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The Chair's Corner

by Sheldon J. Stark

The ADR Section completed a very busy year; and the year ahead is likely to be equally so. I am honored and pleased to be Chair for 2016-2017. I want to thank Joe Basta for his energy, good humor and leadership as Chair over the past year. In addition to an outstanding group of Council members, I look forward to working with an Executive Committee consisting of Joe as Immediate Past Chair, Lee Hornberger, your new Chair-Elect, Bill Gilbride, your Treasurer, Lisa Taylor, your Secretary, and John Hohman and Sam McCargo as members.

I am happy to report that we've hired a Section Administrator, Mary Anne Parks, to assist us in the administrative tasks we do as a Section. Mary Anne is also the Section Administrator for the Environmental Law Section. We look forward to a productive year with Mary Anne's help.

One of our primary responsibilities to our members is to provide training and education. This year, under the leadership of Bob Wright, Skills Action Team Chair, we will offer four new telephone seminars, including "Mediating Probate Disputes," on December 13 from noon to 1:30 p.m.; four Regional Mediator Forums, including the next one at Varnum LLP's downtown Detroit office on December 15 from 4:00 to 6:00 p.m.; our Third Annual ADR Summit with nationally renowned mediator and trainer Andy Little, author of "Making Money Talk" on March 21, 2017, at Cooley Law School in Auburn Hills; and 8-hours of advanced mediator training next fall at our Annual Meeting and Conference, scheduled for Metro Detroit in October 2017. We are also committed to offering a program for advocates focused on how mediation advocacy differs from traditional principles of zealous advocacy. Our goal is to offer it in Metro Detroit and Grand Rapids. We will be seeking co-sponsorship from other Sections. Through the work of Mike Leib, Chair of our Section to Section Action Team, we're working closely with the Young Lawyers Section of the State Bar to serve as a key resource and education partner in managing ADR in their practices.

Our Effective Practices and Procedures Action Team, chaired by Marty Weisman and our Automatic Mediation Task Force, co-chaired by Bill Weber, continue to work on amending the law to provide for early and automatic referral to mediation in civil and probate cases as an effective alternative to case evaluation. A proposed statute is being drafted and will soon be available for review.

Under the direction of our Publications Action Team, Chaired by Lee Hornberger, we've changed the name of this publication from *The ADR Quarterly* to *The Michigan Dispute Resolution Journal* to better reflect the ever increasing quality and sophistication of our content and the high level of information and updates it provides.

The ADR Section is committed to diversity. As your Chair, I recently signed onto the State Bar Pledge to Achieve Diversity and Inclusion found here: http://www.michbar.org/diversity/pledge . To date, the Diversity Pledge has been signed by 4 law schools, including my alma mater, The University of Detroit Mercy School of Law; 36 Sections and Committees, including the Environmental Law Section, the Litigation Section, and the Labor and Employment Law Section; 32 of Michigan's largest law firms, including Bodman, Butzel, Dickinson, Dykema, Mika Meyers, Fraser Trebilcock, Foster Swift, and Varnum; and 1,025 individuals.

The ADR Section Executive Committee has endorsed the Pledge and we hope the Section Council will vote to do so at our next meeting. I urge you to consider signing on, as well.

Finally, the Council will be looking at new and innovative ways to assist ADR providers in building their practices, enhancing their skills and in communicating and networking with one another. If you have ideas or suggestions for other ways the Council can be of assistance, or you'd like to volunteer your time to establishing a better climate for ADR in Michigan, please contact me at shel@starkmediator.com .

For a complete list of Action Team and Task Force Chairs, see below.

ACTION TEAMS OF THE ADR SECTION FOR ALL SECTION MEMBERS TO JOIN:

- **Effective Practices and Procedures Team ("EPP")** – (Marty Weisman mweisman@wyrpc.com) EPP offers comments and recommendations concerning proposed legislation and court rules impacting ADR in Michigan. The Team was successful in lobbying the passage of the Revised Uniform Arbitration Act and the Uniform Collaborative Law Act by the Michigan legislature.

- **Judicial Action Team ("JAT")** – (John Hohman jahohman88@gmail.com) JAT advances ADR goals as they pertain to courts throughout Michigan and promotes ADR awareness in the federal, state and local judiciary. In 2012, the team worked with the Bankruptcy Court for the Western District of Michigan to adopt a new local court rule promoting ADR in all bankruptcy cases.

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- **Outreach/Membership Team** – (Graham Ward wardl@cooley.edu) One of Outreach's goals is to raise awareness in the ADR community of all that the ADR Section has accomplished and what the Section has to offer. This Team also seeks to increase ways to meet the needs of ADR professionals and thereby increase the number of members and affiliates in the Section who will want to join in the very beneficial work we do. Outreach seeks to increase Section membership and is currently considering development of an ADR Section brochure.

Outreach also seeks to increase awareness among the public in general, attorneys, businesses, schools, governmental entities and agencies, and any other potential end users of ADR, about what ADR is and its benefits. The Outreach Team also will be working with CDRCs to help promote ADR in educational settings and will be reaching out to special interest groups such as the LGBT community, low income individuals and the elderly to determine how ADR might best address some of their unique dispute resolution needs.

- **Publications Team** – (Lee Hornberger leehornberger@leehornberger.com) Publications solicits, reviews, and publishes articles for a quarterly newsletter for ADR Section members and affiliates and collects and edits articles for an ADR theme issue of the Michigan Bar Journal. It is also responsible for postings to our e-mail listserv and SBM Connect that keep our members informed of Section activities and related ADR news.
- **Section to Section Team ("STS")** – (Mike Leib michael@leibadr.com) STS strives to increase collaboration with other sections of the State Bar and local bar associations with a view toward enhancing the use of the ADR for members of this Section and those of other sections as well. In doing so, STS has in the past collaborated with other sections in presenting educational programs regarding ADR. Those collaborating Sections have included the Young Lawyers, Litigation, Labor and Employment, Business, and Family Law.
- **Skills ActionTeam (SAT)** – (Bob Wright bob@thepeacetalks.com) Skills is responsible for planning continuing legal education and advanced skill building programs in ADR throughout the year. The Skills Team plans and offers the Annual Meeting and Conference each fall, which showcases local, Michigan talent; and the ADR Summit each spring, which features a nationally renowned mediator and mediation trainer. SAT also plans and offers four Lunch and Learn telephone seminars each year; plus regular regional Mediator Forums where ADR providers meet, network and learn from one another.
- **Diversity Task Force** – The Diversity Task Force was formed to promote and support diversity in the field of ADR, increase the cultural competence of ADR providers and enlarge opportunities for minorities in ADR. More specifically, the Task Force is looking into ways to implement some or all of the recommendations of the Task Force on Diversity in ADR that was convened by the State Bar. See that Task Force's report by going to http://www.michbar.org/adr/pdfs/TaskForce_Diversity.pdf.
- **Governmental Task Force ("GTF")** – (Abe Singer abraham.singer@kitch.com) The GTF was formed to provide short-term assistance to departments and agencies of the State of Michigan and local governmental units. GTF has presented trainings to the Attorney General's office, is working with the Governor's office to provide mediation as a cost-effective alternative to litigation and to promote its use throughout the state and has supported the cities of Ann Arbor and Inkster in facilitating discussions of various issues in those communities.

Crossing the Divide: Mediation Training for the Good of Your Client

by Joseph Hohler III

With trial becoming an all-the-rarer phenomenon in family law cases, it's clear mediation is no longer 'alternative dispute resolution' – it's the norm. Given this, it's baffling there's not a concerted effort to prepare attorneys for mediation practice: how it runs, what to expect and, particularly, how to mediate on behalf of clients.[1] It's high time we changed that and took the actual practice of mediation seriously and trained for it, both for our own good, but especially for the good of our clients.

How Did I Get Here?

Since law school, I've neither partnered with, nor worked, for nobody else, meaning my early years were defined by trial and error – because I lacked practical knowledge, I learned everything the hard way.[2] So, when my first divorce was ordered to mediation[3], I had no idea what to expect,[4] and the only tools to help me were some negotiation exercises from a first year contracts class,[5] and unlimited moxie. Mercifully, the negotiation exercises were useful enough to help me keep my client from giving away the farm. The moxie had no value.

Unfortunately, while settlement was reached, it was only long after the fact I realized what transpired that day was not a mediation at all: The mediator offered no opening statement; no explanation of the process or its purpose; and made no mention that settlement was completely

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voluntary. Instead, what happened was a trial substitute. Only, instead of a judge, there was a mediator, and rather than take the parties as people, with real emotions and needs and voices, they were obstacles – separated quickly and ridden hard toward the mediator's resolution.[6] Treated thus, it was no surprise they reached an 'agreement'. Because many, many mediators run their mediations this way, most attorneys have the idea this is what mediation is supposed to be.

Fortunately, they're wrong.

Every Lawyer Should Learn To Mediate

Every lawyer should learn mediation advocacy, but classes for the same do not exist.[7] Fortunately, there are many available to train to be a mediator.[8] Some are pricier than others,[9] and each has a time commitment,[10] but no matter the individual differences between them, each teaches the basic skills to work as the mediator, which also doubles as teaching them how to advocate in mediation.

Obviously, being a good mediator, or an advocate in mediation, or for that matter, being a good attorney, is not something that can be learned in 'school'. One can learn the rules, but not the necessary temperament or commitment to ego-free neutrality. The only way to acquire these skills is through constant practice. Even so, learning what mediation is and the process of it from the mediator's perspective is a good first step towards better client representation.[11]

If They're Heard, They'll Own It

Mediation is meant to serve the parties' needs, whatever they may be. Too often, though, mediation is bent to serve other needs, be it (1) what the attorney perceives as the clients' interests (frequently wrong); (2) to serve the attorney's interests (e.g., separation from a difficult or slow-paying client); or, (3) to become yet another 'settled' case for the mediator. In other words, rather than focusing on client service, resolution is all that matters.

Mediation is supposed to be about the process, not resolution. But when those aims are flipped and resolution is the focus, to the exclusion of all else, including the equally-valid failure of mediation, we actually see the worst outcomes and the deepest feelings of buyer's remorse. Certainly, some remorse can be due to distasteful outcomes; more-likely, the problem is not with what outcome was reached, but rather with how, i.e. a breakdown of the process.

