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# Unsettled State of Affairs – Non-Party Discovery in Commercial Arbitration

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## INTRODUCTION

One hallmark of arbitration is limited discovery. This is in stark contrast to discovery in civil litigation, which includes the use of multiple and broad devices to acquire information not privileged and relevant to the dispute. Why the contrast? The foundational premise of limited discovery in arbitration is that arbitration is more streamlined, informal and cost-effective. Michigan courts have observed that when parties choose to arbitrate, they forego the "procedural niceties" normally associated with litigation.

Given that full-scale discovery is not available in arbitration, how can parties in arbitration acquire information they need to ensure a full and fair adjudication of their dispute? The growing complexity of disputes which often involves multiple parties and millions of dollars surfaces the problem of non-party discovery. This short article discusses the contours of arbitral authority in directing non-party discovery under various statutes – the Federal Arbitration Act (9 U.S.C. § 7 (2000)), the Michigan Arbitration Act (MCL 600.5001 *et seq.*), and the Revised Uniform Arbitration Act, effective July 1, 2013 (Senate Bill Nos. 901-903). This article also discusses arbitral authority under contract, which includes the rules of the American Arbitration Association.

## THE PARTIES' CONTRACT

The starting point in determining whether discovery is permitted is the parties' contract. Since arbitration is a creature of contract, parties are free to include in their contract any provision relating to discovery. The provision can include the full panoply of devices associated with formal trial, modest discovery directed by the arbitrator upon a showing of good cause or no discovery at all. Without explicit contractual authority to order discovery, the parties would not be entitled to discovery unless other rule-based or statutory authority is implicated.

## COMMERCIAL ARBITRATION RULES OF AAA

Most commercial contracts specify a set of provider rules, the most common of which are the rules of the American Arbitration Association (AAA). AAA's regular track arbitration rule, R-21 Exchange of Information, permits the parties to exchange "documents and other information" and identify witnesses "at the discretion of the arbitrator consistent with the expedited nature of arbitration." AAA's rules for large, complex cases, L-5 Management of Proceedings, sub-section (d) goes further and permits pre-hearing discovery expressly, "as may be agreed to by the parties" or "as directed by the arbitrator, consistent with the expedited nature of arbitration." This rule, which applies in cases involving a threshold of $1,000,000 exclusive of interest, attorneys' fees and arbitration costs/fees, includes depositions or interrogatories to persons the arbitrator determines "is necessary" to decide the matter. While the regular track or complex case track rules may be read broadly, neither set of rules refers explicitly to non-parties. However, the wording, "to such persons" under the complex track suggests that in unusual circumstances, discovery may be directed at non-parties. Counsel should note that not all AAA rules are crafted identically. For example, the Construction Rules of the AAA includes an "exceptional case" provision that permits the arbitrator to direct discovery beyond the limited forms enumerated in the rule. [R-24(d)].

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## STATUTORY AUTHORITY

### ❖ The Federal Arbitration Act (FAA)

If the contract is silent with respect to discovery, and does not include reference to provider rules, the parties may look to the FAA. In order for the FAA to apply, the contract must evidence a transaction "involving commerce." The "involving commerce" language has been broadly construed by the United States Supreme Court. [*Allied Bruce Terminix Cos v. Dobson*, 513 U.S. 265 (1995)]. Thus, the FAA would apply to most commercial arbitrations.

Section 7 of the FAA grants arbitrators authority to "summon in writing any person to attend before them and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material" as evidence in the case. This language empowers arbitrators to subpoena witnesses – including non-parties – to appear at the arbitration hearing and produce documents for the hearing.

Federal court decisions are deeply divided on whether this language authorizes an arbitrator or arbitration panel to subpoena a non-party to produce documents or to provide testimony in advance of the evidentiary hearing. This divide, reflected in the case summaries below, stems from the courts challenge in balancing the subpoena powers available to arbitrators under the FAA with the goals of arbitration – efficiency, speed, and cost-effectiveness.

