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Alternative Dispute Resolution Section of the State Bar of Michigan

Is Mediation a Placebo?

by Barry Goldman

Suppose we have four people. Let's call them Groucho, Harpo, Chico, and Zeppo. Groucho has a broken arm and goes to a physician. Harpo has lower back pain and goes to a Therapeutic Touch practitioner. Chico and Zeppo have a lawsuit, and they go to a mediator. Let's follow them and see what happens.

Groucho

Groucho's doctor starts by examining Groucho's arm. She does a history and physical. She takes x-rays. She reviews his records to see if there are any pre-existing medical conditions that might affect his treatment. Based on what she learns, she determines a course of action.

Groucho's doctor will set and cast his arm according to well understood and universally applied procedures. Any doctor competent to treat broken arms will treat Groucho the same way any other competent physician would.

After six weeks Groucho's cast will be removed and his arm will have healed. This is so whether Groucho believes in Western medicine or not. It is so even if Groucho has been in a coma since his accident.

Harpo

Harpo takes his back pain to an alternative medicine practitioner. I chose Therapeutic Touch for this example because it is among the most thoroughly discredited forms of alternative medicine. By holding their hands a few inches above a patient's skin, Therapeutic Touch practitioners claim to be able to perceive irregularities in the invisible energy field surrounding injured or diseased body parts. By moving their hands they claim to be able to adjust those energy fields and restore health to the affected areas. In a justly famous experiment performed by an 11-year-old girl, Therapeutic Touch practitioners were asked to place their hands through holes in a piece of cardboard. With their view of the experimenter's hands blocked, the practitioners were found not only to be unable to determine whether a presented hand had a disturbed energy field, but unable to determine whether there was a hand present at all.

But Harpo doesn't know this. He has heard good things about Therapeutic Touch in general and this practitioner in particular. His back pain is particularly acute and he has gotten no relief from his usual treatment. He very much hopes therapeutic touch will work, and from what he has heard he expects that it will.

Continued on Page 2

Continued from Page 1

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The practitioner gives Harpo a line of mumbo-jumbo and goes through some hocus-pocus. She talks about the polarity of his energy field. She says she can sense a disturbance in his aura. Whatever. She says he should feel better in a couple of days.

In fact, Harpo feels better almost immediately. Why?

Placebo

Part of the reason Harpo feels better has to do with the natural history of back pain. It comes and goes. Part has to do with regression to the mean. A particularly bad day of back pain is likely to be followed by a day that is not so bad. This is not because of anything the patient may have done or refrained from doing. It is simply because a particularly bad day of back pain is an extraordinary event, and extraordinary events are rare.

Part of the answer has to do with conditioning. We feel better after a visit to the doctor because we have come to associate doctor visits with improved health. Part of the answer has to do with stress. Illness is associated with fear. To the degree that fear can be reduced, the body's natural defenses can more effectively combat illness. When we expect to feel pain relief, the body releases endogenous opioids and pain relief is experienced. It doesn't matter whether the expectation is medically justified or not. Patients given medically inert substances experience pain relief as long as they believe they are getting pain reliever.

We know that Therapeutic Touch has no medical value. It is medically inert, like a sugar pill. But we also know that it makes people feel better. Not everyone. Not people who think it is quackery, not people in comas, but, for people who believe it will work and who expect it to work, Therapeutic Touch makes them feel better. This is the placebo effect.

There is no question that real, measurable medical improvement often accompanies placebo therapy. There is more work to be done before a full understanding of placebo effects can be achieved, but the basic outline of the process is fairly well understood.

Chico and Zeppo

Chico and Zeppo take their lawsuit to a mediator. The question I want to ask is this: Is their experience with their mediator more like Groucho's with his doctor or more like Harpo's with his quack?

This column is adapted from The Voodoo That You Do: The Placebo Effect in Mediation*, presented at the International Institute for the Sociology of Law in Onati, Spain on July 9, 2010. It is available on request by emailing* bagman@ameritech.net

Nina Dodge Abrams has been practicing law over 33 years. She serves as a mediator, arbitrator, family law attorney and handles some probate and estate matters. She has served on the Family Law Council - Mi, the State Bar of Michigan Family Law Section Council and the Alternate Dispute Resolution Section Council along with being an active member of the OCBA Alternate Dispute Resolution Committee.

Mediating Family Matters in a Multicultural Society

By Nina Abrams

The Family Mediation Council presented its Annual Program, **MEDIATING FAMILY MATTERS IN A MULTICULTURAL SOCIETY** on Saturday, November 13, 2010 at the American Spirit Centre in Brighton, MI. The Program was directed to anyone who mediates or works within an ethnic community. It was well attended and very valuable.

