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The ADR Quarterly
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Mediation And The Public Body Client

by Richard J. Figura
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Ever since the adoption of the present ADR provisions by amendment of the Michigan Court Rules in August, 2000, an increasing number of trial courts have adopted ADR plans which have implemented mediation practices. As a result, in many circuits today most civil lawsuits are referred to mediation with the mediation required to be completed before the final pre-trial conference. While there are some practitioners out there who view court ordered mediation as just one more obstacle to get past on the way to trial, the majority recognize it as a cost effective opportunity to resolve a dispute in a manner acceptable to the client, thereby saving the costs of litigation, including the damaged good will of the litigants as well as their out of pocket dollar costs.

As an advocate, when you are preparing for mediation and your client is a governmental body, there are some special dynamics of which you need to be aware. This article will address what you, as counsel, can do to ensure your public body client is adequately prepared to participate in the mediation process and to increase the likelihood that your and your client's efforts will result in an acceptable settlement.

Mediation Confidentiality and the Open Meetings Act

Pursuant to MCR 2.410, the court can direct (and they always do) that the parties, their agents, representatives, insurance carriers, and others, attend the ADR proceeding and that the persons attending "have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement." (emphasis supplied)

This can present a problem for counties, cities, villages, townships and other public bodies governed by a legislative body, because in those cases it is only the legislative body which has the authority to approve a settlement. Literal compliance with this rule would require a quorum of the legislative body to participate in the mediation. That, however, would require the mediation session to be open to the public under the Michigan Open Meetings Act (OMA).[1] Under the OMA, all decisions of a public body shall be made at a meeting open to the public.[2] A meeting is "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy . . .."[3]

The attendance of a quorum of a public body at a mediation would require the mediation be open to the public, but that would be contrary to the confidentiality requirement of MCR 2.411 which provides that "Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties." Getting such written consent is highly unlikely and, in any event, a mediation conducted in full view of the public would undermine the willingness of the parties to speak with candor, one of the main purposes of mediation confidentiality.

A better option which is followed in one form or another in many circuits is for the public body to be represented at the mediation by representatives of the legislative body numbering less than a quorum along with the chief administrative officer, if there is one, and other persons with information important to the issues being mediated.

Since they do not constitute a quorum, the representatives of the public body can comply with the court rules' confidentiality requirements and meet in a mediation session which is not subject to the OMA. Those representatives will not, however, be able to enter into a binding agreement, since legislative body approval is required, and that approval (or decision) can only occur at a meeting open to the public.

They can, however, enter into a settlement agreement which is specifically made subject to approval of the legislative body. In that regard, it helps to have the mediation scheduled so that a regular or special meeting of the legislative body will be held shortly after the mediation (usually 1 week or less). This is important for two reasons. First, if the agreement is not approved by the legislative body, the parties and the court's ADR clerk need to know that as soon as possible because of the court's various scheduling deadlines and trial schedule. Second, the longer the time between the mediation and the meeting, the greater likelihood "buyer's remorse" might set in, causing the representatives at the mediation to change their mind about recommending the settlement to the public body, and possibly even voting against it.

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Choosing the Mediation Team

You, as counsel, need to consider who should be on the mediation team. Sometimes your hands are tied because, due to time constraints, only certain members of the legislative body may be available for the mediation session. Nevertheless, you should strive to have a team consisting of those members who are likely to reflect, or at least be aware of, the majority view of the public body. Additionally, the members selected should be those who have the respect of their colleagues so that any recommendation they make, if there is a settlement, will likely be approved.

It could be a waste of time, for example, if the governing body was represented at the mediation by 2 of its members who are always on the short end of a 5 – 2 vote. While you can never accurately predict what action the body will take on a recommendation made by one or more of its members, by carefully choosing who will participate in the mediation you can minimize the likelihood that a proposed settlement will be rejected by the public body.

Additionally, as pointed out below, you should also discuss which members of the team will be the primary spokespersons for the public body during the mediation.

Preparing the Public Body for Mediation

Experience shows that most legislative bodies and their members are unfamiliar with mediation. You, as legal counsel, should take the time to carefully explain the process to them. This explanation should include several points.