#### Adopting the *"implicit authority"* rationale

- Sixth Circuit – *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) (adopting in dicta the "implicit authority" rationale authorizing arbitrators to order pre-hearing document production by non-parties). Although the Sixth Circuit decided this case under Section 301 of the Labor-Management Relations Act of 1947, the court reached its decision by analogizing to the FAA. "The FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing."
- Eighth Circuit – *In Re Arbitration Between Security Life Insurance Co. of America and Duncanson & Holt, Inc.,* 228 F.3d 865 (8th Cir. 2000) (adopting the "implicit authority" rationale of the Sixth Circuit but also determining that the non-party was "integrally related to the underlying arbitration"). The Eighth Circuit rejected the non-party's argument that Section 7 of the FAA requires the district court to make an independent assessment of the materiality of the information.

#### Rejecting the *"implicit authority"* rationale

- Second Circuit – *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2nd Cir. 2008) (holding that Section 7 of the FAA does not authorize arbitrators to demand pre-hearing document production from non-parties prior to arbitration). The court stated that there might be valid reasons to empower arbitrators to issue subpoenas to non-parties, but the court "must interpret a statute as it is, not as it might be."
- Third Circuit – *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) (rejecting the Sixth and Eighth Circuit's "implicit authority" approach and the "special need" exception of the Fourth Circuit and adopting instead a strict constructionist approach to Section 7 of the FAA which restricts non-party subpoenas to "arbitration hearings"). **[See below for qualification]**.

#### Requiring a *"special need or hardship"* nexus

- Fourth Circuit – *COMSAT Corp. v. National Science Foundation.*, 190 F.3d 269 (4th Cir. 1999) (recognizing the limitations of Section 7 of the FAA but creating a special need or hardship exception that might apply in "unusual circumstances"). The Fourth Circuit left undefined the term "special need," except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.

#### Authorizing a Pre-Merits Hearing for Document Production Only

- Second Circuit – *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2nd Cir. 2005) (holding that under Section 7 of the FAA, an arbitrator or arbitration panel may, in the interest of arbitral efficiency, require that non-parties produce material evidence at a special pre-merits hearing held solely for the purpose of document production).
- Third Circuit – *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) (rejecting the "implicit authority" approach but also observing that arbitrators could require pre-hearing document production of materials from non-parties by conducting a special pre-merits hearing).

Federal cases decided since *Hay Group* have aligned more frequently with the strict interpretation approach limiting non-party discovery generally.[1] Other cases more specifically hold that under § 7 of the FAA, an arbitrator does not have authority to issue subpoenas ordering non-party depositions.[2]

### ❖ The Michigan Arbitration Act (MAA)

The Michigan Arbitration Act incorporates the Michigan Court Rules.[3] Discovery implicates three court rules – MCR 3.602, MCR 2.506, and MCR 2.305. MCR 3.602(F)(1) provides that "MCR 2.506 applies to arbitration hearings." Under MCR 2.506, a subpoena may be directed to a party or witness to testify in open court and to produce records. [MCR 2.506(A)(1)]. Subpoenas pursuant to MCR 2.506

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are to be issued in accordance with MCR 2.305, which permits subpoenas for depositions and for record inspection before trial. [MCR 2.506(A)(3)]. Thus, under convoluted linkage, arbitrators governed by the MAA can issue pre-hearing subpoenas for depositions and/or document production.

The passage of the RUAA, which will supersede the MAA on July 1, 2013, solidifies the authority of an arbitrator to issue pre-hearing subpoenas. The RUAA also authorizes an arbitrator to issue sanctions for non-compliance and explicitly provides for judicial enforcement in the event of non-compliance.

❖ **The Revised Uniform Arbitration Act (RUAA)**

The RUAA recognizes that parties in arbitration may require a mechanism by which discovery can occur, without compromising the goals of arbitration. Section 17(3) authorizes arbitrators to order pre-hearing discovery [not limited to document production] when "appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." RUAA drafters intended to follow the majority approach under the case law of the FAA by ensuring broader arbitral discretion.

