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The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

Drafting ADR Provisions for Transactional Documents

— by Asher N. Tilchin

INTRODUCTION

The resolution of justiciable disputes arising out of transactional documents can be markedly influenced by the draftsperson. These documents, which define the relationships of the parties, are made in the setting of accord. However, these documents often fail to provide adequate direction to the parties at post-agreement times of discord, leaving a court (or an arbitrator) to resolve the disputes that have broken the peace. This article advances the premise that when accord reigns, the draftsperson can serve the parties well by providing, indeed may have a duty to provide, a plan for dispute resolution that goes beyond the typical, often lightly and sometimes carelessly considered arbitration clause.

This article will begin with an analysis of some of the deficiencies found in typical or "standard" arbitration clauses and will advance the proposition that even the well drafted arbitration clause does not by itself adequately cover the alternative dispute resolution (ADR) opportunities that the current legal culture offers. The core proposition of this article is that a mediation road map for both pre-and post-litigation disputes should be incorporated into agreements.

ARBITRATION

Parties to a contract who wish to avoid lawsuits will frequently provide for arbitration as the alternative dispute resolution process.

A typical arbitration clause often reads something like this:

> A dispute between the parties that arises out of this agreement shall be resolved by arbitration according to the commercial rules of arbitration promulgated by the American Arbitration Association (AAA).

This provision may produce unintended results. The AAA rules, often unknown by the draftspersons, may, when invoked, initiate a process that isn't what the parties expected. To avoid the unwanted entry into a process that is too cumbersome, too costly, and inefficient, draftspersons should tailor an arbitration process that suits the objectives of their clients. It can range from the very simple proceeding where a single arbitrator decides the dispute upon review of written position papers prepared by the disputants' counsel, to the more elaborate processes that may:

[D]raftspersons should tailor an arbitration process that suits the objectives of their clients.

- establish the number of arbitrators and his/her/their qualifications;
- require expert analysis, appraisals and opinions;
- define the scope of permitted discovery;
- call for reasoned opinions;
- determine the extent to which the rules of evidence are applied; and
- expand appeal rights.

Continued on Page 2

Continued from Page 1

Asher Tilchin, a principal with Tilchin, Hall & Reynolds in Farmington Hills, has practiced in the areas of real estate and commercial, transactional and litigation law for more than forty years, and now devotes most of his practice to mediation. He is an author and frequent lecturer on ADR, and the secretary of the ADR Section Council.

The available literature is replete with imaginative and artfully crafted arbitration clauses that define the many variations. Indeed, the preferred process may well fall into the AAA rules category.

But even with a comprehensive arbitration clause the draftsperson has only scratched the surface of dispute resolution alternatives. Compared to other ADR options, arbitration is more akin to litigation, because, like a judge, an arbitrator renders a binding decision; and, the procedures of processing evidence are often similar to trial practice. Among the many other options that fall within the list of ADR possibilities is mediation, a frequently used process that empowers disputants to resolve their own disputes by agreement. It is that process, triggered by agreement before the dispute is trial-bound, which is the subject of the balance of this article.

I discuss pre-dispute agreements to mediate disputes in the context of pre- and post-litigation situations. In either context the draftsperson should introduce the mediation clause with a definition. This is how I would define it:

> "Mediation is a process whereby a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disagreeing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving and exploring settlement alternatives."

A mediation clause that requires disputants to engage in the mediation process as a precondition to filing a lawsuit can produce at least two benefits. First, it may work.

PRE-LAWSUIT MEDIATION

A mediation clause that requires disputants to engage in the mediation process as a precondition to filing a lawsuit can produce at least two benefits. First, it may work. If it doesn't, the provision is likely to provide guidance to a judge who orders mediation after a lawsuit is filed. Obligated to detour to a settlement table before reaching the courthouse, an otherwise strident contestant might embrace the opportunity to conciliate. If a settlement isn't reached, a judge who is likely, or required, to order mediation will find guidance in the pre-litigation clause when framing his/her order for mediation. In other words, the pre/post-litigation mediation clause can guide the court that orders mediation after the lawsuit is filed. Moreover, a mediation clause, whether simple, elaborate, or something in between, will be negotiated by the lawyers and clients. These negotiations are likely to have a salutary effect on the parties' disposition to resolve their dispute if it arises.