1.***Explaining the process.*** Some education as to what the mediation process is all about is desirable where the body has had no experience with it or when there are new members on that body. This can be done in a closed session under the OMA as part of consulting with legal counsel regarding settlement strategy in the particular case. It can also be done in an open meeting. The public body may want the public to also learn about mediation to have a better understanding of the process and the public body's obligations when participating in that process.

Whether it's done in an open or closed session, some concepts that should be explained include the following:

a. The mediator is a facilitator and has no decision-making power. Therefore, the mediator will not be deciding which party is right or wrong; nor will he or she be imposing a settlement on the parties.

b. The mediation is confidential. Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial.

c. If the mediation is successful, it will result in a signed mediation agreement which is binding on the parties (subject, of course, to approval by the legislative body).

2. ***Preparing for the mediation.*** Along with helping the legislative body decide who will serve on its mediation team, counsel should discuss with the public body the issues in the pending litigation, potential settlement strategies and the method of addressing those issues in the mediation. This can be done in a closed session under the OMA as part of consulting with legal counsel regarding settlement strategy. This discussion should cover several items.

a. Discuss the strengths and weaknesses of all parties in the case and have them focus on those things on which they may be willing to agree. Remind them that the mediation process is an empowering one and gives the parties an opportunity to craft a settlement which meets their specific requirements rather than having a judgment imposed on them by the court.

b. If the lawsuit involves a claim for damages, discuss how much, if anything, the public body might be willing to pay, and the conditions under which it might be willing to do so. Having this discussion before the mediation will enable better use of the time spent in mediation

c. If the lawsuit involves a dispute with a party with whom the public body will have a continuing relationship, such as a dispute between a city and an adjoining township, consider developing settlement proposals which will not only end the current dispute, but also lead to better future relations between the two entities.

d. Think outside the box. There can be times when a settlement can be reached by the parties discussing other matters not directly involved in the pending litigation. Is there, for example, something your client can do for the other party that they didn't ask for, but which may make them more amenable to settling on terms acceptable to your client? If so, prepare your team to raise these issues at mediation.

e. Discuss who the primary spokesperson for the public body will be and what role each member of the mediation team will play during the mediation. Often, it is better if the lawyers take a back seat and let the parties talk directly to each other as much as possible. After all, these are the persons who will have to accept responsibility for any settlement.

f. Prepare them to expect little or no progress at the beginning of the mediation. Tell them not to get discouraged and give up, but to exercise patience. Often it takes hours for parties who appear hopelessly deadlocked to suddenly find agreement on some point which begins the process of reaching settlement.

g. Remind them that SCAO statistics show each year that approximately 98 to 99 percent of all circuit court civil cases are resolved without a trial. Since there is a 98 to 99 percent chance that their case will not go to trial and that there will be a settlement some day, why not get it settled earlier rather than later - before incurring extensive attorneys fees and costs.[4]

During the Mediation

In your role as legal counsel, there are certain things you will be responsible for during the mediation. You can play a key role in getting the dispute settled. Following are some of the things you should do assist your clients in reaching a settlement.

1. ***Take off the litigator hat.*** As a mediator, I always ask legal counsel to take off their litigator hats during the mediation and use their skills to help me get their clients to focus on finding a common ground on which settlement building can start. Finding the common ground is a primary goal of mediation and that goal can't be reached if counsel for the parties are drawing lines in the sand and insisting that their position is unassailable. You and your clients are not bound by anything said in the mediation, so help your client find that middle ground by encouraging them to move in that direction.

2. ***Keep the train on track.*** Often clients will focus on the perceived correctness and righteousness of their position and get their dander up when they hear the other party criticize them and/or their legal stance. Keep them focused on the things they share in common with the other side. Don't let

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them get angry or allow their anger to dictate what they are or are not willing to agree to. Keep them on the path of seeking an acceptable settlement.

3. There may be times when your team needs to meet privately, either with or without the mediator, to discuss an issue. Assist the mediator by letting him or her know when you think a private caucus is necessary. Conversely, help the mediator find those things which your clients need to say to the other side in a joint session. Mediation is not the time to hold back on ideas and positions. Lay your cards out on the table. Remember, it's a confidential proceeding and nothing said at the mediation can be used in any subsequent proceedings.
4. Remind the other party that your mediation team cannot bind the public body, and that any agreement will have to be approved by the public body's legislative body. At the same time, offer whatever assurances you and your team can offer to the other side that you believe an agreement will likely be approved.