The panelists were: Ellen Yashinsky Chute, speaking about the Jewish Community, Dr. Jack Tsui, and Jan Tsui, speaking on Chinese and Asian Communities, Carlo Martina and Siham Awada Jaafar, speaking about the Arabic community and the Hon. Betty Widgeon and James Widgeon, speaking about the African American community. Following the individual speakers' presentations there was a general panel discussion (with audience participation) of the complexities involved in family mediations and the need for cultural sensitivities.

Continued on Page 3

Continued from Page 2

Each participant pointed out which values in his or her particular ethnic community affected marriage and parties seeking divorce. All pointed out the reasons to seek cultural sensitivity. In the Jewish community, the 2000 year history of discrimination and the seeking of education for the next generation are part of the background to these divorces. In many ways, the modern Jewish family mirrors the "American" family because the parties are second and third generation families. The more observant Jewish families must not only seek a civil divorce but also a religious divorce (through a Get issued by a council of rabbis). When confronted with domestic violence, the family has less physical abuse but more coercive abuse with threatening, control of money, and control over the children.

In the African-American community, while all are aware of the last 300 years of discrimination and disregard of African history, the parties are not all alike, nor do they want to be treated alike. They differ in economic, educational, and social situations. But all are aware of current discrimination related to reaching opinions only based on the color of their skin. To be successful in mediation, each party must be viewed as an individual.

Asian families are usually recent immigrants to the United States. They have different ties to the "old country" and to each other. Not only in divorce are they being met with American values and the way things are done here, they also face discrimination within the community and among the generations. Usually these families are very private and do not want to have their problems made public.

In the Arab community, mediation is built into the family process of resolving disputes. But the dominant control by men gives men an advantage in negotiating for a divorce as well as negotiating for the terms of the marriage contract. Also, a civil divorce judgment may not be enough for the community to consider the parties divorced. There may be other cultural and religious impositions on the marriage to be considered. As with other ethnic communities, the mediator must consider the country from which the parties are closest associated, their ethnic norms, and the relatives in this country who may play an important part in why a marriage works or not. But the respect for mediation helps the parties resolve their problems.

Michigan Needs to Update Its Arbitration Law

By Bill Weber, Chair EPP

William L. Weber. Jr. is a member of the ADR Council of the State Bar of Michigan. He practices law with offices in Beverly Hills, Michigan and is Executive Director of Professional Resolution Experts of Michigan, an organization of 21 experienced atttorneys who have been trained in mediation, arbitration and other forms of dispute resolution.

Michigan's arbitration law was adopted in 1961. It has been nearly 50 years since the arbitration law was passed. No amendments have been made to this ancient law. Michigan, like many other states, should modernize the arbitration law and incorporate features such as notice requirements for initiating arbitration, recognize the use of electronics consistent with state and federal law, bifurcate the role of courts and arbitrators, permit limited forms of discovery, provide arbitrators with immunity protection and enable arbitrators to award remedies consistent with state laws. These features and others are included in the Revised Uniform Arbitration Act (RUAA) that twelve other states have enacted. Michigan should also get on board.

The ADR Council unanimously supported the recommendation of the Effective Practice and Procedures Committee (EPP) that RUAA should be adopted by Michigan. The mission of EPP is to monitor ADR practices and procedures in Michigan and throughout the states and recommend to the ADR Council those practices which are best suited for Michigan. Mary Bedikian, Professor of Law at Michigan State University College of Law and a recognized expert in arbitration law, has written several "white papers" that explain the advantages of adopting RUAA in Michigan. EPP is currently evaluating a strategy for accomplishing enactment of RUAA.

The next step is to present the reasons for adopting RUAA to the Representative Assembly of the State Bar of Michigan. We need the support of the Representative Assembly and we expect to present to the Representative assembly in Spring 2011.

Jaguar Trading, L.P. v Presler

Kristen Polanski, Clark Hill PLC

It is a well known concept that Arbitration is a creature of contract, and as a direct result of this principle, the parties' control over the management of their dispute is usually much greater than the control they possess over a court-managed lawsuit. For example, typically the parties select the arbitrator and define the scope of the arbitrator's authority. Moreover, the technical rules of evidence may or may not apply to the dispute's resolution. Our legal community is comprised of an elaborate web of technical rules and requirements, and the realm of Alternate Dispute Resolution frequently provides a break from the procedural chess match that court-managed litigation can become. But not always.

