The Michigan
Dispute Resolution Journal
A Publication of the Alternative Dispute Resolution Section of the State Bar of Michigan

Lee Hornberger, ADR Section Chair — **Erin Archerd, Editor**

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Vol. 26 No. 2 Spring 2018

Lee Hornberger

The Chair's Corner

by Lee Hornberger

Introduction

A week's vacation in Saint Croix in January caused me to do some thinking. Charles Dickens wrote in *A Tale of Two Cities* (1859):

> It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.

There are those who might think that right now, the present, is "the worst of times [and] … the season of Darkness … ." But being on a Caribbean island, seeing the ruins of the sugar plantations, one realizes that deep Darkness and despair existed centuries ago. This Darkness and despair led to 8,000 slaves on July 3, 1848, marching from the fields of Saint Croix to Fort Frederik and demanding their freedom. They assembled in front of Fort Frederik. If unsuccessful, the slaves' BATNA was either death or continued enslavement. On the other hand, if the slaves had a successful violent uprising, Governor General Peter von Scholten's BATNA was death or the destruction of every plantation on Saint Croix. Governor General von Scholten chose freedom by proclaiming "all unfree in the Danish West Indies are free." This kept the plantations from being destroyed. It ended *de jure* slavery on Saint Croix. It also resulted in Denmark relieving the Governor General from his position and ordering him back to Denmark. No good deed goes unpunished.

There are several lessons to be learned from this. First, the realization of one's BATNA is important. Second, do not be afraid to make a big decision based on principle. Third, regardless of how bleak some may think the situation is, there have been people who have been in much more bleak situations.

The words on John Wayne's tombstone remind us that "Tomorrow is the most important thing in life. Comes into us at midnight very clean. It's perfect when it arrives and it puts itself in our hands. It hopes we've learned something from yesterday."

In order to help the ADR Section and its members have successful tomorrows, the Section is engaged in many activities. Here are some of them.

Public Mediation Action Team

The ADR Section Council Executive Committee at its Friday, January 12, 2018, meeting passed a motion creating the Public Mediation Action Team (PMAT). **Zenell B. Brown** is Chair of the PMAT. Zenell is the Executive Court Administrator of the Third Judicial Circuit of Michigan. She is former head of the Wayne County Friend of the Court.

The PMAT works with Community Dispute Resolution Centers and other organizations to help promote ADR and reaches out to special interest groups such as affinity bar organizations, the LGBT community, low income individuals, and the elderly to determine how ADR might best address some of their unique dispute resolution needs. PMAT also seeks to increase awareness among potential end users of ADR about what ADR is and its benefits. In order to accomplish its mission, PMAT works closely with the other Action Teams and Task Forces, and especially the Judicial Action Team, Section to Section Team, and Diversity Task Force.

February 15, 2018, "The Neuroscience of Decision-Making: What's Really Controlling the Way You Think?"

On February 15, 2018, nationally renowned speaker Kim Papillon presented on "The Neuroscience of Decision-Making: What's Really Controlling the Way You Think?" at Detroit Mercy Law. The co-sponsors for this event were the ADR Section, Detroit Mercy Law, and Miller Canfield Paddock and Stone. Thank you to **Danielle A. Potter**, Chair of the ADR Section's Diversity Task Force; **Phyllis L. Crocker**, Dean of Detroit Mercy Law; **Megan Fidorra Jennings**, Associate Dean for Student Affairs, Detroit Mercy Law; **Michelle P. Crockett** of Miller Canfield; and **Sheldon J. Stark**, Chair of the ADR Section's Skills Action Team for making this outstanding and memorable program possible.

March 20, 2018, ADR Summit with Lee Jay Berman

The ADR Section Annual ADR Summit with world class mediator and trainer, Lee Jay Berman, will be on March 20, 2018, at Western Michigan University-Cooley Law School in Auburn Hills. Lee Jay's cutting edge presentation will be "Harnessing the Power of the Master Mediator: Seeing New Things in the Same Old Rooms." During his presentation, Lee Jay will take us to a higher level of appreciation and understanding. The Skills Action Team has worked very hard to make this a successful and worthwhile endeavor. Additional information and registration are at: https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/ADRRegMarch.pdf

April 17, 2018, Mediator Lunch in Detroit

The Wayne County Family Bar Association and the ADR Section of the State Bar of Michigan are co-sponsoring a lunch for mediators and other ADR practitioners. The lunch will be noon to 2:00 p.m., Friday, April 17, 2018, at the Federal Reserve Bank Branch, 1600 Warren Avenue East, Detroit, Michigan 48207. There will be round table discussions of issues that face mediators. There is convenient parking located inside the security gates at the Federal Reserve Bank Branch. Please bring your driver's license or other government identification to show for admittance to the building. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/ADR04172018.pdf .

This mediator lunch is being organized and moderated by **Zenell B. Brown**, Chair of the Section's Public Mediation Action Team.

April 26, 2018, Teleseminar on Construction Dispute Mediation

The Section is sponsoring a teleseminar on "The Dirty Dozen: The 12 Biggest Mistakes in Construction Dispute Mediation" from noon to 1:30 p.m., April 26, 2018. Two respected and experienced construction law practitioners will share their perspectives and experiences on the most common errors even the best practitioners make when mediating construction law disputes. The insights provided by this program will elevate your practice and assist you in getting the most out of the mediation process every time. The panel members are **Marty Burnstein**, Law Offices of Marty Burnstein, Troy, and **Ronald A. Deneweth**, Deneweth Dugan & Parfitt PC, Troy. The moderator is **Michael S. Leib**, LeibADR, Bloomfield Hills. The Engineer is **Robert E. Lee Wright**. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Ap26_Reg.pdf .

Spring 2018 webinar

The ADR Section and the Business Law Section will co-present a webinar to be produced and recorded by ICLE as part of its Partnership program. The topics are ADR contract language, enforcement, pitfalls, and selecting the right mediator. The presenters are **Daniel E. Sharkey**, Brooks Wilkins Sharkey & Turco, Birmingham, and **Michael P. Hindelang**, Honigman Miller Schwartz & Cohn, Detroit. **Michael S. Leib**, LeibADR, Bloomfield Hills will moderate the program. The webinar will be available at a date to be determined after April 17, 2018, and free to members of the Business Law Section and ADR Section who register for the webinar.

June 7, 2018, Mediator Mixer in Grand Rapids

The Section, in co-sponsorship with the Grand Rapids Bar Association, will have a Mediator Mixer from 4:30 p.m. to 6:30 p.m., Thursday, June 7, 2018, at Mika Meyers in Grand Rapids. Recent issues facing mediators and mediator techniques will be discussed in this exciting educational and social setting. **Scott S. Brinkmeyer** and **Michael S. Leib** are the organizers of this event. The presenters will be **Shon A. Cook**, Shon Cook Law, Whitehall; **Pamela C. Enslen**, Warner Norcross & Judd, Kalamazoo; and

Scott S. Brinkmeyer, Mika Meyers, Grand Rapids. Additional information and the registration link will be available in the future.

Tuesday, June 19, 2018, Special Program with Dr. Elizabeth Stokoe

University-Cooley Law School in Auburn Hills. Dr. Stokoe launched the journal *Mediation Theory and Practice* and is on the board of the College of Mediators. She is Chair of the Department of Social Sciences at Loughborough University in the United Kingdom. She has been Associate Dean (Research) since 2013. She is also Professor II at University College of Southeast Norway. **Barry Goldman** took the initiative to make contact with Dr. Stokoe. Here is a link to a "Conversation Analysis" talk that Dr. Stokoe has given: http://www.carmtraining.org/media/talk-at-the-royal-institution . Additional information and the registration link will be available in the future.

September 21, 2018, Mediator Lunch in Marquette

The Marquette County Bar Association and the ADR Section are co-sponsoring a mediator lunch from 11:30 a.m. to 1:30 p.m., Friday, September 21, 2018, in the Sample Room of The Vierling Restaurant, 119 South Front Street, Marquette, MI 49855. Attendees can purchase lunch from the restaurant menu during the lunch at their own expense. This lunch is being organized and moderated by Thomas L. Solka (Ret. Circuit Court). For additional information and registration, please contact **Thomas L. Solka** (Ret. Circuit Court) at tsolka67@gmail.com .

October 3, 2018, Mediator Ethics Teleseminar

The Section is sponsoring a teleseminar on mediator ethics from noon to 1:30 p.m., October 3, 2018. As mediators, we are faced with complicated delicate issues during the entire mediation process from disclosure obligations before mediation retention to our post mediation activity. Our panel of experienced professionals will share their viewpoints and experiences, including obligations under the SCAO Mediator Standards of Conduct. The presenters are **Donald D. Campbell**, Collins Einhorn Farrell PC, Southfield; **John A. Hohman, Jr**, former State Court Administrator, retired Probate Court Judge, Ann Arbor; and **Alecia M. Ruswinckel**, Professional Standards Counsel, State Bar of Michigan, Lansing. The Engineer is **Robert E. Lee Wright**, The Peace Talks, Grand Rapids. Additional information and the registration link will be available in the future.

October 12 and 13, 2018, Annual Meeting and ADR Conference in Traverse City

The ADR Section's Annual Meeting and ADR Conference, including 8 hours of advanced mediator training, will be Friday, October 12, and Saturday morning, October 13, 2018, at the Park Place Hotel in Traverse City. This will be an exciting learning and networking event featuring Michigan presenters. The Park Place Hotel has reduced rates for our Section, based on availability, on reservations made by September 11, 2018. You can contact the Park Place Hotel at 231-946-5000 and reference "State Bar of Michigan." Neither the hotel's website nor its toll-free number has access to this group information. You must call to reserve at a discount. October is the most beautiful time of the year in Traverse City. There are art galleries, farmers' markets, restaurants, wineries, and out door activities. This is a do-not-miss event. Additional information and the registration link will be available in the future.

The Michigan Dispute Resolution Journal

The Section publishes *The Michigan Dispute Resolution Journal*. The *Journals* are available at: http://connect.michbar.org/adr/journal . **Erin Archerd**, the Editor of the *The Journal* is looking for articles for future issues. Proposed articles for the *Journal* can be emailed to Erin at archerer@udmercy.edu .

February 2019 ADR Theme Issue of the *Michigan Bar Journal*

The ADR Section is sponsoring the February 2019 ADR theme issue of the *Michigan Bar Journal*. June 1, 2018, is the deadline for proposed complete articles to be submitted as a Word attachment to me at leehornberger@leehornberger.com . **Please put the title of the article in the Subject of the email.** ADR theme articles of interest to the wider Bar (as opposed to only ADR practitioners) and cutting-edge topics are especially encouraged. **Under no circumstances can the article, including end notes, about the author, and fast facts be more than 2,500 words.**

Please follow the article guidelines at: http://www.michbar.org/file/journal/about/artguidelines.pdf .

The June 2015 and June 2010 ADR theme issues of the *Michigan Bar Journal* are at: http://connect.michbar.org/adr/journal .

Section Activities and Leadership

Save the date information for most future ADR Sections events is at: http://connect.michbar.org/adr/events/recentcommunityeventsdashboard .

The ADR Section Council and Executive Committee meeting schedule is at http://connect.michbar.org/adr/home .

Social Media

The ADR Section's LinkedIn Group link is https://www.linkedin.com/groups/12083341 .

The ADR Section's Twitter link is https://twitter.com/SBM_ADR .

The ADR Section's Facebook page is https://www.facebook.com/sbmadrsection/ .

ADR Section Mission

The mission of the ADR Section is to encourage conflict resolution by:

1. Providing training and education for ADR professionals;
2. Giving professionals the tools to empower people in conflict to create optimal resolutions; and
3. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

ADR SECTION ACTION TEAMS

Effective Practices and Procedures Team (EPP) – (Marty Weisman 248-258-2700 and mweisman@wyrpc.com) EPP offers comments and recommendations concerning proposed legislation and court rules impacting ADR in Michigan. EPP was successful in lobbying for the passage of the Revised Uniform Arbitration Act and the Uniform Collaborative Law Act by the Michigan legislature.

Judicial Action Team (JAT) – (John Hohman 734-790-5169 and jahohman88@gmail.com) JAT advances ADR goals as they pertain to courts throughout Michigan and promotes ADR awareness in the federal, state and local judiciary. In 2012, JAT worked with the Bankruptcy Court for the Western District of Michigan to adopt a new local court rule promoting ADR in all bankruptcy cases.

Outreach/Membership Team – (Graham Ward 616-301-6800 x 6727 and wardl@cooley.edu) One of Outreach's goals is to raise awareness in the ADR community of all that the ADR Section has accomplished and that the Section has to offer. This Team also seeks to increase ways to meet the needs of ADR professionals and thereby increase the number of members and affiliates in the Section who will want to join in the very beneficial work of the Section. Outreach seeks to increase Section membership and has developed an ADR Section brochure. Outreach also seeks to increase awareness among the public in general, attorneys, businesses, schools, and governmental entities and agencies about what ADR is and its benefits.

Public Mediation Access Team (PMA) – (Zenell Brown 313-224-5363 and zenell.brown@3rdcc.org) PMA works with Community Dispute Resolution Centers and other organizations to help promote ADR and reaches out to special interest groups such as affinity bar organizations, the LGBT community, low income individuals and the elderly to determine how ADR might best address some of their unique dispute resolution needs. PMA also seeks to increase awareness among potential end users of ADR about what ADR is and its benefits. In order to accomplish its mission, PMA works closely with the other Action Teams and Task Forces, and especially the Judicial Action Team, Section to Section Team, and Diversity Task Force.

Publications Action Team – (Erin Archerd 510-604-3003 and archerer@udmercy.edu) Publications solicits, reviews, and publishes articles for the ADR Section's *The Michigan Dispute Resolution Journal* and collects and edits articles for an ADR theme issue of the *Michigan Bar Journal*. It is also responsible for postings to our e-mail listserv that keeps our members informed of Section activities and related ADR news.

Section to Section Team (STS) – (Mike Leib 248-563-2500 and michael@leibadr.com) STS strives to increase collaboration with other Sections of the State Bar and local bar associations with a view toward enhancing the use of ADR for members of this Section and those of other Sections as well. In doing so, STS has in the past put on programs for or collaborated with other sections in presenting educational programs about ADR. Those collaborating Sections have included the Young Lawyers, Litigation, and Family Law, to name a few.

