Vol. 20
No. 1
January, 2012

The ADR Quarterly

Alternative Dispute Resolution Section of the State Bar of Michigan

Michigan Adopts New Court Rule on Confidentiality in Mediation

By Anne Bachle Fifer

Does evidence introduced in mediation become confidential, even if it is otherwise discoverable?

Is a mediator violating confidentiality by reporting a threat of immediate harm made by a party in a mediation?

Should confidentiality prohibit a client from suing her attorney for malpractice based on the attorney's performance in the mediation?

Common sense suggests that the answer to the above scenarios should be, "No." Confidentiality is not so important to mediation that it should protect criminals and tortfeasors. However, if these are court-ordered cases, then under Michigan's Court Rules on confidentiality in mediation in force until recently (the identical provision appears at MCR 2.411(C)(5), General Civil mediation, and 3.216(H)(8), Domestic Relations mediation), the answers were at best unclear, because the rule did not address these situations; and more likely affirmative: it's all confidential. While appellate courts have not directly construed those Court Rules on confidentiality, attorneys in the last ten years since their adoption had become frustrated with their broadness, as interpreted by trial courts, especially in light of cases and statutes in other jurisdictions that would yield more just results.

To define more carefully what is and is not confidential in mediation, the Supreme Court adopted a new court rule on Confidentiality in Mediation, MCR 2.412, effective September 1, 2011. The former rule consisted of two paragraphs; the new rule runs to two pages, and applies to both general civil as well as domestic relations mediations. It states, more simply than the former rules, "Mediation communications are confidential." It explains what this means: "They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants." MCR 2.412(C). The new rule retains the former rule's few exceptions to confidentiality, e.g., if all parties agree in writing to the disclosure, and when there are disputes about the mediator's fee. It additionally addresses the above concerns, and others, by increasing the number of exceptions to confidentiality in mediation from five to twelve.

The new exceptions loosen the current shield around wrongdoing done or revealed in mediation by explicitly permitting disclosure of:

- a mediation party's threats of harm or plans to commit a crime;
- communications regarding abuse or neglect of a child, of a protected individual, or of a vulnerable adult, as defined in Michigan's Social Welfare Act; and
- professional misconduct or legal malpractice committed in the mediation.

The new rule clarifies that confidentiality does not apply to mediations required by law to be open to the public. It provides a limited exception to confidentiality when a court is asked to enforce or rescind a

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mediation agreement based on a communication made in the mediation.

The new rule specifies that evidence otherwise admissible or discoverable does not become confidential solely by its use in a mediation. It also provides that any disclosure permitted by an exception to confidentiality is limited to the portion of the communication pertaining to that exception, just to make clear that one exception to confidentiality does not release all the other communications made in that mediation.

The State Court Administrative Office convened a committee of mediators, litigators and other mediation stakeholders -- including many members of the ADR Section -- two years ago to develop a replacement for MCR 2.411(C)(5)/3.216(H)(8). The committee considered the Uniform Mediation Act, now adopted by twelve states, but opted to pursue a court rule as a quicker remedy to an existing problem than seeking a legislative solution. The committee aspired to incorporate the best principles of the UMA into its court rule, without making confidentiality a privilege, as the UMA does, since that can be created only by statute. The committee's proposed court rule was further refined by the State Bar's Civil Procedure and Courts Committee, and adopted by the Supreme Court on April 5, 2011. The Rule can be viewed at **http://courts.michigan.gov/supremecourt/Resources/Administrative/2010-30_04-05-11_formatted%20order.pdf.**

Rent-A-Center One Year Later: Supreme Court's Trend In Arbitration Challenges and Lower Courts' Reaction

Andrew Mast, Clark Hill PLC

The Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson* will make it more difficult for parties to challenge an arbitration agreement in a court proceeding. Decided in June, 2010 *Rent-A-Center*, 130 S. Ct. 2772 (2010), is part growing line of cases strengthening the enforceability of arbitration agreements.

