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

Erin Archerd, ADR Section Chair | Lisa Okasinski, Editor

Table of Contents

Vol. 30
No. 3 Winter
2022

Want to write for the DR Journal? Email Lisa Okasinski at lisa@okasinskilaw.com


Erin Archerd

The Chair's Corner

By Erin R. Archerd

As the country took a day to pause and reflect on the legacy of Dr. Martin Luther King Jr., I found myself thinking about the importance of the strong ethical and moral compass that we seek to cultivate in our profession.

In his 1963 Letter from Birmingham Jail, Dr. King explains that the purpose of the nonviolent protest at which he was arrested was to create pressure for negotiation between civil rights leaders and city officials and merchants. Only by making segregation and discrimination an issue would people come to the table to discuss it. As professionals who specialize in helping people negotiate conflicts, I admire the way in which Dr. King embraces tension as the catalyst for dialogue and negotiation.

People come to us as dispute resolution professionals, mediators, arbitrators, and lawyers because they trust us to guide them through their conflict using the tools of our trades, and all of our trades call upon us to observe ethical standards. Why is ethics important? Why do we create principles to guide our behavior in our profession? One reason, I would offer, is to continue to build trust in these processes with the public, especially when so much of our work as neutrals happens behind closed doors, or private Zoom links.

One of the many tremendous projects that our Legislative and Court Procedures Action Team (LCPAT) has taken on over the past year is a set of suggested revisions to the Michigan Standards of Mediator Conduct, emphasizing the importance of party self-determination and mediator disclosure of potential conflicts. I am proud of the work that Lisa Taylor, Chair of the LCPAT, and her team has done to reflect on mediator conflicts and disclosures in light of current practice norms, and to make recommendations for further guidance for mediators.

The new year also saw revisions to Michigan's case evaluation rules take effect, and I recommend checking out Scott Brinkmeyer and Judge Milt Mack's summary of those changes in this issue.

Quite sensibly, the Section has decided to hold our 2022 Annual Conference and Meeting online on September 30 and October 1, 2022. Given the success of our prior two years of virtual conferencing, we can look forward to another fun and informative set of presentations and discussions. Presentation proposals are due February 18 to Mary Anne Parks. See the end of this issue of the Journal for more information about submissions.

Certainly, our new, more online-based calendar carries with it some advantages. The largest advantage is that it allows members from throughout our geographically far-flung state ("Hello, Youpers!") to attend more of our trainings and gatherings. It also has allowed us to expand our outreach to national and international speakers. In those ways, it has worked to increase our connections with each other and our national influence.

In addition to our Annual Meeting in the fall, we have a number of great programs coming up this spring, including:

The Mediator Forum on February 24 from 12:00-2:00 p.m.

Best Practices in Non-Administered Arbitrations on March 10 from 12:00-1:30 p.m.

The Diversity and Inclusion Action Team and American Indian Law Section Diversity Virtual Lunch on April 5 from 12:00 – 1:00 pm.

We are also finalizing our plans for our Spring Summit, so more to come from the Section.

The beginning of 2022 has been a dark time for many in our community, dealing with the isolation and anxiety caused by the latest salvo in the coronavirus pandemic or concerns about the lack of political unity in our country, but holidays like MLK Day remind us that we, as dispute resolution professionals, have tools to help address tensions, to be leaders and peacemakers in our

communities.

May 2022 be a year of healing and new discoveries for you all, and please reach out to me with ideas for ways in which our ADR Section can help you further your professional goals this year.

About the Author

Erin R. Archerd *is an Associate Professor of Law at the University of Detroit Mercy. She currently serves as the Co-Chair of the American Bar Association Dispute Resolution Ethics Committee and is the Chair of the State Bar of Michigan Alternative Dispute Resolution Section. She recently contributed an essay to the new anthology* Discussions in Dispute Resolution*:* The Foundational Articles *(2021).* She *can be reached at archerer@udmercy.edu or (313) 596-9834.*

Dwight Golann

Zoom Mediation: What Litigators and Mediators Expect for the Future

By: Dwight Golann

What's been the impact of mediating by Zoom—and will our field remain virtual after Covid recedes? The National Academy of Distinguished Neutrals surveyed more than a thousand mediators and lawyers on these issues, and I've held focus groups to probe into them more deeply. Here is what we've learned.

Mediator perspectives

Last June the NADN obtained the views of almost eight hundred experienced mediators about online mediation. As expected, almost all (91%) the mediations they had conducted over the past twelve months were online. More surprisingly, perhaps, at the height of optimism over vaccines 82% were planning to conduct most of their future cases, into 2022, virtually.

Indeed, *more than half the mediators said they now prefer to mediate on Zoom.* (7% said they'd only mediate online; 47% preferred to do so but would work in person if clients insisted; 42% preferred in person but would go online if necessary). Attitudes varied by region: While 64% of Western neutrals preferred an online process, only 45% of Midwestern mediators did so.

Mediators also said that going on Zoom (overwhelmingly the platform of choice) had not affected their outcomes: 78% reported the same and 10% higher rates of settlement online. As to volume, most reported having as many (39%) or more (36%) cases than before Covid, while only 25% reported a decline. Again, however, there were variations by region: Respondents in mandatory mediation states like Florida tended to report increased business, while Midwest and California neutrals more often experienced lower case volumes.

Litigators' views

In June 2020 the NADN conducted a separate survey of 500 litigators. Despite limited experience with online mediation at that point, more than two-thirds of the lawyers (72%) believed they were as or more effective advocates on Zoom and three-quarters (75%) thought their mediators were as or more effective in a virtual format.

Perhaps most important, a few months into the pandemic *three-quarters of the litigators said they would prefer to conduct most mediations online even after Covid passes.* (52% wanted to mediate more than half, and an additional 22% more than three-quarters, of their cases virtually.)

Why is online mediation so popular?

The lawyers most often (56%) cited the convenience of the online process, saying it imposed less cost, required less time and was easier to schedule. Significant numbers also saw Zoom as just as effective as in-person processes (19%), producing better engagement of the participants (15%) and increasing the presence of decisionmakers (7%). They also mentioned a greater ability to multitask and do other work during downtime.

The prime disadvantages litigators saw in mediating online were "lack of personal interaction," in the form of casual contact in hallways or at lunch (68%) and, contrary to the majority, less party engagement (particularly from lawyers who want injured parties to be physically present) (7%) and lower settlement rates (6%). Some complained that being online made it harder for the mediator to build the rapport necessary to induce their clients to move and made it more difficult to "read" other participants.

Focus group responses

I explored these issues more deeply through online conversations and focus groups that included leading mediators in North America, Great Britain and Europe. They made these points:

Everyone is more relaxed, and we often feel as or even more connected

The mediators were surprised to find that they were able to make strong emotional connections in a virtual process. The key seemed to be that parties often mediate from home, making them more comfortable and relaxed than in a sterile conference room. Disputants, they said, might talk about something in their daily life, or an item in the background may strike a spark.

> Scottish mediator John Sturrock was talking with a party whose partner was present to provide support. He asked what the partner was doing that day; "Making a model of a Lancaster bomber," he replied. Sturrock mentioned that his father had been a navigator in a Lancaster and that he had recently rediscovered his logbook. The effect was to make an instant connection with the partner and provide reassurance to the party.

Parties are more active, and the lawyers less controlling

Parties' greater engagement in virtual mediation also flows, they said, from the format of Zoom. Rather than having a lawyer next to them, each person on Zoom has a window that is separate from and equal in size to everyone else's. The speaker's window lights up as they talk and no one can interrupt them. In the words of mediator Jan Schau of Los Angeles, "The clients have the same 'front row' seat to the mediator (and the other participants) and seem to feel more empowered by this." The effect is that parties engage more readily and lawyers find it more difficult to block or override them, making disputants more accessible to the mediator.

Participants' behavior has improved, and also mediators'

The most unexpected insight, at least for me, is the impact of seeing *oneself* onscreen. Being able to see themselves seems to make lawyers less likely to be nasty or insulting in the process. Philadelphia mediator Ben Picker described a similar impact on a party: "One very angry CEO told me in a caucus session that he was adopting a more reasonable position, in part, because he saw how angry and mean-spirited he looked when in the joint session. He did not like himself very much."

Mediators may also learn from seeing ourselves on Zoom. One neutral commented that "There is an interesting component of 'self-awareness'… I sometimes catch myself looking angry or tired, and I think the participants do too." Another reported that in a web-based process "Parties and lawyers are less confrontational, more friendly. And I *know* I am more friendly."

> I was caucusing on Zoom with an executive who was explaining, for what seemed like the hundredth time, why a damning email he had sent to the other side would have no impact on a court. As he talked I saw myself looking impatient, and realized that he was seeing the same thing, probably making him even angrier. I quickly adjusted my expression, and afterward wondered what signals I had been unconsciously sending to disputants in my pre-Covid mediations.

Convenience, cost and access

Focus group participants agreed with the NADN respondents that disputants love the convenience and cost savings inherent in using Zoom, and the ability to get direct access to decisionmakers such as adjusters and executives. Disputants also say they find the virtual format less fatiguing—although mediators do not always agree with this.

Time differences

Focus group members mentioned some disadvantages of virtual processes. One is that participants in different time zones may have trouble coordinating. In a mediation with participants in Boston, San Francisco and Mumbai, for instance, I had only only a few hours during which everyone was fully rested and engaged.

Hybrid processes

Mediators also stressed how difficult it is to conduct a hybrid process, in which the participants from each side are assembled together and the mediator appears online. Parties in this structure may be blocked by their lawyer, too far away to be seen well, or off-camera completely, while the mediator is a distant presence on a screen.

The implications of all this? The NADN survey concluded that in-person mediation *"will not regain majority status"* even after the pandemic is history. Whatever our personal preference, it appears that from this point on we will practice our profession primarily over the internet..

About the Author

Dwight Golann *has been a mediator and teacher of dispute resolution for more than twenty-five years. A Professor of Law at Suffolk University in Boston, he has led trainings for federal and state courts and agencies and ADR organizations around the world.*

Professor Golann has resolved hundreds of legal disputes in a wide variety of subject areas and is the author of the ABA's leading books on commercial mediation technique, Mediating Legal Disputes*, and advocacy,* Sharing a Mediator's Powers.

