The Michigan
Dispute Resolution Journal

A Publication of the Alternative Dispute Resolution Section of the State Bar of Michigan

William D. Gilbride, Jr., ADR Section Chair | **Erin Archerd, Editor**

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Vol. 27 No. 4 Fall 2019

The Chair's Corner

by William D. Gilbride, Jr.

William D. Gilbride, Jr.

Attendees gave praise and high marks for this year's Annual Meeting at the Inn at St. John's. Among the many accolades received, the insightful and moving remarks delivered by the Honorable Bridget Mary McCormack, Michigan Supreme Court Chief Justice, stand out. The advocacy of our leadership, past and present, and the role of our Section as thought leaders on the subject of alternative dispute resolution were wholeheartedly acknowledged by Justice McCormack. As Section members, we can be proud of the role our Section has played in promoting ADR initiatives, some of which have now been adopted by the Supreme Court, including the Child Protection Mediation Court Rules (MCR 3.970), the Collaborative Law Court Rules (MCR 3.222 and 3.223), as well as the convening of the Case Evaluation Court Rules Review Committee to assess the efficacy of case evaluation. A report by that committee can be found at the end of this issue of the *Dispute Resolution Journal*. New rules MCR 2.401(B)(1) and MCR 2.410 will both focus new emphasis on employing ADR techniques at multiple stages during the pendency of a case.

When I assumed the role of Section Chair, I mentioned in confidence to one or more former Chairpersons of the Section that I felt like a "midget among giants" in the field of ADR. So much of what our Section has accomplished comes as a result of the leadership of our past Chairpersons who forcefully advocated, by all means, for a fundamental paradigm shift in how civil litigation is managed. The list of those leaders is long and there is a thread of creative thinking and perseverance that connects us to the visionaries of our past and the wisdom they brought into the discussion. Much of their work came to conclusion during my term, but by no means can I take credit for it.

Justice McCormack also observed how important mediation is to civil discourse at all levels. She reminded us of our obligation as lawyers to create a civil justice system that is held in high esteem by the public and which includes experimentation with alternative and restorative justice models, especially now in a world fractured by divisive and discourteous discourse. In her own impressive and inimitable way, Justice McCormack captured in her brief remarks the importance of the ADR movement to the people of the State of Michigan.

We were also honored to have the current President of the State Bar of Michigan, Dennis Barnes, address us and participate in our annual meeting. He too acknowledged the important ways in which our Section has brought progressive thinking across many Sections of the Bar.

Based upon the accolades expressed by Justice McCormack and President Barnes, it seems we have come a long way in our 28 years from a fledgling Section to thought leaders on the most fundamental role of lawyers, to provide effective mechanisms for civil dispute resolution. I want to personally thank the tireless effort of all my predecessors, through whose diligence we have been able to bring the Section to this point.

Looking ahead, I see more good things on the horizon. We elected six new Council members and an impressive Executive Committee. In keeping with custom and practice, our incoming Chair, Scott Brinkmeyer, hails from the Grand Rapids area and he will be followed by Chair-elect, Hon. Betty Widgeon (ret.) from Ann Arbor. Sam McCargo will continue as Treasurer, and Zenell Brown has assumed the duties of Secretary. Mike Leib and Susan Klooz will continue the important role of skills programming for the coming year, and Erin Archerd is continuing as editor of this publication. We elected a strong, effective, and dedicated team to lead the Section, and given their experience and passion, we may anticipate many great things to come.

It has been an honor to serve the Section and to work with so many wonderful lawyers. Many thanks to the Council, the Executive Committee, and Mary Anne Parks for all of the support and good counsel.

About the Author

William D. Gilbride, Jr. is a shareholder at the Detroit firm of Abbott Nicholson, P.C. Bill has devoted his professional life to dispute resolution and conducts trials, arbitrations, facilitative mediation and case evaluation services in the metro Detroit area. For more information, please feel free to contact Bill at wdgilbride@abbottnicholson.com.

Antoinette Raheem

Distinguished Service Award Acceptance Speech

by Antoinette Raheem

Mediator Antoinette (Toni) Raheem was awarded the Section's Distinguished Service Award at the 2019 Annual Meeting. The award is given annually for significant contributions to the field of ADR

I have to admit that there is something a bit intimidating about the title of this "Distinguished Service" award. The title seems to imply that it should go to someone who implemented some grand new ADR program or turned the ADR profession on its head or did any of the other amazing things that prior recipients have done.

Yes, I've been involved. I've been on committees, done different types of ADR work, held positions in ADR organizations, taught ADR and the like. But…. I didn't get to do any of those things on my own. I did it with a great deal of support.

The thing I love about our ADR profession and being a part of it is that our ADR community is full of people who have not only supported me, but who support each other, share with each other, and teach each other.

It is these people in our ADR community who have blessed and continue to bless my walk in the ADR field that have *really* given the distinguished service. So, it is these people that I dedicate this award to and who I want to thank tonight:

I accept this award for the distinguished service of those who trained me over the past several decades about the power of ADR, especially those teachers who led me to experience that paradigm shift so many of us experienced when we realized there were far better ways to help resolve conflict than we had originally been taught.

I accept this award for the distinguished service of those who let me sit in on their arbitrations and mediations so I could learn in the best way possible—by experiencing the process firsthand.

I accept this award for the distinguished service of those who taught me how to teach ADR in an interactive and engaging way, that allows students to not just hear about ADR, but to experience and absorb it as well.

I accept this award for the distinguished service of those who took the time to return my call or email when I reached out for help on some ADR issue, whether I needed a sounding board, an answer to a question, or simply advice.

I accept this award for the distinguished service of those who recommended me for teaching positions at law and graduate schools that wanted to expand their ADR curriculum, and those who gave me a chance by bringing me on as an ADR professor.

I accept this award for the distinguished service of those who took the time to guest lecture at my law school ADR classes, expanding on topics I could only touch on and making sure the education of ADR never faltered.

I accept this award for the distinguished service of those who put me up in their homes so I could attend or give ADR trainings in communities far from my own, nurturing my growth in the ADR field.

I accept this award for the distinguished service of those who fought to get me and keep me on Case Evaluations panels even though when I first started as an evaluator, there were few or no people who looked like me on any panel in the state.

I accept this award for the distinguished service of those who worked to make ADR in Michigan and beyond more inclusive as it relates to, not only the recipients, but the providers, as well.

I accept this award for the distinguished service of those who invited me on boards of ADR organizations and served with me on those boards to increase the spread of information about and access to ADR around our state.

I accept this award for the distinguished service of those who invited me to sit on panels or otherwise present about ADR to judges, lawyers, community groups, businesses and school kids to encourage the expansion of ADR into more and different venues.

I accept this award for the distinguished service of those who didn't necessarily help *me*, but who helped others, or who received help from others and will one day pass it forward, as I hope I have done.

And **last, but not least, I accept this award for the distinguished service of** that special person in my life who never complained when I decided to walk away from an established litigation practice to follow my heart and devote my work exclusively to ADR.

All of you, all of us, have given distinguished service in one way or another, as is evidenced by the thriving ADR community in our state. Our profession is not perfect. We need more diversity, more inclusion, more open-mindedness. We need more education about ADR, more volunteers, more mentors. We need to do more to help prevent conflict before it starts by teaching our youth about positive communication and how to respect themselves and other.

But realizing we cannot do any of this on our own is the first step in making the strides forward that we need to make. We thrive by realizing that to simply support, teach and believe in each other is distinguished service enough.

I don't have to wonder about how I somehow was able to make it in the ADR field. I know it was due in large part to the distinguished service of so many of you. You have been my mentors, my cheerleaders, my support. And for that, I thank you.

Nanci S. Klein Acceptance Speech

by Annette Wells

Annette Wells, the Executive Director of Community Dispute Resolution Services in Gaylord, was awarded the Nanci S. Klein Award at the 2019 Annual Meeting. The award is presented to an individual, program, or entity in recognition of exemplary programs, initiatives, and leadership in the field of community dispute resolution.