In this case, the Court interpreted the Federal Arbitration Act to provide teeth to so-called "gateway" or "delegation" provisions. A delegation provision is the language in an arbitration agreement that delegates to arbitration all issues between the parties—which usually expressly includes the "gateway" issue of whether the dispute is arbitrable. In a 5-4 decision, the *Rent-A-Center* Court confirmed that these provisions would be enforced.

For instance, a party may try to avoid arbitration in favor of state or federal court by challenging the validity of the underlying contract, or even the validity of the arbitration agreement specifically, by claiming that either or both are unconscionable. However, if the contract contains a delegation provision, *Rent-A-Center* dictates that that an arbitrator, not a judge, will hear this challenge. Where there is a delegation provision involved, there is only one way to have the challenge heard by a judge. That is to raise an argument that solely and specifically challenges the enforceability of the gateway provision itself.

Rent-A-Center may be the next evolutionary step in what has been called the "severability doctrine" of arbitration, which first emerged in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). The severability doctrine essentially holds that if a contract contains an arbitration agreement, any challenge to the validity of the underlying contract will have to be heard in arbitration, not in court. *Id.* at 404. However, if the challenging party specifically challenges the validity *of the arbitration agreement in particular*, apart from the contract at large, that challenge will be heard in court. Id. at 403-404.

The contract at issue in *Rent-A-Center* contained not only an arbitration agreement, but also a "delegation" provision. This provision directed that even challenges to the validity of the arbitration agreement be heard by an arbitrator, not by a court. *See Rent-A-Center*, 2772 S. Ct. at 2777. The Court decided that

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this provision would be enforced just as would any other provision of the agreement. *Id.* at 2777-78. The only challenge to the arbitration agreement that could be heard by a judge and not an arbitrator would have to specifically and solely challenge the delegation provision itself—not some other aspect of the arbitration agreement, and not some part of the underlying contract. *See id.* at 2779.

Writing for the dissent, Justice Stevens observed that the Court was advancing *Prima Paint* to an extreme, construing that decision to require "infinite layers of severability." *Id.* at 2787 (Stevens, J., dissenting). Justice Stevens lamented this advancement, because he believed *Prima Paint* was "likely erroneous." *Id.* at 2785. Though regretted by Justice Stevens, *Prima Paints* started a trend that *Rent-A-Center* has continued: strictly enforcing arbitration agreements and relegating to arbitration all but the most specific validity challenges. The Court's prevailing rationale has been that arbitration is a creature of contract, and as such, parties deserve the maximum latitude in expressly determining what issues are arbitrable. *See id.* at 2776 (majority opinion).

Therefore, if the contract includes a delegation provision, the parties are bound to "arbitrate arbitrability" and a court will not hear validity challenges unless a party expressly attacks the delegation provision itself. Practically speaking, such narrow arguments can be very difficult to make. For instance, *Rent-A-Center* was an employment discrimination case, in which Jackson was suing *Rent-A-Center*, his former employer. *Rent-A-Center*, 2772 S. Ct. at 2775. One of Jackson's arguments was that the arbitration agreement was substantively unconscionable because it included a fee-splitting arrangement and limitations on discovery, both of which made his fact-intensive discrimination claims impossible to sustain. Id. at 2780. The Court stated that, given the presence of the delegation provision, Jackson's argument could be heard by a court only if Jackson would have instead argued that the fee-splitting and discovery limitations were unconscionable *as to the delegation provision specifically. Id.* In other words, Jackson would have had to specifically argue that these limitations rendered it impracticable to arbitrate even the narrow issue of enforceability. *Id.* The Court acknowledged that this narrower argument would be "a much more difficult argument to sustain." *Id.*