He is the recipient of the Lifetime Achievement Award of the American College of Civil Mediators and recipient of the ABA's 2021 Award for Outstanding Scholarship in Dispute Resolution.

Lee Hornberger

An Overview of Cognitive Biases

By Lee Hornberger, Arbitrator and Mediator

This article reviews cognitive biases that attorneys should understand to better represent their clients.

Beginning

Anchoring

Anchoring occurs when decisions are influenced by a reference point or anchor. Once the anchor is set, subsequent positions may be different from what they would have been without the anchor. Precedent can be an anchor.

We are involved with anchors in our daily lives. A person may be more likely to buy a car if the car is next to a more expensive car. Prices discussed in negotiations that are lower than the anchor may seem reasonable, even if these prices are higher than the actual value of the car.[1]

> The first offer sets the anchor and establishes the negotiating neighborhood. No other number has the psychological power of the first offer. No other psychological principle has the same punch as the anchoring effect.[2]

We should consider being the first to put a proposal on the table. When we put a proposal on the table, we are creating the starting point for the negotiation. The proposal will result in structuring the remainder of the negotiation.

The initial meeting predictions with our client can create an anchor. At these meetings, when clients are interested in hearing what we think their case is worth, we should resist the temptation to create what might amount to an early evaluation. At the first discussion, we have heard only one side of the story. The temptation to start with anchors that our own clients may hold us to creates potential problems for attorneys.

As stated by David Eisenhower,

> … Hitler's view [of the Western Front in June 1944] had little to do with logic and facts … but instead rested on memories of Munich and the German victory over France in 1940 … .[3]

Justice Markman (concurring) discussed anchoring at *Hodge v State Farm Mutual Automobile Ins Co.*[4]

> By litigating a "circuit court case" in the district court, the plaintiff may also take advantage of … the "anchoring effect," that could affect the jury. … [T]his "occurs when people consider a particular value for an unknown quantity before estimating that quantity."[5] …[T]he anchoring effect influences decisions even if the "particular value" considered has nothing to do with the quantity to be estimated.

It is a difficult challenge or to remove an anchor. One approach is to make an equally unreasonable counter-offer in order to hopefully create a new anchor. This might create a mid-point anchor. Provide information from experts or other precedent to counter the anchor. Propose a bracket or range in which to do further negotiating. This helps to create new anchors. Silence can sometimes be helpful in removing an anchor. Work on creating formulas that go into generating a number before stating a new number.

Endowment Effect

The endowment effect is that we are more likely to want to keep something that we already have than to obtain that same object when we do not already have it. We put a higher value on what we have as opposed to what we do not have. What belongs to me is good. What we have is better than what other people have.[6] A party can become so invested in the lawsuit, that the lawsuit has an endowment effect on the party.

Framing

How we describe our proposals makes a difference as to how others will view the proposals. We tend to oppose compromises that are framed as losses rather than gains. We should emphasize what the other party would gain rather than lose in a situation.[7]

> Consider two parents in a dispute regarding child custody. The first parent is described as being about average in a number of relevant areas for consideration. The second parent has some traits that are viewed as very positive and others as more negative. When research subjects are presented these two parents and asked who should be granted custody, the group focuses on the positive traits and grants the latter parent custody. When framed as who should be denied custody, they focus on the negative traits and choose the same parent![8]

In reframing, we change the focus of attention. Napoleon reframed the situation for the French troops opposing him when he said, "Soldiers, I am your emperor. Know me! If there is one of you who would kill his Emperor, here I am." [9]

BATNA (Best Alternative to a Negotiated Agreement)

What do we do if we do not reach a negotiated agreement? Knowing our BATNA gives us power. We should write our BATNA on a piece of paper.[10] When we know what our walk-away point is, we are empowered. It is as if Kenny Rogers were singing to us, "know when to hold them and when to fold them." [11]

Confirmation Bias

Confirmation bias is the inclination to construe information in a way that confirms what we think we are looking for. We do this when we choose information that supports our views, paying no attention to different information. Confirmation bias also occurs when we construe unclear information as reinforcing our beliefs.[12]

When negotiating, it is easy to start analyzing the situation purely from our own perspective. It is important to understand that we do not see the complete picture.

> We are ready, willing, and able to quickly assimilate information that fits our view of the world, our personal stereotypes of events and people, our internal stories about life on this planet. But when someone argues against our mental framework, we go out of our way to avoid changing our basic beliefs.[13]

John Kenneth Galbraith said, "The conventional view serves to protect us from the painful job of thinking."[14]

We can try to counter confirmation bias by arguing the other side's case. We can have a Devil's Advocate.[15]

Confirmation bias is related to the sunk cost effect. The sunk cost effect is continuing on a course of action because we have already "sunk" resources into that course of action. We cannot settle a case for an reasonable figure because we have already invested money and resources in the litigation.

Relationships and What Comes From Whom

Reactive Devaluation

Reactive devaluation occurs when a proposal is devalued because the proposal comes from the other side. This happens in spite of the real value of the proposal.[16] After we hear the proposal, we think, "It must be a trick." This is even though the "trick" proposal might be a reasonable, albeit unacceptable, proposal.

Reactive devaluation can occur in objecting to a belatedly produced exhibit at a hearing. The document comes from the other side. Therefore it must hurt me. This is even though, when read with an open mind, the document might help the objecting party.

Attribution Error

Attribution error is the tendency to under-emphasize situational explanations for an individual's behavior while over-emphasizing dispositional and personality-based explanations for that person's behavior. This is the tendency to think that what people do reflects who they are.[17]

Our need for "self-esteem" plays a role here. We all have needs for these emotions or internal sense of worth. The litigation process is based upon "breach, failure to perform, guilt, etc." These allegations generate the "deny, defend, deflect" response. When we try to find a way to solve a problem, we do not have to assign blame, fault, or guilt. We should reframe the conflict into a shared problem.

Biased Punctuation of Conflict

Biased punctuation of conflict is a tendency to interpret the history of a conflict in a self-serving fashion. We see ourselves as the victim. We see our opponent as the entity against whom we have to defend ourselves. The other person started the controversy.[18] It is not my fault. It is the other person's fault.

How can we get around biased punctation of conflict? One way is to do active listening. It is important to understand that it is not what we say. It is what we hear.

Effect of Ongoing Relationships

Ongoing relationships can have a major impact on the negotiation process. Close relationships can help to lead to cooperation.

> At the beginning of these [1953 Geneva] negotiations, United States Secretary of State John Foster Dulles refused to shake the hand of the premier of the People's Republic of China, Zhou Enlai. Ultimately, to spur the negotiations, Zhou Enlai said, "The two parties should take a few steps toward each other - which doesn't mean that each has to take the same number of steps." Vietnam: A History teaches us to shake hands with the other side because, in part, people can have long memories … .[19]

Furthermore,

> [At Appomattox Court House] both Lee and Grant chose dialogue. Through a series of polite written communications, Grant requested that Lee meet with him to discuss terms. Lee responded with equal politeness. Lee put on his best uniform so as to be dressed for the occasion. They met. At first, they reminisced about the

> Mexican-American War in which they had both fought. Then they discussed surrender terms. Grant's proposal to Lee permitted Confederate soldiers to return to their homes with their mules and horses. There would be no prison camps. There would be no guerilla warfare.[20]

Mimicry, Sunshine, and Touch

Mimicry

Mimicry is commonly used to curry favor. Servers who mimic their customers' tone of voice receive bigger tips. People who are talking with one another unconsciously mimic each other's posture and gestures. Mimicry is one of the ways people show they are in sync with each other. When people are in sync, their interactions go more smoothly.[21]

Sunshine

Studies have shown that servers get more in tips on sunny days. Job seekers who are interviewed on sunny days are more likely to be hired than job seekers who are interviewed on cloudy days.

The mediation should be in a pleasant conference room with windows. When we are in a good mood, we have more imagination.

Food can have the same soothing helpful effect as sunshine. Michigan case law recognizes the benefits of food in mediation. In Jaroh v Jaroh[22] the defendant moved to set aside the mediated settlement agreement, contending she signed it under duress, had no food during the nine-hour mediation, and was pressured to sign it. The Court of Appeals said the mediator provided snacks and there was no evidence the defendant was refused a request to get something to eat.

The importance of snacks arose during the negotiations between the United States and North Vietnam,

> Nixon had long been skeptical about negotiations. "The North Vietnamese are not gonna deal; they never were," he complained to Kissinger. "They were diddling Henry along." But in August [1972], Kissinger's antennae quivered: his North Vietnamese counterparts had augmented the quality of the snacks they served at tea breaks. By late October, he and negotiator Le Duc Tho had reached an agreement. "The situation is now ripe," Tho told his counterpart. [23]

The beneficial effect of food and physical arrangements was used during the 1995 peace negotiations that helped resolve the war in Bosnia.

> According to [then Assistant Secretary of State Richard] Holbrooke, "[P]hysical arrangements could make a difference; every detail mattered....We constantly looked for ways to break down the barriers of hatred and distrust."
>
> … Dinner tables were placed under the wing of a B-2 stealth bomber suspended from the ceiling. Holbrooke "thought that reminders of American airpower would not hurt" and would exemplify the "best alternative to a negotiated agreement" to the diverse participants if they did not reach an agreement.[24]

Touch

When we like and trust someone, we are more likely to touch them. Touching indicates caring and connection. The unconscious mind often cannot tell the difference between caring and connection as opposed to no caring and connection.

Waiters who touch customers get bigger tips. As indicated by a server,[25] "The tips are better when I know who I am serving."

The novel Leave the World Behind points out that "Touching another human being was a curative." [26]

Inspector Ian Rutledge said, "the warmth of human contact was often more important than words." [27]

Cognitive fluency

We are in a room. On the refreshment table there are donuts and fruit. We are asked to remember a number. When we try to remember a large number, we pick the donut. When we try to remember a small number, we pick the fruit. This is cognitive fluency. When things are complicated, we select the easier option.

