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Alternative Dispute Resolution Section of the State Bar of Michigan

Why the State Bar of Michigan Should Endorse the Revised Uniform Arbitration Act

PREPARED FOR THE SPECIAL ISSUES COMMITTEE OF THE REPRESENTATIVE ASSEMBLY OF THE STATE BAR OF MICHIGAN

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Executive Summary

The Revised Uniform Arbitration Act ["RUAA"], drafted and approved by the Uniform Law Commission ["ULC'], was formally approved by the House of Delegates of the American Bar Association in August 2000. The RUAA has been endorsed by the American Arbitration Association (national ADR service provider), the National Academy of Arbitrators (group of prominent arbitrators), Jams/Endispute (national ADR service provider), the National Arbitration Forum (national ADR service provider), and the Association for Conflict Resolution (formerly, the Society of Professionals in Dispute Resolution).

The objective of the RUAA is to modernize the Uniform Arbitration Act ["UAA"], which provides for the enforceability of executory agreements to arbitrate. The UAA, approved by the ULC in 1955, has been adopted, in whole or in part, by virtually every state in the Union, including Michigan [1961].[2]

The RUAA enhances the UAA by including important procedural protections not part of the UAA regulatory scheme. The key protections, described more fully in the summary of changes, include notice requirements for initiating arbitration, validating the use of electronic records and contracts consistent with federal law, bifurcating the role of courts and arbitrators in determining arbitrability, enabling courts to direct consolidation of proceedings in the interest of justice, strengthening the arbitral disclosure process by requiring arbitrators to disclose known financial interests or personal relationships that could affect impartiality, permitting limited forms of discovery, and specifying requirements for awards of punitive damages.

To date, the RUAA has been enacted in 11 states.[3]

Summary of the RUAA

The original UAA, which is patterned after the Federal Arbitration Act ["FAA"] adopted by the United States Congress in 1925, is considered a "bare-bones" statute. Neither the UAA nor the FAA has been modified since adoption, despite the evolution and greater embrace of arbitration, both on the state

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2 MCLA §§ 600.5001 *et seq.;* MSA §§ 27A.5001 *et seq.;* MCR 3.602.
3 The states include: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, and Utah.

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Ms. Bedikian's mediation and arbitration experience spans all types of business and employment disputes, and post-verdict mediations conducted under the auspices of a special Michigan court rule. Her memberships include the State Bar of Michigan, the American Bar Association, and the Oakland County Bar Association. She is the former Chair (1995/96) of the State Bar Section on Alternative Methods of Dispute Resolution, from which she received the Distinguished Service Award for Contributions to the Field of ADR.

and federal levels. Gaps have been filled in by case law, which provides an interesting patchwork of jurisprudence, complicated by lack of uniformity across state lines. Thus, the goal of the Drafting Committee was to design a statute that would preserve the efficiencies of arbitration, incorporate the pertinent law [*e.g.*, disclosures, discovery, immunity, judicial review], and facilitate the use of arbitration by offering uniformity and predictability.

Note: The Drafting Committee did not take a position on the use of mandatory [as a condition of doing business] arbitration agreements.

The following are considered the most important provisions of the RUAA:

Electronic Records (Section 1): The UAA was adopted at a time when virtually all commerce was conducted through paper transactions. The RUAA provides for the use of electronic records, contracts and signatures consistent with recent technological advancements and federal law.

Initiating Arbitration (Section 2): The UAA is silent on how to initiate arbitration. The RUAA fills this gap by specifying notice requirements to adverse parties in arbitration.

Non-waivability of Provisions (Section 4): The RUAA recognizes that party autonomy may be trumped by the need to maintain some basic level of fairness. Section 4 embodies the freedom of contract notion up to the point where varying arbitration terms may result in a violation of applicable law. For example, Section 4 identifies provisions that parties may not waive at all, at any time during the proceeding. These include the right to compel or stay arbitration, the right to move to confirm or vacate an award, and the immunity rights of arbitrators and sponsoring organizations of arbitrations.

