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The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

Overview of a Pre-Dispute Employment Resolution Process

— by Lee Hornberger

This article reviews Michigan law concerning pre-dispute employment resolution processes and provides a suggested resolution process.

In *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 624 (1980), the Supreme Court stated that "the employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution." In Renney v Port Huron Hospital, 427 Mich 415 (1986), the Court found that a resolution procedure was defective when it did not comport with elementary fairness.

Pre-dispute agreements to arbitrate employment claims, including statutory discrimination claims, are enforceable so long as no rights or remedies are waived and the procedure is fair. *Rembert v. Ryan's Family Steak Houses*, Inc, 235 Mich App 118 *(en banc), lv den*, 461 Mich 923 (1999). Pre-dispute agreements are valid if the parties have agreed to arbitrate the claims, there is no statute prohibiting such agreements, the arbitration agreements do not waive substantive statutory rights and remedies, and the arbitration procedures are fair so that the employee may effectively vindicate statutory rights.

Rembert rights include (1) clear notice that the employee is waiving the right to adjudicate claims, including discrimination claims, in a judicial forum and is choosing instead to arbitrate these claims; (2) the right to be represented by counsel in the arbitration; (3) a neutral arbitrator, meeting the criteria of MCR 3.602(E); (4) provision for reasonable discovery, including permitting the taking of depositions for use as evidence and subpoena power pursuant to MCR 2.506; (5) a fair arbitral hearing, including the procedures provided for in MCR 3.602; and (6) a written decision containing findings of fact and conclusions of law.

"Pre-dispute agreements to arbitrate employment claims, including statutory discrimination claims, are enforceable so long as no rights or remedies re waived and the procedure is fair."

Cole v. Burns International Security Services, 105 F3d 1465 (DC Cir 1997), outlined fairness requirements for pre-dispute resolution procedures. Cole required a neutral arbitrator, appropriate discovery, a written award, all relief available in court, and the employee's not being required to pay unreasonable costs. Under *Morrison v. Circuit City Stores, Inc*, 317 F3d 646 (6th Cir 2002)(en banc), a cost splitting provision that placed an undue burden on employees was found unenforceable; and limitations on statutory recovery rights were found unenforceable. Similarly, an arbitration agreement was unenforceable where the employer's exclusive control over arbitrator selection was so unfair as to prevent the employee from effectively vindicating her rights. *McMullen v. Meijer, Inc*, 355 F3d 485 (6th Cir 2004).

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Lee Hornberger is an arbitrator, mediator, and employment attorney in Traverse City and is an Ohio State Bar Association Board Certified Specialist in Labor and Employment Law. Lee is a mediator with Circuit Courts, EEOC, Michigan Civil Rights Department, and community mediation services and an arbitrator with the AAA, NASD, National Arbitration Forum, and National Futures Association. Lee is on the Board of Governors of the Grand Traverse-Leelanau-Antrim Bar Association.

With that as a background, we will review the essence of a process for a small or medium sized employment setting with the realization that each workplace calls for a slightly different procedure. A major goal for a resolution process is to have a fair, final, and binding process that respects all parties' rights and dignity.

Dispute Resolution Process Suggestions

There should be legal consideration by the employee for the arbitration agreement. This consideration would include a signed written agreement that the parties are entering into the process as a condition of hire, continued employment, and any bonuses, raises, or promotions received during employment.

The agreement process will cover all matters directly or indirectly related to recruitment, employment, treatment, or termination of employment; including, but not limited to, claims involving laws against discrimination whether brought under federal and state law, and claims involving co-employees. Excluded from coverage will be workers' compensation claims, unemployment compensation claims, claims arising under employee benefit plans and collective bargaining agreements, and disputes concerning trade secrets and non-competition agreements.

There should be clear notice of waiving all rights to a jury trial or judicial determination on behalf of anyone on any covered issue.