We should make it easy for the other side to understand what we are proposing. We should keep things simple. We should reduce complexity.[28]

Peak End Rule

The peak end rule tells us that what happens at the end of a venture is important.[29]

Richard Nixon wrote,

> The point of greatest danger is not in preparation to meet the crisis or fighting the battle; it occurs after the crisis of battle is over, regardless of whether it has resulted in victory or defeat. The individual is spent physically, emotionally, and mentally. He lets down. Then, if he is confronted with another battle, even a minor skirmish, he is prone to drop his guard and to err in his judgement.[30]

As indicated by former Prime Minister of Canada Kim Campbell, "… [P]eople who are tired make mistakes. … Fatigue is the great enemy of patience and judgment."[31].

About the Author

Lee Hornberger is a former Chair of the SBM Alternative Dispute Resolution Section, Editor Emeritus of The Michigan Dispute Resolution Journal, former member of the SBM Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation.

He has received the George N. Bashara, Jr. Award from the ADR Section in recognition of exemplary service.

He in The Best Lawyers of America 2018-2019 for arbitration, and 2020-2022 for arbitration and mediation. He is on the 2016-2021 Michigan Super Lawyers lists for alternative dispute resolution. He received a First Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2022, a Second Tier ranking in Northern Michigan for Arbitration in 2022, a Second Tier ranking in Northern Michigan for Mediation in 2021, and a First Tier ranking in Northern Michigan for Arbitration in 2019 and 2020.

While serving with the U.S. Army in Vietnam, he received the Bronze Star Medal and Army Commendation Medals. The unit he was in received 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.

He can be contacted at 231-941-0746 and leehornberger@leehornberger.com. His website is https://www.leehornberger.com/ .

Endnotes

1 Goldman, The Science of Settlement: Ideas for Negotiators (2008), pp 67-70. Ward, Conflict Management by Managing Cognitive Biases, Mich B J 32, 34 (February 2019). Agha, Hidden Traps in Shari'a Decision Making. https://www.amazon.com/Science-Settlement-Ideas-Negotiators/dp/0831800119

2 Goldman, First Offer, Mich B J 22, 23 (June 2015).

3 Eisenhower at War 1943-1945 (Random House, 1986), p 286.

4 499 Mich 211; 884 NW2d 238, 245 (2016).

5 Kahneman, Thinking, Fast and Slow (Farrar, Straus, and Giroux, 2011), p 119.

6 Psychology, pp 113-115. Science, pp 21-24.

7 Psychology, pp 111-113. Science, pp 99-104.

8 Conflict, Mich B J (February 2019) at 33.

9 https://www.youtube.com/watch?v=ffeOvwBYkf4 *[2:40]*

10 Psychology, pp 312.

11 Kenny Rogers, The Gambler, https://www.youtube.com/watch?v=7hx4gdlfamo (1:12 to 1:23).

12 Psychology, pp 262-263. Science, pp 35-36 and 113-117. Conflict, Mich B J (February 2019) at 33.

13 Sarnacki, Winning Divorce: New Strategies for Overcoming Bias at Trial, Mich B J (June 2002), p 22 at 24.

14 https://www.goodreads.com/quotes/21701-the-conventional-view-serves-to-protect-us-from-the-painful

15 Psychology, p 12.

16 Psychology, pp 118-119. Science, pp 92-97.

17 Psychology, pp 12-15. Science, pp 26-27. Conflict, Mich B J (February 2019) at 33.

18 Science, pp 127-128.

19 Hornberger, Historic Moments in Negotiation, Mich B J (May 2019), p 20 at 21.

20 Historic, Mich B J (May 2019) at 20.

21 Psychology, pp 199-201 and 504-505.

22 Unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No 334216).

23 Farrell, Richard Nixon: The Life (Doubleday, 2017), p 495.

24 Historic, Mich B J (May 2019) at 22.

25 Todd, A Divided Loyalty (HarperCollins, 2020), p 201.

26 Alam, Leave the World Behind (Harper Collins, 2020), p 133.

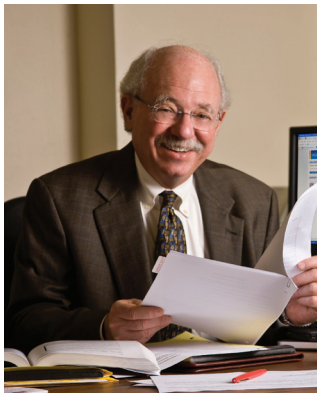
27 Todd, A Test of Wills (Thomas Dunne Books, 1996), p 128,

28 Science, p 64.

29 Science, pp 150-153.

30 Nixon, Six Crisis (1962)(Kindle Loc 876, 92%).

31 Time and Chance (Doubleday 1996), p 338.



Sheldon J. Stark

How Joint Sessions Work & Settle Cases

By Sheldon J. Stark
Mediator and Arbitrator

Most litigators today oppose joint sessions. They argue joint sessions don't work, are likely to antagonize the other side, rarely result in the presentation of new or valuable information, and risk someone blurting out a damaging admission. My experience has been the opposite. No two cases are alike, of course. In the right case, however, joint sessions can result in more satisfying outcomes in less time.[1] When the groundwork is laid to prepare the participants for a productive joint process, their opening remarks previewed and tweaked to delete aggravating material, and the joint session is properly managed, joint sessions can be the exactly right platform for a successful, satisfying and early resolution. What follows are some examples from my docket:

FLSA Class Action

In this Fair Labor Standards Act Case, Plaintiff Class representatives charged they should have been paid but were not for the time it took to key into the workplace, take off their coats, walk to their desks, boot up their computers, and log in. According to the claim, these steps were regularly taking as much as 3 to 5 minutes per day, every day, and involved potentially hundreds of employees. Often, according to plaintiffs' testimony, the log in time alone could take several minutes because passwords were not always recognized. Management argued the complaints were overblown. They described the log in process as quick and seamless, pointing to the printouts they had produced in discovery which electronically tracked employees from start to finish. After reading the two written mediation summaries, the parties did not seem to be talking about the same workplace. After years of working at ICLE, I had some technical training but the technology here was pretty much over my head.

The lawyers agreed to make brief opening statements, then remain together in joint session while I asked questions. Within minutes, after no more than 3 or 4 basic inquiries directed primarily at understanding word choice differences regarding the log-in process, the lawyers began communicating directly, obviously understanding one another quite clearly. Within an hour or so, the lawyers were asking class and management representatives deeper questions. The atmosphere changed from adversarial tension to joint problem solving. Based on what they heard, the plaintiffs conceded on one of their issues while management – after making calls to supervisory employees back at the work place – conceded on another.

Once the claims were clarified and an understanding reached as to the risk of liability on an important issue, the lawsuit was resolved – subject to court approval and an objectors hearing. They would not have reached an understanding or done so as quickly if relying on shuttle diplomacy and a mediator translating the messages from one party to another.

FMLA Termination

Plaintiff, a long-term, high performing employee, was terminated by her employer while on an approved leave for surgery under the Family and Medical Leave Act. The defense had initially been handled by in-house counsel until shortly before the court ordered the parties to mediation. The in-house lawyers had been defending the very advice they themselves had provided and were deeply dismayed when their motion for summary judgment was denied. They were understandably defensive. Outside counsel was retained to take over the defense starting with the mediation. The in-house lawyers participated in the mediation as corporate representatives. Everyone agreed to a joint session to start out.

Precisely when management made the decision to terminate was the central issue in the case. Plaintiff argued the decision was made only days before she was scheduled to return to work but following an extension of leave ordered by her surgeon. Management argued the decision was a reasonable business judgment unrelated to FMLA leave made months earlier, but with implementation and notice to plaintiff delayed until she returned to work. Both sides could point to contemporaneous documents to support their versions of the story.

The participants did not make opening statements but did agree to answer questions "so long as the discussion was constructive." I asked Plaintiff and her counsel to marshal their documents and present the argument through admissible evidence that the decision was made on the date they said. The in-house lawyers then presented their case – with equal support and justification in

the documents showing support for the earlier date. Plaintiff's counsel, without conceding anything, appeared to recognize greater risk than initially thought. Outside counsel saw the risk presented by the way plaintiff's counsel had marshaled her evidence.

I asked if the parties might be interested in my reaction. They were. First, I noted, both sides had good arguments and ample documentation to support their alternative theories. A jury, in my opinion, could reasonably decide it either way. Second, I reminded everyone there were good reasons to question the dates on the documents – both sides had plausible questions about their accuracy or when they were actually created. Third, I pointed out how much time it had taken each side to lay out their case – my patience wasn't tested, but a juror's might be. Fourth, I painted the courtroom picture: Having the burden of proof, plaintiff and her counsel would go first in all things. Plaintiffs would provide the first explanation of the dispute during *voir dire*, for example; or in making opening statements, calling witnesses, and offering documents in evidence. I reminded everyone of the studies on "primacy" versus "recency" – that juries tend to believe the first story they hear rather than the last. The parties reached agreement on a number both sides could accept.

There is no doubt in mind that each side learned a great deal about their risks by directly observing how the other planned their presentations. A description of each side of the case by the mediator during shuttle diplomacy would have been easy to underestimate.

Residential Construction Contract

Plaintiffs were a married couple with children who purchased a multi-acre woodlot out in the country on which to construct their dream house. They carefully selected a contractor to build their house and reached agreement on cost, a timeline, and an architect to design the structure to plaintiffs' specifications. Because they needed money to finance the project, plaintiffs promptly sold their existing home and moved into rental property. Eighteen months later, no construction having been started, plaintiffs fired the contractor and sued for breach of contract and return of their substantial down payment. The contractor countersued charging plaintiffs breached the contract and sought recovery of lost profits. Neither side believed a word uttered by the other and both sides questioned the others motivation, exchanging accusations of bad faith. ("This project was over the contractors head and he won't admit it!" vs. "This project was beyond their means and they pulled the plug because they couldn't afford it!")