The Agreement

If an agreement is reached, it should be reduced to writing at the mediation session. The agreement should specifically provide that it is not binding unless and until it is approved by the legislative body. In that regard, it is recommended that a regular or special meeting of the public body be scheduled within a day or two (no less than a week) following the mediation for purposes of having the body consider the proposed settlement.

It is recommended that the agreement contain specific provisions requiring the public body's representatives at the mediation to not only see that the settlement is placed before the public body for consideration, but that they will support approval of the settlement. Not too long ago, two township board representatives participating in a mediation on behalf of a township in Grand Traverse County reached an agreement with the plaintiff. When the proposed settlement came before the township board for approval, however, the two board members who participated in the mediation argued against the settlement they had reached and joined the majority in voting it down. The circuit court was not pleased with the officials' conduct and imposed costs and sanctions against the township.

This can be avoided if the agreement contains provisions binding the signers to support the proposed settlement. In cases where I serve as a mediator, the final agreement usually contains one or more provisions similar to the following which came from a settlement agreement involving a township defendant.

1. *The participants of the Township in the mediation who are members of the Township's Board of Trustees agree to place this settlement before said Board for its consideration at a special meeting to be held no later than _____.*
2. *At said meeting, the participants of the Township in the mediation who are members of the Township's Board of Trustees agree to recommend approval of this settlement.*
3. *The participants of the Township in the mediation who are not members of the Township's Board of Trustees, if asked to participate in any way by said Board, agree to support the recommendation to the Board that this settlement be approved.*
4. *The representatives of the plaintiff in the mediation, if asked by the Township to provide any information or assistance in their efforts to seek Board approval of this settlement, agree to provide such information or assistance.*
5. *If this settlement is not approved by the Township's Board of Trustees, the parties agree to notify the mediator of same forthwith and further agree to reconvene at a date and time mutually convenient and as determined by the mediator.*

Because of the time gap between the mediation and the meeting of the legislative body, I also usually include a special confidentiality provision as well. The purpose of the provision is to maintain the confidentiality of the mediation and the settlement agreement until such time as the legislative body can consider the proposed agreement. Following is a sample of such a provision.

6. *CONFIDENTIALITY. The parties acknowledge that, pursuant to Michigan Court Rule 2.411(C)(5), this mediation proceeding is confidential and no participant shall disclose any of the discussions that took place in the mediation proceeding and no party shall disclose the terms and conditions of this agreement or any exhibit thereto until such time as the Board of Trustees considers this settlement agreement and votes upon it in an open meeting; provided, however, that the parties agree that this agreement and the exhibits attached hereto, as well as any discussion had during the mediation, may be disclosed to the members of the Township Board of Trustees upon the members thereof agreeing to the confidentiality of such communications.*

Conclusion

Conducting a mediation in which a public body is a participant can present issues and challenges not present in mediations involving non-public parties. The final settlement decision must be made by a majority of a board, council or commission. That decision must be made at a meeting open to the public, but the mediation itself has to comply with confidentiality requirements. With a little effort and careful planning by counsel for the public body, the obligations imposed by the OMA and the court rules can be met and there can be a successful mediation.

If counsel also takes the time to educate the client as to the mediation process and to prepare the client for its participation in the mediation proceeding, the chances of a successful mediation are increased dramatically. This takes on added importance in these days of shrinking public revenues and tightening budgets. Settlement of disputes on terms reached by the parties themselves can go a long way toward preserving public funds and other valuable resources.

1 MCL 15.261 et seq
2 MCL 15.263(2)
3 MCL 15.262(b)
4 Of the 48,628 civil cases disposed of by the state circuit courts in 2008, 305 were disposed of by jury verdict and 437 by bench verdict. *Annual Report of the Michigan Supreme Court, 2008.*

Mediation – Off Ramps on the Litigation Super-Highway

by Jerome F. Rock

To understand the potential advantages of Mediation to the civil litigation practitioner, I offer the analogy that **Mediation** can be viewed as an **"Off Ramp on the Litigation Super-Highway"**.

