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Alternative Dispute Resolution Section of the State Bar of Michigan

Remarks from the Annual Meeting of the State Bar of Michigan Alternative Dispute Resolution Section

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October 5, 2012

(Ed. Note: At the State Bar ADR Section Annual Meeting on October 5, 2012, Eugene Driker was presented with the Section's Distinguished Service Award, to honor Mr. Driker's significant contributions in the field of dispute resolution. With Mr. Driker's permission, we wanted to share with you his warm and insightful comments in accepting this Award.)

My deepest thanks to the ADR Section for this honor and to all of you in the room, so many of whom I've had the good fortune of working with over the years.

Like many of you, I never for a moment planned to become an ADR practitioner. I didn't study it in law school, didn't utilize it much in the early years of my law practice, and took no continuing education that would train me as a mediator or arbitrator. In fact I actually cut my teeth as a mediator over a cold beer. I wasn't drinking it; I was hearing about how it was made.

Let me explain:

About 15 years ago U.S. District Judge Avern Cohn phoned to say that he was in the midst of a mammoth patent infringement case that, by his estimate, was costing the litigants $250,000 a week in fees. The case involved two large foreign brewers. Judge Cohn couldn't figure out why an American judge was being asked to decide a patent dispute between two beer makers from another country. Since the case had been dragging on longer than expected, he asked if I would try to bring about a consensual resolution. I pointed out to Judge Cohn that I knew virtually nothing about patent law and surely nothing about brewing. He wasn't so easily dissuaded and insisted that I try to settle the case.

Those who know Judge Cohn, especially back 15 years ago when he was in his persuasive prime, understand that saying "no" was not an option. He gave me all of a day to familiarize myself with the matter and I was left with these two huge corporations, their retinues of skillful lawyers, and a substantive area of the law about which I was totally ignorant.

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Overwhelmed by reams of pleadings that I had no time to digest, I decided on an unconventional approach. I asked each of the corporations to send their president and general counsel to my office, and asked the trial lawyers to stay away, which didn't endear me to them. With the businessmen in the room we began talking at 9 a.m. on a Thursday and by 5:00 on Friday evening we had settled not only the pending patent case but about a dozen other patent, trademark and copyright issues between them.

This was heady stuff (no pun intended). I promptly decided that I was being summoned by a power even greater than Judge Cohn to a new calling, that of a Solomon-like commercial mediator. What I realized then, and what has stayed with me since, is that knowledge of the substantive area of the law, while helpful, is not essential and that in attempting to resolve business disputes, the most important participants are the top business people.

While I have continued to serve as both an arbitrator and a mediator in dozens of matters since that time, for me mediation is much more rewarding and much more challenging. Deciding a case as an arbitrator employs skills that we learned during the first year of law school: absorbing the relevant facts and applying applicable legal principles. While that's enjoyable, it's not nearly as much fun as trying to understand unstated motivations, secret agendas, complicated business considerations, and all of the subtleties that I have found so helpful in working towards a successful mediated result.

As all of you know from your own experience, it is sometimes much easier to decide a $20 million commercial dispute than broker settlement of a $20,000 family dispute, because the latter usually has all of the hidden issues that are absent from the former.

Several months ago I conducted a mediation between two brothers that involved disputes over real estate they owned together. I was a little apprehensive when, just 48 hours before the mediation was to begin, I received a brief from one brother saying that the other had served three different terms in prison, including one for killing a man. I alerted my secretary to call 911 if the language got too heated. The substantive dispute was easy to solve, and I thought we had the case settled on the reasonable basis of some cross-easements, with no money changing hands. But before people got pens out of their pockets to sign a term sheet that I had prepared, anger bubbled over, harsh words turned into screams, screams turned into threats and the whole settlement collapsed among recriminations that could only exist among siblings. It was a reminder of how wise I was to never take on a domestic relations matter.

A different kind of human issue was at the heart of the longest mediation I've ever conducted, lasting 22 months. U.S. District Judge Thomas Ludington appointed me as a mediator in an Indian tribal boundary dispute. The Saginaw Chippewa Indian Tribe, supported by the U.S. Department of Interior, sued the State of Michigan, Isabella County and the City of Mt. Pleasant to have part of six townships in the County declared a reservation they claim had been granted to them in a treaty signed by President Franklin Pierce in the 1850s. The outcome would not affect title to any property, but would have profound implications on law enforcement, the collection of state and local taxes, and child welfare within the disputed territory. I knew less about Indian law than I knew about brewing, but I waded into the matter, conducting more than two dozen mediation sessions in 3 different cities before finally bringing the parties together in a settlement agreement that was several inches thick. One reason for the prolonged process was entirely my fault. It took me a while to understand that for an Indian tribe, even one with only a few thousand surviving members, recognition of its status as a sovereign nation was the sine qua non of any settlement. Not until I fully appreciated that "line in the sand," and could effectively convey it to the other parties, were we able

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to move forward. Again I was reminded how important it is to be a good listener, especially when emotional issues are in play.