The project was plagued with problems and increased costs from the beginning: The property was wetter than initially understood, the water table higher, forcing the parties to relocate the building site. Relocating the house required a substantially longer – and costlier – driveway out to the road. Due to wet ground and poor weather, there was trouble cutting down the trees and pulling out the stumps. The parties disputed whether plaintiff husband had agreed to handle tree removal personally to save money. Adding to the complexity, there were several change orders, which delayed final plan approval. The construction contract provided work would not begin until final approval of the plans, but "final approval" never actually happened. Who was responsible for that was a point of heated contention.

The parties made opening statements to each other followed by brief legal statements from their counsel. We then went through various "safe" questions and concerns going back and forth giving the parties the opportunity to see and access each other's credibility and explanations for their actions. Parts of the discussion were factually complex – did the contractor fail to show up for this meeting or that one, for example? One of the parties brought a paper calendar on which was noted the dates they were supposed to meet but did not. Were the plaintiffs in touch with the architect directly or were they required to work through the contractor? Did the husband and wife convey conflicting messages?

The joint session made clear that each side had disappointed the other, each side had brought unrealistic expectations to the process, each side carried responsibility in part for the endless delays. No one had clean hands. A short discussion in joint session about costs, attorney fees and the cost of needed experts made clear that failure to resolve their dispute was NOT an option. The contractor, having heard the plaintiffs for himself and recognizing that their financial distress was sincere, made a business decision to return enough of the deposit to settle the claim. The credibility problem had been a significant impediment to finding a solution. Seeing each other tell their story was essential. Each side needed to see and judge for themselves that there truly were two credible and plausible sides to the story. This would not have been possible had the parties been kept in two separate rooms, their only communication coming from the mediator.

Non-Solicitation Agreement

Plaintiff financial services corporation sued one of its former top performing sales representatives for violation of the confidentiality and non-solicitation provisions of an employment agreement after the individual defendant left the firm to set himself up in a

competing business. Competing was not prohibited; using confidential information learned while employed and asking firm clients to move with him were. Although defendant claimed he solicited only family members and very close friends, it was evident that his outreach to potential clients had been broader. The parties were in mediation following denial of defendant's motion to declare the employment agreement void or unenforceable. A trial was looming. Plaintiff was seeking tens of thousands of dollars in lost revenues. Defendant's new business had *not* succeeded. In fact, he'd closed the doors of his office and was living on savings. He had already invested $40,000 in defense costs and attorney fees with many more dollars likely if the case continued.

The parties agreed to make opening statements in joint session. When I met with the plaintiff company president to get acquainted and preview his opening remarks, he was highly critical of defendant's actions. "Why didn't he talk to me [before leaving us]?" the president lamented. "He knew full well what the contract said. He knew he couldn't do that!" It soon became evident that he and defendant had had a long relationship, both personal and professional, and a sense of betrayal was driving the litigation, at least in part. I asked him to explain his underlying needs and interests. "Do you really care about recovering damages?" I asked. "I could care less about damages," he replIed. "I'm concerned about all the sales representatives back at the office watching this play out and wondering if they can get away with it! I need him to concede the agreement is valid and enforceable!" When I entered defendant's caucus room to get acquainted and preview his opening statement, I asked whether he planned to appeal the decision to declare the non-solicitation agreement void. "No. I can't spend any more money on this. I've decided to retire. I'm not going to sell any more financial products. I don't *care* whether his agreement is enforceable or not!"

When I asked to hear the key bullet points of his opening presentation, defendant began with a scathing attack on the president's "greed", his methods and his "ruthless" decision to prosecute the litigation. "Do you think your remarks are going to move the ball forward?" I asked. "No," he conceded. 'What should I say?" "Well," I asked, "was there a time when your relationship was better? Was there a time when you respected him and enjoying working for his company?" "Yes! That's all true! I can say that. I can also tell him that I made a huge mistake. I should have known better."

In the joint session, the president limited his remarks to a desire to bring the litigation to an end, that filing suit was not personal, but a business decision: he couldn't afford to have sales representatives leave and go into business for themselves taking with the clients who were the backbone of his success. The defendant opened with, "I *loved* you, man!" By the time he finished, he'd admitted that it was wrong to leave without a heads up, that he should have asked which clients he could take, that the president had always been a gentleman who treated him fairly and would probably have made concessions. The president, a hard charging "all business" kind of character had tears in his eyes. They did not throw themselves into each other's arms; but they did work out the terms of a settlement with which both sides were happy: no money changed hands while defendant publicly conceded the validity of the employment agreement. "I loved you, man," would not have worked if it was delivered by the mediator during shuttle diplomacy.

The Loan Case

Defendant's life was turned upside down when her husband died unexpectedly, and she was wrongfully charged and convicted for his murder. She was alone and virtually broke. Plaintiff, the defendant's cousin, believed in her and came to her rescue. He found her a top-notch appellate specialist to challenge the conviction, contributed personal funds for her defense, raised significant additional – and necessary— money, took her into his home when she was released after 18 months in prison, gave her a job in his business, and backed her up in every way possible.

When plaintiff began contributing large sums of his personal funds to the defense effort, he asked defendant to sign an agreement to pay back the money should she ever strike it rich from, for example, winning the lottery or selling the rights to her story. Over the next several years, the cousins drifted apart. When defendant's father died, surprisingly leaving her substantial property and assets, she refused to repay the money arguing the loan note had not contemplated an inheritance; and, therefore, a key condition precedent had not been met.

Two days were set aside for the mediation. The first day was devoted to an all caucus model using shuttle diplomacy. Their written submissions had been harsh, aggressive and highly charged. The parties arrived at the mediation venue highly escalated. They had not seen each other in years and met together only for purposes of listening to the mediator's opening. Most of the day was spent in risk assessment – whether an inheritance was meant to be included or excluded from the note, for example— and what the evidence might show. Plaintiff grew increasingly aggravated while defendant seemed impossibly ungrateful. On day two, plaintiff asked if he could speak to his cousin directly and without lawyers. Defendant and her lawyers agreed. I talked to both privately with their lawyers present to understand the message they intended to convey to one another. "I always had your back," was the theme

presented by the plaintiff. "You were the only one who ever cared about me and believed in me," was the theme of her reply. In this case, they both actually did fall into each other's arms in tears. A settlement was hammered out in quick order. Without that joint session, it would not have happened.

The Business Break Up Case

Plaintiff co-founded two small, related businesses with friends. The businesses thrived for several years because all three founders were involved in the operation and worked hard. In addition, one made significant loans to the operation from time to time, all of which were paid back with interest. When plaintiff lost confidence and trust in the lending partner's honesty and candor, however, she announced her decision to withdraw and invoked the buy/sell agreement requiring her "partners" to buy out her interest at "market value." Defendants acknowledged money was owed under the agreement, but the parties could not agree on an amount. When negotiations broke down and lawyers were hired, the parties decided to mediate before filing suit. Mediation commenced almost a year after plaintiff's departure. At the time of mediation, it was unclear whether the businesses were still thriving without plaintiff's participation. The lending founder asserted the businesses were operating in the red and were no longer worth much.

The parties agreed to a joint session because there had been no discovery; and, as the parties had stopped communicating, their positions as to the law and facts warranted the clarity of a face-to-face exchange.

The first issue tackled in the joint session was defendants' contention that plaintiff was only a co-founder of one business, not both. The parties had never paid close attention to the formalities of their business entities. The parties acknowledged that they all did the same things at both businesses. None of the governance documents drafted by counsel had been signed. After everyone had had their say on who owned what and which documents were (or were not) to be relied upon, it was clear to all – lawyers and parties alike – that the documentation was in the words of one participant: "a hot mess."

A review of financial records in the joint session resulted in an identical conclusion: the records were hopelessly confusing and, it could be argued, supported the claims of both sides. To make matters worse, their outside tax service provider had disappeared taking all the revenue and tax records along.

On issue after issue there was confusion, conflicting records, conflicting memories and additional references to the phrase "a hot mess."

When we turned to painting the courtroom picture, should the case not resolve, it was clear each side would pay tens of thousands of dollars in legal fees; and tens of thousands more to forensic accounting and business valuation experts. The case settled. There is no question that the defendants would never have budged if the mediation used shuttle diplomacy. After years of working together successfully, they were able to listen to one another *and* read between the lines. Next to a hanging, nothing focuses the mind quite so much as listening to yourself searching for clarity where no clarity existed.

Conclusion

In each of these disputes, progress and full resolution resulted in substantial part because the participants were willing to give joint sessions a try. Had agreement not been achieved, the participants learned a great deal of valuable information that would have been important to prosecuting and defending the claims had such been necessary. There were often emotions at play, yet not once did emotions escalate out of control. Calm, businesslike civility prevailed in substantial part due to advance preparation: educating the parties and lawyers about the best way to approach joint sessions; obtaining commitment to replacing zealous advocacy with a "joint problem solver" mindset; and securing commitments to listen to each other respectfully and without interruption. Did the parties irritate one another from time to time? Yes. Did that inhibit progress? No. When anyone started "revving up," and seemed to antagonize others, I intervened with gentle reminders about their commitments

Multiple impediments to understanding and resolution were overcome *because* the parties were in joint session. A caucus model using shuttle diplomacy would not have worked anywhere near as well. Parties benefit from assessing the other side's credibility for themselves. Sometimes they have a need to vent to the person sitting on the other side of the table. They can't and often don't trust the mediator's opinion. They suspect we are just "trying to reach an agreement!" No apology or acknowledgement is as effective when delivered by the mediator as when it is delivered directly and personally. In matters with complex, technical, and business aspects, shuttle diplomacy doesn't begin to do the job.

Mediators who do the work of educating participants about joint sessions, who prepare the parties and counsel to present and answer questions, and who manage a safe and respectful process will inevitably observe the power of joint sessions to bring about resolution..