Skills Action Team (SAT) – (Shel Stark 734-417-0287 and shel@starkmediator.com) SAT is responsible for planning continuing legal education and advanced skill building programs in ADR throughout the year. SAT plans and offers the Annual Meeting and ADR Conference each fall, which showcases local, Michigan talent; and the ADR Summit each spring, which features a nationally renowned mediator and mediation trainer. SAT also plans and offers four Lunch and Learn telephone seminars each year; plus regular regional Mediator Forums where ADR providers meet, network and learn from one another.

Diversity Task Force – (Danielle Potter 616-844-8391 and dpotter@miottawa.org) The Diversity Task Force was formed to promote and support diversity in the field of ADR, increase the cultural competence of ADR providers and enlarge opportunities for minorities in ADR. The four current objectives of the Diversity Task Force are to (1) increase the diversity of the ADR Section Council and the ADR Section Council's Action Teams and Task Forces; (2) increase the quality and improve the quantity of ADR trainings for providers regarding understanding, relating to, and meeting needs of diverse clients and consumers of ADR services; (3) support for ADR providers in developing their practices, enhancing their skills, and increasing their visibility in supplying ADR services; and (4) assisting the ADR Section Council with resource availability and for understanding and embracing diversity issues.

Governmental Task Force (GTF) – (Abe Singer 248-626-8888 and asinger@singerpllc.com) GTF was formed to provide short-term assistance to departments and agencies of the State of Michigan and local governmental units. GTF has presented trainings to the Attorney General's office, is working with the Governor's office to provide mediation as a cost-effective alternative to litigation and to promote mediation use throughout the state and has supported the cities of Ann Arbor and Inkster in facilitating discussions of various issues in those communities.

Martin C. Weisman

Effective Practices and Procedures Action Team

by Martin C. Weisman

The Effective Practices and Procedures Action Team (EPP) is one of the most active and important committees of the ADR Section. Membership is open to all members of the Section and we meet by way of a conference call once a month. As the name of the Action Team implicates, we review and discuss legislation, various practices and procedures, and court rule proposals that may impact the ADR community and processes.

Over the past year we have reviewed and made recommendations to the ADR Section Council and Executive Committee to support Senate Bill 517, House Bill 5073, and Civil Procedure and Discovery proposals that have been made to the Supreme Court Administrative Office (SCAO). We have worked on developing and pursuing a form of local court rule to assist mediators in fee collection; and on supporting the legislative efforts of the Family Law Section in connection with collaborative law practices, domestic abuse issues, and on analyzing proposals for limited scope representation (*i.e.*, settlement attorneys) to name just a few of our projects.

In the past years this Action Team undertook to draft and support the adoption of the Revised Uniform Arbitration Act which was adopted nearly unanimously by the Michigan Legislature. The EPP is currently the liaison between the ADR Section's Automatic Mediation Task Force and the ADR Council working for the adoption of some form of automatic ADR, with mediation being the default process, in covered civil actions.

As the current chair of EPP, I would welcome any Section member who would want to be part of this important group, or if you have any issues that you believe we should be looking into. My contact information is mweisman@wyrpc.com .

About the Author

Martin C. Weisman has served as a neutral, court or party-appointed arbitrator and mediator, and has written and lectured on numerous alternative dispute resolution and other topics. He is a former chair of the SBM Alternative Dispute Resolution Section, a member of PREMi, and a member of the AAA Panels of Neutral Arbitrators and Mediators and the National Academy of Distinguished Neutrals. He has been recognized as a Michigan "Super Lawyer" and "dBusiness Top Lawyer."

John Hohman

Judicial Action Team

by John Hohman

Mediation is not commonly utilized by many Michigan probate courts. This is puzzling, because the elements and dynamics of a typical probate dispute make these cases uniquely suited to resolution through mediation. Probate disputes almost always involve members of the same family who are not communicating well with one another. The relationships are frequently marked by long-standing and deep resentments. The parties' reactions to each other in the context of the dispute are charged with emotion. An effective mediator will help the parties work through these obstacles to create workable, long term solutions.

In 2016, the Judicial Access Team (JAT) of the State Bar of Michigan ADR Section Council surveyed the state's probate courts. The survey revealed that the use of mediation varies widely from county to county. Court culture, bar culture, financial resources and availability of trained mediators are the key variables in determining whether mediation is frequently used or rarely used to resolve probate disputes.

The JAT is working on a project to increase the use of mediation in the state's probate courts. The JAT is assembling local teams of State Bar members to lead the probate mediation proliferation project in each county or region. The strategy underlying this project recognizes that each county or region has unique circumstances which dictate the use and frequency of mediation. Team members will assess the strengths and challenges facing each county and prepare and implement an action plan which is designed to remove barriers to widespread use of mediation in the probate courts. The JAT estimates that 30 teams will be created.

What would a local team do? That depends on the strengths and challenges of the locality. Let's assume that the local probate judge is a proponent of mediation, but the bar members are not. In that instance, the team may work with the judge to do a lunch and learn for the local bar on the benefits of probate mediation. The ADR Section has PowerPoint presentations and other resources to share with the local teams to assist. Each county is different, and each solution to increasing the frequency of mediation will depend on what is needed in that county.

If you would like to join the local team in your area to increase the use of mediation in the probate courts, please contact John Hohman, JAT Chair by email at jahohman88@gmail.com .

About the Author

Hon. John A. Hohman, Jr. (retired) specializes in probate and family mediation at Fink and Fink, PLLC in Ann Arbor. Judge Hohman presided as a probate and family judge, and was also the Michigan State Court Administrator. He was named Michigan Jurist of the Year on two occasions (2008 and 2013). He has served as the president of the Michigan Probate Judges Association and as the chair of the Judicial Council of the State Bar of Michigan. He is currently the Chair of the Judicial Access Team of the ADR Section Council.

Barry Goldman

Conversation Analysis Presentation for Section Members on June 19, 2018

by Barry Goldman

If dispute resolution is ever going to be taken seriously as a field of study or a profession, it is going to have to become more scientific. We're going to have to base our practice on something more than anecdote and introspection. And showing pictures of brain scans and mumbling about "mindfulness" does not make anecdote and introspection any more valuable.

Dispute resolution is like medicine, only 400 years behind. What we need is the analog of the invention of the microscope.

I am delighted to say that at last there are signs of progress. Elizabeth Stokoe, Professor of Social Interaction at Loughborough University in the UK, has a scientific technique that can reveal what works and what doesn't in settlement discussions, and she is coming to talk to us.

The technique is called Conversation Analysis, and Prof. Stokoe's presentation to the ADR Section of the Michigan Bar will be held on June 19, 2018 at Cooley Law School in Auburn Hills. As I write this, further details about the presentation are being worked out. But save the date and check the ADR Section page at http://connect.michbar.org/adr/home for updates.

You can watch Prof. Stokoe's presentation to the Royal Institution here: http://bit.ly/2lhnnWu

My understanding of Conversation Analysis is rudimentary. You will know as much about it as I do if you follow the above link and watch the talk, but here is the gist: Conversation analysts first identify an "interaction." That's some bit of talk that is repeated many times by different people - calling the doctor's office to make an appointment, for example. Analysts collect hundreds of recordings of the interaction as it occurs in the real world. They transcribe the interactions, and those transcriptions comprise the data.

Analysts then comb through the data and look for patterns. What words were used when the interaction had the desired outcome? What words were used when it didn't? The idea is to approach the data without any preconceptions, and let the data drive the analysis. The results are often surprising. Obvious, common sense answers are not always what turn up.

It turns out, for example, that when the word "any" is used in a question, it tends to produce a no answer. When the word "some" is used in the same question, it tends to produce a yes. "Would you like any cake?" is not the same question as "Would you like some cake?" They look equivalent. Common sense tells us they are equivalent. But the data show the two questions produce very different results.

The last step is to complete the circle by bringing what has been learned from the data back into the world. If you want your dinner guests to have more cake, use the word "some." If you would prefer they didn't, use "any."

Prof. Stokoe has applied this technique in a number of different contexts: medical interactions, law enforcement, sales, hostage negotiations, and more. But she is particularly interested in mediation. She is on the board of the College of Mediators and edits the journal *Mediation Theory and Practice*.

This could be what we have been waiting for.

Edmund J. Sikorski, Jr.

Dispute Resolution: Selecting the Right Process for Your Clients

by Edmund J. Sikorski, Jr

The choice of which dispute resolution process to use boils down to answering one basic question: **Do you want to actively participate in the resolution outcome or do you want someone else to impose a solution upon you?**

The answer to this question will determine the choice of dispute resolution process. It will be a choice between a process like mediation – where a neutral third party helps the disputants come to a consensual decision on their own – or processes like litigation and arbitration – where a third party imposes a solution and there is a "winner" and a "loser."

Some parties may be required (because of a contract between them that requires the filing of a complaint) to commence litigation or arbitration proceedings in order to bring the parties into the Alternative Dispute Resolution arena. That action is a **strategic** decision, not a commitment to seek a litigated outcome.

There are three basic types of dispute resolution in the American system of civil conflict resolution: mediation, arbitration, and litigation.

MEDIATION

In mediation, the parties employ a qualified neutral third party to help them come to a consensus on their own that resolves the conflict. The parties are encouraged to explore their respective interests (what they really want / what is important to them) and come to a mutually satisfactory solution that they can live with.

The process is confidential.

It is generally accepted that this method of conflict resolution is the most efficient and cost effective. Courts report that mediated resolutions are more likely to be complied with by the parties than litigated resolutions.

In evaluating the suitability of this method for your client, the attorney should address the following issues with the client:

1) What are the client's goals in the litigation?
2) Why does your client want those goals (especially in non-monetary cases)?
3) The same questions should be asked about the other side: What do they want and why do they want it?
4) What are the strengths and weaknesses of your case? Carefully consider the opposing side's view of the case and their strengths and weaknesses.
5) What facts and legal issues are subject to agreement or disagreement?
6) What points are you able to concede?
7) Are there motions that are likely to be filed that make it more or less desirable to settle now?
8) Are there deadlines that make it more or less desirable to settle now?
9) What are the estimates of provable damages and the likelihood of recovery?
10) Is your client economically and emotionally prepared to take the risks inherent in trial?
11) What is the downside risk to your client?

12) What is the downside risk to the opposing party?

13) How much is your client willing to pay, accept, do, or refrain from doing in order to settle the case?

A new empirical study by the Maryland State Justice Institute in January 2016 (full report at www.courts.state.md.us/courtoperations/pdfs/districtcourtstrategiesfullreport.pdf) made the following finding:

"An important benefit to ADR is that the participants who reached agreements in ADR are less likely to return to court for enforcement action, thus creating more efficiency in case processing."

This finding confirms the proposition that the conduct of a fair and impartial mediation process is central to the legitimacy of the decisions reached and to the individual's acceptance of those decisions as final.

CASE EVALUATION

Unique to Michigan is a process called Case Evaluation governed by MCR 2.403.

It is a process through which a panel of three attorneys, appointed by a court and not involved in the dispute, hears issues specified by the parties and then renders a monetary evaluation of the case. Penalties may be attached for not accepting the award if the rejecting party does not improve upon a trial verdict by 10% over the award.

A 2011 Report to the SCAO office included a major finding that twice as many cases were settled "at the table" in mediation compared to the acceptance rate of case evaluation awards.

The full SCAO report can be found at: http://courts.mi.gov/Administration/SCAO/Resources/Doations/Recuments/Publicports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf

This is an intermediate process where third parties tell disputants what to do.

ARBITRATION

Arbitrators listen to each side of the conflict and unilaterally decide on a binding outcome, *i.e.*, arbitrators tell the parties what to do.

Generally speaking, arbitration is more expensive than mediation but much less expensive than courtroom litigation. The disputants can often negotiate almost every aspect of the arbitration process, including the standards of evidence. The process is conducted without the strict application of courtroom evidentiary standards and requirements. Arbitration decisions are usually confidential, final, and not subject to appeal except in a very few circumstances.

LITIGATION

In litigation, a third party also tells everyone what to do. The setting is public, formal, and must adhere to a pre-ordained set of procedural and substantive rules. A judge or jury is responsible for evaluating the competing positions and facts, weighing the evidence as they deem appropriate, and making a decision (a ruling).

The third-party decision is subject to appeal to higher courts.

Client participation and consent to the choice to "bet the farm" on the outcome of the case is absolutely essential for the simple reason that someone will win and someone will lose.

CONCLUSION

The Supreme Court Administrative Office reported in 2016 that LESS than 1% of filed cases conclude by verdict of a judge or jury.

Oakland County Circuit Judge James Alexander informed the participants of the Michigan Institute Business Court Judicial & Practitioner Seminar held on May 2, 2017, that the motion case load in Oakland County only permits 3 minutes of judicial attention per case.

These facts alone compel the conclusion that justice is well-served by observing and implementing the wisdom given us by Abraham Lincoln:

> "Discourage litigation. Persuade your neighbor to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good man. There will still be business enough."

About the Author

Edmund J. Sikorski, Jr., J.D. offers civil mediation services and is an approved Washtenaw County Civil Mediator, an incoming 2017 co-chair if the Washtenaw County Bar Association ADR Committee, and a Florida Supreme Court Certified Circuit Civil and Appellate Mediator now residing in Ann Arbor, Michigan. Recipient of 2016 National Law Journal ADR Champion Trailblazer Award. He can be reached at 734-845-4109 or edsikorski3@gmail.com. His website is www.edsikorski.com .

William D. Gilbride

Erin R. Cobane

Extending Arbitration Agreements to Bind Non-Signatories

by William D. Gilbride, Jr. and Erin R. Cobane

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, codifies a federal policy in favor of arbitration over litigation.[1] "The [FAA] provides that if a party petitions to enforce an arbitration agreement, '[t]he court shall hear the parties, and upon being satisfied of the making of an agreement for arbitration . . . shall make an order directing the parties to proceed to arbitration [.]"[2] Similarly, Michigan state policy favors arbitration of claims.[3] The Michigan Court of Appeals has recognized a presumption of arbitrability "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[4]

Nevertheless, arbitration is a matter of contract,[5] and an arbitration agreement "cannot be imposed on a party which was not legally or factually a party to the agreement wherein an arbitration provision is contained."[6] However, both state and federal courts have identified circumstances in which a non-signatory will be forced to arbitrate his claims.[7] While it is true that the FAA preempts state law that invalidates agreements to arbitrate, 9 U.S.C. § 2 recognizes that enforceability of an agreement to arbitrate may be decided on the basis of state contract law.[8] Michigan courts thus recognize five traditional principles of contract law that allow for an arbitration agreement to be enforced against a non-signatory: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel.[9]

1 E.I. DuPont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3d Cir. 2001) (quoting Sandik AB v. Advent International Corp., 220 F.3d 99 104-05 (3d Cir. 2000)).

