The ADR Quarterly

Alternative Dispute Resolution Section of the State Bar of Michigan

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The Chair's Corner

by Marty Weisman

Things are really humming along for the Section. We have several new Council members that will add a great deal to the Section. They are William Gilbride and Abe Singer, both of Detroit; and Howard Spence of Lansing and Bernard Dempsey of Dearborn. Bill and Abe are both commercial trial lawyers and ADR providers, while Bern is head of the Wayne County Dispute Resolution Center and Howard is a former Administrative Law Judge and Arbitrator. We look forward to their participation and knowledge.

Our March Mediators Summit was a huge success which has prompted us to do it again. Look for our marketing materials towards the end of the year and our choice of a nationally renowned presenter who is not to be missed. On October 2 and 3, we will hold our Annual Meeting and Conference at the Park Place Hotel in Traverse City. The lead off speaker at 12:30 p.m. Friday will be Eugene Driker who will discuss his experiences as a mediator in the Detroit Bankruptcy. There will be local experts in the field of ADR presenting on a whole array of topics. Please take a look at our website for more details and registration information. The link for the agenda and registration form is http://higherlogicdownload.s3.amazonaws.com/MICHBAR/19aeea9e-4ffe-48f5-91af-5059bc9b29bb/UploadedImages/pdfs/AMReg15.pdf . The Sponsorship Form is at http://higherlogicdownload.s3.amazonaws.com/MICHBAR/19aeea9e-4ffe-48f5-91af-5059bc9b29bb/UploadedImages/pdfs/AMSponsor15.pdf . Our Mediation for the Never Married telephone seminar was our last quarterly telephone educational presentation. It too was very successful. Our next telephone presentation will be

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Judge David Lawson of the United States District Court discussing the new Eastern District's ADR Rules. The presentation will only cost Section members $10.00. It will be extremely helpful to those who want to participate and provide ADR Services to cases pending in the United States District Court for the Eastern District of Michigan.

On November 18, 2015, the ADR Section, along with the American Arbitration Association, will be sponsoring a basic arbitrator training course. This course will be given at the State Bar Headquarters in Lansing, and will last from 8:30 a.m. and until 5:30 p.m. The registration fee will be $250.00. The trainers will be Mary Bedikian and Sam McCargo, with additional commentary from Jan Holdinski, and me as the Moderator. This program is designed to acquaint registrants with the basics on how to conduct an arbitration. Registration will be limited to 24 attendees. The agenda and registration information are at http://higherlogicdownload.s3.amazonaws.com/MICHBAR/19aeea9e-4ffe-48f5-91af-5059bc9b29bb/UploadedImages/pdfs/ADRRegNov.pdf.

I urge all of you to participate in the discussion groups that are going on in the Section's website. By now, you may have received emails on the various topics. If you read them you would have learned that the Michigan Court of Appeals refused to enforce a settlement term sheet entered into at a mediation because it was contingent on the drafting of definitive settlement documents. *Control Room Technologies, LLC v Waypoint Fiber Networks, LLC*, unpublished two to one opinion of the Court of Appeals, issued April 28, 2015 (Docket No 320553). You would have learned of a Massachusetts Appellate Court (*Ventrice v Ventrice*, No 13-P-1992 (Massachusetts Appeals Court, March 19, 2015)) holding a mediation statute unenforceable because it made mediation mandatory. You would have also learned tips on handling language in your mediation agreements and best practices. This is a wonderful tool and I urge you all to participate.

The Section is growing. Our Section to Section Action Team, headed up by Peter Kupelian, is working with other Sections of the State Bar to provide those Section's members with information on Alternative Dispute Resolution and how it would work for them. We are doing this by providing program content for other Section's webinars and conferences, as well as written materials.

The June issue of the *Michigan Bar Journal* was dedicated to ADR. Several of our members had articles that were published in it. We urge you to read them. These articles were "First Offer," "Is Med/Arb the Process for You?," "Judicial Intervention in Arbitration Proceedings Pre-Award," "Tribal Court Peacemaking: A Model for the Michigan State Court System?," "Uniform Collaborative Law Act: Michigan Not Left Behind," and the Theme Introduction. The edition is available at http://www.michbar.org/journal/home .

We are constantly looking for ways to improve the acceptance of ADR processes by governmental agencies through our Government Task Force headed by Brian Pappas. We also have a Task Force headed by William Weber looking into possible new court rules or legislation making ADR automatic in various situations. As I have said in The Chair's Corner in *The ADR Quarterly*, we need your participation and input. Please take a look at the various Action Teams and Task Forces that service the ADR Section and contact that chairperson and join in the discussion.

I hope to see many of you at the Annual Meeting in October … . In the meantime, have a great summer …

Unintended and Unexpected Consequences of Med-Arb [1]

by Richard A. Glaser
Katz Sangster Wysocki, P.C.