As it stands, the vast majority of litigants will never see trial, leaving mediation the only opportunity they may ever have to be heard by anybody not their own lawyer – by the mediator, for one, but particularly by the other side. As it happens, being heard is key because, when people truly feel heard they'll own the outcome, no matter how lousy for them it may be.

Before I trained as a mediator, nearly all of the mediations I led clients through had nothing in common with the purpose of mediation. The process was not made to serve their interests and so in retrospect each one stands as a regret for them and I – even the one with my most-difficult and unreasonable client. For me the regret is that, even if she was difficult and unreasonable – and she was the epitome of both – she still deserved a voice. But what happened in the mediation instead? At the first and only point at which she could have been heard and perhaps had her feelings validated? And reached a resolution that addressed them? Nobody listened – the mediator was the worst offender, separating the parties from the start and pummeling them into submission. But I was just as guilty for not understanding that it is the journey of mediation – the process and communication – which makes it work. If I did, I could have protected her, I could have made her heard. But, being untrained at it, I knew no better and so followed the mediators lead, thinking he knew what he was doing. So, instead of reaching a resolution my client felt included in, she only felt abused.

It was only after training to be a mediator I came to understand where I went wrong – I allowed the focus to be on the outcome and not the communication. Now that I am a mediator, I insist on communication first and am constantly surprised to find that some of the most successful mediations actually reached no agreement.[12] Failed to agree or not, they succeeded because the parties communicated and made progress toward their resolution, not mine. And even if they did not get there, getting the dialog going was key.

In Short—

In the end, if there are no courses to train us as meditation advocates, we'll just have to train to be mediators. To be clear, I don't suggest we should all turn into mediators – that would be lunacy. Rather, training as mediators will help us be better advocates, and being better advocates for our clients should be the goal. After all, when we show them our value, they value us. In an increasingly pro per world, this is a lesson well-learned.

About the Author

Joseph Hohler III is a family law attorney, and mediator, practicing in and around Michigan's greatest city – Kalamazoo. He is a member of the Kalamazoo Metropolitan Planning Commission, a member of the State Bar's Member Service's Committee, regularly volunteers at

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the Family Law Clinic in Kalamazoo and is an avid runner. His personal best in the 5k is 18:42; in the 10k is 38:56; and in the half-marathon is 1:28.44.

(Endnotes)

1 In fairness, my law school did, and does, offer a variety of courses in ADR. In fact, it has an ADR clinic. However, none are required and space is limited. See http://www.law.msu.edu/academics/curriculum.html, and http://www.law.msu.edu/adr/program.html.

2 And I mean everything. While law school excels at trying to turn us into appellate judges, it is pretty poor at imparting the practical aspects of practicing the law. See my article 'Flying Blind," at http://www.michbar.org/file/barjournal/article/documents/pdf4article1311.pdf.

3 Until it was ordered, I didn't even know they did that sort of thing.

4 I did take a mediation class in law school but, again, it focused on theory and not practical practice.

5 Taught by the great, but not nearly as intimidating as he seems to be, Daniel David Barnhizer.

6 This experience actually aligns with most every mediation I've been an advocate in and whenever my client wound up unhappy, or suffering extreme buyer's remorse, I could never fathom why. Once I actually trained as a mediator, I understood: my clients never felt like they were part of the process and valued in it, and so they were left to feel as powerless as they would had we litigated.

7 That I know of.

8 For examples of the available trainings, see http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/Mediation-Training-Dates.aspx. I personally recommend any courses by Brian Pappas, who taught my mediation training. See, http://www.law.msu.edu/faculty_staff/profile.php?prof=616.

9 Though if you're willing to volunteer at a dispute resolution center for a set number of sessions, some are willing to pick up the costs of the training, meaning the out-of-pocket costs are zero.

10 Domestic relations mediator training, with the required domestic violence screening protocol, is a 48-hour course, usually taught over the course of a week.

11 Consider mediation training as a football player would consider ballet: it's about sharpening useful skills, not a change in professions. In the same way that ballet training can help a football player with speed, agility, flexibility, etc., mediation training benefits the attorney, even when he, or she, has no intention of being a mediator.

12 Remember, failure is always a valid option.

Susan D. Hartman, J.D.

Susan J. Butterwick, J.D.

Extending Mediation Beyond the Norm: a Case Study of A Public Policy Mediation

by
Susan D. Hartman, J.D.
Susan J. Butterwick, J.D.

The Ann Arbor Farmers Market Case Study

Background

The Farmers Market in Ann Arbor is a publicly owned space made available to private vendors for selling their home-grown food and crafts. It is overseen by a Market Commission, consisting of city employees, public community members and vendors' representatives, all appointed by the Mayor. The Market is governed by city ordinance and regulations. The onsite manager is a City employee. In 1997 the market was booming: there was a long waiting list for vendors to have reserved space in the market. Several issues arose among the vendors concerning the Market. Foremost among these was how space should be allocated among the vendors. At least two groups of vendors were threatening to sue the City because of the way stalls were allocated. Before any suits were brought, the City Administrator suggested that mediation be attempted in order to resolve the disputes without court

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involvement. The City entered into a contract with the local Dispute Resolution Center to provide a mediation process to resolve the various disputes. Two mediators, Susan Hartman and Susan Butterwick, conducted the mediation process.

Structuring the Mediation Process

Creating the Mediation Team The mediators first attended a Market Commission meeting, to introduce ourselves and to become acquainted with the Market and its operation. We then called a meeting open to all vendors, commissioners, and anyone else interested in the issues. About 75 people attended this meeting, at which we explained the mediation process. At the meeting, it was determined that each of the four identified factions of vendors would choose, according to their own procedures, representatives to be part of what we called the "mediation team." In addition, two (non-vendor) Market Commissioners and an Assistant City Attorney were invited to attend all mediation joint sessions as observers or resource people. It was agreed the observers / resource people would sit away from the mediation table, at the periphery of the room. Vendors were encouraged to communicate with their respective representatives in order to have their voices heard in mediation. However, because some vendors were uncomfortable with the organized groups, it was also determined that "Any vendors who still feel unrepresented on the mediation team may also attend and participate in the mediation session." In addition, any vendors were welcome as observers.

The mediators met with the City attorney before the first joint session to assure that she was comfortable with the process and to raise questions about confidentiality from the City's perspective. The issue of the Open Meetings Act was never raised during the course of the mediation by anyone, although we believed that because the group had no authority to promulgate regulations, the act probably did not apply. Our agreement to mediate included a statement that parties agreed not to subpoena the mediators or their records, but the parties themselves were not bound to hold the content of the mediation confidential. We decided to develop a procedure that was similar to what is known as "single text negotiation." This model of negotiation employs the use of a third party neutral to create a "place holder" agreement that reflects all consensual agreements made during the negotiation process along with the specific interests of the stakeholders that each agreement addresses. It became clear to the mediators that the best way for the various factions to arrive at a final consensus was for them to better understand the underlying interest of each group, rather than to negotiate from a purely positional perspective.

First Meeting and Agreement to Ground Rules The first mediation team meeting, which about 30 people attended, began with an explanation of the procedure and agreement to the ground rules for the process. In addition to the mediator confidentiality provision, the agreement included basic procedural rules and agreement to decision-making by consensus. It provided for possible private, confidential meetings between the mediators and various parties. All parties agreed to publicly support any agreement reached by the mediation team. Each person then had an opportunity to list issues that he or she thought should be discussed in the mediation. We set a schedule of weekly meetings and agreed on a location. We met in a conference room of the City fire station.

Weekly Meetings Before each weekly meeting, the mediators met to establish a written plan for the session, including the issue or issues to be discussed, points of agreement on certain issues, specific questions that needed to be answered, and a list of underlying interests affecting the issue. In subsequent meetings, as the team moved toward agreement on each issue, we typed up each tentative agreement, and presented it to the team at the next meeting. We raised questions about possible different interpretations and interests that might be met or not met by the agreement. If the mediation team had changes, we drafted a new tentative agreement. If the mediation team accepted a tentative agreement, we typed it up and distributed it the next week as a final agreement. We established a ground rule that those at the table any given week had the authority to make decisions, and that for those who were going to miss a meeting, it was their responsibility to assure that their view was represented at the table, because the team would not revisit agreements for those who did not attend or have a representative at the meeting at which the agreements were discussed and decided. We knew that progress would become impossible if important discussions had to be revisited each week and issues debated again for those who were absent. We continued to meet weekly from October through early December 1997, and then again from mid-January to early March 1998. Some weeks we scheduled only caucus sessions, where we met with each group separately. The Commissioners and Assistant City Attorney did not attend these caucuses, although the City attorney was available during them for questions. Individual vendors and team members frequently contacted the mediators between sessions with concerns, suggestions, and information they did not want to share at the joint meetings.

Dealing with Impasse—The Survey A few months into the mediation, the team had reached agreement on several important issues, but still appeared intractable on the allocation of stalls and some related issues, and it appeared that we might reach an impasse. The mediators proposed to the mediation team that we conduct a survey, with wording developed by the mediators, of all vendors, and see if information from that survey might help the mediation team move beyond their positions. The mediation team agreed to try this.

The survey consisted of two parts: the first was a list of possible solutions to the allocation issue. All options already suggested at the mediation session were included. Vendors were asked not to rank the options, but to rate them as "preferred," "acceptable," or

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"unacceptable," and were not limited as to how many options they could give any particular ranking. The second part of the survey consisted of a list of statements reflecting various interests that might underlie people's positions. Vendors were asked to rate on a scale of "strongly agree" to "strongly disagree" how they felt about each statement. The City agreed to provide the copying and mailing service. We set up a fairly elaborate procedure to assure that privacy of individuals' votes was protected, that each person could vote only once, that only eligible persons could vote, and that votes from each group of vendors could be counted separately. Thus, the mediation team could know results of their own constituencies, as well as the other constituencies and smaller groups of vendors would have a voice.