I have to first say thank you to attorney and CMS Board Member William Paul Slough for nominating me for this prestigious award. Lee [Hornberger], this is extra special having you present it to me tonight because Paul couldn't be here. Thank you, Lee

Receiving this honor from the ADR Section of the State Bar of Michigan, is humbling and truth be told it lights my passion to further champion mediation and unite mediators, both private and volunteers, in creating a pathway to share mediation and to spread the word so mediation is NOT the Best Kept Secret.

The journey has been possible with great support from my husband and family; my amazing staff Jessica and Laurie; a diverse volunteer Board of Directors including local attorneys, county commissioners, and others all that believe in ensuring that mediation should be part of every community. For all that Doug Van Epps and Michelle Hilliker at SCAO do for ADR/CDRPs for always being there when I call and have questions.

I didn't do this alone… To be able to share and learn with my esteemed peers in private practice and 17 other Center Directors with volunteer mediators that come with a diverse background and experience has been an incredible gift and opportunity for our Center to grow. I thank you all for inspiring me, allowing me to learn with you, and for sharing the wheel.

Annette Wells (left) accepting the Klein Award from Lee Hornberger (right).

2019 SBM Dispute Resolution Section Annual Meeting (See you in Grand Rapids 2020)

Anne Bachle Fifer

Neutral's Lack of Disclosure Catches Attention of Attorney Grievance Commission

by Anne Bachle Fifer

A decision issued recently by the Attorney Discipline Board (ADB) is of interest to all ADR practitioners who are Michigan attorneys. The case presented the issue of whether behavior that is considered inappropriate according to standards for mediators and arbitrators could also be deemed misconduct under the Michigan Rules of Professional Conduct. While the ADB ultimately decided that there was no professional misconduct here, the case serves as a wake-up call to attorney-neutrals: our mistakes as neutrals may trigger a grievance complaint.

Hartman v Hartman

The problem arose from a contentious divorce case, *Hartman v Hartman*, filed in Oakland County in 2009. The couple's attorneys selected an experienced attorney-mediator (the Neutral) to serve as their mediator and, for some issues, as their arbitrator. The Neutral was good friends with the wife's attorney; the question was whether she fully disclosed that relationship to the husband or his attorneys (the husband changed attorneys partway through the process). More specifically, the Neutral did not disclose a Florida vacation with wife's attorney.

The Hartman case dragged on for months, with some mediation sessions and some arbitration hearings. While the case was still pending, Neutral decided in December 2010 to accept the long-standing invitation of wife's attorney to visit his vacation home in Florida that February with their respective spouses. Neutral did not mention her plans to husband's attorney. The next month, there was another mediation session, in which the parties signed a settlement agreement that included a provision for the remaining issues – including attorney fees, the accountant's fee, and division of some household items – to be arbitrated by the Neutral at a future date. Three weeks later, the judge ordered the parties to expedite the process, so husband's attorney contacted the Neutral, and it was then that Neutral told husband's attorney about Neutral's upcoming Florida vacation with wife's attorney and their spouses.

Husband's attorney immediately filed motions to remove the Neutral, and to set aside the mediated settlement agreement. The Circuit Court judge denied both motions. Husband appealed. The Court of Appeals affirmed (*Hartman v Hartman*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2012, Docket No. 304026), finding that the undisclosed relationship did not fatally infect the Settlement Agreement.

Michigan Attorney Grievance Commission

The Attorney Grievance Commission filed a complaint against the Neutral on December 16, 2016 (Case No. 16-143-GA), alleging that her personal relationship with one side's attorney should have been disclosed to the other side, and that this failure to conform to the Standards of Conduct for Mediators also violated Michigan Rules of Professional Conduct such that she should be disciplined under MCR 9.104. The complaint also alleged that the Neutral "failed to disclose a circumstance that may have affected an arbitrator's impartiality," in violation of the Domestic Relations Arbitration Act, MCL 600.5075. (See Lee Hornberger's article, "Mediator-Arbitrator Conduct After Mediation-Arbitration" in the Fall 2017 *Michigan Dispute Resolution Journal* for a detailed list of the charges.)

Attorney Discipline Board Decision

After a lengthy hearing, the ADB panel issued its decision that there was, essentially, no problem. It did not believe that Neutral had violated either the Standards of Conduct for Mediators or the Domestic Relations Arbitration Act by not disclosing her vacation with wife's attorney. She thus did not violate any Rules of Professional Conduct.

This case was decided under Michigan's former Standards of Conduct for Mediators in effect through January 2013. The prior standards contained only two paragraphs regarding conflicts of interest. Michigan overhauled its Standards, effective February 1, 2013, providing a much more detailed section on conflicts of interest that runs to eight paragraphs. The revised provision amplifies the former standard, including essentially the same definition of a conflict of interest as before: "a dealing or relationship that could reasonably be viewed as creating an impression of possible bias or as raising a question about impartiality." The revised Standards describe in more detail the mediator's ongoing duty to inquire into any facts that might create a potential or actual conflict of interest, and to disclose them promptly. "A mediator should resolve all doubts in favor of disclosure." (Standard III.C.)

The ADB decision did not analyze whether the Neutral's conduct violated any standards for arbitrators.

The ADB panel emphasized that there was no evidence that the Neutral was actually biased. However, the panel did not receive any evidence from the husband in this case—the person most aggrieved by the failure to disclose. According to the Court of Appeals opinion, the husband asked, in the court hearing for entry of the divorce judgment, that his attorney state on the record that husband "had concerns about" the Neutral (*Hartman v Hartman*, supra, p. 1).

The panel determined that an interpretation calling for disclosure of "any prior relationship a mediator has with an attorney" would be unworkable, and complained that the Standards fail to inform a mediator as to what kind of prior relationship will subject a mediator to a charge of an unethical conflict of interest. The current Mediator Standard of Conduct on conflicts of interest may address the panel's concern.

Conclusion

Mediators may breathe a sigh of relief that the charges were dismissed, but there is actually little comfort in this decision. Even though the Neutral ultimately prevailed, no one wants to go through a grievance procedure; this one lasted well over two years. The fact that a grievance was even filed indicates that the Attorney Grievance Commission believes that the Standards of Conduct for Mediators impose a professional obligation on attorney-mediators, such that a failure to adhere to the Standards is grounds for a grievance; a different set of facts could bring a finding of professional misconduct.

Although this neutral's failure to disclose was not deemed professional misconduct, this case cannot be read to relieve mediators of the duty to disclose relationships like this. Best practice for mediators is to disclose social relationships and let the parties determine whether they amount to a conflict of interest or not. "A mediator should resolve all doubts in favor of disclosure." Fortunately, the Standards of Conduct for Mediators now in effect provide better guidance on mediator disclosures, and the Dispute Resolution Section has recently formed an ad hoc committee to address concerns around issues like conflicts and disclosures further.

About the Author

Anne Bachle Fifer of Grand Rapids, Michigan, is a mediator, facilitator, arbitrator, and mediation trainer. Her mediation experience includes business contracts, workplace disputes, and estates, as well as church-based conflicts integrating Christian principles into the mediation process. As Michigan's most experienced general civil mediation trainer, she frequently conducts both basic and advanced mediation trainings. She is a mediator, trainer, and board member with Peacemaker Ministries, and is a mediator, trainer and former board member with the Dispute Resolution Center of West Michigan. She regularly serves on state court and state bar committees related to ADR in Michigan. She served two terms on the ADR Section Council, edited its newsletter for several years, and received its 2011 Distinguished Service Award for contributions to the ADR profession. She is listed annually in Best Lawyers in America© *in the field of mediation.*

L. Graham Ward

Four Goals for Dispute Resolution

by L. Graham Ward

We lawyers can always benefit from the research and teachings of other academic disciplines. One I would suggest comes from Professor Michael Duus and his field of Communication. He introduces the concept of multiple goals in all our efforts to resolve conflict. Briefly, Duus identifies four types of goals: (1) process goals, (2) individual goals, (3) relational goals, and (4) outcome goals.