2 *Id*. (quoting 9 U.S.C. § 4).

3 Detroit v. A W Kutsche, 309 Mich. 700, 703; 16 N.W.2d 128 (1944).

4 Amtower v William C Roney & Co (On Remand), 232 Mich.App. 226, 235; 590 N.W.2d 580 (1998) (quoting AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 650 (1986)).

5 See United Am. Healthcare Corp. v. Backs, 997 F.Supp.2d 741, 745-46 (E.D. Mich. 2014) ("An arbitration is, quite simply, a contract."); Beck v. Park West Galleries, 499 Mich. 40, 45; 787 N.W.2d 804 (2016).

6 St. Clair Prosecutor v. AFSCME, 425 Mich. 204, 223, 388 N.W.2d 231 (1986); see AT&T Technologies v. Comm. Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415 (1986) ("Generally, a party cannot be forced to arbitrate any dispute unless he or she has expressly agreed to do so."); Thomson-CSF, S.A. v. American Arbitration Assoc., 64 F.3d 773, 776 (2d Cir. 1995) ("[W]hile there is a strong . . . policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.").

7 Javitch v. First Union Securities, Inc., 315 F.3d 619 (6th Cir. 2003).

8 Tobel v. AXA Equitable Live Ins. Co., No. 298129, 2012 WL 555801, at *2-*3 (Mich. Ct. App. Feb. 21, 2012); see DeCaminada v. Coopers & Lybrand, LLC, 232 Mich.App. 492, 502 n 7; 591 N.W.2d 356 (1998) ("State laws governing contracts in general do not conflict with the FAA simply because they also affect arbitration contracts.").

9 AFSCME Council 25 v. Wayne Cty., 292 Mich.App. 68, 81; 811 N.W.2d 4, 12 (2011). The Fifth Circuit in Sapic v. Gov't of Turkmenistan, 345 F.3d

1. Incorporation by Reference

A non-signatory may be required to arbitrate against a signatory to an arbitration agreement if the non-signatory executes a contract that incorporates the arbitration agreement by reference.

The Sixth Circuit recognized this principle in *Exchange Mut. Ins. Co. v. Haskell Co.*[10] Haskell and Mitchell Homes entered into an agreement containing a clause requiring all disputes relating to the agreement to be submitted to arbitration (the Primary Contract).[11] Haskell then executed a second contract with Rogersville Company whereby Rogersville would assume all obligations with respect to the Primary Contract (the Subcontract).[12] Rogersville then obtained a performance bond through Exchange Mutual Insurance Company, conditioned upon Rogersville performing its obligations under the Subcontract (the Bond).[13] The Subcontract was "referred to and made part of" the Bond.[14]

After a dispute arose, Haskell initiated arbitration proceedings against Exchange Mutual.[15] Exchange Mutual filed a motion in response, arguing that it was a non-signatory to the Primary Contract containing the arbitration clause.[16] The Sixth Circuit held that, although Exchange Mutual was a non-signatory to the Primary Contract, the Bond incorporated by reference the terms of the underlying Subcontract.[17] "The subcontract, in turn, incorporated by reference the terms of the primary contract which imposed an obligation to submit all unresolved disputes to arbitration."[18] Thus, incorporation by reference of a contract containing an arbitration provision incorporates the right and obligation to arbitrate, and a non-party to the agreement may be compelled to arbitrate claims arising out of the primary contract which contained the agreement to arbitrate when the primary contract has been incorporated by reference into the secondary contract.

2. Assumption

If a non-signatory's conduct indicates an intent to be bound by an arbitration award, or an intent to assume the responsibilities and interests of an arbitration agreement, the non-signatory will be bound under assumption.

In *Gvozdenovic v. United Air Lines*, United Air Lines (United) contracted to hire 1,202 flight attendants from Pan American World Airways, Inc. (Pan Am) Pacific Division.[19] The Association of Flight Attendants (AFA) entered into a Letter of Agreement with United which stated that the incoming attendants would become members of the AFA upon commencing employment with United.[20] Further, the Letter acknowledged that the employees' seniority status would be determined in arbitration between the incoming and incumbent flight attendants.[21] The incoming attendants were subsequently presented offers of employment conditioned on the terms stated in the Letter of Agreement.[22] United then deposited $132,700.00 into bank accounts it had opened to assist the attendants in covering the cost of arbitration.[23] The flight attendants drew from these accounts for this purpose.[24] At the first arbitration hearing, the incoming attendants argued that they should receive full credit for their term with Pan Am when determining seniority.[25]

Dissatisfied with the arbitrator's ultimate determination, the incoming attendants sued, contending that they were neither employees of United nor members of the AFA at the time the Letter of Agreement was executed, and thus were not bound to the

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347 (5th Cir. 2003), recited another commonly used list: "Six theories for binding a non-signatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary."

10 742 F.2d 274 (6th Cir. 1984).
11 *Id*. at 274.
12 *Id*. at 275.
13 *Id*.
14 *Id*. at 276.
15 *Id*. at 275.
16 Exchange Mut. Ins. Co., 742 F.2d at 275.
17 *Id*. at 276.
18 *Id*.
19 933 F.2d 1100, 1103 (2d Cir. 1991).
20 *Id*.
21 *Id*.
22 *Id*.
23 *Id*. at 1104.
24 *Id*.
25 *Gvozdenovic,* 933 F.2d at 1104.

arbitration award.[26] The court noted that the record demonstrated an "active and voluntary participation in the arbitration" on the part of the flight attendants.[27] Accordingly, the attendants' conduct manifested a clear intent to arbitrate the dispute, and thus they were bound by the arbitration award even though they were neither employees of United nor members of the AFA at the time the Letter of Agreement was entered into containing the agreement to arbitrate.[28]

3. Agency

Under traditional principles of agency, a principal is bound by the acts of its agent where such agreement is undertaken within the scope of the agent's duties.[29] Similarly, a non-signatory principal may be bound to arbitrate via the acts of its signatory agent.

In *Altobelli v. Hartmann*, the Michigan Supreme Court addressed whether plaintiff's tort claims against individual principals of a law firm fell within the scope of an arbitration clause that mandated arbitration between the firm and a former principal.[30] Plaintiff Altobelli worked as an attorney in defendant law firm.[31] Upon joining the firm, plaintiff signed an operating agreement which required mandatory arbitration of any dispute between "the firm and any current or former partner."[32] Following the termination of plaintiff's equity ownership, plaintiff sued, naming seven individual partners of the firm.[33] However, plaintiff did not name the firm as a defendant.[34] Defendants filed a motion for summary disposition arguing that plaintiff's claims fell within the scope of the arbitration clause as a dispute between "the firm" and any current or former partner.[35]

In binding plaintiff to the agreement, the *Altobelli* court considered the concept of agency, noting that "corporations can only act through officers and agents."[36] Therefore, "the acts of the officers and agents of a corporation, within the scope of their employment, are the acts of the corporation[.]"[37] In terminating plaintiff's equity interest, the individual partners acted within the scope of their employment, and therefore, on behalf of the firm.[38] Consequently, any tort claims that plaintiff possessed against the individual partners constituted a dispute between a former partner and the firm and therefore fell within the scope of the arbitration clause. The court concluded that Altobelli could not circumvent the agreement to arbitrate by naming individual officers of the firm instead of the firm itself in order to bring a court action outside of the agreement to arbitrate.

4. Piercing the Corporate Veil

A non-signatory may also be bound to arbitrate where it is found by the arbitrator to be the alter ego of the signatory, allowing opposing parties to "pierce the corporate veil."

In *Mobius Management Systems Inc. v. Technologic Software Concepts, Inc.*, petitioner, Mobius Management Systems (Mobius), sought to confirm an arbitration award against Technologic Software Concepts, Inc. (Technologic), and its president, Thomas Politowski (Politowski).[39] The parties, Mobius and Technologic had entered into an Asset Purchase Agreement under which

Technologic purchased a software product from Mobius.[40] The agreement contained an arbitration provision, pursuant to which Mobius initiated an arbitration claim when Technologic failed to make payments due to Mobius.[41] In its demand, Mobius named Technologic and Politowski as jointly liable.[42] Politowski appeared specially to contest the arbitrator's

26 *Id.* at 1105.
27 *Id.*
28 *Id.*
29 Restatement (Second) of Agency §219(1) (1958).
30 499 Mich. 284, 287 (2016).
31 *Id.* at 288.
32 *Id.*
33 *Id.* at 291-92.
34 *Id.* at 292.
35 *Id.*
36 *Altobelli*, 499 Mich. at 297 (quoting Attorney General v. Nat'l Cash Register Co., 182 Mich. 99, 111; 148 N.W. 420 (1914)).
37 *Id.* (quoting Nat'l Cash Register, 182 Mich. At 111).
38 *Id.* at 302.
39 Mobius Management Systems, Inc. v. Technologic Software Concepts, Inc., No. 02 Civ. 2820(RWS), 2002 WL 31106409, at *1 (S.D.N.Y Sept. 20, 2002).
40 *Id.*
41 *Id.*
42 *Id.*

jurisdiction over him, asserting that he was not a party to the agreement, and therefore could not be compelled to arbitrate claims against him.[43] Over Politowski's objections, the arbitrator determined that Technologic and Politowski were jointly liable to Mobius, as Technologic was the alter ego of Politowski.[44] Technologic appealed.[45]

The district court recognized that "piercing the corporate veil between a signatory and [non-signatory] party may bind the [non-signatory] party to an arbitration agreement of its alter ego."[46] The court noted that "where an [arbitration] agreement include[s] a 'broad provision for arbitration of all disputes arising thereunder or related thereto,' . . . deciding which issues pertaining to the relationship of the parties are arbitrable should be left to the arbitrators."[47] In the case of Politowski, Mobius submitted evidence to the arbitrator that Politowski was the president and majority shareholder of Technologic, and that, upon defaulting, Technologic sold its assets with Politowski receiving a portion of the invested proceeds.[48] Thus, the arbitrator concluded that the elements for piercing the corporate veil were satisfied.[49] On appeal, the district court held that the arbitration agreement's broad language awarded the arbitrator control over the relationships of the parties, and consequently, their liability.[50] Thus, the issue of whether Technologic was the alter ego of Politowski was properly before the arbitrator, and even though Politowski was not a party to the agreement to arbitrate, his defense to the claim that he and Technologic were not alter egos could be decided by the arbitrator, and Politowski held legally bound by that decision.[51]

5. Estoppel

Under an estoppel theory, a signatory may be compelled to arbitrate his claims against a non-signatory when: (1) the signatory to an arbitration agreement must rely on the terms of the agreement in asserting his claims against the non-signatory; or (2) when the signatory raises allegations of "substantially interdependent and concerted misconduct" by both the non-signatory and a signatory of the contract.[52]

In *City of Detroit Police and Fire Retirement System v. GSV VDO Fund Ltd.*, plaintiff entered into a consulting agreement with Smith Barney Shearson, Inc. (Smith Barney), in which the retirement system would rely on Smith Barney to act as an investment fiduciary.[53] In the course of this relationship, Smith Barney, through its employees Murray and Giampetroni, recommended plaintiff invest in funds managed by GSC.[54] However, Murray and Giampetroni failed to disclose to the City that GSC operated as a private equity arm of Smith Barney.[55] After the investment went bad, plaintiff sued and defendants moved for summary disposition, arguing that plaintiff was bound by an arbitration provision in the consulting agreement.[56] Plaintiff opposed the motion to compel it to arbitration on the basis that it never entered into an arbitration agreement with defendants Murray or Giampetroni personally, or with GSC, and therefore it could not be compelled to arbitrate its claims against those defendants.[57]

The Michigan Court of Appeals held that, under the second prong of the *Grigson* test,[58] plaintiff was required to arbitrate all of his claims, even those claims against non-signatories Murray, Giampetroni, and GSC, as "equity does not allow a party to 'seek to hold the non-signatory liable pursuant to duties imposed by the agreement . . . but, on the other hand, deny

43 *Id.*
44 *Id.*
45 *Id.*
46 Mobius, 2002 WL 31106409, at *2.
47 *Id.*
48 *Id.* at *1.
49 In order to pierce the corporate veil, "the corporate entity must [first] be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." Foodland Distributors v. Al-Naimi, 220 Mich. App. 453, 457, 559 N.W.2d 379, 381 (1996) (quoting SCD Chemical Distributors, Inc. v. Medley, 203 Mich.App. 374, 381, 512 N.W.2d 86 (1994).
50 Mobius, 2002 WL 31106409, at *2.
51 *Id.*
52 City of Detroit Police & Fire Retirement Syst. v. GSC CDO Fund Ltd., No. 289185, 2010 WL 1875758, at *6 (Mich. Ct. App. May 11, 2010) (quoting Grigson v. Creative Artists, LLC, 210 F.3d 524, 528 (5th Cir. 2000)).
53 *Id.* at *1.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.* at *4.
58 Grigson, 2010 F.3d 524 at 528 (5th Cir. 2000) ("[A] non-signatory to an arbitration agreement can compel arbitration . . . (2) when the signatory raises allegations of substantially interdependent or concerted misconduct by both the non-signatory and one or more signatories to the contract.").

arbitration's applicability because the defendant is a non-signatory."[59] According to the court, plaintiff's claims against defendants were "substantially interdependent" because the underlying basis of all claims emanated from the relationship with Smith Barney, a signatory to the agreement.[60] Because plaintiff, a signatory, sought to base his claims on the agreement with Smith Barney, he was estopped from avoiding enforcement of the arbitration agreement, even as to non-signatories.[61] Thus, the City was ordered to have its claims against Murray, Giampetroni and GSC heard in arbitration, even though none of them was party to the agreement to arbitrate.

When analyzing the scope and enforceability of an agreement to arbitrate, counsel needs to give careful consideration to the policies embodied in state and federal law favoring arbitration and the bias of courts to include parties and claims not expressly within the agreement to arbitrate when well-settled legal principals suggest a basis to include such matters within the parties' arbitration proceeding.