About the Author

Sheldon J. Stark *offers mediation, arbitration case evaluation and neutral third party investigative services. He is a Distinguished Fellow of the National Academy of Distinguished Neutrals, a Distinguished Fellow with the International Academy of Mediators and an Employment Law Panelist for the American Arbitration Association. He is also a member of the Professional Resolution Experts of Michigan (PREMi). He is past Chair of the council of the Alternative Dispute Resolution Section of the State Bar and formerly chaired the Skills Action Team. Mr. Stark was a distinguished visiting professor at the University of Detroit Mercy School of Law from August 2010 through May 2012, when he stepped down to focus on his ADR practice. Previously, he was employed by ICLE. During that time, the courses department earned six of the Association for Continuing Legal Education's Best Awards for Programs. He remains one of three trainers in ICLE's award-winning 40-hour, hands-on civil mediation training. Before joining ICLE, Mr. Stark was a partner in the law firm of Stark and Gordon from 1977 to 1999, specializing in employment discrimination, wrongful discharge, civil rights, business litigation, and personal injury work. He is a former chairperson of numerous organizations, including the Labor and Employment Law Section of the State Bar of Michigan, the Employment Law and Intentional Tort Subcommittee of the Michigan Supreme Court Model Civil Jury Instruction Committee, the Fund for Equal Justice, and the Employment Law Section of the Association of Trial Lawyers of America, now the American Association for Justice. He is also a former co-chairperson of the Lawyers Committee of the American Civil Liberties Union of Michigan. In addition, Mr. Stark is chairperson of Attorney Discipline Panel #1 in Livingston County and a former hearing referee with the Michigan Department of Civil Rights. He was a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010 and was listed in "*The Best Lawyers in America*" from 1987 until he left the practice of law in 2000. Mr. Stark received the ACLU's Bernard Gottfried Bill of Rights Day Award in 1999, the Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan in 2009, and the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. In 2015, he received the George Bashara, Jr. Award for Exemplary Service from the ADR Section of the State Bar. He has been listed in "dbusiness Magazine" as a Top Lawyer in ADR for 2012, 2013, 2015, 2016, 2017, 2018, 2019 and 2020.*

Endnotes:

For a better understanding of the "right" case for joint sessions, see https://www.starkmediator.com/wp-content/uploads/sites/4/2022/01/Why-You-Should-Consider-Joint-Sessions.pdf

Adjustments of Area Arbitrators Amidst COVID'S Chaos

By Betty Rankin Widgeon, Arbitrator

Betty Widgeon

When COVID rushed in during March of 2020, area Arbitrators– like all ADR providers– had to decide how they would adapt their practices in an attempt to sustain their livelihood. Fortunately for Arbitrators seeking training, the internet was replete with quality free or low-cost training sessions. Additionally, subsets of Arbitrators in various states set up free monthly and weekly drop-in sessions of hands-on exploration of ZOOM, Web-Ex, and other popular platforms along with discussions on fixes, hacks, and tweaks for the most prevalent glitches Arbitrators were experiencing in managing virtual hearings.

In October 2020, I surveyed a dozen Michigan ADR Section Arbitrators and asked them five questions regarding what adjustments they made to their arbitration practice during the first seven months of the pandemic. First and foremost, I wanted to know what percentage of their arbitrations they had held via a virtual platform instead of in person. I also asked who made the final decision on the hearing format—the Arbitrator or the parties? My other questions explored safety protocols and Arbitrators' use of virtual pre-hearing conferences. This article categorizes and summarizes some of the Arbitrators' responses to those first two questions. Future articles may discuss Arbitrators' responses to the remaining three questions.

Three Classes of Responses

As could be expected, their answers varied; nevertheless, they fell into three distinct classes. Some Arbitrators stated that they had conducted all of their hearings virtually. I refer to this class as those who decided to hop on the *Technology Upgrade* train. The second group of Arbitrators reported that they had continued to do all of the hearings in person. I refer to them as the *Business as Usual* class. I refer to the third group as the *Postponing, Waiting it Out, or Retiring* class. These Arbitrators reported that they ordered or allowed extensive postponements–in hopes that they would be able to resume business as usual within a few months. For a few in this group, COVID-related hearing limitations served to usher in their decisions to retire.

Technology Upgrade

This first option required Arbitrators to assertively seek training on video platforms that were most conducive to allowing them to conduct hearings as close as possible to the way they had been able to conduct face-to-face hearings. They had to learn the basics of functioning in their role as Arbitrators and be confident enough in hosting their hearings to persuade the parties that they were offering the next best option to the in-person hearings that were status quo. The next step for Arbitrators who became proficient with video-hearings was to convince reluctant parties to accept the process. Many Arbitrators scheduled free virtual pre-hearing conferences both to conduct technical check-ins with the parties and to demonstrate their own proficiency in handling video hearings and reported widely that virtual pre-hearing conferences served those dual purposes well.

A few Arbitrators reported that either for medical reasons or for the convenience virtual hearings afford, they had held 100% of their hearing from March through October 2020 using a virtual platform. They reported that they had not experienced a drop in their caseloads, so all of the parties appearing before them either requested virtual hearings or acquiesced to the Arbitrators' position. A number of Arbitrators reported that the overwhelming majority of their hearings (approximately 66%—75%) had been virtual during those seven months. They also felt that virtual pre-hearing conferences were a key contributor to getting parties to agree to virtual hearings. As further incentive, these Arbitrators reported being able to offer the choice of a virtual hearing within thirty days or an in-person hearing within approximately 6 to 9 months depending on COVID conditions. When they did handle in-person hearings, this group reported requiring safety protocols in addition to masks and social distancing.

Business as Usual

A minority of the Arbitrators I spoke with reported that they generally carried on business as usual during the identified time period. Those Arbitrators, by and large, preferred in-person hearings and were sensitive to parties' requests and the parties' comfort level with in-person hearings. A few of the Arbitrators reported that they did in-person hearings because it was too much work to learn a new method at this point in their career. One Arbitrator reported that he had held five hearings and that they had all been in person because he didn't like video hearings. He made the decision and the parties did not insist otherwise. He stated that the parties complied with using masks

and keeping appropriate social distancing. Other Arbitrators in this class reported that they held in-person hearings at the parties' joint requests. One Arbitrator stated that he resolved any disagreement between the parties on whether they wanted a virtual or in-person hearing by dictating that the hearing would be in person, as was the parties' usual practice.

Most of the Arbitrators who opted to continue with in-person hearings adopted some form of hearing protocols, which they discussed with the parties well in advance of the hearing. However, there was a wide range of hearing protocols utilized by this group. The following are some examples:

- a simple statement by the Arbitrator notifying the parties that the hearing room would need to be large enough to accommodate social distancing;
- a requirement that parties would need to have disposable masks and sanitizer available for everyone present
- requirements that disinfectant and gloves be provided at the witness table for witnesses handling documents;
- language ensuring a cleansed facility, cleaning during breaks and between witnesses;
- a requirement for a large room where the Arbitrator is "at least 5 yards from the witnesses who should testify without a mask…Counsel and parties farther away still…[and asking parties] to make inquiries about COVID"; and
- a requirement for a limited number of persons in the room, and cleaning the room in addition to at least two bathrooms available.

On the opposite end of the spectrum, one Arbitrator reported that he would "leave it [safety precautions] to the facility that hosts the arbitration."

Postponing Hearings or Closing Shop

The third response was to postpone the scheduled cases until conditions appeared safe enough to continue holding in-person arbitrations. Sometimes it was the Arbitrators in this group who decided to postpone, but Arbitrators reported that, on several occasions, the parties requested adjournments or postponements. Through independent discussions and observations, I heard several Advocates express that, even though they had received training sessions on holding virtual hearings, they still felt underprepared and would continue to opt for in-person hearings, even if it meant long delays and resulted in backlogs. The reasons behind this discomfort and hesitation with virtual hearings usually related to not wanting to appear inept before the parties they represented and concern that one side might resort to coaching witnesses if the Arbitrator was not in the same room as the parties.

A few of the Arbitrators in this class also expressed that they were simply too far along in their careers, and too close to retirement, to learn a new way of holding hearings—especially when many thought COVID would shortly run its course and allow everyone to get back to business as usual. However, some of the Arbitrators reported that, even by October 2020, they had shut down their practices because many of the parties they had long worked with were still insisting on in-person hearings. Because these Arbitrators were unwilling to hold in-person hearings and were disinclined to try to become competent in handling video hearings, their choices were limited.

About the Author

Betty Rankin Widgeon *is the immediate past Chair of the State Bar of Michigan Alternative Dispute Resolution Section. In 2017, she was appointed to the Michigan Supreme Court Panel of Special Masters to preside over alleged judicial misconduct hearings. She is a former Chief Judge of the 14A District Court, Washtenaw County, MI. She is a member of the National Academy of Arbitrators and the National Academy of Distinguished Neutrals.*

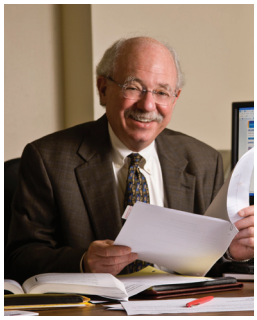
She holds her B.A. and MAEd Degree in Education from Wake Forest University and her J.D. from the University of Michigan. While in law school, she co-authored The Relevance of "Irrelevant" Testimony: Why Lawyers Use Social Science Experts in School Desegregation Cases*, Law and Society Review, 1981-82.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

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

FROM THE FIELD: Adding Techniques to Your Mediator Toolbox

"What is the Value of Closure?"

By Sheldon J. Stark



Sheldon J. Stark

This is the first in a series of "From the Field" columns describing mediator techniques you might find useful in your own practice.

I call this issue's technique "The Value of Closure." I learned it from mediator J. Anderson Little, author of the book, "Making Money Talk" published by the ABA Dispute Resolution Section.

To begin, regardless of what process the parties have designed – joint sessions or shuttle diplomacy and caucus – I always meet with the parties and their counsel the morning of the mediation, before any other aspect, for an introductory, get-acquainted conversation. In that introductory setting, I offer parties a chance to ask questions or share anxieties and concerns they may harbor. I ask their litigation/mediation experience; what they anticipate will happen during the mediation; and whether they've done any independent study to learn more about the process. I ask them to tell me about themselves or their business. I tell them: "It often happens that knowing more about you or your business can become important as we work through the key issues in the dispute. Tell me about yourself and your business." These discussions help build trust in the mediator and confidence in the mediator's process.

