

# The Michigan Dispute Resolution Journal

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

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Erin Archerd

## The Chair's Corner

*By Erin R. Archerd*

While I wasn't here in Michigan for the beginning of the SBM ADR Section, it gives me a great deal of pleasure to be celebrating three decades of our Section. I first learned about "dispute resolution" over twenty years ago as a college student. Spending a summer as a research assistant coding letters sent to the 9/11 Victim's Compensation Fund was not cheerful, but it instilled in me the power of alternatives to litigation and the different notions of justice that those who have been harmed might bring to the resolution of their claims.

These questions of justice have only grown more salient over the years, as I attended law school, practiced law, and became a law professor. From early on in my law school career, it was clear to me that I wanted to focus on negotiation and mediation of disputes, that the zero-sum nature of litigation, while expressing important values about the sort of conduct we expect as a society, did little to address the more immediate needs and concerns of parties. Perhaps put another way, in conflict resolution a personal approach frequently yields the most satisfying results for parties.

I am so proud to be leading a Section focused on promoting a broad variety of dispute resolution methods in the state. And what makes me proudest of our Section is all of our members who are actively involved not only in the practice of dispute resolution, but in our Section's efforts to engage in continuing education and training, to reach out to young lawyers and teach them about ADR, and to innovate and advance ADR processes in Michigan.

Section members were instrumental in the recent reforms to case evaluation and our Section is continuing to monitor how these changes are being implemented throughout Michigan. We know what many of our members serve as case evaluators and court administrators and we want to continue to find ways to honor the service that they are providing in giving parties an idea of what their claims might be worth. Many attorneys also value this step in Michigan's civil adjudication process, and as we see how litigants will react to recent changes like the removal of sanctions for declining to accept the case evaluation panel's award, we want to think critically about the ways in which case evaluation is helping parties resolve their disputes.

This year alone, the Section has submitted comments to the Michigan Judicial Commission, proposed revisions to the Michigan Mediator Standards of Conduct, and submitted comments to the Michigan Supreme Court regarding proposed additions to the Michigan Rules of Professional Conduct dealing with arbitration in attorney-client agreements ([our comment can be found here https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-rules-of-professional-conduct/](https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-rules-of-professional-conduct/)).

The Section has also hosted events every month, typically in a webinar format, including our Mediator Forum, Best Practices in Non-Administered Arbitration, and a Lunch and Learn with the Divided Communities Project. I recently attended a Virtual Lunch that we co-sponsored with the American Indian Law Section and learned a great deal about indigenous peacemaking and tribal dispute resolution here in Michigan. For example, a member of the Pokagan Band of Potawatomi shared that his tribe had a traditional role of being keepers of the fire, and so including a fire in a restorative circle has a unique emotional and psychological effect among tribal members.

We have a lot in the works for the rest of the year. Stay tuned for more information and registration for our **Annual Meeting and Conference on September 30 and October 1**. Our conference sessions will continue to be virtual, but we will be hosting a Reception and Awards Ceremony Dinner to conclude our Conference on October 1 at the Inn at St. Johns in Plymouth. We hope that many of you whose life circumstances allow will be able to join us in person for that event!

We are also looking into hosting a more informal in-person get together some evening this summer. You should have received a survey about it, and we will email Section members with more details once we have the results in from our survey.

In the meantime, we have several excellent upcoming events. The first happens May 3 at 6 p.m., when the Diversity & Inclusion Action Team will be hosting a virtual book club discussion about *Civil Rights Queen: Constance Baker Motley and the Struggle for Equality* by Tomiko Brown Nagin. Email Mary Anne Parks ([parks.maryanne@gmail.com](mailto:parks.maryanne@gmail.com)) for a link to the book club. The second is our two-part ADR Summit with Mediator Nina Meierding focusing on topics including The Power of Listening and

Strategic Questioning (on Day One, May 11) and Working with Conflicting Perspectives of Reality and Why Do We Lie? (on Day Two, May 18). You can find out more about the topics and register [here](#).

We will also be hosting webinars on Mediator Disclosures on June 7 at noon and The Ins and Outs of Employment and Labor Law for Arbitrators and Advocates on August 16 at noon, so save the dates.

If you are reading this and interested in becoming a member of our Section Council, please reach out to me ([earcherd@gmail.com](mailto:earcherd@gmail.com)) and/or our Immediate Past Chair Betty Widgeon ([bwidgeon@gmail.com](mailto:bwidgeon@gmail.com)). We would love to talk to you about it.

As we celebrate 30 years of the State Bar of Michigan ADR Section, I am filled with excitement that ADR has taken such strong root here in Michigan and is continuing to grow and change, helped by the good stewardship of groups like our Section.

What drew you to ADR? What has your journey been? Reach out and let me know – [earcherd@gmail.com](mailto:earcherd@gmail.com).



Anne Bachle Fifer



Dale Ann Iverson

## **“They Say It’s Your Birthday!”: The ADR Section Celebrates Its 30-Year Anniversary**

*By Anne Bachle Fifer and Dale Ann Iverson*

### **Introduction and Historical Context: Michigan’s “ADR culture”**

In celebrating the State Bar ADR Section’s history, we risk sounding as if the full story of dispute resolution in Michigan resides in the justice system and among general civil lawyer neutrals. In fact, there have been many currents comprising Michigan’s modern ADR culture.

The theme of a multi-faceted ADR culture in Michigan was reflected in the interests and experience of the lawyers who came together in the early 1990’s to form the ADR Section. Some were focused on arbitration of disputes that otherwise would have been litigated to settlement/trial in the courts. Others interested in community dispute resolution were helping launch centers in their local communities, especially after the establishment of the SCAO-sponsored Community Dispute Resolution Program (CDRP) in 1989.

Still others were interested in the emerging process of mediation. In the late 1980’s and early 1990’s, some family lawyers were developing the use of mediation in family law, working with mediators with other credentials like a Masters of Social Work (“MSW”) or degree in psychology. Mediation and arbitration had long been utilized in the labor/management arena, especially on the east side of the state. A small cadre of providers were establishing ADR practices, most focused on arbitration and some on mediation. National ADR corporate providers like the American Arbitration Association (AAA) and JAMS were actively reaching out in Michigan and beginning to expand from traditional arbitration to mediation services too.

Thirty years later and the culture of ADR in Michigan has broadened even further, illustrated by:

- Incorporation of both domestic and general civil mediation in the Michigan Court Rules, including mandatory mediation of some cases in some Michigan jurisdictions;
- Conflict management and dispute resolution programs, classes, internships and specialized degrees in Michigan law schools, undergraduate and other graduate programs;
- Development and growth of Restorative Justice and Peacemaking programs and initiatives in schools and specialty courts;

- Introduction and growth of Collaborative Law, especially in family law;
- Pre-filing mediation in divorce and general civil cases;
- Mediation and facilitation programs in special education, child welfare, and agriculture, with the very recent addition of a pilot program in mental health; and
- Introduction of mediation programs for prisoner civil rights cases in Michigan's Eastern and Western Districts, United States District Court.

The ADR Section has been part of the ADR journey state-wide – sometimes leading, sometimes following, always evolving and learning.

### **What's in a Name?**

The evolution of the ADR Section is evident even in its name. Starting out in the early 1980's, the Committee on Arbitration and Alternate Methods of Dispute Resolution was formed by a group of Michigan lawyers. In 1989, it became a standing committee of the State Bar.

That "Arbitration" was initially in the committee's name reflected its makeup and original focus. Many members were arbitrators or represented clients in arbitration, and several were closely affiliated with the AAA.

By 1990, the "Committee on Arbitration and Alternate Methods of Dispute Resolution" had dropped both "Arbitration" and "Methods" from its name, reflecting its expansion to include mediation as well as arbitration. Bylaws were adopted and the Committee became an official section of the State Bar by 1992. During its annual meeting in 1993, the Section, already with over 450 members, voted to change its name from "Alternate" to "Alternative" and has since been known as the "Alternative Dispute Resolution" Section. Notably, the ABA ADR section was formally established that same year.

### **Learning Together: A commitment to learning, insight and reflection**

The Section has always been committed to learning – educating members, the bar, and the public about ADR. As early as 1989, the then-Committee held a half-day conference offering four tracks on ADR in employment law, commercial contracts, construction, and international conflicts, featuring Michigan attorneys. Programming formats have expanded over 30 years. From initial half-day offerings once or twice a year, the Section's signature events have grown to two-day and full-day programs for its Annual Meeting and Mid-Year Event, respectively. Lunchtime webinars and informal networking events (in-person and virtual) have filled in the annual calendar.

In addition to offerings on dispute resolution in the courts, programming since 1993 has included out-of-state presenters from a range of conflict resolution disciplines. Featured speakers have included nationally recognized authors and practitioners such as Ken Cloke, Nina Meierding, Floyd Witherspoon, Robert Mnookin, Leonard Riskin, Raytheon Rawls, and Bernie Mayer.

### **Sharing Information and Insight: publications**

The ADR Section launched a quarterly newsletter in 1993, entitled "ADR Bazaar," featuring four articles, all on arbitration. The second issue, devoted to domestic relations dispute resolution, was called the "ADR Newsletter." It retained that name until 2008, when it became the "ADR Quarterly." Until 2013 this was a paper document mailed to Section members.

In 2017 came a name and format change to the "Michigan Dispute Resolution Journal", moving well beyond the original four-page paper format to an online repository for fuller articles on ADR, with special focus on Michigan. On its website the Section has made available to members materials from webinars and the Annual and Mid-Year Meetings.

### **Shining a Light: Recognizing the richness in ADR culture in Michigan**

Like its education and training efforts, the Section has brought light to more facets of Michigan's ADR culture. In honor of former council member Nanci Klein, long-time executive director of the CDRP in Oakland County, the Section in 2005 created the award that bears her name to recognize exemplary programs, initiatives and individuals in community dispute resolution. Since its inception, the award has honored CDRP centers and individuals around the state including Marquette, Oakland, Petoskey,

Kalamazoo, Jackson, Grand Rapids, St. Joseph, Macomb, and Muskegon.

Another award recognizes service to the Section, named after former Court of Appeals Judge George Bashara, longtime council member. The section also annually recognizes individuals and programs making significant contributions to the ADR field in Michigan, in scholarship, neutral practice, program design, peacemaking, innovation, and ADR initiatives in the courts, as well as in diversity and inclusion in ADR.