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59 City of Detroit Police & Fire Retirement Syst., 2010 WL 1875758, at *6.
60 *Id*. at *7.
61 *Id*.

Phillip J. DeRosier

Offer of Judgment Rule Applies to a Judgment Entered on an Arbitration Award

by Phillip J. DeRosier

Under Michigan's "offer of judgment" rule, MCR 2.405, costs and attorney fees may be imposed on a party that rejects an offer to stipulate to entry of a judgment and fails to obtain a more favorable "verdict." In *Simcor Construction, Inc v Trupp,* ___ Mich App ___ (Docket No. 33383; issued Jan. 9, 2018), the Michigan Court of Appeals clarified that the rule is not limited to judgments entered as a result of litigation in court, and that the definition of "verdict" also includes judgments entered on arbitration awards.

The Facts

The plaintiff in *Simcor Construction* filed a breach of contract claim against the defendants in district court. Pursuant to an arbitration clause in the parties' contract, the court ordered the parties to arbitration. In the meantime, the defendants made an offer of judgment in favor of the plaintiff for $2,200. The plaintiff rejected that offer and made a counter-offer of judgment for $9,383.39, which the defendants rejected. The case proceeded to arbitration, resulting in the arbitrator dismissing the plaintiff's case "with prejudice and without costs."

The plaintiff filed a motion in the district court to vacate the arbitration award. The court, however, confirmed the arbitration award and entered "a Judgment of No Cause of Action" in the defendants' favor. The defendants moved for offer of judgment sanctions under MCR 2.405(D), but the district court denied the motion, concluding that confirmation of the award was not a "verdict" under MCR 2.405(A)(4). The circuit court affirmed, reasoning that "a court that confirms the arbitration award is essentially acting in an appellate capacity and not rendering a 'verdict.'"

The Court of Appeals' Decision

After granting the plaintiff's application for leave to appeal, the Court of Appeals reversed the denial of offer of judgment sanctions. The Court noted that under the offer of judgment rule, a "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment." MCR 2.405(A)(4)(c). The Court explained that applying this rule involves a two-step inquiry. First, determining whether a "judgment" has been entered. And second, determining whether the judgment was entered as a result of a motion.

The Court reasoned that a judgment confirming an arbitration award is a "judgment" for purposes of MCR 2.405 because MCR 3.602(L) provides that "judgments confirming arbitration awards carry 'the same force and effect . . . as other judgments' and 'may be enforced in the same manner.'" Moreover, the Court explained, "the district court entered a judgment in favor of defendants 'as a result of' its ruling on plaintiff's motion to vacate the arbitration award, thereby satisfying the second requirement under MCR 2.405(A)(4)(c), i.e., that the judgment be entered as a result of a ruling on a motion after rejection of the offer of judgment." The Court acknowledged that the arbitrator made the initial decision to dismiss the plaintiff's case, but it was "the district court, not the arbitrator, that made the final determination of whether to confirm, correct, modify, or vacate the arbitration award. . . . Because the court had the final determination as to the arbitration award, the judgment constitutes a verdict."

In light of the Court of Appeals' decision in *Simcor Construction*, parties should keep in mind that rejecting an offer of judgment in a case headed to arbitration carries with it the same risk of rejecting an offer of judgment in any other case.

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Lee Hornberger

Michigan Mediation Case Law Update: 2016-2017

by Lee Hornberger

I. INTRODUCTION

This update reviews significant Michigan appellate cases issued since January 2016 concerning mediation. For the sake of brevity, a short citation style is used rather than the official style for Court of Appeals unpublished decisions.

Prior cases are reviewed at "Michigan Arbitration and Mediation 2014-2015 Case Law Update," *The ADR Quarterly* (April 2016). https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Apr16.pdf

II. MEDIATION

A. Michigan Supreme Court Decisions

Supreme Court orders mediation

Huntington Woods v Oak Park, 500 Mich 1224; 886 NW2d 635 (2016). Parties directed to participate in settlement proceedings and Court of Appeals (COA) Chief Judge appointed as mediator who could direct parties to produce information he believes will facilitate mediation. Additional information or comments made during mediation will be confidential and will not become part of record, except on motion by one of parties. MCR 7.213(A)(2)(f); MCR 2.412(C). If mediation results in full or partial settlement, parties shall file stipulation to dismiss. MCR 7.318. Eventually the Supreme Court vacated, 311 Mich App 96; 874 NW2d 214 (2015), and remanded the case to the Circuit Court. 500 Mich 985 (2017). MCR 7.316(A)(9).

B. Michigan Court of Appeals Published Decisions

COA affirms enforcement of custody MSA.

Rettig v Rettig, ___ Mich App ___ (Docket No. 338614; issued Jan. 23, 2018). Parties signed a mediated settlement agreement (MSA) concerning custody. Over the objection of one parent that the Circuit Court should have a hearing concerning the Child Custody Act best-interest factors and whether there was an established custodial environment, the Circuit Court entered a judgment that incorporated the MSA. The COA affirmed. The COA said although the Circuit Court is not necessarily constrained to accept the parties' stipulations or agreements verbatim, the Circuit Court is permitted to accept them and presume at face value that the parties meant what they signed. The Circuit Court remains obligated to come to an independent conclusion that the parties' agreement is in the child's best interests, but the Circuit Court is permitted to accept an agreement where the dispute was resolved by the parents. The Circuit Court was not required to make a finding of an established custodial environment.

Here are some questions raised by *Rettig*:

- What effect does *Rettig* have on *Vial v Flowers* (Docket No. 332549; issued Sept. 22, 2016; unpublished), an unpublished COA opinion that found Circuit Court does need to determine whether an established custodial environment exists before entering judgment of custody? (See discussion of *Vial v Flowers* below.)
- Was it appropriate for the *Rettig* court to refer to the established custodial environment holding of *Vial* as "nonsensical?"
- If *Rettig* resulted in the demise of *Vial*, did *Vial* deserve a better demise?
- If *Vial* had never existed, would *Rettig* have been a published decision?

The *Rettig* decision is discussed further in this Spring 2018 issue of *The Michigan Dispute Resolution Journal* in Anne Bachle Fifer's article, "Court of Appeals Upholds Enforceability of Mediated Agreement."

C. Michigan Court of Appeals Unpublished Decisions

Mediation confidentiality.

Hanley v Seymour (Docket No. 334400, issued Oct. 26, 2017). Defendant ex-wife sent an attorney suing her ex-husband's current wife financial information about current wife and defendant's ex-husband, who happened to be the attorney representing current wife. Plaintiff ex-husband sued defendant for contempt, claiming violation of a protective order in their divorce that prohibited the parties from disclosing financial information learned during discovery. Defendant argued an unclean hands defense, claiming plaintiff had learned about the contemptuous materials during a mediation session and so could not use those materials in the contempt proceedings. COA found the communications received by attorney from defendant ex-wife were not part of mediation proceedings. Plaintiff ex-husband was made aware of communications at conclusion of mediation in which plaintiff participated with opposing attorney. Opposing attorney had received documents from defendant before mediation was conducted. There was no violation of MCR 2.412(C) regarding confidentiality of mediation communications.

MSA enforced.

Jaroh v Jaroh (Docket No. 334216, issued Oct. 17, 2017). Defendant moved to set aside MSA, contending she signed MSA under duress because she had no food during nine-hour mediation and was pressured by her attorney and mediator to sign MSA. Circuit Court enforced MSA. Defendant argued MSA was obtained by fraud and Circuit Court abused its discretion by failing to set it aside and by failing to hold evidentiary hearing when defendant asserted plaintiff had procured MSA by fraud. COA, affirming Circuit Court, said finding of Circuit Court concerning validity of parties' consent to settlement agreement will not be overturned absent finding of abuse of discretion. *Vittiglio v Vittiglio*, 297 Mich App 391, 400; 824 NW2d 591 (2012), lv dn 493 Mich 936; 825 NW2d 584 (2013). According to COA, defendant's allegation that she did not eat during nine-hour mediation and was pressured to accept terms of MSA by her attorney and mediator did not demonstrate coercion necessary to sustain claim of duress. Mediator provided parties with snacks. There was no evidence defendant was refused request to get something to eat or was not allowed to bring in her own snacks or food during mediation. Mediation was conducted as shuttle mediation where parties were separated.

Mediation and domestic violence.

Kenzie v Kenzie (Docket No. 335873, issued Aug. 8, 2017). Attorney fees granted, in part, because husband initiated altercation with wife following mediation at which he called police and accused wife of domestic violence; and he obstructed mediation process that would have allowed case to reach settlement posture.

Spousal support language not in MSA.

Amante v Amante (Docket No. 331542, issued June 20, 2017). Plaintiff argued both counsel and mediator forgot to include provision barring spousal support in settlement agreement. Plaintiff argued under plain language of judgment of divorce, dispute regarding provision barring spousal support should have been decided by arbitrator. Under terms of judgment, "any disputes regarding the judgment language" should be submitted to arbitrator. Circuit Court did not abuse its discretion in following settlement agreement and entering judgment and denying plaintiff's motion for relief from judgment.

Binding settlement agreement.

Roth v Cronin (Docket No. 329018, issued Apr. 25, 2017), lv dn 501 Mich 910 (2017). Plaintiff appealed order granting summary disposition in divorce proceedings on grounds her attorney was negligent, in part, for engaging in settlement discussions without having determined the value of the marital estate. COA found "[Plaintiff] understood (1) the terms of the settlement, (2) she would be bound by the terms of the settlement if she accepted it, and (3) she had the absolute right to go to trial, where she could get a better or worse result. She testified she understood the terms and would be bound by the settlement, and had the right to go to trial. Plaintiff further testified that it was her own choice and decision to settle pursuant to the terms that were placed on the record."

Circuit Court Judge not disqualified.

Ashen v Assink (Docket No. 331811, issued Apr. 20, 2017), lv dn 501 Mich 952 (2018). Plaintiff argued Circuit Court judge should have been disqualified because, as mediator over case, he would have had personal knowledge of disputed evidence concerning proceeding. Mediation scheduled for June 11, 2015, and was cancelled on June 2, 2015. Judge never actually mediated case. Plaintiff failed to show violation of MCR 2.003(C)(1)(c)(judge has personal knowledge of disputed evidentiary facts concerning proceeding).

Can Circuit Court appoint a Discovery Master?

Barry A Seifman, PC v Raymond Guzell, III (Docket No. 328643, issued Jan. 17, 2017), lv dn 500 Mich 1060 (2017). Defendant contended Circuit Court lacked authority to appoint independent attorney as Discovery Master and to require parties to pay Master's fees; and Circuit Court should have made determination regarding reasonableness of Master's fees. COA held once parties accepted case evaluation award, defendant lost ability to appeal earlier Discovery Master order.

CCA trumps custody MSA.

Vial v Flowers (Docket No. 332549 , issued Sept. 22, 2016). COA rejected wife's contention parties had not entered into MSA concerning custody. December 2015 mediation resulted in MSA. COA held Circuit Court failed to adequately consider child's

best interests before it entered custody judgment in April 2016. COA said party is bound by signature on custody MSA as long as Circuit Court agrees MSA is in best interests of child. MSA signed by parties was binding on parties subject to Circuit Court doing best interests analysis. When parties enter into otherwise binding custody agreement, Circuit Court is not relieved of obligation to examine best interest factors. By entering judgment of custody, court implicitly acknowledges it has (1) examined best interest factors, (2) engaged in profound deliberation as to its discretionary custody ruling, and (3) is satisfied custody order is in child's best interests. Evidentiary hearing not necessarily required given custody MSA. COA indicated Circuit Court also erred by not considering whether established custodial environment existed. *Vial* is called into question by *Rettig v Rettig* (See discussion above).

Attendance and authority at mediation session.

Howard v Glen Haven Shores Ass'n (Docket No. 325812, issued July 7, 2016). Circuit Court properly refused to enforce purported MSA that had been rejected by Board of Directors where there was no court order that entire Board of Directors be present at mediation and it was known settlement was subject to approval by full Board.

MSA not enforced.

Coloma Emergency Ambulance, Inc v Timothy E Onderline, Ears, Inc (Docket No. 325616, issued Apr. 21, 2016), lv dn 500 Mich 897 (2016). Parties participated in mediation which resulted in all counsel signing "Proposed Settlement" document, which referenced future signing of additional documents. Circuit Court held document was not binding contract. COA affirmed. If preliminary agreement includes all essential terms, it can be enforceable agreement. *Opdyke Investment Co v Norris Grain Co,* 413 Mich 354; 320 NW2d 836 (1982); *Heritage Broadcasting Co v Wilson Communications, Inc,* 170 Mich App 812; 428 NW2d 784 (1988).

Domestic relations MSA enforced.

Kleinjan v Carlton (Docket No. 328772, issued Jan. 19, 2016), enforced DR MSA. Circuit Court did not err by entering order based on parties' signed, handwritten MSA, despite defendant's attempt to disavow MSA. Defendant bound by terms of signed, written MSA. MCR 3.216(H)(7). Defendant cannot dispute MSA based on change of heart.

III. Michigan Court Rules AMENDMENTS CONCERNING MEDIATION

MCR 3.216 amended, effective September 1, 2017

"**MCR 3.216 Domestic Relations Mediation**

(3) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not submit a contested issue in a domestic relations action, including postjudgment proceedings, if the parties are subject to a personal protection order or other protective order, or are involved in a child abuse and neglect proceeding. The court may order mediation without a hearing if a protected party requests mediation.

(H) Mediation Procedure

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the state court administrative office as directed by the supreme court. …

Comment:

The amendments of MCR 3.216 update the rule to be consistent with MCL 600.1035, 2016 PA 93, which allows a court to order mediation if a protected party requests it and requires a mediator to screen for the presence of domestic violence throughout the process.

MCL 600.1035 is discussed in *The ADR Quarterly* (July 2016), p. 12. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ 2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/ July16.pdf

MCR 3.216 is examined in the previous issue of *The Michigan Dispute Resolution Journal*, Lore A. Rogers, "Screening for Domestic

Abuse in Mediation of Domestic Relations Cases: What You Need to Know," (Winter 2018) p.27. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Winter18.pdf

MCR 7.316, concerning mediation, amended effective September 1, 2017.