The process should not affect an employee's ability to file a charge with the Equal Employment Opportunity Commission, National Labor Relations Board, or similar state and local agencies.

The proceedings, including the collaboration, mediation, and arbitration proceedings, should be completely confidential and not disclosed to the public unless otherwise required by law or by enforcement proceedings concerning the process.

There should be legal consideration by the employee for the arbitration agreement.

This process will not change the at-will status of the employee or the at-will employment relationship.

There should be a provision providing that there are no other agreements between the parties concerning the resolution of employment related disputes unless such agreements are in writing signed by both the employee and the company president.

The process should provide that if any portion of the process is determined to be invalid, unenforceable or inoperative, such determination will not affect any of the remaining portions of the process and that all issues concerning the enforceability of the process will be decided by the arbitrator.

The process would be enforceable in court in the Western District of Michigan pursuant to the Federal Arbitration Act, 9 USC 1 et seq, utilizing Michigan law.

Collaborative Meeting

The process will call for an initial good faith collaborative meeting with at least the supervisor, the employee, and the human resource person in an attempt to resolve the situation. This will resemble a mediation without a mediator. Information concerning collaborative law can be found at www.collaborativelaw.com.

Mediation

If the matter cannot be resolved in the collaborative meeting, the parties will attempt in good faith to resolve the situation in mediation pursuant to MCR 2.411(A)(2), (B)(4), and (C)(2) and (5). A neutral mediator or co-mediators will work with the parties to jointly explore and attempt to resolve the situation. The services and procedures of the local Community Mediation Service will be utilized. Community Dispute Resolution Act, MCL 691.1556 *et seq*. The confidential mediation session will be held and completed within sixty calendar days of contacting CMS. The employer will pay the CMS fees. Neutral mediators will attempt to help the parties confidentially resolve the situation in a mutually respectful atmosphere.

Arbitration

If good faith mediation does not resolve the situation, the parties will proceed to final and binding arbitration before a neutral arbitrator.

Time requirements would provide that the arbitration request shall be filed within a specified number of days of the event giving rise to the dispute.

Unless determined otherwise by the arbitrator, the employer will pay for the services of the arbitrator concerning statutory issues. The arbitrator will determine who will pay for the costs of the arbitrator's services where there are non-statutory claims at issue. The employee will not be required to pay an arbitrator's compensation in order to secure the resolution of employment discrimination statutory claims. When one arbitrator is utilized, the company will pay all costs and expenses of the

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arbitrator, unless otherwise ordered by the arbitrator.

The neutral arbitrator shall be appointed through the American Arbitration Association or National Arbitration Forum employment rules and the conduct of the arbitration proceeding shall be in accordance with AAA or NAF employment rules to the degree consistent with this agreement.

The parties have the right to representation by counsel of their own choosing in the arbitration process. The arbitrator shall have the authority to order the payment of attorney fees as a judge would under federal statutory law or Michigan law.

The arbitrator is fully bound to apply statutory and other applicable public law, both as to substance and remedy, in accordance with statutory requirements and prevailing federal statutory or Michigan judicial interpretations. The arbitrator can award all relief authorized by applicable law.

After the selection of the arbitrator, there will be a pre-hearing meeting with the parties and their counsel. The purpose of this meeting will be to discuss resolution, discovery, simplification of issues, hearing procedures, and compliance with the arbitration procedure. If the arbitrator upon request finds that a party did not mediate in good faith, the arbitrator may return the matter to mediation for good faith mediation.

Either party can have a court reporter at the hearing. The party requesting the court reporter shall pay for the original transcript and the other party, if it wishes, can pay for a transcript copy. The party not ordering a transcript will have reasonable access to the original transcript. The party ordering the original transcript will provide a copy to the arbitrator.

Unless otherwise provided, the arbitrator shall give deference to but not be strictly bound by the Michigan Court Rules concerning discovery and motion practice, consistent with the purposes of arbitration.