### **Partnering for Good: collaborative relationships**

Significant collaborations and partnerships have nudged the Section to practice what it preaches about problem-solving. Some examples:

- From 2002 until 2015, the Section partnered with ICLE to provide the annual Advanced Negotiation and Dispute Resolution Institute (ANDRI), one of its signature education and networking events.
- The Section's work with SCAO commenced almost from its inception. An important aspect of this relationship has been the two-way communication to address concerns identified by both the Section and by SCAO to improve court-connected ADR. Many committees, work groups and task forces created by SCAO's Office of Dispute Resolution have included section members, including:
  - Online Mediation Training Workgroup 2020-2021;
  - Case Evaluation Committee 2019;
  - Mediation Trainers Summit 2015;
  - Early ADR Summit 2013;
  - Mediation Training Standards Committee 2011-2012;
  - Mediation Confidentiality Committee 2010-2012;
  - Court Rule Revisions meetings 2007-2008;
  - ADR Reporting Standards Work Group 2003-2004.
- From 2009 – 2011, the Section collaborated with the Equal Access Initiative of the State Bar and SCAO to host and facilitate the Task Force on Diversity in ADR, culminating in its final report in 2011. For more on the history and importance of this Report, please read Dale Iverson's article in this issue "Taking Stock: Does Our ADR System in Michigan Effectively Address Issues of Diversity, Equity and Inclusion?"
- Over the last two years, the ADR Section has worked more closely with the Family Law Section to offer perspective on critical issues before the courts and the Attorney Grievance Board, including amicus briefing and proposed revisions to the Standards of Conduct. The issues have included domestic violence, confidentiality, mediator disclosure and withdrawal, conflicts of interest, and the Standards of Conduct for Mediators.

### **Understanding and Expanding the ADR Landscape: The Section goes to work with other ADR stakeholders**

Perhaps the most important development in the past thirty years for court-connected mediation in Michigan was the adoption of the Court Rules for mediation in 2000. To develop these, SCAO convened ADR stakeholders statewide, including many Section members, to form the Michigan Supreme Court Dispute Resolution Task Force. Two similar court rules resulted, for general civil cases (MCR 2.411) and for domestic relations cases (MCR 3.216).

The Section provided key leadership among bench and bar statewide in gaining support for the proposed court rules. These leaders lent key testimony before the Michigan Supreme Court and at bar and judicial forums. Subsequent to passage, Section members worked energetically in their local jurisdictions to help courts develop and sustain court ADR programs consistent with the requirements of the new rules.

The new Court Rules cemented the inclusion of mediation in court-connected dispute resolution, mirroring a shift in the Section to focus on both mediation and arbitration. This was reflected in the Section's membership, training, publications, networking, and advocacy. The Task Force also played a role in cementing for Section leaders the importance of knowledge and insight from ADR stakeholders and processes outside the courts and the state.



Beginning in 2009, the Section went to work on what became another significant milestone in Michigan's ADR culture, this time in arbitration. Between 2009 and 2013 the Section devoted substantial time, talent and financial resources to help craft the Michigan Uniform Arbitration Act (MUAA), and advocate for its passage in the Legislature. In 2014, the Section worked to develop amendments to the Michigan Court Rules to ensure compliance with the MUAA.

## Conclusion

At 30 years, the Section has matured to offer a broader range of benefits to an expanding cross-section of the bar. For some, the ADR Section has provided valuable support in developing their practice in ADR. For some, the Section's value has included its collective work to impact and shape ADR in Michigan. For many, the Section has offered great opportunities to enjoy colleagues and share ideas and insight. All of this has been possible thanks to the contributions of section members of their talent and time through the council, committees and action teams, work groups, and Task Forces, and participation in educational offerings as presenters and attendees. ❄️

*The authors especially wish to thank Mary Bedikian, Zena Zumeta, Jim White, Kathy Babcock, and Martin Weisman for their contributions. In preparing this brief history, we gathered more information than we could include, and yet we know there's even more to this story. For readers who don't see specific mention of their efforts, perhaps momentum will develop for a broader, on-going project highlighting the rich history of the ADR Section.*

## About the Authors

**Anne Bachle Fifer, J.D.**, is a mediator, arbitrator and mediation trainer, with a focus on church-based conflicts. She served two terms on the ADR Section Council, and as editor of its newsletter. She is a frequent speaker for Section events, and is a recipient of its Distinguished Service Award. She currently serves on its Legislation and Court Procedures Action Team and the Disclosure Sub-committee. She has been listed annually in "Best Lawyers in America"® in the field of ADR since 2013.

**Dale Ann Iverson, J.D.** provides services in conflict engagement including court-connected mediation. She trains mediators and teaches negotiation and mediation in undergraduate and law school settings. She has been named a Super Lawyer in mediation annually since 2015, and a Best Lawyer in mediation and arbitration annually since 2012. She was ADR Section Chair in 2001/2002, and currently serves on its Legislative and Court Procedures Action Team and Disclosure Sub-Committee.



Milt Mack

## The Rise and Fall of Case Evaluation

*By Milt Mack*

MCR 2.403, the case evaluation court rule, was adopted in 1985. The rule was adopted during a time of heavy dockets that meant trials might not be scheduled for up to five years in some of the busier courts. Unique to Michigan, those who rejected case evaluation awards and proceeded to verdict risked heavy financial sanctions. In 1989, Chief Justice Dorothy Comstock Riley directed the State Court Administrative Office (SCAO) to study case evaluation.

In 1988, the legislature adopted the Community Dispute Resolution Act. The act created the Community Dispute Resolution Program to provide conciliation, mediation or other alternative dispute resolution services through community dispute resolution centers. The Act provided that

Courts could refer civil cases to community dispute resolution centers approved under the act. The program was funded by the Community Dispute Resolution Fund, which is administered by the state court administrator.

In 1998, the Supreme Court established the Michigan Supreme Court Dispute Resolution Task Force to study the use of ADR in Michigan courts. The task force included judges, practitioners and court administrators from across the state. The task force observed that several courts already had established mediation and other nonbinding settlement processes to resolve all manner of

disputes and the use of these processes was growing. These processes were seen as desirable in order to decrease the cost of litigation and to increase the involvement of parties in the process of resolving their own disputes. Much of the experimentation with dispute resolution programs involved the use of mediation. The task force submitted a report to the Michigan Supreme Court in January 1999. The report contained a series of court rule proposals and recommendations for developing, implementing, and monitoring ADR services in the trial courts.

On May 10, 1999, the Court ordered publication of the proposed court rules and invited public comment. After the comments were received, the task force reconvened to study the comments and make recommendations to the Court. The issues in the initial report that generated the most comments were whether a judge should have the power to order litigants to attempt mediation, whether nonlawyers should be permitted to serve as neutrals in a court-sponsored program, and whether the proposed rules adequately provided access to dispute resolution services for low-income persons. The task force issued its final recommendations in January 2000.

The task force recognized that the court system in Michigan was geared to resolving civil disputes solely through litigation. To a large extent, those engaged in processing court cases presumed that litigation must follow a tortuous, somewhat ineffective path aimed at the battle rather than the solution. This approach was not necessarily in the best interests of the litigants. While some civil cases needed to be litigated, the vast majority settled prior to, or during, trial after the parties had experienced substantial costs, broken relationships, and personal disruption. The offering of court-sponsored dispute resolution programs was seen as an opportunity to turn the court program from a destructive, adversarial process to a more constructive, problem solving one, thereby saving litigants a good deal of time, money, and stomach acid.

The task force recognized the proposed rules represented a potentially major change in approach from the way courts had traditionally resolved disputes and believed that Michigan's citizens deserved state-of-the-art dispute resolution processes. The task force felt that if adopted, the proposed court rules would go far towards accelerating the settlement of cases while conserving the court's resources for those disputes in which judicial determination was truly required.

Following public hearings conducted by the Court on the proposed rules in Grand Rapids, St. Joseph, Flint and Gaylord, the Court adopted the recommendations of the task force on May 8, 2000, including adopting MCR 2.411, the mediation rule. In addition, MCR 2.403, was retitled to "Case Evaluation" from "Mediation". MCR 2.403 was often referred to as "Michigan Mediation" since it was unique in the country and had nothing to do with mediation.

Over time, support for mediation continued to grow while support for case evaluation declined, largely because mediation was more effective than case evaluation at resolving disputes, and because it preserved relationships and reduced costs. For example, the Wayne County Probate Court that had established a case evaluation panel, abandoned the program in favor of mediation. I used to say that probate court was the true family court. When you went to court you were related and when you left the court, you were still related. Thus the preservation of relationships promised by mediation was particularly valuable in probate proceedings.

In response to growing criticism of case evaluation, the SCAO commissioned an independent study in 2011 that, among other things, incorporated over 3,000 lawyers' and judges' survey responses and an assessment of the process' impact on docket management. Case evaluation was found to add several months to disposition time and was less valuable than mediation. Data showed that mediation was more effective at settling cases, reducing cost, and disposing of cases more quickly. While circuit court judges generally had a high opinion of case evaluation as a means to resolve civil cases, attorneys were less convinced of its effectiveness, with less than half (48%) agreeing that it was effective.

The evaluators found that mediation was generally more effective and preferred over case evaluation. The evaluators major recommendations were that Michigan circuit courts should be encouraged to make mediation available for civil cases. Court should not require case evaluation for non-tort civil cases in as much that it was not required by statute. The evaluators also recommended that Michigan circuit courts should continue to offer both forms of ADR but provide more flexibility in choosing the most suitable method and timing for the specific case. In many cases, it would be advisable to use mediation prior to case evaluation and to do so early in the case.

Noting continued discontent with Michigan's case evaluation practices among litigators, and increasingly, among judges, SCAO commissioned a follow up study in 2017. A statewide web-based survey was conducted of 1,135 attorneys and 67 circuit judges as well as interviews with judges and court administrators at three circuit courts. Evaluators also reviewed 358 civil cases in three

circuit courts. The 2017 study was compared with the 2011 study. In both study years, judges rated the effectiveness of each form of ADR more highly than did attorneys. A high percentage of judges and attorneys agreed that mediation was effective for resolving civil cases. Most judges agreed that case evaluation was an effective means to resolve cases, while most attorneys did not. However, the portion of judges who said case evaluation was effective declined from 69% in 2011 to 53%.

Compared to 2011, both groups said they would be less likely to use case evaluation if it was not required for some civil cases. The percentage of judges who said they would voluntarily use case evaluation dropped from 83% then to 66%. The study also found that case dispositions were quicker with mediation while case evaluation added three to four months to disposition. Also, the likelihood that mediation would lead directly to a settlement was much higher than case evaluation.