"Rule 7.316 Miscellaneous Relief

(A) Relief Obtainable. The Supreme Court may any time, in addition to its general powers …

(9) order an appeal submitted to mediation. The mediator shall file a status report with this Court within the time specified in the order. If mediation results in full or partial settlement of the case, the parties shall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) with this Court pursuant to MCR 7.318. …

Staff Comment: The amendment of MCR 7.316 explicitly provides that the Supreme Court may order an appeal to mediation. The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

MARKMAN, C.J. (dissenting). When the proposed amendment of MCR 7.316(A) was published for comment, I wrote a concurring statement raising questions, and expressing concerns, about the proposed amendment, which will allow this Court to "order an appeal submitted to mediation." 500 Mich 1224, 1225 - 1227 (2016). Following publication of the proposed amendment, the Appellate Practice Section of the State Bar indicated that it "shares in [my] concerns," while the Alternative Dispute Resolution Section offered point-by-point responses to these concerns. Although I certainly appreciate these responses, they do not alleviate my concerns. As a result of the concerns raised in my statement of November 30, 2016, I respectfully dissent from the adoption of the present amendment."

Author Comment:

Justice Markman's viewpoint is reviewed in *The Michigan Dispute Resolution Journal* (Summer 2017), p. 3. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ 2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Summer17.pdf ❋

About the Author

Lee Hornberger is an arbitrator and mediator. He has received the George N. Bashara, Jr. Award from the State Bar's Alternative Dispute Resolution Section in recognition of exemplary service. He is a member of The National Academy of Distinguished Neutrals, included in The Best Lawyers of America 2018 for his work in arbitration, and on the 2016 and 2017 Michigan Super Lawyers lists for alternative dispute resolution.

He is Chair of the State Bar's ADR Section, former Editor of The Michigan Dispute Resolution Journal, former Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, former member of the State Bar's Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators.

While serving with the U.S. Army in Vietnam, he was awarded the Bronze Star Medal and Army Commendation Medals. The unit he was in was awarded the Meritorious Unit Commendation and the Republic of Vietnam Gallantry Cross Unit Citation with Palm.

He holds his B.A. and J.D. cum laude from The University of Michigan and his LL.M. in Labor Law from Wayne State University.

Anne Bachle Fifer

Court of Appeals Upholds Enforceability of Mediated Agreement

by Anne Bachle Fifer

The Michigan Court of Appeals recently issued just its second published opinion on the enforceability of mediation agreements in the divorce case of *Rettig v Rettig*, ___ Mich App ___ (Docket No. 338614; issued Jan. 23, 2018). The only other published case is also a divorce case, *Vittiglio v Vittiglio*, 297 Mich App 391 (2012), lv dn 493 Mich 936 (2013).

The narrow issue in *Rettig* is whether a trial court must make findings on the record regarding the best interests of the child(ren) and the established custodial environment after the parties have already reached an agreement through mediation. The Court ruled that such findings are unnecessary, thus strengthening the finality of a mediated agreement regarding child custody. While a trial court still has discretion to reject a mediated agreement regarding custody, it can exercise that discretion simply by accepting the mediated agreement without making specific findings.

One question is why this case was in the ten-percent of Court of Appeals cases selected for publication. It could be because *Rettig* overrules the holding in *Vial v Flowers*, an unpublished opinion per curiam of the Court of Appeals (Docket No. 332549; issued Sept. 22, 2016), where the Court of Appeals held that the trial court had not "adequately examined" whether the mediated custody arrangement was in the best interests of the child, and had "failed to determine whether an established custodial environment exists." The husband in *Rettig* relied on *Vial v Flowers* in arguing that the trial court in his case was required to make findings regarding "best interest" factors as well as "established custodial environment." But the Court of Appeals rejected his argument as "nonsensical in the context of an agreement between the parties," without mentioning *Vial v Flowers*.

The husband's argument was hardly "nonsensical," given that the Court of Appeals had just ordered that very thing in a similar case, three months before the hearing on the husband's motion. The *Rettig* court relied on cases where parents reached an agreement without mediation, whereas *Vial v Flowers* was closer to the *Rettig* situation. Interestingly, Judge Jane Markey was on the three-judge panels that decided both cases.

Since it is published, becoming state-wide precedent, it's worth considering some ADR aspects of *Rettig*.

The Court of Appeals first wrestled with whether the document it referred to as the "memorandum," that resulted from the parties' mediation, was an enforceable agreement. It is not clear why this was even an issue, since the memorandum was a printed, one-and-a-half page document, organized into the typical topics in a divorce mediation agreement, and signed by both parties. In *Kleinjan v Carlton*, unpublished opinion per curiam of the Court of Appeals (Docket No. 328772; issued Jan. 19, 2016), the Court enforced a handwritten mediation agreement. The Court here said the husband "likened" their mediation agreement "to a mediation settlement, where MCR 3.216(H)(7) and MCR 2.507(G) would require certain procedures to be followed." The only requirements of MCR 3.216(H)(7) are that "the terms of the settlement must be reduced to writing, signed by the parties." The *Rettig* "memorandum" meets this definition, as well as the terms of MCR 2.507(G), so it is puzzling why the Court felt it had to go to great lengths – noting that the agreement was "scrutinized" in a hearing – to declare it a valid agreement.

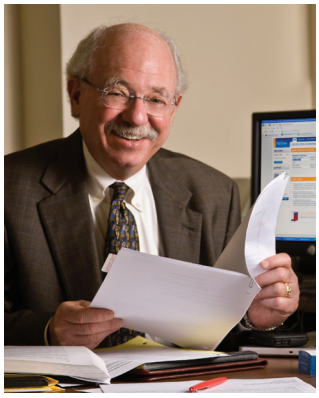
Rettig reiterates a point the Court has made in the past, that a party may not be relieved from a valid mediated agreement simply because the party has changed their mind. See, *e.g.*, *Vittiglio*, supra; *Annis v Annis*, unpublished opinion per curiam of the Court of Appeals (Docket No. 319577; issued Apr. 16, 2015). Consistent with other challenges to mediated agreements, the Court noted that the husband here "had in fact agreed to the memorandum" but now appeared to have "simply regretted making it," a condition to which the Court is unsympathetic.

Finally, the Court of Appeals referred to the process used in this case as "facilitated mediation." The parties referred to the process as simply "mediation," in keeping with MCR 3.216. One wonders why the Court of Appeals felt compelled to add the adjective "facilitated" to describe a process that is referred to in the Court Rule only as "mediation." The Court missed an opportunity to curtail the terminology confusion associated with mediation in the Michigan legal system, and instead contributed to it.

About the Author

Anne Bachle Fifer graduated from The University of Michigan Law School. She is a trainer, mentor and Certified Christian Conciliator with Peacemaker Ministries. Michigan's most experienced general civil mediation trainer, she regularly leads 40-hour mediation training courses through the Institute of Continuing Legal Education and for other organizations, as well as advanced mediation trainings. A frequent trainer for Peacemaker Ministries, she conducts workshops on Christian peacemaking for businesses, churches, and educational institutions, and has taught courses in biblical principles of conflict resolution in churches for both youth and adults, and for Christian organizations around the U.S., in Europe, and in Asia.

She is frequently appointed to state committees convened to improve ADR in Michigan. Recent appointments include committees to revise the ADR Court Rules; to develop a new court rule on confidentiality in mediation (now adopted); and a committee that developed Michigan›s Standards of Conduct for Mediators. She has served on the State Bar's ADR Section Council, Kent County Circuit Court›s ADR Oversight Committee, and the boards of Urban Transformation Ministries and the Creston Neighborhood Association. She has been a volunteer mediator in Michigan›s Community Dispute Resolution Program since 1990, and served two terms on the board of the Dispute Resolution Center of West Michigan since 2010, including three years as board president. She received the Distinguished Service Award from the State Bar›s ADR Section for her contributions to the field of ADR. She is listed in Best Lawyers in America for mediation, and Best Attorneys in Michigan.



Sheldon J. Stark

The Power of Connecting: Establishing Relationships & Building Trust in Mediation

by Sheldon J. Stark

Trust is the cornerstone of mediation. Without trust, the process is more likely to be unproductive, without leading to better understanding or resolution.

Where there is trust, participants are willing to open up and listen to each other - and sometimes the mediator - with an open mind. Mediation works best when people listen to one another and evaluate what they hear objectively and thoughtfully. Where there is little or no trust, participants remain tightly closed off from one another. They hear but they do not listen. They expect the worst and suspect all they hear from the other side, assuming every communication is a threat or mask designed to frighten or gain an unfair or improper advantage.

Where there is trust, participants are not afraid to present themselves honestly. At least one reason mediation provides confidentiality is to encourage participants to say what is truly on their minds. The mediator's task becomes that much more difficult if we must add "mind reading" to our list of skills. Where there is little or no trust, we are forced to guess and speculate about what is going on beneath the surface. Distrustful participants hide their feelings, conceal their motivation and project false impressions to avoid giving up or providing any advantage or insight that might be put to use against them.

Where there is trust, people are willing to take a few risks. A trusting environment is safe one. Giving up any part of their claims or defenses even for the sake of discussion is a risky – and scary – proposition, and without trust there is little incentive to do so. Achieving resolution through agreement is a risky proposition – and it takes some measure of trust to take a chance. Some participants worry they might leave money on the table. Some participants cannot believe representations that vary from their pre-existing conclusions.

Where there is trust, participants are willing to be flexible, engage in movement. They will examine the needs and interests of the other side and look for ways to accommodate them. Where there is little or no trust, even the smallest accommodation is suspect. In an environment lacking any trust, even after a case is settled, suspicion and anxiety can derail a resolution. How many times have you heard: "How do I know I'll get that check by the 27th?" Or, "What's going to prevent them from telling all their friends the settlement amount?"

In the 1980s, when Ronald Reagan was making deals with the Russians to reduce nuclear weapons, he campaigned for public support with a slogan. Do you remember: "Trust but verify!"? Those of you familiar with my political views will understand why I prefer an alternative formulation of this principle from Finley Peter Dunn: "Trust everybody but cut the cards!" These are statements that recognize how difficult it is to establish trust and why confidence-building measures and fact checking help the process along.

In my experience mediating civil cases, it is a rare dispute indeed where mediation will create trust between the parties. In employment and commercial business disputes, it has often taken years for the parties to reach their current level of distrust and suspicion. In personal injury cases, the litigants don't know one another, but plaintiffs have harbored negative feelings about the practices of the insurance industry most of their lives; and many long-time claims adjustors are cynical about claims administration and skeptical about the extent of injuries. For the most part, the best we can hope to achieve is a start on trust building between the parties.

What we can more realistically expect to achieve, is the development of trust between ourselves as mediators on the one hand, and the parties represented by counsel on the other. We do ourselves a disservice, therefore, if we engage in reality testing and risk assessment without first taking care to engage the parties in a relationship and use that relationship to build trust. As Gregory Wood wrote in the Summer 2010 edition of *The Dispute Resolution Journal*, "The success of negotiation will be enhanced if trust building, rather than strategy execution becomes a deliberate objective." One of our strategies, our objectives, our goals needs to be the building up of trust. Mediators want the parties and lawyers to trust them in order for mediators to best do their work.

Building trust with the parties and their lawyers begins by establishing a professional relationship, a relationship based upon respect, confidence, and experience. Out of that relationship, trust can grow and flourish. Arthur Ashe, the great tennis pro, has written, "Trust has to be earned and should come only after the passage of time." Indeed.

Intake

The relationship building process begins for me with the lawyers – they are the first to contact me, and it is through them that I can communicate with their clients. This may not be true in community dispute resolution center practice; but in my experience, generally speaking, there is ample time to work on a better relationship with the lawyers. It may be weeks if not months between initial contact and opening statements at the mediation table. During that interim period, the mediator begins the process of earning the trust so dear to a successful outcome.

Often, I'm contacted by lawyers who know me already. As a result, a core of trust exists from day one. While their trust may be misplaced, they have selected me because some degree of trust and respect exists. But equally often these days, at least one of the lawyers does not know me personally. Whether I know both lawyers, only one, or neither, my process is the same. It is a process that establishes a relationship and builds confidence and trust; or it enhances and confirms for the lawyers that they made the right choice.

The mediator's intake procedures should gain confidence, build trust, and earn respect from ADR consumers. Every mediator should try to see how his or her practices are perceived by the lawyers who contact them. Officious or unfriendly case managers, unreturned phone messages, and lack of direction can undermine rather than increase trust. The mediator can find himself in a hole without realizing how or why it happened.

Mediator intake needs to be:

1. User friendly
2. Responsive
3. Understandable
4. Thorough
5. Competent
6. Party oriented

The Pre-Mediation Conference Call

For me, the process typically begins with a phone call from one of the lawyers asking about availability, conflicts, and fees. During this call I listen to the lawyers' needs, trying to limit the amount of detail given at this early stage and to get an early sense of how well the lawyers are getting along. I explain that a pre-mediation conference call should be scheduled to work out logistics, make disclosures, and obtain a preview of the dispute.

The agenda for the pre-mediation conference call is an important element of the process. I encourage you to take a look at an agenda for a pre-mediation conference call on my website: www.starkmediator.com. In the "Forms" section, lawyers will find a comprehensive agenda for the inital call. I ask them to print it out and have it ready when the call is placed. When the pre-mediation conference call occurs, I go through the agenda item by item, taking notes to capture what the parties say and when they agree. The agenda is thorough, neutral, detailed, and comprehensive. I always invite the lawyers to suggest additional items for the agenda, but they rarely do.

Every logistical question is addressed: When and where are we going to hold it? Who will be present? Will there be written submissions? When are they due? Will they be exchanged? What *kind* of process will we use? What's the fee? Etc. I err on the side of disclosing as much information as I can – and share my sense of whether I am the right mediator for this dispute. I don't always feel confident that I can give value. I ask about the status of the case. What are their claims and defenses? Are they attending mediation voluntarily or by court order? Is discovery complete? Where do negotiations stand? Have there been any offers or counter-offers? Taking care of the logistical questions and concerns of lawyers gives them comfort the mediator will be well prepared, providing a professional environment and full engagement.

I seek a commitment from the lawyers that temporarily, and for the purposes of mediation only, they remove their zealous advocate hats and replace them with joint problem solver hats. The idea is that they take a step back from advocacy for one day. If the case doesn't settle, they can resume their familiar roles as hard-charging, aggressive litigators. They have lost nothing by doing so. Solely for purposes of mediation, however, I encourage them to think about identifying options that could meet everyone's needs. I encourage them to inform their clients – to avoid giving clients the impression that the lawyers are scared or selling out. I always hope that perhaps the lawyers, in turn, will involve the clients as joint problem solvers, as well.