After getting acquainted, I ask what is probably the most important question of the introductory session: What are your goals and objectives? What do you hope to gain from the mediation process today? Without providing a dollar, what do you hope to accomplish today?"

Most people say they are seeking a reasonable resolution, perhaps a settlement somewhere in the middle. A few are looking for an apology or acknowledgement that a wrong was done. In employment cases, there may be a request to change a discharge to a resignation or the removal of "bad" paper from their personnel file. Sometimes parties are looking for relationship repair or a continuing business connection.

If they haven't said so themselves, I ask if they'd welcome an end to the lawsuit. I share the experiences of my clients when I was a trial lawyer. Litigation is stressful. Big time. Sometimes clients reported just receiving a letter from my office caused distress, anxiety, flashbacks. It could take days to settle back down. If they had to prepare for depositions, they experienced night sweats, appetite disruption, sleeplessness and other signs of anxiety. "For these individuals, litigation was an emotional roller coaster ride," I explain. "Closure was therefore of value to them. Bringing an end to the litigation and moving on was worth something. Is there value for *you* in closure? Should we add 'closure' to the list of your goals?" For most, the answer is "yes." Closure *does* have value. It may be difficult to put a price tag on it, but getting out from under a lawsuit – even one they themselves brought – is almost always attractive.

After the facts of the dispute are reviewed and the magnitude of the risks weighed, the negotiation process may reach its limits with the parties still some ways apart. That's where the value of closure plays its assigned role.

For example, plaintiff has reduced her demand to $150,000.00 but not a penny less. The defendant, however, claims it has reached the limit of its authority at $135,000.00. Both parties represent they have no more room to move. Assume for the sake of the example that no more progress is to be made.

Starting with the plaintiff, here's how the technique might be applied:

"When we started this morning, I asked you if you believed closure had value. If you wish to hold out for $150,000.00 that's your right. This is your case. Your experience. Your money. Whether to settle or not is your decision. No one will judge you no matter what you decide. $135,000.00 isn't what you wanted, but it does guarantee an end to the litigation today and includes all the benefits of closure."

"What *is* the value of closure?" I ask. "The value of closure is different for everyone. I can't tell you what closure is worth to you. Neither your spouse nor your lawyer can tell you the value of closure for you. Only *you* can say what closure is worth to you. Maybe the value of closure is nominal, no more than a dollar or two. Maybe it has substantial worth to you. We can measure that value right now. Is it worth $15,000.00 to bring an end to this? $135,000.00 is not what you were hoping for but it is a way to resolve this dispute. Is it worth $15,000.00 to

you to be able to avoid all the risks we talked about through the mediation process today? To now get on with your life/business and start a new chapter? Could you use the $135,000.00 productively?"

Sometimes, the plaintiff recognizes the value of closure and looking at the offer in this light helps them get to yes. Alternatively, they have assessed closure and don't value it as highly. That's their call.

The technique can be equally productive in the defendant's breakout room. In my employment and commercial practice, it has little utility for large businesses. For smaller employers and business entities, however, litigation is costly, distracting, and stressful. The decision-maker is typically in the caucus room. He or she knows full well how many checks have been written to the attorneys; how much disruption the lawsuit has caused; how frequently it has distracted from the core business, reducing their bottom line. "Is it worth another $15,000.00 to stamp 'closed' on this experience?"

"They're not budging from $150,000.00. You don't want to pay that much. That's your call. This is your business. Your money. Yet, there is a chance to make today the last day in the life of this lawsuit. To reach closure is going to require an additional $15,000.00. Does closure represent that value to your business? With confidentiality and non-disparagement in your settlement agreement and release, you can eliminate the possibility of bad publicity and media attention, further disruption in the workplace, the risk of a greater verdict, additional attorney fees, a bad precedent. If closure has value to you, is that value $15,000.00?" Framed in this fashion, the decisionmakers on the defense side are equally empowered to make good business judgments about whether to settle and on what terms.

The "Value of Closure" can be a powerful closing technique in each room.

The technique has additional benefits. First, these questions help us gain trust and build confidence because parties appreciate the time we take to learn their goals and objectives. Often, surprisingly, their own lawyers have not asked questions about what they hope to gain from the process. Second, goal questions add clarity to ideas the parties might have about where they would like to end up. Some parties haven't given the question the time and attention it truly deserves. Third, the answers we get help us as mediators better understand the parties with whom we are working. Fourth, the answers may reveal unrealistic expectations or erroneous misunderstandings about the process, thereby creating an opportunity to provide helpful process information. Whether or not "The Value of Closure" works on the back end to resolve the case; I can attest to its power on the front end. I hope that it works as well for you as it does for me.

About the Author

Sheldon J. Stark *offers mediation, arbitration case evaluation and neutral third party investigative services. He is a Distinguished Fellow of the National Academy of Distinguished Neutrals, a Distinguished Fellow with the International Academy of Mediators and an Employment Law Panelist for the American Arbitration Association. He is also a member of the Professional Resolution Experts of Michigan (PREMi). He is past Chair of the council of the Alternative Dispute Resolution Section of the State Bar and formerly chaired the Skills Action Team. Mr. Stark was a distinguished visiting professor at the University of Detroit Mercy School of Law from August 2010 through May 2012, when he stepped down to focus on his ADR practice. Previously, he was employed by ICLE. During that time, the courses department earned six of the Association for Continuing Legal Education's Best Awards for Programs. He remains one of three trainers in ICLE's award-winning 40-hour, hands-on civil mediation training. Before joining ICLE, Mr. Stark was a partner in the law firm of Stark and Gordon from 1977 to 1999, specializing in employment discrimination, wrongful discharge, civil rights, business litigation, and personal injury work. He is a former chairperson of numerous organizations, including the Labor and Employment Law Section of the State Bar of Michigan, the Employment Law and Intentional Tort Subcommittee of the Michigan Supreme Court Model Civil Jury Instruction Committee, the Fund for Equal Justice, and the Employment Law Section of the Association of Trial Lawyers of America, now the American Association for Justice. He is also a former co-chairperson of the Lawyers Committee of the American Civil Liberties Union of Michigan. In addition, Mr. Stark is chairperson of Attorney Discipline Panel #1 in Livingston County and a former hearing referee with the Michigan Department of Civil Rights. He was a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010 and was listed in "*The Best Lawyers in America*" from 1987 until he left the practice of law in 2000. Mr. Stark received the ACLU's Bernard Gottfried Bill of Rights Day Award in 1999, the Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan in 2009, and the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. In 2015, he received the George Bashara, Jr. Award for Exemplary Service from the ADR Section of the State Bar. He has been listed in "*dbusiness Magazine*" as a Top Lawyer in ADR for 2012, 2013, 2015, 2016, 2017, 2018, 2019 and 2020.*

ADR Legal Updates

Case Law Updates

By Lee Hornberger

Lee Hornberger

This update reviews significant Michigan cases issued since September 2021 concerning arbitration and mediation. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

The YouTube video of the author's 2020-2021 update presentation is at: https://www.youtube.com/watch?v=9Q7deVlExDI

The YouTube video of the author's 2019-2020 update

presentation is at: https://www.youtube.com/watch?v=I0TkP8zs-A8

Arbitration

a. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning arbitration during the period covered by this review.

b. Michigan Court of Appeals Published Decisions

There were no Court of Appeals decisions concerning arbitration during the period covered by this review.

c. Michigan Court of Appeals Unpublished Decisions

COA affirms Circuit Court confirmation of DRAA award

Hoffman v Hoffman, 356681 (December 16, 2021). If agreement leaves any doubts about arbitrability, doubts should be resolved in favor of arbitration. As general rule, arbitration clause written in broad, comprehensive language includes all claims and disputes. Award is presumed to be within scope of arbitrator's authority absent express language to contrary. COA affirmed Circuit Court confirmation of DRAA award in **Petoskey property** case.

COA affirms Circuit Court confirmation of DRAA award

Borke v Kinney, 350809, 354237 (November 23, 2021). COA held arbitrator had authority to determine defendant's income for purposes of calculating annual adjustment payments under terms of settlement agreement, which arbitrator did by utilizing law of contract interpretation. Circuit Court did not err in confirming award. COA said defendant's arguments regarding arbitrator purportedly exceeding authority were "ruse to induce the court to review the merits of the arbitrator[`]s decision," and Circuit Court properly refused to do so.

COA affirms Circuit Court that scheduling grievance not subject to arbitration

Berrien County v Police Officers Labor Council, 355352 (September 30, 2021). COA agreed with Circuit Court that because Union did not cite a specific CBA provision that would impose a limit on Employer's CBA right to schedule use of compensatory time, Employer's management rights to schedule hours and shifts, including overtime, were not subject to arbitration. CBA unambiguously reserved certain matters as management rights, including right to schedule hours and shifts of work, including overtime. Grievances arising out of plaintiffs' actions regarding its management rights are not grievable and are not subject to arbitration.

COA reverses Circuit Court order denying arbitration

Saidizand v GoJet Airlines, LLC, 355063 (September 23, 2021). Arbitration agreement unambiguously provided that only arbitrator had authority to "resolve any dispute relating to the interpretation" or "applicability" of agreement. Because parties "clearly and unmistakably" agreed only arbitrator had authority to determine whether plaintiff's claims were subject to arbitration under agreement, COA held Circuit Court erred by interpreting agreement and deciding whether ELCRA claims were subject to arbitration.

COA holds that court, not arbitrator, decides arbitrability issue

Bay County Road Comm v John E Green Company, 347439, 347712 (September 16, 2021). Parties to agreement to arbitrate may not vary effect of MCL 691.1686 or MCL 691.1687, which grant court authority to decide existence of arbitration agreement or whether issue is arbitrable, summarily decide issue, and order parties to arbitrate. MCL 691.1684(2)(a) and (3). AAA Construction Industry Arbitration Rules do not deprive court of subject matter jurisdiction because they are Rules, not statutes as required under MCL 600.605. MUAA did not deprive court of subject matter jurisdiction and allow delegation of determination of jurisdiction to arbitrator.

COA affirms Circuit Court not to order arbitration.

