Vol 17
No. 2
May, 2010

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The ADR Quarterly
Alternative Dispute Resolution Section of the State Bar of Michigan

Technology Basics:

10 Reasons Why Tweeting Should Be Part of an ADR Practitioner's Daily Vocabulary

By Hannalori S. Bates

How does technology affect ADR? How can these tools be used to benefit ADR practitioners? This article will provide an overview of a particular technological tool. Second, the benefits of this tool for an ADR practice will be addressed. Then, the reader will be guided through the steps to start using this tool. The goal of this article is to increase knowledge about technology and to generate ideas about how it can be useful to ADR practitioners.

Overview of Twitter

Twitter is a social networking site that allows users to set up an account to create a profile page. Users send short 140 character-long messages ("tweets") to other users ("followers") who subscribe to each other's tweets. Tweets are newsworthy items, including links to articles, notification of events, tips, opinions, and other information that can be written in 140 characters. A profile page is a web page that includes the user's photo, user name, a short biography, and the user's tweets. Tweets from a user's followers appear on the user's home page. Tweets may be received through the web or via text messages on a cell phone.

10 ways Twitter can benefit an ADR Practitioner:

MARKETING SOURCE

#1 Promote your articles. Twitter serves as an instantaneous press release to all your followers. If the article is free and online, a user can access it immediately by the link you post in a tweet. All tweets can only be 140 characters, so it is beneficial to shorten the URL or the link to the site. You can do this by going to either *http://bit.ly/* or *http://tinyurl.com/*. On these websites, type in the web address for the article in the box on the page. Click on the button to shorten it, and then use the shortened address in your tweet. If you scroll down the page on *http://tinyurl.com/*, you can use a link that allows the reader to verify the shortened link is not spam. The reader will first be directed to the tinyurl.com site and a description of the link source. The shortened URL for this option always starts with the word "preview."

#2 Drive more traffic to your website. You can write tweets about new content on your web page. (Example: Check out new conflict resolution techniques at <insert web address>) Again, use the shortened web addresses outlined above under #1.

#3 Expand your practice. Twitter gives you the opportunity to connect with more people in your community. By tweeting about ADR or listing it in your bio (on your profile page), users will request to follow you. If job seekers have found jobs by using Twitter, there is potential to receive referrals for mediation or arbitration. This is another tool to demonstrate your subject matter expertise.

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#4 Create awareness about ADR. Use your tweets to increase the web presence of ADR. The more people see ADR in tweets, the more likely they will use it as an option to resolve disputes. You can share links to articles, conferences, seminars, or important legislation.

PERSONALIZED HEADLINES

#5 Be the first to find out news. As stated in #1, it is very easy to promote any news via Twitter. Therefore, once a news story is published, it is likely to be posted on Twitter. Also, users can use Twitter to post ongoing updates during a legislative hearing, conferences, or a major speech. It is almost as if you are attending the event yourself.

#6 Learn the trending topics. On the right side of your home page, you can see the trending topics. These are the topics that are written about most in tweets at the moment. If you click on the topic, a description is listed at the top of the page. Also, all the tweets mentioning the topic are listed. To weigh in on the discussion, you can write a tweet including a hashtag and the trending topic. For example, write "#trendingtopic."

#7 Tailor your news to your interests. One of the best advantages of Twitter is that you can choose who to follow based on your interests. It is a customized ticker of news headlines. You can follow the tweets of all your favorite news organizations and reporters. In addition, Twitter now allows you to group the people you are following into a list. For example, you can create a list of the ADR practitioners or news organizations that you follow. The list will show the tweets from all the users in that category. (See Step 11 under "How to Get Started.")

QUICK AND EASY

#8 Save time. Twitter allows you to efficiently skim headlines and news. In law school, we learned the art of skimming. 140 characters in a tweet can be read in a glance.

#9 Become tech-savvy easily. This guide should help decipher Twitter and demonstrate that it is very user friendly. The Help link at the top of the Twitter page includes guides that are easy to understand. It provides computer screen examples to help the reader follow the instructions.

