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

Lee Hornberger, ADR Section Chair

Erin Archerd, Editor

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Lee Hornberger

# The Chair's Corner

*by Lee Hornberger*

## Passing of the Gavel

On Saturday morning, October 14, 2017, outgoing Alternative Dispute Resolution Section Chair Sheldon J. Stark passed me the gavel to become the Chair of the ADR Section. While on the ADR Section Council, Executive Committee, and as Editor of *The Michigan Dispute Resolution Journal*, I have served under five outstanding Section Chairs. These Chairs were Sheldon J. Stark (2016-2017), Joseph C. Basta (2015-2016), Martin C. Weisman (2014-2015), Antoinette R. Raheem (2013-2014), and Robert E. Lee Wright (2012-2013).

Under Shel's exemplary leadership during 2016-2017, the Section had many outstanding events. These included the March 2017 Annual ADR Summit in Auburn Hills with J. Anderson "Andy" Little, the author of *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes*; the highly successful and educational June 2017 "Mediation Advocacy: Representing Clients in Mediation" seminars for advocates in Grand Rapids and Novi; and the superb, off-the-charts October 13 and 14, 2017 Annual Meeting and ADR Conference at The Inn at St John's in Plymouth.

During the Annual Awards Banquet, the Section Awards were presented. George T. Roumell, Jr. received the Distinguished Service Award in recognition of significant contributions to the field of dispute resolution. The Oakland Mediation Center received the Nanci S. Klein Award in recognition of exemplary programs, initiatives, and leadership in the field of community dispute resolution. Michael S. Leib received the George N. Bashara, Jr. Award in recognition of exemplary service to the ADR Section and its members. In addition, Lisa Taylor received the Hero of ADR Award for her drafting and creation of the ADR Section's outstanding brochure.

Three new Council members were elected at the Annual Meeting. These new Council members are Erin R. Archerd, Susan K. Klooz, and Betty R. Widgeon. Erin is an Assistant Professor of Law at The University of Detroit Mercy School of Law. Susan is a mediator and peacemaker with the Lakeshore Mediation and Community Dispute Resolution Centers. Betty is an arbitrator, fact finder, mediator, and visiting judge with Widgeon Dispute Resolution & Consultation Services. Each of these new Council members has a broad and successful ADR background and will be a positive asset to the Council. In addition, Scott S. Brinkmeyer became a new member of the Executive Committee.

Justice Bridget M. McCormack was the keynote speaker for the Awards Banquet and gave an insightful and interesting speech on the use of ADR in the court system.

We will be doing the following during the next Section year:

### February 15, 2018 – "The Neuroscience of Decision-Making: What's Really Controlling the Way You Think?" Program at Detroit Mercy Law

Under the leadership of its Diversity Task Force, the Section continues to value and develop opportunities for diversity and inclusion. "Diversity is being invited to the party; inclusion is being asked to dance," Vernā Myers told the Cleveland Metropolitan Bar Association.

An important part of this endeavor will be the February 15, 2018, "The Neuroscience of Decision-Making: What's Really Controlling the Way You Think?" program at Detroit Mercy Law, featuring nationally renowned speaker, Kim Papillon. The co-sponsors for this event are the ADR Section, Detroit Mercy Law, and Miller Canfield Paddock and Stone. Thank you to Danielle A. Potter, Chair of the ADR Section's Diversity Task Force; Phyllis L. Crocker, Dean, Detroit Mercy Law; and Michelle P. Crockett of Miller Canfield for making this program possible.

Additional information and registration are at: https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Feb_Reg.pdf

## March 20, 2018 – Annual ADR Summit in Auburn Hills

The ADR Section is excited to present its March 20, 2018, Annual ADR Summit with world class mediator and trainer, Lee Jay Berman, at Cooley Law School, in Auburn Hills. Lee Jay's cutting edge presentation will be "Harnessing the Power of the Master Mediator: Seeing New Things in the Same Old Rooms." This is a do-not-miss event.

I heard Lee Jay moderate and present at the National Academy of Distinguished Neutrals 2017 Advanced Mediation Training Retreat in Toronto, Canada. He took us to a higher level of appreciation and understanding.

Additional information and registration for the March 20, 2018, ADR Summit are at: http://connect.michbar.org/adr/events/eventdescription?CalendarEventKey=7fab91e3-daf8-48c2-99b0-6f43ab9ce42e&CommunityKey=8aa9f208-87ad-4434-8e05-bb1982c6b20d&Home=%2fadr%2fhome

## Late Spring 2018 Mediator Symposium in Grand Rapids

The ADR Section, in co-sponsorship with the Grand Rapids Bar Association, will have a Mediator Symposium in late spring 2018 at Mika Meyers in Grand Rapids. Recent issues facing mediators and mediator techniques will be discussed in this educational and social setting.

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

The ADR Section's 2018 Annual Meeting and ADR Conference, including 8 hours of advanced mediator training, will be Friday afternoon, October 12, and Saturday morning, October 13, 2018, at the Park Place Hotel in Traverse City. This will be an exciting learning and networking event featuring Michigan presenters.

The Park Place Hotel has reduced rates for our Section, based on availability, on reservations made by September 11, 2018. You can contact the Park Place Hotel at 231-946-5000 and reference "State Bar of Michigan." Neither the hotel's website nor its toll-free number has access to this group information. You must call to reserve at a discount.

Traverse City is beautiful all year, but especially in October.

## The Michigan Dispute Resolution Journal

The ADR Section publishes *The Michigan Dispute Resolution Journal*. Current and prior Journals are available at: http://connect.michbar.org/adr/journal .

The Editor of the *The Journal* is always looking for articles for future issues. This is your chance to become a published author in the leading ADR publication in Michigan. Proposed articles for the *Journal* can be emailed to its Editor, Erin R. Archerd, at archerer@udmercy.edu .

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

The ADR Section is privileged to be sponsoring the February 2019 ADR theme issue of the *Michigan Bar Journal*. June 1, 2018, is the deadline for proposed complete articles to be submitted as a Word attachment to me at leehornberger@leehornberger.com . Please put the title of the article in the Subject line of the email.

We encourage you to submit a proposed article to be a part of this event. ADR theme articles of interest to the wider Bar (as opposed to only ADR practitioners) and cutting-edge topics are especially encouraged. Under no circumstances can the article, including end notes, about the author, and fast facts be more than 2,500 words. Please follow the article guidelines at: http://www.michbar.org/file/journal/about/artguidelines.pdf

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

## Future Section Activities and Leadership

We are continuing to plan future Section activities and to create opportunities for leadership. Information concerning the Action Teams and Task Forces is available at: http://connect.michbar.org/adr/reports/teams .

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

### ADR Section Mission

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

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

## ADR Section Action Teams

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

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

**Outreach/Membership Team** – (Graham Ward 616-301-6800 x 6727 and wardl@cooley.edu ) One of the Outreach Team's goals is to raise awareness in the ADR community of all that the ADR Section has accomplished and that the Section has to offer. This Team also seeks to better meet the needs of ADR professionals and thereby increase the number of members and affiliates who will want to join in the very beneficial work of the Section. Outreach seeks to increase Section membership and is currently considering development of an ADR Section brochure.

Outreach also seeks to increase awareness about ADR and its benefits among the public in general, attorneys, businesses, schools, governmental entities and agencies, and any other potential end users of ADR. The Team will be working with Community Dispute Resolution Centers to help promote ADR in educational settings and will be reaching out to special interest groups such as the LGBT community, low income individuals, and the elderly to determine how ADR might best address some of their unique dispute resolution needs.

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

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

**Skills Action Team ("SAT")** – (Shel Stark 734-417-0287 and shel@starkmediator.com ) The SAT is responsible for planning continuing legal education and advanced skill building programs in ADR throughout the year. This team plans and presents the Annual Meeting and ADR Conference each fall—which showcases local, Michigan talent—and the ADR Summit each spring, which features a nationally renowned mediation trainer. The SAT also plans and offers four "Lunch and Learn" telephone seminars

each year, plus regular regional Mediator Forums where ADR providers meet, network, and learn from one another.

**ADR SECTION TASK FORCES**

**Diversity Task Force** – (Danielle Potter 616-844-8391 and dpotter@miottawa.org ) The Diversity Task Force was formed to promote and support diversity in the field of ADR, increase the cultural competence of ADR providers, and enlarge opportunities for minorities in ADR. The four current objectives of the Diversity Task Force are to (1) increase the diversity of the ADR Section Council and the ADR Section'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 ADR providers in developing their practices, enhancing their skills, and increasing their visibility in supplying ADR services; and (4) assist the ADR Section Council with resource availability and with understanding and embracing diversity issues.

**Governmental Task Force ("GTF")** – (Abe Singer 313-965-7445 and abraham.singer@kitch.com ) The GTF was formed to provide short-term assistance to departments and agencies of the State of Michigan and local governmental units. GTF has presented trainings to the Attorney General's office, is working with the Governor's office to provide mediation as a cost-effective alternative to litigation and to promote its use throughout the state, and has supported the cities of Ann Arbor and Inkster in facilitating discussions of various issues in those communities.

Abraham Singer

# Governmental Task Force

*by Abraham Singer*

The Governmental Task Force ("GTF") was formed to engage with various units of state and local government to illustrate the value of mediation as a more expeditious and cost-effective dispute resolution method than engaging in civil litigation or administrative proceedings. To that end, the GTF has been in contact with the Attorney General's Office and various local governments to discuss their interest in promoting alternative dispute resolution as a means of resolving disputes without the need for litigation.

In addition, GTF is in discussions with the Office of the Director of the Michigan Administrative Hearing System which conducts all of the state's administrative hearings to install a formal mediation process into this dispute resolution process. Evan a cursory review of the administrative hearing process reflects the potential value of mediation. For example, tax tribunal proceedings, which many times are a battle of competing "experts," would clearly appear to be ripe for mediation.

The above are simply some examples of our current activities and the GTF would be well-served by the efforts and ideas of additional volunteers. To volunteer to assist the GTF, please contact Abe Singer by phone at 313-506-5199 or by e-mail at singer.abe@gmail.com.

## About the Chairperson

*Abraham Singer has been involved in complex civil litigation for over 40 years, and is currently a member of the Council of the ADR Section of the State Bar. During his career he has been asked by judges in both state and federal courts to act as a mediator or arbitrator in a number of complex civil cases as well as being selected by the parties themselves for that purpose.*


L. Graham Ward

# Outreach Task Force Update: Reaching and Outreaching

*by L. Graham Ward*

During this first year, the Outreach Task Force, myself, and Abe Singer have been working to generate more interest in ADR from the Office of the Attorney General. We are at an early stage in approaching state administrative officers such as the Tax Tribunal. I have lectured before financial services providers in Bloomfield Hills and explored the potential to restore a program previously conducted at the Michigan State University Law School that allows small investors to arbitrate claims against brokers.

I have guest-lectured within the business school at Western Michigan University, acquainting professors and students in a number of undergraduate and graduate programs with the utility and efficiencies of alternative dispute resolution programs. Jointly, with WMU's Psychology Department, a study has been funded and is in process collaborating with the community dispute resolution centers in Jackson and Kalamazoo. The program helps to identify "traits" favorable toward resolution and for the edification of our practitioners.

A proposal has been submitted to the Michigan Small Business Development Center to offer free training regarding the availability and use of alternative dispute resolution and other "hybrid" methods of resolving conflict. A decision is pending by their offices at Grand Valley State University.

I have met with in communicated with Supreme Court Justice McCormack regarding future expansion of the ADR Section's services in conjunction with the Supreme Court Administrative Office and in anticipation of "filling in" the loss of institutional memory, given our 1% rate of civil trials, by substituting new and creative forms of dispute resolution.

Suggestions for outreach to the community, as well as additional volunteer interest, are always appreciated.

## About the Chairperson

*Graham Ward is the Director of the Center for the Study and Resolution of Conflict at the Western Michigan University Cooley Law School. The program teaches participants how to improve the way they deal with conflicts by using new, creative tools and modify existing ones, creating the"ultimate due process," as well as better ways of "Getting to Yes." He can be reached at wardl@cooley.edu and 586-612-1704.*


Lee Hornberger

# Some Reflections on Automatic Mediation

*by Lee Hornberger*

## Introduction

Welcome to the world of alternative dispute resolution. In the world of ADR, there are many mansions. Among these mansions are arbitration, collaborative law, early neutral evaluation, fact-finding, med-arb, mediation, peacemaking, and summary jury trial. *Michigan Judges Guide to ADR Practice and Procedure* (SCAO 2015).

http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf

The ADR Section has historically been at the forefront of administrative and legislative ADR activities including the Uniform Collaborative Law Act, MCL 691.1331 *et seq*; the Michigan Uniform Arbitration Act, MCL 691.1681 *et seq*; and the Mediator

Standards of Conduct (effective March 1, 2013).

We will briefly review a refreshing and promising part of the developing ADR field: the world of automatic mediation.

Many ADR Section members, including Joseph C. Basta, Mary A. Bedikian, Lisa Taylor, William L. Weber, Martin C. Weisman, and Robert E. Lee Wright, have worked long and hard in helping to draft proposed automatic mediation language.

## White Paper on Automatic Mediation

Professor of Law Mary A. Bedikian discusses automatic mediation in her excellent *White Paper on Automatic Mediation*. Her *White Paper* is included in this issue of the *Journal* and can also be found at: http://www.leehornberger.com/files/WhitePaper-AutomaticMediation.pdf

The *White Paper* discusses why Michigan should have automatic mediation. The *White Paper* gives the following reasons:

1. Mediation offers an opportunity to address more than the legal claim.
2. Mediation provides superior outcomes.
3. The parties consider mediation results as generally fairer.
4. Diverting cases to mediation provides faster and less expensive resolutions.
5. Trained mediators increase the likelihood of settlement.
6. Early intervention in the case increases the potential for resolution and avoids multiple court proceedings.
7. Compulsory process already exists in Michigan.
8. Mediation preserves the parties' ability to exercise self-determination.
9. Automatic mediation removes the discretionary factor from case referral.