That unusual case got me to thinking about just what skills are most important in the mediation process. And it got me to recall a person I met within a few months of becoming a lawyer whose career led him to one of the most successful mediations ever.

My first job out of Wayne State Law School was in the Antitrust Division of the U.S. Department of Justice. Shortly after I arrived at Justice, I met and then took over the desk of a young lawyer who was moving up to Capitol Hill as an assistant to Senator Ed Muskie of Maine. That young lawyer was George Mitchell. He went onto become United States Attorney and then a United States District Judge in Maine, one of its U.S. senators, the Senate Majority Leader and, after he left the Senate, the mediator who successfully achieved a resolution between Catholics and Protestants who had been fighting for decades in Northern Ireland.

I've stayed in contact with Senator Mitchell over the years and, looking at his varied experiences, it is interesting to speculate on just which of them contributed most significantly to his success in Northern Ireland. My guess is that his years as Majority Leader of the U.S. Senate provided just the right set of skills to get that seemingly impossible job done. To effectively lead a group of 100 senators, none with small egos, necessarily required being a good listener with an ability to show them how to compromise.

I tried to channel Senator Mitchell's talents in the Indian tribal mediation by emphasizing the importance of compromise, asking each of the five parties to give on lesser issues in order to arrive at a mutually beneficial result on the biggest issues.

Speaking of compromise, a month from tomorrow we will elect new federal and state public officials. Never in my lifetime have I seen such a poisonous atmosphere in government at all levels. The notion of political compromise has simply disappeared and the middle ground has evaporated, to be replaced by venomous attacks upon one's opponent.

Recognizing this distressing situation, perhaps it's time for all of us to focus more heavily on a broader role of helping government officials use the tools of ADR to better serve the public interest. Indeed, the mission statement of this Section speaks not only about serving members of the Bar, but also providing creative leadership to the general public in the dispute resolution field. Since your agenda for tomorrow's session includes mediating in the public arena, this pressing need should be on the minds of all of us as we return to our own communities.

Might members of this section look for opportunities to write op-ed pieces, sponsor public forums, or conduct seminars for government officials, all of which would emphasize how the techniques we use to bring litigants together can and should be employed to bring our political leaders together to deal with the staggering problems our country faces?

Might the Section itself try to engage public officials to consider the benefits of resolving issues through dialogue and compromise?

Edmund Burke, the famous political philosopher, observed that "all government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter."

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Avoiding an Appearance of Impropriety: When Does Socializing Between Neutral and Advocates Spell Trouble?

Anne Buckleitner -- Smietanka, Buckleitner, Steffes & Gezon

The Michigan Court of Appeals recently dipped a toe in the ethical boundary waters surrounding attorneys who work and play together in the ADR realm. In *Hartman v. Hartman*,[1] the Court of Appeals explored ethical standards governing a mediator/arbitrator who vacationed with one of the attorneys with whom the mediator/arbitrator was just concluding an active Domestic Relations mediation. The case provides food for thought for all ADR practitioners about whether voluntary disclosure of social relationships between the neutral and advocates is appropriate, and exercising restraint in those same relationships. *Hartman* reinforces the importance of compliance with mediation fundamentals of evenhandedness and neutrality in all forms and phases of ADR –– particularly when the players have personal relationships.

In *Hartman*, Plaintiff appealed an Oakland Circuit Court's refusal to set aside a settlement agreement and a judgment of divorce. The settlement agreement was the culmination of a contentious combination of mediation, binding arbitration, settlement talks in which the neutral had some involvement, and, finally, a judicial hearing on the last unresolved details. Following mediation and arbitration, but just before the hearing, Plaintiff sought to have the parties' settlement agreement set aside because of his concerns about the mediator/arbitrator's partiality toward Defense counsel.

Unbeknownst to Plaintiff, The Neutral and Defense Were Friends

The *Hartman* trial court had first referred the parties to mediation, and the parties jointly selected the mediator. When mediation was unsuccessful, the parties agreed to use the same mediator for binding arbitration; following some arbitration the plaintiff proposed settlement terms that led to resolution of most of the issues. He later asserted that he settled only because he believed that the mediator had made comments showing that she favored the defendant, and he believed that as an arbitrator, the mediator would rule for Defendant. The mediator continued to have what was described as an "informal" role throughout the settlement talks that resolved most issues. The few remaining issues were to be resolved by the trial court following a hearing. When the parties put the terms that they had resolved on the record, Plaintiff noted that he had had "concerns" about the mediator, apparently about a perceived favoritism toward Plaintiff.