In Alternative Dispute Resolution ("ADR") circles, much buzz has circulated about blending the best aspects of mediation and arbitration to create an alternative form of ADR known as "Med-Arb." In Med-Arb, a non-evaluative mediator first attempts to facilitate a consensual settlement between the parties. If mediation efforts fail to resolve all disputed issues, then the "mediator" puts on her "arbitrator" hat and proceeds to enter a final and binding award. In this way, the mediator's and the parties' respective investments are not wasted if settlement is not achieved, because the mediator's preliminary efforts translate directly into the arbitration learning curve.

From the mediation perspective, the imminence of a definitive award sharpens the parties' focus to settle. From the arbitration perspective, the neutral enters the decision-making process with lots of information and insight into the dynamics of the parties' dispute.

[1] The author wishes to thank the following for their key insights and feedback regarding this article: Shel Stark, accomplished ADR practitioner and mediator; Paul Simon, founder and President of Business Mediation Network; and Nathan Karnes, who practices law in Grand Rapids.

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What's not to like?

A. Med-Arb and Its Reliance on Private Contract and Waiver

To attorneys who have served as counsel or neutrals in arbitrations and mediations, the perils of Med-Arb are evident. For example, clients might not fully appreciate what they are buying into or giving up. The success of mediation depends on the mediator earning the trust and the confidences of the parties, usually through private meetings where candid *ex parte* communications are encouraged but, absent authorization, may never be shared with the other party. On the other hand, the integrity of arbitration rests on the absolute neutrality of the arbitrator – *ex parte* communications with either side are forbidden and can result in an award being set aside on the grounds of bias or evident partiality.

If the mediator is empowered to later render a final and binding arbitration award, will the parties confide their secrets and vulnerabilities? Might the mediator hold back on her best conciliatory tactics and assessments so as not to be misconstrued or appear to be pre-judging? Can either party be comfortable that any resulting arbitral award will not be influenced by confidential, *ex parte* communications from the mediation phase, rather than based on the objective facts and arguments presented to and confronted by both parties in arbitration?

Champions of Med-Arb recognize these challenges, and assert that the parties can be educated and the process and its participants adequately protected by full written disclosures and signed express waivers. In recognition that confidences shared in mediation caucuses may influence the arbitral award, commentators urge that the parties acknowledge the risk of confidential communications and expressly agree not to challenge an award on such grounds, relying on the arbitrator's ability to disregard the secrets and confidential bargaining positions conveyed during mediation. See, e.g., Blankley, "*Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both As Mediator and Arbitrator in the Same Case,"* 63 Baylor L. Rev. 317 (2011).

However, in view of the U.S. Supreme Court's opinion in *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008), and related federal decisions, there are no guaranties that the efficiencies and finality contemplated by Med-Arb will be enforced by a judiciary that may perceive an unwaivable conflict with the exclusive domain of the Federal Arbitration Act (FAA). The participants should also consider whether foreign courts (which cannot be discounted in the global economy) might hesitate to stay litigation in favor of Med-Arb or even find that a Med-Arb award is incompatible with its sovereign understanding of arbitration under the New York Convention. See, e.g., Vlasic, "*Med-Arb – Can You Afford the Risk,*" ADR Newsletter, Michigan State Bar, January 2008; Onyema, "*The Use of Med-Arb in International Commercial Dispute Resolution,"* 12 Am. Rev. Int'l Arb. 411, 415 (2001).

B. How Some Foreign Jurisdictions Treat Confidences During The Mediation Stage

Several foreign jurisdictions have embraced and codified the concept of Med-Arb more readily than the United States. See, e.g., Goodrich, "*Arb-Med: Ideal Solution or Dangerous Heresy,*" Vol. 15, Issue J, International Arbitration Law Review, 2012, and Van Eupen & Ko, *Hong Kong refuses to enforce a foreign arbitral award following "arb/med" procedure,* Int. A.L.R. 2011, 14(4) N. 25-28[2], which note that the arbitration laws of Australia, Japan, China, Hong Kong, and Singapore, as well as the China International Economic and Trade Arbitration Commission (CIETAC) Rules, permit arbitrators to act as mediators if the parties so agree. However, each of these Austral-Asian codes include the proviso that, upon resuming the role of arbitrator after mediation failed, the arbitrator must promptly disclose to all parties any and all confidential information obtained during the mediation that the arbitrator considers to be material to the arbitration proceeding. This disclosure requirement contrasts sharply with the direction of American Med-Arb proponents who advise that confidential communications be maintained and arbitral awards be strictly confined to the evidence presented at the hearing.

The American bias to protect confidences shared in mediation is understandable. After all, many states have adopted the Uniform Mediation Act which sanctifies the confidential communications central to the mediation process. The assumption that, as an arbitrator, the neutral can segregate mediation negotiations from relevant evidence is not alien to American jurisprudence where judges have often presided over bench and jury trials after having participated in settlement conferences.