Unless otherwise provided, the arbitrator shall give deference to but not be strictly bound by the Michigan Rules of Evidence including rules on examination and cross examination of witnesses, consistent with the proposes of arbitration.

The arbitrator, upon request, will provide for discovery pursuant to the AAA, NAF, or National Association of Securities Dealers employment discovery rules.

The arbitrator will have the power to subpoena and subpoena duces tecum parties and non-parties to attend the arbitration hearing pursuant to MCR 3.602(d). A copy of all subpoenas shall be immediately provided to all parties at the time of issuance.

Each side may provide a pre-arbitration statement of no more than ten pages and an oral opening of no more than thirty minutes. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may provide for longer submissions.

Each side will have four hours of evidence presentation time, including all witness examination of any kind by that party. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may provide for additional time.

Each side may provide a post-hearing written argument of no more than ten pages. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may provide for a different length. There will be no oral post-hearing arguments unless ordered by the arbitrator.

The arbitrator will issue the award within twenty calendar days of the closing of the hearing, including the receipt of the transcript. The reasoned award will contain findings of fact and conclusions of law. The award will not be more than ten pages in length. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may submit a longer award.

The arbitration award may be entered as a judgment by the applicable court.

The arbitrator is fully bound to apply statutory and other applicable public law, both as to substance and remedy, in accordance with statutory requirements and prevailing federal statutory or Michigan judicial interpretations.

Conclusion

This article has reviewed the establishment of a prototype pre-dispute employment resolution program, including collaboration, mediation, and arbitration, in order to create a process which has "equal judicial dignity" in the resolution of employment disputes. *Renney, supra*, 427 Mich at 436 n. 16.

Mediating Custody and Parenting Time Disputes

— by Trish Oleksa Haas

When I asked him the usual question that we ask all children of divorce - if you had three wishes, what would they be? - he said, 'I want to die.' Startled at this unexpected response, I said, 'Why? What would happen if you died?' 'If I were dead,' the little boy said in a somber tone, 'I'd be in heaven. My dad would be there. My mom would be there. And we'd live in the same house.'[1]

Divorce is reported to be one of the most traumatic events in a child's life, second only to death of a family member.[2] However, there are ways to minimize the trauma. Researchers have consistently concluded that children fare best when the conflict between divorcing parents is kept to a minimum.[3] Given this premise, it seems illogical that custody is often decided by a process that results in parents pointing out each other's faults.

In a courtroom custody battle, one parent must win and the other must lose. Such a setting hardly lays the foundation for future cooperation.

In a courtroom custody battle, one parent must win and the other must lose.[4] Such a setting hardly lays the foundation for future cooperation.[5] Since parents will always have the commonality of their child, the process of dividing custodial responsibilities should foster cooperation. Mediation is a process which furthers this goal.

"Mediation is a cooperative effort between divided parents and a neutral third person to develop healthy ways of settling differences about the care of their children."[6] The neutral third party facilitates communication, in the hopes of promoting settlement. Mediation has been recognized as a preferred method for dispute resolution because unlike litigation, mediation does not result in a winner and a loser.[7] Rather, a trained, neutral person helps the parties to reach a solution satisfactory to both parties.[8]

Despite the significant benefits mediation can bring to a child custody dispute, it is not common for parties to enlist a mediator to help resolve a custody dispute. Thus, many jurisdictions have "encouraged" the mediation process by mandating mediation in cases of custody disputes.