We received about 75 surveys back, and presented the results at the next mediation session. We chose not to offer any analysis of our own, but to present only the data, and let the mediation team decide what conclusions to draw from them. We presented the survey results for each group of vendors as well as totals. When the core mediation team, of about 15-20 people, reviewed the results, they noted that the numbers showed some significant differences between the groups, but also showed several areas of agreement. The interests questions showed some common ground, with strong support of the Market itself. The mediation team realized that, if they combined the "preferred" and "acceptable" ratings, there was at least one option that was acceptable to a majority of respondents in each vendor group. We therefore started focusing on that option and helping the parties negotiate options around it.

Agreement Process When it became clear that the team might reach consensus on some of the basic issues, we turned to a discussion of what form the mediation team wanted the agreements to take. They decided that the team should draft proposed ordinance and regulation language, for submission to City Council.

We, the mediators, then started drafting proposed language for regulation and ordinance revision, following the same procedure of tentative agreements and redrafting that had been used for agreements up to that point. The mediation team decided to propose a full revision of the regulations, so we drafted language for every section. The City attorney was helpful with questions about how proposed solutions could fit with existing ordinances and with language suggestions for drafting the proposed ordinances and regulations.

In the end, there were two specific details on which the parties could not reach consensus. The group agreed to disagree on those details and to present the City Council with the proposed changes to the ordinance and regulations. They included two alternatives, for the City to choose between, for the still-disputed items.

Communication with the City The mediation team then discussed how the proposal should be communicated to the City. We, the mediators, felt it should come from the parties, not the mediators. The team selected three representatives to meet with the City Administrator and present the proposals.

In the background during the last stages of this process, various groups and individuals objected to specific provisions after an agreement was made. At one point, when we scheduled a caucus meeting, one group brought about 20-30 additional members, who had not been a part of any of the mediation sessions, and to whom we had to re-explain the concept of consensus and interest-based negotiation. We remained staunch advocates for the process, while trying to maintain strict neutrality on the outcome. In the end, a few individuals withdrew from the mediation, deciding either not to stand in the way of consensus, or changing their mind after an agreement had apparently been reached.

When the proposal was finally offered to City Council, about a year after the mediation process began, almost all those involved in the mediation, even those who had been most position-based, told the Council that mediation had been an extensive give-and take process and urged the Council not to start picking apart the proposal and changing words here and there, but to accept it as a whole. To do otherwise might change the delicate balance that had led to its acceptance.

The City Administrator had chosen language for the two non-agreed details, and the few vendors who opposed the proposal at City Council felt that although they had "agreed to disagree" they could not support the options chosen by the City Administrator. The Council accepted the proposal as presented by the Administrator, revising both the ordinance and the regulations.

Lessons Learned

- There were many more issues that needed to be resolved than those initially identified by either the City or the vendors. The mediation team ended up making extensive changes that would have not been considered had this been dealt with as an adversarial process, either in a lawsuit about property rights and due process rights or in a public hearing at City Council. In this setting the vendors were able to identify several common interests that they held, and use those as a reference point for settling some of the specific differences that led to the dispute.
- The vendors had no legal authority to change the ordinance or the regulations. The success of the mediation depended on the willingness of the City Council to take the process seriously and adopt the recommendations of the mediation team.

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The fact that the interests of all involved had been considered helped the Council accept the recommendations without amendment. In addition, the attendance of the Assistant City Attorney at all mediation sessions helped keep the options within the range of those that would be accepted by the City. The City Attorney specifically helped in drafting some of the proposed language and answered questions on details such as definitions. She would have been at a disadvantage to help with the drafting had she not been present for the discussions each week where she developed an understanding of the interests that the changes were meant to satisfy.

- The process took a year to complete. There were weekly meetings for about six months. The process of getting the agreement to City Council and getting Council approval took about another six months.
- The process of going back to the constituencies, in the form of a survey, helped the representatives move past impasse. The wording of that survey in interest-based form was vital for it to help the parties move beyond their original positions.
- Although this situation was referred before anyone filed suit, it could have taken place after a situation reached the courts. However, probably the further into litigation it was, as positions hardened, the more difficult it would have been to come up with a comparable consensus result.
- The mediators recognized at the beginning that the representatives of the various groups needed to communicate with their constituencies and that the numbers of people involved meant that confidentiality would be difficult if not impossible to enforce. Therefore a modified confidentiality agreement was drafted.
- We went with a 100% consensus process of everyone at the table. This meant that there were a few details that were not resolved. It also led to a few people leaving the mediation process. However, although some people left, no one was so dissatisfied that they filed suit or otherwise stood in the way of the new rules.
- We made the choice of allowing any vendor who was willing to sign the Agreement to Mediate to attend the mediation sessions, either as a group representative or as an individual. Although some people attended only a few sessions, a core of about 15 people attended regularly and built up a respect for the process and an ability to work together. It might have been a smoother process if attendance had been limited, but limiting participation might also have alienated more vendors.

About the Authors

Susan Hartman is a retired mediator and attorney who lives in Ann Arbor. She was previously a member of the State Bar ADR Section Council.

A longtime ADR practitioner, Susan Butterwick provides civil and advanced mediation and restorative practice training in Michigan and nationally. She is an adjunct professor at the Wayne State University Law School and WSU's Masters in Dispute Resolution program, where she teaches civil mediation. She recently directed the Peacemaking Court Program at the Washtenaw County Trial Court, and she currently serves as a referee of the juvenile division of the court on the child welfare docket where she is developing a program for the use of restorative practices and mediation on child protection cases. Susan is a former member of the State Bar ADR Section Council.

Mediation Ethics Reference Materials

by Alecia Ruswinckel

All items herein are excerpts from the referenced source materials.

Applicability of the Michigan Rules of Professional Conduct

Michigan Rules of Professional Conduct

Michigan Ethics Opinions – michbar.org > For Members > Ethics > Ethics Opinions > Search by Topic > Alternative Dispute Resolution

Mediator Standards of Conduct, Office of Dispute Resolution, State Court Administrative Office, Michigan Supreme Court

Neutral Party

RI-256 The touchstone for a lawyer functioning as a neutral arbitrator or mediator in an alternate dispute resolution proceeding in which one or more of the participants is self-represented is to preserve neutrality.

A lawyer functioning as a neutral arbitrator or mediator in an alternate dispute resolution proceeding in which one or more of the participants is self-represented should assure that all parties understand that the lawyer's function is not to provide advice or counsel to any party, and that no party may rely on the lawyer to protect its interests or (in arbitration, where ex parte communications are forbidden) confidences.

http://www.leehornberger.com/UserFiles/File/ADRSectionSpeech-10-2-2015.pdf

Supreme Court denies leave to appeal in "pressure to settle" case.

Vittiglio v Vittiglio, 493 Mich 936; 825 NW2d 584 (2013), denied leave to appeal

from ***Vittiglio,*** 297 Mich App 391 (2012). In Vittiglio COA affirmed Circuit Court's holding that audio recorded settlement agreement at mediation session was binding and "a certain amount of pressure to settle is fundamentally inherent in the mediation process." COA affirmed Circuit Court's holding that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and Circuit Court did not abuse its discretion in awarding costs and attorney fees.

Mediator Drafting Documents

RI-278 A lawyer acting as a mediator in a domestic dispute resolution process may draft documents which purport to represent the understanding reached between the parties.

RI-351 A lawyer who acts as a mediator in a family law matter cannot draft all of the instruments, including pleadings, necessary to consummate an agreement reached by the parties through mediation while representing to both parties that the lawyer is acting only as a mediator and not as a lawyer representing either party. Drafting all of the instruments necessary to effectuate the divorce, including all pleadings, constitutes the performance and delivery of legal services to such an extent that the lawyer who provides all of those services is no longer serving merely as a third-party neutral. Assuming arguendo that a client-lawyer relationship is formed where a lawyer prepares all of the documentation necessary to effectuate a divorce, customizing the terms to the parties' circumstances and agreement, doing so at the behest of opposing parties in a litigation matter constitutes a conflict of interest under MRPC 1.7(a). Under these circumstances, seeking to abrogate the responsibilities of a lawyer to a client through a prospective agreement that either asserts the lawyer does not represent either party or requires the parties to acknowledge that the lawyer represents neither party violates MRPC 1.8(h)(1) by constructively seeking to prospectively limit the lawyer's liability for malpractice.

Conflict of Interest

RI-235 A lawyer, who had previously been selected and acted as a partisan of a party in a multi-member special mediation panel, may not subsequently represent the partisan who selected that lawyer in subsequent litigation on the same or a substantially related matter unless all parties consent.

RI-279 A lawyer whose law firm represents unions in contract negotiations with a public university may accept a position at the university as an adjunct professor, or as a neutral in a nonbinding mediation process for adjustment of disputes between university

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employees, provided that the unions consent after consultation.

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Post arbitration-mediation conduct of arbitrator-mediator.

> ***Hartman v Hartman***, 304026 (August 7, 2012).
> The post-arbitration-mediation conduct in Hartman raises issues under several conduct guidelines for neutrals. For example, prior to February 1, 2013, the Michigan Supreme Court State Court Administrative Office Standards of Conduct for Mediators indicated:
>
> > (4) Conflict of Interest … (b) The need to protect against conflicts of interest also governs **conduct that occurs … after the mediation**. A mediator must avoid the appearance of conflict of interest … **after the mediation**. Without the consent of all parties, a mediator **shall not subsequently** establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that would raise legitimate **questions** about the integrity of the mediation process. A mediator **shall** not establish a personal or intimate relationship with any of the parties that would raise **legitimate** questions about the integrity of the mediation process. Emphasis added.
>
> Since February 1, 2013, the Michigan Supreme Court State Court Administrative Office Mediator Standards of Conduct Standards has indicated:
>
> > **Standard III. Conflicts of Interest**
> >
> > A. A mediator should avoid a conflict of interest or the appearance of a conflict of interest **both during and after mediation**. A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an **impression of possible** bias or as raising a question about the impartiality or self-interest on the part of the mediator.…
> >
> > G. In considering whether establishing a personal or another professional relationship with any of the **participants after the conclusion of the mediation process** might create a **perceived** or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered. Emphasis added.
>
> The Model Standards of Conduct for Mediators (September 2005) of the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution states:
>
> STANDARD III. CONFLICTS OF INTEREST …
>
> > F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest. Emphasis added.