Milford Hills Properties, Inc v Charter Twp of Milford, 353249, 353489 (September 2, 2021). COA affirmed Circuit Court determination defendant did not show arbitration agreement should be enforced but reversed denial of summary disposition in connection with plaintiffs' claims. Defendant alternatively argued, if any claims are not dismissed on their merits, matter should be referred to arbitration to resolve dispute over amount of excess capacity. COA agreed with Circuit Court that defendant had failed to show arbitration was in order.

COA said conclusion plaintiffs' claims were without merit as matter of law rendered issue of extent to which wastewater treatment plant had excess capacity moot in connection with those claims. Question of arbitration remains premature until and unless plaintiffs on remand persuade Circuit Court to allow them to amend their complaint to attempt to revive their tort claims by adding individual parties and new theories in avoidance of governmental immunity. COA affirmed Circuit Court that defendant had not shown arbitration agreement should be enforced at this time.

Mediation

a. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning mediation during the period covered by this review.

b. Michigan Court of Appeals Published Decisions

There were no Court of Appeals published decisions concerning mediation during the period covered by this review.

c. Michigan Court of Appeals Unpublished Decisions

COA reverses enforcement of email exchange settlement agreement.

Haqqani v Brandes, 355308 (October 21, 2021). COA reversed Circuit Court enforcement of email exchange alleged settlement agreement. "Signature: Nothing in this communication is intended to constitute an electronic signature. This email does not establish a contract or engagement."

COA affirms enforcement of MSA.

Shores Home Owners Ass'n v Wizinsky, 353321, 35620 (October 14, 2021). Settlement agreement was entered into following mediation. All parties represented by counsel at mediation. MSA was reduced to writing and signed. Language of agreement was unambiguous and plain. COA affirmed Circuit Court enforcing agreement.

About the Author

Lee Hornberger *is a former Chair of the SBM Alternative Dispute Resolution Section, Editor Emeritus of* The Michigan Dispute Resolution Journal*, former member of the SBM Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of the Professional Resolution Experts of Michigan (PREMi) and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the George N. Bashara, Jr. Award from the State Bar's ADR Section in recognition of exemplary service.*

Other Legal Updates

By Lisa Taylor, Scott Brinkmeyer, and Hon. Milt Mack

Lisa Taylor

Scott Brinkmeyer

Hon. Milt Mack

MCR 2.403, 2.404, and 2.405

On December 2, 2021, the Michigan Supreme Court significantly revised the case evaluation process (MCR 2.403) as well as MCR 2.404 and MCR 2.405. A Court may now order case evaluation only if the parties do not stipulate to another ADR process such as mediation. Notably, mandatory case evaluation for tort cases was eliminated, as were sanctions for rejecting a case evaluation award. Parties who participate in a stipulated ADR process cannot later be ordered to engage in case evaluation without their written consent

The rules changes also reduced to seven the number of days case evaluation summaries must be filed in advance of the hearing, added an additional $150 penalty for filing required materials within 24 hours of the hearing, reduced to seven the number of days after the hearing for case evaluators to provide parties with an award, and added the following language to MCR 2.404 B.4.(b) pertaining to neutral evaluators: "Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral

alternative dispute resolution provider, for a period of up to 15 years prior to an application to serve as a case evaluator."

Regarding Rule 405, the definition of "verdict" was expanded to include judgment entered on an arbitration award, and "actual costs" now include those dating to the rejection of the prevailing party's last offer or counteroffer. Limited interest of justice exceptions for refusing to award attorney fees were added.

The SCAO committee felt that giving parties more control over the selection of the ADR process and eliminating the sanctions provisions of case evaluation is likely to increase the use of mediation in resolving matters,

The new rules are effective January 1, 2022.

MRPC 1.8

On December 15, 2021, the Michigan Supreme Court issued an order advising that it is considering an amendment to MRPC 1.8, Conflict of Interest: Prohibited Transactions. The proposal would add language, in a new MRPC 1.8(h)(3), that the inclusion of an arbitration clause in an attorney-client agreement is prohibited unless the client is independently represented in reviewing the provision. Specifically:

> Rule 1.8 Conflict of Interest: Prohibited Transactions.
>
> (a)-(g) [Unchanged.]
>
> (h) A lawyer shall not:
>
> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement; or
>
> (2) settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.; or
>
> (3) make an agreement that includes a lawyer-client arbitration provision unless the client is independently represented in reviewing the provision.

Comments on the proposal may be submitted by April 1, 2022, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. Comments may also be submitted in writing at P.O. Box 30052, Lansing, MI 48909 or via email atADMcomment@courts.mi.gov. When filing a comment, refer to ADM File No. 2021-07. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Justice Viviano would decline to publish the proposed amendment for comment.

For more details, the link to the order is:

https://www.amazon.com/Science-Settlement-Ideas-Negotiators/dp/0831800119

About the Authors

Lisa Taylor *provided the summary of the proposed amendment of MRPC 1.8 Lisa Taylor is currently chair of the SBM ADR Section Legislation and Court Procedures Task Force.* ***Milton Mack*** *and* ***Scott Brinkmeyer*** *provided the summary of the changes to MCR 2.403, 2.404, and 2.405. Milton Mack is the former Chief Judge of the Wayne County Probate Court and former State Court Administrator. Scott Brinkmeyer is former chair of the ADR section and former president of the State Bar of Michigan. Scott was also the ADR Section representative serving on the Supreme Court Case Evaluation Court Rules Review Committee in 2019-20, which made recommendations to the Court.*

Diversity and Inclusion Action Team (DIAT) Update

By DIAT Co-Chairs Shawntane Williams and Lee Hornberger

Shawntane Williams

Lee Hornberger

The ADR Section's Diversity & Inclusion Action Team (DIAT) promotes and support diversity in the field of ADR, increases the cultural competence of ADR providers

and increases the opportunities for minorities in ADR. The four current objectives of the

Diversity Task Force are to:

1. increase the diversity of the ADR Section Council and the ADR Section Council's Action Teams and Task Forces;

2. increase the quality and improve the quantity of ADR trainings for providers regarding understanding, relating to, and meeting needs of diverse clients and consumers of ADR services;

3. support 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 for understanding and embracing diversity issues.

DIAT sponsored the creation of the ADR Section's Diversity and Inclusion Award. This Award is presented at the ADR Section's Annual ADR Conference, and is given in recognition of significant contributions concerning diversity and inclusion in the field of alternative dispute resolution. Michigan Supreme Court Chief Justice Bridget Mary McCormack received the Award in 2020. John Obee received the Award in 2021.

The DIAT Book Club provides an opportunity for Section members to meet and discuss books concerning diversity and inclusion. The January 26, 2022, Book Club featured *The Ground Breaking: An American City and Its Search for Justice* with author Scott Ellsworth in attendance. The November 16, 2021, Book Club featured *You Don't Look Like a Lawyer: Black Women and Systemic Gendered Racism* with author Dr. Tsedale M. Melaku in attendance. Other books that have been discussed include *Caste* by Isabel Wilkerson, *Coffee and Conversation* by Zenell Brown, Madam Arbitrator by Sandra Gangle, *Small Island* by Andrea Levy, *The Warmth of Other Suns: The Epic Story of America's Great Migration* by Isabel Wilkerson, and White Fragility - *Why It's So Hard for White People to Talk About Race* by Robin DiAngelo.

DIAT provided the "I'm a Neutral—So, Why Don't You Trust Me? (Navigating Race, Gender, and Other Barriers that Hinder our Effectiveness)" presentation to the October 2020 ADR Conference and the "Diversifying the Practice of ADR: Lessons Learned Mediating in Diverse Communities and Conflicts" presentation at the October 2021 ADR Conference.

DIAT provided the September 9, 2021, webinar by Dr. Tsedale M. Melaku concerning "You Don't Look Like a Lawyer: Black Women and Systemic Gendered Racism." Dr. Melaku's presentation was reviewed in Harshitha Ram's "You Don't Look Like a Lawyer: Black Women and Systemic Genered Racism' - a Speech Analysis," *The Michigan Dispute Resolution Journal* (Fall 2021).

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

In addition DIAT is working on a diversity video project, its October 2022 ADR Annual Conference presentation, and other projects.

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

About the Authors

Shawntane Williams, ADR Section Council Member, and Diversity and Inclusion Action Team Co-Chair). Shawntane is a graduate of Wayne State University Law School. She is currently in private practice where she represents businesses and employers in labor and employment law, business law, and ADR matters. She is

also an Arbitrator on AAA's Employment Law & Consumer Law Panels and a Mediator.

***Lee Hornberger** is a former Chair of the SBM Alternative Dispute Resolution Section, Editor Emeritus of* The Michigan Dispute Resolution Journal*, former member of the SBM Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of the Professional Resolution Experts of Michigan (PREMi) and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the George N. Bashara, Jr. Award from the State Bar's ADR Section in recognition of exemplary service.*

Upcoming Mediation Trainings

8-Hour Advanced Mediator Training

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

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

Date: February 22, 2022
8-Hour Mediator Update Training
Location: Lansing, MI
Hosted By: Resolution Services Center
Registration and additional information (RSCCM.org)

Date: May 3, 2022
8-Hour Mediator Update Training
Location: Lansing, MI
Hosted By: Resolution Services Center
Registration and additional information (RSCCM.org)

48-Hour Domestic Relations Mediator Training

ONLINE DATES: February 8-11, 14-15, 2022
Hosted By: Resolution Services Center
Registration and additional information (RSCCM.org)

ONLINE DATES: April 4-8 & 11, 2022
Hosted By: Resolution Services Center
Registration and additional information (RSCCM.org)

40-Hour General Civil Mediator Training Program

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

ONLINE DATES: March 15-18 & 21, 2022
Hosted By: Resolution Services Center
Registration and additional information (RSCCM.org)

ONLINE DATES: May 17-20 & 23, 2022
Hosted By: Resolution Services Center
Registration and additional information (RSCCM.org)

How to Find Mediation Trainings Offered in Michigan

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

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

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

Request for Proposals for ADR Section's 2022 Annual Meeting and ADR Conference.