In 2018, the SCAO convened an “ADR Summit” to interpret the most recent case evaluation study’s findings and to otherwise assess the development of alternative dispute resolution services (ADR) in the state. Among other recommendations regarding ADR practice in the state, a majority of attendees recommended that case evaluation should become voluntary and that the sanctions provisions be removed.

The findings of the 2011, 2017 and 2018 studies were then submitted to the Supreme Court in October 2018 with a recommendation to form a Case Evaluation Court Rules Review Committee. The Committee was authorized and met several times during 2019, and issued its report and recommendations in December 2019. The 27-member Committee included lawyers representing plaintiffs, defendants, and insurance carriers, as well as court administrators and judges. The Committee found that case evaluation lacked credibility due to: panelists’ lack of subject matter expertise and court experience; lawyers’ misplaced focus on “winning case evaluation” rather than working towards settlement; lawyers’ lack of preparation; game-playing with the timing and submitting of case evaluation summaries; the brevity of the process (in taking only 10-15 minutes in some jurisdictions); the cost of the process; and, clients being locked out of the process and not understanding why they are not seeing the judge. Among the other shortcomings of case evaluation, the Committee cited a lack of diversity and the unfairness and inappropriateness of sanctions. Sanctions were seen as unfairly penalizing a plaintiff who may have a single case in contrast to insurance companies that can absorb sanctions across a large portfolio of cases.

Nearly all committee members concluded that given this list of problems with the process, case evaluation could not be fixed, but should not be entirely eliminated for the benefit of those parties who did find it of value. Noting the recent adoption of court rules that promoted the use of discovery plans and ADR practices in resolving discovery disputes, the committee settled on a compromise proposal: allowing parties to be exempted from the process if they participated in an ADR process in accord with a court-approved stipulation. In short, parties could waive participation in case evaluation. And if parties did participate in case evaluation as traditionally practiced, sanctions would not apply. These are the core committee proposals submitted to the Michigan Supreme Court.

On March 19, 2020, the Supreme Court published the Committee’s proposed court rules for comment. While a number of judges objected to the elimination of sanctions arguing that it was effective at settling cases and without sanctions, case evaluation had little to no value, many who were familiar with case evaluation felt that it had already demonstrated that it was of little to no value even with the threat of sanctions in the background.

On December 1, 2021, the Supreme Court adopted the proposed court rules based on the Committee’s recommendations.

It remains to be seen what lies ahead for case evaluation practice. Will parties agree to use a different ADR process and thus avoid case evaluation? Will certain classes of parties nevertheless elect to receive an advisory case evaluation award? Might parties, or even a court, develop some other independent means of financially valuing claims and defenses to take the place of the much-maligned random three-member panel process?

While these questions remain to be answered, it is encouraging to see that the Court is actively exploring better ways to resolve disputes. While the original form of case evaluation may have served its purpose of alleviating heavy dockets at an earlier time, it is clear that it has become an outmoded method of resolving disputes in light of more modern alternatives. \*\*

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<https://www.courts.michigan.gov/4af55a/siteassets/reports/ce-rule-committee-report.pdf>

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Laurence D. Connor Michigan Bar Journal, May, 2000, Vol 79, No. 5

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## About the Author

*Judge Mack currently serves as State Court Administrator Emeritus for the Michigan Supreme Court. He served as State Court Administrator from 2015 to 2020. Previously he served as a judge for the Wayne County Probate Court from 1990 to 2015 and as Chief Judge from 1998 to 2015. He also served on the Council of the ADR Section of the State Bar from 2014 to 2020. He received the Frank J. Kelley Public Service Award from the State Bar in 2011 and the Judicial Pioneer Award from the Wayne Mediation Center in 2001.*



Lisa Taylor

## ADR Section Initiatives — We've Been Busy!

*By Lisa Taylor*

The ADR Section through its Legislation and Court Procedures Action Team (LCPAT) has been quite active. In the last two years, the section filed amicus briefs in two Michigan Supreme Court cases, and LCPAT continues to monitor cases in the Court of Appeals and the Supreme Court that might affect members of the Section. In addition, the Section submitted several initiatives for consideration by the Michigan Supreme Court, the Michigan Judicial Council, the State Bar of Michigan's Board of Commissioners and the State Court Administrative Office. Below is a summary:

### A. Issues Submitted to the Michigan Judicial Council.

On January 31, 2022, the ADR Section submitted to the Michigan Judicial Council matters of concern to the ADR section, which included proposals for addressing some of these concerns and a request that the MJC consider them as part of its strategic plan. The ADR submission made clear that the suggestions were not exhaustive nor set in stone, but rather encouraged the MJC to include the ADR section in the conversation. The concerns outlined, with some of the suggestions for addressing them, were:

1. **The current mediator application process thwarts the goal of providing a diverse roster of mediators to litigating parties throughout the state.** One solution would be to implement a statewide mediator roster, which would allow litigants access to mediators outside of their counties if they chose. It would also allow for better data gathering regarding the use and outcomes in mediation, and of course, it would be much more efficient for mediators.
2. **Judges continue to improperly involve themselves in the mediator selection process in contravention of MCR 4.211(B) and 3.216(E).** These rules are essential to self-determination and to address concerns of diversity, equity, and inclusion. The purpose of the random-assignment rule is to prevent any bias in assignment and to allow all court roster mediators an equal chance at assignment. Further, a judge's involvement in mediator selection, no matter how small, is likely to be regarded as a dictate from the judge, and this can prevent parties from using the mediator they deem best suited to their case.
3. **Litigants are not being adequately informed of the range of pro bono mediators available to them, despite MCR 2.410, which provides in Section (B)(2)(d) that each court's ADR plan must "specify how access to**

**ADR processes will be provided for indigent persons.”** Many courts’ ADR plans include their local Community Dispute Resolution Center as the only option, but another option provided under the Michigan Court Rules is to ask mediators to serve pro bono occasionally.

Some courts ask their mediators about their willingness to provide pro bono service, but ADR clerks are not routinely making any such list available to parties or counsel. Other courts do not ask rostered mediators if they’re willing to serve pro bono. So, although many rostered mediators have indicated a willingness to provide pro bono service, this information is not provided to those who would benefit from such service.

**4. There is a lack of uniform procedures and acceptance of the consent judgment provisions of MCR 3.222 and 3.223.** The court rules allow joint petitions and streamlined court processes for parties who have reached final settlement using Collaborative Law, pre-suit mediation or other methods. However, many judges, court clerks and other court staff do not seem to understand and accept the new procedures. Clients and attorneys have reported problems filing the joint petitions, clerks insisting on issuing summons and scheduling pretrial proceedings despite the rules’ prohibitions, and judges’ reluctance to waive the six-month waiting period even when couples have worked long toward their settlement agreements and entering the judgment is, in reality, just a formality for them. Perhaps training of Judges and staff could take place when changes such as these court rules take effect, or if not formal training, a memo on the changes and the effect on court procedures.

**5. Data Collection Regarding the Use and Benefits of Mediation.** To the Section’s knowledge, there has never been an effort in Michigan to carefully develop goals and strategy for court mediation data collection. LCPAT has recently formed a subcommittee to address this issue. With the Supreme Court’s new focus on data-driven improvements to our courts, this seems the ideal time to gather and incorporate mediation data into the Court’s overall plan...

**6. Consistent Use of Terminology.** The term “Facilitation” is not used in the mediation court rules. However, the term “facilitation” is used in court orders, opinions, among court personnel and by attorneys who are actually referring to the process of mediation. Uniformity in court orders and between court personnel and attorneys is important, so that everyone understands what process is being used and what rules to follow.

**B. Disclosure Guidelines in New Proposed Standards of Conduct for Mediators.** On January 31, 2022, the ADR Section and the Family Law Section submitted to State Court Administrative Office proposed amendments to the Michigan Standards of Conduct for Mediators, to provide clearer guidance regarding mediator disclosures and conflicts of interest. The submission was a culmination of research and drafting begun in 2019. When the mediation court rules were drafted, more than 20 years ago, the drafting committee adopted the judicial disqualification standard and applied that same standard to mediators, providing that disqualification of a mediator “is the same as that provided in MCR 2.003 for the disqualification of a judge.” Time has proven that standard inappropriate for mediators. The Standards were last amended in 2013, and since then, a Court of Appeals case and an Attorney Discipline Board opinion have created confusion regarding mediator disclosures and conflicts of interest. The amendments are an attempt to lessen that confusion. A summary of the proposals:

1. Revise the Standards of Conduct for Mediators by:

- a. Clarifying in the preamble that violating a standard is not a basis for invoking a disciplinary process.
- b. Re-organizing Standard I, Impartiality, by stating the standard, then providing commentary.
- c. Merging Standard II, Impartiality, and Standard III, Conflict of Interest, into one new Standard II, to be called, “Impartiality, Disclosure and Withdrawal,” with some new content as well as new commentary.
- d. Re-numbering the remaining standards.

2. Amend MCR 2.411(B)(5) and MCR 3.216(E)(5) to remove the sentences regarding disqualification and replace them with the statement that the Michigan Standards of Conduct for Mediators govern mediator disclosure and withdrawal.

Pursuant to Court Rule, SCAO has the final authority for the Standards of Conduct for Mediators and the Section is now awaiting SCAO’s response to our proposals.

**C. Case Evaluation Proposed Order.** Also on January 31, 2021, the ADR Section wrote to Chief Justice McCormack with an informal request for clarification about the new case evaluation rules, ADM File No. 2020-06, December 2, 2021, specifically, whether/how they apply to pending cases filed before the January 1 effective date, which was not addressed by the Supreme Court order. The Section noted that while there are cases that provide general guidance, such as *Reitmayer v Schultz Equipment and Parts Company*, 237 Mich App 332 (Mich. Ct. App. 1999) (addressing the application of the amendment to MCR 2.405 to a pending case), more specific guidance would be helpful. The Section explained its concern that if direction was not provided, various courts and ADR clerks may interpret this question differently, leading to an array of approaches across the state and unnecessary litigation seeking clarity.

Unfortunately, the Supreme Court was not able to provide an answer. Sarah Roth, Supreme Court Administrative Counsel, responded on February 2, 2022, that while she understood how helpful a bright line rule would be regarding the applicability of these amendments, “the Court speaks through its orders, and it does not provide informal guidance on specific case-based scenarios nor does it speak to timeframes for the applicability of court rule amendments outside of what is contained in the order.” She also explained that “[b]ecause the Court did not identify in its order an “applicability date” for the case evaluation court rule amendments, parties, courts, and attorneys would be expected to turn to the other guidance available [case law and court rules].”