#10 Engage with other ADR professionals. Finally, this tool allows you to send out news without having to gather a list of email addresses. You can forward news by hitting the "retweet" button in one click. (See Step 10 under "How to Get Started.") It is not intrusive, as users can choose when to read it.

How to Get Started

1. Go to *http://twitter.com/* and click on the link to sign up.
2. Create an account by filling in the basic information.
3. Sign in.
4. Click on the "Settings" link in the top right corner. This page contains basic information. You can add your website link so that it will be listed on your profile page. You can also add a short biography. Users usually write 1-2 word descriptions of their profession and interests. (Example: ADR Practitioner, Labor Disputes, Contract Law.) If you want to control who sees your tweets and make sure your tweets do not appear in search engine results, check off the box at the bottom to make your tweets private. The tweets will only be visible to those whom you give permission. If you are primarily using Twitter to market your practice, then it might be wise to keep your tweets public. You can always change your privacy settings.
5. Next, return to your home page by the link at the top. Type your first "tweet" in the "What's Happening?" box at the top of your home page.
6. Click on the "Find People" link in the top right corner. You can either search for people's names by typing each one in under the "Find on Twitter" tab. You can also use your email address to find users under the "Find on other networks" tab.
7. Click on the "follow" button next to their name to have their tweets appear on your home page. If their tweets are private, then your request to follow the person will need to be confirmed by them before you can access their tweets. You can also follow a user's tweets by clicking on the Twitter icon on their web page. By clicking on the icon, you will be directed to sign in to your Twitter account.
8. If a Twitter user wants to follow you and your tweets are protected, then you will have to confirm their request. To confirm, go to your home page. Find the "new follower requests" link in the right column above the search box. Click on this link and respond by accepting each request by clicking on the button next to each user's name. You also have the choice to follow this person or decline their request. You can also block the person from following you and seeing any of your updates on Twitter.

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9. Once you have started to "follow" people, you can read their tweets on your home page. Your home page is comprised of a timeline of all the tweets from users you are following. Click on individual users to read only their tweets. Your profile page lists all of your tweets.
10. If you run the cursor over the tweet on your home page, you will see an option to "reply" or "retweet" in the right corner under the tweet. Your reply will appear on your profile page starting with the @ symbol followed by the user name to whom you sent the message. In order to see replies to your own messages, go to your home page. In the right sidebar under home, click on your user name preceded by the @ symbol. The @ symbol is shorthand for "reply to." "Retweet" means that you forward the original author's tweet to all of your followers. Note: You can also send other Twitter users a private message known as a "Direct Message." Click on the "Direct Message" link on your home page to do this.
11. To create a list of profiles that fall into a category like news or ADR, go to your home page and click on the number of profiles you are "following" in the right sidebar. Next to each user's name there is an icon that looks like a bulleted list. Run the cursor over the icon and click on "new list." Then, you can create a list to categorize the people you are following. Add specific users to this list by running over the same icon next to each user's name and checking off the appropriate list.

Good Luck and Happy Tweeting!

When is an apology really an expression of empathy? Mediating medical malpractice actions

By Donna J. Craig

Donna J. Craig, RN, JD is principal in the Bloomfield Hills firm of Donna Craig & Associates, PLC, a law firm specializing in health care law and alternative dispute resolution services. Ms. Craig is the chair-elect of the ADR Section of the State Bar of Michigan, and a member of a number of ADR panels, including the American Health Lawyers Association, American Arbitration Association and PREMi (Professional Resolution Experts of Michigan).

I began my legal career in an era when physicians and other healthcare providers were told when they had an adverse outcome, to "call your insurance company and to not talk to anyone except your defense counsel". From the time the adverse event occurred, healthcare providers would put their guards up and would avoid discussions with patients. Patients, on the other hand, had questions about what happened and felt shunned by their healthcare providers. A patient's frustrations would lead to the inevitable and litigation would be initiated.

You often hear plaintiffs say "It's not about the money", or "I just want some answers". Meanwhile, as the litigation drags on, the anger grows for these patients. As for healthcare professionals, they too experience frustration and anger for being sued and having their professional care critiqued. A standoff begins, and once in litigation, the parties never have the opportunity to have a dialogue.