In a recent Michigan Court of Appeals decision, the court addressed whether a party seeking confirmation of an arbitration award must first file a complaint and not merely a binding arbitration award with the circuit court to invoke jurisdiction under the Michigan Arbitration Act ("MAA"). In Jaguar Trading L.P. v. Presler (unpublished opinion per curiam of the Court of Appeals, decided August 3, 2010, Docket No. 290972), the Court concluded that if there is no pending action between the parties, the plaintiff must file a complaint to request confirmation of an arbitration award; for without filing a complaint to initiate a civil action, the award cannot be confirmed. MCR 3.602, MCL 600.1901, and MCR 2.101(B).

In that case, when a dispute arose, per agreement, it was resolved through binding arbitration. On August 13, 2007, an arbitration award was issued in plaintiff's favor for $25,219.44, and on August 12, 2008, plaintiff filed State Court Administrator's Office (SCAO) Form MC 284, titled "Binding Arbitration Award," in the Circuit Court. The form required plaintiff to indicate the basis for the binding arbitration, which was statutorily based on contract; the nature of the claim arbitrated, which was commercial; and the total amount of the award. In response, instead of filing an answer, defendant moved for summary disposition. According to defendant, the court lacked jurisdiction over the dispute, because under MCR 3.602, which governs statutory arbitration, a party seeking relief must first file a complaint as in other civil actions.

Because the Court was called upon to interpret and apply the court rules, the Court's opinion is understandably technically based, and presents a "bright line" determination by the court. Despite plaintiff's attorney filing an SCAO form and attaching the original arbitration award and other exhibits submitted during the arbitration proceeding, the court was unwilling to grant plaintiff any leeway.

The Court held that MCR 3.602(I) states, "[a]n arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule." Moreover, MCR 3.602(B)(2) clearly provides, "[i]f there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions." By seeking confirmation of the arbitration award, plaintiff requested circuit court relief, and by doing so, plaintiff's relief was subjected to the requirements of a civil action. By failing to file a complaint with the circuit court, plaintiff did not satisfy the civil action procedural requirements of both MCL 600.1901 and MCR 2.101(B); therefore, "having failed to invoke circuit-court jurisdiction under the MAA by properly initiating a civil action through the filing of a complaint, plaintiff was entitled to neither confirmation of the arbitration award nor summary disposition." Id. at 10.

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Should we conclude that the technical rules and requirements of court litigation will always trump the generally-more-forgiving realm of arbitration? Perhaps not.

Defendant further argued that because plaintiff filed the "Binding Arbitration Award" only one day before the one-year limitation period of MCR 3.602 expired, and because the filing of the award was statutorily

Continued on Page 5

Continued from Page 4

insufficient to entitle plaintiff to confirmation of the award, plaintiff was barred from initiating any further proceedings regarding the matter. Given the Court's earlier bright line analysis, defendant appeared to have a valid argument. However, in a somewhat surprising twist, the Court held that, by filing the arbitration award within one year of the award being issued, Plaintiff did strictly comply with the language of the rule; and therefore, "MCR 3.602(I) does not itself prohibit plaintiff from filing a complaint with the lower court for confirmation of a timely filed award." Id. at 11.

The Court was unwilling to shut the door completely on plaintiff's claim, which appeared to protect some of the more procedurally-relaxed characteristics of Alternative Dispute Resolution..

New Rule of Professional Conduct Concerning Mediators

Very recently the Supreme Court issued Amendments to the Michigan Rules of Professional Conduct. In particular, newly adopted Rule 2.4 requires a lawyer serving as a third-party neutral to notify unrepresented parties that the lawyer is not representing them. The new Rule and Comment is set out below.

Order of the Supreme Court, October 26, 2010

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.1,3.3, 3.4, 3.5, 3.6, 5.5, and 8.5 of the Michigan Rules of Professional Conduct and new Rules 2.4, 5.7, and 6.6 of the Michigan Rules of Professional Conduct are adopted, effective January 1, 2011.

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, an arbitrator, a conciliator, or an evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, an evaluator, or a decision maker depends on the particular process that is selected by the parties or mandated by a court.

Continued on Page 6

Continued from Page 5

The role of a third-party neutral is not unique to lawyers, although, in some court connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third party neutrals. Lawyer-neutrals also may be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected. A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute resolution are governed by the Michigan Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Staff Comment: There is no equivalent to MRPC 2.4 in the current Michigan Rules of Professional Conduct. The rule is designed to help parties involved in alternative dispute resolution to better understand the role of a lawyer serving as a third party neutral.

Former Council member Anne Bachle Fifer is a mediator and mediation trainer based in Grand Rapids.

