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The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

Which Cases are Most Suitable for Court-Ordered Mediation?

By Richard Morley Barron

The very essence of mediation[1] is voluntariness. Thus, it may appear inconsistent and inappropriate to ever consider judicially forcing litigants to participate in a process such as mediation that is quintessentially voluntary. Yet in many jurisdictions[2], such as Michigan, the Supreme Court has, by promulgation of court rules[3], authorized a trial court judge to order the parties, in a case assigned to them, to participate in facilitative mediation, even over the objection of a party. While Michigan rules do provide the parties with the right to object[4], such motions, in general, are not likely to be successful.

Such rules authorizing court-ordered mediation reflect a judicial awareness of two phenomena. First, judicial statistics regularly demonstrate that approximately only 2% of all civil actions go to verdict[5]. Most of the other 98% are settled, typically near to the date set for trial after many months or years of litigation and after the expenditure of substantial time and money. Second, experience has demonstrated that many, usually most, cases ordered into mediation by a court, even prior to the conclusion of formal discovery, result in a voluntary settlement.

The Michigan Supreme Court analysis[6] appears to be that, given these two observations, the potential benefits of compelled mediation[7] to the parties and to the court far outweigh the risk that the mediation will be unsuccessful. After all, what is being forced upon the parties and their counsel is merely the requirement that, prior to conducting a full-blown trial, the parties have sat down face-to-face to discuss their competing positions and have attempted to come up with a mutually acceptable resolution. Experience demonstrates that in many cases where counsel firmly assures the court that mediation "won't work" the case is in fact settled with a mediated agreement. In short, courts such as the Michigan Supreme Court have concluded that, as a general rule, when the court orders the parties in a case to mediate it, the chances of settlement are high and the risks of the parties not benefiting from such mediation are low.

Still, it is clear that not all cases will settle in mediation and not all cases ought to be mediated[8]. Therefore, trial judges in jurisdictions that authorize mandatory mediation would benefit from guidelines as to which types of cases on their dockets would most likely settle if ordered into mediation. I respectfully suggest, based upon my research and experience, that the following ten factors are reliable indicia that such cases are more likely than average to be resolved by mediation. It is, I believe, very helpful to the success of court-ordered mediation that counsel generally be allowed input on the question of whether or not to order mediation and also on the scheduling of any mediation consistent with the circumstances of each case.

Factors favoring mediation.

I. <u>One or more of the attorneys request mediation.</u>

Even if one party is opposed to mediation, unless they can articulate some specific reason that would clearly make mediation pointless (e.g., a key

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Richard Morley Barron has a practice limited to civil mediation with an office in Genesee County. He has been engaged in mediation, primarily the resolution of civil actions in the circuit courts of Michigan, since 2002. He has received mediation training from Nancy Klein, Harvey Burdock, Anne Bachle-Fifer, Doug Noll and Bob Creo. He is a member of the ADR Sections of the ABA, SBM (Member JAT and EPP action teams), and Genesee County Bar Assn. (Chair ADR Comm.). He can be contacted at: www.mediate.com/rbarron.

expert witness has not yet conducted a necessary examination), mediation is likely to be productive. Where the parties need time to conduct additional discovery, or otherwise, the court can order mediation to be held well into the future.

II. One or more of the attorneys bring up ADR or admit that mediation might work.

Here too, a risk/benefit analysis dictates that unless a party can clearly establish that their case is one of the unusual cases that will probably not benefit from mediation, a court should probably have the parties attempt to mediate their dispute. The minimal time and expense required for mediation is statistically very likely to be off-set by the savings of time and money resulting from a mediated agreement.

III. One or more of the attorneys indicate that settlement discussions were held but were unsuccessful.

This is the classic case to be mediated: The parties want to settle but have been unable to do so on their own. A skilled mediator should be able to assist the parties to objectively evaluate their respective positions and work out a resolution which meets the real needs of the parties and is acceptable to them.