According to RUAA Commentary, the issue of the scope of permissible discovery directed at non-parties assumed prominence as a result of the holding in *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999), in which the Fourth Circuit Court of Appeals held that the under the FAA, arbitrators did not have power to issue document production subpoenas to non-parties prior to the arbitration hearing. Earlier federal district court opinions held to the contrary. See, for example, *Amgen, Inc. v. Kidney Ctr. of Delaware County*, 879 F. Supp. 878 (N.D. Ill. 1995). Thus, the aim of Section 17 was to clarify that arbitrators have subpoena authority over discovery, and that such subpoena power, "while not entirely clear from the language of the RUAA, *"ipso facto"* empowers the arbitrator to order non-party discovery."[4]

Of particular note is that Section 17(7) allows parties to secure necessary information in an arbitration involving persons located outside the state. Currently, enforcing a subpoena or a discovery-related order requires two separate legal actions. Section 17(7) provides for a single enforcement action in the state where the arbitration occurs.

## CONCLUSION

Discovery issues will continue to abound in arbitration, largely because parties often fail to include a clear provision for discovery in their contracts. This failure is understandable, since parties do not like to contemplate the occurrence of a controversy at the beginning of what they aspire will be a long and financially beneficial relationship. This point belies the reality. Conflict is unavoidable, and in commercial relationships, it is almost a given. Counsel would be wise to encourage their clients to include a provision respecting discovery to avoid the procedural pitfalls noted in this article. While the passage of the Revised Uniform Arbitration Act may offer greater predictability, its application to a particular dispute is not magical. Without a choice-of-law provision that states Michigan law will apply, the FAA is likely to fill the gap. The state of the law under the FAA is in flux, and it is not likely to be settled any time soon. Smart contract drafting at the front end will avoid complications at the back end – complications that could have enduring consequences.

[1] *See, for example, Matria Healthcare LLC v. Duthie*, 584 F.Supp.2d at 1078 (N.D. Ill. Oct. 6, 2008) (concluding that neither the text nor the history of § 7 of the FAA allows a non-party in arbitration to participate in discovery without his consent).

[2] *See, for example, In re Arbitration Between Hawaiian Elec. Indus., Inc. and HEI Power Corp.*, No. M-82, 2004 WL 1542254, at *3 (S.D.N.Y. July 9, 2004) (concluding that it is beyond the scope of § 7 of the FAA for an arbitration panel to issue a non-party subpoena for pre-hearing testimony). See also *SchlumbergerSema, Inc. v. Zcel Energy, Inc.*, No. Civ. 02-4304PAMJSM, 2004 WL 67647, at *2 (enforcing an arbitration panel's document production subpoena under § 7 of the FAA but not enforcing the subpoena with respect to the pre-hearing deposition of a non-party witness. "[T]he production of documents . . . imposes a lesser burden than does a witness deposition.").

[3] MCL 600.5021 states, "The conduct of arbitration shall be in accordance with the rules of the supreme court."

[4] David W. Lannetti, *Protecting Contracting Parties in Construction Arbitrations Based on the Availability – or Non-availability – of Nonparty Discovery*, 29 CONSTR. LAW. 24 (2009).

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

# Letting Litigants Know That MEDIATION Really Works!

## Mediation Settles Cases

- Nearly 70% of all cases sent to mediation result in settlements that day. (*Kent County*, 2008 statistics for general civil and divorce mediations). Compare to 17% acceptance rates for case evaluation. (*Oakland County*, 2008 article by Kevin M. Oeffner in *Laches*). Many cases that don't settle on the day of mediation do so shortly afterwards.
- Nearly all mediated agreements are fulfilled by the parties. A 1999 SCAO study showed a voluntary compliance rate of 90% for mediated agreements vs. 53% for non-mediated judgments. (*SCAO Study of Small Claims Cases*, 2001).
- Client surveys show that over 90% of mediation participants are satisfied with mediation- even if the case is not resolved at mediation. (*Kent County Survey of Mediation Participants*, 2008).