Determinations of Arbitrability (Section 6): The UAA is silent on how the question of who decides arbitrability and by what criteria. Section 6 makes clear that courts will determine whether or not an agreement to arbitrate exists. An arbitrator, however, will determine procedural issues of arbitrability, such as timeliness, and whether conditions precedents to filing have been met. This bifurcation of function is consistent with the legal principles enunciated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 35 (1967); and re-affirmed in *Buckeye Check Cashing v. Cardegna*,126 S. Ct. 1204 (2006).

Consolidations (Section 10): Current law is schizophrenic on the subject of when separate arbitrations involving the same transaction may be consolidated. Federal courts generally will not order consolidation. Section 10 of the RUAA provides a mechanism for consolidation if a party is not prejudiced by the outcome, and the consolidation reduces time and expense for the parties. A separate provision precludes consolidation if the parties explicitly provided against it in their arbitration agreement.

Arbitral Disclosure (Section 12): The RUAA provides specific disclosure obligations requiring arbitrators to disclose known financial interests or personal relationships that could affect their impartiality. An arbitrator's failure to a known material interest or relationship may be used to establish "evident partiality," a ground on which a court may vacate the award.

Arbitral Immunity (Section 14): The general purpose of immunity is to encourage qualified individuals to serve as arbitrators. Section 14 of the RUAA codifies case law that provides both arbitrators and sponsoring organizations immunity from civil liability, tantamount to a judge. [Exceptions are those pertaining to arbitrator fraud or corruption]. Section 14 also solidifies arbitral immunity by requiring a court to award to arbitrators and arbitration organizations attorneys' fees and reasonable litigation expenses against any person unsuccessful in litigation.

Arbitration Process (Section 15): This section preserves the parties' right to fashion arbitration to best suit their circumstances. However, a new provision in this section authorizes arbitrators to decide matters based on a *"request for summary disposition."* Parties may preclude a case from being dismissed on summary disposition grounds by an explicit provision in their agreement.

Discovery (Section 17): The RUAA recognizes that parties in arbitration may require some form of evidence to advance their case. Section 17 authorizes arbitrators to order pre-hearing discovery but to do so only when *"appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost*

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effective." Section 17 also facilitates the process of securing necessary information in an arbitration involving persons located outside the state by providing for a single enforcement action, in the state where the arbitration occurred.

Change of Award by Arbitrators (Section 20): The RUAA permits parties to seek clarification [in case of ambiguity or technical/computational error] directly with the arbitrator, rather than having to petition a court to re-instate the arbitrator's authority for this purpose.

Remedies (Section 21): Section 21 retains the general proposition that arbitrators may award broad forms of relief. Such broad forms may exceed the type of relief a court grants. However, under the RUAA, limits are placed on the arbitrators' remedial power to award attorneys' fees and punitive damages. With respect to punitive damages, RUAA places further constraints on arbitrators. An award of punitive damages may be made only where the evidence at the arbitration hearing meets the legal standard that otherwise would apply to the claim. As an additional safeguard, the arbitrator must specify in the award the basis in law and fact supporting a punitive damages award, and to state such an award separately from other grants in the award.

The Michigan ADR Section Council specifically approved the following language on punitive damages, to substitute for the RUAA language:

"21(a) An arbitrator may not award punitive damages or other exemplary relief unless such an award is authorized by statute in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

"21(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the statutory and factual basis justifying and authorizing the award and state separately the amount of punitive damages or other exemplary relief.

Conclusion

The RUAA does not depart from the foundational provisions of the UAA or the FAA. Rather, it includes provisions that were previously addressed by arbitrators or courts on a case-by-case basis, resulting in process inefficiencies, increased costs, and disparate results. The RUAA is a qualitatively improved statute that will offer arbitration participants enhanced predictability and, over time, increase the national uniformity of state arbitration legislation.

Law Students Humanizing "Thinking like a Lawyer" "What would your mother say?" A Mediator/Educator's Perspective

Martin I. Reisig [1]

Which values and skill sets will best serve us as mediators and perhaps more generally as lawyers? Where do we learn them? Several years ago I wrote an article entitled "Mediator Role Models."[2] It was a chance to relate lessons learned from my parents and other special people in my life to my serving as a mediator. For the last several years I have asked law students in my advanced mediation class at University of Detroit Mercy School of Law to write a paper highlighting peacemaking and mediation skills they have learned from observing important people in their lives. My not so subtle reminder to these students is that thinking like a mediator is so much more than matching a set of facts to a bunch of laws. These lessons apply just as significantly to our broader role as attorneys and counselors.