## Thirteenth Circuit Court

The 13th Circuit (Grand Traverse, Leelanau, and Antrim counties) has had automatic mediation for many years. Absent domestic violence-related situations, all civil cases in the 13th Circuit are subject to automatic mediation. The 13th Circuit does not have mandatory case evaluation. The 13th Circuit ADR plan is at: http://www.13thcircuitcourt.org/DocumentCenter/View/27

Under the 13th Circuit Court Plan, the Court can refer any civil case to mediation unless otherwise provided by statute or court rule. The Court relies upon mediation as an ADR process because mediation enables the Court to streamline its docket by enabling people to take advantage of this timely and affordable alternative to the litigation process. Through mediation, people are empowered to control the outcome of their disputes. "ADR helps reduce costs to taxpayers due to a reduction of an overall need for jurors, compensation for lay and expert witnesses and the need for additional judges and courtrooms." Thirteenth Judicial Circuit Court Annual Report (2016 ed.), p. 18.

## Alternative Dispute Resolution: Best Practices for Judges

The SCAO's publication *Alternative Dispute Resolution Best Practices for Judges* is at:

http://courts.mi.gov/Administration/SCAO/Resources/Documents/bestpractice/ADR-BestPracticesForJudges.pdf

The Best Practices provides that judges should:

1. Consider ADR in all cases.
2. Consult with the parties as early as possible about the best ADR process for their case.
3. Have the parties identify a mediator early in the case.

## Conclusion

In the fullness of time, Michigan will have automatic comprehensive alternative dispute resolution. This is because:

1. Mediation works to help expeditiously settle cases in a confidential and professional environment with lower costs.
2. Automatic mediation has worked well where it has been implemented, such as the 13th Circuit Court. In the 13th Circuit, the parties are free to select their mediator as well as the general timing of the mediation.
3. Mediation recognizes the real interests of the parties which might be different than what the law might say is to be the imposed resolution.
4. Mediation provides practical solutions that limit risk and can look at the future as well as the past.
5. Experience has shown that a mediated settlement is more likely to be followed and implemented than a court-imposed decree.
6. Up to now, the implementation and use of mediation in Michigan courts has been haphazard and not uniformly available. The practice of referral of cases to mediation should be uniform throughout the state (at least in those courts with approved ADR plans) in order to make the benefits of the mediation process available to more Michigan citizens.

*The views, opinions, and conclusions in this article are those of the author and do not necessarily reflect the position or opinion of the State Bar of Michigan or the ADR Section of the State Bar of Michigan.*

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### About the Author

*Arbitrator and mediator Lee Hornberger received the George N. Bashara, Jr. Award from the ADR Section in recognition of exemplary service. He is a member of The National Academy of Distinguished Neutrals, included in The Best Lawyers of America 2018 for his work in arbitration, and on the 2016 and 2017 Michigan Super Lawyers lists for alternative dispute resolution. He is Chair of the State Bar ADR Section, former Editor of The Michigan Dispute Resolution Journal, former member of the Representative Assembly, former President of the GTLA Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators.*

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

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

Mary Bedikian

# White Paper on Automatic Mediation Prepared for the SBM ADR Section Council

*by Mary A. Bedikian[1]*
*Updated February 15, 2017*

## Executive Summary

The purpose of this white paper is to consider whether Michigan should adopt an automatic mediation process for civil disputes in circuit courts.[2] Court–rule based voluntary ADR programs, which include traditional facilitative mediation, often report low utilization rates. To improve usage and also to increase satisfaction levels among litigants earlier in the litigation life cycle, numerous states revised their court rules to compel one or several forms of ADR. The

most common forms of ADR are non-binding arbitration and mediation.[3] In non-binding arbitration, a neutral evaluates the evidence and renders a decision that the parties are free to accept or reject. In mediation, a trained mediator facilitates dialogue between the parties to maximize areas of agreement. Optimal results may occur in the context of a single session or multiple sessions. States that have implemented ADR programs, primarily mediation which focuses on a more facilitative structure, have reported significant settlement success and high participant satisfaction, resulting in fewer judicial resources expended overall.

## Introduction

The last several decades have witnessed a dramatic growth in both court–directed discretionary referrals to ADR and also court-mandated ADR.[4] These programs have been introduced for various reasons, largely in response to criticism that the trial process is long, costly, cumbersome, and emotionally debilitating for litigants. Michigan responded to this criticism in the late 70s, when it adopted "case evaluation" under MCR 2.403 for all tort cases and other civil cases upon election. Case evaluation, however, which focuses on applying rules of law to make a determination of liability and includes penalties for failure to achieve a sufficient verdict, does not satisfy broader party interests nor does it provide party control over outcome. Mediation, if structured properly, addresses these deficiencies.

## Reasons Why Michigan Should Adopt An Automatic Mediation Program

Current empirical research strongly suggests that diverting cases automatically into mediation retains the traditional benefits of mediation while removing arbitrary or inconsistent court referrals from the mainstream. Specifically,

- ***Mediation Offers an Opportunity to Address More Than the Legal Claim:*** Unlike adjudicatory processes, including arbitration, the communications in mediation are not confined to the narrow legal parameters of a dispute. The mediated session(s) can include whatever the parties believe is relevant, including any aspect of their past, present, or future circumstances or relationship.

- ***Mediation Provides Superior Outcomes:*** Mediation enables parties to reach the outer limits of their conflict, which may include interpersonal dynamics. This holistic approach to case resolution also allows parties to consider remedies not common in adjudicatory processes. For example, in non–domestic civil disputes, mediated outcomes can include a letter of reference, an apology, or a reformed commercial contract. In domestic cases, where violence is not an issue, the parties can craft a parenting arrangement that is particularized to their needs, without being subject to black letter law applications that often do not take into account their family's unique dynamics. Even contested dissolutions of marriage and custody battles benefit from mediation because the goal of mediation is to tailor solutions to the needs of parents and children. Luchs, *Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence,* 28 J. Am. Acad. Matrim. Law 455 (2016). The rigidity of court rules thwarts the ability of the parties to present their "full" story and to use the venting process as a cathartic release. Mediation overcomes these barriers.

- ***Parties Consider Mediation Results Generally More Fair:*** Compared to litigation and even arbitration, parties in mediation tend to view the process as more fair, largely because outcomes are self-determined and they are able to consider a broader range of remedies. Placing parties in a confidential environment where they are in full control of their settlement at any early stage provides them with an opportunity to delve deeper into the issues separating them, and protects them from being bound by judicial decisions with which they would have to fully comply regardless of whether or not they agree with the ruling. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts,* 33 Willamette L. Rev. 565 (1997).

- ***Diverting Cases Provides Faster and Less Expensive Resolution:*** When mediation occurs early in the litigation process, there is usually less use of court staff and judicial time. Given the settlement rate associated with compulsory mediation (less than voluntary mediation), $$$ are saved in both legal and court fees. For example, in a 2011 study of civil cases in Michigan with a monetary value of $25,000 or more, mediation produced far more settlements and consent judgments (*i.e.*, 84% of cases) than other approaches including case evaluation (62%), mediation plus case evaluation (62%), and the regular litigation stream (45%). Additionally, mediated cases took an average of 295 days to resolve (regardless of whether they settled or not), while case evaluation took an average of 463 days, and cases in the regular litigation stream took an average of 322 days. Campbell and Pizzuti, *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, Report to the State Court Administrative Office, Michigan Supreme Court (2011).

- ***Trained Mediators Increase Likelihood of Settlement:*** Generally, court–mandated mediation assures that mediators are sufficiently trained in the mediation process. Typically, such programs require a minimum of 40-hours of training. Training exposes neutrals to all aspects of the mediation process, including ways in which to facilitate discussion and encourage participants to share information likely to lead to resolution. Also, trained mediators often have subject matter expertise, which enables them to transition upon the parties' request into a more evaluative role should the circumstances demand. This transference of role from facilitator to evaluator, where the mediator actually evaluates the parties' legal claims and defenses and offers a best-case scenario, heightens settlement probabilities.

- ***Early Intervention Increases the Potential of Resolution and Avoids Multiple Court Proceedings:*** If properly designed, a compelled process early in the litigation cycle can help parties better shape the parameters of their dispute, settle all or a portion of it, or reduce the need for court reliance on discovery exchanges through a discovery order. From a human perspective, early engagement of mediation reduces the likelihood that parties will become entrenched in positions. Once positions solidify, settlement becomes more elusive.

- ***Compulsory Process Already Exists in Michigan:*** Michigan circuit courts already employ two primary means of dispute resolution – case evaluation and mediation – to dispose of civil claims. Case evaluation is mandatory; mediation is not. In case evaluation, three attorneys appointed by a court and not involved in the dispute, hear arguments and evaluate the case. Their result, an award, may be accepted or rejected by the parties. If rejected within a certain time frame, penalties attach if trial results do not improve the award by 10 percent. Mediation follows the orthodox method, where a facilitator encourages communication between the parties, and aids in identifying issues and solutions. A 2011 in-depth study found: a) the use of one or both of these ADR processes greatly increased the percentages of cases in which a settlement or consent judgment was achieved; b) where mediation occurred, nearly half (47%) were settled during the actual mediation, with 72% of the cases ultimately resolved through settlement or consent judgment without resort to case evaluation or trial; and c) using mediation to resolve civil cases generally reduces costs to the court. Campbell and Pizzuti, *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts,* Report to the State Court Administrative Office, Michigan Supreme Court (2011). Because automatic mediation would not carry consequences for failing to reach agreement, it may be viewed in a more positive light than case evaluation.

- ***Mediation Preserves the Parties' Ability to Exercise Self-Determination:*** Self-determination – the parties' ability to make free, informed choices – is a core principle of mediation. While some critics of compelled mediation contend that forcing parties into mediation undermines the concept of self-determination, this criticism is easily addressed. There is a difference between coercion within the mediation process and the type of "coercion" involved in being required to participate in mediation. Being told to participate in mediation is simply different than being told to settle – or worse – told how to settle. If mediation fails, the parties may still pursue litigation unencumbered. Court access is merely delayed, not foreclosed. Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,* 11 Cardozo J. Conflict Resol. 479, 485 (2010).

- ***Mandatory Mediation Removes the Discretionary Factor from Case Referral***: In a discretionary framework, whether mediation occurs at all is highly contingent on a judge's proclivities towards mediation and training. An automatic mediation regime, which directs cases into mediation irrespective of the above factors, ensures predictability and removes the possibility of arbitrary use of discretion.

## Successful State Experience with Automatic Mediation, Non-binding Arbitration or Other Forms of ADR

Numerous states have adopted some form of ADR to augment litigation, with notable success. A few of the institutionalized programs, cited in the Michigan case evaluation and mediation report, are noted below. Most of these programs are in addition to either voluntary or automatic mediation, or a mediation variant.

**Arizona**, Ariz. Rev. Stat. Ann. § 12-133 (mandatory non-binding arbitration of money damage claims under $65,000).

**California**, Cal. Civ. Proc. Code § 1141.10-28 (mandatory arbitration of civil claims with damages under $50,000 in jurisdictions with 16 or more judges).

**Nevada**, NRS 38.258 (mandatory arbitration of money damage claims not exceeding $50,000 in jurisdictions of 100,000 populations).

**New Jersey**, N.J. Stat. Ann. § 2A:23A-20 (after unsuccessful mediation, auto negligence and PI cases along with stipulated cases, may be ordered to arbitration where money damages do not exceed $20,000).

**New York**, U.S. Dist. Ct. Rules N.D.N.Y., Order 47 (mandatory mediation plan applying to all civil actions pending as well as newly filed, except as otherwise indicated).

**North Carolina**, N.C. Gen. Stat. § 7A-38.1 (mandatory mediation in superior court of all civil disputes).

**Texas**, Tex. Civ. Prac. & Rem. Code Ann. § 154.002 (West 2011) (not a pure compulsory mediation process; leaves discretion to the court to refer cases to mediation, however, the majority of judges now order mediation).

## Conclusions

- Mediated resolutions achieve higher compliance rates, resulting in less cost overall and more targeted application of judicial resources.
- Higher mediation usage results in higher net economic benefits.
- Mediation focuses on finding solutions, not assessing fault, allowing parties to avoid the risks and uncertainty of trial.
- Mediation provides for flexibility and creative resolutions not typically associated with litigation or other adjudicatory forms of ADR.
- Mediation's focus on a more fulsome exchange of information promotes more settlement opportunities, even if the initial session culminates in impasse.
- Incorporating a mediation step integrates settlement efforts into Michigan civil procedures and changes the emphasis from excessive trial preparation to settlement with trial as a last resort. It decisively shifts the focus from an adversarial process to one where settlement is both a viable option and a goal.

## Recommendations

In designing the mediation mechanism, the following parameters should be considered:

- To heighten mutually satisfactory settlements, mediation should occur early in the litigation.
- The program design should include confidentiality and privilege[5] provisions to protect the integrity of the process and to ensure that mediation communications are not admitted into evidence if a trial were to occur.
- Mediation should not prescribe any particular level of participation. Confidentiality of mediation may be jeopardized if a court were to make evaluations concerning what occurred during mediation. This, in turn, would impact party perception of process and impede the sharing of useful information. Mediation parties should be permitted to exercise complete autonomy within the process, including the level at which they participate.
- An opt-out provision should be available, using a "good cause" barometer, for cases involving public policy, domestic violence,[6] or child abuse and neglect. Employing an opt-out provision limits any innate contradiction with the self-determination principles of mediation.
- Mediation should not include any financial penalties. The right to trial should remain unencumbered and accessible.