Winning, an outcome goal, may often be hard to define and if parties only focus on "winning" many opportunities to create value, expand the pie, and to preserve or do the least damage to relationships will be lost. This has to be considered so long as it remains true that as much as 80% of conflict arises between persons with pre-existing relationships. Seeking an understanding of these goals should begin with the initial client interview and expand during the counseling relationship. It would be well to consider these goals and how they can be achieved in a pre-negotiation, pre-mediation, or pre-arbitration conference.

1. Process Goals

Consider process goals. How will the dispute or conflict be resolved, assuming the parties are not contractually bound to some process, appropriate or otherwise? How do the needs of each party fit the different conflict resolution formats? If privacy is paramount, then clearly trial should present problems. Even an arbitration cannot maintain complete privacy while mediation just might be best if parties cannot resolve the conflict between themselves. How and to whom do the parties wish to present their perspectives? In litigation and arbitration both parties will be playing to third party deciders, such as judges, jurors, or arbitrators. To what extent will witnesses be used? Is there a process which might be more conducive to witness comfort and ability to speak freely? The need for a speedy resolution between parties dug-in to their positions suggests arbitration may be best.

2. Individual Goals

Individual goals refer to how the participant wishes to be perceived both by the person with whom they are in conflict as well as witnesses and all others involved in the process. "I want to be listened to, as well as heard," could be one of these individual goals. Perhaps most importantly, it includes how participants view themselves and how they are seen by everyone else.

3. Relational Goals

Relational goals merit consideration in that so much conflict begins between persons with mutually beneficial relationships. Litigation presents the greatest risk of permanent damage to that relationship. Arbitration has the same disrupting potential, but with the availability of each side limiting the amount of damage by a "high-low" deal, or by suggesting remedies for the arbitrators and from which the arbitrators are bound to choose. Mediation and negotiation present the best model to preserve or do the least damage to that relationship. They also leave the most room for creative, value-generating resolutions.

4. Outcome Goals

I saved outcome goals for last as it may well be true that serious creative attention to the first three goals may diminish the perception of each side about what "winning" means, both on the day of decision and into the future where such resolutions have to be implemented. To the extent that outcome goals focus on "winning" it diminishes the other three goals. It also presents the potential for both parties to question who won or lost.

Reframing Winning in Terms of Improving Implementation

Every resolution or decision has to be implemented. Depending upon the investment of the parties in the resolution process, the "winner" may be faced with conduct from the "loser" that we could label as conflict, compliance, or commitment. We have all been in court on motion day listening to arguments over whether the other party has failed to comply with a court order, hid assets, refused disclosures, refused to drop the kids off at the time ordered, or not paid the support ordered. Court orders seem honored much more by attorneys than litigants. Resolution processes imposed by overwhelming power possessed by one create

potential conflict in implementing the resolution. When the parties have participated in process selection; been fully heard; and told the story in their own words without the limits of the many proscriptions of evidence, relevance, and materiality; one can anticipate compliance by the "losing" party. Parties may also become invested in that outcome and will commit to successful implementation.

Scholars often speak of the "downward spiral of conflict" with the adversarial process actually doing little to disrupt, and often accelerating, that downward spiral. Consideration of these four goals can diminish that risk. Often, we choose to "satisfice." We do good enough, but we do not optimize our resolutions. Herbert Simon introduced this idea as part of his concept of bounded rationality. Briefly, he indicated we often cannot learn everything about an issue, there simply being too much information to absorb and, often, we have time constraints by which time decision will or must be made, often by a "less interested, less knowledgeable" third party decider. Litigation and arbitration put those third parties in a position where they cannot know everything and must decide, if only to get back to their regular activities. Process choice may allow us a much better opportunity to avoid both the downward spiral and diminish the impact of satisficing.

What I am suggesting is we reframe the conflict from one characterized by emotion, fear, anger, and the desire to seek and obtain to one where the participants recognize they are in this conflict together and share a problem of mutual interest. I often wonder what a client seeking revenge might have said if I told them, "Go home and read Hamlet and see how revenge worked for them!"

About the Author

Graham Ward is the Director of the Center for the Study and Resolution of Conflict at the Western Michigan University Cooley Law School. The program teaches participants how to improve the way they deal with conflicts by using new, creative tools and modify existing ones, creating the "ultimate due process," as well as better ways of "Getting to Yes." He can be reached at wardl@cooley.edu and 586-612-1704.

Erin Archerd

Building a Career in Dispute Resolution and Mentoring New Practitioners

by Erin R. Archerd

I led a session on mentoring neutrals at the Fall 2019 Annual Meeting with two incredible women: Zenell Brown, the Executive Court Administrator at the Wayne County Third Circuit Court, and Melissa (Mel) Divan, In-House Counsel at Southeastern Dispute Resolution Services. In dialogue with my co-panelists and audience members, we had a conversation about what it means to be a mentor and how potential mentees might reach out to people who could become their mentors.

People joining the dispute resolution profession face many challenges.

They must find sources of work. For new neutrals, this can often come from getting placed on a court roster, or even volunteering with a CDRP and eventually receiving referrals from the center. Many neutrals are coming from practice, and so former co-workers or colleagues can refer business your way.

Neutrals must develop a network of professional colleagues, which can be hard when many are working on their own or in small groups. Joining organizations is key. Start by attending conferences, but rather than just attending, begin to take on responsibility and leadership positions.

Neutrals must build entrepreneurial skills. This is often hardest for recent graduates or non-lawyers, who are trying to break into an industry in which legal experience and credentials are common. Most lawyers, through trial and error, discover whether they have an entrepreneurial spirit. You need to be thinking about practice management from Day 1. If you are doing this by yourself, you

are running a small business. This is a reason why many neutrals who qualify like to be listed on AAA, JAMS, etc. rosters and have administrative work done for them by the provider organization.

Finally, many neutrals eventually find themselves specializing. I have a friend who is a professional tax mediator, another who conducts church mediations. Many people focus on family or general civil mediation, or like to arbitrate commercial disputes. On the other hand, it is possible to have many different types of practice as a neutral, ranging from facilitative mediation to more evaluative forms of practice like arbitration.

I like to emphasize the difference between mentors and sponsors. Neither role requires a lot of time, but they are different. As a mentee, your job is to find mentors who can educate you, build your confidence, and share their experience with you. You, the mentee, must then impress your mentors and turn them into sponsors, who will provide you access, advocate on your behalf, and endorse your skills. Mentors teach you. Sponsors promote you.

Advice from the Panelists

Zenell Brown shared some wisdom she has received over the years, this included the importance of networking, writing, presenting, marketing, and sharing generously with others. Overall, Zenell advocated being goal oriented in approaching one's career, and said that those who seek her out as a mentor can expect "specific homework tasks."

Mel emphasized creativity and fearlessness in her advice. One of her mentors, Graham Ward, once told Mel, "Negotiations are always ongoing, flexible, and have the potential to be creative." Accordingly, Mel takes a casual approach in mentoring, though she warned she is always trying to get mentees to come work for her.

My biggest piece of advice was not to read too much into receiving a "no" from a potential mentor. You should never assume that when people say "no" it means that they do not like you or do not want to help you. Smart people learn to set boundaries and telling you "no" might mean they simply do not have the ability to be a good mentor to you right now.

Mel took my advice a step further and told attendees to "Have the courage to be disliked." Zenell encouraged attendees to be open to experiences and to keep learning.

Advice from the Audience

As part of the session, audience members filled out giant post-it notes with advice on working with mentors and stuck their advice to the walls of the room.

Some of their advice included:

Put Yourself Out There

- Do things that scare you.
- Just ask.
- Extend yourself, take a chance, and follow your areas of interest.
- Establish a professional and moral baseline.

Let Go of Fear and Judgment

- Don't be afraid to be disliked.
- Don't be afraid to ask questions.
- Mediators enjoy talking about what they do, so never hesitate to ask questions.
- Accepting criticism is a gift; sometimes it's not packaged well, but it's a gift nonetheless.

Talk about Your Contributions

- Mentors get as much from mentees as mentors.

- Put the same effort in "pro bono" work as you do in your paid work.
- Tell [mentors] where you're going. Tell them where you are. Then tell them where you went.