When the next court hearing was adjourned to accommodate the defense counsel's Florida vacation, Plaintiff was enraged at the realization that the mediator and the defense counsel were vacationing together at defense counsel's house in Florida. Plaintiff sought to have the settlement agreement set aside asserting that the mediator/arbitrator had engaged in "apparent impropriety." Defense counsel defended the joint vacation, noting that it was nothing more than ordinary hospitality and that he had hosted numerous attorneys, including judges, at his Florida home.[2]

The Court of Appeals ultimately upheld the Circuit Court's refusal to set aside the settlement agreement because it found no material relationship between the "apparent impropriety" and the settlement agreement that had been agreed upon prior to the defense counsel's and the mediator/arbitrator's joint vacation.[3] Essentially, the Plaintiff was unable to show that he would have gotten a different result if not for the social relationship between the arbitrator and defense counsel.

In assessing whether the mediator's conduct rose to the level of "procedural unconscionability," the *Hartman* court

1 No. 304026, an unpublished opinion issued August 7, 2012.

2 It wasn't likely a great vacation for Defense counsel. Plaintiff's counsel used the time to file multiple motions to have the arbitrator recused and to set aside the settlement. The vacationing defense counsel responded with faxes to Plaintiff's counsel threatening to ask the arbitrator to ask the trial court for sanctions.

3 The Court of Appeals considered (and rejected) each of Plaintiff's many theories for setting aside the settlement agreement – fraud, duress, and mistake. The Court rejected Plaintiff's creative arguments that it had been a material mistake to believe that the arbitrator had been impartial. Plaintiff also attempted arguments that the "apparent impropriety" had been unconscionable, or violated MRPC 8.4 ("conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of criminal law").

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noted that the standards of conduct for domestic relations mediation outlined at MCR 3.216(k) reinforce "honesty, integrity, and impartiality in providing court-connected dispute resolution services." The Court further pointed to SCAO Standard 4 as discussing "conflicts of interest" that can occur if a circumstance can be "reasonably seen as raising a question about impartiality." With regard to "impartiality," SCAO Standard 3 says "if at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw."

The Appearance of Partiality Can be Deduced from the Totality of Circumstances

The *Hartman* court concluded that the facts before it reflected a situation that precluded the neutral from further work on this case due to the appearance of partiality.[4] The Court also noted that MCR 3.206(E)(5) states that the rule for disqualification of a mediator is the same as for disqualification of a judge as outlined in MCR 2.003. *Hartman* notes that judges are disqualified for failing to adhere to the appearance of impropriety standard set in Canon 2 of the Michigan Code of Judicial Conduct which notes that "Public confidence in the judiciary is eroded by impartial or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety." The *Hartman* court observed that an "actual showing of prejudice or bias" need not shown – that impropriety may be deduced from the totality of the circumstances -- where, for example, "experience teaches that the probability of actual bias or prejudice on the part of the judge or decision maker is too high to be constitutionally tolerable."[5]

It is not very surprising that the *Hartman* opinion imposes the same standard of impartiality required of a judge upon arbitrators, whose role is inherently evaluative. It is more surprising, though, that the Court speaks to the importance of impartiality for facilitative mediators. Whatever the reasoning behind the *Hartman* court's thinking on this point, it's clear that parties' confidence in whatever process they are involved in is always bolstered by impartial behavior. It's not coincidental that the settlement agreement in this matter fell apart as his confidence in the mediator's neutrality waned.

It also raises the question of whether the mediator/arbitrator in this matter should have disclosed her prior familiarity with Defense counsel, and what level of familiarity raises that level of requirement. Finally, it's clear that even if a neutral has disclosed a prior relationship or dealings with the advocates, his or her conduct and commentary must be scrupulously neutral to avoid misinterpretation.

4 While the *Hartman* court found that the totality of the circumstances rose to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters, they found some small mercy in the timing. At the point that Defense counsel hosted the mediator, the only remaining unresolved matters were those to be settled by the trial judge. The minor arbitration awards issued before the settlement agreement's handling of those matters had superseded the settlement agreement. The only issue remaining was whether the settlement agreement could be set aside.