**D. Amendment to MRPC 1.8.** As reported in the last Journal, the MSC issued an order advising that it is considering an amendment to MRPC 1.8, Conflict of Interest: Prohibited Transactions. The proposal would add language, in a new MRPC 1.8(h)(3), that the inclusion of an arbitration clause in an attorney-client agreement is prohibited unless the client is independently represented in reviewing the provision.

The ADR Section submitted a comment which included suggested language that it thought would better capture the concern that seemed to underly the proposed rule, i.e., ensuring clients are informed about and understand arbitration before agreeing to any mandatory provision. The submission noted the importance to the Section of continuing to promote the benefits of arbitration as well as ensuring that its use is consensual. The Section explained its opinion that as drafted, the proposal inappropriately equates arbitration with limitations of liability, is overbroad and is contrary to authority in other jurisdictions, therefore the Section proposed:

To avoid preemption by the FAA or conflict with the MUAA, the ADR Section recommends that a provision requiring informed consent to an arbitration provision in an attorney-client retainer agreement should not appear in MRPC 1.8(h), Prohibited Transactions, but instead should be part of MRPC 1.4, dealing with client communication, or MRPC 1.18, dealing with duties to a prospective client, or a new MRPC 1.19. Further, the rule should require that the client be properly informed of the advantages and disadvantages of arbitration, and should have an opportunity to consult independent counsel, but analogous to the existing MRPC 1.8(h)(2), should not mandate that the client actually consult independent counsel.

For the reasons discussed above, the ADR Section proposes that the Court adopt the following proposed language as a new MRPC 1.4(c) or MRPC 1.18(e), or perhaps a new MRPC 1.19:

A lawyer shall not include a provision requiring arbitration of disputes in an agreement with a client or proposed client unless the client or proposed client is reasonably informed of the advantages and disadvantages of the arbitration provision, is advised to seek independent counsel, and affirmatively consents to arbitration in writing.

Finally, the submission noted that the Section would like to work with the Bar and/or the Michigan Supreme Court in considering additional guidance or training on including arbitration provisions in client agreements. The SBM Board of Commissioners voted to oppose the proposed amendment and allowed the ADR Section to submit its proposal to the Court.

As these initiatives indicate, LCPAT’s members care deeply about legislation and court procedures that affect ADR Section members and do not hesitate to take action when appropriate. Our meetings are usually quite interesting and often filled with lively discussion. Any section member who shares this interest would be most welcome to join our action team. ❄❄

## About the Author

**Lisa Taylor** has been a full-time mediator for over 14 years and is active in the ADR community, serving as secretary of the ADR Section Council for five years, receiving the ADR Section's "George N. Bashara, Jr., Award" and its "Hero of ADR" Award, and now chairing its Legislation and Court Procedures Action Team (LCPAT). The Supreme Court Administrative Office appointed Lisa to serve on the Collaborative Law Court Rules Committee that drafted the Collaborative Law and Consent Judgment court rules adopted by the Michigan Supreme Court.

Lisa has published articles on ADR in the *Michigan Lawyer's Weekly* and at *Mediate.com* and presented at the ADR Section Annual Meetings. Lisa is also a member of the State Bar of Michigan's Family Law Section and is a professional with Professional Resolution Experts of Michigan (PREMi).



Dale Ann Iverson

## "Taking Stock: Does Our ADR System\* in Michigan Effectively Address Issues of Diversity, Equity and Inclusion?"

Dale Ann Iverson

From 2009-20011, the Task Force on Diversity in ADR met in Lansing, MI over three full days. Their effort produced the "Report of the Task Force on Diversity in Alternative Dispute Resolution: Action Proposals for Crafting an Effective Alternative Dispute Resolution System That Addresses Issues of Diversity", a 43-page report with two appendices. The Report described at length the Task Force's process and proposed action plans. The Report is available at <https://connect.michbar.org/adr/communityresources/ourlibrary>.

## Introduction

Anniversaries can celebrate, memorialize, commemorate. Among other things they can create platforms to celebrate accomplishment, offer or request forgiveness, repair past wrongs, or make or renew commitments to the future. At 30 years, what opportunities does this anniversary afford the ADR Section to do any or some of those things?

At many levels of human connection, we're taking stock of our efforts at diversity, equity and inclusion ("DEI"). In the legal profession and justice system there is cause for celebration, for disappointment and regret, and for new energy and re-commitment. In just such a re-commitment, Michigan Supreme Court Justice Elizabeth Welch in her concurrence to the January 2022 Order creating the Commission on Diversity, Equity and Inclusion in the Michigan Judiciary, observed:

*The recommendation to create the Commission is based [in part] on decades of prior research and recommendations, including those of the 1987 [Michigan] Supreme Court Task Force on Gender Issues in the Court, the 1989 Task Force on Racial/Ethnic Issues in the [Michigan] Courts, the 1996 State Bar of Michigan Task Force on Race/Ethnic and Gender Issues in the Courts and the Legal Profession, the National Consortium on Racial and Ethnic Fairness in the Courts (of which Michigan is a founding member), the National Center for State Courts, the Conference of Chief Justices, and the Conference of State Court Administrators (emphasis added).*

## History

The Task Force on Diversity in ADR was convened in 2009 by the ADR Section and the Equal Access Initiative of the State Bar of Michigan. The Task Force Steering Committee developed the Task Force Theme and the questions it was asked to consider related to that theme:

### TASK FORCE THEME (2009-2011)

**“What would an ADR system look like that effectively addresses issues of diversity?”**

1. *What can and should be done to provide equal access to ADR processes?*
2. *What can and should be done to broaden professional opportunities in ADR for members of under-represented groups?*
3. *What can and should be done to improve the effectiveness of conflict resolution processes and providers in responding to the diverse conflict resolution needs of the state’s citizens, including cultural competence?*

The task force then set forth the following “Themes for Action,” as well as “Action Steps” to achieve those goals.

**Themes for Action and Action Steps**

***I. Better understand and consider cultures, language, and other factors among potential ADR end users so that diverse end users may gain optimal access to and benefit from ADR.***

- a) *Identify cultural differences communication factors of diverse End Users that should need to be better understood to improve ADR processes.*
- b) *Reach out to End Users for help in more effective communication with diverse End Users.*
- c) *Create a tool to identify the diverse conflict resolution techniques of diverse End Users.*
- d) *Assess values important to diverse communities’ conflict resolution process.*

***II. Support individuals from diverse communities in becoming successful ADR providers so the ADR provider pool will be reflective of a wider spectrum of end users.***

- a) *Promote diversity among approved ADR trainers, ADR trainees and training material.*
- b) *Develop assessment tool to help End Users identify and select available and knowledgeable ADR providers from diverse communities.*
- c) *Develop an objective rotational system for court appointment of mediators.*
- d) *Institute and promote a mentoring system for new ADR professionals.*
- e) *Encourage the State Bar of Michigan to accept pro bono ADR services as fulfilling the pro bono obligation of its members.*

***III. Increase the cultural competence of all ADR providers so that the needs of all ADR end users may be better met.***

- a) *With regard to training, 1) Supplement basic ADR training with training to enhance cultural competence; 2) verify that diversity training has been taken by every court-appointed mediator; and 3) create an electronic resource list of those trainers and/or trainees of enhanced training.*
- b) *Assess the current system of ADR training to determine the degree to which cultural competence is incorporated.*
- c) *Develop a universal framework for cultural competence and increase the number of culturally competent and diverse trainers.*
- d) *Develop Code of Conduct for ADR providers that sets ethical standards addressing applicable to cultural competence and bias.*
- e) *Educate ADR Providers on the “business case” for developing their own cultural and other competencies.*

***IV. Increase community knowledge of, access to and receptivity to ADR, while ensuring that the ADR provided is tailored to the needs of all end users.***

- a) *Provide ADR services closer to the points of conflict within the community.*



- b) Decentralize access to ADR by outreach and promotion to community groups through websites, governmental organizations, education, expansion of pro bono ADR services, exploration of non-traditional funding, early ADR for cases under \$25,000, ADR on line and allowing non-prejudicial extensions in court cases so parties can pursue ADR.
- c) Embed ADR in state government service contracts with for-profit and not-for profit service providers.
- d) Educate and empower diverse communities through education on the value of ADR.
- e) Reach out to community leaders for guidance in development of a culturally respectful dispute resolution process.
- f) Create a website for diversity and conflict resolution which includes educational resources on diversity, community needs and assessment tools, and self-evaluation tools.
- g) Develop a Pilot ADR Project by identifying a potential ADR End User community of diverse citizenry and develop a trial program to implement some or all of the above Action Proposals.

Always a critical step in a collaborative effort like this is to gain consensus around the goals for the collaboration. For the Task Force's broad group of individual and organizational stakeholders, this was a sensitive step. Ultimately, a consensus was reached that the Task Force would prioritize creativity and inclusion to develop the broadest range possible of viable action steps for future action by stakeholders and others at their initiative. The Task Force did not create a set of negotiated consensus recommendations, around which all participants could commit their organizations. The Report concluded:

*In order to create an ADR system in Michigan which truly is effective in addressing issues of diversity, much work is needed. This report builds on efforts already underway, but it is also a beginning. Its value today lies in the creativity and innovation of the proposals from diverse stakeholders. In the long-term, the value of this effort will be measured by commitment and action to create an ADR system in Michigan that effectively addresses issues of diversity. This is our goal, and our challenge.*

ADR Section Chair Donna Craig (2010/2011) extended this invitation for on-going work in her cover letter accompanying the Report:

*The ADR Section will use the ideas in this report to inform its efforts and projects to expand the knowledge and use of ADR. Additionally, the ADR Section welcomes opportunities to work collaboratively with public or private groups to further access to and use of ADR by diverse populations of individuals and organizations.*

### Reflecting on the ADR Section's Next 30 Years

There is pride in playing an important role in convening the Task Force and producing the report; there is wisdom gained through important contributions from Task Force members and expert presenters; there is gratitude to many for imparting knowledge and logistical support; there are lessons learned about convening, growing and sustaining collaborative efforts; and there is satisfaction gained from tackling some of the strategies that emerged from the Task Force work and in the progress that has been made (although not quantified).