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[2] Nearly every state in the United States has some type of mediation process. If mediation is "required," it is usually called "mandatory mediation" or "compulsory mediation." To distinguish our proposed legislation, we are calling it "automatic mediation (A/M)."

[3] Other ADR techniques – facilitative, evaluative, or adjudicatory – are available to litigants on a voluntary basis. These techniques include: early case management conference, early neutral evaluation, fact-finding, mini-trial, Friend of the Court conciliation, moderated settlement conference, mediation/arbitration hybrids, arbitration, and summary jury trial.

[4] Court-annexed ADR programs gained major traction in 1983 when Rule 16 of the Federal Rules of Civil Procedure was amended to encourage courts to use "extrajudicial procedures to resolve the dispute" at pre-trial conferences. Since then, both state and federal courts have gone beyond this initial mandate to rely more heavily on court-mandated mediation as an appropriate adjunct to civil proceedings.

[5] The current draft of the "Automatic Mediation Statute" specifically addresses this point. Draft Section 4902(6): "Mediation proceedings shall be held in private and 'mediation communications' shall be confidential and privileged. Privileged mediation communications shall not be subject to discovery and shall be inadmissible in any proceedings, subject to the exceptions in this chapter."

[6] This issue is also addressed in the proposed legislation. Draft Section 4902(4)(a): "To object to mediation, a party must either notify the court the matter is not appropriate for mediation, as provided in MCL 600.1035, or file a written objection to mediation containing facts to establish good cause, including without limitation: (i) child abuse or neglect; (ii) domestic abuse…"

Paul Monicatti

# Mediation Advocacy Beyond the Norm

*by Paul F. Monicatti*

When it seems like everything around you, globally and locally, is in a constant state of dysfunctional conflict and turmoil, it is easy to think and act like it's normal to be disruptive and disagreeable. Nothing could be further from the truth. It doesn't have to be that way when it comes to the practice of law and life. It is possible for lawyers to treat others with respect, civility, understanding, and professionalism. Mediation is the perfect place to do that. This article discusses possible ways for lawyer advocates in mediation to rise above the ordinary and dramatically enhance the process, provided that they and their clients genuinely share the same goal—resolution of the case or controversy. Based on actual experience, these techniques work.

Aside from strategically preparing clients adequately prior to the day of mediation, the most important pre-mediation activities for lawyer advocates are preparing a written pre-mediation case summary and oral remarks to be presented at the mediation during any opening joint session. Each of these will be addressed separately. What follows is not intended to be a comprehensive discussion of best practices. Rather, it is submitted for your consideration as suggested alternatives.

## Effective Written Mediation Advocacy

Standard mediation practice requires parties to mutually exchange written pre-mediation summaries unless the dispute is relatively simple or preparation cost is a factor. Ultimately it depends on the parties' and the mediator's mutual preferences, which should be determined in advance when arranging the mediation.

Submitting background information via documents already in existence, such as case evaluation summaries used in Michigan or dispositive motion briefs, in the interest of saving costs risks alienating the parties further instead of drawing them closer. By definition, these documents are intended to be heavily adversarial, argumentative, and one-sided rather than collaborative.

Unlike the summaries and briefs mentioned above, pre-mediation summaries give an advocate the latitude to set a non-adversarial tone conducive to joint problem solving. While it is appropriate to zealously yet fairly advocate one side of a dispute, crossing the line into argumentative or confrontational territory can be avoided if desired. Inflammatory and polarizing comments likewise can be eliminated. Additionally, an open mind and a serious intent to negotiate in good faith can be diplomatically signaled to the other side.

A couple of different approaches regarding pre-mediation summaries can be tried in an effort to minimize or eliminate the risk of "poisoning the well from which one drinks." One strategy is politely suggesting to the attorneys in scheduling correspondence that if they are planning to submit a pre-mediation case summary that is adversarial, argumentative, and accusatorial, then they might want to reconsider that thought in the spirit of mediation and send one that tones down the destructive rhetoric yet still advocates for clients. Otherwise, attorneys should send only existing background materials and spend time, effort, and money more wisely by preparing their clients for meaningful negotiations.

While the above strategy has worked often enough to continue it, unfortunately it does not achieve widespread compliance. More promising is the other strategy which is to request that counsel submit, with as little as only two or three days advance notice, a succinct, 1-2 page case synopsis in non-narrative, bullet-point format, limited to the following information:

- Briefly list without detail or debate the legal theories for all claims and defenses, and cite without discussion any controlling cases or statutes
- Briefly list without detail or debate all damages and remedies claimed or contested
- Briefly list without detail or debate the key disputed factual, legal, damage, and evidentiary issues impeding settlement
- Briefly list without detail or debate the procedural history and case status (significant trial court rulings, appeals, prior ADR attempts, etc.)

• Anything else important for the mediator to know on a preliminary basis

The latter strategy was used most recently in a complex, high stakes case. It resolved in mediation due primarily to the collaborative, problem solving, working relationship among multiple parties that had not been poisoned by typical, pre-mediation summary destructive rhetoric. Information gaps and missing details were subsequently filled in during several days of open conversation in joint session. This process will be used again in an upcoming similar case where the stakes are high as well.

## Persuasive Oral Mediation Advocacy

Except on those occasions when counsel or the parties really cannot stand being in the same room with each other, advocates ought to welcome the opportunity to use the gift of an opening joint session in order to appeal directly to the decision makers on the other side and to express/vent emotions constructively. Besides, in this age of vanishing trials (based on recent statistics, only slightly over 1% of all cases filed ever reach trial), the most common way for advocates to perfect their oral advocacy skills is during mediation openings in joint session.

At the root of many disputes are misinformation, misunderstanding, and miscommunication. Joint sessions usually help eliminate a lot of these problems. Even if shuttle diplomacy between isolated parties in separate rooms is handled by a skilled mediator, something is lost in translation no matter how careful and diligent the mediator is in conveying the message. The parties also lose the opportunity to ask clarifying questions directly and observe non-verbal communication, among other advantages. Although counsel's style may be that of a zealous adversary during litigation proceedings, it's possible to take a kinder, gentler approach when advocating during mediation, unless of course that conflicts with overall strategy.

From the objective perspective of an experienced mediator, here are some techniques I find most persuasive and least antagonistic during opening joint sessions:

• Conversation not confrontation

• Communication not interrogation

• Constructive discussion not destructive argument

• An interesting story that is credible and powerful, with a persuasive legal theory and compelling, memorable theme(s)

• Careful choice of words, avoiding "hot button" phraseology, inflammatory and polarizing comments, and sensitive areas

• Presentation that values respect, rapport, and trust with the other side instead of alienating them

• Active listening more than talking

• An open mind receptive to different perspectives

• Calm and positive demeanor

• Problems, not people, are jointly attacked

• Empathy, understanding, compassion, humanity, and even apology expressed when appropriate

• Emphasis on problem-solving for the future not problem-blaming for the past

Now, we know that folks in Michigan and elsewhere often frown upon the use of opening joint sessions for all of the usual, well-known excuses, many of which are legitimate concerns. Unscripted, unrestricted, and unguided opening joint sessions are risky and can be a recipe for mediation disaster. However, have you considered modifying your approach to make it work effectively instead of rejecting it completely? Absolute refusal to consider joint sessions is like throwing out the baby with the bath water, as the old adage goes. Briefly, here are some innovative alternatives for restructuring traditional joint sessions to make them more productive:

• ***"Learning Conversation"*** as used by Eric Galton in Texas

- Involves a collaborative group attempt to understand each other with no set agenda
- Mediator acts as the joint discussion host to initiate conversation and mostly stays quiet as long as discussion goes well, occasionally joining in to take the conversation in a different direction
- Abandons traditional no-interruption rule in mediation

- Uses interactive dialog rather than a monolog, argument, or lecture
- Encourages polite, non-confrontational questions
- Especially suited but not limited to pre-suit mediations and those with limited discovery
- Little if any lawyer resistance or flare-ups

• "***Directed Discussion***" as used by Jerry Palmer in Kansas

- Mediator sets the agenda for focused joint discussion by specifically requesting the parties to address particular issues the mediator feels might be outcome-determinative
- Mediator thus controls what topics counsel discuss and the basic flow of information in an organized way
- Mediator prepares a discussion outline for use in joint session based on information gleaned from pre-mediation written submissions and ex-parte conversations with counsel
- Discussion then flows from the mediator's outline as the mediator directs questions to one side or another
- After the mediator's directed discussion, the parties are given the opportunity to raise anything else, by question or comment, that they believe should be communicated to the other side before separating into private caucuses to further discuss and consider the issues raised

• "***Joint Session 2.0***" as used by Jeff Kichaven in California

- Counsel and the mediator jointly collaborate to pre-arrange and set the agenda for focused joint discussion, thus giving counsel some control over the process
- Dependent on counsel's submission of pre-mediation materials far enough in advance of the hearing to allow time for the mediator to follow-up with counsel before the mediation
- After reviewing the submitted materials, the mediator then confers with each counsel by phone to determine the critical issues and pressure points to be addressed as well as those to be avoided because they're too inflammatory
- Mediator then works separately to convince each side to focus on those issues and points in joint session in order to lay the foundation for productive conversation between attorney and client in the caucuses to follow

• "***Crossed Caucus***" as used by the author

- Involves an informal discussion, adhering to a pre-arranged agenda of specific topics, in which clients without attorneys or attorneys without clients (depending on where the impediments are), meet and talk together, usually in the mediator's presence
- Relies on mutual agreement to have a casual conversation without confrontation, accusation, or argument
- Focuses on problem solving solutions not problem blaming
- Addresses only what is most important to each side
- Timing is important, and it usually, although not always, occurs in the later stages of a mediation
- Especially useful in relationship-based disputes such as employer/employee, close corporation or family business, probate, or life partner breakups
- Not useful when there is a radical power or sophistication imbalance

• "***Extended Open Session***" as used by the author

- Similar to Eric Galton's Learning Conversation in that all conversation takes place in open session, except for minimal private caucusing in order to: discuss problems, proposals, strategy, or confidential information; enlist the mediator's help; or diffuse tension
- Emphasis is on interactive, continuous, open exchange of information back and forth
- Uses non-confrontational, non-argumentative questions interspersed with extended troubleshooting of issues, brainstorming options, and problem solving with creative, innovative, and unconventional ideas

What can we learn from all of these non-traditional methods? Since mediation by its very nature is flexible and adaptable to

different situations, advocates who aren't afraid to test out such techniques and others will become more versatile in their practices and perhaps more in demand. You do not need to use them in every mediation or even in most mediations. But if you try sometimes, you just might find, you get what you need in a mediation.

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### About the Author

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**Edmund J. Sikorski, Jr.**

# Mediator Neutrality

*by Edmund J. Sikorski, Jr.*

In the world of Alternative Dispute Resolution (ADR) third party mediators are required and admonished to be neutral and impartial, but few articles specifically discuss the requirements of the definition and very few give practical working examples.

The purpose of this article is to address and elucidate the characteristics of mediator neutrality and impartiality.

MCR 2.411(2) provides:

> "Mediation is a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power."

The rule requires neutrality of the mediator but does not define the characteristics of the requirement.

The Oxford Dictionary (www.https:/en.oxforddictionaries.com) defines neutrality as, "the state of not supporting or helping either side in a conflict, disagreement, etc.; impartiality."

Standard II of the Model Standards of Conduct for Mediation (SCAO 2013) defines impartiality as, "freedom from favoritism, bias, or prejudice."

It has long been recognized that the meaning of a word influences human behavior. In fact, the Bible says, "Reckless words pierce like a sword, but the tongue of the wise brings healing." (Bible, Proverbs 12:18 NIV)

The pen is indeed mightier than the sword.

A word is a speech sound or combination of sounds, or the representation in writing that symbolizes and communicates a meaning.

In the world of linguistics, definitions of word meanings are called lexical semantics. Meanings of conceptual words like "neutrality" and "impartiality" – as opposed to a word that describes an object, like "shovel" – are explained by example.

The following are examples of non-neutral statements and behaviors by a mediator:

1. "My partner/expert says that your expert opinion is questionable/faulty/all wet."
2. "This is a great deal. You must accept it.
3. "Your position is untenable. You will lose it at trial/summary judgment."
4. "Here is what I think of the merits of your case…"
5. "My opinion is that…"
6. "I believe that…"

How then does a mediator invite discussion of issues in the language of diplomacy, neutrality, and impartiality? Here are a few examples:

1. "The other side takes the position that…"
2. "The other side says that your expert opinion is flawed because…"
3. "If you lose on that issue, this looks like what some of the results may be…"
4. "Both sides appear to be confident that they will win and achieve the results they want; but the fact of the matter is that only one side will win and the other side will lose. The odds of winning or losing are therefore 50/50."

The bottom line is that neutrals do not express their opinions and beliefs on the merits or wisdom of a particular outcome. They invite the parties to formulate their own opinions and conclusions leading to case resolution.

It is not infrequent that a mediator is invited into a caucus trap where one party asks the mediator to weigh in on the merits or terms of case resolution. This places the neutral in a position of being an evaluator and is dangerous ethical grounds with shifting sands beneath.

Fortunately, a mediator's tool box has at least two "instruments" to assist the parties and avoid jeopardizing neutrality and impartiality.

**1. Engaging the parties (usually in caucus) in decision tree analysis:**
A decision tree is a road map developed by a mediation participant that converts the risk of a "good chance," a "fighting chance," or an "arguable position" into numerical language to arrive at probable case outcomes because:

a) Numbers capture and quantify case assessments.
b) Numbers help shift a party's attention, promoting emotional detachment and focus on the numerical cumulative impact of litigation risk.
c) Multiplying the risk assessments developed by the participant(s) against each other obtains a probability estimate and then combines that result to yield an average discounted outcome.

**2. Having parties consider loss without asking directly about the strengths or weakness of their case:**
Instead of inviting the parties to discuss the strengths and weakness of their respective positions (assuming that this discussion would take place in the presence of clients) ask each party to answer the following question:

"Assume that the trier of fact just returned a verdict against you. Tell me why the judge (or each juror) found against your position/client."