One student wrote, "I probably should take such qualities (peacemaking) and learn from others, but all too often I find myself continuing the pattern of confrontation and conflict." Some aspects of law school only provide tools for confrontation; I hope that these following lessons from the students' personal role models are at least equally valued. It should be understood that these tools of cooperation, caring and peacemaking will define a crucial part of a worthwhile legal career.[3] We can all choose our paths.

One reason to teach as an adjunct is to learn and I thank the students who have taught me and reminded me of the reasons I love being a lawyer.[4] The following are snippets of wisdom taken from the students' mediation role model papers.

MOTHER

"My mom always told me that when you don't allow yourself to really understand the other person in the conversation, you will just hear based on your own thoughts and not what they are really saying."

"She taught us that when you treat people like individuals and respect them for their personal attitudes and beliefs which might be different from your own,

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you can solve almost any type of problem, because people are always willing to solve a problem if they know they are being heard."

"…she would emphasize the importance of actually having that conversation and not just letting something go or trying to avoid it because she felt that doing this was not a successful way of solving the problem, it just masked it."

"It usually takes her caring and listening to get us to talk to each other again… I love that you can tell her anything and you can trust that she will only reveal what it is that you want her to reveal."

"She simply guides the situation so that everyone can feel good about themselves…I never felt as if my mother picked a side or that the result was unfair…she always tries to get us to smile."

"She has this knack for looking past the words that are used to the underlying message…she is very aware that a problem is rarely one person's fault, and forces you to look at the situation critically to see how everyone may have contributed."

FATHER

"…my father never over-reacts, and often puts things quickly in perspective…never loses his cool…handles things compassionately and calmly."

"(Dad and Mom helping neighbors)… My parents would offer the neighbors something to eat and drink to make them feel at ease… most of the time was spent with my parents listening…"

"The 'why,' 'what,' and 'how,' questions were always annoying when my dad got in the middle of disputes between my sisters and me, but they were effective. 'What are you fighting about?' 'How did this start?' 'Why?' 'How can you fix this?' This approach was much more effective than when he would say 'stop fighting.' It made us think about each other's side and point of view, and more importantly, it made my sister and I come up with a mutual resolution to our problem."

"My father follows the motto, 'In order to disagree, one has to understand. If one doesn't understand how can one say they disagree?' People have asked him how are you able to be peaceful in a time of turmoil. I have come to realize that a great way to inspire is to lead by example."

"My dad (police officer, coach) is also incredibly flexible…He doesn't get frustrated if a situation doesn't go exactly as planned. In one of those situations my dad is right there suggesting something different."

"…my father is extremely patient, he always lets the other person tell their side of the story first, he takes time before he approaches a difficult conversation, and he refuses to compete with someone who is yelling at him, or out of control…more importantly he tends to increase his patience as the other person loses theirs. He allows the other person to speak first, so that the other side feels satisfied that they have at least told their side of the story. This makes the other person listen attentively rather than mentally prepare how they will tell their side of the story."

'He would force me to take responsibility for my actions and feel comfortable with the decisions that I had to make. Being able to look at things from another prospective made my life more peaceful. He used common sense and simplicity."

GRANDMOTHER

"I believe people consistently come to her for a number of reasons. First, they know that she will always make time to listen. Second, she appreciates everyone's concerns. She listens and carefully makes sure to verbally recognize their point of view. I have also never heard her take sides, whether or not she is in the presence of the disputing individuals. Therefore, people trust her and they are open to her thoughts and ideas. Taken together these characteristics make people around her feel safe…"

"She listens with all eyes on me. She never seems disinterested, she is always engaged in the conversation… being in her presence is always peaceful because she is so positive."

"She very quietly and patiently listened to me while I vented my side of the story. Then, instead of taking a side or lecturing me on what I did wrong, she counseled me with patience. She paraphrased my mother's side of the story and asked me if I could understand where she was coming from. She also explained to me her feelings on the importance of family; there will be disputes here and there but it is important to look past these and work at maintaining good relationships, because this is what matters in the end."

GRANDFATHER

"…he listens, he is respectful and he never passes judgment on people."