Presumably, foreign jurisdictions that mandate a mediator's disclosure of confidential information that is deemed material upon transitioning to the arbitration stage would view a less transparent Med-Arb procedure with suspicion. They may even question whether the award resulted from a recognized arbitration proceeding. In our global economy, this distinction could present real problems when a prevailing party seeks to enforce an American Med-Arb award in a foreign jurisdiction (particularly against one of its own citizens) that internally demands full disclosure by the arbitrator of material confidential information privately shared in the failed mediation.

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[2] The primary purpose of the articles was to report on a Hong Kong court that declined to enforce a Chinese arbitral award on public policy grounds where the conduct of a member of the arbitral tribunal, while attempting to settle a dispute, was perceived to present a real risk of bias based on his unorthodox and aggressive communications directly with one of the parties. J. Reyes concluded that recognition and enforcement in Hong Kong of this Chinese award would be contrary to any sense of justice. Gao Hai Yen v Keeneye Holdings, (2011) HKEC, J. Reyes (4/12/2011).

As noted in the Goodrich article, the Hong Kong Court of Appeal reversed J. Reyes, holding that the award, although suspect, should be enforced.

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The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") was adopted to provide a uniform standard for the recognition and enforcement among signatory nations of foreign arbitral awards. The New York Convention mandates enforcement of such awards unless subject to one of the specified narrow defenses, which includes a public policy exception.

A public policy objection ordinarily is confined to narrow and exceptional grounds, as it may elevate sensitivity to local mores above the Convention's deference to the accepted practices and procedures where the award was made. The *Keeneye* case in Hong Kong (see, fn. 2, *supra*) illustrates that tension and, while the Chinese award was recognized on appeal, it was only after the expense, delay and public controversy antithetical to the objections of arbitration.

In the commercial arbitration context, where collectible assets reside overseas or other good reasons exist to convert an arbitral award into a foreign judgment, the potential obstacles to enforcement should be identified and evaluated before drafting the Med-Arb Agreement, rather than awaiting entry of the award. Key considerations are discussed in Section D, *infra*.

C. Potential Limitations to Contractual Waivers under the Federal Arbitration Act (FAA)

In 1925, Congress passed the FAA to establish arbitration agreements as a preferred alternative to civil litigation and to recognize and enforce arbitral awards in American courts as final and binding. The FAA establishes that U.S. courts must defer civil litigation to the procedures set forth in valid arbitration agreements. There has been no shortage of federal and Supreme Court litigation as to the application and interpretation of the FAA. Still, the definition of "arbitration" under the FAA (as under the New York Convention) remains elusive, and the extent to which a Med-Arb agreement, or its resulting award, will be recognized and enforced cannot be taken for granted. See, e.g., McLean & Wilson, "*FAA Applicability to Med-Arb Agreements*," New York Law Journal, Vol. 240, No. 8 (July 2008).

In *Hall Street*, *supra*, the Supreme Court determined that the grounds for vacatur of arbitration awards under Section 10 of the FAA are exclusive. The scope of judicial review could not be expanded beyond the four narrow categories of Section 10 (1)-(4), as the parties in *Hall Street* had attempted by "authorizing" the reviewing court to set aside an award for erroneous conclusions of law or substantially unsupported findings of fact, which are not among the limited grounds recognized by the FAA for vacatur. Nor, presumably, could the parties contractually restrict the scope of judicial review by eliminating one or more of the Section 10 categories. See, e.g. *Hoeft v. MVL Group*, 343 F. 3d 57 (2d Cir. 2003). According to the U.S. Supreme Court, the Congressional vision for the recognition of arbitration agreements and the enforcement of their awards under the FAA is not subject to compromise or tinkering.

In the context of Med-Arb, this raises the question whether the parties can waive in advance of the proceedings significant grounds to challenge an award because of evident partiality or improper bias under FAA Section 10(2), or that the arbitrator exceeded his authority under FAA Section 10(3) in making an award improperly influenced by confidences obtained in mediation caucuses.

Consider a situation where the losing party detects in the award evidence of private communications or partial compromises that were not in the arbitral record, and then challenges the award as having been influenced by *ex parte* conferences and negotiations that the disappointed party had no opportunity to confront or rebut. The prevailing party under Med-Arb may argue that both sides assumed that risk and, with advice of counsel, had expressly waived their rights to challenge an award based on the arbitrator's earlier role as a mediator. The prevailing party may also seek to distinguish *Hall Street* and *Hoeft* because the parties' decision to waive their personal rights and arguments is fundamentally different than an effort to remodel the federal courts' statutory scope of review under the FAA.

On the other hand, the arbitrator's powers are defined by the scope of the arbitration agreement. To the extent the agreement instructs the arbitrator to disregard confidential information gleaned from mediation, it would be an abuse of the arbitrator's powers to allow the award to be affected by such private evidence, which would also imply improper bias. After *Hall Street* and *Hoeft*, can the parties so restrict the already limited grounds on which courts may either enforce or set aside arbitral awards?