In order to build on this analogy, we need to accept a common definition for Mediation, and undergo a quick review of the Court Rules that can lead to Mediation. Within the litigation bar, the term mediation was first used to describe the case assessment process that became institutionalized in 1985 as MCR 2.403. In 2000, MCR 2.403 was officially changed to Case Evaluation, and Court Rule 2.411 was introduced as Mediation. Both Mediation and Case Evaluation are considered Alternative Dispute Resolution processes under MCR 2.410, although there is a clear separation between the approach of Mediation, which is facilitative, and the product of Case Evaluation, which is highly evaluative. In ADR lexicon, these are on opposite ends of the continuum of client control and

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participation. The purpose of this article is to explain this distinction and how it can be used to the practitioner's advantage.

Most litigators participate as panel members on the Case Evaluation programs, but may not understand why the "evaluation" they render is "evaluative" in the lexicon of ADR. The panel reads the briefs, listens to the attorneys and renders a dollar figure. Your client does not participate in this process. This action is final. This is the value of your case. As an added incentive, sanctions are added to the mix for additional coercion. If the panel was diligent, and the attorneys and their clients are rational and , the case is settled. As we know, this is not always the outcome.

Mediation takes a different approach. In addition to the procedural guidelines presented in MCR 2.411, mediation has created a new sub specialty in the practice of law for hundreds of attorneys who have completed the 40 hours of highly structured formal training approved by the State Court Administrative Office and delivered by ICLE and others in the technique of "facilitative" mediation. This training is required to participate on the "approved list of mediators" established by the local ADR plan adopted under MCR 2.410(B). Mediators are also required to participate in a minimum of 8 hours of advanced mediation training biannually in order to maintain their status on the "approved list of mediators". The training received and skills developed by trained mediators are important in order to guide the parties through a successful mediation experience. Mediation by definition is consensual; therefore the clients are in control of the outcome; there is no settlement unless the clients agree. Quite a different paradigm from the "evaluative" approach of Case Evaluation.

The flexibility of MCR 2.401 and MCR 2.410(C) is the gateway to the creative use of Mediation as a resource to settle disputes at every stage in the litigation continuum; and can often be used more than once if the parties are not yet not prepared to settle at the earlier session. In some instances it is beneficial to keep the mediator involved in the process to assist in resolving issues (such as discovery and scheduling disputes) that often arise during litigation. The following discussion presents the argument for use of Mediation at the various stages along the Litigation Super-Highway.

Early Case Mediation - The First Off Ramp

My intention is to expose you to the potential of Mediation as a process, so you can recognize the opportunities to utilize Mediation early in the litigation cycle, and as an ongoing tool to take the practice of litigation to a higher level of both civility and cost effectiveness.

Some jurisdictions in Michigan, notably the Sixth Judicial Circuit in Oakland County, have established formal Early Case Mediation programs that order parties and their counsel to participate in an introductory Mediation session within 100 days after the Complaint and Answer have been filed, and presumably before extensive discovery has taken place. The statistical results for the Civil Early Intervention Conference Program in Oakland County for 2008 measure the effectiveness of the program 60 days after the completion of the EIC session at 36%. This includes all matters that were voluntarily dismissed, settled privately, or resolved at the Early Mediation stage. The Mediation session didn't resolve all these cases, but it is responsible for achieving several important objectives.

- First, it forced the parties (attorneys and their clients in the same conference room, at the same time), to communicate directly, a practice too seldom achieved during the course of traditional litigation practice;
- Second, it served to define and narrow the issues, with the expectation that cases that should be resolved early, get identified, and will in fact get settled quickly and cost effectively;
- Third, it gave the parties an introduction to the process of Mediation with the express objective of educating and encouraging the parties to participate in an ADR process to resolve their dispute and explore the possibility of early settlement;
- And finally, it gave the parties an opportunity to size up the talent and skill of the mediator to determine if there was an desirable match for their dispute.

If you're not subject to a mandatory or formal Early Case Mediation program, why would the litigation practitioner want to bring their clients into a Mediation forum at an early stage of the litigation cycle? For the appropriate case, and under the right circumstances, the benefits to the parties can be substantial.