An interesting and effective approach to pre-lawsuit mediation clauses is found in one of Steven A. Hochman's sample ADR clauses published in the 1996 ALI/ABA ADR Seminar Materials Book[1]. He makes a case for a carefully staged process that first initiates mediation and continues until the parties settle or declare an impasse. If the mediation fails, the matter goes to arbitration. One of the advantages to this elaborately staged process is that it imposes a cooling-off period and permits the parties time to acclimate themselves to a mediation environment.

Draftsperson's Agenda

A comprehensive mediation clause should address at least these six items. It should:

1. define the types of disputes that require mediation.
2. specify the events that trigger mediation.
3. incorporate expressly the covenant to deal in good faith
4. prescribe sanctions or penalties, if any, if the process is not abided by.
5. provide for mediator qualification and selection process.
6. address fees and costs.

1. Types of Disputes

The types of disputes covered by a mediation clause should be the ones that if not resolved will result in a lawsuit. In other words, the dispute that is to be mediated must be justiciable.

The following clause is an example of how a pre-litigation mediation clause could be introduced:

> "A party to this contract who in good faith believes that the other party(ies) has (have) breached this contract in a manner redressable in a court of law or through arbitration, is prohibited from filing a lawsuit or initiating arbitration without first initiating the following mediation procedures...."

2. Triggering Mediation

The clause should state that the event that triggers a mediation is not the existence of a dispute; it is the written intention to litigate the dispute. The

Continued on Page 3

Continued from Page 2

methods and form of the notice should be defined. For example, it could be a letter; or it could be a draft of a proposed complaint that requires an answer. The latter method will help the parties define the dispute before the lawsuit is filed.

3. The Good Faith covenant

Suppose that a party initiates mediation, and the parties are then obligated by agreement to mediate, but one or more of the parties doesn't want to settle. Does this signify non-compliance, and if it does, what are the penalties? Or would this undesirable turn of events be ameliorated or exacerbated by a requirement to mediate in "good faith"? And perhaps the most difficult challenge is how to define an arguably indefinable concept. We know that good faith can be faked. Indeed, determining the intent and attitude of a person is a most difficult task.

The dilemma over the use of a good faith standard has been treated by writers of documents with varying degrees of specificity ranging from the very simple to the complex. A simple good faith clause is found in Roger & McEwen's *Mediation: Law, Policy, Practice* in which Professor Gray is quoted as describing a typical clause in a Chinese contract as "any problems will settle friendly through negotiations."[2] This treatise and a rapidly increasing body of discourse are grappling with the questions I have posed and many other issues raised by the difficulties of ascertaining when the covenant of good faith has been breached and eliciting remedies therefore.

A "good faith" dialectic has also entered into the discourse among rule-makers who promulgate court-annexed mediation rules and laws. But whether or not a good faith requirement is incorporated in a mediation clause, the sine qua non of effective pre-lawsuit (and post-lawsuit) mediation is the exercise of good faith by both parties. Only with the actuality of good faith on the part of all parties is a pre-dispute agreement to mediate likely to be successful.

4. Selection of the Mediator

The selection of an effective mediator is a critically important element of the process. The mediation clause should be sharply focused on the following criteria:

- Professional status (lawyer, nonlawyer);
- Educational background;
- Subject knowledge;
- Domicile;
- Mediator specialty training or certification;
- Track record/experience; and
- Mediator's technique (e.g., evaluative, facilitative, transformative).

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5. Mediator Authority

The mediator should be empowered to set the mediation schedule with reasonable accommodation to the schedule of counsel and their clients. Authority should be vested in the mediator to direct the proceedings and to decide whether impasse is reached.

6. Fees and Costs

The cost sharing responsibility for mediator fees and related costs should be covered in a mediation clause. Generally, fees will be shared equally.

POST-LITIGATION MEDIATION

Court Annexed Mediation

Assuming that the mediation fails and the matter winds up in court, court annexed mediation is likely to follow. I posit in this article that a pre-litigation mediation clause will have a positive effect on a court-ordered mediation under the Michigan Court Rules.