"…he asks questions that make you think he really wants to know what you are talking about."

"…he understands that human emotions cause people to do things that aren't always right, and he would never make someone feel bad about it."

"He would only give advice on how to remedy a situation if the person asked for it."

"For my grandfather, who was elected the village official (village in Macedonia)…respect was his number one rule; he not only gave it, but expected it in return from everyone…he spoke in a very quiet, low voice. When someone was trying to push his buttons or got angry, he would slow down the speed of his voice and talk even quieter so that the person would have to stop talking and listen carefully…by talking in his quiet voice and acknowledging each party with kind words and anecdotes that would help them feel

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understood…if someone wanted to yell or be verbally abusive towards another person, my grandfather would simply ask, 'What would your mother think if she were here to see you behaving this way?"

BROTHER/SISTER

"(brother, after engaged in a deep conversation with a homeless man), you can learn something from every person you encounter; all it takes is seizing the opportunity to connect with that person (on some level)… People are the most valuable asset on this earth and there is a wealth of knowledge within them that can be unlocked with the simplest, purest form of acceptance and tolerance."

"(sister)… when you are talking with someone who you know is not tallying marks as you speak it opens up possibilities to discuss anything."

"(sister)…has a desire to learn about other people's lives and what makes each person unique…she asks open ended questions…I can tell that she has been listening to every word that I have said…she brings calmness to even the most stressful situations…"

RELATIVES

"My cousin…is a person who brings peace into the room. She is so full of energy and enthusiasm, very outgoing and always polite. It seems to me that people flock to her because of her positive attitude…when she talks to someone they can feel this positive attitude and it is contagious…she gives me undivided attention through eye contact, listening only to me and no distractive behavior.. She makes people feel comfortable."

"(Uncle)…cool head and an open ear…approached every situation with a sense of calmness... (sibling dispute)…my uncle listens to each side of our story…his focus is on the big scheme of things…he will throw out possible solutions…the first thing that helps facilitate a solution is the trust factor that both my brother and I have in my uncle…"

"(great uncle-attorney)…his calm, understanding behavior had a bigger impact on our family than we ever imagined…such a quiet, humble man... (Courts closed for funeral) showed that being personable and courteous is far more important in the law…for being a man of incredible intellect, he used active listening skills and always maintained a respectful tone with friends and family alike."

SPOUSE

"My wife has the uncanny ability to be a good attentive listener. She seems to always know when a person needs to vent and when they are actually seeking advice or guidance. Even when we have our disagreements or I am upset she knows just when to listen and when to give advice."

"…to possess a nonjudgmental character like my husband, allows individuals to trust you and feel comfortable telling you their whole story without leaving out parts of the situation which might make them feel embarrassed…My husband always allows people to complete their stories without appearing frustrated…"

FRIEND

"I learned from…that the world is not limited to two mutually exclusive choices."

"… Has helped me understand that sometimes it's no one's fault."

"…what is important is to focus on the good in the relationship and in the person."

"…he is always able to see life on the other side of the conflict, often its resolution."

"He is great to talk to about my disputes with others because he is willing to risk stepping on my toes to open my eyes to my own contribution to a dispute."

"(Neighbor) He listens without judging, lets me talk as much as I want, I know that he is actively listening and engaged in what I have to say. Sometimes he comes up with possible solutions, but mostly he just listens.

"(girl friend) She rarely interrupts, instead having the speaking party finish completely their thoughts before she offers up her advice…is never one to jump to conclusions…no matter how tough the question she asks, you feel comfortable because you know the only reason she is pressuring you is because she has your best interest in mind."

"(Fiancé) I may rant and rave and get angry or upset, but he stays calm and balanced. In turn, he calms me down…"

MENTORS

"(supervisor)…after she had given us a chance to speak and rephrased each of our stories in her own words, I felt a sense of relief—she actually heard what I was saying…she always treated everyone equally and with respect…"

"(manager) keeping a calm, consistently optimistic tone was key."

"(Minister) by establishing a rapport with each parishioner and by working with each person to identify a way to participate in the function of the church…was fostering an atmosphere of cooperation and peace."

"(Judge) He does an excellent job of focusing 100% of his attention on what you are telling him. His response is often crafted with a question that could only be asked if someone was truly listening."