In 1980, California became the first state to enact legislation that mandated mediation in all contested custody cases.[9] "The statute's purpose was to reduce acrimony which may exist between the parties and to develop an agreement, assuring the child or children's close and continuing contact with both parents after the marriage is dissolved."[10] Although the statute has been amended several times,[11] the mandatory mediation requirement has remained intact since its inception.[12] Further, since California enacted its mandatory mediation statute, many other jurisdictions have followed its lead and acknowledged the benefits of mediating custody disputes.[13]

In Michigan, mediation services are currently made available to parties to a custody or parenting time dispute through the Friend of the Court.[14] However, the Friend of the Court is not empowered to require disputing parents to meet with a mediator.[15] Further, until recently, even a judge was not permitted to order parties to a contested custody dispute into mediation unless the dispute involved a post-judgment matter.[16] However, the 2000 revision to Michigan Court Rule [MCR] 3.216 deleted that prohibition; a judge is now permitted to order parties to a custody dispute into mediation at any time.

While these changes are laudable and demonstrate the Michigan Supreme Court's recognition of the benefits of mediating custody disputes, additional changes are needed so that all divorcing parents may benefit from the process of mediation. An initial referral to mediation should be mandatory for all parents who disagree on how to divide custodial responsibilities.[17] In the alternative, Michigan judges should recognize the benefits of mediating contested custody issues, and order mediation more frequently, as permitted by MCR 3.216. Mediation should be the preferred method for resolving custody disputes because it is successful, diffuses parental acrimony detrimental to children, and addresses the emotional needs of the parties.

Mediation produces positive results.[18] Mediation not only resolves disputes quicker than its counterpart, litigation,[19] it also has a high rate of success. When custody issues are mediated, studies have shown that roughly two thirds of the cases culminate in a settlement.[20] Although there are those who assert that mediation must be voluntary to work, this assertion cannot be supported.

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The likelihood of the parties reaching an agreement does not appear to be affected by the voluntariness of their participation.[21] Thus, parents that are ordered into mediation are just as likely to settle as parents who enter mediation on their own accord. And, even if a mediation session does not immediately culminate in an agreement, parties who have attempted mediation are more likely to settle their dispute before trial than parties who have never attempted mediation.[22]

Further, mediation addresses the emotional needs of the parties involved. Even if a mediation session is mandatory, the settlement itself is voluntary and the participants formulate their own plans.[23] "[V]oluntary settlements reduce the emotional . . . costs of resolving family disputes . . . . They give participants 'voice' in their dispute settlement process, which makes them more likely to adhere to agreements reached and feel more respect for the process and the society from which the agreement resulted."[24] Unlike a trial, in a mediation session, it is the parties themselves who formulate the custody arrangement.

Unlike litigation, mediation expects parents to act civilly[25] and fosters behavior necessary for future parental cooperation.[26] And, future parental cooperation truly is in the best interest of a child,[27] because prolonged parental conflict causes great damage to children.[28] Parents who mediate their custody dispute are also less likely to return to court over a future dispute.[29]

Mediation also reduces tension and hostility between parents during the divorce and after the divorce.[30] This result is significant because litigation has the opposite effect; negative feelings are usually enhanced by litigation.[31] Furthermore, unlike parties who litigate, parties who mediate are generally highly satisfied with the process.[32] Mediated agreements also tend to afford non-custodial parties increased amounts of visitation.[33]

Although the usefulness and safety of mediation has been questioned in cases of domestic abuse, [34] this concern can be alleviated through the statute or court rule.[35] As recommended by Model Family Mediation Standards,[36] if domestic abuse or violence is suspected, a mediator should be allowed to meet with the parties separately.[37] Aside from this exception, face-to-face facilitative mediation should be the preferred method of resolving contested custody disputes in Michigan.[38]

The substantial benefits of mediation balanced against the downfalls of litigation demonstrate that mediation should be the preferred method of resolving custody disputes in Michigan.[39] A referral to mediation should be required in all contested child custody disputes. Even in the absence of a mandate, Michigan judges should be encouraged to order mediation more frequently in custody disputes. The recent change to MCR 3.216 that permits a judge to refer custody disputes to mediation demonstrates the Supreme Court's tacit approval of such practice. And, because mediation decreases the likelihood of detrimental, ongoing parental conflict, mediation truly is in the best interest of children.