D. Other Possible Traps and Pitfalls

As noted earlier, the client must be well educated and mentally prepared for the Med-Arb experience. Counsel should push and prod to be satisfied that this hybrid process will best serve the client's needs and expectations.

1. Is the client's objective to achieve finality or mutual resolution?

- If finality, is it worth the risk to expose the arbitrator to the "dirty little secrets" your opponent might spin behind closed doors?
- If mutual resolution is desired, is it better to explore that option as early as feasible and without the specter of an immediate and final judgment? The client might also benefit from assurance that the neutral will not treat mediation as the pathway to the more lucrative arbitration engagement.

2. Are the client and counsel prepared financially and psychologically to arbitrate?

- The mindset necessary for effective mediation is much different than the focused advocacy essential to arbitration.

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- The motivation to reduce the legal spend by investing in mediation will be diminished to the extent legal fees must be simultaneously invested to prepare properly for an arbitration.

3. Is the timing right?

- Most experienced neutrals and counsel would agree that the optimal time to mediate is early, before the financial and emotional investment takes on a life of its own. Arbitrations, like trials, require time and careful preparation. There may well be a nexus where the time is right for both; good luck finding it.

4. Finding the right neutral.

- You don't need a card-carrying lawyer to mediate or to arbitrate. Psychologists and retired business executives have proven to be exceptionally effective mediators. General contractors and engineers are often selected to arbitrate construction disputes. However, to fill both roles requires a special combination of skills and experience that likely would eliminate non-lawyers, as well as candidates who would be well suited through technical expertise, cultural background or demeanor to serve in one role, but not the other.

E. Still Ready for Med-Arb?

If clients and counsel are determined that Med-Arb's anticipated benefits out-weigh the risks, then they must devote special attention to preparing the Med-Arb Agreement. Several of the articles cited herein provide sound pointers and guidelines for elements to be included.

See also, e.g., http://businessmediationnetwork.com/resources/med-arb/, and the following points:[3]

Fundamentally, any Med-Arb agreement must explain in advance the processes, expectations, and the roles and the risks for everyone's edification and protection. It should be signed by the parties, their counsel, and the appointed neutral who will act as mediator/ arbitrator. The Med-Arb Agreement should also reference the original ADR agreement and clarify whether it supplements or replaces that agreement.

The parties should consider whether any settlement reached through mediation should be reduced to an arbitration award. It might be best to acknowledge that option and reserve its implementation until a settlement is actually reached as confidentiality concerns may outweigh enforcement priorities.

The neutral should expressly acknowledge that any arbitration award will not rely upon or be influenced by any *ex parte* communication of confidential information received during mediation, just as a judge would not substantively consider for her final decision any evidence that she had deemed inadmissible.

The parties should stipulate that, in addition to the neutral's vow, they will not seek to set aside or challenge the recognition or enforcement of any award based on the arbitrator's role in the mediation process, including participation in ex parte conferences.

Include a stipulation that the arbitrator's award shall be recognized and enforced as a judgment in any court or forum of competent jurisdiction, consistent with applicable state or national law, the FAA, and/or the New York Convention.

In the award, the arbitrator should recount, without divulging confidences, the progression of the ADR proceedings and expressly confirm that he has not taken into consideration or been influenced by any information conveyed in mediation that was not introduced at arbitration.

F. Conclusion

Med-Arb is neither for the faint-of-heart, nor those prone to second-guessing. But its allure was well expressed by the CFO of a multi-national corporation who complained that the "Kumbaya" spirit of facilitative mediation is of little value if its investment results in no tangible result. The business community might well prefer the finality and certainty of Med-Arb rather than fret over due process and seemingly remote concerns over legal enforcement. Still, as counsel to our clients or practitioners of the ADR arts, it is incumbent that we understand the risks, communicate them clearly, and be conscientiously prepared to deliver our services as advocates or neutrals.

Rich Glaser has practiced civil litigation in Detroit and Grand Rapids for 38 years, and has provided mediation, arbitration and other ADR services since the 1990s. He was selected by the Western District of Michigan Federal Court to serve on its inaugural VFM roster in 1996, and has taught International Commercial Arbitration in an adjunct capacity. Rich heads the Grand Rapids office of Kotz Sangster Wysocki, P.C.

[3] Additionally, the parties and counsel should carefully interview a selectively screened group of candidates for this pivotal role and explore not only their experience and credentials, but also their attitudes and philosophies about the Med-Arb process.

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THE MEDIATOR'S PROPOSAL:

Why It Should Not Be Used In Civil Mediation, and Why Mediators Sometimes Make An Exception to this Rule

by Lawrence P. Schneider
Knaggs, Harter Brake & Schneider, P.C.