Look Outside the Traditional Mold of Neutrals

When I was in law school, I had the good luck to train as a mediator in a program that deliberately brought in people of all ages and all walks of life. There were Harvard Law students, who provided the backbone of the training class and the daily administration of the Harvard Mediation Program, but there were also pastors, psychologists, social workers, teachers, and judges, ranging in age from roughly 25 to 55. Having that group with me from the beginning of my mediation training and working with my co-trainees in the local courts conducting mediations using a co-mediation model showed me the strengths that attorney and non-attorney mediators can bring to the mediation table.

I firmly believe that non-lawyers can be excellent mediators, and that lawyer and non-lawyer mediators benefit from training with each other, discussing cases, and considering the ways in which they can leverage their unique skills to provide a better and more well-rounded mediation experience. As an attorney and a law professor, I find speaking with non-lawyers about their approach and perspective as neutrals to be a great asset to my thinking about what processes like mediation can be.

However, it can be intimidating to approach someone whose professional background is significantly different from your own. That is why having a Section that embraces lawyers and non-lawyers is so valuable. It allows neutrals from a broad range of backgrounds to interact with and learn from one another.

The Only Rule is Work

People come to dispute resolution because we love the work. I believe that lawyers especially gravitate to this field because of the creativity and open-mindedness that it encourages in practicing neutrals. Lately, I have been reading the teaching of artist Corita Kent, who famously told her students, "The only rule is work. If you work it will lead to something. It's the people who do all of the work all the time who eventually catch on to things."

Breaking into the field of dispute resolution, and building a practice as a neutral, is difficult. Many people keep their "day job" for years while they build their "dream job" of working as a neutral full time. Keep up the work. It will lead to something. You will catch on.

The Dispute Resolution Section is here to help.

About the Author

Erin R. Archerd is an Associate Professor of Law at the University of Detroit Mercy. She currently serves as the Co-Chair of the American Bar Association Dispute Resolution Ethics Committee and is on the Executive Council of the State Bar of Michigan Alternative Dispute Resolution Section. She can be reached at archerer@udmercy.edu or (313) 596-9834.

12 Holiday Wishes from Your Family Mediator

by Zenell B. Brown

Zenell B. Brown

Children need emotional support from both parents regardless of their marital or coupling status. Holidays can be stressful as children move from one parent's home to the other during this season. When parents act out, the stress level can increase. Family mediators work to help parents reach holiday parenting time agreements in hopes of making holiday parenting time stress-free and easy. The parents negotiate and sign off on the details of pick up and drop offs, holiday calls, and transportation costs. The mediator bids the parents farewell and happy holidays.

However, successful holiday parenting time is more than words in an agreement or a court order. Successful parenting time takes commitment and work.

The 12 holiday wishes from your Family Mediator is aimed to be points of reminders and encouragement for parents as they co-parent over the holiday season.

12 Holiday Wishes from Your Family Mediator

Kind Words. Start with "Please" and "Thank you," and increase your kindness vocabulary after that. A little kindness goes a long way—always.

Listening. Listening is an intentional act of ensuring another's experience is being heard. Being heard is a universal human desire. Remember how you practiced listening during mediation by having one person speak at a time without interruption and paraphrasing to ensure what was said? This is something you can try at home.

Peace. Seek inner peace and promote calmness in your interactions. The glamorous seductive depiction of courtroom fights is deceiving because you have never seen the wounded—the children.

Patience and Flexibility. Nothing is perfect. No one is perfect. During the holiday season, many unplanned and unexpected things happen. Be patient and bend a little when you can to support best outcomes for your child.

Joy. Children's smiles are priceless.

Laugh a Lot. Parents' good-natured laughter reinforces a child's sense of safety. Blow raspberries and share holiday stories and jokes together as a way to connect. A good sense of humor also can make children smarter.

Believe. Remember how you used to believe and expect the best. That is the theme of the entire season. So suspend your disbelief and join in reindeer games.

Presence. Be there. Share time with your child without the busyness and distraction.

Joy. Capture joy. Pictures and selfies with your child's happy holiday moments make precious memories.

Sharing. How about more pictures? Give your child a picture of his other parent for his bedroom or private space.

Time with Loved Ones. We live in a world of blended and non-traditional families and kinship. Make sure your child spends time with those who love him and whom he loves.

Courage for 2020. May you continue to have courage to help build a positive co-parent relationship. Speak the truth with the best intentions for all involved. Ask for help when needed.

To all the families, Happy Holidays and a Happy New Year.

Sincerely,

Your Family Mediator

About the Author

Zenell Brown has been in the family mediation community since 2000. She has co-authored a mediation training curriculum, conducted 40-hour SCAO approved trainings, and has presented at the Association of Family and Conciliation Court, National Association of Court Management, and the National Black Child Development Institute conferences. She has an extensive background in working with never-married families using mediation as a tool to resolve parenting time and custody dispute.

Zenell continues to add to her current credentials of Juris Doctor (Wayne State University Law School), Public Service Administration Graduate Certificate (Central Michigan University), Court Administration Certificate (Michigan State University), and Certified Diversity Professional (National Diversity Council-DiversityFirst).

Check out the 2020 Annual Meeting Request for Proposals on page 16

SBM | Alternative Dispute Resolution Section

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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 click on "Mediation Training:"

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

Monroe/Lenawee: February 13-15 and 20-22, 2020
Training sponsored by Southeastern Dispute Resolution Services.
Call 517-990-0279 or email Marc Stanley (marc.stanley75@gmail.com) for more information.

Lansing: February 24, 25,25,27 & 28, 2020
Training sponsored by Resolution Services Center of Central Michigan.
Information and registration here.

Grand Rapids: April 29-30, May 1, 13-15, 2020
Training sponsored by Dispute Resolution Center of West Michigan
Register: http://drcwm.org/training/ or call 616-744-0121

Bloomfield Hills: July 20-24, 2020
November 10, 17, 24, December 1, 8, 2020
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

Advanced Mediation Training

Mediators listed on court rosters must complete eight hours of advanced mediation training every two years. The trainings listed below have been pre-approved by SCAO to meet the content requirements of the court rules (MCR 2.411(F)(4), MCR 3.216(G)(3)) for advanced mediation training for both general civil and domestic relations mediators.

Lansing: February 13, 2020
Training sponsored by Dispute Resolution Center of Central Michigan.
Information and registration here.

Grand Rapids: April 21, 2020
Location: Kent County Courthouse
Trainers: Anne Bachle Fifer, Dale Ann Iverson, Robert E. L. Wright
Contact: anne@abfifer.com

Detroit: May 12, 2020
ADR Section Annual Summit includes 8 hours of Advanced Mediation Training
Location: Detroit Mercy Law
Training sponsored by ADR Section of State Bar of Michigan

Grand Rapids: October 16-17, 2020
ADR Section Annual Meeting includes 8 hours of Advanced Mediation Training
Location: Courtyard by Marriott
Training sponsored by ADR Section of State Bar of Michigan

Other SCAO-Approved Trainings

SCAO requires 40-hours of mediation training for divorce and custody issues as well as an 8-hour Domestic Violence Screening Training for mediators. The trainings below include both the 40-hour domestic training and 8-hour screening training unless otherwise noted.

Grand Rapids: January 12, 2020 (Noon to 2:00 p.m.)
Two-Hour Advanced Mediator Training: The Ethics Game
Location: RVC Offices Conference Room, 678 Front Ave., Grand Rapids, MI
Training sponsored by Dispute Resolution Center of West Michigan.
More information and registration available here.

SBM STATE BAR OF MICHIGAN

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p (800) 968-1442
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306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

www.michbar.org

ALTERNATIVE DISPUTE RESOLUTION SECTION

December 20, 2019

Request for Proposals for ADR Section's 2020 Annual Meeting and ADR Conference in Grand Rapids, Michigan. Proposals are due by February 14, 2020.

On October 16 and 17, 2020, the ADR Section will host its Annual Meeting and ADR Conference at Courtyard by Marriott in Grand Rapids, Michigan. The ADR Conference will include up to 8 hours of advanced mediation training featuring Michigan practitioners and experts. If you would like to be a presenter at the ADR Conference, please submit your suggestions to me by email (address below) by February 14, 2020.