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* This article is an excerpt from Trisha Haas, Child Custody Determinations in Michigan Not in the Best Interests of Children or Parents, 81 U. of D. Mercy L. Rev. 333 (2004). Permission to quote has been given by U. of D. Mercy L. Rev.

[1] Honorable Ronald L. Solove, Confessions of a Judicial Activist, 54 Ohio St. L. J. 797, 799 (1993).

[2] Honorable Edward Sosnick, Oakland County's Divorce Education Program Helps Parents Recognize That How Well Their Children Do Post-Divorce Depends Largely on the Parents' Understanding of Their Children's Needs and the Impact on Children of Parents' Attitudes and Behaviors Toward Each Other, 80 Mich. Bar J. 34, 35 (2001).

[3] Linda D. Elrod, Reforming the System to Protect Children in High Conflict Custody Cases, 28 Wm. Mitchell L. Rev. 495, 496-07 (2001).

[4] Kathleen Niggemeyer, Comment, Conceiving the Lawyer as a Creative Problem Solver: Parental Alienation is Open Heart Surgery: It Needs More than a Band-aid to Fix It, 34 Cal. W. L. Rev. 567, 570 (1998).

[5] See, e.g., Stephanie Barnes, Strengthening the Father Child Relationship Through a Presumption of Joint Custody, 35 Willamette L. Rev. 601, 624 (1999)("[S]ole custody awards may antagonize 'losing' parties, causing them to return to court because of their resentment toward the winning parties"); Lynne Kenny & Diana Vigil, A Lawyer's Guide To Therapeutic Intervention in Domestic Relations Court, 28 Ariz. St. L. J. 629, 639 (1996)("When winning is the primary goal, almost everyone loses, particularly the children.").

[6] Douglas Darnall, Parental Alienation: Not in the Best Interest of the Children, 75 N.D. L. Rev. 328, 358 (1999).

[7] See 2002 Mich. Community Disp. Resol. Program Ann. Rep. 2, available at http://courts.michigan.gov/scao/resources/publications/reports/CDRPannualreport2002.pdf (last visited Feb. 4, 2004).

[8] See id.

[9] Dane A. Gashcen, Mandatory Custody Mediation: The Debate Over Its Usefulness Continues, 10 Ohio St. J. Disp. Resol. 469 (1995).

[10] Id. at 469-70 (quoting CAL. CIV. CODE §4607 (1993) [repealed 1994]).

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Trish Oleksa Haas graduated cum laude from the University of Detroit Mercy School of Law in May, 2004, where she was an associate editor of Law Review. A court-rule-trained mediator, she currently works for the Wayne County Neighborhood Reconciliation Center.

[11] Id. ("These various amendments incorporated changes that required the mediator to effect an agreement that is in the best interests of the child, gave the mediator authority to meet with the parties separately when there was a history of domestic violence, and allowed for the appointment of counsel to represent the minor children.").

[12] See CAL FAM. CODE §3170 (West 1994) (providing in relevant part: "(a) If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.").

[13] See, e.g., Del. Fam. Ct. Civ. Rule 16(b); N.M. STAT. ANN. §40- 4-8 (Michie 1994); OR. REV. STAT. §107.179 (1993); WIS. STAT. ANN. §767.11 (West 1993).

[14] See MICH. COMP. LAWS ANN. §552.513 (West 2001).

[15] MICH. COMP. LAWS ANN. §552.513 (West 2001).

[16] See Michigan Supreme Court Dispute Resolution Task Force, Report to the Michigan Supreme Court, 46-48 (1999), available at http:// courts.michigan.gov/scao/resources/ publications/reports/cdrpreport.pdf.

[17] By definition, mediation is a voluntary process. So, parties cannot be forced to mediate their disputes. However, parties can be required to attend an initial referral to mediation, which should satisfy a court's requirement.