Surveys have revealed that, in the opinion of parties to mediation and their attorneys, two of the biggest tactical mistakes mediators can make are:

1) Declaring impasse and giving up too early.
2) Failing to declare impasse long after the process has stopped being useful, at least for the day (sometimes perceived as "running up a bill").

As mediators, we strive to know the difference, where we do not give up too early, but we do not waste the time of the parties who have asked our assistance. Sometimes, that is the most difficult thing we do as mediators.

We often talk about techniques and methods to "bridge impasse." There is one that can be used, but only with extreme care and as a "last resort" on the part of the mediator.

The Mediator's Proposal

A mediator's "recommendation" or "proposal" is quite frequently used in labor contract disputes. Unlike the practice in civil dispute resolution, labor mediators often perform an *evaluative* function. They can talk about their experience in the labor market, and what trends they are seeing with other employers and unions and their contracts. In labor negotiations, binding agreements usually cannot be made at the bargaining table or even at mediation. Typically, a tentative agreement is made at the table and the union takes the agreement to a ratification vote of its membership. In public sector labor negotiations, a city council or other governing body may have to give final approval to any settlement, especially if it exceeds the authority the negotiator may have been given. In private sector collective bargaining, the management negotiator will typically have more authority to enter into a binding agreement, but sometimes a Board of Directors or other body will first have to sign off on the agreement.

As with general civil mediations, labor mediators certainly strive to help the parties reach their own agreements. But often, since the negotiators at the bargaining table and at mediation do not always have the "ultimate authority" to bind a larger group to whom they must answer, they may fear being chastised for tentatively agreeing to something that their constituency will vote down.

When the parties are seemingly at impasse during the collective bargaining process, the labor mediator may ask if a "mediator's proposal" would be of assistance. In exchange for such a proposal, the negotiators would agree to at least take the proposal back to their constituency for a vote.

A mediator's proposal is not a forecast of who will win in the long run, or even what the mediator believes is "fair" to both parties. It is simply a choice made by the mediator, believing that it is a choice that both parties could accept, while at the same time being a stretch for both parties. It has the advantage of allowing the spokespersons for the bargaining teams to take a settlement back to the membership and employer's governing body for a vote. Thus, they are not "creating" the bad news, just delivering it! For example, the spokespersons at the table may be able to report that the mediator made a final proposal that they couldn't, in good faith, refuse. Often, not being responsible for a controversial settlement may also help a negotiator avoid the wrath of the constituent body that must act on the "proposed settlement." The fact that the settlement is being "recommended" or "proposed" by a neutral third party may give the settlement figure just a little more credibility to the ultimate decision makers.

This process is not guaranteed to result in a labor contract, but at least it gets the dispute to the constituency, who may be more flexible or anxious to resolve the contract than the negotiators.

Using a Mediator's Proposal in Civil Mediation, Where the Decision-Makers Are (or Should be) at Mediation

Suppose the parties have negotiated for hours. All forward movement has ceased for the past two hours, yet the parties and lawyers remain heavily invested in the process. They have repeatedly emphasized to you that they want to leave the mediation with an agreement. But now they are getting frustrated. Suppose further that you have developed a good rapport with the parties. One or

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both lawyers have privately expressed frustration to you that their client is being just a little too stubborn, but that lawyer is unable to change the client's mind. Neither party is willing to budge, or make another offer. Everyone is looking at their watches. Someone says, "I am not missing my daughter's swim meet tonight, and it starts in two hours." The parties and lawyers are demanding that you, as the mediator, do *something*.

Earlier in your mediation career, you would have declared an impasse and sent everyone home. Instinctively, however, you know that this case should settle, and you know where that settlement should probably be, given all that you know about the case, your reality testing, and the positions of the parties. An adjournment will not work -- trial is impending. You know that the parties selected you because you practice in the subject area of the dispute. The parties made much progress today, but you have run out of "tried and true" mediation techniques to bridge the final gap or break the impasse. Many minutes go by. You hear briefcases shutting in one room, and coat hangers rattling in the other.

You can let them walk out.

Or you can break every rule that you have been taught as a mediator and suggest a confidential Mediator's Proposal. Only if both parties agree should you utilize this tool.

It should not be a "cut the baby in half" proposal (unless absolutely warranted). A Mediator's Proposal under these circumstances is not really as much a "proposal" as it is a *final question* before you declare impasse:

Would you settle the case for $72,000, payable within 60 days? □ Yes □ No

You tell the parties that you will put a question with nothing more on a page in two unsealed plain envelopes. You ask that each side check one box - yes or no - write nothing more and return it to you in the envelope sealed. Above all, you warn, "Do not sign or identify your response." You make it clear that the only thing that you will ever reveal is whether you receive two "yes" responses, in which case, you will reconvene the entire group to draft a settlement. If you receive one or two "no" responses, you will thank the parties, declare impasse, and send them on their way. A party who rejects will never know how the other party responded. Even you, as the mediator, will not know who said "yes" and who said "no" in that case.