IV. It appears that the cost of litigation will be a significant fraction of the actual amount at issue.

This is merely to say that if the parties cannot really afford to fully litigate the case, they should settle it. Or, put differently, since the parties are almost certain to settle anyway, they can only maximize their benefit by settling early and minimizing their litigation expenses.

V. Plaintiff's recovery, if any, is likely to be modest.

In other words, the victory has to justify the costs of the war. It is easy for disputing parties to get caught up in the emotional vortex of litigation and lose sight of the concept of proportionality of remedy.

VI. The trial of the case is likely to be lengthy and/or complex.

Not only should small cases go to mediation, but also big ones. The benefit to the parties, assuming that they are represented by competent and prepared counsel, is that they are able to marshal all their evidence and arguments at a convenient time and place. They avoid the trauma and stress of trying to coordinate jury preparation, witness preparation and attendance, etc., knowing that the case may very well not be reached on the assigned trial date. Mediation, where necessary, can be scheduled over a period of days to allow all aspects of the case to be thoroughly examined and challenged in a controlled forum. If mediation fails in such a complex case, both the court and counsel can be confident that a firm trial date is required and that it is very unlikely that there will be a "last minute" settlement. Furthermore, the respective sides are likely to have "trimmed down" their case.

VII. All parties are represented by experienced and reasonable counsel.

Most mediators will acknowledge that the better the attorneys, the better the chances of a mediated settlement. This may seem somewhat counter-intuitive but good lawyers know that a mediated agreement generally maximizes the benefits to their clients. Good lawyers know the strengths of the other side and the weakness of their side. This is, of course, the *sine qua non* to achieving a mediated agreement.

VIII. The parties are likely to have to continue to deal with each other after the case ends.

Unlike tort actions where, normally, the parties have no further contact with each other after the conclusion of the lawsuit, actions between employers and employees, between husbands and wives, between business associates and between neighbors, require a dispute resolution that does as little damage as possible to the continuing relationship between the parties. Facilitative mediation is ideally suited for this challenging task.

IX. The parties are all sophisticated and able to evaluate their needs and interests, independently of their counsel.

For whatever reason, there are some cases in which clients, typically business persons, are occasionally more willing and able to discuss a compromise settlement than are their attorneys. Unlike the litigation forum, mediation furnishes a setting which allows the parties an opportunity to negotiate directly with one another. By definition, if the clients are happy, the attorney is happy.

X. The case has proceeded through discovery and case evaluation,[9] yet has not settled.

While most of the cost and effort of preparing for a trial will already have been expended, several factors still favor trying mediation. First, a trial date is imminent and last minute trial preparation will have disclosed previously unappreciated "loose ends" and legal hurdles. Second, the excuse that "I need to

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do more discovery" is gone. Third, the parties will be most sensitive to the need to protect themselves from a bad result. Fourth, counsel for all parties will be free from the nagging fear that there might be still more helpful evidence out there that could undercut a negotiated settlement. Fifth, the case evaluation award will give the mediator a starting point in discussing reasonable settlement value.

In summary, each case is unique and not every case benefits from mediation. However, the preceding ten case characteristics should be helpful in allowing judges to cull those cases on their docket most likely to be successfully mediated, either by suggestion or by order.

1 MCR 2.411(A)(2) "Mediation" is a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power.

2 The following jurisdictions appear to allow court-ordered mediation, at least to some degree: AL, CO, FL, GA, HI, IL, KA, MA, ME, MI, MO, MT, ND, NH, NC, NJ, NV, OH, OR, PA, SC, TX, WA, WI and some federal district courts.

3 MCR 2.410, 2.411, 3.216 & 5.143.

4 MCR 2.410(E) "Within 14 days after entry of an order referring a case to an ADR process, a party may move to set aside or modify the order. A timely motion must be decided before the case is submitted to the ADR process."