But what of the Section's next 30 years, ADR and DEI? Are we satisfied that the original Task Force theme has been adequately addressed? How best do we answer that question? And if we're not satisfied, what's next? Reflecting solely from my own perspective, some of the most obvious questions we might ask to evaluate our progress could be:

- √ *Since 2011, has the ADR system in Michigan more routinely honored EEOC requirements that mediators and mediation programs in and outside the courts provide reasonable accommodations under the ADA, and otherwise addressed the needs of people with disabilities in ADR processes?*
- √ *Since 2011, has the ADR system in Michigan improved its responsiveness to the needs and concerns of the LGBTQ community in dispute resolution?*
- √ *Since 2011, have opportunities for neutrals of color and women in arbitration and mediation improved?*
- √ *Since 2011, have our courts improved adherence to the fundamental value of self-determination in all aspects of court-*

*connected mediation, including mediator selection and protections against coercive process (including emotional and physical intimidation by other parties), even where the temptation is ever greater to capitalize on the benefits of mediation to achieve court administration goals?*

√ *Since 2011, has our ADR System adequately addressed racism and sexism in its own administration and within ADR processes?*

And these questions may be the easiest to tackle. They don't begin to touch on more nuanced areas for action raised by the Task Force around the cultural competence of our processes, their accessibility, and touching on varied cultural approaches to conflict. I'd encourage you to reflect on the brief summary of action steps included herein from the report. Some are readily do-able; others require more study; and many by now beg for the next new ideas, some 11 years after the report's publication. Judging by the news around us, the ADR Section would have plenty of good company in prioritizing this work for the benefit of the public and the courts. ❄️

### About the Author

**Dale Ann Iverson, J.D.** served as ADR Section Chair in 2001/2002. Together with Toni Raheem, Section Chair in 2013/2014, she co-facilitated the work of the Task Force. Dale simultaneously served on the Equal Access Initiative of the State Bar, a Task Force collaborator. Dale provides services in conflict engagement including court-connected mediation. She trains mediators and teaches negotiation and mediation in higher education settings. She has been named a Super Lawyer in mediation annually since 2015, and a Best Lawyer in mediation and arbitration annually since 2012.

### Endnotes:

The term "ADR system" was used in all the work of the Task Force. I use it here with the same meaning. The Task Force did not intend to limit its discussion to court-connected dispute resolution, and intended to include community dispute resolution, private arbitration, among other pieces of the universe of conflict resolution mechanisms in Michigan.



Lee Hornberger

## Michigan Arbitration and Mediation Case Law Update

*By Lee Hornberger, Arbitrator and Mediator*

### I. INTRODUCTION

This update reviews appellate decisions issued since December 2021 concerning arbitration and mediation. This update uses short citation style rather than official style for COA unpublished decisions.

YouTube of author's 2020-2021 update presentation at:

<https://www.youtube.com/watch?v=9Q7deVlExDI>

YouTube of author's 2019-2020 update presentation at:

<https://www.youtube.com/watch?v=I0TkP8zs-A8>

### II. ARBITRATION

#### A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning arbitration during review period.

#### B. Michigan COA Published Decisions

There were no COA published decisions concerning arbitration during review period.

### C. Michigan COA Unpublished Decisions

COA affirms denial of motion to vacate DRAA award.

***Pascoe v Pascoe***, 356477 (April 14, 2022). COA affirmed denial of motion to vacate DRAA award. COA indicated review of awards extremely limited. Review of award is one of narrowest standards of judicial review. Award may be vacated by court in when arbitrator exceeded its powers. MCL 600.5081(2)(c) and MCR 3.602(J)(2)(c). Party seeking to prove domestic relations arbitrator exceeded authority must show arbitrator acted beyond material terms of arbitration agreement or acted contrary to controlling law. Court may not review arbitrator's findings of fact, and error of law must be discernible on face of award. Court not permitted to review arbitrator's factual findings or arbitrator's decision on merits. Arbitrator's "evidentiary findings and credibility assessments by the arbitrator were simply not subject to challenge in court." The opinion in this case includes a powerful outline of law concerning deference to awards.

[https://www.courts.michigan.gov/4974b1/siteassets/case-documents/uploads/opinions/final/coa/20220414\\_c356477\\_51\\_356477.opn.pdf](https://www.courts.michigan.gov/4974b1/siteassets/case-documents/uploads/opinions/final/coa/20220414_c356477_51_356477.opn.pdf)

#### COA affirms consent judgement enforcing award.

***Hans v Hans***, 355468, 356936 (March 31, 2022). In March 2019, Circuit Court entered judgment, consistent with arbitrator's award. Judgment approved by plaintiff and defendant. In July 2019, defendant filed motion for clarification of judgment as applied to proceeds from sale of real property. Circuit Court issued post-judgment order explaining how sale proceeds to be distributed. Plaintiff appealed. COA affirmed. According to COA, divorce judgment entered in accordance with award and parties agreed to terms of judgment which was appropriately characterized as a consent judgment.

Judge Shapiro dissent would remand case for Circuit Court to review whether distributions made and credits provided were consistent with intent of parties and arbitrator.

[https://www.courts.michigan.gov/495814/siteassets/case-documents/uploads/opinions/final/coa/20220331\\_c355468\\_78\\_355468.opn.pdf](https://www.courts.michigan.gov/495814/siteassets/case-documents/uploads/opinions/final/coa/20220331_c355468_78_355468.opn.pdf)

[https://www.courts.michigan.gov/496659/siteassets/case-documents/uploads/opinions/final/coa/20220331\\_c355468\\_79\\_355468d.opn.pdf](https://www.courts.michigan.gov/496659/siteassets/case-documents/uploads/opinions/final/coa/20220331_c355468_79_355468d.opn.pdf)

#### COA affirms Circuit Court ordering arbitration.

***Tariq v Tenet Healthcare Corp***, 356904 (March 24, 2022). Plaintiff appealed Circuit Court granting summary disposition. Plaintiff alleged defendants engaged in retaliation and discrimination. Defendants moved for summary disposition, asserting plaintiff's claims subject to arbitration agreement. Circuit Court agreed. COA affirmed. Where arbitration provision is distinct and is executed separately, arbitration provision may be binding even if rest of handbook is not binding. COA must resolve all doubts in favor of arbitration and avoid bifurcating parties' claims between court and arbitrator.

[https://www.courts.michigan.gov/495bee/siteassets/case-documents/uploads/opinions/final/coa/20220324\\_c356904\\_33\\_356904.opn.pdf](https://www.courts.michigan.gov/495bee/siteassets/case-documents/uploads/opinions/final/coa/20220324_c356904_33_356904.opn.pdf)

#### COA affirms confirmation of award.

***TBI Solutions, Inc v Gall***, 356747 (February 24, 2022). COA affirmed confirmation of award. Existence of arbitration agreement and enforceability of its terms are questions for court to determine rather than for arbitrators. MCL 691.1686. If court determines dispute arbitrable, merits of dispute are for arbitrator.

[https://www.courts.michigan.gov/493d0a/siteassets/case-documents/uploads/opinions/final/coa/20220224\\_c356747\\_30\\_356747.opn.pdf](https://www.courts.michigan.gov/493d0a/siteassets/case-documents/uploads/opinions/final/coa/20220224_c356747_30_356747.opn.pdf)

#### COA affirms non-granting of attorney fees.

***Atlas Indus Contractors v Ross***, 356179 (February 17, 2022). COA agreed with Circuit Court that arbitrator not empowered to award defendants attorney fees and costs after final award because defendants requested award of fees and costs under arbitration provision in contract, and arbitrator had already addressed merits of plaintiff's breach of contract claims. AAA Rules for Commercial Litigation, Rule 47(d)(ii), precluded award of fees after entry of final award.

[https://www.courts.michigan.gov/493977/siteassets/case-documents/uploads/opinions/final/coa/20220217\\_c356179\\_36\\_356179.opn.pdf](https://www.courts.michigan.gov/493977/siteassets/case-documents/uploads/opinions/final/coa/20220217_c356179_36_356179.opn.pdf)

### COA reverses confirmation of award against non-signatory.

*Domestic Uniform Rental v AZ Auto Ctr*, 355780 (February 17, 2022). COA affirmed confirmation of award as to arbitration agreement signatories over objections arbitrator used expedited procedures without agreement of defendants.

[https://www.courts.michigan.gov/49398e/siteassets/case-documents/uploads/opinions/final/coa/20220217\\_c355780\\_26\\_355780.opn.pdf](https://www.courts.michigan.gov/49398e/siteassets/case-documents/uploads/opinions/final/coa/20220217_c355780_26_355780.opn.pdf)

### COA affirms confirmation of DRAA award.

*Zalewski v Homant*, 354218, 354561 (February 1, 2022). COA affirmed denial of motion to vacate DRAA award. Zalewski is discussed at O'Neil, The Scope of Arbitration, Michigan Family Law Journal (March 2022), p. 3.

<https://higherlogicdownload.s3.amazonaws.com/MICHBAR/29647f32-d7bf-4b3b-97a7-a9359ef92056/UploadedImages/pdf/newsletter/March2022.pdf>

[https://www.courts.michigan.gov/493a2c/siteassets/case-documents/uploads/opinions/final/coa/20220201\\_c354218\\_34\\_354218.opn.pdf](https://www.courts.michigan.gov/493a2c/siteassets/case-documents/uploads/opinions/final/coa/20220201_c354218_34_354218.opn.pdf)

### COA affirms confirmation of award.

*Jenkins v Suburban Mobility Auth for Reg'l Transp*, 355452 (January 13, 2022). Plaintiff appealed confirmation of award. Plaintiff challenged order granting defendant's motion to strike and exclude claims at arbitration. Plaintiff argued Circuit Court erred when it decided whether she could arbitrate claims that she assigned to her medical providers because those claims were governed by parties' arbitration agreement. COA affirmed.

[https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113\\_c355452\\_44\\_355452.opn.pdf](https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113_c355452_44_355452.opn.pdf)

[https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113\\_c355452\\_45\\_355452c.opn.pdf](https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113_c355452_45_355452c.opn.pdf)

### COA affirms confirmation of DRAA award.

*Hoffman v Hoffman*, 356681 (December 16, 2021). If agreement leaves doubts about arbitrability, doubts should be resolved in favor of arbitration. COA affirmed confirmation of DRAA award.

[https://www.courts.michigan.gov/49391f/siteassets/case-documents/uploads/opinions/final/coa/20211216\\_c356681\\_44\\_356681.opn.pdf](https://www.courts.michigan.gov/49391f/siteassets/case-documents/uploads/opinions/final/coa/20211216_c356681_44_356681.opn.pdf)

## III. MEDIATION

### A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning mediation during review period.

### D. Michigan COA Published Decisions

There were no Court of Appeals published decisions concerning mediation during review period.