At the beginning of all litigation cases, attorneys will develop a preliminary litigation strategy that at a minimum, considers the following items:

- Identify the client's objectives, both monetary and non monetary.
- Asses the client's "time value of money".
- Estimate the likelihood of success on summary judgment or at trial.
- Gauge the client's and the attorney's ability to tolerate risk.
- Identify expense of litigation, impact of delay, tolerance for stress, distraction from business operations.
- Now, look at this same case for factors that suggest opportunity for meaningful early Mediation, such as:
- High level of emotions between the parties, breach of trust, need for vindication, etc.
- Presence of non-monetary issues, such as non-competition, injunction, rescission or specific performance, etc.
- Limited litigation "staying power"; a party needs the money sooner rather than later, or there are litigation budget pressures.
- Desire of a party for prompt resolution to avoid litigation stress or distraction from business operations.
- The parties may have had prior business dealings, and are familiar with many of the underlying facts and legal issues. Think employment, franchise, real estate and business agreements and commercial loan transactions.

These matters are candidates for early case Mediation. Do you take the Mediation Off Ramp now, or wait for an opportunity after you've completed some discovery and perhaps attempted dispositive motions? It's all a matter of cost, and the benefit you derive from the effort.

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Upcoming ADR Trainings

General Civil

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

Flint: **February 8-12, 2010**

Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Bloomfield Hills: **February 19, 26, March 5, 12, 19, 2010**
Training sponsored by Oakland Mediation Center
Contact: (248) 338-4280, ext. 217. To register online, visit www.mediation-omc.org.

Plymouth: **June 3-5, 25-26, 2010**
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 training has been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Bloomfield Hills: **November 9, 11, 13, 16, 18, 20**
Training sponsored by Oakland Mediation Center
Contact: (248) 338-4280, ext. 217. To register online, visit www.mediation-omc.org.

Ann Arbor: **February 26-28, March 6-7, 2010 July 26-30, 2010**
Training sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com or call 1-734-663-1155

Flint: **Feb 22-26, 2010**
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Macomb Community College: **March 9 – April 4, 2010**
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Schoolcraft College: **April 27 – May 13, 2010**
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

Domestic Violence Screening for Mediators

December 5, 2009 or February 27, 2010 or May 1, 2010
Training sponsored by Alternative Dispute Resolution Consortium
Email: jjenio@adrccenter.com

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: **November 17**
"3rd Annual Master Class: A Multi-media Comparison of Two Experts"
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Bloomfield Hills: **December 11, 8:30-5:30**
Trainer: Earlene Baggett Hayes
Training sponsored by Oakland Mediation Center
Contact: (248) 338-4280, ext. 217. To register online, visit www.mediation-omc.org.

Thank You, Jim Vlasic and ADR Council!

by Susan J. Butterwick, JD

Susan J. Butterwick, JD
Ann Arbor, MI

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.

At its annual meeting, the ADR Council of the State Bar makes a donation in honor of its outgoing chair to a non-profit, charity, or specific cause of the past chair's choosing. This year's outgoing chair, Jim Vlasic, selected the Wayne Mediation Center's Truancy Prevention Mediation Program as his designee for the council's donation.

As a consultant to the truancy prevention mediation initiative, I want to personally thank the council and Jim Vlasic for the council's contribution. Many members of this section routinely volunteer at community dispute resolution centers across the state because we all recognize the good work the centers do in our communities. However, I want to highlight the Wayne Center's truancy prevention mediation program, because it typifies the kind of specialized work that community centers do around the state that we private practitioners cannot do on our own due to the inability of many institutions to provide private payment for these services. The non-profit centers can receive grants to handle these cases at lower costs, and private practitioners who want to volunteer for community work can (and do) help make these programs successful. Here's why I count my work with this program right up there, among the more rewarding work I've done in my mediation career.

Statistics reveal a grim predictive relationship between school truancy, eventual delinquent behavior in youth, and subsequent costs to society and the economy. Mediation provides a unique opportunity to work with students, families, and schools to address the problems affecting school attendance, and by extension, the future of our communities. When successful, mediation diverts families and children from the court system at this point in their lives and, hopefully, continuing into the future. One principal in Southwest Detroit reinforced my thoughts on the value of this program when she said that mediation is the most effective attendance intervention that her school has ever implemented, in part because, "This kind of conversation just doesn't occur otherwise between schools and families." These conversations do not involve complex legal questions, but they can involve complex socio-economic barriers to a child's future. And the presence of a third party neutral can have the same positive impact on seemingly "hopeless" cases involving more than thirty unexcused absences for a student in a semester, as it can on a medical malpractice, personal injury, or commercial case involving hundreds of thousands of dollars.