The Michigan Court Rule 2.400 et seq

MCR 2.400 et. seq. was expanded in 2000 with the addition of the Sections 2.410 Alternative Dispute Resolution, and 2.411 Mediation. ADR is invoked during litigation by court order under Section 2.410(C)(1), which reads:

> "At any time, after consultation with the parties, the court *may* (emphasis added) order that a case be submitted to an appropriate ADR process. More than one such order may be entered in a case."

Many judges will order mediation if for no other reason than to clear their docket. Other reasons will also motivate a mediation order. But what should the order direct - other than to mediate? The court rule contains some procedural directives and guidelines but does not establish adequate criteria with respect to which cases will be ordered to mediation; when the order will or should issue - if at all; who mediates; fees that may be imposed (other

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than reasonable); and who pays them. Concern over the court rule's potential adverse impact on mediation is expressed by Justice Marilyn Kelly in her Dissenting Statement that follows MCR 2.410. In essence, Justice Kelly expresses her concern that the voluntary nature of mediation will be lost through mandatory court orders; that due process may be violated; and that mediation will be used as a docket control device instead of serving its much more salutary objective of providing cost savings and preserving relationships through dispute resolutions voluntarily crafted by the parties. Stated more succinctly, her opinion is that coercion and mediation don't mix.

A pre/post mediation clause will neutralize Justice Kelly's concerns. This is not to say that the angry disputant will not feel coerced by an order to mediate (despite her/his pre-dispute agreement to the contrary) when he/she wants to pull the litigation trigger and use litigation for leverage, or revenge, and perhaps to maximize his/her redress. But when coming before the court faced with a provision to mediate agreed to by the petitioner at a time of harmony, he/she will have little standing in a challenge to a court order to mediate, particularly one that follows the criteria and guidelines designed by the parties.

The pre/post litigation clause could go beyond the basics of mediation

When crafting a comprehensive pre/post litigation mediation clause, the draftsperson should consider that the court will be guided by its provisions in determining when to order mediation, the mediator selection process and fee responsibility. The pre/post litigation clause should provide direction on these matters and could go beyond the basics of mediation by providing for the appointment of a settlement or mediation master if a lawsuit is filed - and even name the person or persons to serve as a mediator throughout the litigation as it runs its course, particularly to empower the mediator in the early stages of litigation to facilitate the exchange of information. Skillful oversight is likely to ameliorate typical discovery rancor. This person would also provide an environment that keeps settlement hovering above the "litigation express".[3] A "scorched earth" litigation philosophy will be dampened by an ever-present settlement master or mediator who will be in a position to facilitate a settlement before resources of time, emotion and energy are expended and dissipated by exhausted litigants prior to reaching the courthouse steps.

ADDITIONAL GRIST FOR THE ADR MILL

Other than mediation, there are other ADR choices that can be drafted into a transactional agreement. Here are some examples:

- The draftsperson could provide for early neutral case evaluation by a neutral acceptable to all parties. Following an evaluation, if the parties don't settle, the parties could enter into a mediation with a different person - or perhaps even the evaluator. The use of an early evaluation as an alternative to the case evaluation required under MCR 2.403 might induce early settlement, particularly if the same sanctions for acceptance and rejection specified in this rule apply to the private evaluation.
- The possibility of the use of mediation/arbitration, sometimes referred to as Med-Arb.
- Summary jury trials are useful when the parties are wide apart with respect to the value of a case and a jury trial is pending. This process can be advisory or binding and used before or after filing a lawsuit. At the very least it will serve as a reality check that may motivate a settlement.
- Partnering is an effective dispute resolution technique used in construction contracts.

CONCLUSION

Disputants are likely to end up in mediation by court order after a lawsuit has been filed. Since disputants are often angry because of the breakdown in their relations, they are more likely to sue than enter into voluntary conciliation. The two core premises advanced by this article are that (1) a disputant's propensity to sue might be lessened if before the dispute she/he is committed by written contract to mediate as a precondition to litigation; and (2) if that fails, the mediation clause will increase the chances of constructive dialogue in a court ordered mediation.