Subsequent Arbitration

RI-265 A lawyer who has served as a mediator under MCR 2.403 may not later serve as an arbitrator in an arbitration proceeding between the same parties concerning the matter which was mediated.

Whether a lawyer who has served as a mediator in a private mediation setting may serve as an arbitrator in a proceedings between the same parties concerning the matter which was mediated depends upon the rules of the private mediation forum and the arbitration forum.

Record retention and mediation

RI-181 The Michigan Rules of Professional Conduct are silent, and therefore impose no obligation, on the subject of whether a lawyer who functions as a neutral arbitrator or mediator must retain records relating to the arbitration or mediation for any specific period of time or notify the parties to such proceedings prior to the time the lawyer disposes of or destroys those records.

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Mediation Business

RI-263 A lawyer may establish a nonlaw business offering alternate dispute resolution services, train lawyer and nonlawyer staff to be arbitrators and mediators in the business, establish rules governing the proceedings, and charge participants for costs and expenses incurred and for the presiding officials.

A lawyer may, as a condition of using the nonlaw business services, require participants to release the presiding officials and staff from all liability arising from the exercise of their duties.

RI-275 A lawyer owner of a nonlaw business offering alternative dispute resolution [ADR] services is not per se prohibited from rendering ADR services to clients of lawyers who are opposing counsel to the lawyer in legal matters unrelated to the ADR matter, to clients of other lawyers who are co-counsel with the lawyer in legal matters unrelated to the ADR matter, or to clients of other lawyers who are members of the lawyer owner's law firm.

The lawyer owner must evaluate on a case by case basis whether the lawyer's interest in maintaining the ADR business of opposing counsel materially limits the lawyer's ability to diligently represent a client in the unrelated matter against opposing counsel.

The lawyer owner may not render ADR services to current clients of the lawyer, the lawyer's law firm colleagues, or the lawyer's co-counsel, unless:

a. the lawyer's interest in the ADR business is disclosed to the client;

b. the terms of the ADR services are fair and reasonable, fully disclosed and transmitted to the client in writing in a manner that can be reasonably understood by the client;

c. the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

d. the client consents in writing.

Arbitration

RI-268 When a lawyer serves as an arbitrator, the Michigan Rules of Professional Conduct impose no duty of disclosure of present or former relationships with other persons or entities. Such a duty, if any, may arise from contract, or from other applicable law or rules.

RI-271 A lawyer under consideration for selection as an arbitrator on a three-member arbitration panel is ethically required only to conduct such inquiry and make disclosures with regard to the matter and participants as are necessary to ascertain whether ethical constraints are in place as a result of the lawyer's professional activities, and, if so, to deal with them in accordance with ethics rules.

RI-274 A party nominated arbitrator is not prohibited by ethics rules from communicating with the nominating party about the strategy or merits of a case before, during, and after the arbitration proceeding commences when outside the presence of the other party, or the presence of the other arbitrators. Where arbitration is court mandated, such communications may not be conducted if prohibited by the judge unless stipulated to by the parties.

A party nominated arbitrator is not prohibited by ethics rules from advocating the position of the nominating party during deliberations. However, a lawyer acting as an arbitrator should make sure that such conduct is not prohibited by a judge in the case of court mandated arbitration.

It is incumbent upon a lawyer to determine whether such communications and advocacy are prohibited by the judge before engaging in the conduct.

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> In ***Cummings v Cummings***, 318724 (May 19, 2015), plaintiff appealed Circuit Court order which denied plaintiff's motion to vacate "binding mediation award." COA affirmed. COA held binding mediation is equivalent to arbitration and subject to same judicial review. According to COA, parties agreed to binding mediation, which like arbitration, does not require a certain degree of formality. Relief from untimely award was not warranted where appellant failed to allege what substantial difference would have resulted from a timely award. In addition, according to COA, cases where award was vacated due to ex parte communication involved a violation of arbitration agreement prohibiting such conduct. The binding mediation agreement did not contain a clause prohibiting ex parte communication, so there is no indication that mediator exceeded his powers by acting beyond material terms of parties' contract. COA said "Plaintiff also asserts that the mediator badgered

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witnesses, but the only example he gives is that the mediator poked a witness with a pencil. While poking a witness with a pencil, if that is exactly what occurred, is inappropriate, it does not show a concrete bias." COA pointed out the hearings were often hostile or aggressive. Although there were times where mediator's behavior was not indicative of 'a good mediator' or necessarily professional, mediator did the best he could to control the situation he was presented with and keep calm when hearings became aggressive."

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Thomas v City of Flint, 314212 (April 22, 2014) (Donofrio and Cavanagh [majority]; Jensen [concurring]. During course of pending arbitration, neutral arbitrator inadvertently sent e-mail to plaintiff's counsel that was intended for one of arbitrator's own clients. Plaintiff's counsel then requested neutral arbitrator to recuse herself and she declined. Circuit Court granted plaintiff's motion to disqualify neutral arbitrator. Plaintiff appealed. COA indicated arbitrator should be disqualified if, based on objective and reasonable perceptions, arbitrator has serious risk of actual bias, the appearance of impropriety standard is applicable to arbitrators; and arbitrators are not judges and are not subject to Code of Judicial Conduct. Unintentional e-mail did not give rise to objective and reasonable perception that serious risk of actual bias existed. MCR 2.003(C)(1)(b). COA reversed Circuit Court's order granting plaintiff's motion to disqualify.

In concurrence's viewpoint, if plaintiff wished to challenge impartiality of neutral arbitrator, he was required to wait until after award was issued and file a motion to vacate. MCR 3.602(J)(2)(b).

Judicial mediators or arbitrators

JI-28 - A retired judge may participate as mediator or arbitrator as long as (a) the retired judge does not participate during the period of any judicial assignment, (b) the retired judge is disqualified from mediation and arbitration in matters in which the judge served as judge, and is disqualified as judge from matters in which the judge participated as mediator or arbitrator, and (c) the participation does not reflect adversely on the retired judge's impartiality or raise an appearance of impropriety.

Lawyers representing clients in alternative dispute resolution

RI-134 A lawyer who represents multiple plaintiffs in a matter must withdraw from representation of all the clients if a mediation award in the matter is accepted by some clients and rejected by others, unless all clients consent to the lawyer's continued representation.

RI-171 A lawyer may not instruct a client to tender a settlement offer directly to an opposing party represented by counsel unless the opposing party's counsel consents.

A lawyer who knows that another lawyer has not communicated a settlement offer to a client is required to report the matter to the Attorney Grievance Commission.

RI-255 If counsel for the opposing party offers to resolve a pending dispute through alternative dispute resolution forums, a lawyer is required to convey that offer to the client.

RI-262 A lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests, or if the lawyer has any reason to think that the client would find the alternative desirable.

RI-308 A lawyer is not ethically prohibited from re-negotiating a contingency fee agreement with a client.

A lawyer may accept assignment of the proceeds of another action as a charging lien for the lawyer's fees, if the client is fully informed and agrees in writing, but may not require such an assignment.

RI-264 It is not per se unethical for a lawyer to act as an advocate in an arbitration proceeding when the lawyer is a necessary witness to testify about a contested fact. A lawyer should be guided by ethics rules applying to lawyers acting as witness at trial.

RI-78 No specific ethical rule prohibits a lawyer, when acting in good faith and without purpose of harassment, to call to the attention of an opposing party the possible applicability of a penal statute or make reference to specific criminal sanctions, or to warn of the possibility of criminal prosecution, even if done in order to assist in the enforcement of a valid right or legitimate claim of a client.

A lawyer may properly advise a client to either withhold or pursue criminal proceedings when such action is consonant with the protection of the client's rights and not contrary to a specific statutory or other duty to report the conduct, and may advise a client that the client may, in an appropriate case and in good faith, request that authorities commence or dismiss criminal charges against another party, even though the client's objective is the receipt of compensation or the obtaining of some other legal redress to which the client may be entitled.

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Unless a specific duty to report conduct is imposed by law, a lawyer may also agree, when requested by a client, not to report alleged criminal activity on the part of another party as a condition of resolving the client's matter.

Arbitration of Attorney Fees

RI-2 There is no ethical prohibition preventing an attorney from including in a fee contract with a client a provision requiring arbitration of any fee dispute, provided that the client obtains independent counsel concerning the advisability of entering into such an agreement.

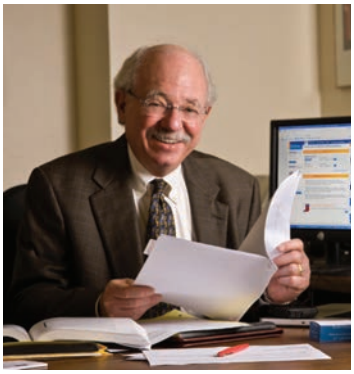
RI-169 A lawyer may not offer or make an arbitration clause in a retainer agreement which circumvents ethics rules by: (a) preventing a client from obtaining independent advice regarding whether to agree to an arbitration clause; (b) purporting to restrict a client from reporting to the Attorney Grievance Commission information concerning a lawyer's ethical misconduct; (c) prospectively limiting the lawyer's legal malpractice liability unless permitted by law and unless the client has the advice of independent counsel; or (d) working a settlement of the lawyer's malpractice liability with an unrepresented or former client without advising the client that independent representation is appropriate.

RI-257 A lawyer may enter into an agreement with a client that disputes arising out of the representation, including disputes regarding fees, possession of files and malpractice, will be resolved in a named alternate dispute resolution program, provided the client obtains independent counsel concerning the advisability of entering into the agreement.

A lawyer may not enter into an agreement with a client that disputes arising out of the representation pertaining to the lawyer's ethical conduct will be resolved in a named alternate dispute resolution program.

About the Author

Alecia M. Ruswinckel, Professional Standards Assistant Counsel with the State Bar of Michigan, manages the Client Protection Fund and provides ethics education, information, and guidance to Michigan attorneys. Prior to joining the bar, her practice focused on civil litigation, probate litigation, estate planning, and mediation.



Sheldon J. Stark

Sonal Priya

"The Big Nuisance: A Not So Radical Proposal For Mediating Nuisance Value Conflicts"

by Sheldon J. Stark and Sonal Priya

Is There A Problem?