### E. Michigan COA Unpublished Decisions

#### COA reverses rejection of consent judgment

*Stacy v Stacy*, 353757 (March 17, 2022). Plaintiff submitted proposed consent judgment that would transfer defendant's pensions to plaintiff. Referee recommended case be dismissed because division of assets in proposed consent judgment was not fair or equitable to defendant. Referee stated it did not appear parties wanted to be separated but only wanted to qualify defendant for Medicaid. Circuit Court effectuated referee's recommended order. COA reversed Circuit Court. Without making finding that consent judgment was entered into through fraud, mistake, illegality, or unconscionability, Circuit Court not permitted to modify, and deny, proposed consent judgment in order to obtain equitable result.

[https://www.courts.michigan.gov/494b6d/siteassets/case-documents/uploads/opinions/final/coa/20220317\\_c353757\\_29\\_353757.opn.pdf](https://www.courts.michigan.gov/494b6d/siteassets/case-documents/uploads/opinions/final/coa/20220317_c353757_29_353757.opn.pdf)

### COA reverses rejection of marriage settlement agreement.

***Rudzinski v Rudzinski***, 355312 (March 10, 2022). COA reversed denial of motion to enforce marriage settlement agreement. In October 2015, parties began discussions about ending marriage. Parties had meetings about dissolving marriage and dividing assets. These conversations resulted in settlement agreement which parties signed in June 2016. In January 2019, Thomas filed for divorce. Dolores then moved to enforce settlement agreement. Circuit Court denied Dolores's motion to enforce agreement. In absence of fraud, duress, mutual mistake, or severe stress, Circuit Court erred by refusing to enforce agreement.

[https://www.courts.michigan.gov/493d25/siteassets/case-documents/uploads/opinions/final/coa/20220310\\_c355312\\_29\\_355312.opn.pdf](https://www.courts.michigan.gov/493d25/siteassets/case-documents/uploads/opinions/final/coa/20220310_c355312_29_355312.opn.pdf)

#### **COA affirms entry of JOD signed by attorneys.**

***Turner v Turner***, 354495 (February 10, 2022). COA stated negotiation and settlement are part of civil lawsuits. For negotiations to work, parties must be able to take other side at their word. Agreements subscribed to in writing and signed by party or party's attorney are binding. Parties negotiated consent JOD in person and through emails. Wife's attorney drafted documents and signed them, along with Husband and his attorney. JOD contract binding on both parties, despite wife's later disagreement. Circuit Court properly entered JOD.

[https://www.courts.michigan.gov/493af3/siteassets/case-documents/uploads/opinions/final/coa/20220210\\_c354495\\_27\\_354495.opn.pdf](https://www.courts.michigan.gov/493af3/siteassets/case-documents/uploads/opinions/final/coa/20220210_c354495_27_354495.opn.pdf)

#### **Post final order motion for mediation.**

***Jones v Peake***, 356436 (January 20, 2022). Post final order motion for mediation in Paternity Act, MCL 722.711 et seq., case was frivolous. MCR 3.216(C)(1) and MCR 3.224(C)(1) and (2). MCL 600.2591 and MCR 1.109(E).

[https://www.courts.michigan.gov/49394d/siteassets/case-documents/uploads/opinions/final/coa/20220120\\_c356436\\_32\\_356436.opn.pdf](https://www.courts.michigan.gov/49394d/siteassets/case-documents/uploads/opinions/final/coa/20220120_c356436_32_356436.opn.pdf)

#### **COA affirms Circuit Court interpretation of MSA.**

***Morial Inc v Am Auto Ins Co***, 355837 (January 6, 2022). MSA encompassed plaintiff's claims for penalty interest and attorney fees. Parties' intent was to release defendant from liability from "any and all claims ... or causes of action" for no-fault benefits. Plaintiff's claims premised on payment of no-fault benefits, specifically benefits having been paid untimely, and were included in MSA. MSA identified claims "for all services provided to ... through September 30, 2019" intended to be released. This language covered period up until October 1, 2019, mediation and agreement to settle.

[https://www.courts.michigan.gov/4939ae/siteassets/case-documents/uploads/opinions/final/coa/20220106\\_c355837\\_28\\_355837.opn.pdf](https://www.courts.michigan.gov/4939ae/siteassets/case-documents/uploads/opinions/final/coa/20220106_c355837_28_355837.opn.pdf) ❄️

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### **About the Author**

**Lee Hornberger** is a former Chair of the SBM Alternative Dispute Resolution Section, Editor Emeritus of *The Michigan Dispute Resolution Journal*, former member of the SBM 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, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation. He has received the George Bashara Award from the ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from the ADR Section. He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 to 2021 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for alternative dispute resolution. He received a First Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2022; and received a Second Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2022. He received a Second Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2020. He received a First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019.



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## Action Team Updates

The ADR Section's Diversity & Inclusion Action Team (DIAT)'s "What can ADR practitioners do to promote Diversity and Inclusion in the ADR profession?" presentation to a plenary session at the September 30, 2022, ADR Section Annual ADR Conference. This presentation will touch on the following topics.

What are the individual steps that we can take to be welcoming and to reach out to women and people of color who want to build a neutral practice? How can diversity and inclusion become a reality?

How do you get experience? Why and how did the panel members enter the ADR profession?

Who should you approach?

How does one get on a panel and what is it like to be on a panel?

Does being a judge first really help and how do you do that?

How do you build up a specialty practice like labor and employment?

How important is having a master's degree or having practiced labor law?

A general overview of how to build your practice? What worked for the panel members in becoming successful ADR practitioners?

How can the more seasoned neutrals bring in new neutrals to the profession.

What is networking and how can you network to help you successfully attain your goals?

What are the collateral opportunities for prospective ADR professionals?

What did not work for the panel members? What are the lessons the panel have learned and the mistakes they have made?

We need to be welcoming to individual people and help them along in the profession.

As Michiganders, we are well positioned to do that.

The Moderator will be **Shawntane Williams**, Williams & Associates Law Firm, PLLC, Farmington Hills.

The presenters will be,

**Earlene R. Baggett-Hayes - Panelist**

The Law & Mediation Center PLLC, Pontiac

**Lee Hornberger - Panelist**

Arbitrator and Mediator, Traverse City

**Michael S. Leib – Panelist**

LeibADR LLC, Bloomfield Hills

**Antoinette R. Raheem - Panelist**

Law & Mediation Offices of Antoinette R. Raheem PC, Bloomfield Hills

The DIAT Book Club provides an opportunity for Section members to meet and discuss books concerning diversity and inclusion. The May 3, 2022, Book Club featured *Civil Rights Queen: Constance Baker Motley and the Struggle for Equality* by Tomiko Brown-Nagin.

On April 5, 2022, DIAT and the American Indian Law Section co-sponsored a virtual Diversity Lunch for mediators, arbitrators, other ADR practitioners, and American Indian Law Section members. There were discussions of issues that face mediators, arbitrators, and other neutrals.

In addition, DIAT is working on a diversity video project and other projects.

DIAT promotes 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 DIAT 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.

You are invited to join DIAT and help with its activities. For further information, you can contact Co-Chair Shawntane Williams at [sw@williamspllc.com](mailto:sw@williamspllc.com) or Co-Chair Lee Hornberger at [leehornberger@leehornberger.com](mailto:leehornberger@leehornberger.com). \*\*



Betty Widgeon

## Arbitration Matters: Attributes of Acclaimed, Accomplished Arbitrators

*Betty Rankin Widgeon*

Over the past two years, I have met on a weekly basis with Arbitrators mainly from Massachusetts, Michigan, Maryland, Washington, and Louisiana to discuss various matters that were affecting our arbitration practices and best methods for handling virtual hearings; appropriate protocols for in-person hearings; first impressions about making rulings in awkward and difficult situations; and dealing with ethical conundrums.

Most of these Arbitrators are fellow members of the National Academy of Arbitrators. For us, an unexpected but appreciated by-product of limitations imposed by the pandemic was that we ended up taking advantage of ZOOM and other virtual platforms to communicate and network as never before. The profession has benefited as both seasoned and novice Arbitrators have seized upon the multiplied opportunities to sharpen their skills and also openly share experiences with colleagues.

In January, I sent a questionnaire to a number of my NAA colleagues and other Arbitrators regarding the top characteristics and attributes of acclaimed and accomplished Arbitrators. My questions were broad and open-ended. What are the top three to four ingredients in becoming a seasoned, respected Arbitrator? What “gems” would you offer to mentees or newer Arbitrators regarding the route to becoming acceptable to the parties? What are your top 2-3 “lessons learned” in becoming the Arbitrator you are today? The Arbitrators responded candidly and categorically. Regarding the first questions, Arbitrators offered the following sagacity: (1) lead with ethics and generosity; (2) master appropriate Arbitrator temperament; (3) discern and focus on the necessary; and (4) continue Arbitrator education (CAE). Their answers to questions two and three will be reserved for future *Journal* issues.

### Lead with Ethics and Generosity

The Arbitrators responding to my questionnaire rated neutrality and confidentiality as top Arbitrator qualifiers. In fact, one described the importance of being scrupulously careful about keeping confidentiality. Closely related is the matter of guarding against ex-parte communication. This is a line that, once crossed, can become a treacherously slippery slope. One Arbitrator opined that one should avoid talking about “anything more controversial than the weather.” She explained that she errs on the side of formality in order to keep her hearings from derailing. Even if she knows the advocates, she is formal with everyone in front of clients and witnesses. She advised against giving the impression that she “runs in the same circles” with one of the parties or advocates or was “just back from a fancy vacation” while a Grievant is unemployed.

### General Nuggets of Wisdom

Be ethical and reasonable in billing. Consider waiving a late cancellation fee, depending on the reasons—it could earn an Arbitrator more respect than insisting on payment when there is legitimate reason to waive it, when an advocate gets sick unexpectedly or one has a sudden family tragedy. Also, consider making a practice of scheduling case management conferences before. Explore

settlement, but don't mediate a settlement unless the parties know that, if mediation settlement fails, they are free to get another Arbitrator.

The parties pay Arbitrators for the day; if the case takes the entire day, don't appear in a rush to leave. Give the parties your full attention, avoiding making or responding to cell phone calls to conduct other business during the hearing or breaks. When doing so will assist the parties and move the hearing along, offer the parties a virtual pre-hearing conference at no additional cost. Offer to host virtual hearings if you are competent to do so.