Endnotes:

1. Steven A. Hochman practices law in New York City. He is a leading national figure in the ADR movement. The full text of that clause can also be found in A. Tilchin, "Drafting ADR Provisions for Real Estate Transaction Documents," Mi. Real Property Rev., Vol. 30, No. 3 (Fall 2003).

2 Rogers and McEwen, Mediation: Law, Policy, Practice. New York: Clark Boardman Callaghan, 1994, p. 3.

3 The phrase "litigation express" is used by J.R. Van Winkle, "Mediation: A Path Back for the Lost Lawyer." ABA Section of Dispute Resolution, Senior Lawyer's Division (2001).

Upcoming Mediation Trainings

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of the mediation court rules, MCR 2.411 (general civil) or MCR 3.216 (domestic relations). Please note that participants must attend all of the dates listed for each training session in order to complete the 40-hour training. For more information, visit the SCAO web-site at **www.courts.michigan.gov/scao/dispute/odr.htm.**

General Civil

Training sponsored by Community Dispute Resolution Center of Genesee County:

Flint: **August 4, 6-7, 11, 13-14**

Contact: Dayna Harper, 810-249-2619 - Daynalharper@aol.com

Training sponsored by The Resolution Center of Macomb County:

Mt. Clemens: **September 15, 17-18, 22, 24-25**

Contact: Craig Pappas at 586-469-4714 - theresolutioncenter@mediate.com

Training sponsored by The Dispute Resolution Center of Washtenaw County:

Ann Arbor: **October 15-17, 22-24**

Contact: Kaye Lang at 734-222-3788

Training sponsored by Institute for Continuing Legal Education:

Plymouth: **November 18-20, December 3-4**

Plymouth: **February 24-26, March 11-12, 2005**

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

Domestic Relations

Training sponsored by Mediation Training and Consultation Institute:

Ann Arbor: **December 1-3, 6-7**

Register online at www.learn2mediate.com, or call 1-800-535-1155

Training sponsored by the Oakland Mediation Center:

Bloomfield Hills: **September 12-14, 19-20**

Contact: Denise Rugg at 248-338-4280 - deniserugg@ameritech.net

Training sponsored by Institute for Continuing Legal Education:

Plymouth: **January 25-29, 2005**

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

Advanced Mediator Training, General Civil

Mediators on general civil court rosters are required to obtain 8 hours of advanced mediator training every two years.

Training sponsored by Oakland Mediation Center:

Bloomfield Hills: **August 9** - Speaker: Michael Landrum. (8 hours)

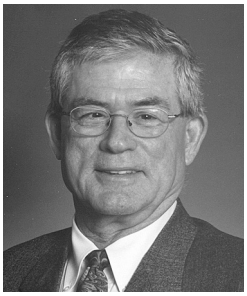
Contact: Denise Rugg at 248-338-4280 - deniserugg@ameritech.net

Training sponsored by Dispute Resolution Center of Central Michigan:

Lansing: **August 20** - "Ten Things Mediators Hate to Hear." Speaker: Anne Bachle Fifer (4 hours)

Contact: Karen Beauregard at 517-485-2274.

Due to the recent cancellation by Douglas Noll, The Oakland Mediation Center's Advanced Mediator Training will now be conducted by Mr. Michael Landrum, president of Americord, a conflict management and consulting firm based in Minnesota. Mr. Landrum is a mediator, litigator, adjunct professor of ADR, and frequent mediation trainer and lecturer.



Jon H. Kingsepp specializes in business litigation, municipal law and banking litigation with Howard & Howard of Bloomfield Hills. A commercial mediator, he is immediate past chair of the ADR Section, and also sits on the Council of the Senior Lawyers Section.

Is Mediation in Conflict with the Open Meetings Act?

— by Jon H. Kingsepp

As a public sector attorney, I have had conflicting opinions about the applicability of the Open Meetings Act ("OMA") to threatened litigation or to resolving issues of conflict among board members. The OMA allows a closed session of a public body to discuss litigation or to consult with an attorney regarding trial or settlement strategy in connection with specific pending litigation. MCL 15.268(e).