In conclusion, mediators coax the parties to make their own case analysis and draw appropriate conclusions.

This is the working definition of "neutrality" and "impartiality."

Neutrality, impartiality, and impartial process are central to the legitimacy of decisions reached and the individual's acceptance of those decisions.

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## About the Author

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Sheldon J. Stark

# Why Mediators Should Never Say "Never"

*by Sheldon J. Stark*

"Never give in, never give in, never, never, never, never…." Winston Churchill. Quoted in Thomas E. Ricks, "Churchill and Orwell, the Fight for Freedom," Penguin Press, 2017

If the parties to a dispute are not ready to settle, no technique, no approach, no amount of skill or artistry employed by a mediator will bring them together. Conversely, if the parties desire a resolution it will happen notwithstanding misjudgments, blunders or missteps by the mediator. Knowing party intent in advance might just save time and money. (A "middle" category of dispute exists, of course, where the talent, techniques, and approach of a good mediator reduce impediments, cause a realistic assessment of risk, help parties better appreciate potential financial and non-economic costs and guide the parties to understanding, resolution, and closure.)

Regrettably, a party's commitment to the settlement process in any given dispute is not always evident or even discernable, and party agreement to mediation is not always evidence of an intent to settle. A party may be seeking early discovery, a better understanding of what's at stake, or an opportunity to send a message.

What's behind an unwillingness to settle? Parties may lack sufficient information on which to base a realistic assessment of risk and exposure. Mediation can, but does not always, provide the kind of information on which decision makers generally rely. Information supplied by the other side may not be trusted or be so wrapped in "spin" as to warrant rejection and disbelief. In such cases, the parties are unwilling to settle until they have had some amount of discovery or an opportunity to "test" a theory or claim.

On other occasions, a party is not ready to engage seriously until the other side has been forced to answer for its conduct – although mediation may help that party realize such is unlikely to happen. Similarly, a party may require some form of acknowledgment of wrong or unfairness. In still other cases, the defense may insist on a dispositive motion decision before it is ready to put real money on the table. More often, parties wish to settle but are unready to bargain productively because they have dramatically different – and sometimes unrealistic – opinions about the value of the claim or potency of the defense.

Accordingly, readiness to settle is often a matter of timing. Have the parties had an opportunity to take the discovery they need? Are important motions pending or decided? Have expenses been mounting up to where settlement has become a more attractive option? Every mediator has seen cases where the parties retain their services immediately after a key witness has been deposed, or they are preparing for oral argument on a dispositive motion and decide the time has come to manage risk, or following decision on an important legal or evidentiary matter and a trial on the merits is looming on the horizon. This article encourages mediators and litigators to consider returning to mediation because the dynamics of the dispute may have shifted and settlement has become possible.

Keep in mind: Just because mediation didn't result in resolution at the table doesn't mean the dispute *can't or won't* be settled. No more than1.2% of cases are going to trial today. Failure to reach agreement on the scheduled mediation date may well mean simply that the timing wasn't right. Mediators, therefore, should not give up just because settlement was beyond reach on a given day. Instead, mediators should be ready and available to return to the mediation process at any time, either at the request of the parties or on their own initiative.

There is little or no harm in returning to the table – literally or figuratively – at later stages in the litigation process. Perhaps a few telephone calls will suffice. If a case doesn't resolve, good practice suggests the mediator ask if the parties would be open to a call in 30, 60 or 90 days. No one ever refuses the offer. Litigators on their own should be ready to bring the mediator back into the negotiation any time they believe further negotiations might prove productive.

Never saying "never" is especially apt in this era where early mediation has become increasingly popular. More and more parties are opting to engage in mediation before filing suit. Judges increasingly encourage early mediation to resolve legal disputes on their docket. This is the norm in our business courts. Early mediation does work. Most business court cases do settle. Participant surveys suggest participant satisfaction with both process and outcome. Early settlement reduces transaction costs, eliminates business disruption and distraction, and salves the stresses and strains of an often-invasive litigation process. Even when the conflict does not resolve at an

early stage the issues may be narrowed, the sails trimmed, a better understanding reached, and an appreciation of what it might take to achieve resolution gained.

Awareness of the benefits of early resolution, however, doesn't necessarily translate into readiness on the date set for mediation. Perhaps passions need more time to cool – on one or both sides. Distrust and suspicion may require parties to take discovery from key witnesses before they are ready to accept opposing counsel's representations of what those witnesses have to say. Sometimes parties are too deeply dug in and escalated to hear what the other side is saying. People may need time to digest or process what they learned. Mediation provides a golden opportunity for the exchange of information – but that information exchange will be useless unless and until the parties are ready to recognize the potential impact and risk to their desired litigation outcome. When cases do not resolve, mediators should not give up. Yogi Berra's famous aphorism, "It ain't over till it's over," is particularly instructive.

A case in point: Months ago, I mediated a difficult and highly escalated employment dispute where strong feelings existed on both sides. Neither party was prepared to concede that the other side's very different version of what happened was plausible – or equally likely to persuade a jury. Both sides were represented by experienced, able counsel. The dispute did not settle. Summary disposition was thereafter argued and denied, as were defense motions *in limine*. Months later I called the lawyers to check in and test whether attitudes toward settlement had changed. The parties remained far apart. The defense was not deterred by denial of its motions; plaintiff and counsel felt vindicated.

Later still, with a trial date looming and trial preparation proceeding apace, one of the lawyers contacted me to ask if I would get back involved. I did. The discussions and exchanges from the earlier mediation process were still fairly fresh in everyone's mind. We didn't need to spend a lot of time covering that ground again. Our 11th hour negotiations focused instead on the risk that the decision of a jury, choosing between two competing and plausible versions of events, could not be predicted with any degree of certainty. During trial preparation, plaintiff's risk assessment grew more realistic; while defendant's confidence in the "righteousness" of its decision to terminate was tempered by the looming prospect of explaining its rationale to a jury. To paraphrase Samuel Johnson, nothing focuses the mind like the prospect of a hanging!

I had given up on this case. I had already followed up once some 60 days after mediation to no avail. I had closed the file and sent it to storage. It was out of my mind. It was truly the 11th hour. Could the parties have picked up the phone and negotiated a similar agreement on their own? Perhaps, but neither side was ready to "blink" while closing in on their impending trial date. Bringing the mediator back was the right call. Churchill nailed it. Never, never, never give up.

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## About the Author

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

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Richard L. Hurford

# Lessons Learned from Engaging in Positive Difficult Conversations – Effective Mediation Advocacy

*by Richard L. Hurford*

With increasing frequency (oftentimes during a mediation) we hear the refrains: "There are just some people I can't talk to," or "They just don't listen to reason." The polarization of society into the "right" and "wrong" camps is undoubtedly a contributory factor to parties' reticence to engage in difficult but critically important conversations.

While a fascinating social development, the inability to have productive difficult conversations is all too often self-defeating and counterproductive to important negotiations, including those that take place during mediations. A *sine qua non* of many successful and mutually beneficial business negotiations is truly engaging in positive conflict resolution through knowing how to have difficult conversations in an effective manner.

Celeste Headlee, a highly accomplished radio talk show host, recently published a book: *We Need To Talk: How to Have Conversations that Matter.* Although this work focuses on Ms. Headlee's experiences as an effective interviewer during a nationally broadcast radio program, the book provides a number of thoughts that may serve the reader well when entering into a mediation or other important negotiation. Her suggestions include:

**Be curious.** Have a genuine interest in learning even from those with whom you disagree.

**Resist the "halo and horns effect."** The purpose of listening is to understand – not to determine immediately whether the speaker is right or wrong. Resist the immediate impulse to judge.

**Be respectful and avoid frustration.** Persevere in having the difficult conversation and avoid interrupting or changing the subject.

**End well.** Keep the door open to future difficult discussions.

During two recent mediations, one involving a highly emotionally charged medical malpractice dispute and the other a very acrimonious employment claim, well-known and aggressive defense trial attorneys engaged in extremely effective mediation planning and advocacy that was a pleasure to behold. The independent pre-mediation discussions with all counsel involved in these two cases underscored to everyone that the path to a resolution involved the ability to have a number of very difficult discussions in emotionally fragile settings. In addition to significant factual and legal disputes, both plaintiffs believed the defendants had no interest in proceeding with good faith settlement discussions.

To set the stage for these difficult mediations, both defense attorneys opted to discuss potential mediation processes that afforded the defense attorneys and their clients with the opportunity to make a few brief, preliminary remarks to opposing counsel and their clients. The common objectives of both defense counsel were to underscore their good faith desire to pursue a resolution and set the emotional stage for further anticipated difficult discussions. The preliminary statements independently developed by defense counsel did **not** involve an argumentative factual or legal summary of the case, the potential defenses to the claims, an attack on the plaintiffs, a rebuttal of the damages alleged, or require plaintiffs to make any reciprocal opening statements. Rather, both defense attorneys and their clients merely wanted the opportunity to provide the plaintiffs with various assurances concerning their conduct and objectives during the mediation process.

After obtaining the agreement of plaintiffs' counsel to the proposed mediation process, both mediations commenced with each defense counsel providing the plaintiffs and their counsel with certain assurances that encompassed many of Ms. Headlee's recommendations on how to have meaningful difficult conversations. Although the preliminary statements differed in some respects, the themes were similar and included the following assurances provided to the plaintiffs and their attorneys:

A genuine statement of appreciation to the plaintiffs and their counsel for their willingness to take the time and effort to participate in the mediation. This was coupled with the assurance the defendants were proponents of the mediation process, took this mediation very seriously, and would similarly work very hard to determine if the matters could be resolved.

Assurances were provided there was no interest in personally attacking the plaintiff. The goal was to find as many areas of agreement as possible and narrow the areas of disagreement until a resolution could be achieved.

The personal representatives of the defendants independently acknowledged the loss and suffering that each plaintiff no doubt experienced.

Defense counsel made a commitment to listen carefully to the plaintiffs and earnestly evaluate and re-evaluate the case in light of all information learned during the course of the mediation.

As there was a genuine desire to resolve the case there was also an assurance of looking for ways to be creative and look for options that might be beneficial to a resolution.

A statement was made that there was a commitment to honesty. The goal was not to convince or change the minds of the plaintiffs but to simply and honestly let the plaintiffs know those facts and evidence that will be presented to the jury.

While the nuances of the mediation process differed significantly in each case, these preliminary statements were very helpful and held the attention of the plaintiffs and paved the road for those difficult conversations that followed. It also calls to mind the likely outcome of simply telling a party they are wrong and not truly listening or attempting to understand the position of the other side. As the saying goes: "If you wish to make a man your enemy, tell him simply -- 'You are wrong.' This method works every time." Such an approach is not necessarily calculated to lead to productive or effective difficult discussions or negotiations.

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### About the Author

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*He is a professional with Professional Resolution Experts of Michigan (PREMi), a Distinguished Fellow in the International Academy of Mediators (by invitation only), a member of the National Association of Distinguished Neutrals (by invitation only) and a member of AAJ, DRI, MDTC and ACR. Richard's web site can be accessed at hurfordresolution.com .*

Doug Van Epps

# On the ADR Horizon — What the Current Literature Suggests

*By Doug Van Epps*

*A version of this article originally appeared in "Connections," a seasonal newsletter of the State Court Administrative Office. Connections can be found at scao-connections.blogspot.com .*

Breaking with this column's typical focus on current alternative dispute resolution (ADR) initiatives, the next few paragraphs will focus on recent publications that envision the possible roles of ADR in our trial courts in the near future.

A discussion about the future best begins with a quick reference to "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," a 2004 article by law professor Marc Galanter, who popularized the notion of the "vanishing trial." Looking at federal court cases filed from 1962 to 2002, Galanter noted that adjudication rates dropped from 11.5 percent to 1.8 percent, a result similarly reflected in state court statistics.

Possible causes for the decline included "a shift in ideology and practice among litigants, lawyers, and judges," increased ADR practice, and heavier involvement of judges earlier in the litigation. Galanter concluded by stating that "[t]he consequences of this decline for the functioning of the legal system and for the larger society remain to be explored."

Nearly 14 years later, with Michigan civil case adjudication rates now at one percent, some consequences are becoming clear. [1] First, new lawyers will have few opportunities to try cases. Second, and relatedly, the incoming cohort of judges (except those from prosecutors' offices) generally will have had little or no trial experience. Third, since settlement has become the primary disposition method, and since most negotiated settlements have confidentiality clauses, the valuation of claims and defenses will become even more challenging for lawyers. And finally, as a result, there will be increased pressure on neutral mediators to value claims and defenses, taking the historical place of seasoned attorneys speculating what a jury might award.

Likely there are many more consequences of there being so few trials, but it is clear that the main focus of litigation will be discovery, motion practice, and settlement negotiations—not conducting civil trials.

Now back to the future. In contemplating the displacement of trials by settlement, many authors are questioning the central role of courts in the future, and are asking, "Are courts a service or a place?" Increasingly, they see "court" as being a service, and in an era when much of the public does a significant amount of its work online, the authors believe that much of what courts currently do could be provided online. [2]

In one context, online dispute resolution (ODR) is viewed as handling routine functions electronically. In Michigan, the Matterhorn system, used in approximately 19 Michigan district courts, enables users to negotiate minor traffic tickets online. Just as plea-bargaining takes place in court on the date of a hearing, through Matterhorn, citizens can access the court online and propose a reduction of points. If the court (in consultation with law enforcement) agrees, the citizen pays the fee online and avoids having to go to court.

In another context, which would be familiar to anyone who has used the Ebay® or PayPal® dispute resolution systems, ODR means providing litigants with the means to either negotiate online with each other to try to reach a settlement, or to negotiate with the help of a neutral mediator. Akin to automating traffic ticket plea-bargaining, this simply moves online what typically occurs on small claims day in courts where magistrates or mediators are available to help parties reach a settlement.