Reasons Why a Mediator Should Refrain from Using a Mediator's Proposal

1. It runs contrary to the cardinal rule of mediation, that settlements should be party-driven, not mediator-driven.
2. Such an agreement may be grudgingly accepted at best, and one of the purposes of mediation is to allow parties to satisfy their own interests.
3. Savvy lawyers who know you will use the technique will not work at mediation to settle the case, but instead will try to posture for a favorable mediator's proposal.
4. It is contrary to everything you have been taught.
5. It is fraught with dangers in complex disputes which involve more than a mere payment of money.

When, if ever, a Mediator's Proposal Might be Used

Only when you, as a mediator, using your very best judgment, experience, and ability to read people, determine that failure to do so, under the narrow circumstances of a particular case, will likely work a greater disservice to the parties than doing so. *In other words, it is your only alternative before declaring impasse, and these parties desperately want to resolve the case today!*

In this author's personal experience, both as a labor negotiator, and a civil mediator, it has become clear to me that every once in a while, the parties really do desire that a neutral third party, not their own lawyers, suggest an appropriate settlement. I have not used the practice often in my career, but I can say that I have not been disappointed on those rare occasions when I felt compelled to resort to the practice.

To be sure, this process does not always work, and if it does not, it will result in the conclusion of mediation proceedings in the case, at least for that session. Overuse of this practice could destroy the mediator's reputation as a true neutral. But there are some occasions when a mediator instinctively knows that it is not only acceptable, but appropriate, to stray into an evaluative mode.

Every mediator wants a few tools available to avoid declaring "Impasse." When used sparingly and wisely, it is not improper to break all of the rules we have been taught, and consider a "Mediator's Proposal." Above all, mediation is not all about following set rules of

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procedure; it is about using sound judgment to help the parties arrive at their own resolution. Sometimes, a gentle nudge might be just what the parties need.

Lawrence Schneider has served as an attorney and partner in the Lansing law firm of Knaggs, Harter, Brake & Schneider, P.C. since 1997. He was a partner in another prominent Lansing law firm for 17 years before that, after serving three years as an assistant prosecuting attorney in Ingham County after graduating from Thomas M. Cooley Law School in 1977.

Larry has focused his legal practice on employment law while with both law firms, and regularly serves as a neutral state and federal case evaluator in employment and civil rights lawsuits. He is also a civil mediator, concentrating in the resolution of employment lawsuits. He has also served as an administrative law examiner for the Michigan Commission on Law Enforcement Standards and is a volunteer arbitrator for the Attorney Grievance Commission. Larry has also been appointed to serve as a special assistant attorney general by Attorney Generals Frank Kelley, Jennifer Granholm, Mike Cox, and Bill Schuette.

Larry recently moved in-house to one of his longstanding clients, the Michigan State Police Troopers Association. He remains of counsel to the Knaggs Harter Law Firm to continue his ADR practice. He is the President of the Board of Directors of the Resolution Services Center of Central Michigan.

Mediation and Domestic Abuse

by

*Veronica T. Thronson and Zena D. Zumeta**

MCR 3.216(A)(1) requires that all domestic relations cases, as defined by MCL 552.502,[1] and actions for divorce and separate maintenance that involve the distribution of property be subject to mediation, unless otherwise provided by statute or court rule.[2] The Court Rule further provides that parties who are subject to a personal protection order or who are involved in a child abuse and neglect proceeding may not be referred to mediation without a hearing to determine whether mediation is appropriate. Parties may also move to remove the case from mediation on various grounds, including domestic abuse and concern for the health or safety of a party.[3]

The State Court Administrative Office (SCAO) has published a Domestic Violence Screening Protocol for use by mediators. The 2014 Michigan Standards of Conduct for Mediators require the use of this protocol by domestic mediators.[4] In addition, courts and lawyers should be aware of and alert to the presence of coercive control and domestic abuse that may make mediation inappropriate.

This article addresses the SCAO protocol that has been put in place to ensure that cases where domestic abuse is present are screened prior to mediating. We provide a brief overview of the dynamics of domestic abuse and the pros and cons of mediating cases involving domestic abuse. Finally, we provide an overview of the screening protocol with its helpful tips on how to determine if domestic abuse is present in the relationship and, if so, whether mediation should be altered or declined.

The purpose of mediation is to help people reach voluntary non-coerced agreements. The presence of fear by one party toward the other party, and coercive control of one party over the other, allow the possibility of non-voluntary and coerced agreements. These are also indicative of a power imbalance great enough to question whether one party will overpower the other during the mediation. For these reasons, lawyers, mediators and judges should be hesitant to order or welcome parties into mediation where there is the presence of coercive control, or physical, emotional or verbal abuse, all which constitute domestic abuse.