Topics may cover any aspect of ADR practice from mediation to arbitration, from case evaluation to summary jury trial. Your segment may be an update, a demonstration, a technique presentation, practice management topic, a skill-building exercise, a set of ethical challenges, or any other matter you believe would be of interest to your fellow Section members. Please avoid lecture type presentations.

Proposals should include:

1. Nature of your topic including proposed agenda (bullet points);

2. Name(s) of speaker(s);

3. Amount of time you wish to allocate to your segment (uniformly 60 minutes);

4. Whether your segment will be a presentation, an interactive exercise, a group discussion or other format;

5. Learning objectives-takeaways, teaching points, identification of skills to be improved by the presentation;

6. Resources required (projector, flip chart, etc.);

7. Anticipated materials to be provided.

Proposals are due by **February 14, 2020**.

We look forward to receiving your proposal!

Michael S. Leib
Skills Action and Event Committee Co-Chairperson
michael@leibadr.com
248-563-2500

Michigan Supreme Court

Case Evaluation Court Rules Review Committee

Report to the Michigan Supreme Court

December 2019

State Court Administrative Office
Michigan Hall of Justice
Lansing, MI 48909

Contents

Committee Members

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Hom, Arene, Bachrach, Corbett, Kramer, Harding & Dombrowski

Mr. Larry Bennett, Attorney
Seikaly Steward & Bennett

Ms. Fatima Bolyea, Attorney
Mantese Honigman

Mr. Scott Brinkmeyer, Attorney
Scott S. Brinkmeyer Esq

Ms. Zenell Brown, Court Administrator
3rd Circuit Court

Honorable Joyce Draganchuk
30th Circuit Court

Ms. Debra Freid, Attorney
Freid Gallagher Taylor & Associates

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3rd Circuit Court

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Mr. Kevin Oeffner, Court Administrator
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Mr. Michael O'Malley, Attorney
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Ms. Casey Peacock, Customer Service Clerk
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Ms. Lindsay Poetz, Customer Service Clerk
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Mr. Michael Puerner, Attorney
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Mr. James Rashid, Attorney
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Mr. Robert Riley, Attorney
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Mr. Michael Sullivan, Attorney
Collins Einhorn Farrell

Mr. Douglas Toering, Attorney
Mantese Honigman

Justice David Viviano
Michigan Supreme Court

Honorable Christopher Yates
17th Circuit Court

Facilitator/Reporter: Doug Van Epps, Director, Office of Dispute Resolution, State Court Administrative Office, Michigan Supreme Court

[1]

Case Evaluation Court Rules Review Committee
Report to the Michigan Supreme Court

Background

Michigan's case evaluation practice is governed by MCR 2.403. The selection of case evaluators is governed by MCR 2.404. Chiefly in response to growing criticism over the case evaluation process voiced by lawyers, the State Court Administrative Office (SCAO) commissioned a study in 2011 that, among other things, incorporated over 3,000 lawyers' and judges' survey responses and an assessment of the process' impact on docket management. The study found that case evaluation added several months to case disposition times, that a significant number of lawyers felt the process was less valuable than mediation, and that judges rated the process more favorably than lawyers reported.[1] A follow-up study conducted in 2018, in which evaluators returned to three of the original courts and received survey responses from over 1,000 lawyers and judges, reported similar findings, however noted that support for the case evaluation process—among both lawyers and judges—had eroded further.[2]

Also in 2018, the SCAO convened an "ADR Summit" to assess the development of alternative dispute resolution (ADR) services in the state and to interpret the most recent case evaluation study's findings. Among other recommendations regarding ADR practice in the state, a majority of attendees recommended that case evaluation should become voluntary and that the sanctions provisions should be removed.[3]

In light of this recommendation, in 2019, the SCAO convened the Case Evaluation Court Rules Review Committee to further assess the efficacy of the current case evaluation rules and to recommend to the Michigan Supreme Court any amendments the committee deemed appropriate.

Committee Procedure and Issue Identification

The committee met four times between April 3 and October 21, 2019. After reviewing the recent case evaluation study results, the committee identified a number of areas of concern with the case evaluation process. These included:

1. Lack of Credibility of the Process

Many committee members stated that the case evaluation process lacks credibility among lawyers. Reasons for the lack of credibility included:

- panelists' lack of subject matter expertise and court experience
- lawyers' focusing on "winning case evaluation" rather than working toward settlement

[1] The study appears here: courts.mi.gov/2011CaseEvaluationStudy
[2] The follow-up study appears here: courts.mi.gov/2018CaseEvaluationStudy
[3] The ADR Summit report appears here: courts.mi.gov/2018ADRSummitReport

- lawyers' lack of preparation for the hearing
- game-playing with the timing of submitting the case evaluation summaries
- the brevity of the process (in taking only 10-15 minutes in some jurisdictions)
- the cost of the process (summary-writing, chiefly)
- clients being locked out of the process and not understanding why they are not seeing the judge

2. Unclear Purpose of the Process

The committee noted that the purpose of case evaluation—whether to provide an actual value of claims and defenses, or to provide a reasonable settlement figure—has never been addressed in the court rule. Noting that in the former case, a very low or even zero valuation would not likely result in settlements, some committee members suggested that if the rule is retained, the stated purpose should be to provide a figure that parties could reasonably accept as a settlement. Other members believed the purpose may be case-dependent in that some parties may wish a "true" value of the case, while others may prefer a suggested settlement value.

3. Excessive Written Summaries

Despite court rule limitations on the size of the summaries under MCR 2.403(I)(3), committee members reported that summaries are too long, particularly when accompanied by limitless exhibits, and frequently arrive too late to be effective. The penalty for late filing ($150) was viewed as too low to address the issue, prompting the committee to discuss whether to recommend reducing the due date to seven days prior to the hearing, and increasing the penalty for late filing.

4. Lack of Diversity

Committee members remarked that women and people of color remain poorly represented on case evaluation panels.

5. Unfairness and Inappropriateness of Sanctions

One purpose of sanctions was said to be "to make unreasonable people reasonable," but sanctions were also said to unfairly penalize plaintiffs who may have a single case, in contrast to an insurance company that as a part of doing business could absorb sanctions across a large portfolio of cases.

6. Mandatory Participation

The committee noted that some states have similar processes, but more resemble non-binding arbitration and have caps on the dollar values of claims being evaluated, e.g., $100,000, and do not have sanctions provisions.

[3]

7. Ineffective in Prompting Early Settlement

The committee noted that because case evaluation occurs late in the litigation life cycle, attorneys have no incentive to seriously assess a case and make settlement proposals prior to the case evaluation hearing. Members reported that typically less than 20 percent of awards are accepted by all parties within the 28 day acceptance/rejection window. Other members cited that the award nevertheless contributes to subsequent settlement negotiations and that judges use the award amount in promoting settlement during pretrial conferences.

A number of committee members noted that mediation is significantly more effective than case evaluation because in many cases, and particularly pre-filing, parties voluntarily choose to use mediation and also choose their mediator.

One suggestion was to require case evaluation in non-complex cases, as a means to get lawyers to look at their case, meanwhile making case evaluation optional in complex cases.

8. Hybrid Mediator/Case Evaluator Role

Examples of mediators assuming the role of case evaluators were noted. Some committee members questioned the authority for this, while one member said it offered broader flexibility than case evaluation alone, in that the mediator could consider liens, structured settlements, and trusts. The committee noted that the role of "evaluative mediator" already exists in MCR 3.216 (Domestic Relations Mediation) and could be recommended for inclusion in MCR 2.411 (General Civil Mediation).