Is there a flood of nuisance value lawsuits jamming up our court system? Are mediators handling large numbers of cases with little value? An informal survey of Michigan mediators has turned up no such evidence.

A review of the literature, however, suggests there are some who believe there is. Several commentators have gone so far as to offer radical solutions to combat a perceived "pervasive phenomenon". One such solution is *mandatory* summary judgment. See, "Solving the Nuisance Value Settlement Problem: Mandatory Summary Judgment" by Randy J. Kozal and David Rosenberg and "A Model in Which Suits are Brought for Their Nuisance Value," by David Rosenberg[1] and S. Shavell.[2] In "A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement"[3] by David Rosenberg and Steven Shavell, the authors argue courts should be given the power to bar settlements duly negotiated between the parties where the case has only nuisance value. Others argue that judges should be empowered to stay proceedings for an "expedited" claim validity phase. See, "Nuisance Value Patent Suits: An Economic Model and Proposal" by Ranganath Sudarshen,[4] and "Agency Costs & The False Claims Act," by David Farber. In our view, radical changes to the civil justice system are not necessary. We believe these commentators are offering to fix something that is not broken. We offer instead classic, proven mediator techniques to manage "nuisance value" cases.

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"Nuisance Value" defined

What is a nuisance? What is nuisance value? These words are typically meant to suggest that plaintiff's claims lack merit. "Nuisance value" is a term typically used by claims adjusters to describe the small amount of compensation the carrier is willing to pay to make an "iffy" personal injury or wrongful discharge claim go away. A nuisance settlement is usually a nominal amount, offered when their insured's liability is unproven, or when the adjuster believes the victim's damages are minimal.

Merriam-Webster defines nuisance as "a person, thing, or situation that is annoying or that causes trouble or problems." The Oxford Dictionary defines "nuisance value" as "the significance of a person or thing arising from their capacity to cause inconvenience or annoyance." A Harvard Law School paper from 2004 defines a nuisance suit as "...a legal action in which the plaintiff's case is sufficiently weak that he would be unwilling to pursue it to trial."[6] Black's Law Dictionary (Abridged Ninth Edition) defines "nuisance settlement" as follows:

> A settlement in which the defendant pays the plaintiff purely for economic reasons – as opposed to any notion of responsibility – because without the settlement the defendant would spend more money in legal fees and expenses caused by protracted litigation than in paying the settlement amount.

Typically, the defense characterizes plaintiff's claims as "nuisance" for one of the following reasons: 1) there is no liability; 2) plaintiff has an untenable theory; 3) defendant did nothing wrong to the plaintiff; 4) plaintiff has not suffered harm or has failed to mitigate damages; or 5) there is no evidentiary basis to support the claim.

Nuisance Value in Mediation

If the word " nuisance" comes up in mediation, it is generally early on. Sometimes plaintiff's counsel is the first to raise it in the form of a complaint: "The defense isn't taking this case as seriously as they should. They're treating it like a nuisance." Most often, it is defense counsel explaining why the claim has little value in their analysis and hasn't settled earlier. "We see this as no more than a nuisance case." Or, "From our perspective, this case has little more than nuisance value." Or, "We're willing to make an offer to get rid of it, but the numbers are nominal." Plaintiff counsel often reacts with indignation or outrage. When they hear, "nuisance value," it signals to their ears that the mediation process is heading in an unproductive direction. "This is not a nuisance case," they angrily reply, or "They're not here in good faith." If and when defendants persist, frustrated, plaintiff counsel may add: "We're out of here." Accordingly, mediators must tread carefully when they hear the words "nuisance" or "nuisance value."

How does "nuisance value" translate into dollars? A nuisance value offer may start anywhere from $1,500, $2500, $3,500, even $5,000. However, in a tort case involving death or an employment case for a high salaried executive, nuisance value can also mean six figures. "Nuisance value" is therefore a matter of perspective and context. That said, of course, there are sometimes cases properly characterized as "nuisance". As will be discussed below, there are techniques available for mediators to assist parties in analyzing their risk and exposure to help assess whether a nuisance settlement is appropriate.

If the claim is truly limited to nuisance value, defendants may or may not be interested in paying a small amount to save on "defense costs." Sometimes claims adjustors and risk managers choose to fight. "Millions for defense but not one penny for tribute" is their mantra. This is more likely to arise in a court ordered mediation. Rarely will the defense agree to the cost of mediation if they are unwilling to settle at some level. The choice to fight or pay are both reasonable business judgments but each carries a level of risk. Neither strategy works every time. Mediation is a voluntary process. The final decision belongs to the parties. A mediator can examine the costs of proceeding and explore the risks and potential verdict range but a party is well within its rights if a roll of the dice is preferred.

A realistic plaintiff may well be interested in a nuisance value settlement but needs the help or cover of a mediator before agreeing to accept. Finding the "sweet spot" where - in the words of Winston Churchill "each party walks away equally unhappy" - is not always easy. If the defense chooses to pay but not enough to keep plaintiff and counsel in the process, what's a mediator to do? Mediation offers the parties an opportunity to brainstorm creative, outside-the-box resolutions – resolutions that would not be available if the case proceeded to trial. As an example, a young woman brought a claim against a hotel over alleged unacceptable service. The hotel saw the dispute as a nuisance. A resolution acceptable to both parties was a fully paid vacation for the charging party at another hotel in the chain. This met the needs of both parties: the hotel managed its risk, gave up only one empty room and avoided damaging its reputation by a negative review while the claimant managed her risk, and enjoyed an unblemished time away to replace the vacation lost.

Where's the Incentive?

As noted, nuisance cases are relatively rare in mediation. Accordingly, when mediators hear "nuisance," the authors suggest keeping an open mind. Perhaps it is; perhaps it is not. To paraphrase Mark Twain, in our experience, the alleged flood of nuisance value suits is greatly exaggerated. Indeed, nuisance characterizations should be carefully examined as there is little incentive for a plaintiff's lawyer to

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pursue nuisance litigation.[7]

In the first place, most plaintiff lawyers are paid on a contingency fee basis: no payment unless there is a settlement. One third of a nuisance value is one third of very little. Where's the incentive to bring a nuisance suit? Absent unusual circumstances, few plaintiff lawyers will knowingly accept nuisance value cases to litigate. Contingency fee lawyers cannot earn a living that way. Moreover, to reach a point where the other side is willing to talk settlement or offer to engage in a mediation process, plaintiff's counsel may be forced to make a significant investment in court costs for filing fees, deposition transcripts, expert witness evaluations and reports, etc. etc. A garden-variety case may cost $5-10,000 of the lawyer's capital–well in excess of most nuisance value settlements.[8] Because many in the insurance world have made a policy decision to limit nuisance settlements, relying on their stronger bargaining position and the lawsuit's lack of merit, any claim pursued for nuisance value is a risky venture indeed. This is no mystery to the average plaintiff lawyer. Who would want to invest effort and resources in such a high risk/low value dispute? Who has TIME to process a nuisance suit? It's simply bad for business. Therefore, the mediator's first reaction to charges of "nuisance value" should be "tell me why you think so."

Second, a lawyer who brings nuisance value cases quickly earns a poor reputation. Lawyers talk about each other all the time. It's part of the litigator's life. We rely on our reputations. We rise and fall with them. The reputation we earn has a huge impact on how satisfied we are with our practices. Lawyers with a good reputation are treated with respect and given credibility by the courts and opposing counsel. Lawyers with good reputations are taken seriously by the other side. "If you brought this case, I better take a close look at it." Word that someone brings nuisance cases will quickly spread throughout the Bar. A reputation for bringing bad cases - either out of ignorance, poor judgment or simple callous indifference to the Rules of Professional Responsibility (which discourages bringing non-meritorious law suits[9]) - undermines the credibility and reputation of that lawyer. What's more, a lawyer's poor reputation undermines the value of the good cases he/she might bring. "Why should I believe this is a good case when the last three you brought were not worth my time or yours?" That kind of reputation hurts a lawyer's personal credibility in general, and his/her ability to persuade a court or fact finder that the claim has true merit. Their claims are viewed with considerable skepticism and rarely are given the benefit of any doubt.

Third, a lawyer who brings nuisance cases is more likely to run into discipline trouble and complaints against his/her license with the State Bar. Why? Clients conclude their case must have merit because the lawyer agreed to take it. Most clients – even those with strong cases – have expectations, often unreasonable, about the value of their case. They read about similar (or not) cases in the paper and say, "My case is even stronger than that!" When the lawyer communicates the nuisance value offer and recommends the client accept, those expectations are shattered. How can this be? "The lawyer has sold me out. The lawyer is in the pocket of the insurance company. The lawyer is incompetent." There's an old saying: "Expectations are resentments under construction." A resentful client is likely to bring charges of some kind against the offending lawyer. Just what that lawyer needs: a low value case that results in threats to his license.

More likely than not, therefore, when the mediator hears that the plaintiff's claim is a "nuisance," the odds are that something else may be going on. Our best advice to mediators: "trust but verify."

Has the Defense Engaged in Realistic Risk Assessment?

Sometimes defense counsel doesn't truly believe the case lacks value. There's another old saying, "The best defense is a good offense." Sometimes charging that a claim has "nuisance value" is a technique to rock plaintiff and her lawyer back on their heels and lower their hopes for a good financial settlement. A good mediator needs to explore this possibility by asking good risk questions. Sometimes it may turn out the defense is sincere, but for whatever reason, they have failed to engage in realistic risk assessment. The claim may not be a "nuisance" at all.

Whether the defense is sincere, mistaken or on the mark can only be answered as the mediation process unfolds. Was defense counsel too close to the situation to be objective and give good advice? Did the party representative make the decision that resulted in litigation? Perhaps it was defense counsel who advised the actions leading to litigation. Perhaps the client did not adequately investigate the claim. Perhaps a key participant on the defense side has been less than honest. Is the litigator outside his or her area of expertise? Mediators need to understand the basis for defendant's position at the table. Have they realistically assessed the problems and shortcomings? Is there a legal basis for the claim? Is the claim solidly based upon case law? What do the cases hold? Is the law unsettled? What are the elements of the claim and will there be evidence to support every element? Has the plaintiff presented evidence the defense has not considered, undervalued or given insufficient attention? Is the defense in denial? Risk assessment and reality testing often reveal whether the nuisance characterization is sincere, mistaken, the result of inexperience or a negotiation ploy[10] .