During the conference call, I maintain neutrality concerning the merits, and a professional demeanor toward the litigators. If I know one lawyer and not the other, I avoid familiarity. When I was in practice, and judges greeted opposing counsel like long lost friends, I hated it! I won't engage in the same practice as a mediator. It doesn't build trust, it undermines trust!

When I was employed at ICLE, responsible for putting together basic and advanced mediation training programs, I needed to take vacation time to mediate – which limited the number of cases I could take. As a result, I encouraged lawyers who hired me to try the SCAO-approved facilitative model, characterized by joint sessions, opening statements by parties and lawyers, and caucus limited to problem solving difficult issues. If I was going to give up my vacation time to mediate, I wanted to be sure that the techniques we were offering in ICLE mediation training actually worked. Today, I am careful to solicit attorney input about the mediation model they prefer. I do not push litigators outside their comfort zone. No one knows better than the lawyers what technique will work best for their clients. I am happy to tailor my approach to the needs of the participants.

At the conclusion of the call, the agenda exhausted, every issue buttoned down, I am confident the lawyers have been impressed by the organization and are comfortable we've established the foundation for a professional process with a competent, neutral, and well-prepared mediator. They will pass along those feelings to their clients.

When the call is concluded, I follow up with a letter summarizing what we've agreed to and hammered out. I enclose a copy of my CV and Agreement to Mediate and encourage the lawyers to send all three to their clients. Why? First, the letter confirms everyone has a common understanding of the next steps and responsibilities. There is no confusion about dates and times, locations, deadlines, and the kind of process they will experience. I provide my CV because I do *not* want to talk about my credentials during the mediation. I'd rather they learn about me from their lawyer. Describing my own credentials at the start of the process sounds like bragging; tooting my own horn. This is not a matter of modesty – though, in Churchill's words, I have much to be modest about. Rather, if there's a contrarian at the table, I don't want to motivate him to take me down a peg. If someone thinks I'm spending valuable and expensive time talking about myself, it can be a turn off. If the clients have my CV in advance, there's one potential pot hole avoided. The letter also contains material from which the lawyers and their clients might benefit. I remind the lawyer that my website contains articles and practice aids which might be helpful to them in taking full advantage of the process. The more participants are familiar with the process, the greater the likelihood that trust will grow. Finally, because not every mediator uses a written Agreement to Mediate, I want the lawyer to be comfortable with it before signing. It is one more place to demonstrate preparation, thoroughness, and professionalism. Moreover, my Agreement to Mediate contains a paragraph about

confidentiality, which reinforces openness and candor.

I trust that the lawyers will share these documents or their contents with their clients. Based on my limited observation, most seem to do so. It's important to trust the lawyers. They are our customers. They are also responsible for preparing their clients to make the most of the process. In turn, they will convey their trust in you to their clients. When the mediator trusts the lawyers, the lawyers gain trust in the mediator. Lao Tzu has written, "He who does not trust enough will not be trusted." If you expect trust, you must give it.

If any special issues or problems surface during the pre-mediation conference call, I follow up by contacting the lawyers in hopes of resolving it early. Private conversations often provide a better understanding without everyone listening in. If problems are not addressed early, they inevitably arise at the mediation table to cause mischief. The follow up call may be to both lawyers, but does not need to be. Sometimes I call both just to continue that relationship building process.

Mediation Summaries

With the pre-mediation conference call complete, I look forward to learning more about the parties to the dispute. I wait anxiously for the mediation summaries to read their stories unfold. What did the parties do? What did they say to one another? How did they behave? How did they end up in litigation? What wrong was done, if any? What motivates them now? What makes them tick? What are they after? What do they need? How can mediation help them? Have they identified their goals and objectives? Do they actually know what they want? Do they share common interests they may not yet recognize? What can I do to help them? What value can I bring to the dispute?

Reading the summaries carefully, especially the deposition transcript pages normally attached, provides preliminary impressions of who the parties are and how they think. I want very much to understand them. The better a mediator understands the parties, the better able he is to know where they are coming from, recognize what is important to them, and appreciate how they view the world. A better understanding can unlock the secret of how to connect and establish a relationship out of which trust can develop.

Meeting Parties for the First Time

This preparation is going to show up – whether you want it to or not, when the day of mediation arrives and you meet and start talking to the parties. Mediator preparation sends an important message. It gains party confidence, builds additional trust, and helps the parties bond with the mediator. Meeting the parties for the first time is one of my favorite moments in the process. Parties are as anxious to meet the mediator for the first time as the mediator is to meet them. I look forward to it. We have only one chance in life to make a first impression, and whatever impression we leave with them is likely to linger throughout the day. I want to make the best impression I can.

On the trust front, there are typically built in headwinds blowing favorably in a mediator's direction. The lawyers who selected us have likely shared their opinions of us and encouraged the parties to place their trust and confidence in our skills. At the same time, though we have no authority as mediators, the parties are likely to see us as representatives of the justice system, empowered to help them achieve a good result.

Even in cases where the parties prefer a joint session approach, I like to meet separately with each side for a short time before mediation officially kicks off. The purpose is to say hello, shake hands, get acquainted and "take the temperature of the room." I want to look each party in the eye, and let that party look me in the eye. Eye contact is a big deal. It is part of relationship building and it enhances trust. Trial lawyers have done it for generations with jurors. Litigators have been doing it with witnesses in depositions or on the witness stand since *Hadley vs. Baxendale*! Why? Because people believe they perceive something from looking into each other's eyes. An old proverb has it that "the eyes are a window to the soul." Amen. Window or no, we believe we gain more clues about truth-telling and honesty from what our eyes see than from what our ears hear.

To meet privately, I first await the arrival of all parties and all lawyers to inform them of my intention. This can be awkward when one side is late, but it is worth waiting. The reason is simple. Anyone who gets involved in the legal system brings with them a "healthy" measure of paranoia about lawyers and judges. Imagine what a party might think when she arrives at the appointed place and sees the mediator walk out of a private meeting with opposing counsel and client wearing a smile on his face? Can she ever trust that mediator again? No amount of explanation is going to make that party totally comfortable. I like to begin the private meeting by looking for a way to make a connection. "I see you grew up in Port Huron. So did I." Or, "When were you at the University of Michigan?" Or, "I see you're a history buff. What period are you interested in?"

When the introductions and the effort to find common ground are complete, I find it useful to ask questions and get the parties started talking. This is not the time for a lecture or more explanation from the mediator. I ask questions like:

1. "How are you feeling today?"
2. "Anything going on with you we should address before the process starts?"
3. "Have you been worrying about today?"
4. "Do you have questions about the process?"
5. "What would you like to see come out of this today?"

If the party isn't forthcoming or is unready to share, I invite them to ask for a private meeting any time they feel it would be helpful.

Opening Statements

We're now ready for my opening statement, in which I continue to work on establishing a relationship with the parties, build on my ongoing relationship with the lawyers and gain trust and confidence from everyone at the table. Eye contact is once again an essential. While I rely on notes when I deliver an opening statement , it is not read. My goal is to have a conversation that keeps everyone engaged. From time to time, I ask if anyone has questions. If the parties are not making eye contact back, I may include that party's name in my comments to make certain they recognize I know they are present.

I say I've read their summaries and feel comfortable that I have a sense of the dispute. I praise the attorneys and express my appreciation for their good work in explaining their respective positions. I have a file in my hand, full of their papers and my notes, which sends a message that I've put time into their matter. I am prepared! Litigants like to see a prepared mediator as much as the attorneys do. Someone is paying a lot of money for mediation services. They are entitled to preparation, commitment and engagement from the mediator. I do everything in my power to demonstrate they will get that from me.

Another of my strategies – again something I developed trying jury cases – is to see if I can get heads nodding in understanding or agreement around the table. For example: "Mediation is an information exchange process. I've found that if we all agree to listen to one another with an open mind, we might just hear something new or see something in a new light that helps everyone reassess the risks they face." Or, "Mediation is not a justice process where we establish who is right and who is wrong. Mediation is a dispute resolution process where we try to find common ground on which a settlement can be built."

Describing the process – how the day will unfold - helps manage expectations. What can they expect? When will we meet privately? What is supposed to happen? What role will each of us play in the process? "Expectations are resentments under construction." A process description helps build confidence and reduces anxiety. It is difficult for participants to hear if they're uptight and can't relax because they don't know what to expect.

The opening statement is another opportunity for the mediator to telegraph confidence in the process and in the litigants' ability to resolve their dispute. Confidence from the mediator spreads to the participants. Confidence is infectious.

Reframing party opening statements is another important opportunity to give a boost to the trust-building effort. Reframing demonstrates that the mediator has heard and understood the party – so much so, that the mediator is able to put the statements and concerns in his own words. Reframing seeks to instill the idea that, "this guy really gets me!" A good reframe demonstrates that the mediator has heard the words *and* the music: the mediator's words address what the party described and what the party was feeling.

Reality Testing and Risk Assessment

During the mediation process itself, whether in joint session or caucus, when reality testing and risk assessment begin, the mediator begins "spending" down the reserve of trust and confidence so carefully built up from day one. No one is pleased when their theories or favorite facts - with which they have fallen in love - are questioned or challenged. "Isn't it self-evident…?" they sometimes imply incredulously. As Ann Radcliffe has written: "I never trust people's assertions. I always judge of them by their actions." The mediator's actions, in questioning risks, asking about problems or identifying weaknesses, seem to speak louder than verbal reassurances that the mediator is neutral or has "no dog in the fight."

Parties especially may begin to question whether they should have listened when you invited them to trust you and the process. Why are you in here questioning my case," they are often thinking and sometimes ask. "Why aren't you in the other room administering the kind of beating THEY so richly deserve?" In such moments I rely on process symmetry. I promise that whatever

is happening in this room, will happen next in the other. I remind everyone that my job is to help them appreciate their risks, not decide who wins or who has the stronger case.

Sometimes parties become adversarial and start looking at the mediator as their enemy. If the mediator has not prepared the participants for reality testing and risk assessment, they may feel betrayed. Trust once lost may be difficult to win back.

Here it is helpful to be as honest and transparent as possible. If you seem to have lost your neutrality, recognize you have done so and explain yourself. "Perhaps my experience in cases like this is beginning to show. I apologize if I appear not to be appreciating the strengths of your position. I don't mean to be favoring one side over the other. I wouldn't be a very good mediator if I did that. On the other hand, I've seen cases just like this in the past. By and large, based on my experience, the issue about which I'm asking is a problem and if you're going to engage in meaningful risk assessment, you need to face it and either develop a way to meet it or acknowledge there's an elephant in the room. It's probably a factor you should consider in assessing your likelihood of success. I'm sure your lawyer can handle it well, but it warrants some discussion so at least you're able to think it through."

When the going gets tough, mediators must continue to demonstrate their neutrality and their confidence that the process is working as it should. I remind the party that my analytical reasoning, experience, questions about risk assessment, and focus on reality testing are among the reasons they hired me. I promise anyone complaining about my questions and concerns that I expect to engage in a parallel process in the next room.

The mediator should continue to accumulate capital and trust during the mediation process itself. The mediator always remains a careful listener. A good mediator should never grow impatient or worse, *look* impatient. Reframing whenever possible shows the mediator understands the parties' perspective and putting it in your own words is a way to replenish the supply of trust.

I may also draw their attention to the process and ask for help putting together "ammunition" to help create movement in the other room. "Let's try something different. Let's talk about the strengths of your case and what I can say to the other side that might just loosen them up. What's your take on why it took so long for them to launch an investigation into the charges of sex harassment?" With one mediator intervention and call for help, an increasingly skeptical participant may see that the tables can be turned and the other side made to face the risks that it hasn't fully appreciated.

Mediators should avoid "judging" party behavior – which is not always so easy. A judgmental mediator can put a party off, create an adverse reaction, or turn trust into hostility. If the mediator finds a party's conduct or decision problematic, putting the onus on others can help: "Your lawyer tells me this is a jury trial. How will you explain to the jury that the pressure to start an intimate personal relationship bothered you so much that you resigned, and yet you never brought it to anyone's attention in management?"

Whether in joint session or caucus, neutral sounding questions to encourage a party to question his or her own assumptions are the rule. Through patience, clear communication, honesty, transparency, and a better understanding of the needs of the participants, the mediator can help the parties identify options on which all sides can agree.

Settlement

When the case settles, trust and confidence in the mediator continue to be an important to completion of the process. Parties may turn to the mediator as one person they can count on to keep track of the terms and the mediator may be the only one trusted to draft a term sheet or Memorandum of Understanding. The mediator may also be asked to serve as an arbitrator in the event of a dispute in the agreement drafting or administration stage.

When the parties have achieved their legitimate settlement expectations, trust flows into the room. Appreciation is evident in the eyes of participants. Gratitude can be heard in their voices. Litigators remember this feeling of trust – or the lack of it! – the next time they need mediation services. With trust they will call again.

A version of this article was first presented at the Institute of Legal Education's 10th Annual Advanced Negotiation & Dispute Resolution Institute.

About the Author

Sheldon J. Stark offers mediation and arbitration services. He is a member of the National Academy of Distinguished Neutrals, a Distinguished Fellow with the International Academy of Mediators, and an Employment Law Panelist for the American Arbitration Association. He is also a member of the Professional Resolution Experts of Michigan (PREMi). He is Chair Emeritus of the Alternative Dispute Resolution Section of the State Bar and former chair of the Skills Action Team. Mr. Stark was a distinguished visiting professor at the University of Detroit Mercy School of Law from August 2010 through May 2012. He has worked with ICLE and remains one of three trainers in ICLE's award-winning 40-hour, hands-on civil mediation training. Before joining ICLE, Mr. Stark was a partner in the law firm of Stark and Gordon from 1977 to 1999, specializing in employment discrimination, wrongful discharge, civil rights, business litigation, and personal injury work.

He is a former chairperson of numerous organizations, including the Labor and Employment Law Section of the State Bar of Michigan, the Employment Law and Intentional Tort Subcommittee of the Michigan Supreme Court Model Civil Jury Instruction Committee, the Fund for Equal Justice, and the Employment Law Section of the Association of Trial Lawyers of America, now the American Association for Justice. He is also a former co-chairperson of the Lawyers Committee of the American Civil Liberties Union of Michigan. In addition,
Mr. Stark is chairperson of Attorney Discipline Panel #1 in Livingston County and a former hearing referee with the Michigan Department of Civil Rights.