## Mediation Procedures are Flexible

- Location for the mediation is flexible: attorney offices, courthouses, conference rooms, hotels, airports, even homes!
- Timing is flexible to accommodate discovery needs.
- Relief is flexible and not limited to remedies available in court.
- Although most are concluded in a single session, multiple mediation sessions are possible and can be scheduled at the convenience of the participants.
- Parties can jointly select a mediator or, absent agreement, the ADR Clerk can appoint one randomly from the court's roster of qualified mediators.

## Mediation is Often Effective When Used Early

- Although scheduling the actual mediation session(s) should be jointly determined between the mediator and all counsel, mediation often works best when scheduled before positions harden and parties become entrenched.
- Extensive and costly formal discovery is not always necessary prior to mediation-- mediators can help counsel narrow and target discovery to obtain the essential information required for mediation.
- In fact, early mediation is likely to save time and money otherwise invested in discovery.

## Mediation Saves Time & Money

- Because mediation more often than not either leads to a settlement or narrows discovery, it saves both time and money.
- Early mediation often maximizes the savings to all parties. The mediator can help tailor the process to maximize savings while accommodating discovery needs.
- While parties usually pay a pro rata share of the mediator's charges, studies show they will still save money.

## Mediation Allows the Parties to Obtain Their Own Best Resolution

- The parties themselves are best able to devise a settlement to meet their fundamental needs, which may include relief not available in court.
- Mediation is "party-centric," providing the only point in litigation with direct communication between the parties and informal communication directly with opposing lawyers.
- A mediated settlement may include issues and persons outside the confines of litigation.

## Mediation Helps All Participants Assess Risks

- Cases often don't settle prior to trial due to limited views or positions taken by one or more parties or counsel. In mediation, such views or positions are often changed and the parties are able to proceed with a more realistic assessment of their case.
- Clients and their counsel need to confront the strengths of their opponent's case as well as the weaknesses of their own case, prior to the day of trial. Mediation can assist parties to identify such strengths and weaknesses, and quantify the cost of a trial, to permit them to engage in more meaningful risk assessment. Often, attorneys appreciate having their OWN clients receive this reality testing from a neutral observer.

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## Mediation Does Not Require Parties to Settle

- Parties ordered into mediation are not *forced* to settle. They are never compelled to accept a proposal with which they disagree. They are merely expected to discuss the case directly with their opponents.
- Even when complete resolution is not achieved, mediation may still help to resolve some of the issues and help everyone focus on the important ones.

## Mediation Works!

- Working with a mediator allows attorneys and clients to control their destiny by fashioning their own resolution rather than having others do so.
- Mediation can preserve or restore relationships by eliminating fundamental misunderstandings and by improving communication between parties.

**For more information, please contact:**

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# Special Masters Under the Michigan Court Rules

*By Tifani Sadek, Clark Hill, PLC*

The appointment of a special master is a frequently used method of assisting trial courts with various matters, especially discovery-related disputes. However, Michigan law is ambiguous on this issue because while special masters are often utilized, there is no express authorization for their appointments. Where special master appointments have been stipulated to by the parties, they have withstood judicial scrutiny. *See Mitan v. New World Television,* 469 Mich. 898 (2003). In *Mitan*, the Michigan Supreme Court did not explicitly authorize the use of special masters, but it did hold that it is improper to reverse their appointment on appeal where the parties requested them. *Id*. at 898.

However, where trial courts have attempted to grant specific judicial powers to special masters without stipulation of the parties, the Michigan Court of Appeals has reversed them. For example, in *Carson Fischer Potts & Hyman v. Hyman,* the Michigan Court of Appeals struck down a trial court order that appointed a special master where the order conferred the power to make recommendations of findings of fact and conclusions of law to the court. 220 Mich. App. 116, 124 (1996). The Court reasoned that Michigan Rule of Evidence 706, which was the trial court's basis for appointing the special master, does not expressly authorize such powers. Similarly, in *Oakland Co Pros v. Beckwith-Evans Co.*, the Michigan Court of Appeals reversed the appointment of a special master who was granted the authority to make recommendations to the trial court pertaining to factual findings and legal conclusions. 242 Mich. App. 579, 590 (2000). In *Beckwith*, the trial court had relied on MCR 1.105 instead of MRE 706 in its order, but the Michigan Court of Appeals again found that this rule did not expressly authorize the delegation of such judicial functions to a special master.