5 Marc Galanter, The Vanishing Trial (2004) at www.abanet.org/litigation/vanishingtrial/

6 http://courts.michigan.gov/scao/resources/publications/reports/cdrpreport.pdf

7 The apparently oxymoronic phrase "compelled mediation" means here compelling the parties to attempt to negotiate a mutually voluntary agreement with the understanding that there is no penalty for failing to successfully mediate.

8 Questionable cases for mediation might include cases involving constitutional issues, statutory construction, a strong public interest, or issues on which a precedential decision is desirable.

9 MCR 2.403.

New Arbitration Web Site Open to the Public

by Star Swift

Grand Valley State University has a new web site that features public sector grievance arbitration awards. The site was developed primarily for university students but it is open to the public at no charge. The site also has the resumes of labor arbitrators in Michigan, links to awards in other states, links to public sector unions in Michigan, and links to various agencies and associations that are relevant to collective bargaining and arbitration in Michigan.

Grievance awards are summarized by issue and by the arbitrator's name. The names of the parties in the awards have been deleted or changed. The awards are identified by the arbitrator's last name. (For example: Smith #1, Smith #2, etc.)

The site has received excellent reviews from arbitrators, mediators, lawyers, and representatives from both union and management. If you have a public sector grievance award that you would like posted on the site, please send the award to: swifts@gvsu.edu. as an attached Word document. You may delete or change the names of the parties or we will be happy to do it for you. The awards provide a wonderful teaching tool for our students.

If you would like to visit the web site, go to www.gvsu.edu/arbitrations/

LOOKING FOR Newsletter Contributors.

The ADR Newsletter is looking for contributions of interest to the members of the Alternative Dispute Resolution Section. Contributions may address legal developments, practice skills, professional issues, new books or resources. They can be written as objective reporting articles or as advocacy pieces. Please contact Newsletter editor Ben Kerner at (313) 965-1920 or benkerner@aol.com.

A New Tool for Negotiating With Your Client

by Dale Ann Iverson, Visiting Professor, Thomas M. Cooley Law School
(reprinted by permission of the Grand Rapids Bar Association)

In the new book, *What's Fair: Ethics for Negotiators* (Program on Negotiation at Harvard Law School, 2006), authors Carrie Menkel-Meadow and Michael Wheeler elevate the topic of negotiation ethics to center stage. In his contribution, Roger Fisher, co-author of the primer on interest-based negotiation, *Getting to Yes*, offers that the biggest challenge to candor and fairness in negotiation is that lawyers are conflicted between their obligation to get clients the best deal and their own interest in behaving honorably and preserving their reputation and self-esteem. Fisher suggests that lawyers negotiate with clients a "code of negotiation practices" that both will follow and which allows the lawyer to pursue the client's interests without sacrifice to the lawyer's personal and professional integrity. Fisher provides such a code to readers along with a cover memo to the client explaining its purpose.

Fisher's "Code of Negotiation Practices" is not as unrealistically lofty as some might expect, and not as practical as some might hope. His "Code" is premised on the importance of maintaining client confidentiality while minimizing bluffing, deceit, browbeating, active misrepresentation, and stubbornness. It emphasizes, among other things, building good relationships (through honesty and keeping promises), committing carefully (avoiding "locking in" prematurely), communicating effectively (listening well and acknowledging good points from the other side), and clarifying interests (with your client as well as your opponent).

Fisher's "Code of Negotiating Practices" is a good starting place for new lawyers, and old, to reflect on client communication and negotiation. As soon as new lawyers finish a trial advocacy program like the ones offered by ICLE, NITA, or the US District Court for the Western District, and return to the office, senior lawyers might consider handing out copies of *Getting to Yes* and Fisher's chapter from *What's Fair*. Then, ask them to prepare a memo and "code" that they would feel comfortable handing out to clients in preparation for any negotiation. Perhaps the best follow-up lesson would be to hear from more experienced lawyers about their "code" for negotiating.

