomfield Hills, Michigan 48302-0181; (248) 334-3400/(248) 398-3938.

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End Note:

1 The words "litigation engine" are used by John R. VanWinkle in his book, *Mediation, A Path Back for the Lost Lawyer*, published by the ABA section of the Dispute Resolution/Senior Lawyer's Division.

Ohio State University's Moritz College of Law is presenting a symposium entitled,

"The Collision of Two Ideals: Legal Ethics and the World of Alternative Dispute Resolution."

Nationally-known speakers include Kimberlee Kovach, Richard Bales, Jack Cooley, Rodney Max, Jack Hanna, and Robert Bordone. The event will be held Thursday, January 20, 2005, at the law school in Columbus. For more information, visit their website, moritzlaw.osu.edu/jdr.

Michigan Mediator Wins National Award

Michigan's own Zena Zumeta received the John Haynes Distinguished Mediator Award at the closing luncheon of the Association of Conflict Resolution Annual Conference this fall.

The John M. Haynes Distinguished Mediator Award is presented annually by the Association for Conflict Resolution to a prominent and internationally recognized leader in mediation who demonstrates personal and professional commitment to finding mediation solutions to conflict while balancing therapeutic and legal perspectives. John Haynes was a pioneer in the field of family mediation, a respected author and practitioner, an international trainer, and the first president of the

Academy of Family Mediators. In keeping with his legacy, the award is presented to someone who demonstrates innovation, creativity, and outstanding competence in published writings, training, and practice, maintains personal and professional integrity and respect for others, and embraces a sense of humor and humility about our standing as fallible beings.

Zena, a mediator and mediation trainer, is principal of the Mediation Training and Consultation Institute in Ann Arbor, and received the Distinguished Service Award from the ADR Section last year. ❄️

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). Please note that participants must attend

all of the dates listed for each training session in order to complete the 40-hour training. For more information, visit the SCAO web-site at www.courts.michigan.gov/scao/dispute/odr.htm.

General Civil

Training sponsored by Institute for Continuing Legal Education:

Plymouth: **February 24-26, March 11-12, 2005**

Troy: **May 19-21, June 17-18, 2005**

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

Domestic Relations

Training sponsored by Mediation Training and Consultation Institute:

Ann Arbor: **December 1-3, 6-7, 2004**

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

Training sponsored by Institute for Continuing Legal Education:

Plymouth: **January 25-29, 2005**

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

Advanced Mediation Training

Sponsored by Oakland Mediation Center, Bloomfield Hills

“Understanding and Managing Difficult Conflicts” featuring Douglas E. Noll,

January 31, 2005, 9am - 6pm

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

Training sponsored by Oakland Mediation Center:

Bloomfield Hills: **April 11-12, 14, 18-19, 2005**

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



COMMENTS
FROM
THE CHAIR

A Warm Invitation to Section Members and ADR Professionals: Please Join Us!

— by *Richard Hurford, Section Chair*

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.

The past year for the ADR Council of the State Bar was both exciting and challenging and witnessed many accomplishments. The Council thought it was extremely important that we not lose our focus and commitment and, therefore, we engaged in a strategic planning session in October to identify our priorities and available resources for 2005. As always, there is a long list of priorities, but a shortage of resources to accomplish the priorities.

Any strategic planning must first start with a vision, and let me share with our membership the ADR Council's vision for 2005:

In 2005 the ADR Section continues to be a primary resource within the State Bar of Michigan providing education, advice and policy guidance on ADR issues. The Section works in tandem with the Supreme Court Administrative Office 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 practices, and training design.

Consistent with this vision, and to meet our priorities in 2005, the Council has organized itself into specific "Action Teams" that are chaired by members of the Council. Those Action Teams and the chairs are:

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 and coordinate common efforts in the field of ADR.
Newsletter Action Team	Benjamin Kerner (313) 965-1920 benkerner@aol.com	Publication of the Section's Newsletter (solicitation and publication of appropriate articles and providing notice of newsworthy events, programs and training).
2005 Annual Meeting Action Team	To be determined	Replicate the success of the 2004 Annual Meeting that was held over a two-day period in Mt. Pleasant in September 2004.
SCAO Action Team	Richard Hurford (313) 792-6306 richard_hurford@mascohq.com	Coordinate with SCAO to identify common priorities during 2005 and provide resources to meet those priorities.
Access Action Team	Tony Braun (313) 223-3575 rbraun@dickinson-wright.com	Working with the Community Dispute Resolution Centers and other appropriate stakeholders to extend the availability of ADR to those who would otherwise be unable to afford it.

Action Team Name	Chair	Purpose
Skills Action Team	Dale Iverson (616) 988-9623 daleiverson@justmediation.org	Coordinate with ICLE to develop programming for ANDRI and for Section programs including programming for the Section's 2005 Annual Meeting.
To Be Determined	Dave Baumhart (313) 972-5690	Identify best ADR practices nationally, publish those best practices, and coordinate with appropriate stakeholders (state government, law schools, business schools, and practitioners) to implement those best practices in the State of Michigan.

Participation in the work of each Action Team is not limited to members of the Council or to members of the State Bar. To reflect our vision, and recognizing that the field of ADR is comprised of diverse practitioners, **the bylaws of the ADR Council were recently amended to extend affiliate status to individuals who are leaders and educators in the field of ADR but who are not members of the Michigan State Bar.** The ADR Council invites each of you to evaluate the rich and diverse opportunities available by the mission of each Action Team and encourages you to seriously consider providing your time and talent in accomplishing the goals of your Council in 2005. We believe that the work of the Council provides

ADR professionals with unique opportunities to make a difference in this dynamic, growing and evolving field. Whether it is a suggestion for programming, writing an article for the Newsletter, or insights on how to grow ADR in your community, no suggestion or offer of assistance will be unappreciated or ignored. We hope that you will seriously consider the opportunities available and take a moment to contact the Chair of the Action Team that is of interest to you.