Rent-A-Center has now been on the books for over a year, and the district courts seem to be interpreting the case to lend further support to arbitrators' ability to arbitrate "gateway" issues. *See, e.g., Amway Global v. Woodward*, 744 F. Supp. 2d 657, 666 (E.D. Mich. 2010). Put another way, "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Id.* at 667 (quoting *Rent-A-Center*, 130 S. Ct. at 2777-78) (internal quotes omitted). In *Morocho v. Carnival Corporation*, the challenge to the arbitration agreement concerned the difference between the choice of law mandated by the "gateway" provision and that established for the arbitration agreement as a whole. 2010 U.S. Dist. LEXIS 140018, at *3 (S.D. Fla., Oct. 28, 2010). The court deemed this a specific challenge to the delegation provision, and thus subject to review in court. *Id.* In *Smith v. ComputerTraining.com, Inc.*, the court deemed the plaintiffs not to have challenged the delegation provision specifically, and thus the determination of the "validity, enforceability, arbitrability or scope of this Arbitration Agreement must be decided in arbitration." 772 F. Supp. 2d 850, 860 (E.D. Mich. 2011) (internal quotes omitted).

For parties to arbitration agreements with delegation provisions, *Rent-A-Center* will make successful challenges to those agreements more difficult, and potentially, less practical even to attempt. But if a party wishes, at a minimum, to have his or her challenge reviewed in court, *Rent-A-Center* sets out what this challenge must contain.

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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):

Bloomfield: **March 2, 9, 16, 23 & 30, 2012**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call (248) 338-4280

Grand Rapids: **March 21-23, 28-30, 2012**
Training sponsored by Dispute Resolution Center of West Michigan
Contact: Jon Wilmot, (616) 774-0121
Website: www.drcwm.org

Roscommon: **April 19-21, May 3-4, 2012**
Training sponsored by Community Resolution Center and Community Mediation Services
Contact: Jane O'Dell, (810) 249-2619;
E-mail: jane.odell@comcast.net
Contact: Annette Wells (989) 732-1576;
E-mail: annette.cms@frontier.com /
www.otsego.org/cms

Plymouth: **September 27-29, October 19-20, 2012**
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 trainings have been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Ann Arbor: **February 8-10, 13-14, 2012**
Training sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com or call (734) 663-1155

Bloomfield: **May 2, 9, 16, 23 & 30, 2012**
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: **January 26, 2012**
"Best Practices in Mediation"
Trainers: Anne Bachle Fifer & Dale Ann Iverson
Training sponsored by Grand Rapids Bar Association
Contact Karen Flick, 616-454-5550, or go to www.grbar.org/cde.cfm?event=366930

Bloomfield: **January 27, 2012**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call (248) 338-4280

Plymouth: **March 15, 2012**
Advanced Negotiation and Dispute Resolution Institute (ANDRI)
Training co-sponsored by the ICLE and the ADR Section
Register online at www.icle.org,
or call 1-877-229-4350.

Bloomfield: **March 15, 2012**
Trainer: Terry Bean
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call (248) 338-4280

Ann Arbor: **March 29 - 31, 2012**
Elder Mediation
Trainers: Zena Zumeta & Susan Butterwick
Training sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com or call (734) 663-1155

EARLY EXPERT EVALUATION
ADR IN THE CONTEXT OF INSURANCE COVERAGE AND INDEMNITY

Mark G. Cooper and Hal O. Carroll

(Ed. Note - Pursuant to our continuing efforts to collaborate with other State Bar Sections, through our Chair Dave Baumhart, and our Section-to-Section Committee Chair Richard/Dick Figura, the ADR Section is undertaking an initiative to "exchange" articles for publication with several other Sections relating to the use of mediation and/or arbitration this year. Our first such effort comes from Hal Carroll and Mark Cooper, of the Insurance and Indemnity Section - we think you will enjoy it!)

Executive Summary

Disputes concerning insurance coverage and contractual indemnity obligations have not been considered good candidates for conventional case evaluation methods because the issues that drive the result are contractual and legal in nature, unlike the factual disputes that underlie most tort claims, but Early Expert Evaluation can work well for these disputes.