Spotting a trend, the National Center for State Courts ("NCSC") Council of State Court Administrators and the National Association for Court Administration Joint Technology Committee ("JTC"), in a recent Resource Bulletin, offer a primer on ODR and lay out implementation models and considerations for courts. Because there are so few implemented ODR systems in place, the document more outlines questions to ask than reflects any best practices.

Merely automating current practices online isn't sufficient to build the court of the future, argue several authors affiliated with the NCSC. [3] They advocate for revamping traditional court processes, and focus on implementing a triaging process that matches the issues litigated with the right process. Not every case requires the full-blown adversarial process and a trajectory headed toward an extremely unlikely trial, they assert. Instead, like triaging in the health care environment, they believe courts could better help parties determine which judicial resources they need and which dispute resolution process (adjudicatory, problem-solving, mediation, etc.) would best serve their interests. With only one percent of cases reaching adjudication, placing more emphasis on the front end of the litigation may help parties save time and expense, and simultaneously remove from the court cases that really could be resolved more quickly.

A triaging approach necessarily suggests that lawyers will need to change the way they have traditionally thought about litigation. Settling cases up-stream rather than resolution taking place mere weeks before the trial date should prompt a changing role for lawyers, says Richard Susskind, a leading futurist focusing on the practice of law. [4] Susskind argues that traditional legal practice will be disrupted by a slew of factors, including automated document assembly, online legal guidance (think Michiganlegalhelp.org), artificial intelligence problem-solving (think Watson), online dispute resolution, and more. And he envisions new practice areas that are closely tied to technology. He concludes that "legal service (will) move from being a one-to-one, consultative print-based advisory service to a one-to-many, packaged, Internet-based information service."

"Disruption" is a word Susskind and most other authors frequently use in contemplating the future. And it is the theme of another Resource Bulletin issued by the JTC, called "Courts Disrupted," mentioned above. We're all pretty familiar with the

concept of disruption: think of how Amazon® and eBay® "disrupted" conventional shopping, how Uber® disrupted public transportation, and Airbnb® has disrupted the hospitality industry. The JTC bulletin examines trends potentially disruptive to courts, such as: data aggregation, as in companies' analyzing judges' decisions to predict how they will rule in the future; intelligent automation, as in an apps determining eligibility for a traffic ticket appeal and automatically filing the appeal; online dispute resolution, as mentioned above, and perhaps taking place prior to filing in court; decreases in case filings; and "decoupling the bar from the court," which is recognizing that the bar's interests and the courts' interests do not necessarily coincide.

Finally, in "Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law," two law professors assert that the growing number of self-represented litigants is largely a result of creating a legal culture that is so complex that only those with significant financial means can afford to participate in it. [5] Whereas the past decades' efforts to address "access to justice" efforts have focused on "lawyering up," which is having as a goal every person having access to a lawyer, the authors believe that the real solutions lie not in trying to attain the unrealistic goal of having everyone represented by counsel, but rather in creating simple, streamlined, and easy to understand tracks that litigants in the most typical types of disputes can manage *without* lawyers. Consistent with the views of other authors cited above, these professors also cite the potential of online dispute resolution for allowing parties to first negotiate among themselves, and if unsuccessful, to have an online mediator. Absent parties reaching a resolution on their own through ADR, the authors recommend a less formal adjudicatory process and a higher level of engagement by judges in drawing out the facts of the dispute.

So what does all this mean? Perhaps that there is an emerging consensus that our courts will be increasingly turning to technology as a means to provide an easily accessible path to solving the problems litigants are bringing to court. This may include triaging, early online dispute resolution, specialty tracks for self-represented litigants, access to limited license practitioners (the equivalent of nurse practitioners in the health care environment), or any number of proposals the authors of these books and bulletins have shared with us. In any case, in an era where trying cases is no longer the norm, we do know that we need to continually focus on providing means of helping litigants resolve their conflicts as efficiently, effectively, and economically as possible. These resources may help point the way to our achieving those goals.

One final request for comments on the future of ADR in our state. The Court is considering adding new rules regarding Child Protection Mediation, and any interested parties are encouraged to review and comment on the proposed additions, which can be viewed on the Michigan Courts website. [6]

## Endnotes

1. In 2016, only 10 Michigan circuit courts had 10 or more bench and jury trials. Thirty-seven courts had between 1 and 5 trials. 20 courts had no trials at all.

2. See Ethan Katsh and Orna Rabinovich, "Digital Justice," Oxford University Press, 2017.

3. Victor Flango and Thomas Clarke, "Reimagining Courts: A Design for the Twenty-First Century," Temple University Press, 2015.

4. Richard Susskind, "Tomorrow's Lawyers," Oxford University Press, 2013

5. Benjamin Barton and Stephanos Bibas, "Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law," Encounter Books, 2017.

6. http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2017-19_2017-10-17_FormattedOrder_PropAmendtOfMCR2.410-2.411.pdf

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## About the Author

*Doug Van Epps is the Director of the Michigan Office of Dispute Resolution, based in the State Court Administrative Office. The first and only director of that office, he has shaped the position in the 28 years he has held it, moving from creating a system of volunteer mediation centers around the state to being a force for dispute resolution within state government and throughout the Michigan court system.*

Byron P. Gallagher, Jr.

# Mediating Attorney Fee Disputes

*by Byron P. Gallagher, Jr.*

## Introduction

Attorney fee disputes are quite common. [1] Sometimes these disputes arise between an attorney and a former client when the client objects to payment of fees or after a client terminates an attorney under a contingent fee agreement and the attorney is seeking a quantum meruit award of attorney fees.

Frequently these disputes arise out of claims by a prevailing party after the litigation of contracts that include provisions providing for attorney fees such as may be included in leases for commercial real estate, loan documents, and other commercial agreements. Some settlement agreements provide for an award of attorney fees in the event of a breach.

A number of statutes provide for awards of attorney fees such as:

i. Antitrust
ii. Arbitration
iii. Civil Rights
iv. Construction Liens
v. Consumer Protection
vi. Condemnation
vii. Debt Collection
viii. Domestic Relations
ix. Employment
x. Environmental
xi. FOIA
xii. Insurance Coverage
xiii. Interpleader
xiv. Libel/Slander
xv. No-Fault
xvi. Open Meetings
xvii. Social Security Number Privacy Act
xviii. Sales Representatives
xix. Tax/Headlee Amendment
xx. Trade Secrets
xxi. Qui Tam - Medicaid False Claims Act
xxii. Whistleblowers

Attorney fees may be also awarded by Courts in connection with discovery disputes pursuant to MCR 2.302; case evaluation sanctions pursuant to MCR 2.403; offer of judgment sanctions pursuant to MCR 2.405; and other sanctions pursuant to MCR 2.114, MCR 2.625, MCL 600.2591, and MCR 7.216(C)(1).

Mediation of attorney fee disputes usually involves legal and factual issues compounded by personal conflict between the attorneys and clients that make these disputes difficult to resolve. When awards of attorney fees under consumer statutes are at issue, it is common for the attorney fees claimed to exceed the amount of the judgment in favor of the clients.

The unique circumstances of these disputes coupled with the strong feelings of the attorney whose fees are at issue can make for challenging mediations.

## Initial Considerations

The mediator should conduct a pre-mediation phone conference in order to hear a brief summary of the respective positions and to get a feel for the personalities involved. This is important for planning the mediation and considering the best approaches to the mediation. Often, there is a great deal of hostility involved that must be appropriately handled by the mediator in order to keep the conversation and negotiations going during the mediation. It is wise to gather as much information as possible in the pre-mediation conference. Forewarned is forearmed.

The mediator who has a well-thought-out plan and agenda for this phone conference should make a good impression on the parties and has a better chance of running an efficient and controlled phone conference.

Some topics to consider raising during the phone conference include:

1. What is the basis for the attorney fee dispute?
    A. Attorney-client dispute
    B. Party vs party with attorney fees as damages or sanction
    C. Other
2. Is the fee dispute exclusive of other claims?
3. Is legal malpractice part of the dispute or is this threatened?
4. Are ethical violations claimed?
5. Is the client-party willing to waive the attorney-client privilege?
6. Are there billing records or invoices that reflect the fees claimed?
7. Do the parties agree on what are reasonable hourly rates for the services?
8. Do the parties agree on what are reasonable hours for the services?
9. Do the parties agree on some portion of the fee claimed?
10. Will parties be required to attend the mediation in person (versus by phone)?
11. Will the parties who attend the mediation have full authority to make an agreement?
12. Will the parties make opening statements at mediation?

It may be helpful for the mediator to remind the parties that the standard for the amount to be awarded by the court is for reasonable fees, not actual fees, as described in *Smith v Khouri*, 481 Mich. 519, 528 n12, 751 NW2d 472 (2008): [2]

> In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* and [Michigan Rules of Professional Conduct] 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors.

The mediator may also want to request that the parties review MRPC 1.5 before drafting their mediation summaries. MRPC 1.5 lists the following factors for determining the reasonableness of fees:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services [3];

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Note that all of the above factors do not apply to every matter. The factors do not necessarily have equal weight.

The mediator should set a mediation schedule, during this phone conference, with the input of the parties as to the date, time and place of the mediation, now long the mediation summaries should be, if the summaries are to be exchanged by the parties or if the summaries will only be provided to the mediator, and the deadline for submitting the summaries to the mediator. The mediator should consider asking the parties whether they agree that the mediator may contact the attorneys to discuss ex-parte any issues before the mediation. These communications are valuable to eliminate mediator confusion and build rapport before the day of the mediation.

### What to Request in Parties' Mediation Summaries

Generally, a mediation summary will recite the facts, may summarize applicable law, and may provide a proposed settlement of the dispute. When attorney fees are at issue, it is helpful for the attorneys for each party to commit to a logical analysis of their position as to the fees claimed in the mediation summary that is designed to educate both the opposition and the mediator.

The standards to be applied in determining a reasonable attorney fee are well established. It may be helpful to all if each party addresses the MRPC 1.5 factors applicable to the matter, in their mediation summary. This analysis by the parties may help sharpen their thinking before the mediation.

The information reflected in billing records and invoices may run the gamut from vague to extremely detailed. It is tedious work to review another attorney's billing records that may run hundreds of pages and relate to a matter that you were not personally involved in.

It may be helpful for the party opposing the fee claim to annotate the billing records at issue with proposed time or charge reductions and reasoning for the reductions. These annotated billing records could be attached to the party's mediation summary.

Similarly, it may be helpful for the party claiming the fee to also annotate the billing records at issue with proposed time or charge reductions and reasoning for the reductions as an attachment to the party's mediation summary.

### The Mediation

As with all mediations in the initial joint session and after brief introductions, the mediator should proceed with an opening statement, including a brief explanation of the process, a description of the confidential nature of the mediation and confirmation that the mediation agreement has been executed.

The mediator should then proceed, in almost every case, with asking each attorney and/or party to make an opening statement. As uncomfortable as these opening statements may seem, they can be very effective in setting the stage for a settlement.

After the opening statements, the mediator should briefly summarize the respective positions of the parties so that each party is confident that the mediator understands their position. The mediator should confirm what the parties agree on and outline the points of disagreement.

To keep conversation going in the joint session, it may be helpful to bring the parties back to MRPC 1.5 factors and have each party summarize their position in light of the applicable factors. These factors provide a consistent framework for analysis of the dispute.

Only when progress has stopped in the joint session should the mediator separate the parties for caucus discussions. If possible, the joint session should be resumed after a caucus so that the parties can directly discuss their differences.

Settlement of these disputes by caucus is not likely if the parties are not steadily moving to a mid-point on the tiresome offer / counteroffer shuttle. The use of the joint session may work because of the animosity that is often present in these disputes. This is counter-intuitive. Few people really want to confront their adversary face to face. Initially, the parties and their attorneys may prefer to camp out in a conference room where they do not need to face the adversaries. However, the joint session where people really have a chance to speak their mind is usually quite awkward at first but, often after the parties have had a chance to vent their differences in person, a settlement is likely to be reached.

### Conclusion

Attorney fee disputes often require the mediator to manage various personalities and to successfully break multiple impasses during the course of the mediation. These mediations tend to become more time consuming as the amount of attorney fees at issue increases. The mediator should keep private notes of exactly what offers and counter-offers were made and when they were made. These notes are helpful to refer to over a long mediation.

It is important for the mediator to be patient and keep the discussions going because often one or more parties may be intentionally stonewalling until later in the day when suddenly progress is made that leads to a settlement. These disputes have an excellent chance of being settled through mediation, and the chance of settlement will increase if the mediator begins with a thoughtful approach to the dispute and is able to make appropriate adjustments throughout the mediation.

### Endnotes

Fee disputes remain common, despite the existence of the "American Rule" providing that each party is responsible for paying its own attorney fees. *Nemeth v Abonmarche Dev, Inc*, 457 Mich. 16, 576 NW2d 641 (1998).

Reasonable attorney fees may also be determined by a jury when appropriate. Michigan Model Civil Jury Instructions 180.03, Attorney Fees—Reasonable Value of Legal Services.

An award of attorney fees may include an award for the time and labor of any legal assistant who contributed non-clerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan. MCR 2.626.

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**About the Author**

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Lore A. Rogers

# Screening for Domestic Abuse in Mediation of Domestic Relations Cases: What You Need to Know

*by Lore A. Rogers, J.D. [1]*

For several years, court appointed mediators in domestic relations cases have been required by Michigan Court Rule and the State Court Administrative Office ("SCAO") Mediator Standards of Conduct to conduct initial and ongoing screening to identify and appropriately accommodate cases in mediation where one of the parties has been, or is being, subjected to domestic violence/abuse by the other party. However, when a workgroup organized by the State Bar of Michigan Family Law Council's

ADR Committee conducted listening sessions on this topic in several forums in Michigan in 2015, workgroup members learned that not only were some mediators not using the screening tool created for that purpose, others were not screening at all, and a significant number of family law attorneys and mediators involved in these cases did not know about this screening requirement.