A New ADR Section Initiative

As we mark the 5-year anniversary of the modifications and additions of court rules related to ADR, the ADR Section Council has embarked on an initiative to conduct an inventory of the ADR practices and policies of courts throughout the State. Both mature and more recent Court programs will be inventoried.

We will conduct our inventory through written surveys and personal interviews of judges, court administrators, and ADR Clerks. The survey covers topics including use of ADR generally; preferences in process type, timing of ADR, and mediator selection; views regarding court lists of mediators; expectations or goals in using ADR; and more. Our hope in collecting the information is to acknowledge the realities of beliefs and practices about ADR in court systems that serve diverse communities. Additionally, we hope to highlight ADR programs and practices from one court that may be transferable and beneficial to another court or community.

Council members will conduct the interviews and process the data during the first quarter of 2007. The results of the *Inventory Initiative* may have implications for many of the other action teams within the Section Council including Access, Effective Practice & Policies, Judicial Access, Publications, and Skills. ADR Section members can expect to read about, hear about, and see the results of this ambitious initiative in subsequent activities of the Council.

If you have an interest in working with the Inventory Initiative Action Team, please contact Robert E. L. Wright to volunteer your service. He is at (616) 776-6334 or wrightr@millercanfield.com.

Upcoming Mediation Trainings

General Civil

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

Plymouth: **February 8-10, 23-24**
June 14-16, 29-30
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Ann Arbor: **February 12-16, 19-22**
Training sponsored by Dispute Resolution Center
Contact: Kaye Lang, 734- 222-3745, drc@mimediation.org

Lansing: **March 8-10, 29-30**
Training sponsored by Dispute Resolution Center of Central Michigan
Contact: Karen Beauregard, 517-485-2274, drccm.beauregard@tds.net

Grand Rapids: **April 11-13, 19-20**
Training sponsored by Dispute Resolution Center of West Michigan

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

Domestic Relations Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Ann Arbor: **August 20-24**
November 28-30 and December 5-6
Training sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com or call 1-734-663-1155

Plymouth: **January 23-27**
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Bloomfield Hills: **May 9-11, 21-22**
Training sponsored by Oakland Mediation Center
Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

Advanced Mediation Training

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

Ann Arbor: **January 19** "Parent-Teen Mediation"
January 20 "Kinship Care Mediation"
Trainings sponsored by Dispute Resolution Center
Contact: Kaye Lang, 734- 222-3745, drc@mimediation.org

Bloomfield Hills: **January 26**, 8:30 am – 5:30 pm
"Advancing Your Mediation Skills," Zena Zumeta
Training sponsored by Oakland Mediation Center
Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

Kalamazoo: **May 4**, 8:30 am – 5:30 pm
"Breaking the Logjam: Apology and Other Impasse Busters," Anne Bachle Fifer & Bob Wright
Training sponsored by Dispute Resolution Services
Contact: Barry Burnside, 269-552-3434, bburnside@gryphon.org

COMMENTS FROM THE CHAIR

Remember, what we ask of people is not easy.

by Barbara A. Johannessen

Within every 40-hour mediation training are exercises and role plays that assist the participant "trainees" to develop skills that are helpful in mediation. Role plays in which "trainees" are asked to serve as mediators, parties, or attorneys enable each participant to experience mediation from the assigned perspective. More important than how it feels to be in the mediator hot seat, I believe role-plays help us understand how a party may be feeling when the mediator attempts certain predictable interventions or asks that certain normal tasks of mediation be performed. That is, the interventions may be predictable and tasks may appear normal to those trained in mediation process; yet, to the parties who may not be trained in mediation process, these activities appear mysterious, counterintuitive, or just plain scary.

What we ask of people in mediation may be simple, but it is not easy. I had the opportunity at the recent 2006 Association for Conflict Resolution Conference in Philadelphia to watch master conflict resolvers and collaborative process experts prove this point.