Disputes over coverage and indemnity obligations can be referred to an evaluator who is both neutral and knowledgeable in these areas, and who is empowered by the parties to take an active role in evaluating the contract and policy language involved. The evaluator would engage each party in a discussion of the strengths and weaknesses of its position, and of the opposing parties' position. The evaluator can suggest a resolution in dollar terms or in the percentage of each party's responsibility for the underling loss.

If the parties desire, the evaluator can prepare a written report with a detailed analysis. That report can contain as much detail as the parties request, ranging from a simple statement of dollars or percentages, to a detailed analysis of each party's position.

The resulting report can either serve to resolve the dispute or it can serve as a catalyst for further negotiations between the parties. In either case, this process would result in substantial cost savings, by focusing the discussion early in the case, and by avoiding the risk of the defendants arguing their dispute "in front of" the tort plaintiff.

Disputes involving insurance coverage and contractual indemnity have seemed resistant to the application of ADR principles and procedures. Traditional case evaluation, for example, works well when the disputes are fact-based, but it's seldom successful with disputes involving insurance coverage and indemnity, where contract issues predominate.

Insurance coverage and indemnity disputes have two characteristics that make it hard to fit them into the traditional ADR mechanism. First, they are heavy on legal issues because they necessarily involve the interpretation of contracts, and the interpretation of a contract is pre-eminently a matter of law.[1] Second, the legal issues relating to insurance coverage and the analysis of indemnity clauses are of a type that many practitioners are not familiar with.

A third characteristic is not present in all such disputes, but it is present in many. This is the multiple party situation. In construction site injury cases, for example, it is common to have more than one indemnity clause, more than one policy and more than one "additional insured" obligation. This leads to a complicated web of obligations with contingencies abounding throughout the resulting matrix of possible payors and payees. If, for example, two (or more) insurers both provide coverage, do they share equally or in some other way? What if there are excess policies, with or without drop-down coverage? If there are two indemnitors, how do they share the obligation? What if one or more of the indemnity clauses is a step-over clause? And how do the indemnity obligations mesh with the insurance obligations?

When this happens, even the best of facilitators can come up short, simply because there are too many "what-ifs" to be resolved, and the principles that govern the resolution of them lie within a narrow specialty of practice. That does not mean that ADR can never succeed, of course. Facilitation can work in some situations, and some form of arbitration may also work.

But we believe there is a form of ADR that can work well for these types of cases, even – perhaps especially – the multiple party case. This is a specialized form of case evaluation – Early Expert Evaluation.

The purpose of the evaluation, as the name suggests, is to get an early evaluation by a neutral expert of the parties' claims of insurance coverage and contractual indemnity. The goal is to obtain an objective, comprehensive and detailed analysis – at the beginning of the dispute – of the issues and arguments with a view to determining the likely result if the insurance coverage and

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indemnity issues are brought before a court.

The reason for using an expert as a neutral evaluator is not that counsel for the parties are lacking in expertise. On the contrary, attorneys who are experts recognize the benefit of having an expert who is also neutral take an active role in discussions. The points that the evaluator raises in the discussions will focus each party's attention on the strengths and weaknesses of each party's analysis.

What makes early evaluation by an expert more productive in these cases is that so much of the dispute focuses on the documents. The parties dispute the interpretation of the documents and their application to the facts, but the language of the documents and the underlying facts are seldom disputed.

The premise that underlies Early Expert Evaluation is that the evaluator will be someone who (1) is knowledgeable in the substantive law of insurance coverage and indemnity, (2) whose real-world experience in the area includes knowledge of how various arguments are received by the courts, and (3) who can take a neutral position.

The benefit that results from this is a substantial saving to the clients, as well as a result based on an analysis by someone who is familiar with the principles governing the issues, and with the techniques of analysis.

The parties can design the details of the Early Expert Evaluation process in whatever way suits them, ranging from a process that mirrors simple facilitation to a process more akin to arbitration.