He was a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010 and was listed in "The Best Lawyers in America" from 1987 until he left the practice of law in 2000. Mr. Stark received the ACLU's Bernard Gottfried Bill of Rights Day Award in 1999, the Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan in 2009, the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. In 2015, he received the George Bahara, Jr. Award For Exemplary Service from the ADR Section of the State Bar. He has also been listed in "dbusiness Magazine" as a Top Lawyer in ADR for 2012, 2013, 2015, 2016. He can be reached at shel@starkmediator.com.

Danielle Potter

Section Members Learn to Address Unconscious Decision-Making

by Danielle Potter

On February 15, 2018, the ADR Section, in collaboration with the University of Detroit Mercy School of Law and Miller Canfield, P.L.C. welcomed internationally renowned Judicial Professor, Kimberly Papillon, to Detroit for a three-hour presentation titled, "The Neuro-Science of Decision Making: What's Really Controlling the Way you Think?". Attendance was limited and was complementary to Section members. A cocktail reception for networking and collegiality followed.

Ms. Papillon's presentation began by asking us to participate in a truncated version of the Harvard Implicit Association Test (https://implicit.harvard.edu/implicit/takeatest.html). If you haven't tried it yourself, you will be surprised by the results!

She moved on to defining how the brain functions, including how decision-making is often unconsciously riddled with implicit bias regarding race, ethnicity, gender, age, and numerous other factors starting in our infancy. During the second portion of the presentation, she suggested remedial measures we might take to reduce the unintentional implicit bias that is frequently incorporated into our decisions and judgments. This was particularly welcome for the ADR providers in the room. Whether we serve as mediators or arbitrators, we have a responsibility to provide the most objective, unbiased, and professional process possible for the parties and advocates involved in the process. It is especially important for members of the ADR community, therefore, to be conscious of our implicit biases and reduce them to the extent possible.

The presentation raised awareness for how frequently our conscious value system does not match the implicit ideas and associations embedded in our brain that can drastically impact our decision-making process.

Ms. Papillon presented several studies showing the effect of implicit bias. In one study, identical resumes were presented for assessment as to who would be the better employee. The only difference in the resumes was the name attached, such as John

versus Jane. John's resume was rated higher. In another study, the resume of an African-American was reviewed, first with and then without a criminal conviction. These were compared with resumes with and without a criminal conviction of white job applicants. The Caucasian *with* a criminal conviction did better than African-American applicants *without* a criminal conviction. How could this happen? Implicit bias!

Ms. Papillon emphasized that *everyone* has these implicit biases. In addition to the more obvious biases like race and gender, implicit bias may also be triggered by a person's name, the sound of their voice, their particular accent (*e.g.*, southern vs. northern US; Russian; Latin; Arabic; or English aristocratic vs. English middle class), or the particular features of someone's face. Studies show these biases are developed in our infancy and impact us virtually all our lives.

Ms. Papillon also commented on how positive experience with a person doesn't necessarily translate into reduced bias. We may have an affinity for someone with a particular characteristic – such as a child with a piercing, for example – while still retaining a bias against hiring anyone with a piercing in the workplace. Age bias and bias against people with tattoos were both mentioned, which the research indicates we may not be able to rectify. Interestingly, age bias grows in prevalence the older an individual becomes.

Despite these studies, Ms. Papillon left us with hope and optimism that we can combat these implicit sources of bias. Remedial measures begin with admitting there is a problem and acknowledging that implicit bias exists and affects the decision-making process. Participating in certain activities counteracts the brain's natural tendency to follow inherent and embedded implicit bias.

For example, playing a competitive team sport with members of a different ethnic group can be highly effective in reducing bias against that group. One of Ms. Papillon's favorite video games is NBA Basketball where an African-American may join an all Caucasian team of all-stars or vice versa. These kinds of remedial measures target the brain's basil ganglia and force the brain to override our biases with new rules.

Ms. Papillon provided much food for thought and a vast amount of research to consider for future study. As I drove home, I could not help but wonder where does this research leave current affirmative action practices? How might this impact the mediator's tool-kit of positive manipulation, where a mediator develops rapport with a participant by identifying mutual commonalities? While the impact on our decision-making process in arbitration is clear, how does it impact the way we approach mediations? How do we adjust our favorite techniques and interventions as mediators as a result of our own implicit biases? How might we hope to grow and develop to be more professional and unbiased while conducting alternative dispute processes in the future?

The program was provocative and powerful. Thanks to my fellow Section council members, the Skills Action Team, and the Diversity Task Force for their support in organizing and participating in this event!

About the Author

Danielle Potter, a graduate of the University of Michigan and Michigan State University College of Law, has spent her career serving the people of Michigan as an attorney and as a mediator and custody investigator. Danielle can be reached at dpotter@miottawa.org.

Howard T. Spence

Interactive Course on Decision-Making Was Eye Opening

by Howard T. Spence

I recently attended a symposium/presentation on "The Neuroscience of Decision-Making" sponsored by the State Bar of Michigan Alternative Dispute Resolution Section, of which I am a member of the Executive Council. Based on my participation, I very highly recommend members of the ADR Section learn more about these topics.

The subject matter of this wonderful and highly informative presentation related to implicit bias and the neuroscience of how certain parts of the brain impact on our responses to others in our environment and our opinions and assessments of them. The presentation and discussion addressed the fact that sources of our prejudices, stereotypes, and reactions to and thought processes about other people have both a social psychological aspect as well as a physical or neuroscience aspect.

This presentation was given by Kim Papillon who is a noted researcher and expert in the areas which were discussed. She used her research and a summary of the research conducted by many other clinicians and academics to put together not only descriptors of how this particular type of implicit bias works in decision-making, but also to come up with some suggestions about how individuals can to respond to implicit bias to reduce it and to help make more objective and controlled decisions.

Ms. Papillon has presented to many judicial officials and judges across the country. She has taught this information to decision-makers at the National Judicial College in Reno, Nevada for some time. Her research and judicial teaching has impacted and helped judges from all states at all levels and also the federal government come to grips with the fact that we all have "implicit biases" and prejudices.

Because we all have these biases, it is incumbent upon judges and others involved in the criminal law enforcement process to recognize their own biases and to take those biases into account in terms of decision-making professionally in their own courts and in making sentencing determinations. This also applies to quasi-judicial decision-making by neutrals like Administrative Law Judges and arbitrators.

The entire presentation was interactive rather than strictly a lecture. It was very eye-opening, and I myself learned a lot which I intend to incorporate into my own decision-making and into my evaluation of the decision-making processes used by others – including lay people who interact in social media and elsewhere to generate opinions which enhance implicit bias and make it more difficult for critical thinking and reasoning to be used to come to measured and substantial reliable conclusions. Indeed, as I sat in that class, I could better understand how some of the current social media fights and controversies we are dealing with in the United States at this time interact with the implicit biases of members of our communities.

The symposium was held in Detroit at the University of Detroit Mercy School of Law in downtown Detroit on Jefferson Avenue. The presentation was well-attended by members of the ADR Section; law school faculty, staff, and students; and corporate lawyers from Miller Canfield, a large Michigan-based law firm which also helped underwrite and fund this presentation.

About the Author

Eaton County Commissioner Howard T. Spence is an attorney, arbitrator, and administrative law judge. He currently sits on the Executive Council of the State Bar of Michigan Alternative Dispute Resolution Section. He can be reached at htspence@spence-associates.com or (517) 321-8775. His website is http://www.spence-associates.com.

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SBM ADR Section's 2018 Annual Meeting and ADR Conference in Traverse City

The October 12 and 13, 2018, SBM ADR Section Annual Meeting and ADR Conference will be held in Traverse City.

The State Bar of Michigan Alternative Dispute Resolution Section's 2018 Annual Meeting and ADR Conference, including 8 hours of advanced mediator training, will be Friday, October 12, and Saturday morning, October 13, 2018, at the Park Place Hotel in Traverse City.

Hotel Registration. Reduced rates will be based on availability until September 10, 2018. Contact the Park Place Hotel directly at 231-946-5000 and reference "State Bar of Michigan." Neither the Hotel's website nor its toll-free number has access to this group information.

Solicitation for Articles for the February 2019 Michigan Bar Journal's ADR Theme Issue

The ADR Section is privileged to be sponsoring the February 2019 ADR theme issue of the *Michigan Bar Journal*.

We strongly encourage you to submit a proposed complete article to be a part of this great event.

ADR theme articles of interest to the wider Bar (as opposed to only ADR practitioners) and cutting-edge topics are especially encouraged.

Proposed Length: The ADR Section will be providing four proposed articles to the State Bar. The authors must closely follow the manuscript requirements outlined in State Bar article guidelines. Theme Journal issues have a maximum of 10,000 words to work with, which usually breaks down to approximately four 2,500-word articles. The 2,500-word length includes end notes, about the author, and fast facts. Under NO circumstances can the article, including end notes, about the author, and fast facts be more than 2,500 words.

Publishing Schedule: We will be obtaining, reviewing, and submitting ADR theme articles to the State Bar as follows.
November 2017. Start solicitation of proposed complete articles.
June 1, 2018. Deadline for proposed complete articles in Word to Lee Hornberger leehornberger@leehornberger.com . Please put the title of the article in the Subject line of the email.

August 1, 2018. Authors and articles committed.

September 15, 2018. Copy of selected articles to State Bar of Michigan theme editors.

November 15, 2018. Final copy of articles to *Michigan Bar Journal* Editor.

February 1, 2019. February 2019 *Michigan Bar Journal* ADR issue to be published.

Format and Citations: Should you want to submit a proposed complete article it is very important that you very carefully read and comply with all the requirements of the *Michigan Bar Journal* formatting and citing rules and procedures.

Short, concise "about the author" bios, jpeg photos, fast facts if appropriate, and eventually an executed copyright agreement from each author are required. Fast facts are 2-3 brief sentences that will be formatted in the side bar to emphasize key points and draw the reader to the article. The article CANNOT be more than 2,500 words, including about the author, end notes, and fast facts.

Please follow the article guidelines found at at: http://www.michbar.org/file/journal/about/artguidelines.pdf

The Michigan Bar Journal uses the Michigan Appellate Opinion Manual as a citation style guide. The Manual is at:
http://courts.mi.gov/Courts/MichiganSupremeCourt/Documents/MiAppOpManual.pdf

The June 2015 and June 2010 ADR theme issues of the *Michigan Bar Journal* are at: http://connect.michbar.org/adr/journal

You are urged to participate in this important publication.

Lee Hornberger
Chair
ADR Section, SBM
231-941-0746
leehornberger@leehornberger.com

MICHIGAN PLEDGE TO ACHIEVE DIVERSITY AND INCLUSION

WE CAN,
WE WILL,
WE MUST

Diversity creates greater trust and confidence in the administration of justice and the rule of law, and enables us to better serve our clients and society.

We believe that diversity and inclusion are core values of the legal profession, and that these values require a sustained commitment to strategies of inclusion.

Diversity is inclusive. It encompasses, among other things, race, ethnicity, gender, sexual orientation, gender identity and expression, religion, nationality, language, age, disability, marital and parental status, geographic origin, and socioeconomic background.

Diversity creates greater trust and confidence in the administration of justice and the rule of law, and enables us to better serve our clients and society. It makes us more effective and creative by bringing different perspectives, experiences, backgrounds, talents, and interests to the practice of law.

We believe that law schools, law firms, corporate counsel, solo and small firm lawyers, judges, government agencies, and bar associations must cooperatively work together to achieve diversity and inclusion, and that strategies designed to achieve diversity and inclusion will benefit from appropriate assessment and recognition.

Therefore, we pledge to continue working with others to achieve diversity and inclusion in the education, hiring, retention, and promotion of Michigan's attorneys and in the elevation of attorneys to leadership positions within our organizations, the judiciary, and the profession.

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Sign the Michigan Pledge to Achieve Diversity and Inclusion in the Legal Profession. michbar.org/diversity/pledge

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, and click on "Mediation Training:"

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

Dearborn: April 4, 6, 11, 13, 18, 20, 25, 27, 30 and May 2, 2018
Training sponsored by Wayne Mediation Center
Register: http://www.mediation-wayne.org

Ann Arbor: April 13-15 & 20-22, 2018
Training sponsored by the Dispute Resolution Center
Register: http://thedisputeresolutioncenter.org/services/trainings-2/#faq1

Grand Rapids: June 6-8, 13-15, 2018
Training sponsored by Dispute Resolution Center of West Michigan
Register: http://drcwm.org/training/ or call 616-744-0121

Sault Ste. Marie: September 7-8, 20-22, 2018
Training sponsored by Eastern UP Community Dispute Resolution Center
Register: http://www.eupmediate.org

Plymouth: October 18-20, November 2-3, 2018
Training sponsored by Institute for Continuing Legal Education
Register: http://www.icle.org/modules/store/seminars/schedule.aspx?PRODUCT_CODE=2018CK0445

Bloomfield Hills: November 6, 13, 20, 27, December 4, 2018
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org/ or call 248-348-4280 ext. 216

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):

Marquette: March 19-20, 26-29, 2018
Training sponsored by Marquette-Alger Resolution Service
Register online at http://www.marsmediation.org

Bloomfield Hills: May 2-4, 9-11, 2018
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org/ or call 248-348-4280 ext. 216

Ann Arbor: May 3-5, 17-18, 2018
Training sponsored by Mediation Training and Consultation Institute
Register online at http://learn2mediate.com/divorce-custody/

Lansing: June 18-23, 2018
Training sponsored by Dispute Resolution Center of Central Michigan
Register: http://www.rsccm.org

Advanced Mediation Training

Mediators listed on court rosters must complete eight hours of advanced mediation training every two years. The trainings listed below have been pre-approved by SCAO to meet the content requirements of the court rules (MCR 2.411(F)(4), MCR 3.216(G)(3)) for advanced mediation training for both general civil and domestic relations mediators.