The ADR Council, working with you, looks forward to making a difference in 2005 and growing ADR into all it can be for our own practices, our clients, and the stake holders of ADR we serve. ❄️

8-Hour Advanced Mediator Training

(meets requirements for mediators to retain their status on court rosters)

“Understanding and Managing Difficult Conflicts”

featuring Douglas E. Noll, J.D., nationally-recognized mediator, mediation trainer, law professor, and author

This workshop provides participants with an introduction to human conflict theory, including:

- conflict goals
- conflict escalation and de-escalation
- conflict resolution processes
- mediation theory.

Through a series of interactive exercises and roleplays, participants are introduced to an interest-based, no-caucus mediation process that is highly effective in escalated disputes of all kinds. This course is for any person wishing to expand skills and knowledge of mediation, peacemaking, and negotiation techniques.

Monday, January 31, 2005, 9 am - 6 pm

Cost: \$200

**Continental breakfast
and lunch included**

sponsored by

**Oakland Mediation Center [new location!]
550 Hulet Drive, Suite 102 • Bloomfield Hills
Tel. (248) 338-4280 - Fax (248) 338-0480
www.mediation-omc.org**



ICLE's 4TH ANNUAL Advanced Negotiation & Dispute Resolution Institute

Helping resolve your toughest cases while maximizing results

Cosponsored by the Alternative Dispute Resolution
Section of the State Bar of Michigan and
the Michigan Judicial Institute

Tuesday, March 15, 2005 • 8:30am–5:30pm • Plymouth

Level: Intermediate/Advanced

MI Advanced Mediation Credit: 8.0

CLE: 6.25 units

Michigan's best and most comprehensive ADR program for general civil and domestic relations practitioners and mediators is back with national experts, advanced mediation training and networking that can't be found anywhere else! Meet with key players including judges, litigators, mediators and arbitrators.

FEATURING

- 2 practice areas: General Civil and Domestic Relations
- 4 separate tracks: Negotiation, Mediation or Case Consultation, Arbitration, and Judicial
- 8 full hours of advanced mediation training
- 40 speakers in 23 sessions
- 9 Judges—insights from the bench

JUDGES ATTEND FREE!

Back again this year, Probate & Circuit Court Judges can take advantage of free registration at ICLE's 4th Annual Advanced Negotiation & Dispute Resolution Institute.

NATIONAL EXPERT

DR. BERNARD MAYER

Nationally renowned mediator, trainer, and author of "The Dynamics of Conflict Resolution" leads multiple sessions at the Institute.

He will lead 4 case consultations 2 with general civil mediators and 2 with domestic relations mediators. He will also present: The Heart of Dispute Resolution: Dealing with the Conflict in the Room; Mediating Across Cultural Boundaries; Dealing with the Highly Competitive Negotiator, and discuss where the field is going.

Featuring:

In the Mediation Track:

Dr. Bernard Mayer shares his insight and experience with highly competitive negotiators and conducts case consultations. PLUS, a panel of major users explain how they select ADR providers. Can YOU get on the list?

In the Judicial Track:

What Judges want to know from mediators – a facilitated dialogue; when and how to best refer cases to mediation – judges reveal their thinking.

In the Negotiation Track:

Growing your ADR practice; a theory of effective negotiations; an intro to collaborative law; and negotiation ethics – they do exist.

In the Arbitration Track:

Making it speedy & affordable again; appealing & setting aside awards; managing discovery. And more!

Lunch: Two successful mediators share marketing secrets.

Reception: Meet friends & colleagues. Sponsored by the ADR Section of the State Bar.



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ICLE's 4TH ANNUAL Advanced Negotiation & Dispute Resolution Institute

Helping resolve your toughest cases while maximizing results

Cosponsored by the Alternative Dispute Resolution Section of the State Bar of Michigan and the Michigan Judicial Institute

DATE & TIME

ICLE's 4th Annual Advanced Negotiation & Dispute Resolution Institute is on Tuesday, March 15, 2005 from 8:30am to 5:30pm.

MORE DETAILS

For more details about ICLE's 4th Annual Advanced Negotiation & Dispute Resolution Institute or for a complete schedule of events, please visit www.icle.org/andr

CONVENIENT LOCATION

Located at St. John's Golf & Conference Center (www.stjohnsgc.com) in Plymouth right off of M-14. Hotel reservations can be made at the Hilton Garden Inn Plymouth.



Please register me for the **4th Annual Advanced Negotiation & Dispute Resolution Institute**, seminar #05CI-0460. *Photocopy this form for additional registrants.*

CODE 5GA A

Registration Fees (handbook included)

- General: \$260
- Member of Cosponsoring Section: \$230
- ICLE Partner/0-3 year lawyer (P62100+): \$210
- Judges attend FREE!*

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*Probate & Circuit Court Judges only.

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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.

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fax: (313) 965-1921*



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Alternative Dispute Resolution Section

Enjoy the advantages of membership:

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2. Attend ADR Section seminars at a reduced cost.
3. Receive notice of change in laws affecting ADR.
4. Learn about mediation training programs being offered in the state.
5. Receive the optional Membership Certificate, suitable for display, at an additional cost of \$8.

Copy and mail this form to: Alternative Dispute Section
State Bar of Michigan
306 Townsend
Lansing, MI 48933-2083

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Firm or Organization: _____

Business Address: _____

City and Zip _____

My check is enclosed payable to the State Bar of Michigan in the amount of

\$30 \$38 if membership certificate is requested