Detroit has a staggeringly high absenteeism and low graduation rate. As noted by the ACLU of Michigan, there is a direct link between school absenteeism, poor academic performance, delinquency, and violence or other serious crimes in adulthood.[1] Truancy costs students more than their education; it costs them their future - and it affects the future of our communities as well. Consider some examples of the immediate and distal costs associated with truancy that transcend the confines of the school walls and reach into our communities to affect all of us:

- ***Truancy means the loss of large sums in federal and state dollars for school districts that receive funding based on attendance.[2]***
- ***About 70 percent of convicts entering state prisons every year are school dropouts.[3]***
- ***The Michigan Department of Corrections reports that the state spends about $30,000 per year on each of the more than 50,000 persons incarcerated in its facilities. On the other hand, the National Center for Education Statistics reports that the annual cost of providing a public school education for a child is between $5,000 and $10,000.[4]***
- ***Even if they don't end up in jail, school dropouts tend to require welfare support, unemployment, and public health care and are far less likely to contribute to the tax base. Each year, the cost of Michigan's dropouts to local, state and federal governments is $2.5 billion.[5]***
- ***Every day, over 9% of the enrolled students are recorded as truant from Detroit Schools.[6]***
- ***While exact statistics are difficult to find on a yearly basis, in 2000 the Detroit Free Press noted, "students with the worst records as truants, and their families, are being hauled to court in an attempt to reduce the high rate of truancy that plagues the city - nearly 40% of the district's 167,400 students."7 (Note that this figure represents 66,960 students who have "the worst records as truants." Presumably the number of students who have 10 or more unexcused absences is far greater, as 10 unexcused absences is the baseline for truancy determination in the Detroit Public School System.)***
- ***Approximately 20,000 students drop out of Michigan's schools every year.[8]***

1 Michigan's Throwaway Kids: Students Trapped in the School-to-Prison Pipeline," 2009 American Civil Liberties Union of Michigan.
2 *Family Court Review*, Vol. 44 No. 4, October 2006, 683-695.
3 The Detroit News, May 30, 2005.
4 "Michigan's Throwaway Kids: Students Trapped in the School-to-Prison Pipeline," 2009 American Civil Liberties Union of Michigan.
5 The Schott Foundation for Public Education (The Schott 50 State Report Black Male Data Portal).
6 Detroit Free Press, 2005.
7 Detroit Free Press, Feb. 10, 2000.

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- ***The number of Michigan "non-graduates" (which includes more than dropouts) is estimated to be 45,305 for the 2007-2008 school year. That number and the figure of 41,319 Michigan juvenile arrests in 2007 are strikingly close.[9]***

- ***If the dropouts scheduled to graduate in 2007 had completed school, the nation's economy would have benefitted by an additional $329 billion in earnings over the course of their lifetimes. If current circumstances remain unchanged, it is projected that more than 12 million students will drop out during the next 10 years, and the cost to the nation will be a loss of $3 trillion.[10]***

- ***Dropouts from Michigan's class of 2008 alone would have contributed $11,779,231,953 during their working years had they graduated.[11]***

- ***The national high school graduation rate is an appalling 70%.[12] One study has determined the high school graduation rate in Detroit to be an astounding 21%, the lowest in the nation among the largest districts.[13] Detroit Public Schools disputes this figure and counts its graduation rate as 58% in 2007, still among the nation's lowest. [14]***

Beginning with three schools in Southwest Detroit in the spring of 2007, with support from the United Way, Wayne Mediation Center's truancy prevention mediation program initially focused on elementary schools with the thought that mediation could be most effective early on, before an ongoing pattern of truancy has been established and long before a student is closing in on the age of 16, after which it is no longer mandatory to attend school in Michigan. The program relied on the idea that given the chance, adults with authority over the elementary student (educators, counselors, parents, law enforcement, and others), with the help of social service agencies when necessary, can work effectively together in a collaborative setting to assist the student in removing barriers to school attendance, precluding the need for court intervention.

There is absolutely no question but what these barriers are increasing exponentially as more families face home foreclosure, homelessness, job loss and a myriad of corresponding social problems. And few places are experiencing these hardships to the degree that Wayne County is. Yet, even during the 2008-2009 school year, while the economy worsened considerably, the success rate of truancy prevention mediation increased over the improvement rate of the two previous years in Wayne County. **In 2008-09, students from 13 schools whose cases were mediated improved their attendance by 67% post-mediation, compared to a 62% and 63% improvement in the two previous years of the program.** This demonstrates that given the opportunity for increased understanding and problem solving, the barriers to school attendance can be resolved by the majority of families who participate in the program. In some cases, additional social service and community resources are obtained through the program to assist the families to reach the goal of improved attendance. The program is now beginning to expand into grades 6-10 in a few schools to test the effectiveness of the process with older students. Mediators are assisted by Spanish or Arabic speaking interpreters when needed.