Was Discovery Unproductive?

Sometimes responsible plaintiff counsel accepts a case for representation believing the facts will develop in discovery in a certain way. When they start digging, however, the evidence may not turn out to be that way at all. Plaintiff's counsel is sometimes forced to admit he couldn't find persuasive, admissible evidence of wrongdoing. They may or may not be willing to acknowledge that "the case went south," or, turned out to be "a dry well." That can happen. Such cases may nonetheless have SOME settlement value - especially as

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plaintiff's lawyer has invested time and money and is unlikely to dismiss the case voluntarily. As a result, plaintiff may be willing to accept significantly less than was initially anticipated. As many mediations focus on risk assessment, a claim that didn't pan out in an evidentiary sense may still pose a risk worth managing by seeking an amicable resolution.[11]

Cases that did not develop as expected provide ample questions to explore. *Why* did the case turn out to be weaker than expected? If the discussion is candid and plaintiff concedes the obvious, negotiations may be more productive. Perhaps plaintiff's initial demand would have been reasonable if the case had panned out; but it did not. Perhaps a lower number that factors in risk will result in a better response from defendant. Sometimes no money need change hands. In a recent mediation between two physicians who worked together in one practice, for example, one of them concluded he wasn't being paid in accordance with his contract. He believed he'd been cheated out of substantial dollars. Just before reaching the mediation table, however, all of the billings - which had been handled by a third party, not the defendant or his staff - were produced. Plaintiff's counsel examined them and realized proving substantial unpaid fees was unrealistic. Fortunately, there were many non-economic issues to be horse-traded. The case settled. Both sides were happy - and no money changed hands.

Why Can't We Agree?

Another line of inquiry to achieve the same goal is to ask the defense how such a capable, experienced plaintiff lawyer could be so wrong - assuming defense counsel knows and respects her opposition? Reasonable minds often differ about the value of a case. Two experienced, able and persuasive advocates can sometimes look at the same landscape and reach diametrically opposite conclusions. If the defense sincerely believes the dispute is limited to nuisance value, the mediation may not be over. There remain several techniques in the mediator tool kit.

What Will the Costs Be?

One technique for moving forward is to explore "defense costs." How much money has the defense spent already in defending this "nuisance" litigation? Is there a litigation budget moving forward? How much discovery remains? How many depositions? Is plaintiff seeking or threatening to seek electronic records? How much will that cost? Will there be experts? How much time and effort will be expended to bring a motion for summary disposition? Is there a risk the motion will be denied? If denied, how much more money will be spent on a trial? Is there a risk that a defense verdict at trial might be appealed? How much more will an appeal cost in time, effort and disruption? Defense costs generally exceed "nuisance" value. In today's world, defense costs of $20,000, $40,000 or $75,000 are not unusual. Many employment cases will cost over $100,000 just to reach trial. In employment litigation, prevailing plaintiff's can recover actual attorney fees. Even if a plaintiff's verdict is modest, an award of substantial attorney fees can exceed the demand sought at the mediation table. Defendants do not always arrive at the table having considered the risk of limiting plaintiff to a small verdict but being exposed to actual attorney fees. If defendant is willing to settle for defense costs, resolution may well be possible. Plaintiff may equally recognize great risks ahead and conclude defense costs are a reasonable way to manage them.

How Big a Nuisance Are you?

Another technique is to explore the range of "nuisance value." $5,000 might not sound like a "nuisance" in a small claims case. By contrast, $100,000 might be nuisance value in a death case or discharge case for a highly compensated executive. While some plaintiff lawyers may be offended to hear their claims characterized as "nuisance", others could care less what it's called so long as the final offer meets their goals. "Yes," plaintiff's counsel might say, "I recognize you call this a 'nuisance' case, but I consider myself a big nuisance!" Big nuisance, indeed.

A simple technique, depending on the mediator's relationship to defense counsel, might be to ask straight out: "What is the range of nuisance value for which you'd be willing to settle this case?" If the answer is, "we'd never pay more than $35,000", the mediator has something to work with. As this is tantamount to asking a party for its "bottom line," however, the answer may not be reliable.

A mediator might further explore defendant's range by using "what if" questions. "What if plaintiff brought her demand down to five figures? What could you offer then?" The answer, of course, might be so small an increase as to remain unproductive. Defense counsel, implementing a negotiation strategy that is not working out, might be ready to provide a constructive answer. Though not yet ready to disclose flexibility to the plaintiff, the defense may be ready to signal to the mediator that they aren't yet close to their limits of authority.

An end game variation of the mediator "what if" question is: "I don't have authority for this, but if I could get plaintiff to walk away at $25,000, is it possible you would pay it?" If the defense is favorably disposed, the same question could then be asked in the plaintiff's room: "I don't have a number yet, but if I get them up to $25,000, is it possible you would take it?" This technique permits the lawyers to achieve a resolution or close the gap significantly without relinquishing their settlement positions should the case not settle.

Conclusion

It is not evident that a glut of nuisance value cases is interfering with the civil justice system. Accordingly, radical changes – mandatory summary judgment motions or judicial authority to reject settlements, for example – are not necessary. Despite commentary to the

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contrary, there are few responsible plaintiff lawyers willing to bring nuisance value cases they would never take to trial. Sometimes, however, mediators will be faced with mediating alleged nuisance value claims. There are many time-tested and effective techniques available to mediators to deal with them. Mediators may explore the sincerity of a "nuisance" characterization, focus on the costs of going forward, determine if either side is unrealistically analyzing risk, explore the range of "nuisance" settlements and brainstorm non-economic issues resulting in resolution without payment of significant dollars. Radical solutions are better left in the pages of law review articles, not adopted as new court rules.[12]

About the Authors

Sheldon J. Stark offers mediation and arbitration services. He is a member of the National Academy of Distinguished Neutrals and an Employment Law Panelist for the American Arbitration Association. He is a member of the Council of the ADR Section of the State Bar and chairs the Skills Action Team. Mr. Stark was a distinguished visiting professor at the University of Detroit Mercy School of Law from August 2010 through May 2012, when he stepped down to focus on his ADR practice. Previously, he was employed by ICLE. During that time, the courses department earned six of the Association for Continuing Legal Education's Best Awards for Programs. He remains one of three trainers in ICLE's award-winning 40-hour, hands-on civil mediation training. Before joining ICLE, Mr. Stark was a partner in the law firm of Stark and Gordon from 1977 to 1999, specializing in employment discrimination, wrongful discharge, civil rights, business law, and personal injury work. He is a former chairperson of numerous organizations, including the Labor and Employment Law Section of the State Bar of Michigan, the Employment Law and Intentional Tort Subcommittee of the Michigan Supreme Court Model Civil Jury Instruction Committee, the Fund for Equal Justice, and the Employment Law Section of the Association of Trial Lawyers of America, now the American Association for Justice. He is also a former cochairperson of the Lawyers Committee of the American Civil Liberties Union of Michigan. In addition, Mr. Stark is chairperson of Attorney Discipline Panel #1 in Livingston County and a former hearing referee with the Michigan Department of Civil Rights. He was a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010 and was listed in "The Best Lawyers in America" from 1987 until he left the practice of law in 2000. Mr. Stark received the ACLU's Bernard Gottfried Bill of Rights Day Award in 1999, the Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan in 2009, and the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. He has also been listed in "dbusiness Magazine" as a Top Lawyer in ADR for 2012 and 2013.

Sonal Priya is a final year student of Bachelors of Law in Ramaiah College of Law, Bangalore, India. She has been appointed as the Student Ambassador for Centre for Social Justice Ahmadabad, Gujarat, India in 2015. She is a member of the Advisory Board of Debating Society in her Institute. She participated in various Inter College and Intra College Debate, Moot and Essay writing Competitions. She has completed a short training program on Arbitration from National Law School of India University, Bangalore and a course on Environment Protection by International Centre for Culture and Education where she has contributed as an Earth Ambassador too. She has attended Summer School at Oxford University in International Trade and Maritime Law and Intellectual Property Laws. She is a part of Students Committees at her Institute and an active participant in extra-curricular and co-curricular activities. She has also gained work experience in the field of law by interning in various law firms and Advocate's Chambers. She hopes to be a provider of ADR and Litigation Services in the near future.

(Endnotes)

[1] Virginia Law Review, Vol. 90, p. 1849, 2004

[2] Available at http://www.law.harvard.edu/programs/olin_center/

[3] International Review of Law and Economics 26 (2006) 42–51

[4] Ranganath Sudarshan, Nuisance-Value Patent Suits: An Economic Model and Proposal, 25 Santa Clara High Tech. L.J. 159 (2008)

[5] David Farber, Agency Costs and the False Claims Act, 83 FORDHAM L. REV. 219 (2014).

[6] The Harvard John M. Olin Discussion Paper Series: available at http://www.law.harvard.edu/programs/olin_center/

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[7] On the other hand, the authors did find a website blog titled, "The Insurance Adjustor's 'Nuisance' Value of Your Claim," which advises "Even if the insurance company is right in claiming no liability for your injury, you may be able to get a 'nuisance settlement.'"

[8] At a seminar sponsored by ICLE, the Institute of Continuing Legal Education, several years ago, a lawyer representing the insurance carriers in medical malpractice cases described his instructions to make certain plaintiff's counsel has invested over $75,000.00 before engaging in settlement negotiations.

[9] Michigan Rules of Professional Responsibility, Rule 3.1.

[10] Perhaps it is plaintiff and plaintiff's counsel who are unrealistic or mistaken. The same questions and techniques can be used to explore risk and realistic analysis with them. Are they over-valuing the claim? Have they missed something important? Are they sweeping their weaknesses and risks under the rug?

[11] In addition to the risk of an adverse ruling, cases may risk collateral consequences: the departure of key employees, adverse publicity, disruption of business operations, public exposure of sensitive or embarrassing information, aggravation of customer relations, impact on banking relationships, etc.

[12] The authors wish to thank Earlene Baggett-Hayes, Shel Stark's friend and colleague at PREMi, Professional Resolution Experts of Michigan, for her ideas, advice and suggestions.