Submit proposals to Mary Anne Parks (parks.maryanne@gmail.com) by February 18, 2022.

On September 30 and October 1, 2022, the ADR Section of the State Bar of Michigan will host a virtual ADR Conference. An in-person Awards Banquet will also be held in conjunction with the Conference in Southeast Michigan (location TBD).

The ADR Conference will include at least 8 hours of advanced mediation training featuring Michigan practitioners and experts, and the ADR Section is seeking presenter proposals by Friday, February 18, 2022.

Topics may cover any aspect of ADR practice from family 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. However, please avoid lecture type presentations.

EACH PRESENTATION WILL BE 50 MINUTES IN LENGTH.
WE WILL BE USING THE ZOOM MEETING FORMAT EXCLUSIVELY THIS YEAR.

Reservation of the final decision as to topic, constitution of a panel or demonstration, and approval of content belongs to the ADR Section Skills Action Team and its co-chairs. The ADR Section is committed to diversity, equity and inclusion and this should be kept in mind when considering panel members, demonstrations, and skill-building exercises.

Once received, your proposal will be reviewed, and you may be contacted to discuss or revise your proposal before the ADR Section Council decides which proposals will be accepted for the Conference.

Proposals should include:

1. Nature of your topic including proposed agenda (bullet points)
2. Name(s) of speaker(s)
3. An explanation of how your proposed presentation will be interactive: a presentation, an interactive exercise, panel discussion, Zoom polling, or other format
4. A description of learning objectives-takeaways, teaching points, identification of skills to be improved by the presentation
5. Assistance you may require with a virtual presentation, such as instruction on the use of PowerPoint, Zoom Share Screen, etc.
6. Whether you anticipate providing any written materials to attendees and, if so, whether you want them distributed by the ADR Section before or after your presentation.
7. Your experience with using the Zoom platform:
    a. none (I need someone else to run everything for me)
    b. novice (I will need a practice session)
    c. experienced (I may need help getting volume to play a video clip, but otherwise won't require any assistance in advance)
    d. expert (I could teach a class on it)

Submit proposals to Mary Anne Parks **(parks.maryanne@gmail.com)** by **February 18, 2022** and please include your name, phone number and email address.

We look forward to receiving your proposal and are grateful for your expertise, time, and effort, in developing meaningful proposals.

Ed Pappas, Zena Zumeta and Nakisha Chaney
Skills Action Team and Event Co-Chairpersons

STATE BAR OF MICHIGAN

ALTERNATIVE DISPUTE RESOLUTION SECTION

ADR Section's 2022 Annual Meeting and ADR Conference, Sept. 30 - Oct.1, 2022

On September 30 and October 1, 2022, the ADR Section of the State Bar of Michigan will host its ADR Conference which will continue to be virtual. The ADR Conference will include at least 8 hours of advanced mediation training featuring Michigan practitioners and experts. Save the Dates!

Request for Proposals for ADR Section's 2022 Annual Meeting and ADR Conference

To submit your proposal or inquire about how to be a presenter, please contact parks.maryanne@gmail.com. Proposals are due by February 18.

Upcoming Events

DIAT Book Club Discussion, Wed., Jan. 26, 7 p.m.

The Diversity & Inclusion Action Team has selected its next book "The Ground Breaking: An American City and Its Search for Justice" by Scott Ellsworth and is inviting all Section members to attend our discussion.

The book tells the long, untold story of the race massacre in Tulsa, Oklahoma in

1921 and its cover up. It goes on to tell the story of how the cover up was overcome and the story allowed to emerge. The author was one of the people responsible for finding evidence and bringing it to light. Ellsworth is a professor now at the University of Michigan and has agreed to participate.

If you'd like to attend, please contact Shel Stark at shel@starkmediator.com.

Mediator Forum, Thurs., Feb. 24, Noon, No Cost to Register

Small group discussion where mediators share their favorite techniques, experiences, interventions and approaches. Registrants will be randomly divided into small groups by Zoom. After a time, we will return to large group to share the best ideas. New groups will then be randomly assigned to continue the discussion and exchange with a different group of colleagues. We expect three sessions in all, each of which will focus on different topics.

Come and explore ideas with your fellow mediators!

Best Practices in Non-Administered Arbitrations, Thurs., March 10, Noon, No Cost to Register

This is a must-see webinar. Learn the essential elements of a non-administered arbitration-an arbitration conducted privately between the parties and the arbitrator or arbitrators that does not involve an administering organization. If you are an active arbitrator and/or an advocate, you will want to hear from the experts on how to select arbitrators, the applicable law, how to structure the arbitration, what agreements are necessary, how to begin the arbitration, and other important practical information on how to conduct the arbitration.

DIAT-AILS Diversity Virtual Lunch, Tues., April 5, Noon, No Cost to Register

The State Bar of Michigan American Indian Law Section and the ADR Section's Diversity and Inclusion Action Team are co-sponsoring a virtual Diversity Lunch for mediators, arbitrators, other ADR practitioners, and members of the American Indian Law Section. There will be discussions of issues that face mediators, arbitrators, and other neutrals.

SBM | ALTERNATIVE DISPUTE RESOLUTION SECTION

2021 AWARD WINNERS

THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE STATE BAR OF MICHIGAN IS PROUD TO ANNOUNCE THAT THE FOLLOWING INDIVIDUALS ARE THE RECIPIENTS OF THE ADR SECTION'S MAJOR AWARDS IN 2021.

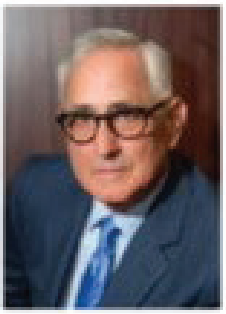
THE DIVERSITY AND INCLUSION AWARD is given in recognition of significant contributions concerning diversity and inclusion in the field of alternative dispute resolution. **John Obee** is the 2021 award recipient.

THE DISTINGUISHED SERVICE AWARD is presented to an individual, program, or entity in recognition of significant contributions to the field of dispute resolution. **Sheldon Larkey** is the 2021 award recipient.

THE GEORGE M. BASHARA AWARD (THE CHAIR'S AWARD) is presented to an individual, program, in recognition of exemplary service to the Section and its members. **Scott S. Brinkmeyer** is the 2021 award recipient.

THE NANCI S. KLEIN AWARD is presented to an individual, program, or entity in recognition of exemplary programs, initiatives, and leaders in community dispute resolution. **Dispute Resolution Center of West Michigan** is the 2021 award recipient.

A ONE-OFF "LIFETIME ACHIEVEMENT AWARD" FOR DOUG VAN EPPS. Perhaps no person has been more instrumental than **Doug Van Epps** in bringing the use of ADR into the Michigan State Court system. As the decades-long head of SCAO's Office of Dispute Resolution, Doug has been a firm yet gentle voice in the creation of rules and programs promoting the use of dispute resolution in the State of Michigan and in courts throughout the United States.



THE HERO OF ADR AWARD is presented to a person or entity for supporting the ADR Section's mission or the field of conflict resolution generally, by providing exemplary assistance. **Michael S. Leib** is the 2021 award recipient.

FOR MORE INFORMATION ABOUT THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE STATE BAR OF MICHIGAN VISIT: **CONNECT.MICHBAR.ORG/ADR/HOME.**

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

Thanks to our Annual Meeting Sponsors for their generous support!

PLATINUM SPONSOR

WIDGEON DISPUTE RESOLUTION, PLC

DICKINSON WRIGHT PLLC

ABBOTT NICHOLSON PC
ATTORNEYS AT LAW

GOLD SPONSORS

LEWIS & MUNDAY
A PROFESSIONAL CORPORATION

SILVER SPONSORS

ALTON T. DAVIS PLLC

AMERICAN ARBITRATION ASSOCIATION®

Lakeshore Resolution
VOICES CHOICES SOLUTIONS

SCHAEDLER LACASSE & FROST, PC.

Fraser Trebilcock
LAWYERS

PREMi
PROFESSIONAL RESOLUTION EXPERTS OF MICHIGAN, LLC

LeibADR LLC

SHELDON J. STARK
Mediator and Arbitrator

Laura A. Athens
Attorney and Mediator

LAW OFFICES OF
CARLO J. MARTINA, P.C.

BastaResolutionsPLLC

LAW OFFICES OF ABRAHAM SINGER PLLC

DIVORCE SUPPORT ANONYMOUS

BRONZE SPONSORS

LEE HORNBERGER
Arbitrator & Mediator

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION 2021-2022

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

1. Providing training and education for ADR professionals;
2. Giving professionals the tools to empower people in conflict to create optimal resolutions;
3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and,
4. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

Membership in the Section is open to all members of the State Bar of Michigan. Affiliate status is open to any individual with an interest in the field of dispute resolution. *(Section membership is free for sitting judges)*

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

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

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

APPLICATION TYPE: ____ Member ____Sitting Judge ____Affiliate *(Affiliate memberships are subject to Council approval.)*

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*? _____

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.

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

Non-members must submit payment by check.

Please make check payable to:
STATE BAR OF MICHIGAN

Enclosed is check #_____

Mail your check and completed membership form to:

Attn: Dues Dept., State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933

Members using a Visa or MasterCard must join online at e.michbar.org

Revised 01/2021

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;
3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and,
4. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

Join the ADR Section

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

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

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

Editor's Notes

The Michigan Dispute Resolution Journal is looking for articles on ADR subjects for future issues. You are invited to send a Word copy of your proposed article to ***The Michigan Dispute Resolution Journal*** to Editor, Lisa Okasinski at Lisa@Okasinskilaw.com.

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

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

ADR Section Member Blog Hyperlinks

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

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

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

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

ADR Section Social Media Links

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

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

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

https://twitter.com/SBM_ADR https://www.linkedin.com/groups/12083341

ADR Section Homepage

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

Dispute Resolution Journal

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

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

For comments, contributions or letters, please contact:

*Erin Archerd - archerer@udmercy.edu – **313-596-9834***
*Lisa Okasinski - lisa@okasinskilaw.com – **313-355-3667***
http://connect.michbar.org/adr/newsletter