### Master Appropriate Arbitrator Temperament

Be genuine. Appropriate and "judicial temperament" is touted for the courtroom. For the most part, the arbitration hearing room is no different. The Arbitrator sets the tone and tenor. She may and should do so without raising her voice or belittling the counsel, the advocates, or the witnesses. If she doesn't already possess an appropriate Arbitrator temperament, she must develop one, balancing a suitable disposition against being overly solicitous. The most sought-after Arbitrators perfect the art of controlling the hearing. They learn how to handle objections artfully and avoid arguing with the parties. An astute Arbitrator asks minimal questions, usually to clarify. If she asks a procedural question, she waits until after direct and cross-examination are completed, and offers Counsel a chance to follow up. When judging credibility, acclaimed Arbitrators rely more on records, logic, and corroboration than witness demeanor.

### Organize Your Thought Process; Discern and Focus on the Necessary

The accomplished Arbitrator usually arrives early in the morning. He learns how to discern necessary details and avoid gratuitous remarks during hearings and their decisions. He avoids unnecessarily lengthy decisions, remembering that the bill does not depend on the length of the decision but on the quality of the writing. He recognizes that, although he possesses the final authority, it's not about him. He tries to make the parties comfortable, especially in virtual hearings where some may be less familiar with the platform. He noted that, ultimately, we establish reputation in each hearing we hold and with each decision we submit.

In general, the Arbitrators attached much importance to submitting their decisions on time. One Arbitrator reported that he writes a draft of his decision as soon after his hearing as possible. He then takes some time away from the draft and later excises anything that is unnecessary or confusing. He takes pride in carefully articulating the parties' arguments and writes his arbitration decisions with the intention that the Grievants understand his rationale.

### Continue Arbitrator Education (CAE)

The responding Arbitrators emphasized the importance of continuing professional education development. Some emphasized the continued role of conferences and dinners where one can enlarge her networking circles. Prior to the pandemic, arbitration was generally considered a lonely profession, but that is changing. Many of the reporting Arbitrators encouraged involvement with ADR and other bar associations sections. Additionally, most Arbitrators encouraged establishing and maintaining mentor-mentee relationships well into their practices, providing opportunities to serve as examples and learn from mentees.

Our own ADR Section is one of the most active of the State Bar's Sections. The section boasts 781 members, including a healthy percentage of Arbitrators. It also hosts workshops training seminars and *Lunch and Learns* events nearly every month. Opportunities abound to write articles and present on popular ADR topics—an excellent way to make one's name known. Alternatively, section members can easily contribute monthly through membership on various Council Action Teams. Both within and outside the ADR Section, drop-in learning opportunities abound. Those opportunities help us establish affiliations with other Arbitrators, foster helpful bonds, become more aware of our biases and learn how to navigate around them, as we all strive to become better Arbitrators..\*\*

### About the Author

*Betty Rankin Widgeon is the immediate past Chair of the State Bar of Michigan Alternative Dispute Resolution Section. In 2017, she was appointed to the Michigan Supreme Court Panel of Special Masters to preside over alleged judicial misconduct hearings. She is a*

*former Chief Judge of the 14A District Court, Washtenaw County, MI. She is a member of the National Academy of Arbitrators and the National Academy of Distinguished Neutrals.*

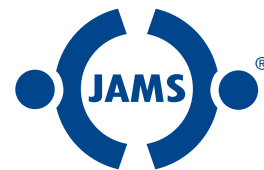
*She holds her B.A. and MAEd Degree in Education from Wake Forest University and her J.D. from the University of Michigan. While in law school, she co-authored 'The Relevance of "Irrelevant" Testimony: Why Lawyers Use Social Science Experts in School Desegregation Cases,' *Law and Society Review*, 1981-82. She arbitrates labor, employment, commercial, and consumer cases and mediates for private firms and corporations.*

*She is trained in videoconferencing and conducts hearings, mediations, fact-findings, and facilitations via virtual platforms. One of her focuses is assisting newer professionals in building their ADR practices.*

#### **Endnotes:**

<sup>1</sup> Responses of the following Arbitrators were summarized and compiled for this article: John Alfano, NAA, Avenue, MD; Debra Brodsky; NAA; Farmington, MI; Jeff Cassidy, NAA, Brewster, MA; James Cooper, NAA, Boston, MA; Elaine Frost, NAA, Grosse Point Woods, MI; Marc Greenbaum, NAA, Auburndale, MA; Lee Hornberger, Traverse City, MI; Samuel McCargo, Detroit, MI; Bonnie McSpiritt, NAA, Centerville, MA; Debra Neveu, NAA, New Orleans, LA; John A. Obee, NAA Farmington Hills, MI; Rosemary Pye, NAA, Chevy Chase, MD; Marsha Saylor, Seattle, WA; Betty Rankin Widgeon; NAA, Ann Arbor, MI; Beth Wolfson, NAA, Dedham, MA; O'Neal Wright; Farmington, MI; E.R. Scales, Southfield, MI; Sherrie Rose Talmadge, NAA; Boston, MA.





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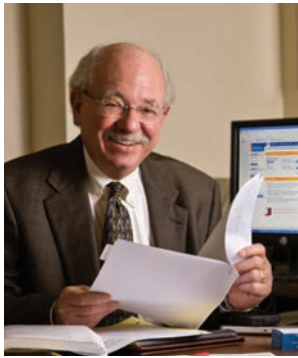


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Sheldon J. Stark

# From the Field: Adding Techniques to Your Mediator Toolbox

## A Wide Variety of Mediator Proposals

*By Sheldon J. Stark, Mediator and Arbitrator*

### Introduction

In this column, the second in a series about effective mediator techniques, I'll share with you the surprising variety of ways ADR providers approach using mediator proposals.

### Mediator Proposal Defined

A mediator proposal is typically a one-time, "take-it-or-leave-it" dollar figure the mediator suggests at the end of the mediation process that – it is hoped – both parties will be tempted to accept. If both sides accept, the case settles for the number proposed. If one party accepts and the other rejects, the rejecting party is not informed of the acceptance.

### Example 1: Mediator Proposals Texas-Style

Eric Galton, a Texas mediator and former President of the International Academy of Mediators, uses the mediator proposal technique sparingly, and only after he's convinced the parties aren't going to make another move and thus can't get to "the finish line" otherwise. The parties must agree to the process. After proceedings at the mediation have been concluded, Eric waits a couple days to give the parties time to reflect on what they learned at the table during the process. He then provides each advocate a written, confidential reasoned proposal. The parties then have a week to respond. Waiting precludes anyone claiming they were forced to settle for an unacceptable number. Not arbitrary, his number is the result of considerable thought and contemplation taking into consideration the risks, costs, challenges, strengths and weaknesses presented. Each side receives a different private and confidential letter because the reasons, risks and analysis differ for each. The intended audience is the decision maker(s) who may or may not have been at the mediation table. The letter includes Eric's credentials and experience to underscore he has the competence, experience and credibility to make a proposal the parties should respect – and accept. Eric's goal is to propose a number each side must stretch to reach.

### Example 2: Michigan Mediator Magic

Ed Pappas, former Michigan State Bar President, ADR Section Skills Action Team co-chair, and senior partner at Dickinson Wright, mediates complex matters that often require a second day to reach resolution. Ed lets the mediation process work first. He employs the technique in only a small percentage of cases. Ed waits for the lawyers to ask for a proposal. He doesn't agree unless and until he is certain the parties have been negotiating well and have gone as far as they are going to go. He starts by asking for party consent. If yes, Ed brings the lawyers together without parties. He solicits their suggestions for a number they would each be willing to recommend. If there is consensus, Ed presents the proposal verbally to everyone together and at the same time. Typically, parties make a decision immediately, thereby leaving the table with a written term sheet. He will, however, agree to more time to make this important decision if requested.

### Example 3: My Own Method

In my practice, I too wait for a request but do not agree until alternative closing techniques have first been rejected. If that request comes too early, I lack sufficient information to propose a number with any hope of success. The advocates understand that. When the time is right, I explore the range of possible numbers with each litigator separately. I bring everyone together to describe my process. I explain my number will be "south" of the plaintiff's last communicated offer, but "north" of the defendant's last communicated offer. My proposal will not be the midpoint. Rather, I promise to make an assessment of the strengths and weaknesses of their claims and defenses, factor in the fees and costs, evaluate the magnitude of the risks each faces, and present a number each side will have trouble rejecting. If they are interested, I explain my reasoning. I encourage each side to make up their minds that day if they can. Additional time is provided if either party needs to reach out to decision makers not at the table.

### Example 4: A Unique Approach

Orit Asnin is a mediator in Israel who mediates complex commercial and business disputes in a multi-cultural, high conflict arena

both within Israel and with international parties. Orit begins with the proposition that the mediation process belongs to the parties and their representatives, not the mediator. Accordingly, everyone must give their consent, clients and litigators alike. By requiring everyone to be part of the process, Orit believes the likelihood her proposal will be accepted is enhanced.

Although Orit commonly agrees to mediator proposals, several factors must fall into place first.

- Everyone consents
- The parties have stopped moving and the process has reached a standstill.
- She has a good sense of a range of possible numbers.
- The parties are truly ready – mevushalim, “cooked enough” in Hebrew.

An Orit Asnin “proposal” is not only “hers”. As a result of all she learns during the mediation, her proposal isn’t necessarily limited to money. It may include previously discussed solutions, such as specific suggestions for how the parties might work together with possible future business arrangements or joint ventures. If an apology or an acknowledgment is important, she will include that, as well.

Significantly, an Orit Asnin Proposal may allocate a small percentage of the money to a worthy charitable institution or cause but only if the parties are open to the notion of a charitable contribution. In such case she will add the contribution to her proposal leaving the parties to find a cause to which both can agree. Orit finds charitable contributions add value. Parties experience greater satisfaction with the process and take pride in doing something bigger than themselves.

Orit brings everyone together in one room to communicate her proposal. She asks participants to be respectful and not react even if they believe she has completely “misunderstood” them. She asks that they save their reaction until back in caucus. Using humor, she invites any response as long as it is positive. Paraphrasing a famous Henry Ford quip, she notes it is like buying a car in any color so long as it is black. She may or may not include a rationale with the proposal. In some cases, a rationale is apt and helpful in reaching a decision. In others, a rationale is unnecessary and could prove harmful.

She asks for a response while everyone is at the table. If there is good reason for additional time, she asks the lawyers to recommend the number to their clients.