This prompted members of the workgroup to prepare materials and make several presentations, including a webinar in October 2017 sponsored by the ADR Section of the State Bar, to inform lawyers and mediators on this issue. Those presentations have been incorporated into this article in the hope that this information will be widely disseminated to, and implemented by, domestic relations mediators. It is not hyperbole to say that the safety of some mediating parties depends on mediators doing so.

## The Path to Requirement for Screening

Michigan Court Rule 3.216(A) provides that "[a]ll domestic relations cases. . . are subject to mediation under this rule, unless otherwise provided by statute or court rule." If either of the parties in a case are subject to a personal protection order or an open child abuse/neglect case, then that case cannot be referred to mediation without a hearing by the court to determine whether mediation is appropriate. MCR 3.216(C)(3). Additionally, either party may object to, and a case may be exempt from, court-ordered mediation on the basis of domestic abuse, inability of a party to negotiate for themselves, reason to believe that a party's health or safety would be endangered by mediation, or for other good cause. MCR 3.216(D).

In order to be eligible to serve as a domestic relations mediator under this Court Rule, the mediator must meet the minimum qualifications set out in MCR 3.216(G), including completion "of a training program approved by the State Court Administrator. . . ."

The Michigan Standards of Conduct for Mediators published by the SCAO (available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf) provide that:

> 1."[R]easonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of the issues. Examples of impediments to the mediation process include: domestic abuse. . . ." Standard VI.A.
>
> 2."In domestic relations cases, 'reasonable efforts' should include meeting separately with the parties prior to a joint session and administering the Mediator Screening Protocol for domestic violence, published by. . . [the SCAO]." Standard VI.A.2

The Court Rule and the Mediator Standards of Conduct, when read together, require mediators appointed under authority of the Court Rule to screen for the presence of domestic abuse or domestic violence. That screening should include use of the Mediator Screening Protocol (the "DV Screening Protocol"). However, until 2016, nothing required privately retained domestic relations mediators, not appointed by court order, to engage in screening for domestic abuse, much less to use the established DV Screening Protocol.

That changed when MCL 600.1035 was enacted. Effective August 2016, this statute mandates that "[i]n a domestic relations mediation, the mediator shall make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. *A reasonable inquiry includes the use of the domestic violence screening protocol for mediation provided by the state court administrative office* as directed by the supreme court" (emphasis added). The requirement to "make reasonable inquiry" is not limited to court-appointed or court-ordered mediation; it applies to any domestic relations mediation.

## Is the Use of the DV Screening Protocol Required as Part of the Mediator's Reasonable Inquiry?

It is unclear from MCL 600.1035 whether domestic relations mediators are required to use the DV Screening Protocol. [2] However, given the Mediator Standards of Conduct's admonition that mediators *should* use the DV Screening Protocol and the fact that using the DV Screening Protocol clearly would satisfy the statutory mandate to make reasonable inquiry, there is no good reason not to use the DV Screening Protocol unless exceptional circumstances require the use of an alternative tool.

## The Importance of Screening for Domestic Abuse

Zena Zumeta, a nationally recognized practitioner of, and trainer on, mediation, has articulated Five Principles of Mediation that

are also reflected in the SCAO Domestic Violence Screening Protocol for Mediators Training Manual, p. 22, Version 5.0. (the "DV Training Manual") (available at *http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Domestic%20Violence%20Screening%20Protocol%20for%20Mediators.pdf*). These principles should guide mediators in determining whether any case or party is suited to mediation.

1. Will each party able to speak up or negotiate for themselves?

2. Will each party able to reach and carry out a voluntary agreement?

3. Will each party be safe and comfortable during and after mediation sessions?

4. Where there is a power imbalance, does the lower power party want to mediate?

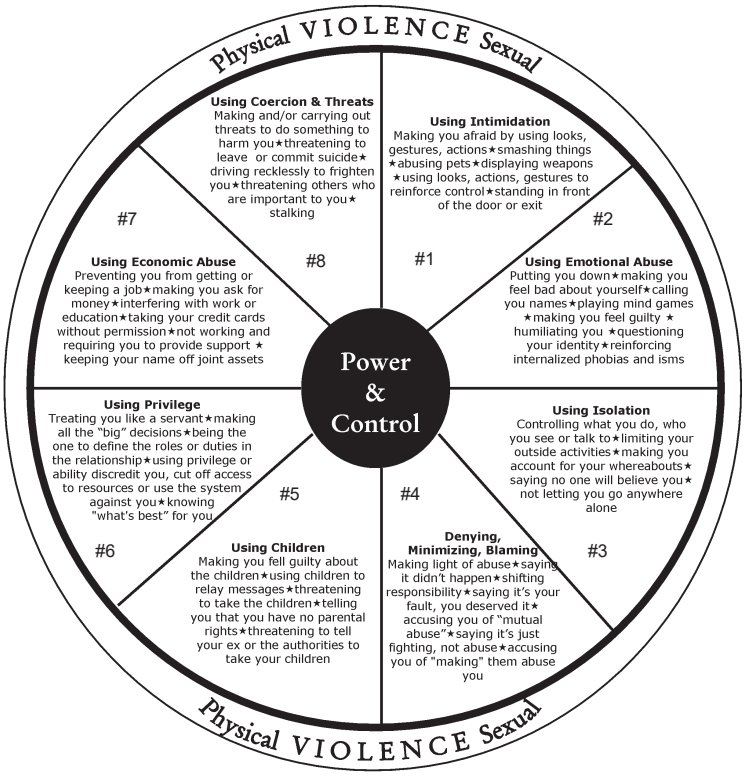
5. Is the mediator knowledgeable and experienced enough for the particular case?

When the answer to 1-3 or 5 "no," a mediator must thoughtfully evaluate whether accommodations can be made, while remaining neutral in approach, to change the answers such that mediation is a meaningful option for dispute resolution. When the answer to question 4 is "no," then mediation should not proceed, unless accommodations made for 1-3 and 5 enable the lower power party to freely choose to engage in mediation.

Application of these principles becomes particularly important in domestic relations cases when one of the parties has been, and in many cases continues to be, subject to domestic abuse by the other party. For purposes of this article, "domestic abuse" is defined as it is on page six of the DV Training Manual. Domestic abuse is a pattern of physical or sexual force or violence, threats, and other abusive tactics engaged in by one person against their current or former intimate partner in order to control that partner. It includes not only acts of force or violence that rise to the level of a crime, but also behaviors that are coercive and yet non-criminal. Such behaviors could include things like controlling finances; using psychological or emotional abuse and intimidation; isolating a partner from social supports; or interfering with employment, schooling, or housing opportunities.

The Power & Control Wheel, shown at right, is a tool commonly used by experts working in the field of domestic abuse to categorize and describe the different ways that these criminal and non-criminal coercive acts are used by an abuser against his or her intimate partner. The physical and sexual violence around the rim of the wheel typically are the behaviors that are criminal in nature, and these may be used by the abuser intermittently. The acts of force and violence serve as the enforcers, the glue that holds or reinforces the typically non-criminal but abusive behaviors reflected in the wedges or spokes of the wheel. The non-criminal abusive behaviors in the wedges of the wheel are used by an abusive partner frequently, sometimes many times in a single day. Used together, these tactics serve to confuse the abused party, to wear down their sense of self and their self-esteem, to make them afraid and intimidated without clearly understanding why, to isolate them from support, and to blame themselves for what the abusive partner is doing to them.

## Power and Control Wheel




*Adapted from the Domestic Abuse Intervention Project Duluth, Minnesota*

Reflect on the following scenario: [3]

> John is seated in the living room of his home, appearing dressed as if he has only just recently come home from work—wearing a button-down shirt, loosened tie, and dress pants. His partner, Jane, appears in the living room in a dress, and asks John if he likes the dress. John slowly puts down his drink, looks up, frowns, and asks: "Where did you get that? Is that new? When did you get it?" Jane replies that the dress is new, and that she bought it for Sally's party. John raises his voice slightly and asks how much it cost, and Jane replies, with some hesitation, that it was marked down. . . to $150. John rises from the sofa, kicks over a stack of books, and begins to yell at Jane about the cost of the dress, about the fact that she spent his money without asking, that she looks like a slut in the dress, and he has already told her that she isn't going to Sally' party because he is going to a football game that night and Jane needs to stay home to watch the kids. When Jane says her sister can watch the kids, John approaches her, grabs her and shakes her briefly by the shoulders, yelling that she is stupid and that he has told her before that her sister and her family are NOT allowed in their house.
>
> Jane begs John not to yell and attempts to walk away from him. John follows her, yelling at her "Don't you DARE walk away from me!" and backs her into a corner of the dining room. He lowers his voice and asks her: "Why would you wear a dress like that, huh? Do you have a boyfriend? That's it, right? You have a boyfriend." Jane glares at him and says, defiantly, "Maybe I do. Maybe I DO!" John says flatly: "That's it" and, hands shaking, removes the rings on both hands and takes a step toward Jane. Jane begs John, "Don't! Don't!" When John continues to advance she picks up a glass ashtray and strikes John in the head. John staggers and falls to his feet, bleeding from the head. The police are called. Jane is arrested after she and John both tell the police that he did not hit her and she did hit him.

In this scenario, John has engaged in several acts of coercive control and abuse toward Jane, and it is fairly clear from the context that this is not the first time. If one of them were to file for divorce within a few months of this incident and the case referred to mediation, it is entirely possible that neither party would disclose this history in the absence of screening for that purpose. And it is also likely that Jane, having been the one arrested and been emotionally abused, erroneously would believe that she – not John – is the abusive party. Jane is unlikely to feel safe during the mediation process or to be able to negotiate an agreement freely and voluntarily. She may not even feel that she has a choice *not* to mediate, if she is being coerced by John to participate in mediation.

Use of the DV Screening Protocol can help identify situations like this one. The DV Screening Protocol was developed over 15 years ago, and recently reviewed and modified, by a workgroup of experts in the field convened by the SCAO for that purpose. It draws upon the behaviors reflected in the Power & Control Wheel and is designed to elicit enough information to enable a mediator to learn of abusive and coercive control in the context of the domestic relationship that could either make mediation inappropriate or appropriate only with sufficient accommodations in place.

### How to Use the DV Screening Protocol: Some Do's and Don'ts

- **Do use the DV Screening Protocol in every domestic relations case.** The statute requires "reasonable inquiry" in any domestic relations case. Not just the ones where someone has alerted you to the possibility that there may be domestic abuse or you suspect there might be.

- **Do use the DV Screening Protocol in separate meetings with each party, at different times, and on different days whenever possible.** This is what mediators "should" do in accordance with the SCAO's Mediator Standards of Conduct, see section VI.A.2. Doing so provides an abused party with a safer place to disclose and can enhance the likelihood that they will do so.

- **Do conduct screening in person whenever possible, as opposed to by telephone.** In-person meetings assist the mediator in establishing rapport with the client and assist the client in evaluating whether the mediator is worthy of trust in maintaining confidentiality of the information disclosed by the client. In-person meetings also allow the mediator to observe the client while he or she is answering the questions. This observation can be helpful in detecting signs of fear or hesitation, signs that can lead to helpful follow-up questions and additional information.

- **Do ask the questions in the order that they are presented in the DV Screening Protocol.** That order is designed to build gradually from general questions to more specific questions about the history of the relationship and the use of coercive and abusive tactics. Years of use by both experienced and less-experienced practitioners has demonstrated that it is effective in doing so.

- **Do ask all the questions, even if they seem redundant.** They are meant to be. Some questions seek the same or similar

information, but because they come later in the protocol and ask for the information in a slightly different way, they can often trigger the client to recall or disclose additional information.

- **Don't announce to the client that you are going to screen for domestic violence.** The fact that you are screening for domestic violence is something only you need to know. Announcing that this is the purpose of the time you are spending with the client will make it less likely that they will disclose. An abuser will avoid disclosing in order to protect their own interests. An abused party will avoid disclosing for many reasons, including out of shame, embarrassment, fear for their safety if the abuser learns of the disclosure, and also sometimes to protect the abusive party. As well, announcing the purpose of the screening process could endanger the abused party – if you as mediator decline to mediate after concluding the process, the abuser reasonably could conclude that the abused party has disclosed the violence and may seek to retaliate against the abused party for doing so.

- **Don't hand the questionnaire to the parties or mail it to the parties and ask them to fill it out.** Not only does this risk the same outcomes as indicated in the preceding paragraph, it also means you will not know if the abused party was the one who actually completed their own questionnaire. An abused party may be reluctant to put the details of the abuse in writing. And most people are not likely to provide comprehensive answers when responding in writing to questions.

- **Don't announce the section headings as you move from section to section in the DV Screening Protocol.** The protocol is broken into groupings of questions, with introductory headings. These headings are included in the document for purpose of guiding the mediator conducting the screening and are not intended to be read aloud to the client being screened. Announcing that you are now going to ask questions about "violence and fear of violence" carries with it all the same problems as would announcing the purpose of the screening process.

## Common Concerns Expressed About Using the DV Screening Protocol

When the members of the ADR workgroup conducted listening sessions in areas of Michigan, they heard some common concerns raised by lawyers and other professionals involved in mediation. This article shares and responds to those briefly here.

*Concern: "If domestic abuse is identified, then we can't mediate."*

The SCAO DV Training Manual states that "[c]ases in which domestic violence is present are presumed inappropriate for mediation." However, the DV Training Manual goes on to state that "[t]his presumption can be overcome, but only if the abused party desires to participate in mediation and the circumstances of the individual case indicate that mediation will be a safe, effective tool for all concerned." DV Training Manual, p. 6.