9. Attributes of an Effective ADR System

The committee then identified what it considered to be attributes of an effective ADR system. These included the notions that:

- parties should have a choice of ADR processes
- judges should become involved in cases earlier, as in the business court cases (includes triaging the case for appropriate ADR processes and timing)
- the job of a case evaluator should be clarified such that panelists should not be participating as "advocates" for plaintiffs or defendants
- emphasis should be on "smarter" processes, not necessarily "faster," for example, stage discovery, attempt mediation of discovery disputes, then conduct depositions, then conduct a final mediation

Recognizing that some attorneys still find the case evaluation process helpful, and to take into account the growing use of mediation and availability of other ADR process, the emerging vision for rule amendments would maximize party choice in the selection of an ADR process by allowing parties to waive participation in case evaluation by having a stipulated order to participate in an alternative ADR process. The stipulation would identify what ADR process they will use, who the intended neutral is, and when the process will take place. Case evaluation would remain the

default ADR process in cases in which parties that either wish to use it or where parties fail to obtain a stipulated order to use another process.

The committee also concluded that sanctions provisions should be removed for a variety of reasons, including that they were viewed as primarily working against plaintiffs, force settlements that are not based on the merits of claims and defenses, and are no longer needed. This led to a similar conclusion in the committee's consideration of MCR 2.405 (Offers to Stipulate to Entry of Judgment), that the sanctions provisions are not helpful in resolving cases and are no longer necessary.

Following the committee's drafting amendments to MCR 2.403, 2.405, and 2.411, the proposals were sent to a variety of judicial associations and State Bar of Michigan sections for informal comment. The comments received were considered at the committee's final meeting on October 21, 2019.

Committee Discussions

Reflecting on both the evaluation studies and the concerns identified above, except where noted, the committee agreed on the following points:

1. Some form of mandatory or automatic ADR is needed.

2. Case evaluation should only be ordered if parties have not stipulated to their preferred ADR process in their early discovery plan. Case evaluation sanctions should be removed. "Sanctions" is the tail wagging the dog: it prompts settlements, but not based on the merits of the case. [One committee member opposed this notion and would retain the rule and sanctions as they presently appear.]

3. Having a variety of ADR processes available beyond just case evaluation is helpful.

4. Any new case evaluation proposals should be integrated with the new authority for parties to submit a "discovery plan" to the court under MCR 2.401.

5. Litigants should have more control over identifying processes that lead to a resolution of their case.

6. The right to trial should be preserved.

7. The rights of parties to opt out of ADR altogether should be preserved if that is what they put in their early discovery plan. Parties should determine if ADR is appropriate in their plan. [One committee member opposed this notion and would retain the rule and sanctions as they presently appear.]
8. If parties cite the prohibitive cost of ADR in their discovery plan, they should not be forced to use it.

9. Case evaluation outcomes could include providing: a high/low valuation; an actual value; or a settlement value.

10. "Gamesmanship" in the process should be eliminated.

11. MCR 2.405 (Offer of Judgment) should be updated to reflect the removal of sanctions in MCR 2.403.

12. The "evaluative mediation" process should be adopted in MCR 2.411.

13. Increase the competency of case evaluation panel members.

14. Case evaluation summaries and attachments should be due 7 days before the hearing.

15. Request the ADR Section to develop a recruitment system for case evaluators.

The committee lacked consensus on the following topics:

1. Increasing late fee. Some members felt the cost would simply be passed along to the client.

2. Summary and exhibits should not exceed 25 pages. Some members felt that critical documents may exceed 25 pages.

3. Providing documents at the time of the hearing should be prohibited. Some members felt that critical documents becoming available just prior to the hearing should be considered. If not considered, it is near certain that the award will be rejected.

Case Evaluator Qualifications

The committee considered a number of options in response to complaints about the lack of qualifications of case evaluation panelists, including:

1. Having a three-, two-, or one-member panel as in arbitration. Parties could pick one panelist from a list, then the other party picks, and the two panelists then pick a third.

2. Creating a web-based clearinghouse of case evaluators that permits ratings and reviews (e.g., to identify who is fast, inexpensive, and accurate). Otherwise, provide a means for parties to endorse effective evaluators.

3. Provide case evaluation training, for example, a mandatory 8-hour training course by subject matter categories to achieve a higher level of subject matter competence.

4. Develop semi-pro circuit rider panels that go from area to area.

5. Provide a statewide list of case evaluators.

[6]

6. Provide public funding of case evaluation.

7. Create a video on how to conduct case evaluation.

The single qualification-related item the committee did recommend was to expand the period of time in which the experience of neutral case evaluator applications could be considered. The increasing difficulty in identifying neutral case evaluators over a period of just five years prompted committee members to recommend that an applicant's experience up to 15 years may be considered, as well as other ADR experience as a neutral, such as serving as a mediator.

Otherwise, the committee concluded that if case evaluation is made optional and the sanctions provisions are removed, it is uncertain how large a problem "credibility of the panels" will be in the future.

Rule Proposals and Discussion

The committee (with one dissenting member) recommends the following rule proposals for adoption by the Michigan Supreme Court. A discussion of the proposals follow each rule.

Rule 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.

(2) In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:

(a) identify the ADR process to be used;

(b) describe its timing in relation to other discovery provisions; and,

(c) be completed no later than 60 days after the close of discovery.

(3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

(a) be submitted to the court within 120 days of the first responsive pleading;

(b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and,

(c) be completed no later than 60 days after the close of discovery.

~~Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.~~

~~(3) A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.~~

(~~3~~4) Cases filed in district court may be submitted to case evaluation under this rule. The time periods set forth in subrules (B)(1), (G)(1), (L)(1) and (L)(2) may be shortened at the discretion of the district judge to whom the case is assigned.

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer

(a)-(b) [Unchanged.]

(c) ~~on the judge's own initiative~~ if parties have not submitted an ADR plan under subsection (A).

(2) [Unchanged.]

(C)-(H) Unchanged.

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least ~~14~~ 7 days before the hearing, each party shall

(a) serve a copy of the case evaluation summary and supporting documents in accordance with MCR 2.107, and

(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within ~~14~~ 7 days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. Filing and serving the materials identified in subrule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional $150 penalty. ~~An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.~~

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within ~~14~~ 7 days after the hearing, the panel will make an evaluation and notify the attorney for each party of the panel's evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) Unchanged.

(L)-(N) Unchanged.

~~(O) Rejecting Party's Liability for Costs.~~

~~(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.~~

~~(2) For the purpose of this rule "verdict" includes,~~

~~(a) a jury verdict,~~

~~(b) a judgment by the court after a nonjury trial,~~

~~(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.~~

~~(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.~~

~~(4) In cases involving multiple parties, the following rules apply:~~

~~(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.~~

~~(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant~~

may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR2.626.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion

(i) for a new trial,

(ii) to set aside the judgment, or

(iii) for rehearing or reconsideration.

(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or

~~alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).~~

~~(10) For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.~~

~~(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.~~

Discussion:

The committee first considered whether to simply recommend that case evaluation be abandoned altogether. Citing the above-mentioned studies' findings that some lawyers still found the process to be worthwhile, the committee turned to whether the rule could simply be fixed to address the problems with the process. After lengthy discussion about the interrelationship of the numerous criticisms of the process noted above, and particularly in the recruitment, training, payment of, and retention of a diverse group of quality case evaluators, committee members concluded that the process could not be "fixed," and that a better means of addressing criticisms was to afford parties the option of selecting a process they deemed better and more appropriate for their case than case evaluation.

The resulting proposals retain the central notion of MCR 2.403 that courts may consider case evaluation to be their default ADR process. Only in circumstances where a judge issues an order approving the parties' stipulation to use a different ADR process may parties be exempted from participation in case evaluation. If parties do not file a stipulation, or if the stipulation is not approved by court order, they may be ordered to participate in case evaluation.

The committee also concluded that, in light of the adoption of amendments to MCR 2.401(C) (effective January 1, 2020) regarding the filing of discovery plans with the court, a single stipulated plan incorporating both discovery and ADR should be permitted to (a) make sure that discovery and ADR are considered together; and (b) to reduce the number of steps and parties must take to obtain an order addressing both discovery and ADR.

If parties do not file a discovery plan under MCR 2.401(C) the parties could file a separate stipulation to use an ADR process other than case evaluation. The stipulation must be received early in the case--within 120 days--and must identify which ADR process will be used, and when it will take place. Nothing in the proposals precludes a court from requiring additional information about the selection or timing of the ADR process as currently permitted under MCR 2.410(C).