Auburn Hills: March 20, 2018
ADR Summit: "Harnessing the Power of the Master Mediator"
Trainer: Lee Jay Berman
Training sponsored by ADR Section of State Bar of Michigan
Register online at http://connect.michbar.org/adr/events/eventdescription?CalendarEventKey=7fab91e3-daf8-48c2-99b0-6f43ab9ce42e&CommunityKey=8aa9f208-87ad-4434-8e05-bb1982c6b20d&Home=%2fadr%2fhome

Grand Rapids: April 16, 2018 for Domestic Relations Mediators
Training sponsored by Dispute Resolution Center of West Michigan
Register: http://learn2mediate.com

Bloomfield Hills: July 24, 2018
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org/
or call 248-348-4280 ext. 216

Traverse City: October 13-14, 2018
ADR Section Annual Meeting includes 8 hours of Advanced Mediation Training
Training sponsored by ADR Section of State Bar of Michigan

How to Find Mediation Trainings Offered in Michigan

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

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

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

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ALTERNATIVE DISPUTE RESOLUTION SECTION

4th Annual ADR Summit

Harnessing the Power of the Master Mediator: Seeing New Things in the Same Old Rooms

March 20, 2018, 8:30 a.m.-5:30 p.m. (Catered reception to follow)

WMU-Cooley Law School, 2630 Featherstone Rd, Room 145, Auburn Hills

Presenter: Lee Jay Berman

Our 2018 ADR Section Annual Summit features one of the most exciting, entertaining and compelling mediators and mediation trainers working in the field today: Lee Jay Berman.

This all-day workshop is for mediators ready to move to the next level of awareness and consciousness, grounded in deeper connection with participants. Designed for mediators who have achieved a level of success and a respect for other mediation styles and applications, it will move them beyond the confines of evaluative and facilitative processes of mediation. It will assist them to make a difference with their work – both in the lives of their mediation participants, and in themselves. This experiential workshop will reach far beyond classic mediation training to work with the counter-intuitive.

Master Mediators see things differently, they hear things differently, and they proceed differently than other mediators. This workshop is just what mediators need who feel like their work has hit a plateau. You will practice tools which Master Mediators draw upon to allow them to function at a higher level, including deep insights in self-awareness; neuro-linguistic programming (NLP) to build rapport and understanding; the psychology of conflict and manipulation; and raising your levels of perception. All of these tools allow Master Mediators to see and hear more of what's going on in the room and provide the impact participants want when they say, "Now, go work your magic."

Lee Jay Berman was an early member of the National Academy of Distinguished Neutrals and a Distinguished Fellow with the International Academy of Mediators. He's been certified by the International Mediation Institute, and appointed as a Dispute Resolution Expert with the United Nations Development Program. He is a Master Mediator on the American Arbitration Association's employment mediation panel. He's been twice recognized as a "Top Neutral" by California's Daily Journal; was awarded "Mediator of the Year – California" each year since 2012 by Acquisition International Magazine; and he was voted into Who's Who of International Commercial Mediation annually since 2012. He has been a lecturer and trainer at Pepperdine Law School's Strauss Institute for Dispute Resolution, and a founder of the American Institute of Mediation.

Lunch on the premises included. Continue the conversation after the seminar and join your colleagues and friends for a complimentary reception at 5:30 p.m. Sponsored by the ADR Section.

This program has been approved for 8 hours of advanced mediator training by the State Court Administrative Office.

For additional information regarding the seminar contact Sheldon Stark at 734-417-0287 or shel@starkmediator.

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ALTERNATIVE DISPUTE RESOLUTION SECTION

4th Annual ADR Summit

Harnessing the Power of the Master Mediator: Seeing New Things in the Same Old Rooms

March 20, 2018, 8:30 a.m.-5:30 p.m. (Catered reception to follow)

WMU-Cooley Law School, 2630 Featherstone Rd, Room 145, Auburn Hills

P #:_____

Name:_____

Your Firm: _____

Your Law School (if student): _____

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Cancellation Policy: All cancellations must be received at least 72 business hours before the state of the event and registration refunds are subject to a $20 cancellation fee. Cancellations must be received in writing by e-mail (tbellinger@michbar.org), or by U.S. mail 306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.). No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar materials.

Cost

REGISTRATION DEADLINE: March 15, 2018
(Includes lunch and a catered reception)

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

Law students must include their law school e-mail address.

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

This program has been approved for 8 hours of advanced mediator training by the State Court Administrative Office.

Materials

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

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

Questions

For additional information regarding the seminar contact Sheldon Stark at 734-417-0287 or shel@starkmediator.com.

Register One of Two Ways

Online: visit http://e.michbar.org to register online

Mail your check and completed registration form to:

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

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

Family Law Mediation Luncheon

April 17, 2018, Noon-2:00 p.m.

Federal Reserve Bank Branch • 1600 E. Warren • Detroit • 48207

The State Bar of Michigan ADR Section and the Wayne County Family Bar Association are pleased to announce a joint mediator lunch where you can learn, connect and share. The intent is to foster structured dialogue among mediators and arbitrators as they share a meal and exchange best practices, experienced insights and effective approaches to resolving family law disputes.

Cost

REGISTRATION DEADLINE: April 10, 2018

- ❑ Registrants (includes boxed lunch) $20
- ❑ Sitting Judges ..... FREE
  Judges must register by mail to receive this discounted rate.

Boxed Lunch Options

❑ Turkey Sandwich ❑ Veggie Sandwich ❑ Ham Sandwich

Parking

Convenient parking available inside the security gates at the Federal Reserve Bank Branch. Please bring your driver's license or other government identification to show for admittance to the building.

Questions

For additional information regarding the luncheon contact Zenell Brown at zenell.brown@3rdcc.org or (313) 224-5363.

Topics

- Educating parties and counsel in conducting themselves
- Handling the Domestic Violence Screening Protocol
- The Mediator's role in drafting Final Settlement Agreements
- Safety in mediation
- Defusing high tension/high conflict situations
- The elements of "bullet proof" settlement agreements
- Rule change updates
- Status of Automatic ADR

Register One of Two Ways

Online: https://www.eiseverywhere.com/adr041718

Mail your check and completed registration form to:
State Bar of Michigan
Attn: Seminar Registration
306 Townsend Street
Lansing, MI 48933

P #:_____

Name:_____

Your Firm: _____

Your Law School (if student): _____

Address:_____

City:_____ State: ____ Zip: _____

Telephone: (_____) _____

E-mail Address: _____
Law students must include their law school e-mail address.

Enclosed is check # _____ for $ _____

Please make check payable to: State Bar of Michigan To pay with credit/debit card visit http://e.michbar.org

Cancellation Policy: Registration and Payment must be received at the SBM on or before 3PM on April 10, 2018. The registration fee for this event is forfeited if attendance is canceled. As a courtesy to the planners, written notice of your intent not to participate is appreciated. That notice can be made by e-mail (tbellinger@michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.)

September 21 Mediator Lunch in Marquette

The Marquette County Bar Association and the ADR Section of the State Bar of Michigan are co-sponsoring a lunch for mediators and other ADR practitioners. The lunch will be 11:30 a.m. to 1:30 p.m., Friday, September 21, 2018, in the Sample Room of The Vierling Restaurant, 119 South Front Street, Marquette, MI 49855. Attendees can purchase lunch from the Vierling menu at their own expense.

There will be round table discussions of issues that face mediators. Among the topics to be discussed are:

- How mediators advise attorneys and their clients on how the attorneys and clients should assist/behave during the mediation process.
- How should the mediator handle the domestic violence screening protocol?
- Should mediators act as scriveners to draft settlement agreements?
- An update on mediation rule changes, including automatic ADR.
- Safety in mediation and defusing high tension situations.
- New language for agreements to mediate - safety, timing of mediation, confidentiality, and reporting of bad conduct.
- How to draft a final and binding bulletproof mediated settlement agreement.

Registration is required and space is limited.

For further information and registration, please contact Thomas L. Solka (Ret. Circuit Court) at tsolka67@gmail.com .

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ALTERNATIVE DISPUTE RESOLUTION SECTION
LUNCH & LEARN REGISTRATION

The Dirty Dozen: The 12 Biggest Mistakes in Construction Dispute Mediation

Teleseminar, April 26, 2018, Noon-1:30 p.m.

Two respected and experienced construction law practitioners share their perspective and experience on the most common errors even the best practitioners make when mediating construction law disputes.

Between them, our presenters have handled well in excess of 500 cases! If you handle construction disputes - or wish to do so - the insights provided by this program will elevate your practice and assist you in getting the most out of the mediation process every time!

About Our Speakers:

Marty Burnstein is a construction lawyer, arbitrator, and mediator with over 45 years experience. He represents commercial property owners, general contractors, subcontractors, and suppliers of all sizes. Marty has been a sole practitioner since 1995.

Marty has taught and lectured in the area of construction liens and payment bonds for the Construction Association of Michigan (CAM) and other industry trade organizations. Marty has served as the Chair and Vice Chair of the ADR Committee of the Oakland County Bar Association. He continues to serve on the Oakland County Business Court's Advisory Committee.

Marty has been consistently recognized by his peers in the following:

- Best Lawyers in America, Construction Law;
- D Business Magazine Top Lawyers, Construction Law;
- Michigan Super Lawyers, Construction Law; and
- AV Rated by Martindale-Hubbell

Ronald A. Deneweth is president of the Troy law firm of Deneweth, Dugan & Parfitt, P.C., where his practice is concentrated in the area of commercial law, handling considerable matters in the construction and surety area. He received his S.S. in Economics, cum laude, from John Carroll University and his J.D. degree, cum laude, from the Detroit College of Law. Mr. Deneweth is a member of the Michigan Surety Association and has acted as both lecturer and legal counsel to the association. Mr. Deneweth is also a member of the Fidelity and Surety Law Committee and the Forum on the Construction Industry of the American Bar Association, and the State Bar of Michigan. He is a frequent lecturer on the construction industry for the Michigan Association of CPAs, The National Business Institute, the American Subcontractors Association, The Institute of Continuing Legal Education, Lorman Education Seminars, and is an Adjunct Professor of Construction Law-Michigan State University Law School. Mr. Deneweth has been recognized as one of the top 100 Michigan lawyers across all areas of practice in Michigan and one of the top practitioners in construction and surety law.

Michigan Super Lawyers, Construction/Surety; Michigan Super Lawyers, Top 100 in All Practice Areas; Crain's Detroit Business Top Construction Lawyers; America's Best Lawyers; Martindale-Hubbell, AV Preeminent Rating since 1986; Top Lawyers; Dbusiness Magazine

Ron has acted as a mediator or arbitrator in over 375 cases and has represented clients in hundreds more mediations and arbitrations.

Practice Development Institute

This two-day workshop on June 22-23, 2018 in Chicago at the ABA Offices, led by Forrest "Woody" Mosten, provides a practical model for implementing client-centered peacemaking strategies in your profession, including unbundled legal services and innovative dispute resolution tools.

Participants will learn new ways to help clients while staying out of court, and will explore the personal and ethical dimensions of collaborative problem solving.

The State Bar of Michigan's ADR Section is co-sponsoring this workshop so members of our Section may attend and receive the discounted rates available to ABA DR Section members.

Learn more at: https://www.americanbar.org/groups/dispute_resolution/events_cle/practice-development-institute.html

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION 2017-2018

The ADR Section of the State Bar of Michigan is open to lawyers and other individuals interested in participating. To comply with State Bar of Michigan requirements, lawyer applicants to the ADR Section are called Members and non-lawyer applicants to the ADR Section are called Affiliates. The mission of the Alternative Dispute Resolution Section is to encourage conflict resolution by:

1. Providing training and education for ADR professionals;
2. Giving professionals the tools to empower people in conflict to create optimal resolutions; and
3. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

Membership in the Section is open to all members of the State Bar of Michigan. Affiliate status is open to any individual with an interest in the field of dispute resolution.

The Section's annual dues of $40.00 entitle you to receive the Section's *Michigan Dispute Resolution Journal,* participate in programming, further the activities of the Section, receive Section listserv announcements, participate in the Section's SBMConnect discussions, and receive documents prepared by and for the ADR Section.

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

Note: Dues are due between October 1 and November 30.

APPLICATION TYPE: ____ Member ____Affiliate

NAME: _____

FIRM: _____

ADDRESS: _____

_____

CITY: _____ STATE: _____ ZIP CODE: _____

PHONE:_____

E-MAIL: _____

State Bar No. _____(if applicable)

Have you been a Member of this Section before:_____

Are you currently receiving the *Dispute Resolution Journal*? _____

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

Please return payment to:

Samuel E. McCargo
Lewis & Munday PC
535 Griswold Street, Suite 2300
Buhl Bldg
Detroit, MI 48226-3683

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

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

Members using a Visa or MasterCard must join online at e.michbar.org.
Non-members must submit payment by check.

Revised 12/2017

SBM Connect
State Bar of Michigan

Connect With Us

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

The ADR Section SBM Connect hyperlink is:

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

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

ADR Section Mission

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

1) Providing training and education for ADR professionals;

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

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

Join the ADR Section

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

The Section's annual dues of $40 entitles you to receive the Section's *The Michigan Dispute Resolution Journal*, participate in programming, further the activities of the Section, receive Section ListServ and SBMConnect announcements, and participate in the Section's SBMConnect and the Section's Discussion ListServ. The Section's ListServ and SBMConnect provide notice of advanced training opportunities, special offers for Section members, news of proposed legislative and procedural changes affecting your ADR practice, and an opportunity to participate in lively discussions of timely topics.

In implementing its vision, the ADR Section is comprised of several Action Teams. You are encouraged to participate in the activities of the Section by joining an Action Team. The Action Teams include the Skills Action Team, responsible for advanced ADR training provided at the annual ADR Summit, annual ADR Meeting and Conference, and Lunch and Learn teleseminars; Effective Practices and Procedures Action Team, responsible for monitoring and initiating judicial and legislative changes affecting ADR in Michigan; Judicial Access Team, charged with assisting courts to provide ADR to litigants; and the Publications Action Team, providing this *Journal* and Listserv and SBMConnect announcements concerning meetings, conferences, trainings and other information related to ADR.

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

Editor's Notes

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

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

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

ADR Section Member Blog Hyperlinks

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

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

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

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

ADR Section Social Media Links

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

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

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

https://twitter.com/SBM_ADR

ADR Section Homepage

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

Dispute **Resolution** Journal

State Bar of Michigan
306 Townsend St.
Lansing, MI 48933

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

For comments, contributions or letters, please contact:

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*Erin Archerd - archerer@udmercy.edu - **313-596-9834***
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http://connect.michbar.org/adr/newsletter