As an advocate of dispute resolution, I strive to resolve disputes before litigation has commenced. Many communities can barely support protracted litigation. They are concerned with financial constraints that arise through a lack of control over health care and retirement expenses, as well as reduced revenue sharing income from the State of Michigan. By way of avoiding litigation, one issue I have faced is how to achieve pre-litigation settlements without running afoul of the public disclosure requirements of the OMA.

A recent experience required a detailed analysis of the problem to avoid the limitations of the OMA. When a dispute among regional board members arose that had to be resolved and that had been a critical issue for that board for approximately two years, outside counsel recommended use of mediation. Obviously, the issue under discussion was not protected by the closed meeting provisions of the OMA, and yet it was important to resolve this dispute through a confidential process that held the promise of resolving the longstanding feelings of hostility among board members. They obviously did not want the process to be reported by the press, which might then draw certain political officials into the process. A goal was to keep the dispute from being publicized so all involved members of the board could keep focused on the resolution process itself. We did not want that process to be the feature article in the local newspapers. The existence of the mediation effort itself, if publicized early, could have resulted in a total standoff, which might have threatened the future of the regional system.

We used the Community Dispute Resolution Act (MCL 691.1557) provision on confidentiality as a part of the agreement

The attempt at mediation lasted nearly ten months without any disclosure to the press. Initially, discussions involving attempted resolution were held at the end of a noticed regular meeting. The public body did not go into closed session to continue the discussion since no member of the public was in attendance. The minutes regarding those discussions were succinct due to the confidentiality agreements that were imposed by consensus among the board members of the regional body. After many months, it became apparent that a more formal mediation process ought to be implemented to push the parties to the goal post. Much had been done in seven months to clarify views, create common understanding of the issues, and identify potential problems to be resolved. However, while the public body was now at the 20-yard line and only needed to move 20 yards more, it became necessary at this time to bring in an outsider. The outside mediator, a non-lawyer who was familiar with the field of activity and respected by members of the regional board, mediated the final points over a period of three separate sessions. A collateral issue became how to protect the confidentiality of the formal mediation process.

We used the Community Dispute Resolution Act (MCL 691.1557) provision on confidentiality as a part of the agreement that all participants signed with the mediator. Also considered was MRE 408, which protects settlement discussions whether or not there is pending litigation. This court rule, along with the Community Dispute Resolution Act, pointed to a predominant principle that settlement discussions, whether informal or formal, should be confidential and, in particular, discussions involving a mediator should be confidential. In support of the proposition of recognizing and encouraging settlement discussions, dicta was used from the case of People v Whitney, 228 Mich App 230 at 252 (1998), suggesting that "pending litigation most naturally refers to a suit that actually has been filed. However, active participation with an opponent in some type of alternative dispute resolution mechanism without a suit having been filed in court is considered to be 'litigation'."

The OMA was adopted at a time when mediation was not as publicized as it is today. Therefore, the legislature in preparing that act was unable to anticipate the increased need for protection of a public body's discussions from public disclosure in the matter of threatened litigation, or

attempts to resolve threatened litigation. In order to accomplish such work, and in order to operate in an orderly and effective manner, the public body must have protection against public disclosure. The goal is to administer your responsibilities as a public official effectively and efficiently and not to be the subject of constant press articles that are fed to the public on a weekly or daily basis. The tool of mediation, with the attendant protections of confidentiality under the Community Dispute Resolution Act, is one of the foremost vehicles for attaining this protection.

Another tool which might be utilized is to have outside counsel author a letter concerning the dispute addressed to the public body. That letter itself, pursuant to the Freedom of Information Act ("FOIA"), deals with information or records subject to the attorney-client privilege. MCL 15.243(h). Therefore, discussion of the content of the letter, which may involve legal consequences arising from the dispute as well as potential problems among board members, can be had in closed session. However, portions of such a meeting which do not involve disclosure or discussion of legal advice may be subject to the Open Meetings Act. Such was the situation in Booth Newspapers Inc v Wyoming City Council, 168 Mich App 459 (1988) and People v Whitney, 228 Mich App 230, 247 (1998).