Requiring an order following receipt of an ADR plan identifying the ADR process and timing was thought necessary to preclude parties' simply averring that they will participate in some unidentified process at an indeterminate time, leaving courts without a means of effectively managing the case toward disposition.

With one member dissenting, the committee voiced strong support for eliminating the "sanctions" provisions of the rule. The reasons included:

1. Sanctions were thought to primarily penalize plaintiffs who had a single case, thus assuming a far higher level of risk of a negative outcome at trial than an insurance carrier who could spread the risk (meaning costs) among hundreds of other cases.

2. Sanctions for failure to accept an award that a lawyer believed was provided by a panel not competent to completely assess the merits of the case were viewed as unjust, and thus basing the disposition of the case not on the true merits of the claims and defenses, but rather on the fear that sanctions may attach.

3. Lack of any evidence, empirical or otherwise, that sanctions provided meaningful value to parties or the court.

4. Some judges use the threat of sanctions to "strong-arm" settlements during pre-trial conferences.

The committee believed that this approach would best address these concerns, chiefly in maximizing parties' opportunities to select the ADR process and ADR provider that best suits a given case, and permitting parties to try or settle cases on the merits of the claims and defenses without the threat of sanctions.

The dissenting view reflected concerns that (a) the proposed changes to MCR 2.403 do not balance the need for flexibility with the realities of a high volume docket, like Wayne County's, in which the vast majority of civil cases are no-fault "PIP" and auto negligence cases; and (b) the proposed amendments lack the specificity, structure, and enforceability mechanisms inherent in case evaluation, and this would be detrimental to effective docket management.

Alternative provisions offered included:

1. Retaining case evaluation as the default process for PIP and auto negligence cases unless a motion is filed within 28 days of the filing of the first responsive pleading and entry of an order by the court.

2. The order for an alternative ADR process should include details such as the name of the ADR provider; date the ADR process is scheduled to take place; guidelines for the ADR process; and, date by which ADR must be completed.

3. Rather than eliminate sanctions provisions, give judges the discretion to refuse to award sanctions in the interest of justice.

4. Make the proposed "interest of justice" standards in MCR 2.405 applicable to case evaluation.

In addressing the alternative proposals, the committee believed that addressing a single case type in a single court should be locally managed and should not guide the drafting of rules affecting courts throughout the state. Additionally, the committee noted that since waiver of case evaluation would require an ADR plan's approval by Order, a court simply could deny issuance of an order. This would still permit the parties to pursue other ADR options pre-case evaluation. Further, members suggested that the new discovery rule amendments, effective January 1, 2020, with provisions for early disclosures, are likely to improve courts' management of civil lawsuits, including auto negligence actions.

Regarding the specificity of parties' ADR plans, committee members expressed that early in the litigation parties may not be able to identify which ADR provider may best suit the case, the date of the provider's availability months away, or even which ADR process, whether non-binding arbitration, mediation, neutral evaluation, etc., may be most appropriate. Additionally, these items could be locally addressed in guidance the court provides in terms of its expectations in drafting discovery plans.

Regarding sanctions, the committee maintained its earlier recommendation to remove the provisions from MCR 2.403 and 2.405.

Under subrule (K)(1), the reduction of the time to notify attorneys of the award from 14 to 7 days is intended to reflect the current practice in which parties are most typically provided with the award at the hearing. The committee also considered reducing the time to accept or reject the award from 28 days to 14 days under subrule (L)(1), taking into account how technology permits quicker correspondence, a number of members cited circumstances where owing to the need to secure various levels of authority through local, regional, and national offices, 14 days would be too tight a deadline for clients to meet. The proposal was not adopted.

Rule 2.404 Selection of Case Evaluation Panels

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(3) [Unchanged.]

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) separate lists for various types of cases, and,

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants.

Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution

provider, for a period of up to 15 years prior to an application to serve as a case evaluator.

(5)-(8) [Unchanged.]

(C)-(D) [Unchanged.]

Discussion:

One issue brought to the committee concerned primarily larger courts' decreasing ability to identify "neutral" case evaluators for purposes of assignment on specialty sublists. While MCR 2.404 (B)(2)(d) currently requires that applicants demonstrate "…an active practice in the practice area for which the case evaluator is listed for at least the last 3 years," committee members shared their observation that lawyers more frequently switch between plaintiff and defendant representation and law practice areas than in the past. Accordingly, as to neutrals only, the proposed amendment would permit assessing an applicant's representation of both plaintiffs and defendants for a period of up to 15 years.

Rule 2.405 Offers to Stipulate to Entry of Judgment

(A) Definitions. As used in this rule:

(1)-(3) [Unchanged.]

(4) "Verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award.

(5) [Unchanged.]

(6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) Unchanged.

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(2) [Unchanged.]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to

(i) cases involving offers that are token or de minimis in the context of the case; or

(ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

(E) This rule does not apply to class action cases filed under MCR 3.501.

~~(E) Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.~~

Discussion:

The "offer of judgment" rule, MCR 2.405, came to the committee's attention chiefly as a result of its conclusion that with case evaluation made optional for persons selecting other ADR processes, and the removal of sanctions, far greater use would be made of the offer of judgment. This prompted a more in-depth review of current practice under this rule.

The committee concluded that owing to the implications of recommended amendments to MCR 2.403, current MCR 2.405(E), regarding the relationship between case evaluation and the offer of judgment, is unnecessary.

Additionally, several proposed amendments were suggested by holdings in appellate cases as well as recurring problems in practice under this rule raised by committee members.

The committee recommends amending the definition of "verdict" under MCR 2.405(A)(4)(c) to include a motion entering judgment on an arbitration award. This provision adopts the holding of *Simcor Construction, Inc v Trupp* (322 Mich App 508, 2018), in which the court held that a "judgment" includes one issued following a motion to enter a judgment on an arbitration award.

Committee members noted that MCR 2.405(A)(6) is unclear as to the date at which costs and fees may become taxable, and reasoned that to maximize the rule's effectiveness, the date should be tied to the date of the rejection of the prevailing party's last offer or counter offer.

Committee members also noted that several appellate cases have considered refusing to award costs "in the interest of justice" under MCR 2.405(D)(3). The proposed examples of exceptions are drawn from *31341 Van Born Rd, LLC v McPherson Oil Company* (unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019, (Docket No. 342740), which are in turn derived from *Luidens v 63rd Dist Court*, 219 Mich App 24, 1996. The committee believed it important for the rule to reflect these cases' holdings that *de minimis* offers should not serve as the basis for determining costs, nor should costs be assessed in cases of first impression or public interest.

Finally, the committee considered whether this rule should apply in class action lawsuits, particularly where an individual plaintiff may have just hundreds of dollars at stake, and the defendant is a large corporate entity. The committee concluded that the rule could operate so inequitably as to plaintiffs that an exception should be made for this case type.

[15]

Rule 2.411 Mediation

(A)-(H) [Unchanged.]

(I) Evaluative Mediation.

(1) This subrule applies if the parties requested evaluative mediation, or if they do so at the conclusion of mediation and the mediator is willing to provide an evaluation.

(2) If a settlement is not reached during mediation, the mediator, within a reasonable period after the conclusion of mediation shall prepare a written recommendation for settlement purposes only. The mediator's recommendation shall be submitted to the parties of record only and may not be submitted or made available to the court.

(3) If both parties accept the mediator's recommendation in full, within 21 days the attorneys shall prepare and submit to the court the appropriate documents to conclude the case.

(4) If the mediator's recommendation is not accepted in full by both parties and the parties are unable to reach an agreement as to the remaining contested issues, the mediator shall report to the court under subrule (C)(3), and the case shall proceed toward trial.

(5) A court may not impose sanctions against either party for rejecting the mediator's recommendation. The court may not inquire, and neither the parties nor the mediator may inform the court, of the identity of the party or parties who rejected the mediator's recommendation.