In a more recent case, *Caudill v. State Farm Mutual Ins. Co.,* both the Michigan Court of Appeals and the Michigan Supreme Court declined, without comment, to review the trial court's appointment of a special master under terms similar to that in *Carson* and *Beckwith*. 485 Mich. 1107 (2010). While the declination itself is not instructive, the dissent in *Caudill* implicates the Michigan Court Rules that provide for alternative dispute resolution ("ADR") as one legally permissible avenue for appointing a special master. Per MCR 2.410, after consultation with the parties, a trial court may order that a case be submitted to an "appropriate ADR process," which is defined as "**any** process designed to resolve a legal dispute in the place of court adjudication." MCR 2.410(A)(1), (A)(2), (C) (emphasis added). Further, MCR 2.410(C) provides authority for the court to "specify, or make provision for selection of, the ADR provider" as well as "make provision for the payment of the ADR provider."

In summary, a trial court's appointment of a special master where all parties have consented has been upheld as a matter of fairness. Absent such a stipulation, the legal grounds for the appointment is uncertain. However, given the considerable flexibility provided by the Michigan Court Rules in providing for alternative dispute resolution, the trial court could invoke MCR 2.410 and appoint a mediator to mediate the case and order that, in the event that the parties cannot reach a settlement, the mediator would then render a case evaluation.

# 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: **June 6, 13, 20, 27, July 11**
**September 13, 20, 27, October 4, 11**
*Training sponsored by Oakland Mediation Center*
Register online at www.mediation-omc.org or call 248-348-4280 ext. 21

Flint: **June 7, 14, 21, 28 and July 12**
*Training sponsored by Community Resolution Center*
Call (810) 249-2619

Plymouth: **October 3-5, 18-19**
*Training sponsored by Institute for Continuing Legal Education*
Register online at www.icle.org or call 1-877-229-4350.

## Domestic Relations Mediation Training

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

**May 16, 23, 30, October 18, 25,**
**November 1, 8, 15, 22**
*Training sponsored by Oakland Mediation Center*
Register online at www.mediation-omc.org or call 248-348-4280 ext. 21

## Advanced Mediation Training

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

Holland: **May 17, 2013**
"Mediating Monetary Claims and Damages"
Trainer: Stephen Tresidder
*Training sponsored by Mediation Services*
Contact Susan Kuite, 616-399-1600, skuite@mediationsolvesconflicts.org

# Mediation: When, Not If

*Matthew W. Schlegel*

Only a tiny percentage of cases actually go to trial because approximately 98 percent of them are resolved either through settlement or a dispositive motion. In light of that statistic, parties and their attorneys should be asking themselves when, not if, they should mediate their cases. Mediation is known for its high success rate in resolving disputes efficiently.[1] Selecting the appropriate time to mediate, however, can substantially improve the chances for a successful resolution. Mediate too soon and you may waste a good opportunity for settlement and sour the parties on the mediation process. Mediate too late and you may have wasted time and money developing the case unnecessarily.

Parties often do not engage in serious settlement discussions until after they have already fought through expensive discovery and pretrial proceedings. Although that may be appropriate in some cases, it is not necessary in every case. Each case is different and needs to be analyzed as such. Mediation is a process designed to provide an ideal opportunity to reach a mutually acceptable settlement. Maximizing that opportunity requires the parties to have the basic information necessary to adequately assess the risks involved. It generally does not require that discovery have been completed as to all possibly relevant facts, or that all pretrial legal issues have been resolved by the court.

**Most Cases are Appropriate for Mediation**

Sure there are bound to be certain cases that may not be appropriate for mediation. Perhaps mediation is not necessary because the parties or attorneys can resolve the case on their own, or perhaps the case involves one of those rare "all or nothing" issues that just cannot be compromised by either side. Those cases are the rare exception, however, and are fewer than many believe. The vast majority of civil cases can benefit from a properly timed mediation. If mediation is not appropriate when first considered in a case, reconsider it later on.