Fortunately we have learned that "keeping it to oneself" is not the way to go. Over the last seven years, thirty-four states (not Michigan) have enacted "apology laws," enabling healthcare providers and patients to have these much needed discussions without fear that such expressions would be used against them in a court of law. While the statutes vary, they all have the common goal of encouraging people to talk and express empathy for another person's situation.

Apology laws are really a misnomer, as there are no apologies of wrongdoing, but rather expressions of empathy for the patient's situation. Studies show that when there is a sincere expression of empathy on the part of the healthcare provider, cases settle quicker and there is more satisfaction on the part of the plaintiffs with those settlements.

Personal injury and medical malpractice litigation will always involve a monetary component, which the parties' attorneys are equipped to negotiate on behalf of their clients. But there is also the need to address plaintiff's anger and sense of loss, and bring emotional closure to what they have experienced. A monetary settlement alone will not bring this closure. The best way to facilitate both a monetary settlement and closure for the plaintiff (for the healthcare provider as well) is to provide for dialogue between the parties.

Mediation provides an avenue in which to obtain closure for the parties. Oftentimes, as a mediator, I hear one or both attorneys say that "this is only about the money." And yet once the mediation begins, intertwined among the monetary discussion, we are addressing the patient's anger and other non-monetary issues and emotions. Mediation is successful when the parties are able to not only express what they need, but also truly hear what is being said to them. Once that occurs, the parties have a fruitful discussion, and a connection is made. A connection that cannot be replicated in litigation.

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Mediation and "apologies" or expressions of empathy go hand-in-hand. For a physician to say, "Mrs. Smith, I am sorry this happened," is the first step in connecting with the emotions being felt by the patient. For the most part, most people have the ability to express empathy or forgiveness in the right setting. Finding the right setting is where mediation comes in.

Whether or not an expression of empathy should be offered in mediation is a discussion that should start with defense counsel's assessment of the circumstances, facts, and evidentiary rules, since there is no "apology law" in Michigan. If defense counsel and the client feel it is in order, the pros and cons may be discussed with the mediator, either in a conference call prior to the mediation or during a private caucus during the mediation session. The mediator, without discussing confidences of the other side, can provide the defense with some guidance as to whether the expression would be taken in the light it was intended. Saying you're sorry may not be enough. For there to be true closure for both parties, a discussion about what happened (as guided by the needs of the parties) also needs to occur.

Disclosure. Oftentimes in mediation, patients want to know what happened and want some assurances the same outcome won't happen to someone else. I recall one mediation in which the decedent's family wanted to talk to the unit's administrator before settling, and without attorneys present! The monetary aspects of the settlement had already been hammered out. The attorneys agreed to allow the parties to talk to one another, in the presence of the mediator. After forty-five minutes the door opened and the plaintiffs announced that they were ready to sign the settlement agreement. The family expressed their feelings and had their questions answered. The discussion was also valuable for the administrator, who learned how her staff and unit were perceived, which was not in a good light.

Apology vs. Admission of Guilt. Of course in Michigan, since there is no apology law, any expression or apology should be analyzed by defense counsel in terms of whether it will be perceived as an admission of guilt or an admission against the defendant's interest. But there is a difference between admitting to liability and providing a true expression of sadness and empathy for the patient's situation. Heartfelt empathy during mediation, from one human being to another, can be a powerful tool to diffuse and lower the anger of the plaintiff and/or family.

Sincerity. Every apology or expression of empathy must be sincere. An insincere expression may be perceived as flippant or patronizing, and only make matters worse. Defense counsel must be the judge of whether her client is truly empathetic and capable of providing a sincere apology.

Closure. Plaintiff's anger is always present to some degree in all litigation, but particularly in medical malpractice actions. Healthcare providers also feel angry about being sued and having their professional judgment questioned. The mediator serves to identify anger and other emotions, and create an atmosphere where a dialogue between the parties can take place. While the mediator is not a therapist, mediations can be very effective in giving the parties a process to explore the facts, identify each party's needs, including resolution of certain emotions, and facilitating the dialogue. By participating in such a process, the parties at least have an opportunity to discuss what really matters to them and come to an emotional closure.