(6) The mediator's recommendation may not be read by the court and may not be admitted into evidence or relied upon by the court as evidence of any of the information contained in it without the consent of both parties. The court shall not request the parties' consent to read the mediator's recommendation.

Discussion:

Committee members suggested that MCR 2.411 should reflect the increasingly common practice of mediators being asked to provide a valuation at some point in the mediation process. Some members observed that a variety of "evaluative" ADR processes already exist, as appearing in the SCAO's "Michigan Judges Guide to ADR Practice and Procedure," and that recently adopted MCR 2.411(H), effective January 1, 2020 already permits "discovery mediators" who may also be experts. Concluding that the court rule should nevertheless comport with common practice, the proposal outlines an evaluative mediation process and is modeled on the "evaluative mediation" provision already appearing in MCR 3.216(I) regarding domestic relations mediation.

-- SCAO –

SAVE *the* DATES

2020

Annual Summit & Annual Meeting and ADR Conference

The ADR Section's 2020 Annual Summit, including 8 hours of advanced mediator training, will be Tuesday, May 12, 2020, at Detroit Mercy Law in Detroit.

On October 16 and 17, 2020, the ADR Section will host its Annual Meeting and ADR Conference at The Courtyard by Marriott in Grand Rapids. The ADR Annual Conference will include up to 11 hours of advanced mediation training featuring Michigan practitioners and experts.

MICHIGAN PLEDGE TO ACHIEVE DIVERSITY AND INCLUSION

WE CAN,
WE WILL,
WE MUST

Diversity creates greater trust and confidence in the administration of justice and the rule of law, and enables us to better serve our clients and society.

We believe that diversity and inclusion are core values of the legal profession, and that these values require a sustained commitment to strategies of inclusion.

Diversity is inclusive. It encompasses, among other things, race, ethnicity, gender, sexual orientation, gender identity and expression, religion, nationality, language, age, disability, marital and parental status, geographic origin, and socioeconomic background.

Diversity creates greater trust and confidence in the administration of justice and the rule of law, and enables us to better serve our clients and society. It makes us more effective and creative by bringing different perspectives, experiences, backgrounds, talents, and interests to the practice of law.

We believe that law schools, law firms, corporate counsel, solo and small firm lawyers, judges, government agencies, and bar associations must cooperatively work together to achieve diversity and inclusion, and that strategies designed to achieve diversity and inclusion will benefit from appropriate assessment and recognition.

Therefore, we pledge to continue working with others to achieve diversity and inclusion in the education, hiring, retention, and promotion of Michigan's attorneys and in the elevation of attorneys to leadership positions within our organizations, the judiciary, and the profession.

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Sign the Michigan Pledge to Achieve Diversity and Inclusion in the Legal Profession. michbar.org/diversity/pledge

SBM Connect
State Bar of Michigan

Connect With Us

The Alternative Dispute Resolution Section has a website and interactive community for its members - SBM Connect. This private community enhances 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 Michigan Dispute Resolution Journal*
- FIND upcoming Section events
- NETWORK via a comprehensive member directory
- SHARE knowledge and resources in the member-only library
- PARTICIPATE in focused discussion groups

ADR Section Mission

The mission of the Alternative Dispute Resolution Section is to encourage conflict resolution by:

1) Providing training and education for ADR professionals;

2) Giving professionals the tools to empower people in conflict to create optimal resolutions; and

3) Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

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 *The Michigan Dispute Resolution Journal*, participate in programming, further the activities of the Section, receive Section ListServ and SBMConnect announcements, and participate in the Section's SBMConnect and the Section's Discussion ListServ. The Section's ListServ and SBMConnect provide notice of advanced training opportunities, special offers for Section members, news of proposed legislative and procedural changes affecting your ADR practice, and an opportunity to participate in lively discussions of timely topics.

In implementing its vision, the ADR Section is comprised of several Action Teams. You are encouraged to participate in the activities of the Section by joining an Action Team. The Action Teams include the Skills Action Team, responsible for advanced ADR training provided at the annual ADR Summit, annual ADR Meeting and Conference, and Lunch and Learn teleseminars; Effective Practices and Procedures Action Team, responsible for monitoring and initiating judicial and legislative changes affecting ADR in Michigan; Judicial Access Team, charged with assisting courts to provide ADR to litigants; and the Publications Action Team, providing this *Journal* and Listserv and SBMConnect announcements concerning meetings, conferences, trainings and other information related to ADR.

The membership application is at: http://connect.michbar.org/adr/join.

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION 2019-2020

The ADR Section of the State Bar of Michigan is open to lawyers and other individuals interested in participating. To comply with State Bar of Michigan requirements, lawyer applicants to the ADR Section are called Members and non-lawyer applicants to the ADR Section are called Affiliates. The mission of the Alternative Dispute Resolution Section is to encourage conflict resolution by:

1. Providing training and education for ADR professionals;
2. Giving professionals the tools to empower people in conflict to create optimal resolutions; and
3. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

Membership in the Section is open to all members of the State Bar of Michigan. Affiliate status is open to any individual with an interest in the field of dispute resolution.

The Section's annual dues of $40.00 entitle you to receive the Section's *Michigan Dispute Resolution Journal,* participate in programming, further the activities of the Section, receive Section listserv announcements, participate in the Section's SBMConnect discussions, and receive documents prepared by and for the ADR Section.

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. Information on Action Teams will be forwarded upon processing of this Application.

Note: Dues are due between October 1 and November 30.

APPLICATION TYPE: ____ Member ____Affiliate

NAME: _____

FIRM: _____

ADDRESS: _____

_____

CITY: _____ STATE: _____ ZIP CODE: _____

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Have you been a Member of this Section before:_____

Are you currently receiving the *Dispute Resolution Journal*? _____

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Please return payment to:

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Annual dues are $40.00. There is no proration for dues and membership must be renewed on October 1 of each year.

Make checks payable to State Bar of Michigan: Enclosed is check #_____

Members using a Visa or MasterCard must join online at e.michbar.org.
Non-members must submit payment by check.

Revised 5/2018

Editor's Notes

The Michigan Dispute Resolution Journal is looking for articles on ADR subjects for future issues. You are invited to send a Word copy of your proposed article to ***The Michigan Dispute Resolution*** ADR Section, Lee Hornberger at leehornberger@leehornberger.com, William D. Gilbride, Jr. at wdgilbride@abbotnicholson.com and Editor Erin Archerd at archerer@udmercy.edu.

Articles that appear in ***The Michigan Dispute Resolution Journal*** do not necessarily reflect the position of the State Bar of Michigan, the ADR Section, or any organization. Their publication does not constitute endorsement of opinions, viewpoints, or legal conclusion that may be expressed. Publication and editing are at the discretion of the editor.

Prior ***Journals*** are at http://connect.michbar.org/adr/journal.

ADR Section Member Blog Hyperlinks

The SBM ADR Section website contains a list of blogs concerning alternative dispute resolution topics that have been submitted by members of the Alternative Dispute Resolution Section of the State Bar of Michigan.

The list might not be complete. Neither the State Bar nor the ADR Section necessarily endorse or agree with everything that is in the blogs. The blogs do not contain legal advice from either the State Bar or the ADR Section.

If you are a member of the SBM ADR Section and have an ADR theme blog you would like added to this list, you may send it to ADR Section Immediate Past Chair 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/memberblogs.

ADR Section Social Media Links

Here are the links to the ADR Section's Facebook and Twitter pages.

You can now Like, Tweet, Comment, and Share the ADR Section!

https://www.facebook.com/sbmadrsection/

https://twitter.com/SBM_ADR https://www.linkedin.com/groups/12083341

ADR Section Homepage

The ADR Section website Homepage is at http://connect.michbar.org/adr/home . The Homepage includes the Section Mission Statement, Who We Are, Why You Should Join the ADR Section, and Let Litigants Know that MEDIATION Really Works. The Homepage also provides access to the Section calendar, events, and ADR Section publications.

Dispute **Resolution** Journal

State Bar of Michigan
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Lansing, MI 48933

The Michigan Dispute Resolution Journal 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 Michigan Dispute Resolution Journal seeks to explore various viewpoints in the developing field of dispute resolution.

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