Most attorneys have heard at least one client proclaim that he will never settle regardless of the expense involved in going to trial because "it is the principle involved." Such clients may not be ready to mediate until after the litigation process has associated a dollar figure with that principle the client holds so dear. Other cases may involve opposing parties who are equally convinced that they cannot possibly lose at trial. Obviously both sides cannot be right, but those parties may

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not be ready for mediation, at least not at that time. Yet other parties may believe that their case does not merit the additional cost of mediation. That determination should take into consideration how much litigation expense and risk can be avoided if mediation resolves the case. The cost of mediation in most cases will be substantially less than the cost of proceeding to trial.

**The Advantages of Mediation**

*Flexibility*

Parties may say that they want "their day in court," when what they really want is an acceptable resolution to their dispute. A trial and even an arbitration tends to be an all or nothing no-holds barred battle that often leaves at least one party bitter and dissatisfied. Mediation, on the other hand, provides the parties an opportunity to reach a mutually acceptable resolution whereby both sides are at least satisfied with the process and accepting of the resulting outcome. Mediation can be particularly beneficial where there is a desire to preserve relationships because the opposing parties are likely to continue to interact into the future, such as with disputes involving partnerships or continuing working relationships.

Parties have substantial flexibility in designing the mediation process itself. They can decide when to mediate, where to mediate, and who to select as their mediator. Many experienced mediators are convinced that they have the skills necessary to assist the resolution of any dispute. Some parties, however, believe that they benefit from selecting a mediator with specialized knowledge or expertise in a particular industry or area of law. Other parties consider whether a particular mediator favors a "facilitative" or more "evaluative" mediation philosophy.

It has been said that litigation is typically all about money, whereas mediation is all about resolution. A trial generally results only in a monetary award, which will not achieve either party's non-financial objectives. Mediation, on the other hand, provides the parties with the flexibility to craft a settlement that provides both sides with what they need, including non-monetary terms of resolution that are not available in court. Part of the value a skilled mediator can bring to the process is assistance identifying and suggesting creative solutions tailored to the unique issues presented in the specific case at hand.

*Confidentiality*

The understandable reluctance of opposing parties to divulge their "true" settlement positions to each other is a common impediment to settlement. Mediation allows the parties to provide their settlement concerns and figures to a neutral mediator in confidence. Upon being informed of the parties' respective concerns and desires in private, a mediator is better positioned to help the parties reach a resolution that fulfills their actual needs. It is important, however, that the parties select a mediator who they can trust to hold their settlement discussions in confidence, only to be revealed to the other side upon express prior consent. One of the foundations of mediation is the comfort parties can have in disclosing information for limited settlement purposes without fear that the information may be divulged or used against them later. Pursuant to MCR 2.412(C): "Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in subsection (D)."[2]

*Catharsis Opportunity*

The parties' emotions also can be a settlement roadblock, often without the parties' conscious awareness. Mediation can provide a party the opportunity to "vent" his feelings, thereby removing emotional barriers and allowing parties to focus more rationally on practical solutions. This might be done either through a "private caucus" or a "joint session." Experienced mediators often comment on the substantial progress that can be made towards settlement once a party feels he has had the opportunity to be heard and understood by his opponent. Each case must be analyzed independently, however, and the parties' attorneys should discuss such emotional issues with the mediator prior to the mediation. A skilled mediator can monitor emotional levels, adjust the process accordingly, and attempt to maintain civility to promote a mutual resolution.

*Cost Savings*

Mediation can also save the parties unnecessary litigation costs. Those savings can be substantial depending on the timing of the mediation and settlement during the continuum of a pending lawsuit. Even if a mediation does not result in an immediate settlement, it may nevertheless be "successful" in terms of identifying facts and claims, focusing the issues, accelerating the process, and potentially laying the groundwork for a future settlement.

**Deciding the Appropriate Time to Mediate**

In light of the fact that the vast majority of civil cases settle prior to trial, one might argue that the best time to attempt to settle a case through mediation is at the very beginning of that case. A case must be "ripe" for mediation. The parties must have enough information at mediation to make a reasonably informed decision. Selecting the appropriate time to mediate, however, is a decision that must be made on a case-by-case basis.