Mediation in probate cases

Susan J. Butterwick, J.D. and Susan D. Hartman, J.D.

The following summaries are based on mediations of probate cases. Judge Milton Mack, Chief Judge of Wayne County Probate Court, reviewed the summaries and submitted likely court decisions based on the facts of each case. The actual mediated agreements, following the judge's opinions below, illustrate the differences between court decisions and mediated settlements.

Estate division case. Two daughters (step-sisters) of deceased father disagreed over personal property and the house. Angry accusations surfaced over who had removed several valuable personal items.

Court Decision: "The question is who should be the Personal Representative of the estate. In this case, a Public Administrator would be appointed who would then propose how to distribute the property. The Public Administrator's plan would probably be approved by the court."

Mediated Agreement:

- All "missing" and contested items were located, accounted for and distributed cooperatively.
- Both families agreed informally on ways to repair their strained relationships.

Note: Relieved attorneys noted they had not been able to settle this contentious case for months.

Guardianship case. A woman in advanced stages of dementia was cared for at home by her two daughters, one of whom was co-guardian with their brother. The sisters accused their two brothers of removing mementos and furniture from the home, and denied both brothers

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access to the home. The sisters removed all photos of their brothers from their mother's room. The paid care workers, on the sisters' instruction, gave no health information to the brothers. The sisters characterized the co-guardian brother's calls for information and issuing care orders as interference.

The sister co-guardian petitioned to have her brother removed as co-guardian. Both sisters were unhappy that they had to "do all the work," while their brothers maintained they could not help while being denied access.

Court Decision: "The legal question would be whether to remove the brother as co-guardian. An additional question would be whether to remove the sister for failing to carry out her duties. The request to remove the brother would be denied and the sister would instead be removed."

Mediated Agreement:

- Sister and brother remain co-guardians.
- Brothers' photos to be returned to the mother's room.
- Co-guardian brother to make medical decisions.
- All siblings to exchange information for mother's care by logging information in her care notebook.
- Brothers to bring groceries, clothing, and medications to the home.
- Bills to be submitted to the brother for reimbursement from respondent's account.
- If further disputes arise, they will return to mediation before going to court.

Note: After the mediation, the siblings told old family stories, reminisced, and hugged one another.

Conservatorship case. An 81-year old single nursing home resident with cancer and early dementia was extremely proud that she had worked in a factory since age 20 and supported herself. Her brother petitioned the court for conservatorship so that he could pay her nursing home and other bills, which she had not been paying. Respondent opposed the court petition and the idea of anyone handling her finances.

Court Decision: "The legal question is whether she needs a conservator. The brother would probably be appointed in this situation."

Mediated Agreement:

- Respondent agreed to a conservatorship because she was reassured she would have some autonomy. Respondent received the $60 left over each month after payment of bills to use as she pleased.

Note: While the mediated agreement appears similar to the court decision in this case, the effect was different. During the mediation, respondent admitted that she couldn't keep track of things as well as she used to and didn't really object to her brother handling her bills. Her primary interest was in retaining some spending money ("to jingle in my pockets") and feeling that she still could make some choices. Had the court imposed the same conservatorship, she would have continued to resist her brother's authority and might never have discussed her interest in maintaining some autonomy while losing control over other aspects of her life.

Susan J. Butterwick has mediation experience in civil and family disputes. She is a private mediator and a volunteer for community dispute resolution centers in SE Michigan. She is an approved mediator trainer by the Michigan State Court Administrative Office and trains attorneys and community members for civil court mediation under MCR 2.411. Susan also provides mediation training in adult guardianship / probate, parent-teen, truancy prevention, and child protection matters. She has served as directing attorney / program director for court-connected adult guardianship and child protection programs. She currently serves as consultant director of family programs at the Wayne Mediation Center. A member of the Council of the State Bar of Michigan's ADR Section, Ms. Butterwick is an adjunct professor of law for the Wayne State University Law School and an adjunct professor for WSU's Master in Dispute Resolution Program through the Communications Department.