- In some cases the evaluator would work much like a facilitator, drawing the parties out in explaining their positions. The difference here would be that the evaluator, based on his or her expertise, would ask pointed questions concerning each party's position. The result would be that each party becomes more aware of the strengths and weaknesses of their analyses, from the perspective of someone who is neutral.
- We think that more often, the process would be more akin to evaluative mediation, where if no compromise is reached during the facilitative process, the neutral evaluator accompanies the analysis with a dollar figure or percentages reflecting each party's responsibility for the ultimate verdict on liability.
- If the parties choose the evaluative mediation model, they can provide for case evaluation sanctions if the recommendation is rejected. More often, we think the parties would prefer the recommendation would be advisory.
- Finally, the parties could choose to be bound by the result, but we think that in most cases they would prefer the evaluation to be advisory.

What makes this process different from conventional ADR is that it brings the expertise of the evaluator to bear. It is the analysis by an expert, and the evaluator's "hands-on" participation in discussions, that sets this form of evaluation apart from conventional case evaluation or facilitation. The process we propose is much more akin to evaluative mediation – the evaluative mediation model is generally understood to be a process that includes an assessment by the mediator of the strengths and weaknesses of the parties' cases and a prediction of the likely outcome of the case – as opposed to the more common facilitative mediation. In facilitative mediation, the mediator does not make recommendations to the parties, offer an opinion as to the outcome of the case, or even predict what a court would do.

We believe there are two scenarios in which this procedure is most likely to be used with respect to indemnity clauses, and in a related way to insurance coverage.

First, Early Expert Evaluation by a neutral expert can be helpful very early in litigation, especially when there are multiple parties, each facing much risk because of the underlying injury, and there is no agreement on the various contract obligations. Experienced attorneys in this area will recognize the value of early guidance, because the underlying litigation is going to be expensive, and they all understand the value of not litigating among the defendants "in front of the plaintiff," so to speak. This can avoid the risk presented by a situation where each claims handler, often located in a different state and unfamiliar with Michigan law, makes an initial determination, after which defense counsel writes a coverage opinion that largely mirrors the hoped-for outcome, and the parties then dig in and work toward filing a dispositive motion.

If the parties' attorneys are experienced in these areas, an early analysis and evaluation by a neutral expert serves as a catalyst for discussion and a basis for further negotiation. If the parties' attorneys are not experienced in this area, the process will educate them about the strengths and weaknesses of their positions and the other parties' positions, and give each party a better understanding of the likelihood of the outcome it desires.

The second scenario arises later in the case – likely after significant underlying discovery has taken place, a neutral analysis by an expert would be beneficial where the parties and their attorneys and/or claims handlers felt more complete fact development would allow better analysis of the respective contract obligations. Another late-case scenario would be where the attorneys and parties are less knowledgeable in the area of law or where their focus on underlying tort liability issues have let the indemnity and

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coverage issues just bump along with no clear direction, or perhaps where they have dug in with respect to their positions perhaps without fully appreciating the consequences or impact.

Procedures

The procedure in each particular case can be designed by the parties to suit their needs, so the following descriptions are offered as illustrations of possibilities.

Input. In the simplest case, the parties could provide the evaluator with the underlying facts, the underlying complaint, the relevant contract and policy documents, and the question(s) they would like to be addressed. They would not offer their own analyses for review.

The premise of the Early Expert Evaluation process is that the chosen evaluator is knowledgeable, so it may be possible to do away with the parties' presentations of their own analyses, but more often, each party would also provide its own analysis in written form. The evaluator would then respond to each argument.

Oral Presentation. In most cases though, the parties would present their analyses (with or without prior written presentation) to the evaluator in a meeting. The evaluator would then conduct a discussion much like facilitation, except that the evaluator would be more "hands-on," and probe each party's argument with questions based on the evaluator's expertise.