ADR Section Identifies Themes for the Future

By Anne Bachle Fifer

What should be the focus of the Section in the next couple years? Incoming ADR Section Chair Donna Craig commissioned a survey of the over 700 members of the ADR Section this fall in order to obtain feedback on what is important to Section members. A focus group, comprised of interested Section members, convened in September to identify what the Section did well and in what ways it could improve. Anne Vrooman, Director of Research and Development with the State Bar of Michigan, used this data to design the survey questions. Over 100 members completed the survey in October.

The Council used its November 12 meeting to analyze some of the data generated by the survey. Three themes emerged as being of primary importance for the Section:

1) Providing skill-building **training** for ADR providers

2) Informing the **public** about ADR

3) Working with **courts** to increase the use of ADR

Continued on Page 7

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):

Bloomfield: **March 3, 10, 17, 24, 31; June 3, 10, 17, 24, 30; Sept 2, 9, 16, 23, 30;**

Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280

Ann Arbor: **April 1-3, 8-10**
Training sponsored by Dispute Resolution Center of Washtenaw and Livingston Counties
Contact: Jainelle Robinson (734) 222-3745
or (517) 546-6007 - Fax: (734) 222-3760
Website: www.thedisputeresolutioncenter.org

Grand Rapids: **April 19-21, 28-29**
Training sponsored by Dispute Resolution Center of West Michigan
Contact: Jon Wilmot, 616-774-0121

Domestic Relations Mediation Training

Ann Arbor: **February 9-11, 16-17; July 25-29**
Training sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com
or call 1-734-663-1155

Bloomfield: **April 29 – May 7; October 7, 14, 21, 26, 28**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-338-4280

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:

Grand Rapids: **February 25**
"Best Practices in Mediation"
Trainers: Anne Bachle Fifer & Dale Ann Iverson
Training sponsored by Dispute Resolution Center of West Michigan
Contact: Jon Wilmot, 616-774-0121

Plymouth: **March 17**
Advanced Negotiation & Dispute Resolution Institute
Co-sponsored by ADR Section and Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Bloomfield: **March 21**
"How to Mediate Like a Pro"
Trainer: Mary Ann Greenwood
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-338-4280

Bloomfield: **June 8**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-338-4280

Continued from Page 6

Survey respondents ranked the Section as "effective" in its efforts to provide training for ADR providers, but ranked the Section as not effective regarding informing the public and improving courts' use of ADR.

The survey yielded specific ideas for how the Section can continue to provide training for ADR providers, including offering more arbitration training, familiarizing litigators and other lawyers with ADR, training judges, and offering one-day seminars for litigators and businesspeople to become more familiar with ADR. Importantly, the survey also revealed that training has a negative side: some respondents complained that, despite their investment in training, they have not been able to complete their "internship" so as to be listed on a court roster or that their listing on a court roster has not resulted in any mediations. For example, one respondent wrote, "I have been on the court lists in Oakland, Wayne and Macomb Counties for 3 years. I have never been appointed to mediate a single case." Some recommended that the Section limit the number of trainings or the number of mediators ("too many mediators, too few mediations") such as through a certification process.

Survey respondents also expressed dismay with the lack of enthusiasm for ADR from the courts. "Some judges think mediation is a waste of time and won't do it," one respondent wrote. Others complained about the way the court roster works in

Continued on Page 8

The ADR Quarterly

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Continued from Page 7

their counties, e.g., "It appears that the selection process has biases," and "I believe judges are selecting or encouraging certain mediators to parties." The Council agreed to work on ensuring a fair mediator selection process, to increase use of ADR in less-populated counties, and to encourage courts to make earlier referrals to ADR.

Some respondents suggested that the Section work to unify the court mediator rosters, and the Council noted that SCAO is already in the process of doing this, with input from several Section members.

A few respondents observed that the low quality of some ADR providers is a challenge ("too many inexperienced providers"). The Council is discussing whether, and how, to address this concern.

Another observation that emerged from the survey was that members are not familiar with the work the Section has already done, so one of the Council's goals is to ensure that members are informed about Section activities and accomplishments.

As for the respondents to the survey, the vast majority (83%) have practiced law for over 21 years. Half have been ADR providers for over 11 years, half fewer than 11 years. 36% of the respondents are solo practitioners, with the rest dispersed among firms, government, non-profit, and other employers. Geographically, the highest concentration of respondents (21%) reported being based in Oakland County; the next highest county was Wayne, followed by Washtenaw, then Kent, Ingham and Grand Traverse.

The survey has given the ADR Section Council data that will help the Council prioritize its activities for the coming year.

The ADR Quarterly is published by the ADR Section of the State Bar of Michigan. The views expressed by contributing authors do not necessarily reflect the views of the ADR Section Council. The ADR Quarterly seeks to explore various viewpoints in the developing field of dispute resolution.

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