[18] Report from the Kentucky Special Task Force on Parenting and Custody, Research Memorandum No. 490, at 14 (1999) (citing that 50-90% of all cases required to attend mediation formulated an agreement), available at http://www.lrc.state.ky.us/lrcpubs/Rm490.pdf.

[19] Andrew Schepard, An Introduction to the Model Standards of Practice for Family and Divorce Mediation, 35 Fam. L. Q. 1, 5-6 (2001) ('Studies report that mediation parents reach resolution of their disputes more quickly than litigation parents, taking less than half the time and less cost to produce a parenting plan.').

[20] See id. at 3 (stating that in California, cases referred to mediation result in full settlement one half of the time, and partial settlement two thirds of the time.).

[21] Gaschen, supra note 9, at 488.

[22] Schepard, supra note 19, at 5-6.

[23] Gaschen, supra note 9, at 478.

[24] Schepard, supra note 19, at 3.

[25] Darnall, supra note 6, at 359 ("The mediator will discourage the parents from making accusations or laying blame. Little emphasis is made on looking at past mistakes.").

[26] Gaschen, supra note 9, at 482-83 ('Mediation stresses honest, open communication, attention to the underlying causes of disputes, reinforcement of positive bonds, and avoidance of blame.').

[27] Id. at 483.

[28] Schepard, supra note 19, at 3.

[29] Bill Ezzell, Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes, 25 Law & Psychol. Rev. 119, 122 (2001). (citing that future disputes are less likely because the custody arrangement tends to be more detailed than custody orders rendered by another.).

[30] Gaschen, supra note 9, at 486 (citing Joan B. Kelly, Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes, 9 Behav. Sci. & L. 387, 393 [1991]).

[31] Id.

[32] Ezzell, supra note 29, at 130.

[33] Gaschen, supra note 9, at 483.

[34] See id. at 471 (commenting that victims of spousal abuse are often unable to effectively mediate with their spouse).

[35] Currently, MCR 3.216(D)(3) seems to address these concerns by allowing parties who are ordered to mediate to be excused from mediation in certain circumstances. These circumstances include: child abuse or neglect; domestic abuse, an inability on one party to negotiate for themselves, the potential for danger to the health or safety of a party, or any other good cause shown.

[36] Schepard, supra note 19, at 22 (it is noteworthy that the American Bar Association adopted the model standards on February 19, 2001).

[37] Id.

[38] MCR 3.216(1) permits parties to engage in evaluative mediation as an alternative to facilitative mediation in certain circumstances. Evaluative mediation differs from facilitative mediation in that the mediator can propose an agreement if the parties fail to reach an agreement themselves. Because mediation of this sort does not empower the parties to determine their own settlement, it is the opinion of this author that some of the benefits of mediating an agreement are lost. Thus, facilitative mediation should be the preferred method for dispute resolution.

[39] Solove, supra note 1, at 801 ("[T]he adversarial atmosphere of the courtroom [is] absolutely the wrong place to make determinations about the welfare of the children of divorce.").

Mediation Loses a Leader

by Anne Bachle Fifer

It is with great sadness that the Section notes the sudden passing of Nanci S. Klein, who suffered a heart attack on January 27, 2005. Nanci has been the executive director of the Oakland Mediation Center for over ten years, and, in a field where frequent turnover is common, she was the longest-serving director of a Michigan Community Dispute Resolution Program center. Nanci oversaw Michigan's largest CDRP center with vision, efficiency, and charm, and was tireless in her efforts to promote mediation. A lawyer-turned-mediator and mediation trainer, Nanci teamed up with Harvey Burdick to offer 40-hour mediation trainings several times each year; many of our Section members no doubt benefited from her training. Always seeking new ways to advance the profession, Nanci regularly wooed nationally-known mediators to Bloomfield Hills to offer advanced mediation trainings. Nanci served two terms on the Section Council, 1996-2002, and wrote articles for the newsletter. Her contribution to the field of mediation in Michigan is considerable; we have lost a leader and a friend.

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.**

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