Breach of Confidentiality Provision Leads to Loss of Settlement

by Edmund J. Sikorski, Jr., J.D.

Mediated settlement agreements are governed by contract law. When a material feature of such an agreement is a confidentiality provision and a party breaches that provision, the breaching party can lose its benefits under the settlement agreement. *Gulliver Schools, Inc. et al. v. Snay*, 137 So.3d 1045 (Fla. 3rd DCA 2014) painfully illustrates this point. For those interested in exploring this subject further, the topic of confidentiality agreements in mediation agreements governed by Florida law is discussed in depth in *Act Deux: Confidentiality After the Florida Mediation Confidentiality and Privacy Act*, Nova Law Review, Vol. 36, Issue 1, 2011.

In *Gulliver Schools*, the court found the following confidentiality provision to be central to the parties' mediated settlement agreement:

> 13. CONFIDENTIALITY … The plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this Agreement … A breach…will result in disgorgement of the Plaintiffs portion of the Settlement Payments.

Four days after the settlement agreement was signed, Gulliver notified Snay that he had breached the agreement based on the Facebook posting of Snay's college-age daughter, wherein she stated:

> Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.

This Facebook comment went out to approximately 1200 of the daughter's Facebook friends, many of whom were either current or past Gulliver students.

After a one page discussion of the law requiring that clear and unambiguous contract language be enforced as written, the appellate court reversed the trial court's order granting Snay's motion to enforce the agreement:

> Rather, before the ink was dry on the agreement, and notwithstanding the clear language of section 13 mandating confidentiality, Snay violated the agreement by doing exactly what he had promised not to do. His daughter then did precisely what the confidentiality agreement was designed to prevent…

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Gulliver illustrates the point that confidentiality agreements need to be taken seriously and that the consequences of violating them can be serious.

Originally published November 17, 2016, in Practice Points for the ABA-Section of Litigation – Alternative Dispute Resolution

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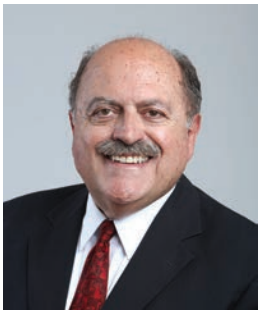
About the Author

Edmund J. Sikorski, Jr. J.D. is a mediator in Ann Arbor, Michigan. He is a recipient of the 2016 National Law Journal ADR Champion Trailblazer Award and a past member of the Board of Directors of the Florida Academy of Professional Mediators (2014-2015). He speaks and writes extensively on ADR topics, including "Litigator's Practical Guide to Successful Mediation." He has litigated in the Michigan and Federal trial and appellate courts for more than thirty years. Prior to law school, he was an accomplished surgical and Emergency Room technician working at hospitals in Detroit and Ann Arbor, Michigan. He can be reached at edsikorki3@gmail.com http://www.edsikorski.com/



AWARDS PRESENTED AT ADR SECTION ANNUAL MEETING AND CONFERENCE

At the ADR Section Annual Meeting and Conference in September 2016 in Grand Rapids, the ADR Section presented its annual awards. Robert E. Lee Wright received the Distinguished Service Award, Jo-Ann Lauderdale received the Nanci S. Klein Award, and Lisa Taylor received the George N. Bashara, Jr. Award. Bob Wright provided the following insightful comments on receiving the Distinguished Service Award.

State Bar of Michigan ADR Section Distinguished Service Award

by Robert E. Lee Wright

Thank you to the Section, the Council, the Nominating Committee, and to the anonymous person who nominated me for this prestigious award.

I am grateful to all of my friends and colleagues who taught me everything I know about mediation, including three in the audience tonight:

Anne Bachle Fifer who led my first mediation training and taught me the value of empathy and apology and relying on a higher power to guide me;

Zena Zumeta who taught me to mediate divorce and custody disputes and to be nonjudgmental by using the words like, “interesting” and “fascinating” instead of “are you nuts?”;

And my favorite punster, Shel Stark, who taught me to develop a plan before mediating and to be flexible enough to abandon the plan, always with good humor;

And I am especially grateful to my beautiful, darling wife, Arlene, who has lovingly supported me on this ADR odyssey since 1999 and in our evolving journey together for the past 26 years. I could not have been here tonight without her.

So in thinking about my comments tonight, I am mindful of the admonition to be brief lest I come under an assault of dinner rolls. (If you do not understand that particular reference, just ask someone who attended our annual meeting in Auburn Hills a few years ago to explain it.) And at the same time I am feeling responsible to say something meaningful about the practice of mediation -- which many of us hold in such high regard and which I dearly love.

I was pondering what I can say, meaningfully yet briefly and succinctly, when I received an e-mail from my friend and colleague Lee Hornberger, head of our Publications Team, asking for a copy of my comments for publication in *The Michigan Dispute Resolution Journal*. Boy, did that add pressure. Thanks to Lee for all he does for the Section.

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So I decided telling the story of how I came to stand here tonight probably does not fit those criteria. So I won't tell you about my 24 years at Miller Canfield and leaving there in 2011 to set up my standalone ADR practice, finally quitting my day job!

And I won't dwell on my spiritual journey which began with an epiphany during a walk on the beach in 1999, a midlife course correction; and a Master's degree in spiritual psychology in 2001, with an emphasis on empathic listening skills. Nope, those are out.

So then I was thinking of the autumnal equinox which began yesterday and continues today. I could talk about equal time for day and night, light and dark, and the equality of parties in mediation. How we try to treat them all with equal dignity and respect, even when one of them is provoking words like "interesting" and "fascinating" from our lips.

Next I thought of giving you my prognostications on the future of ADR, especially mediation. But my crystal ball is cloudy and I am not seeing the next great process over the horizon which will replace mediation as the #1 resolution method.

Then, yesterday, I read of a landmark mediation in New Orleans involving a mediation between the prosecutor, a confessed murderer, and the victim's family which resulted in an agreed sentence of 30 years for the perpetrator, with the concurrence of the family and the state. It sounded like a restorative justice conference, another process I truly enjoy.

This brought to mind serving on the board of our local community dispute resolution center and my good friend Doug Van Epps who has pioneered so many of their programs over his career. What a gift Doug has been to the citizens of our state.

Then I recalled two mediations which had a profound effect on me. So I decided I would share them with you. I promise to be brief.

One was at the dispute resolution center here in Grand Rapids. Two women, neighbors and former friends, had not spoken to one another for over a year. I don't recall the particulars of the dispute which brought them to the center. But I do recall a magic moment when, after not looking at one another throughout the mediation, one of them turned and said to the other, "that's not what I said." And proceeded to correct a misapprehension from over a year earlier.

At that point, the other woman turned and began speaking directly to her former friend. I had the good sense to push my chair back and just allow them to talk. After writing up an agreement, I sat and listened as they walked down the hallway, laughing and talking with one another and I thought, "this is wonderful."

Fast forward about 10 years to a mediation involving a wrongful conviction and malicious prosecution case which led to the incarceration of an innocent man in Jackson Prison for over a decade. After multiple days of mediation, spread over a couple of months, the parties came to an agreement which ensured the wrongfully convicted individual and his wife, who pushed for his release and exoneration for every one of those years, would never have to work another day in their lives. Yet I sensed there was something missing.

So once the written agreement was signed and thanks to training I received from Anne Bachle Fifer, I went back to the defense room and asked if they would be willing to consider an apology. They would. I took it the other room to see if they would be interested in hearing one. They would. So we set another date solely for the purpose of giving and receiving an apology.

The attorney who actually prosecuted the man came to my office solely to apologize. I listened to a dress rehearsal of the apology and it sounded good to me. But when we met with the husband and wife, I was moved beyond words. If there was ever a time I would like to have recorded something in a mediation, that was it.

"Mr. X, I want to sincerely apologize to you for my part in your wrongful imprisonment. I have devoted my career to doing justice. What happened to you was a travesty of justice and I am ashamed to have had anything to do with it."

The husband was stoic, but I watched as a single tear rolled down his cheek as he said, simply, "thank you." At that point, his wife began weeping and the loss of all of those years together seemed to melt in that moment. It was the most humbling experience of my mediation career and is yet another reason I love this field so very dearly.

So, in closing, I stand here to acknowledge the incredible privilege we mediators have to share intimate moments with those we serve and, hopefully, bring a little more peace into their lives. I am truly blessed to be a member of this profession. Thank you, enjoy the rest of the conference and have a great night.

Request for Proposals
October 13-14, 2017,
ADR Section Annual Meeting and Conference

On October 13 and 14, 2017, the ADR Section will host its Annual Meeting and Conference in Metro Detroit. The exact location will be determined soon. The Annual Meeting and Conference will include up to 8 hours of advanced mediation training featuring Michigan practitioners and experts.

If you would like to be a presenter or provide a training segment at the Conference, please submit your suggestions to Robert Wright by e-mail, bob@thepeacetalks.com, by February 28, 2017.

Topics may cover any aspect of ADR practice from mediation to arbitration, from case evaluation to summary jury trial. Your segment may be an update, a demonstration, a technique presentation, practice management topic, a skill-building exercise, a set of ethical challenges or any other matter you believe would be of interest to your fellow Section members.

Proposals should include:

1. Nature of your topic including proposed agenda (bullet points)
2. Name(s) of speaker(s)
3. Amount of time you wish to allocate to your segment (45 to 90 minutes)
4. Whether your segment will be a presentation, an interactive exercise, group discussion or other format
5. Learning objectives
6. Resources required (projector, flip chart, etc.)

We look forward to receiving your proposal!

Bob Wright
Chair, Skills Action Team
bob@thepeacetalks.com

SBM
State Bar of Michigan

ALTERNATIVE DISPUTE RESOLUTION SECTION

3nd Annual ADR Summit:

Elevate Your Mediation and Negotiation Skills to the Next Level

March 21, 2017, 8:30 a.m.-5:30 p.m.

WMU-Cooley Law School, 2630 Featherstone Rd, Auburn Hills

P #:_____

Name:_____

Your Firm: _____

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Enclosed is check # _____ for $ _____

Please make check payable to: State Bar of Michigan

To pay with credit/debit card visit http://e.michbar.org

Materials

Please note: Materials will be posted in the event library several days before the seminar. To access the library:

1. Go to http://connect.michbar.org/communities/mycommunities (You will be directed to a log-in page before you see the Groups page)
2. Double-click on the event name
3. Materials will be on the library tab.