There are many special conditions that a mediator can implement in a specific case that could make it possible to mediate, provided that the abused party wishes to mediate and that the mediator believes that mediation can be safe and effective with those accommodations in place. [4] Some examples of accommodations that the mediator could suggest or require include (but are not limited to) requiring both parties to retain separate legal counsel, requiring the attorneys to be present at mediation, conducting mediation by caucus, keeping the parties in separate rooms, and requiring the abusive party to arrive first and to leave last at any mediation session. [5]

*Concern: "It takes too long to screen."*

If there is no history of domestic abuse in the relationship, administering the DV Screening Protocol does not take much time at all. The length of time increases only when a party discloses a history of abuse and coercive control, and the mediator then follows up for more information. Additional time then may need to be spent determining whether and what accommodations can be made to make mediation possible given the history of domestic abuse. The investment of that additional time is critical to ensuring that mediation can be done safely and can result in a voluntary, informed agreement.

*Concern: "Requiring both attorneys to be present at mediation is too costly."*

This may or may not be a special condition required by the mediator, so it should not be assumed that screening will result in increased attorney fees. In many cases, the attorneys already want to be present at mediation. Requiring their presence makes it more likely that any agreement reached won't be coerced and so reduces the risk of the agreement being challenged after the fact (eliminating the attendant legal expenses of such a challenge). And mediation – even with the presence and cost of attorneys –

generally is less time-consuming than preparation for and conducting a trial.

*Concern: "As a mediator, I feel pressure from the judge/attorneys to just get it done and doing the screening means I can't do that."*

Those working within the civil or criminal court system have felt this kind of pressure at one time or another, and it is perhaps one of the reasons why the legislation requiring screening was enacted. No mediator should just "get it done." Central to the purpose of mediation is that it is voluntary, that it is informed, and that it is negotiated. This is not possible when one of the parties to mediation is subject to coercion and abuse. While pressure from the court or the attorneys can be uncomfortable, mediators are the only ones who can ensure that the principles of mediation are met and it is their professional, ethical, and now statutory obligation to do so.

*Concern: "When the court has ordered a case to mediation, I assume that the attorneys or court have already screened for a history of domestic violence, so why should I have to do it again?"*

This assumption is neither a safe nor reasonable one. Courts have limited ability or resources to do an effective screening. While court staff may be reviewing court proceedings and files for information that would reveal a history of domestic abuse, *e.g.*, Personal Protection Order filings or criminal histories, court staff typically are not engaging in interviews with the parties to find that history. Some attorneys do not ask their clients about a history of domestic abuse or do so ineffectively. And even if the courts and the parties' respective attorneys are doing screening (and even if the attorneys tell the mediator there is NO history of domestic abuse), a domestic relations mediator is required by statute to conduct his or her own screening at intake and to continue to assess for domestic abuse throughout the mediation process.

*Concern: "But the court process will be so much worse for the abused party."*

This can sometimes be the case. Experts within the domestic violence arena have observed that abusers use the court system as another means to control their partners, and to punish and economically devastate them for resisting control and leaving the relationship. [6] It is incumbent on practitioners within the family court system, then, to critically examine that system and incorporate policies and practices that are consistent with their role as either advocates or impartial decision makers and yet don't play into or reinforce the strategies used by abusers. For example, parenting time and other orders in domestic relations cases should be specific in their terms so that abusers are not able to terrorize their partners by failing to return the children timely, and are not allowed to escape accountability when they do things like calling and harassing the abused party by phone at 11:30 p.m. by claiming they just wanted to talk with the children, when the children go to bed at 9:00 p.m.

## What Are the Risks of Failing to Screen for Domestic Abuse Initially and Throughout Mediation?

At best, the failure to screen for the presence of domestic abuse could result in a coerced agreement, where the unrecognized abused party is unable to stand up for themselves, unable to freely negotiate, and unable to reach a voluntary agreement. By mediator standards, this would be a failed mediation. At worst, the failure to screen creates a risk of increased physical and psychological harm to the abused party, and possibly to the children of the abused party.

Michigan courts have been reluctant to invalidate mediation agreements reached when one of the parties asserts that the agreement was involuntary and coerced because the domestic abuse was either unrecognized or insufficiently addressed. [7] However, as one writer has noted, mediators who fail to comply with the statute and the guidance provided by the SCAO DV Screening Protocol and DV Training Manual may find themselves subject to claims against them for harm caused to the abused party.[8]

## Endnotes

1. This article is based on a presentation and webinar jointly developed by the author and by Rebecca Shiemke, J.D. and Zena Zumeta, J.D.

2. An argument can be made that the section of the statute to which italicized emphasis has been given here means that the DV Screening Protocol must be used in order for the mediator to have engaged in "reasonable inquiry." Had that not been the intent, the legislature could have said that a reasonable inquiry may include, but is not limited to, use of the screening protocol." However, an argument can also be made that if the legislature intended to require use of the DV Screening Protocol, it could as easily have said exactly that, *e.g.*, "The use of the domestic violence screening tool shall be used in conducting reasonable inquiry. . ."

3. This scenario is drawn from a scene in the training video "Domestic Violence Arrests: Beyond the Obvious," produced by the Office of the Los Angeles City Attorney, the Los Angeles Police Department, and the California Alliance Against Domestic Violence in 2000 with a grant from the Office on Violence Against Women.

4. Note that a mediator should not try to convince an abused party to mediate by offering special conditions – if the abused party does not want to mediate, then mediation should not occur no matter how many accommodations could be made to allow them to do so. See DV Training Manual, pp. 27, 36.

5. A list of other possible accommodations is contained within the DV Training Manual, pp. 42-44. Conducting a safe and effective mediation when a history of abuse has been identified is beyond the scope of this article. That topic is explored in depth during the 8-hour domestic violence training module required by court rule and the SCAO for mediators who want to be eligible for court-appointment. Training on conducting mediations when there is domestic violence is offered by different teams of private trainers throughout the State of Michigan. Contact your local dispute resolution center or the SCAO for a list of qualified training teams and opportunities.

6. See, *e.g.*, R. Lundy Bancroft and Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, at 125, Sage Publications (1st Ed., 2002).

7. See *Vittiglio v. Vittiglio*, 297 Mich App 391 (2012).

8. See Anne Bachle Fifer, "Another Mediator Doesn't Get Sued," available at http://abfifer.com/blog/2012/09/another-mediator-doesnt-get-sued/

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## About the Author

*Lore A. Rogers, J.D., currently works as staff attorney for the State of Michigan Domestic and Sexual Violence Prevention and Treatment Board. She has extensive experience working within the field of domestic and sexual violence, both as a direct services provider and as a trainer, writer, facilitator, and developer of policy and protocols. For several years, Ms. Rogers has co-taught with Zena Zumeta, J.D., both a one-day DV Screening for Mediation course in Michigan and a two-day course in Ohio. Prior to her work in this arena, Ms. Rogers was a successful civil litigation attorney in Michigan.*

**Sheldon J. Stark**

## 2017 ADR SECTION ANNUAL AWARDS BANQUET

# Introductory Remarks from the Chair

*by Shel Stark*

Good evening, everybody. My name is Shel Stark and it has been my honor and privilege to serve as your chair this last year. Friday the 13th may have been very unlucky for the Knights Templar, but I'm feeling very fortunate to be a part of this dynamic and exciting organization tonight on *this* Friday the 13th.

On behalf of the entire ADR Section council, welcome to our Annual Awards banquet. Thank you for joining us this evening. It has been an exciting year which is capped off by tonight's festivities. The purpose of our awards is to recognize the remarkable contributions of individuals and an organization that have gone above and beyond the call of duty. We are truly blessed to know and work with tonight's award recipients.

Our first award this evening is a Hero of ADR Award. The criteria for this Award can be found on our website. I invite everyone in the Section to take a look. Anyone can nominate whoever they believe is deserving of one of these, which can be given every quarter. My hope is you'll take advantage of the opportunity when you see someone make an important contribution to the work we do.

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/ADRHero.pdf

Tonight's Hero of ADR Award recipient is Lisa Taylor, our council Secretary. I love the name of Lisa's firm, Taylor Made Solutions. Taylor Made Solutions indeed! Lisa balances a full time ADR practice with raising her family. She is dedicated to helping Michigan families resolve conflict in domestic relations matters. She has tirelessly and expertly performed her responsibilities as Secretary of the ADR Section Council and Executive Committee month in and month out over the course of years. Her minutes are accurate and provide helpful levels of detail. The immediate cause of this nomination is that for years and years, we have wanted an ADR Section brochure, especially for outreach to individuals who might have an interest in joining our Section. Over the years, various Outreach Task Force Chairs have agreed to produce a brochure for us – and year after year we've been disappointed. In support of our decision to staff a booth at the 2017 State Bar Annual Meeting in Detroit, Lisa *volunteered* to create a brochure for the ADR Section. In less than a week's time, she produced an outstanding brochure at a reasonable cost for use in all future efforts to reach out to people who might be interested in what we do and how they can benefit from being members. Lisa truly exemplifies the spirit of the Hero of ADR Award!

Our second award tonight is the George Bashara Award, given exclusively at the discretion of the outgoing Chair. It is named in memory of a great friend to ADR, former Court of Appeals Judge George N. Bashara, Jr. As Chair, I've selected Mike Leib as our recipient. Mike retired from his firm, Maddin Hauser, doing highly intense commercial litigation. He participated in ICLE's award-winning 40-hour, hands-on general civil mediation training and has now reinvented himself as a mediator and peacemaker. Mike joined the council and has been an enthusiastic volunteer. He's worked hard as a member of the Skills Action Team; he's done several presentations for the Section, including the Young Lawyers Summit last year; and he recently stepped up into a leadership position by chairing the Section-to-Section Team. He worked very hard with Young Lawyers to create an ADR helpline with a link on their website. He recruited volunteers – experienced mediators and trainers – to serve as mentors and sounding boards for members of the YLS struggling to better understand and utilize ADR in order to make the most it for their clients. Most recently, he took over planning and administrating our Regional Mediator Forum series where mediators learn from one another. The first, a great success, was a lunch on October 27 at Minerva's in Traverse City. The next is scheduled for the spring at the Mika Meyers office in Grand Rapids. Stay tuned and watch for registration information. Mike's energy, his commitment, his stepping up and taking responsibility for job after job mark him as a new up and coming ADR leader. He made it easy for me to select Mike for the George Bashara Award.

Our third award of the evening is the Nanci Klein Award, given to an outstanding Community Dispute Resolution Center. Nanci was one of the great pioneers in our field. She was a founder and the first Executive Director of the Oakland Mediation Center ("OMC"). She was a talented and dynamic teacher and trainer. My own 40-hour basic training came from Nanci and her training partner Harvey Burdick back in 1999. That makes this a special honor for me. Nanci built the OMC into a powerhouse, cutting edge organization just as it continues to be today. The OMC offers a wide array of services and meets the needs of one of our state's largest communities. They mediate disputes, civil and domestic; they perform community services; they educate; they handle cases all over Oakland County evaluated at under $25,000; they maintain a highly regarded training division; and they work on special education. It is a real pleasure to give this award tonight to Charity Burke – Nanci Klein's able successor as Executive Director of the Oakland Mediation Center.

I also want to acknowledge long time OMC staffers Camelia Vreche, former Executive Director Bonnie Haines, and a staffer with my all-time favorite name: Kenzie Bizbang!

Our final award tonight is our prestigious Distinguished Service Award, given for significant contributions to the field of ADR. The list of previous recipients can be found on our Section website. http://connect.michbar.org/adr/awards

The list includes individuals such as Eugene Driker, Zena Zumeta, Bob Wright, Anne Bachle Fifer, Tracy Allen, Dick Hurford, and Susan Butterwick. Tonight, the Award is going to someone who can truly be called an ADR icon. Tonight's Distinguished Service Award recipient is George T. Roumell, Jr. Not only is George a direct lineal descendant of his mentor at Harvard Law School, Archibald Cox (where is Archibald Cox when we really need him?!) but he was also a classmate and friend of Derek Bok, a former President of Harvard University. We are lucky to have George as were the hundreds and hundreds of students who attended his labor law courses over the last 50 years at Detroit College of Law, now MSU Law College.

George is a workhorse. When he and I were tenants in the Ford Building in downtown Detroit, George was a partner with Wallace

Riley in the firm of Riley and Roumell. George was always the first one in the building – signing in by 6 a.m. – and one of the last out at night. We could almost hear the Xerox machine breath a sigh of relief when George left for the day. Coincidentally, but not accidentally, when I was Chair of the Labor and Employment Law Section, I had the honor of presenting George with their Distinguished Service Award. George had long been a friend and mentor. He's been an inspiration. In researching my remarks, I learned a story about George's "driving skills" while he was traveling to an arbitration in his car. There was an unfortunate accident and George's car turned over. When the police arrived, the wheels were still spinning. Where was George? Never satisfied to waste a moment, he was finishing dictation of his opinion and award in an arbitration case he'd decided earlier!

When George was State Bar President, he made me proud to be a lawyer. His term coincided with the height of "tort reform." Large corporations, the Chamber of Commerce, drug companies, and the insurance industry spent millions of dollars to roll back Michigan's personal injury system and the process used for generations to compensate the victims of negligence and poorly designed or unsafe products. George took up the cause of "the civil justice system" on behalf of the "little guy." Though a member of a prestigious, establishment law firm – Wally Riley had been American Bar Association President and represented many large business enterprises – George was a font of wisdom and reason, a champion of justice, and an influential voice attempting to preserve the rights of people.

George has been one of the most respected and sought-after labor arbitrators in the business.

During my years as Education Director at ICLE, the Institute of Continuing Legal Education, George volunteered year after year to organize and present numerous and creative topics on labor law arbitration inviting some of the most respected and influential arbitrators to join him including the likes of Ted St. Antoine, Paul Glendon, Dick Mittenthal, Katherine Van Dagens, and Anne Patton. He continues to volunteer presentations for the ADR Section, proposing interesting and thought-provoking programs, and this year is no exception.