Output. As is explained above, the evaluator can recommend a resolution amount or percentage, and rejection of that recommendation can be accompanied by case evaluation-type sanctions, if the parties so choose. If the parties choose, the evaluator can provide a written report with a detailed analysis of the contract language and the law supporting the recommendations.

Advisory or Binding? As is mentioned above the result can be binding if the parties prefer, but more often it will serve an advisory function, to give the parties a candid view from a neutral perspective.

Uses of the Report. If the parties ask the evaluator to provide a detailed written report, they would decide in advance what use can be made of the report. It isn't possible to prevent any party from adopting parts of the analysis in any motions that are later filed with the court if the case does not resolve, but the agreement would normally specify that no party may quote from or refer to the report with any form of attribution.

If the case is referred to Early Expert Evaluation by the court, then of course the court would specify what uses will be made of the report, or it may choose to leave that to the parties. The referral agreement, which defines the terms of reference to the evaluator, must specify what uses can and cannot be made. One possibility is to allow the parties to cite the report as persuasive authority for the court, or if the parties later go to some form of facilitation.

Advantages

The system of Early Expert Evaluation offers several advantages.

Cost. Like all ADR, the parties get the benefit of controlled cost. This comes in part from the fact that the evaluation comes early in the litigation, and by avoiding some or most of the preparation that goes into motions, briefs, and reply briefs. The fact that the evaluator is an expert in the field will simplify the presentation of the arguments.

Settlement. The Evaluator's report should provide the parties a better view, from the outside, of their claims and arguments. This can enhance the possibility of settlement in two ways. First, it may give each party a different view of its position. Second, each party will know that the other parties now have the benefit of the report's analysis and can use that if the case goes forward.

Expertise. The factor that underlies these benefits is the expertise of the Evaluator. Insurance coverage and indemnity law are fairly arcane areas, and many judges are not intimately familiar with them. Bringing a complicated set of issues before a court that is unfamiliar with them and must also handle many other cases on a crowded docket can lead to decisions that are less than satisfactory. The expertise that is necessary for Early Expert Evaluation has two components: theory and practice. The Evaluator must be familiar with the details of the law that governs the interpretation of insurance policies and indemnity contracts, but must also be familiar with how cases of this type have been and are litigated and how they are seen by the courts.

Persuasive Effect. The analysis should be more persuasive than conventional evaluation or facilitation, because of its timing and the expertise of the evaluator. Even if the referring attorneys are themselves experts in the field, an opinion expressed by a neutral expert should have some persuasive effect. Also, if an attorney is having trouble persuading his or her client of weaknesses in the case, a neutral analysis will provide support and perhaps "cover."

Summary

Early Expert Evaluation is different from facilitation and other forms of ADR in that the evaluator is further removed from the process of negotiation. By replicating the adjudicative process, it provides an evaluation that is objective, detailed and supported by analysis. For some cases, this will be sufficiently persuasive that the parties will accept the analysis and resolve the case on that

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basis. But even if the Evaluator's analysis does not lead directly to settlement, it will focus the argument and give each party a better sense of the strengths and weaknesses of its position. In this way, it will provide a basis for more effective negotiations between or among the parties.

Early Expert Evaluation is not the only form of ADR that can be productive in resolving disputes involving indemnity and insurance contracts, but it is uniquely well adapted to the types of issues that those disputes present.

Hal O. Carroll is a co-founder and first chairperson of the Insurance and Indemnity Law Section, which was founded in 2007. In addition to civil appeals, Mr. Carroll practices extensively in the area of insurance coverage and indemnity law, representing both policyholders and other parties seeking coverage, and insurance companies. He also consults with businesses and insurers on the drafting of contracts. Mr. Carroll is a frequent author of articles in the areas of insurance coverage and indemnity contracts. His email address is hcarroll@VGpcLAW.com.

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[1] In theory, ambiguities are now supposed to be resolved by the trier of fact after testimony, *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 468; 663 NW2d 447 (2003). In reality, this seldom happens and the rule is generally applied without such testimony.

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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