Because of the increasing inclination to file lawsuits coupled with their serious financial impact on public entities, the use of mediation in resolving disputes that are not yet in litigation has become increasingly important. The goal is to resolve the dispute and minimize the expense to the public entity as well as the inconvenience to the other parties involved in the dispute. Therefore, every alternative dispute resolution mechanism that realistically approaches those goals should be employed, different ones for differing circumstances. With proper positioning of the parties, for instance, by formal confidentiality undertakings in an agreement to mediate, the confidential character of pre-litigation dispute resolution processes can be preserved, even as against the requirements of the Open Meetings Act.

In order to accomplish such work, and in order to operate in an orderly and effective manner, the public body must have protection against public disclosure.

Kent County Settlement Week Disposes of 118 Domestic Cases

— by David R. Drain

The first domestic relations "Settlement Week" in seven years was recently conducted by the Kent County Circuit Court's Family Division. In four days, June 14 - 17, 204 domestic relations cases were ordered into a settlement week which resulted in almost 60 percent of the cases (118) being settled or otherwise disposed of. The selected domestic relations cases had all been on the Court's docket longer than one year.

The cases were facilitated by 44 volunteers from both the Court's domestic relations mediator roster and the Family Law Section of the Grand Rapids Bar Association, and included both attorneys and non-attorneys. To prepare them for settlement week, the facilitators attended a May training session at the courthouse. During settlement week, the facilitators, serving pro bono, met in conference with the attorneys and parties during 90-minute sessions.

Throughout settlement week, the Family Division Judges cancelled all hearings in order to be available to meet with the facilitators to help with settlement discussions and place the settlements on the record. Additionally, the Circuit Court Referees were available to assist in the settlement effort, with the result that 81 settlements were placed on the record during the four days. In another 14 cases the parties committed to mediation, arbitration, or settlement conference, and another 29 cases had judgments or dismissals entered prior to the scheduled conference.

The idea for another settlement week resulted from an October, 2003, judicial retreat during which the judges discussed case scheduling issues. Besides endorsing the expanded use of Alternative Dispute Resolution, the judges proposed a settlement week to clear the backlog of older cases before implementing some scheduling changes. The Family Division Judges are extremely pleased with the effort that went into these conferences, and the very positive results.

David R. Drain has been the 17th Circuit Court Deputy Administrator since October, 1995. Prior to moving into his current position, Mr. Drain was with the Kent County Clerk's Office for eleven years. Mr. Drain is also a 1998 Graduate of the Court Executive Development Program and a Fellow of the Institute for Court Management.

The ADR Newsletter

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

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The ADR Newsletter 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. This newsletter seeks to explore various viewpoints in the developing field of dispute resolution.

For comments, contributions or letters, please contact:

Anne Bachle Fifer: at (616) 365-9236, fax: (616) 365-9346 or Benjamin Kerner at (313) 965-1920, fax: (313) 965-1921

Amendments to By-laws will be considered at Annual Meeting

Pursuant to Article VIII, Section 2, of the Amended By-laws of the ADR Section of the State Bar of Michigan, the Section Council is publishing the following proposed amendments to its by-laws, which will be considered at the Section's Annual Meeting on September 10, 2004. Both proposed amendments are to Article II, Membership:

Article II. Section 1. Dues. ~~Each member of the Section shall pay to the State Bar of Michigan annual dues of Twenty Dollars ($20.00).~~ Each member of the Section shall pay to the State Bar of Michigan annual dues of Thirty Dollars ($30.00). [remainder unchanged]

Article II. Section 5. Affiliates. Persons other than Michigan State Bar members, engaged in the use or advancement of ADR through practice or teaching, may become, with the approval of the Council, non-voting Affiliates of the Section upon payment of annual dues as defined in Section 1. Affiliates will not be eligible for Council or Executive Committee membership but may assist in the activities of the Section as requested. [new section]

The ADR Section Council recommends adoption of both amendments.

Register now for the Annual Meeting of the ADR Section!

Thursday & Friday, September 9-10, 2004

Soaring Eagle Casino & Resort, Mt. Pleasant

featuring Harry Goodheart, president, American College of Civil Mediators

Registration form inside!