Before addressing the Domestic Violence Screening Protocol used by mediators in Michigan,[5] it is important to remind the reader about domestic abuse and its prevalence in society. Most experts agree that domestic abuse is an alarming problem that affects not only the family but the entire community and society in general. The National Intimate Partner and Sexual Violence Survey found that nearly 3 in 10 women and more than 1 in 4 men in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetimes.[6] It is also reportedly the leading cause of serious injury to American women between the ages of 15 and 44, and is more common than automobile accidents, muggings, and rapes combined.[7] Still, domestic abuse brings fear, guilt and shame to the abused party who may not be able to admit it to herself[8] or to report it. One just needs to open the newspaper to realize that although much has been done in terms of holding perpetrators accountable and protecting their abused partners, domestic abuse continues to be seen by many as a private matter that people are not able or willing to discuss in public.

What is Domestic Abuse?

The United States Department of Justice defines domestic abuse as "a pattern of abusive behavior in any relationship that is used

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by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone."[9]

Tactics of Power and Control

Careful screening of a relationship is essential to determine if there is domestic abuse in the relationship. Unfortunately, a screener is not likely to immediately determine a primary aggressor or an abused party. Perpetrators of domestic abuse use a number of coercive and intimidating tactics to manipulate and control their intimate partners. While it may be obvious to see physical abuse, it is more difficult to discern other forms of abuse. The tactics used by abusers include:

- **Emotional and Verbal Abuse:** such as persistent criticism; insults; mind games; humiliating the other party; making the other party feel guilty.
- **Sexual Coercion:** such as manipulating the other party into having sexual intercourse; unwanted touching; sexual assault.
- **Financial/Economic Abuse:** controlling how money is spent; preventing the other party from getting or keeping a job; giving an "allowance" to the other party; making the other party beg for money; denying the other party access to income.
- **Sexism:** creating set roles based on gender, for example, making sure the "man" makes all the decisions and giving the woman roles that involve cooking and cleaning. Teaching male children to be disrespectful of women.
- **Using Children:** using children as a way to create dependency; threatening to take away the children; hurting or threatening to hurt the children; telling or threatening to tell the children negative things about the other party; encouraging the children to disrespect the other party.
- **Denying, Blaming or Minimizing:** such as denying the abuse or acting as if it is not that serious; saying the other party provoked the abuse by not following the rules; not taking responsibility for the abusive behavior.
- **Isolation:** keeping the other party away from friends and family; taking or controlling access to social media.
- **Extreme Jealousy:** accusing the other party of cheating or not letting her be involved in social activities at work or with relatives.
- **Intimidation or Threats:** such as using looks, actions, gestures, throwing objects at the wall or near the other party; displaying weapons; destroying property; threatening to hurt the other party or someone she cares about, including pets; threatening to commit suicide.

In addition to the above-mentioned tactics, perpetrators who are parties to a divorce or custody proceeding may try to undermine the abused party's parenting; they may bring frivolous motions or may threaten the abused party during exchanges of the children for parenting time.

A screener must be aware that sometimes an abuser is able to appear charming and outgoing while an abused party may appear angry, difficult and/or combative. A screener must be alert to ensure that his or her own safety and that of the parties are priority when determining whether a case is appropriate for mediation.

How can we find out if coercive control or domestic abuse is present?

The SCAO Protocol has several sections that utilize a well-researched approach to asking questions about this delicate topic. Most abused parties and perpetrators are used to hiding any details of abuse. Moreover, some abused parties may not have labeled the behavior they are enduring as abuse. Therefore, the parties are not told that they are being asked about domestic abuse, and the protocol starts with general questions on the dynamics of the relationship and builds up to specific questions about physical, emotional and verbal abuse.

The screening should be done separately and in person with each party. Best practice is not to have both parties in the building at the same time, in case that could be intimidating to one of them. The interview is confidential, and the mediator will not tell anyone what has been discussed without the permission of the party. Exceptions to confidentiality are covered by MCR 2.412,[10] and include threats of harm to another person, information about abuse or neglect of a child or vulnerable adult, criminal activity, and the like. The mediator is looking for any signs that there might be intimidation, coercion or fear. The signs can be very slight, and nuanced, so it is very helpful to be face to face with the parties.

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The purpose of the screening is to determine whether mediation is appropriate. The standards for determining whether mediation is appropriate are the following:

1) Can the parties speak up for themselves and negotiate effectively for themselves, or do they have someone with them in the mediation to do that for them?

2) Can the parties reach and carry out voluntary and un-coerced agreements?

3) Can the parties feel safe and comfortable during and after mediation sessions?

4) If there is a power imbalance, does the less powerful party want to mediate?

What are the questions that are asked during screening?