Details REGISTRATION DEADLINE: March 17, 2017

J. Anderson "Andy" Little, is the author of the ABA's best-selling book, *Making Money Talk, How to Mediate Insured Claims and Other Monetary Disputes*. When Andy presented at ICLE's 2014 Advanced Negotiation and Dispute Resolution Institute, he left a profound impression, helped many registrants change and enhance their techniques and approach to mediating, and left many attendees asking to hear more of his tips. Andy chairs the North Carolina Dispute Resolution Commission, is first chair of the NC Bar Association- Dispute Resolution Section, and chair of the Dispute Resolution Committee. A successful trial lawyer, Andy has mediated more than 4,000 cases over the last 15+ years.

Eight hours of SCAO-approved Advanced Mediation Training credit pending.

Cost

- ❑ ADR Section Members $155
- ❑ Non-Section Members $195
- ❑ Law Students $25
- ❑ WMU Cooley Law Students .....FREE

Law school students must submit their form by mail to receive this reduced rate.

A limited number of free scholarships for CDRC employees are available. To request a scholarship contact bob@thepeacetalks.com.

Questions

For additional information regarding the seminar contact Robert E. Lee Wright at (616) 682-7000 or bob@thepeacetalks.com.

Register One of Two Ways

Online: **visit** http://e.michbar.org

Mail your check and completed registration form to:

State Bar of Michigan, Attn: Seminar Registration
306 Townsend Street, Lansing, MI 48933

Cancellation Policy: All cancellations must be received at least 48 business hours before the start date of the event and registration refunds are subject to a $20 cancellation fee. Cancellations must be received in writing by e-mail (tbellinger@mail.michbar.org), or by U.S. mail 306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.). No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar materials.

Upcoming Mediation Trainings

General Civil Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a). For more information, visit the SCAO Office of Dispute Resolution web-site, http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/Mediation-Training-Dates.aspx

Bloomfield Hills: **February 23, March 2, 9, 23, 30, 2017**
July 24 - 28, 2017
November 14, 21, 28, December 5, 12, 2017
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Plymouth: **February 16-18, March 3-4, 2017**
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Grand Rapids: **April 2017**
Training sponsored by Dispute Resolution Center of West Michigan
For more information, contact Christine Gilman at cgilman@drcwm.org

Petoskey: **May 3-5, 10-12, 2017**
Training sponsored by Northern Community Mediation
For more information, call Jane Millar, 231-487-1771

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 9-11, 16-18, 2017**
Training sponsored by Mediation Training and Consultation Institute
Contact: info@learn2mediate.com or call (800) 535-1155
or (734) 663-1155

Advanced Mediation Training

Mediators listed on court rosters must complete eight hours of advanced mediation training every two years. The trainings listed below have been pre-approved by SCAO to meet the content requirements of the court rules on mediation for both general civil and domestic relations mediators.

Grand Rapids: **February 2, 2017**
Trainers: Anne Bachle Fifer, Dale Ann Iverson, Bob Wright
Contact: Anne Bachle Fifer, anne@abfifer.com

Auburn Hills: **March 21, 2017 – Third Annual ADR Section Summit**
"Elevate Your Mediation and Negotiation Skills to the Next Level"
Trainer: Andy Little
Training sponsored by ADR Section of the State Bar of Michigan
Register: http://www.michbar.org/news/viewevent/eid/639

Domestic Violence Screening

Ann Arbor: **February 11, 2017**
Training sponsored by Mediation Training and Consultation Institute
Contact: info@learn2mediate.com or call (800) 535-1155
or (734) 663-1155

How to Find Mediation Trainings Offered in Michigan

Mediation trainings are regularly offered by various organizations around Michigan. Mediators who wish to apply for court mediator rosters must complete a 40-hour training approved by the State Court Administrative Office. Courts maintain separate rosters for general civil and domestic relations mediators, and there are separate 40-hour trainings for each. In addition, domestic relations mediators must complete an 8-hour course on domestic violence screening. Mediators listed on court rosters must complete eight hours of advanced mediation training every two years. MCR 2.411(F)(4)/3.216 (G)(3).

Most mediation trainings offered in Michigan are listed on the SCAO Office of Dispute Resolution web-site:

http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/Mediation-Training-Dates.aspx

Editor's Notes

The Michigan Dispute Resolution Journal is looking for articles on ADR subjects for future issues. You are invited to send a Word copy of your proposed article to *The Michigan Dispute Resolution Journal* Editor Lee Hornberger at leehornberger@leehornberger.com.

Articles that appear in *The Michigan Dispute Resolution Journal* do not necessarily reflect the position of the State Bar of Michigan, the ADR Section, or any organization. Their publication does not constitute endorsement of opinions, viewpoints, or legal conclusion that may be expressed. Publication and editing are at the discretion of the editor.

Prior *ADR Quarterlies* are at **http://connect.michbar.org/adr/newsletter**.

ADR Section Member Blog Hyperlinks

The SBM ADR Section website contains a list of blogs concerning alternative dispute resolution topics that have been submitted by members of the Alternative Dispute Resolution Section of the State Bar of Michigan.

The list might not be complete. Neither the State Bar nor the ADR Section necessarily endorse or agree with everything that is in the blogs. The blogs do not contain legal advice from either the State Bar or the ADR Section.

If you are a member of the SBM ADR Section and have an ADR theme blog you would like added to this list, you may send it to Dispute Resolution Journal Editor Lee Hornberger at leehornberger@leehornberger.com with the word BLOG and your name in the Subject of the e-mail.

The blog list link is: http://connect.michbar.org/adr/memberblogs.

ADR Section Social Media Links

Here are the links to the ADR Section's Facebook and Twitter pages.

You can now Like, Tweet, Comment, and Share the ADR Section!

https://www.facebook.com/sbmadrsection/
https://twitter.com/SBM_ADR

Expanded ADR Section Homepage

The ADR Section has expanded and updated the Homepage of its website. The site is at http://connect.michbar.org/adr/home . The Homepage includes the Section Mission Statement, Who We Are, Why You Should Join the ADR Section, and Let Litigants Know that MEDIATION Really Works. The Homepage also provides access to the Section calendar, events, and ADR Section publications.

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION 2016-2017

The ADR Section of the State Bar of Michigan is open to lawyers and other individuals interested in participating. To comply with State Bar of Michigan requirements, lawyer applicants to the ADR Section are called Members and non-lawyer applicants to the ADR Section are called Affiliates. The Section's mission is:

> The Alternative Dispute Resolution Section provides members of the State Bar of Michigan and the general public with creative leadership in the dispute resolution field. The Section fosters diversity in the profession, develops and offers educational programs, promotes access to litigation alternatives regardless of income, monitors legislative and judicial activity and provides policy guidance, information and technical assistance on ethical issues, dispute resolution techniques and training design. The Section produces publications which promote wider use and excellence in the provision of alternative problem-solving techniques and dispute resolution services.
>
> Membership in the Section is open to all members of the State Bar of Michigan. Affiliate status is open to any individual with an interest in the field of dispute resolution.

The Section's annual dues of $40.00 entitle you to receive the Section's Newsletter, participate in programming, further the activities of the Section, receive Section listserv announcements, and participate in the Section's discussion listserv, and receive documents prepared by and for the ADR Section.

In implementing its vision, the ADR Section is comprised of various Action Teams. You are encouraged to participate in the activities of the Section by joining an Action Team. Information on Action Teams will be forwarded upon processing of this Application.

Note: Dues are due between October 1 and November 31.

APPLICATION TYPE: _____ Member _____ Affiliate

NAME: _____

ADDRESS: _____

_____

CITY:_____STATE:_____ ZIP CODE _____

PHONE:_____

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Are you currently receive the Dispute Resolution Journal? _____

All orders must be accompanied by payment. Prices are subject to change without notice.

Please return payment to:

William D. Gilbride Jr.
Abbott Nicholson PC
300 River Place Dr Ste 3000
Detroit, MI 48207-5066

Annual dues are $40.00, or $48.00 if Member or Affiliate certificate is requested. There is no proration for dues and membership must be renewed on October 1 of each year.

Make checks payable to State Bar of Michigan: Enclosed is check # _____ for _____

Members using a Visa or Mastercard must join online at **e.michbar.org**.

Non-members must submit payment by check.

SBM Connect
State Bar of Michigan

Connect With Us

The Alternative Dispute Resolution Section has a website and interactive community for its members - SBM Connect. This private community enhances the way we communicate and build relationships through the Section. Log in to SBM Connect today and see what the buzz is all about!

The ADR Section SBM Connect hyperlink is:

http://connect.michbar.org/adr/home

- ACCESS to archived seminar materials and The Michigan Dispute Resolution Journal
- FIND upcoming Section events
- NETWORK via a comprehensive member directory
- SHARE knowledge and resources in the member-only library
- PARTICIPATE in focused discussion groups

ADR Section Mission

The mission of the Alternative Dispute Resolution Section is to encourage conflict resolution by:

1) Providing training and education for ADR professionals;

2) Giving professionals the tools to empower people in conflict to create optimal resolutions; and

3) Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

Join the ADR Section

The ADR Section of the State Bar of Michigan is open to lawyers and other individuals interested in participating.

The Section's annual dues of $40 entitles you to receive the Section's Newsletter, participate in programming, further the activities of the Section, receive Section listserv announcements, and participate in the Section's discussion listserv.

In implementing its vision, the ADR Section is comprised of various Action Teams. You are encouraged to participate in the activities of the Section by joining an Action Team.

The membership application is at: http://connect.michbar.org/adr/join.

SBM State Bar of Michigan | Alternative Dispute Resolution Section

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The Michigan Dispute Resolution Journal 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 Michigan Dispute Resolution Journal seeks to explore various viewpoints in the developing field of dispute resolution.

For comments, contributions or letters, please contact:

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*Joseph C. Basta - jcbasta@yahoo.com - **313-378-8625***
*Sheldon Stark - shel@starkmediator.com - **734-417-0287***

http://connect.michbar.org/adr/newsletter