"Enthusiasm was his gift. He had a way of expressing his interest in every word we said, every emotion expressed, and every fear in our hearts. He was also showing us how to be excellent active listeners. His attention was focused entirely on what we were saying."

"(Rabbi) I have never seen him interrupt someone…he will sit with patience, listen and nod his head to indicate he is paying attention. His stories have such an impact on people because they can relate to them. After listening and thinking about a story rabbi has shared, I have often found myself thinking, 'if this could happen in the story with those people, then I can make changes to harness those attributes in my life."

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FINAL THOUGHTS

There are promising movements within legal education and the legal community referred to as: Therapeutic Jurisprudence, Comprehensive Law, Collaborative Law and Humanizing Legal Education which all broaden the meaning of the phrase "Thinking like a Lawyer" to include increasing the value of restoring people to society and to healing relationships.[5] Taking time to reflect and honor the lessons we have learned in: listening, caring, patience, calmness, optimism and respect can only make us better lawyers and mediators. "Thinking like a Lawyer" in addition to recognizing the importance of law and facts, should also and perhaps most importantly mean bringing the lessons we have learned from our role models to the forefront of our mediating and law practices.[6]

(Endnotes)

1 Martin I. Reisig, Birmingham, Michigan, is a full time mediator and frequent arbitrator. He is also an Adjunct Professor of advanced mediation /mediation clinic at The University of Detroit Mercy School of Law. He is past chairman of the Oakland County Bar Association ADR committee and a past president of the Oakland Mediation Center. Prior to focusing on mediation he had an extensive trial practice. Further mediation articles are available at www.reisigmediation.com. Marty was interviewed at the 2008 conference of the International Alliance of Holistic Lawyers, see www.youtube.com Marty Reisig. This article was prepared for the Oakland County Bar Association May 2010 issue of Laches and a longer form appeared on www.cuttingedgelaw.com

2 Reisig "Mediator Role Models," Laches, Oakland County Bar Association, November 2003, Alternative Dispute Resolution Issue

3 For a further review of ADR programs in law schools and the Mediation program at University of Detroit Mercy School of Law see Professor C. Michael Bryce, "ADR Education From A Litigator/Educator Perspective," St. John's Law Review, Volume 81, Winter 2007, Number1

4 Special thanks to my students at the University of Detroit Mercy School of Law who have been so open to learning new skills, remembering and valuing peacemaking lessons learned from family and friends and giving to the community through their volunteering at the Wayne County Mediation Center, The Resolution Center of Macomb County and the Oakland Mediation Center. Also special thanks to these Community Dispute Resolution Centers for all they have contributed to the education of these students.

5 Leading advocates for modifying "Thinking like a lawyer" include: David B. Wexler, Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice (2008), Bruce J. Winock, David B.Wexler, Dennis Stolle, Practicing Therapeutic Jurisprudence: Law As A Helping Profession (2000), Susan Daicoff, Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses (2004), Steven Keeva, Transforming Practices: Finding Joy and Satisfaction in the Legal Life (2002), Daniel Bowling, David A. Hoffman, Bringing Peace Into The Room (2003), Lawrence S. Krieger, "The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity, and Happiness," 11 Clinical Law Review 425 (2005), Kim Wright www.cuttingedgelaw.com, the International Alliance of Holistic Lawyers, www.iahl.org and David B. Wexler, International Network on Therapeutic Jurisprudence, www.law.arizona.edu/depts/upr-intj/

6 The 2007 Carnegie Foundation study by William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S. Shulman, "Educating Lawyers—Preparation for the Profession of Law," fully recognized the need to train lawyers to be fully dimensional and open to the messiness and complexity of life, not solely sterile fact gatherers and masters of legal arguments.

COURT OF APPEALS

Mediation settlement agreement is enforceable as any other contract, and the same rules of interpretation apply.

Richard Figura, ADR Section Council Member

Since mediation as we know it today was established in the Michigan Court Rules in 2000, there has only been a handful of appellate decisions involving the enforceability of mediated settlement agreements. In those case, Michigan appellate courts have routinely held that mediated settlement agreements are enforceable in the same manner as other contracts and settlement agreements. In December, 2009, the Michigan Court of Appeals did so again.