*Discovery Requirements*

Do the parties need any discovery before they mediate? If so, how much discovery? The parties must balance their desire for enough information to make an informed decision against their desire to avoid unnecessary litigation costs. Does the likely settlement amount of a case at a given point in time justify the anticipated expenses associated with additional discovery and pretrial procedures? Will an exchange of documents suffice? Do the parties really need to depose every potential witness before they mediate, or might one or two key witness depositions be sufficient? Do the parties need any expert witness depositions prior to mediation, or might those experts' reports suffice? Do the parties need to incur any expert witness expense at all prior to mediation?

*Motion Rulings*

Sometimes a case may not be ready for mediation because, although the parties know the facts well enough, at least one party needs a legal ruling from the court before it is willing to "come to the table." That situation often involves dispositive motions, but it also may involve non-dispositive motions, such as motions in limine. Some parties or their attorneys may insist that their motions be heard before mediation because they believe they will win their motions and do not want to compromise unnecessarily. Of course, those parties' settlement postures may suffer if the court does not see their motions the same way they do and rules against them. The very uncertainty of the outcome of a motion can create incentive for parties to compromise.

*Case Evaluation*

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The ADR Quarterly

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## We Are Going Green!

In an effort to cut back on the amount of paper used to produce the ADR Quarterly, we are announcing our **Go Green** campaign. We have discovered that a significant number of our members receive the Quarterly in hardcopy, even though they are also on our e-mail list and receive the Quarterly electronically at the same time. We also know that many of our members receive the Quarterly electronically and then print it out for reading or to keep a copy in their own files. We determined it was time to "save a few trees", and also, candidly, save some cost (which is substantial) so that the Section dues could be put to more important uses, such as last year's support of the passage of the Revised Uniform Arbitration Act.

Look for us in the near future to make the Quarterly even more "electronically user friendly" so that you will not even be tempted to print it off on receipt in your e-mail box. Thank you for understanding and for your support! - *Editor*

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Case evaluation also can impact the timing of mediation. Should the parties mediate before or after case evaluation? Will they have sufficient information to mediate prior to case evaluation, which generally follows the completion of most discovery? Might case evaluation result in a number that can actually become an impediment to settlement? Do the parties want to mediate in lieu of case evaluation? Although MCR 2.403(A)(2) provides that case evaluation of tort cases is mandatory in circuit court, courts may except claims seeking equitable relief from case evaluation for good cause or by parties' stipulation pursuant to MCR 2.4031 (A)(3). Case evaluation is just one of the various types of alternative dispute resolution processes that all civil cases are subject to under MCR 2.410(A), and a court may order that a case be submitted to any "appropriate" alternative dispute resolution process after consultation with the parties pursuant to MCR 2.410(C). Consider whether the parties want to ask the court for leave to submit their case to mediation instead of case evaluation.[3]

**Conclusion**

Parties and their attorneys should continually consider appropriate opportunities to explore a reasonable settlement from the inception of a lawsuit, if not earlier. Human nature must be taken into account. Some people simply will not consider budging from their positions absent some change in status. That change may come from an adverse ruling from the court; it may come from a gradual wearing down from the cost and aggravation of litigation; or it may come from sources that were not anticipated and which may never even be identified. Thus, even if mediation is not possible or appropriate at one point in time, it should be re-considered throughout the litigation process. Selecting the right time to mediate a case maximizes the value of that mediation and increases the likelihood of a settlement.

[1] Mediation" as referenced in this article is "a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement," as defined in MCR 2.411(A)(2).

[2] Check the limited confidentiality exceptions set forth in MCR 2.412(D). For discussion of some of the issues involving the scope of confidentiality in mediation, see Webb and Pappas, Confidentiality in Mediation: *A Reality Check for the Process*, Laches (May 2008).

[3] See Basta, *When Case Evaluation Just Gets in the Way*, The PREMIer Source (January 2009), available at www.premi.us.

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