One program segment was entitled "A Difficult Conversation: Engaging a Process around the topic of Same Sex Marriage." The program included a panel of four individuals, two each representing proponents and opponents of same sex marriage respectively. The content of the conversation was important, in particular because everyone in the audience was likely to have deeply held views about this topic; however, the intent of the program was to examine the process for conducting conversations about contentious topics. How can we constructively engage people of differing viewpoints in conversations that build understanding?

I was thrilled to finally have an opportunity to hear two thoughtful people of the opposing viewpoint to my own share their beliefs. One was a policy maker and political operative with a conservative think-tank and the other was a professor at the law school of a religious and conservative university. They were articulate, accomplished individuals. I did not expect to agree with much of what they said, but I considered it my responsibility to gain sufficient understanding of their perspective and its origins so that I could stand in their shoes.

Only one of the panelists was trained as a mediator. She was the only panelist who had the ability to speak provisionally – i.e., with a willingness to have her viewpoint impacted by the viewpoint of others. She was the only panelist who recognized that value-based discussions are best conducted with a mission of understanding rather than persuasion. She was the only panelist who was able to distance herself from the dialogue so as not to take comments personally. Perhaps the most profound statement of the panel came from this panelist when she said, "If I had only met you [the other panelists] during this program, I would not have liked you. But having met you over lunch before our program, I find instead that you are people whom I respect, yet with whom I have differing views."

Listening to the panel discussion was not easy; however, the entire audience knew going in that listening to these dramatically different viewpoints would be difficult. As professionals in dispute resolution, we supposedly had all the techniques to "gird our loins" (or hearts or heads) so as to refrain from engaging in destructive dialogue.

So, what did I learn from this program? Most of the lessons I learned came in the question and answer period. In mediation, we ask people to separate the people from the problem – a foundational tenet of interest-based negotiation. Yet, during the Q & A I watched highly trained conflict resolution professionals attack the panelists with statements like, "This was the most difficult hour I have forced myself to listen to, especially when it is clear that you hate me and people like me." Or, "I know that your law school represents and espouses intolerance and hatred towards those who do not hold your viewpoint." Clearly some part of this audience was not able to separate the people from the problem.

In mediation we ask people to speak of interests, not merely of positions, so that we might not only expand the opportunities for resolution but also recognize elements of common ground between parties. Yet, I watched this highly trained audience exclaim that some of the panelists' positions were wrong, morally, ethically and legally, and that theirs was right. Only one member of the audience attempted to speak in the language of interests by first determining whether all panelists could agree that obtaining health care insurance for children was a good thing and then attempting to determine what means for acquiring insurance would be acceptable and what means would not. This audience, with one

exception, could not speak in terms of interests.

At first I was embarrassed by the outcome of the program. I wanted to apologize to the panelists whose perspective on this issue was in opposition to probably the entire audience and to acknowledge why they might be reticent to participate in such programs when asked. I was ashamed that a group of highly skilled professionals could not seem to "walk the talk." I wondered what had happened in the program that the most knowledgeable and experienced conflict resolution professionals could not engage in the behaviors we ask of mediation participants every day.

Then I remembered that we were there to examine the process for conducting "difficult conversations". Clearly the process utilized for this program did not result in constructive dialogue. When issues are important and personal to the parties, process matters. So I offer a few opinions on how the process for the program could have been improved.

The panel moderator did not clearly define the goal of the program or receive agreement from the participants regarding the goal. The parallel in mediation might be when a mediator neglects to identify the parties' goals in participating in mediation. A mediator may presume that the goal of mediation is "settlement," whereas for any one of the parties the goal may be to determine whether a reasonable settlement is possible or to simply comply with a court order. Encouraging parties to share their own goals for the mediation may be a helpful exercise and may help a mediator design a process that more adequately meets the parties' needs.