In an unpublished opinion decided on December 22, 2009 *(Health Call of Detroit vs. State Farm Mutual Automobile Insurance Company; Nos. 286353; 288009)*, the Michigan Court of Appeals held a facilitated settlement agreement could be enforced as any contract (i.e., a party could file a claim for a breach thereof) and the same rules that apply to the interpretation of any contract (including judicial interpretation of ambiguous terms) apply to a facilitated settlement agreement.

There was previous litigation *(HealthCall I)* involving a claim for the expenses of medical care and treatment under the no-fault insurance act. The parties agreed to attend a facilitative mediation. At the conclusion of that facilitation a document entitled "Facilitation Settlement" was signed by counsel for each party and the facilitator.

The settlement contained the following language:

> "The case was resolved by way of settlement as follows: That State Farm shall pay RN care at $49 for 1,944 hours or $54,864.00, and $23,000.00 for aide care outstanding from 7/23/04 – 10/31/05. The parties shall take testimony from BCBSM regarding periods 11/1/04 – 1/31/05 and no resolution of the inpatient portion of the bill relating to attendant care."

The inpatient care portion of the bill for which the settlement document said there was "no resolution" was subsequently resolved by the trial court and a final order was entered.

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Upcoming ADR 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):

Flint: **February 8-12**
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Lansing: **February 18-20, March 4-5**
Training sponsored by Resolution Services Center of Central Michigan
Contact: Linda Glover, 517-485-2274

Bloomfield Hills: **February 19, 26, March 5, 12, 19**
Training sponsored by Oakland Mediation Center
Call (248) 338-4280, ext. 217 or visit www.mediation-omc.org.

Mt. Clemens: **April 28, 30, May 1, 5, 7-8**
Training sponsored by The Resolution Center
Call 586-469-4714 or visit www.theresolutioncenter.com

Plymouth: **June 3-5, 25-26**
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Domestic Relations Mediation Training

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

Ann Arbor: **February 26-28, March 6-7**
July 26-30
Training sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com or call 1-734-663-1155

Flint: **February 22-26**
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Macomb Community College: **March 9 – April 4**
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Schoolcraft College: **April 27 – May 13**
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Domestic Violence Screening for Mediators

February 27 or May 1
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Advanced Mediation Training

Mediators listed on court rosters must complete eight hours of advanced mediation training every two years. The following training fulfills this requirement:

Dearborn: **March 26-27**
Adult Guardianship and Family Caregiver Mediation
Trainers: Zena Zumeta and Susan Butterwick
Training sponsored by Wayne Mediation Center
Contact: www.wayne-mediation.org or call 313-561-3500

Plymouth: **June 8 6th Annual Mediators' Forum**
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Petoskey: **September 10**
Trainer: Anne Bachle Fifer
Training sponsored by Northern Community Mediation
Contact Jane Millar, 231-487-1771

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Nine months later, plaintiff sought to reopen HealthCall I in the form of a motion to strike part of the opinion and order. The trial court refused to reopen the case, but advised plaintiff's counsel that if defendant had violated the facilitation agreement that an action for breach of that agreement might be a proper action.

Thereafter, plaintiff filed the instant litigation claiming breach of contract, promissory estoppel, and unjust enrichment. Plaintiff alleged that the facilitation settlement contained an agreement that defendant violated. The issue in the case involved the interpretation of the sentence: "The parties shall take testimony from BCBSM regarding periods 11/1/04-1/31/05."

The court held that agreements settling pending lawsuits are contracts and a breach thereof is enforceable just as a breach of any contract. The court further held that such agreements are construed according to the same legal principles regarding construction and interpretation of contracts.

The court then found that the language quoted above was ambiguous and remanded the case to the trial court to determine the nature of the parties' agreement under the facilitation agreement.

Practice Note. This case underscores the need for a mediator to insist that the written settlement agreement spell out clearly what the obligations of the parties are with respect to all issues. All too often the parties and their counsel, believing they have reached an agreement, are in a hurry to leave the mediation and go on to other pressing business. The mediator must impress upon them how important it is to "tie down" all loose ends so there is no room for disagreement on the terms of the agreement. The document doesn't have to be as detailed as the final stipulations and orders submitted by the parties to the court, but it must give them a clear, unambiguous framework for preparing those final settlement documents.

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