5 Gates v. Gates, 256 Mich App 420, 441; 664 NW2d 231 (2003).

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):

Bloomfield: **November 2, 9, 16, 28 & 30**

Training sponsored by Oakland Mediation Center

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

Plymouth: **February 28, March 1-2, 22-23, 2013**

Training sponsored by Institute for Continuing Legal Education

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

Petoskey: **April 10-12, 17-19, 2013**

Training sponsored by Northern Community Mediation

Contact Jane Millar, 231-487-1771

Domestic Relations Mediation Training

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

Ann Arbor: **January 31, February 1-2, 7-8, 2013**

Training sponsored by Mediation Training & Consultation Institute

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

Kalamazoo: **April 10, 12-13, 15, 17, 19, 2013**

Training sponsored by Dispute Resolution Services of Gryphon Place

Contact: Barry Burnside, 269-552-3434, ext 3, or bburnside@gryphon.org

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:

Bloomfield: **November 15**

"Tools for Managing Conflict: What You Don't Know May Hurt You!"

Trainers: Judith Bridges, JoAnna DeCamp, and Susan Lebold

Training sponsored by Oakland Mediation Center

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

Bloomfield: **December 14**

"Demolishing the 10 Biggest Road Blocks to a Successful Mediation"

Trainers: Antoinette Raheem and Earlene Baggett Hayes

Training sponsored by Oakland Mediation Center

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

Domestic Violence Screening Training

Ann Arbor: **February 9, 2013**

Training sponsored by Mediation Training & Consultation Institute

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

New ADR Court Rule Adopted in the United States Bankruptcy Court for the Western District of Michigan

Robert E. Lee Wright, MA, JD

Your State Bar ADR Section has been busy in advancing the interests of ADR in the U. S. Bankruptcy Court for the Western District of Michigan. Working on behalf of the Judicial Access Team of the State Bar of Michigan's ADR Section, Robert Wright of The Peace Talks, PLC, met with the judges and staff of the United States Bankruptcy Court for the Western District of Michigan to discuss the implementation of ADR and mediation in the court. As a result, the local rules committee drafted a new court rule, LBR 9016-1, which will become effective on August 1, 2012. The rule adopts by reference the ADR rules of the United States District Court for the Western District of Michigan.

The text of the new rule can be found at the website: (http://www.miwb.uscourts.gov/cms/assets/Rules-and-Forms/Rules/Local-Rules-2012.pdf) and, for convenience, it is included in this article.

LBR 9016-1 Alternative Dispute Resolution

(a) ADR Favored - The Court favors the use of alternative dispute resolution (ADR) methods in bankruptcy cases and contested matters whenever ADR might help to reach an early resolution of the case. In adversary proceedings, a discussion regarding the potential use of ADR is required as part of the conference held pursuant to Fed. R. Bankr. P. 7026(f).

(b) Methods Available - Appropriate ADR methods include Voluntary Facilitative Mediation and the other methods specifically set forth in the Local Civil Rules for the United States District Court for the Western District of Michigan. (See W.D. Mich. L. Civ. R. 16.3 - 16.8 on the district court's website at http://www.miwd.uscourts.gov.) If parties elect to use Voluntary Facilitative Mediation or any of the other ADR methods listed on the district court's website, the parties must follow the local civil rules applicable to the selected method. Other ADR methods may also be agreed on by the parties.

(c) Confidentiality - ADR proceedings are considered "compromise negotiations" as that term is used in Fed. R. Evid. 408. All oral or written statements made at any stage of the ADR 51 process are confidential and may only be used as permitted under Fed. R. Evid. 408 or as otherwise agreed in advance by the parties.

(d) Trial Deadlines and Procedures Unaffected - The use of ADR does not affect the normal progression of a case toward trial. Parties who elect ADR may continue to file motions and engage in discovery. Any case referred to ADR remains subject to management by the Court, and the parties must comply with all deadlines or other obligations imposed by the Court unless the Court orders otherwise.

(e) Payment of Fees and Costs - Parties electing to use ADR are solely responsible for the fees and costs associated with the selected ADR method. Fees and costs will be shared equally unless otherwise agreed by the parties. If a party is delinquent in paying the fees and costs associated with ADR, the neutral may seek a Court order directing payment. The Court may also require the fees and costs to be paid in advance.

(f) Pro Bono Service - If a party cannot afford the fees or costs associated with ADR, the Court may request that the neutral waive or reduce the fee for the indigent party. All other parties are expected to pay their fees and costs. ❋

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

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Each of us here knows the truth of that statement. Both individually and as members of this organized Bar, we've got to spread that message. We know from our own experiences, both as representatives of clients and as mediators, that compromise is not a dirty word. It reflects a well-tested mechanism to resolve conflicts, leaving each side feeling that it has benefitted by negotiation rather than battle.

I think it is incumbent on all of us to promote this path to a far wider audience, for the benefit of our nation and all of its citizens.

Thank you again for this wonderful recognition.