Susan D. Hartman has provided mediation and training services since 1996, privately through PeaceTalks and as a volunteer community mediator in Michigan. In 2007, she acted as a trainer and consultant on elder mediation for the Community Mediation Program, National Center for Mediation and Conflict Resolution, Ministry of Justice, Israel. She currently serves on the Training Standards Committee of the Association for Conflict Resolution's Section on Elder Decision-Making and Conflict Resolution, which has developed standards for Elder Mediation training programs. She is nationally known for her work in adult guardianship mediation, and is the author of the Adult Guardianship Mediation Manual and the chapter on adult guardianship mediation in ADR Handbook for Judges. She has served on the Councils of the ADR Section and the Elder Law Section of the State Bar of Michigan. She is a cum laude graduate of the University of Michigan Law School, and practiced elder law before becoming a mediator.

With its focus on collaborative process, mediation is often a good fit for probate cases. As in these examples, mediation is particularly useful when the claims are not simply legal disputes, but involve ongoing relationships. The process in a contested probate hearing can polarize and damage relationships further; a third-party decision based solely on the legal merits of the case usually creates unhappiness and anger on at least one side.

Mediatable issues can arise in almost any kind of case in the probate jurisdiction: decedent's estates, disputes arising from trusts, guardianships over minors or adults, conservatorships, other protective proceedings and Mental Health Code cases. In guardianship and

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mental health cases, although the question of capacity remains an issue for court decision, there are often a multitude of other issues, regarding care and planning and assignment of responsibilities, that are well suited to collaborative decision making.

As an attorney in probate-related mediation, you have an opportunity to counsel your clients on using the process effectively. You can educate your clients on their legal options and the legal effects of actions, letting them know the risks as well as benefits of a court hearing, and then allow them to be the final decision-maker once you have given them the necessary information. Guardians ad litem, or sometimes the vulnerable person's attorney, can help by focusing on the interests of the vulnerable person, by moving the focus onto meeting needs of the parties.

Attorneys who are able to prepare themselves and their clients well, to understand what their clients believe is truly important about a case, and to recognize that personal relationships as well as legal issues may have an impact on the agreement, will find that clients benefit from mediated agreements. Even when agreements are not reached, parties will have gained insight about their own goals and expectations about the case, and often will have set the stage for reaching a settlement through further negotiation.

This article originally appeared in the Feb. 8, 2010, edition of Michigan Lawyers Weekly.

Upcoming ADR Trainings

General Civil

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

Plymouth: **June 3-5, 25-26**
October 7-9, 29-30

Training sponsored by Institute for Continuing Legal Education

Register online at www.icle.org, or call 1-877-229-4350.

Bloomfield: **June 4, 11, 18, 25, 30**
July 29, August 4, 12, 19, 26
September 17, 24, October 1, 8, 15

Training sponsored by Oakland Mediation Center

Register online at www.mediation-omc.org or call 248-338-4280

Lansing: **August 19-21, 27-28**

Training sponsored by Resolution Services Center

Call 517-485-2274, or visit www.resolutionservicescenter.org/training/

Domestic Relations Mediation Training

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

Ann Arbor: **July 26-30**

Training sponsored by Mediation Training & Consultation Institute

Register online at www.learn2mediate.com or call 1-734-663-1155

Advanced Mediation Training

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

Plymouth: **June 8 6th Annual Mediators' Forum**

Training sponsored by Institute for Continuing Legal Education

Register online at www.icle.org, or call 1-877-229-4350.

Bloomfield: **June 17**

Trainer: Zena Zumeta

Training sponsored by Oakland Mediation Center

Register online at www.mediation-omc.org or call 248-348-4280

Petoskey: **September 10**

Trainer: Anne Bachle Fifer

Training sponsored by Northern Community Mediation

Contact Jane Millar, 231-487-1771

Leading by Collaboration, Governing Through Consensus

By Daniel Cherrin

Daniel Cherrin is an attorney, mediator, public relations executive and lobbyist. Cherrin is the former Communications Director/Press Secretary for the City of Detroit and president of North Coast Strategies, which provides cutting edge practical advice where government action or inaction, litigation vulnerability or complex regulatory requirements will impact your reputation and bottom-line. You can reach Cherrin at dcherrin@NorthCoastStrategies.com or (313) 300-0932 or visit www.northcoaststrategies.com for more information.