### Why Mediator Proposals Work

Despite differences in the way mediator proposals are employed, the result for parties is resolution. All four of us report high acceptance rates. Why is that?

- Parties retain mediators they trust and respect. They’re willing to give mediator proposals careful consideration.
- Mediator proposals give decision-makers “cover,” when resolution might not be popular or palatable to other stakeholders, business associates or family members. (“It wasn’t my decision. The mediator recommended it!”)
- If participants have been paying attention, mediation is a valuable learning experience. A number likely to be rejected in the morning, becomes acceptable by afternoon.
- Parties appreciate the opportunity to test their claims and defenses on a truly objective and trusted neutral.
- Mediation is an opportunity to vent feelings, grievances, and emotions. People feel listened to and respected. Following a well-managed mediation process they are better able to take a step back and make a mature, businesslike judgment about resolution.

Mediator proposals represent a powerful closing technique. ❄❄

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### About the Author

**Sheldon J. Stark** offers mediation, arbitration case evaluation and neutral third party investigative services. He is a Distinguished Fellow 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 past Chair of the council of the Alternative Dispute Resolution Section of the State Bar and formerly chaired 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, when he stepped down to focus on his ADR practice. Previously, he was employed by ICLE. During that time, the courses department earned six of the Association for Continuing Legal Education's Best Awards for Programs. He 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, and the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. In 2015, he received the George Bashara, Jr. Award for Exemplary Service from the ADR Section of the State Bar. He has been listed in "dbusiness Magazine" as a Top Lawyer in ADR for 2012, 2013, 2015, 2016, 2017, 2018, 2019 and 2020.



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## Upcoming Mediation Trainings

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The following training programs have been approved by the State Court Administrative Office. The list is updated periodically as new training dates become available. Please contact the training center for further information.

<https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/>

**ONLINE DATE: June 2, 2022**

Hosted By: Oakland Mediation Center

Registration and additional information  
([mediation-omc.org](https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/))

### 8-Hour Advanced Mediator Training

**ONLINE DATE: June 2, 2022**

Hosted By: Anne Bachle Fifer, Dale Ann Iverson, Robert Wright

Registration and additional information  
([mediation-omc.org](https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/))

**ONLINE DATES: August 2-3, 2022**

Hosted By: Oakland Mediation Center

Registration and additional information  
([mediation-omc.org](https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/))

**DATE: May 10, 2022**

Hosted By: Resolution Services Center

Registration and additional information ([RSCCM.ORG](https://www.resolution-services.com/))

### 48-Hour Domestic Relations Mediator Training

**ONLINE DATES: May 3-5, 10-12, 17-19, & 24-26, 2022**

Hosted By: Oakland Mediation Center

Registration and additional information ([RSCCM.org](https://www.resolution-services.com/))

**ONLINE DATES: June 22-24, 27-29, 2022**

Hosted By: Resolution Services Center

Registration and additional information ([RSCCM.org](https://www.resolution-services.com/))

**ONLINE DATES: November 1-3, 7-9, 14-16, & 21-23, 2022**

Hosted By: Oakland Mediation Center

Registration and additional information ([mediation-omc.org](https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/))

### 40-Hour General Civil Mediator Training Program

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.

**ONLINE DATES: May 17-20 & 23, 2022**

Hosted By: Resolution Services Center

Registration and additional information ([RSCCM.org](https://www.resolution-services.com/))

**ONLINE DATES: July 6-8, 13-15, & 19-22, 2022**

Hosted By: Oakland Mediation Center

Registration and additional information ([mediation-omc.org](https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/))

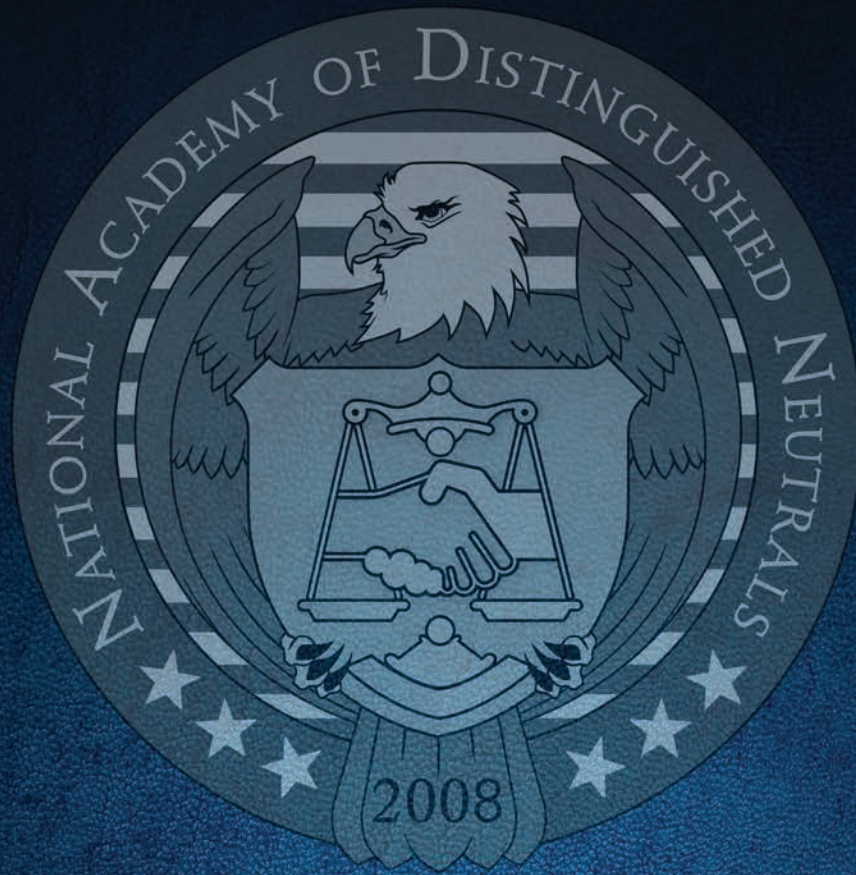
## How to Find Mediation Trainings Offered in Michigan

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 website:

<https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/> \*\*





**[www.NADN.org](http://www.NADN.org)**



Visit our Michigan Chapter members at  
**[www.MichiganMediators.org](http://www.MichiganMediators.org)**



**FOR IMMEDIATE RELEASE**

February 9, 2022

**Mike Leib****CONTACT**

Martin Weisman  
Executive Director  
Professional Resolution Experts  
of Michigan, LLC (PREMi)  
[premiadr.com](http://premiadr.com)  
[mweisman@wyrpc.com](mailto:mweisman@wyrpc.com)  
(248) 882-2571

## **PREMi Continues to Grow with the Addition of Arbitrator and Mediator Mike Leib**

Renowned group of ADR professionals increases its depth of experience with the addition of recognized Michigan arbitrator and attorney.

**DETROIT** – Professional Resolution Experts of Michigan (PREMi), a group of renowned and respected alternative dispute resolution neutrals, is pleased to welcome Michael Leib to its ranks. Mr. Leib is a valued arbitrator and mediator, located in Southeast Michigan. While he mediates and arbitrates cases primarily located in the Detroit Metropolitan area, he is able to service a much larger area through remote platforms.

He handles both non-administered and administered arbitrations and is a member of the American Arbitration Association Commercial Panel. His lengthy litigation background in diverse areas allows Mr. Leib to arbitrate and mediate business related disputes including insolvency, complex commercial, employment, professional liability, and real estate disputes. He is a Best Lawyer.

He has enjoyed his active participation in leadership roles with the State Bar of Michigan's ADR Section concerning the presentation of educational webinars and conferences and review of legislation, court rules, and ethical rules affecting ADR practitioners. As a result of his participation, Mr. Leib has been the recipient of several awards given by the ADR Section including the George Bashara Award and the Hero of ADR Award. He continues his service on the Debtor/Creditor Committee of the State Bar's Business Law Section, participating in the drafting of receivership court rules and legislation as well as co-authoring articles on receivership court rules and newly enacted receivership legislation.

"It is an honor to become a member of PREMi, a distinguished group that includes the best mediators and arbitrators, most of whom I have had the opportunity to know, observe, collaborate, and share ideas with," said Mr. Leib.

*Professional Resolution Experts of Michigan, LLC (PREMi) is an association of legal professionals with numerous years of experience in dispute resolution and a large breadth of subject matter knowledge. PREMi's attorneys work with parties in conflict across Michigan and around the country, utilizing creative approaches and processes to achieve meaningful results. More information about PREMi can be found on its website: [www.premiadr.com](http://www.premiadr.com).*

###

**PRESS RELEASE**PREMi – [www.premiadr.com](http://www.premiadr.com) – (248) 882-2571



## MICHIGAN PLEDGE TO ACHIEVE DIVERSITY<sup>AND</sup>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.



Sign the Michigan Pledge to Achieve Diversity and Inclusion in the Legal Profession. [michbar.org/diversity/pledge](http://michbar.org/diversity/pledge)

*Thanks to our Annual Meeting Sponsors for their generous support!*

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## ALTERNATIVE DISPUTE RESOLUTION SECTION

### MEMBERSHIP APPLICATION 2021-2022

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;
3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and,
4. 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. *(Section membership is free for sitting judges)*

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: <input type="checkbox"/> Member <input type="checkbox"/> Sitting Judge <input type="checkbox"/> Affiliate <i>(Affiliate memberships are subject to Council approval.)</i>	
NAME: _____	<p>All orders must be accompanied by payment. Prices are subject to change without notice.</p> <p>Non-members must submit payment by check.</p> <p>Please make check payable to: STATE BAR OF MICHIGAN</p> <p>Enclosed is check # _____</p> <p>Mail your check and completed membership form to: Attn: Dues Dept., State Bar of Michigan Michael Franck Building 306 Townsend Street Lansing, MI 48933</p> <p>Members using a Visa or MasterCard must join online at <a href="http://e.michbar.org">e.michbar.org</a></p>
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 <i>Dispute Resolution Journal</i> ? _____	
<p><b>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.</b></p>	

Revised 01/2021



## 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;
3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and,
4. 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 Journal** to Editor, Lisa Okasinski at [Lisa@Okasinskilaw.com](mailto:Lisa@Okasinskilaw.com).

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/journal>. \*\*

## 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 Editor, Lisa Okasinski @ [Lisa@Okasinskilaw.com](mailto:Lisa@Okasinskilaw.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](https://twitter.com/SBM_ADR) <https://www.linkedin.com/groups/12083341>

## 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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<http://connect.michbar.org/adr/newsletter>