The panel moderator chose the structure of the panel discussion. He pre-determined a 3-prong approach to the discussion that led to immediate polarization of the panel and audience. The parallel in mediation might be when a mediator decides to begin the parties' discussions with the legal issues, often a polarizing exercise, or determines what issues will and will not be discussed in mediation. Instead, he might have determined whether the parties would like to engage in a discussion that enables parties to become more "human" to one another. Creating an opportunity for the "getting to know you lunch" referenced above may serve the mediation process better then a mediator having prepared an agenda for the discussion.

The panel moderator did not engage in techniques of active listening that enable participants to hear information through a new voice and that serve to model methods of dialogue, which encourage constructive rather than destructive engagement. The parallel in mediation might be when a mediator does not engage in summarization, reflection, and reframing. Engaging in active listening techniques throughout the mediation, even when the mediator believes everyone's views are clear, may be a helpful exercise to ensure clarity and understanding between parties.

Finally, remember that what we ask of people is not easy. The techniques of constructive dialogue and interest-based negotiation can be learned and practiced; yet when the issues are important and personal, even the most highly trained individuals can resort to techniques and tactics that are destructive or counterproductive. The parallel in mediation is when the conflict that has engaged these parties is important and personal to them. The conflict itself and the presence of the other party can trigger natural human instincts of self-preservation. A mediator who acknowledges this fact, at least to him/herself, may discover his/her reserves of patience and insight when conducting the mediation.

I was a participant in a difficult conversation and I found it nearly impossible to practice the techniques I encourage others to use when in conflict. I assume I have become accomplished at talking the talk of collaboration, but can I actually walk the talk? I challenge all those who want to be or claim to be mediators to test your mettle. Engage in a difficult conversation about an issue that is important and personal to you. Reflect on your engagement in the dialogue. Did you walk your talk?

The ADR Newsletter

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For comments, contributions or letters, please contact:

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

— 6th Annual

Advanced Negotiation & Dispute Resolution Institute (ANDRI)

Mark your calendar: March 22, 2007 (INN at St. Johns, Plymouth) and visit the ICLE website www.icle.org/andr to register for the most important ADR event in Michigan. ANDRI, co-sponsored by the ADR Section, ICLE, and SCAO, is designed to meet the needs of ADR providers and users with 3 tracks (negotiation, mediation and arbitration) plus a track featuring the judiciary and bonus segments on Marketing ADR.

The 2007 ANDRI features national presenter Melvin A. Rubin, a pioneer of ADR in his home state of Florida. In addition to his extensive ADR practice, Mr. Rubin serves on the Supreme Court of Florida ADR Policy Committee responsible for recommendations to the Court in the formulation of the standards and rules for mediation and arbitration in Florida and on the Board of Advisors of the International Association of Collaborative Professionals (IACP). He is an international trainer of professionals in ADR and is internationally known for his expertise in issues of ADR malpractice and ethics. Mr. Rubin will provide ANDRI attendees with tools necessary to minimize ADR liability exposure and will present perspectives on ethics in each of the mediation and arbitration tracks. Additionally, Mr. Rubin will share his practical tips for earning a living in ADR.

A cadre of local talent will share their expertise on topics including:

- What Advocates Gain from Joint Sessions in Negotiation and Mediation,
- Developing and Applying Strategic Principles to Negotiation,
- Making the First Move in Negotiation,
- Preparing Yourself and Your Client for Mediation,
- Revisiting Framing: How Mediators Construct Good Questions,
- To Caucus or not to Caucus – choosing the right approach for the right case,
- Talking About Money at the Table,
- Powers of the Arbitrator: The Super-Neutral at Work, and more.

And ANDRI will provide a special look at mediating in the context of public policy and public interest issues. ANDRI is a jam-packed day of ADR programming and an opportunity to network with professional colleagues and judges. You can even earn credit toward the Advanced Mediation Training (AMT) required of Court-list mediators. Cost: $245 for Section Members, $275 for others.

Visit **www.icle.org/ANDR** or call **877-229-4350** now.