George is a giant.

In recent years he has also continued to be a role model, generous with his time and talent. He remains the most deserving and stellar a colleague one could ask for, all these many years later and with a different State Bar Section. George shows no signs of slowing down or losing a step!

George T. Roumell, Jr.

# ADR Distinguished Service Award Winner Speech

*by George T. Roumell, Jr.*

*The Distinguished Service Award*
*is given annually for significant contributions to the field of ADR.*

When I was graduated from law school in 1954, we had no courses in ADR. What was that?

When I began teaching at the University of Detroit Law School and later at the Detroit College of Law ("DCL"), we had no courses in ADR.

When I joined the American Bar Association in 1955, there was no ADR Section. And there was no ADR Section in the State Bar of Michigan.

Frank Sanders and Roger Fisher came later at my law school. By the time DCL moved up to Michigan State University, we were teaching courses in ADR. The law schools throughout the country were putting ADR courses in their programs. Pepperdine and the University of Missouri, among other others, became leaders in teaching ADR.

And then the American Bar Association established the ADR Section. By the time I became President of the State Bar of

Michigan, the ADR Section was born.

Then what happened is there were law offices that opened throughout Michigan where the major area of practice was ADR.

The Michigan Courts invented the pre-trial conference under Circuit Judge Ira Jayne and developed what they called mediation, which was really case evaluation. Then, under the leadership of our Supreme Court, our [State] courts established true mediation to resolve disputes. And as time went on, our law students now knew about negotiation, mediation, case evaluation, med/arb, arb/med, and summary jury trials. It was the language of the future of the legal profession.

There was a reason for this move. The use of ADR tools for dispute resolution meant that disputes were being settled in a more efficient, economical, and speedier process than through litigation. For example, at one time in Cook County, IL, it took upwards to seven years for a civil case to be litigated in the trial court. Second, with the increased number of disputes that are developing, the State cannot keep adding judges because of the cost. Third, certain disputes demanded unusual expertise causing parties to engage mediators who had the particularly needed expertise.

ADR is here now, and it is the way of the future to resolve the continuing growth of disputes in society.

When I was President of the State Bar of Michigan in 1985, I had the slogan, "With the Judges and lawyers of the organized Bar, there will be justice. And with justice, there can be freedom."

Today, I suggest a new slogan – "With the Judges who support ADR and the lawyers who practice ADR, there will be justice. And with justice, there will be freedom and peace."

That is the point. I may not see it in my lifetime. You may not see it in your lifetime. But the practitioners of ADR will lead the way to peace throughout our world. That's what we're all about.

Thank you very much for the honor you have bestowed on me.

**Charity Burke**

# Nanci S. Klein Award Winner Speech

*by Charity Burke*

*The Nanci S. Klein Award is given annually to an outstanding Community Dispute Resolution Center.*

Thank you. I am honored to accept this award on behalf of the Oakland Mediation Center ("OMC"). Receiving this award is particularly meaningful to me, as Nanci was my first mentor 20 years ago when I first started in this field and began volunteering at OMC in 1997. I received an email from one of our long-time volunteers, Marty Reisig. He congratulated OMC on receiving this award and expressed who Nanci was so beautifully. Marty wrote "Nanci would've been so proud of you and OMC. She served without ego, but simply to do good and to make this a better, more understanding and kinder place for all of us. She was blessed to live with purpose – you could not have a better role model". I couldn't agree with him more.

This award is a celebration of all the hard work, time, and dedication of past and present boards of trustees, executive directors, staff, and most importantly volunteers, who are the lifeblood of our organization. Without them, we couldn't do many of the wonderful things we do for our community.

Oakland Mediation Center has been serving our community for 28 years! OMC is one of 18 Community Dispute Resolution Center Programs (CDRPs) across the state of Michigan. I believe a couple of other directors are here this evening. I would also like to thank Doug Van Epps for his continued support and advocacy for the Community Dispute Resolution Centers. If you are not currently volunteering or an active friend to a Community Center, I would invite you to contact your local center to see how you could support our mission. I'm confident you will find volunteering and/or supporting the CDRPs to be an extremely rewarding experience.

This is an exciting time to be onboard with OMC. We are in the planning stages of an exciting business development initiative, with the hopes of reaching deeper and providing more support to our community. Stay tuned for some exciting developments to come to Oakland Mediation Center!

At this time, I'd like to make a toast to Nanci. Here's to Nanci, and to the Oakland Mediation Center continuing her legacy of excellence for another 28 years to come!

# 2017 SBM ADR Annual Conference

Hero of ADR Award

Justice McCormack

Nanci Klein Award

Cocktail Reception

George Roumell Distinguished Service Award Speech

Shel Stark & Lee Hornberger Passing the Gavel


Joe Basta at Table

SBM | Alternative Dispute Resolution Section

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

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

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

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

# Request for Proposals for the SBM ADR Section's 2018 Annual Meeting and ADR Conference in Traverse City

On October 12 and 13, 2018, the ADR Section will host its Annual Meeting and ADR Conference at the Park Place Hotel in Traverse City. The ADR Conference will include up to 8 hours of advanced mediation training featuring Michigan practitioners and experts. If you would like to be a presenter or provide a training segment at the meeting, please submit your suggestions to Shel Stark by email (address below) by February 15, 2018.

Topics may cover any aspect of ADR practice from mediation to arbitration, from case evaluation to summary jury trial. Your segment may be an update, a demonstration, a technique presentation, practice management topic, a skill-building exercise, a set of ethical challenges, or any other matter you believe would be of interest to your fellow Section members.

**Proposals should include:**

1. Nature of your topic including proposed agenda (bullet points)

2. Name(s) of speaker(s)

3. Amount of time you wish to allocate to your segment (45 to 90 minutes)

4. Whether your segment will be a presentation, an interactive exercise, group discussion or other format

5. Learning objectives

6. Resources required (projector, flip chart, etc.)

We look forward to receiving your proposal!

Best Regards,

Shel Stark, Chair
Skills Action Team
SBM ADR Section
shel@starkmediator.com

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

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

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

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

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

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

August 1, 2018. Authors and articles committed.

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

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

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

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

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

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

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

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

You are urged to participate in this important publication.

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

# MICHIGAN PLEDGE TO ACHIEVE DIVERSITY AND INCLUSION

**WE CAN,**
**WE WILL,**
**WE MUST**

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

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

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

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

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

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

SBM
State Bar of Michigan

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

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

# MEMBERSHIP APPLICATION 2017-2018

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

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

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

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

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

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

APPLICATION TYPE: ____ Member ____Affiliate

NAME: _____

FIRM: _____

ADDRESS: _____

_____

CITY: _____ STATE: _____ ZIP CODE: _____

PHONE:_____

E-MAIL: _____

State Bar No. _____(if applicable)

Have you been a Member of this Section before:_____

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

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

Please return payment to:

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

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

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

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

Revised 12/2017

# Upcoming Mediation Trainings

## General Civil Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a). For more information, visit the SCAO Office of Dispute Resolution web-site, and click on "Mediation Training:"

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

**Bloomfield Hills: February 23, March 2, 9, 16, 23, 2018**
*Training sponsored by Oakland Mediation Center*
Register online at www.mediation-omc.org/
or call 248-348-4280 ext. 216

**Plymouth: October 2018**
*Training sponsored by Institute for Continuing Legal Education*
For more information, call 1-877-229-4350.

## Domestic Relations Mediation Training

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

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

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

## Advanced Mediation Training

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

**Grand Rapids: February 1, 2018**
**"Honing Your Mediation Skills"**
*Trainers: Anne Bachle Fifer, Dale Ann Iverson, Bob Wright*
**Register online at https://tinyurl.com/y8r6lala**

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

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

# How to Find Mediation Trainings Offered in Michigan

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

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

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

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

# THE NEUROSCIENCE OF DECISION-MAKING: What's *Really* Controlling the Way You Think?

## February 15, 2018

### 3:00-6:00 p.m. Program ■ 6:00-7:00 p.m. Afterglow

### University of Detroit Mercy School of Law ■ Room 145 ■ 651 E Jefferson ■ Detroit ■ 48226

***Featuring Nationally Renowned Kim Papillon, Esq.***

**Event sponsored by:**
**State Bar of Michigan ADR Section ■ Detroit Mercy Law ■ Miller Canfield Paddock & Stone**

The ADR Section is proud to announce a complimentary new program featuring one of the country's leading lawyers, thinkers, researchers, and presenters on the subject of how we make decisions and form opinions. When we serve as ADR providers, represent and advise clients, develop legal analyses and recommend conflict resolutions our brain reactions affect and conflict with our conscious goals to be methodical, deliberative and fair.

In this highly interactive seminar, we will explore emerging research in neuroscience and how it affects decision-making in the legal process. Brain imaging and decision-making studies will be used to explain how we decide who should win and who should lose when we arbitrate, what risks lie ahead if a conflict does not settle when we mediate, what is the optimal analysis of a conflict, and how to best represent clients at the table. The seminar will pinpoint the areas where discretion is utilized and where decisions can be affected by unconscious thoughts. The program will review how brain reactions and unconscious processes can affect analysis, behavior and conclusions. It will focus on fairness guided by science.

Our special guest is Kimberly Papillon, a nationally recognized expert on the subject of decision-making in law, medicine and business. Ms. Papillon is a regular member of the faculty at the National Judicial College. She has presented and lectured for Kaiser Permanente, Michigan State University School of Medicine, the Labor and Employment Law Sections of various bar associations, including Michigan, the Securities and Exchange Commission and the U.S. Department of Justice. She has lectured to trial court, appellate court and supreme court judges in over 20 states and 4 countries, private attorneys, prosecutors, public defenders and police officers. To learn more about Kimberly Papillon, visit https://thebettermind.com

Following the program, please join us from 6:30 p.m. to 7:30 p.m. for a complimentary Afterglow, sponsored by Miller Canfield Paddock & Stone. Registration for a Kimberly Papillon program can cost hundreds of dollars. This program is free thanks to grants from the ADR Section of the State Bar, The University of Detroit Mercy School of Law and Miller Canfield Paddock & Stone.

The ADR Section offers special thanks to Danielle Potter, Chair of the ADR Section's Diversity Task Force; Phyllis Crocker, Dean, Detroit Mercy Law; and Michelle Crockett, of Miller Canfield for making this program possible.

SBM State Bar of Michigan

ALTERNATIVE DISPUTE RESOLUTION SECTION
REGISTRATION

# THE NEUROSCIENCE OF DECISION-MAKING: What's *Really* Controlling the Way You Think?

**February 15, 2018 ■ 3:00-6:00 p.m. Program ■ 6:00-7:00 p.m. Afterglow**
**University of Detroit Mercy School of Law ■ Room 145**
**651 E Jefferson ■ Detroit ■ 48226**

***Featuring Nationally Renowned Kim Papillon, Esq.***

**Event sponsored by: State Bar of Michigan ADR Section ■ Detroit Mercy Law ■ Miller Canfield Paddock & Stone**

***This program is open only to ADR Section members***

## Cost

REGISTRATION DEADLINE: February 12, 2018

❑ Program (3:00-6:00 p.m.) ..... FREE

There is no charge for this event, but registration is required for facilities planning.

❑ Afterglow (6:00-7:00 p.m.) ..... FREE

There is no charge for this event, but registration is required for facilities planning.

## Questions

For additional information regarding the seminar contact Mary Anne Parks at (248) 895-6400 or parks.maryanne@gmail.com.

## Register One of Two Ways

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

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

P #:_____

Name:_____

Your Firm: _____

Address:_____

City:_____ State: ____ Zip: _____

Telephone: ( _____ ) _____

E-mail Address: _____

Revised 11/15/17

Cancellation Policy: Registration must be received at the SBM on or before 3PM on February 12, 2018. As a courtesy to the planners, written notice of your intent not to participate is appreciated. That notice can be made by e-mail (tbellinger@michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.)

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ALTERNATIVE DISPUTE RESOLUTION SECTION

## 4th Annual ADR Summit

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

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

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

## Presenter: Lee Jay Berman

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

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

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

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

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

*This program has been approved for 8 hours of advanced mediator training by the SCAO.*

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

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State Bar of Michigan

# ALTERNATIVE DISPUTE RESOLUTION SECTION

## 4th Annual ADR Summit

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

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

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

P #:_____

Name:_____

Your Firm: _____

Your Law School (if student): _____

Address:_____

City:_____ State: ____ Zip: _____

Telephone: ( _____ ) _____

E-mail Address: _____

Enclosed is check # _____ for $ _____

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

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

### Cost

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

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

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

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

Pre-approval for 8 hours of advanced mediator training will be sought from the State Court Administrative Office.

### Materials

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

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

### Questions

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

### Register One of Two Ways

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

Mail your check and completed registration form to:

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

SBM Connect
STATE BAR OF MICHIGAN

## Connect With Us

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

The ADR Section SBM Connect hyperlink is:

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

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

## ADR Section Mission

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

1) Providing training and education for ADR professionals;

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

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

## Join the ADR Section

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

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

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

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

## Editor's Notes

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

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

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

## ADR Section Member Blog Hyperlinks

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

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

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

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

## ADR Section Social Media Links

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

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

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

https://twitter.com/SBM_ADR

## ADR Section Homepage

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

Dispute **Resolution** Journal

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

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

*For comments, contributions or letters, please contact:*

*Lee Hornberger - leehornberger@leehornberger.com - **231-941-0746***
*Erin Archerd - archerer@udmercy.edu - **313-596-9834***
*Joseph C. Basta - jcbasta@yahoo.com - **313-378-8625***
*Sheldon Stark - shel@starkmediator.com - **734-417-0287***

**http://connect.michbar.org/adr/newsletter**