It should be noted that students who do not improve after mediation are not overlooked. The school follows up with them, and if there is no reasonable excuse for their continued absenteeism, they are forwarded on to the prosecutor's office and court system via petition by the school or its attendance agent. Wayne Mediation Center mediators also work at the Third Circuit Court (Juvenile Division) to mediate ordinance violation tickets for truancy, curfew violations, and incorrigibility cases referred by the court. The Wayne Mediation Center also mediates abuse and neglect cases at the Third Circuit Court.

Thank you, ADR Section members, for the work you do in your communities to support and advance initiatives such as this around the state. And thank you, ADR Council, for your support of the Wayne Mediation Center's Truancy Prevention Mediation Program. It makes a difference and it matters. To one kid at a time. And to us all as community members.

8 "Michigan Dropout Crisis Costs $2.5 Billion Annually – Solutions Sought To Raise Graduation Rates," (Press Release), Michigan Education Association (April 30, 2008).

9 "Michigan's Throwaway Kids: Students Trapped in the School-to-Prison Pipeline," 2009 American Civil Liberties. Union of Michigan, citing June 2008 Issue Brief published by the Alliance for Excellent Education (www.all4ed.org).

10 The High Cost of High School Dropouts (Issue Brief) Alliance for Excellent Education, www.all4ed.org. and June 2008 update.

11 Ibid

12 U.S. Department of Education.

13 The Bill and Melinda Gates Foundation, 2006.

14 "Michigan's Throwaway Kids: Students Trapped in the School-to-Prison Pipeline," 2009 American Civil Liberties Union of Michigan.

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The early case Mediation session is an opportunity to size up the other side, frame the major issues, and identify key documents or discovery that will be required by each party. A trained mediator will know how to structure the meeting, engage the parties and explore the interests that need to be addressed to put the parties on the path to settlement. Whether you represent the plaintiff or the defendant, the mediator is your resource to keep the parties engaged, to ask the questions that keep the dialogue moving, and intercede as necessary to overcome conflict between parties.

Here are some of the advantages of early case Mediation:

- You establish communication between parties. Civility and mutual respect will go a long way in resolving this dispute.
- You size up the other party and develop a sense of how credible, sympathetic, etc. the opposition will be.
- You refine and simplify the issues and direct resources accordingly.
- You may find out the money is only part of the solution. Mediation assists the parties in developing options and creative solutions that put them in control of the settlement, and sometimes money is not the only issue that must be addressed.
- You may get a sense of the "time value of money" for the other party. There may be needs that require prompt funding, and the mediator can explore the importance of these factors.
- You get clients to understand what will be involved procedurally and accept a realistic time schedule for the case. Your clients hear the case from the other party's perspective, offering a reality check on expectations.
- You establish a realistic budget (reserve) for the litigation.
- The early case Mediation session can cover the similar ground as a pretrial scheduling conference, but the mediator can deal with issues in collaboration with the parties producing action focused on consensus and settlement rather than compliance with generic litigation practices.
- You're not forced to settle the case; your efforts are directed at finding out what needs to be done to settle the case. You're in a problem solving mode. This is a very positive environment.
- You identify those matters that can, and do settle early. A quick win for all sides.
- You develop a sense of what's necessary and when it's appropriate to re-convene a Mediation session. As a trusted neutral, the mediator can be instrumental in planning these future steps and reschedule the Mediation hearing.

These are substantial benefits. When you consider that the cost of an early case Mediation session is comparable in order of magnitude to a single deposition on the Litigation Super-Highway, the litigation practitioner now has the opportunity to demonstrate their willingness to innovate and affirm their commitment to deliver cost-effective litigation strategies. Our clients expect nothing less.

Even if the parties need to return to the Litigation Super-Highway, their experience with early case Mediation provides them with an appreciation of the game changing nature of Mediation, and the incentive to look for the next closest Off Ramp to resume the Mediation dialogue.

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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