Conflict among lawmakers and regulators is inevitable. The issues that come before the legislature, city councils, school boards and other government bodies can have the potential to divide a community. As a result, policy makers tend to avoid controversial issues or postpone crucial decisions hoping to avoid conflict. A carefully structured dialogue, mediated or facilitated by skilled third-party neutrals could offer a more effective and durable method to resolve conflicts and build consensus around controversial and often complex public policy issues.

Consensus building is a process by which the parties seek unanimous agreement. It involves a good-faith effort by each stakeholder to meet the interests of each other. In today's legislative environment, politics often trumps policy and public policy dispute resolution can assist lawmakers and regulators in reaching consensus and bring closure to a number of issues that have long been unresolved.

The process by which consensus is reached is designed to change how the stakeholders think of their issues and what is possible to bring them to some conclusion. Through facilitation or mediation, conflicts can be avoided and conflicts can be resolved -- Even when it involves the intersection of public policy and politics. Public policy dispute resolution provides for a nonpartisan process for resolving public policy disputes and has proven successful at all levels of government. In fact, it is emerging as a more effective way of dealing with some of the most polarizing issues, such as: community development; energy and the environment; health care; human services; telecommunications; transportation; and, intergovernmental disputes.

In public policy dispute resolution, all the interested stakeholders come together with the help of a third party neutral who will assist the stakeholders in reaching consensus. For example, in 1996, the State of Michigan, along with the other Great Lakes states participated in mediation in order to resolve the conflict over Chicago's diversion of Lake Michigan water. The United States Justice Department and Solicitor General's Office convened a mediation process ending years of conflict, producing a Memorandum of Agreement between all eight states on how to manage the world's largest source of fresh water. Public policy dispute resolution creates a process to resolve even the most controversial issues.

Negotiated rulemaking is a form of public policy dispute resolution. It is a consensus-based approach used to draft regulations. It has worked in resolving a number of controversial issues. For example, in 2001, wind energy permitting procedures were typically slow and required coordination among federal, state, and local governments as well as private business, local residents, and environmental organizations. When wind power developers targeted Sherman County, Oregon as a potential development sight, then-Governor John Kitzhaber initiated a community level collaborative process. Local leaders responded and convened a group of stakeholders to work together to address permitting issues proactively. The project helped minimize conflict and streamline permitting. There is a similar process here in Michigan, organized by the Great Lakes Wind Council to generate regulations concerning off shore wind farms.

As alternative dispute resolution becomes a more accepted practice to resolving disputes, various governments are giving serious thought to integrating ADR in resolving issues in various governments and agencies. Public policy dispute resolution has worked in states such as Texas, New Mexico, Utah and Virginia, where each state has passed legislation creating a policy dispute resolution process.

At the same time, as the City of Detroit Charter Commission begins to rewrite the city charter, there is a unique and rare opportunity to create a process, within the City Charter, by which disputes can be resolved at the council table, or to help resolve disputes between the public, the city and its various departments. Legislation or regulations can provide the framework by which certain public policy and regulatory disputes are resolved.

Policymakers can avoid making difficult decisions on controversial issues by creating a process by which public policy disputes can be resolved. Through a facilitated consensual process, issues such as government shutdowns, employment-related issues, the negotiation of intergovernmental agreements and delayed projects can be avoided.

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Collaboration, however, is not appropriate for all decisions. It is not necessary or recommended to use a formal collaborative process for routine, simple, or urgent decisions. Collaborative processes are often effective when applied to complex policy questions that affect multiple, interdependent interests, where all the diverse parties affected have compelling reasons to engage with one another in a search for a joint policy or program outcome, and where sufficient time and resources are available to support the process.

Nonetheless, decisions that are reached collaboratively can result in high-quality outcomes that are easier to implement, receive fewer legal challenges, make better use of available resources, and better serve the public. Simply, better policy can be made when decision-makers have more data and a deeper understanding of the interests of all those involved. In addition, making decisions through collaborative processes can create a long term "network dynamic" of shared learning, improved working relationships, and better joint problem solving ability in the future, that will help the state or local communities move forward and on to the next issue.

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

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