The first questions focus on what brought the parties to mediation, including questions about the decision to separate or divorce and whether each party wants to mediate. The second section concerns control, coercion, intimidation and fear. But the questions are still general – how were decisions made in the marriage/relationship; what happens when the party speaks up; what happens when they fight; how do they feel about sitting with their partner in the same room in mediation (or would it be better to have attorneys or separate rooms, etc.)? The follow-up questions suggested are very important, as they flesh out the reasons for the answers that are given.

Section 3 focuses on violence and fear of violence. The questions now become more focused and less general. Has there been any physical violence? Is this party afraid of the other party? Does this party feel threatened or harassed by the other party? The questions also ask about arrests, convictions, personal protection orders and the like, as well as specific acts of violence and the presence of weapons in the home. The final question in this section is whether the party feels in any danger at the present time.

Section 4 focuses on the children, and danger to the children. Section 5 asks if they've told their attorneys about any violence or abuse. Often they have not told their attorneys. Finally, there is a short section on substance abuse and mental illness, which could cause capacity problems for mediation. There are two final wrap-up questions and the screening protocol is done. It can take 15 minutes to an hour, depending on how much the person wants to talk.

There are also two abbreviated questionnaires, in case there is limited time, or the parties are already in the courthouse and through security screening. However, the longer protocol is much preferred.

Guidance

The protocol also gives guidance for how to administer the protocol, and action to take based on the answers to the questions. For example, if abuse is brought up, make sure that the abused party gives compelling reasons to want to mediate before moving forward. There are also suggestions for how to make the process safer,[11] how to contact help, and how to safely conclude mediation so that there is less chance of retaliation by the abuser against the abused party. The protocol includes checklists and scripts to help the mediator, and examples of protective provisions in mediated agreements. It is comprehensive and extremely helpful.

We invite you to read through the protocol and see what it offers.[12] We would like to start a conversation about its use in the Family Law and Family Mediation community.

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1 "Domestic relations matter" means a circuit court proceeding as to child custody, parenting time, child support, or spousal support, that arises out of litigation under a statute of this state. MCL 552.502(m).

2 Note that we are referring to private mediation under the court rule. For litigants with an open Friend of the Court (FOC) case for child custody or parenting time, mediation is governed by statute. See MCL 552.513.

3 MCR 3.216(C) and (D).

4 Standard VI.A., Safety of Mediation, states:

> "Consistent with applicable statutes, court rules, and protocols, reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues. Examples of impediments to the mediation process include: domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; mental illness or other mental impairment; and inability to understand or communicate in the language in which mediation will be conducted….

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> "In domestic relations cases, "reasonable efforts" should include meeting separately with the parties prior to a joint session and administering the "Mediator Screening Protocol" for domestic violence, published by the State Court Administrative Office."

Mediator standards can be found online at: http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf

5 Please note that mediators on the court's roster must be trained in the use of the Domestic Violence Screening Protocol. However, there are other mediators who are not approved by the court, and who do not use the Protocol. We suggest that attorneys inquire whether a mediator is using the Protocol before engaging a private mediator.

6 The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report, the Centers for Disease Control.

7 Maryland Network Against Domestic Violence, 1999.

8 Because an overwhelming number of abused victims are women and children, gender references in this article refer to women. However, the authors acknowledge that domestic abuse affect male victims and same sex partners as well.

9 http://www.justice.gov/ovw/domestic-violence

10 This rule applies to civil and domestic relations cases referred to mediation under MCR 2.410 and 3.216. Under this rule, all mediation communications are confidential, not subject to discovery and inadmissible as evidence. Mediation communications include written and oral communications made during a mediation session or in the course of preparing for or planning mediation. The rule lists specific exceptions to confidentiality, such as when all parties agree otherwise in writing. When allowed, the rule also specifies the permitted scope of disclosure.

11 For example, interviewing the parties on different days or times and ensuring that the abused party has a safety plan, if still living with the abuser.

12 The SCAO Screening protocol can be found online at: http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Domestic%20Violence%20Screening%20Protocol.pdf

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A version of this article was previously published in the *Michigan Family Law Journal*, a publication of the Family Law Section.

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Enhanced Knowledge in Contested Probate Matters Helpful in Mediations

by Sally Babbitt

Like many mediators, I have been through the requisite training to be a court approved mediator in both general civil and domestic relations mediation. And theoretically, I can mediate any type of case. However, as a litigator, I feel that it is a great benefit to have a mediator who is knowledgeable and experienced in my area of work—probate and trust matters.

Contested or litigated probate matters may involve such issues as challenges to the validity of a will or trust, challenges to accountings or fees, interpretation of discretionary provisions in a document, breach of fiduciary, and guardianship and conservatorship proceedings. Challenges often deal with matters of legal capacity or undue influence, so having experience in the symptoms and nuances of these problems is very helpful.

There are several reasons that probate and trust cases are unique from other civil matters and domestic matters. First, unlike most general civil matters (but similar to domestic relations cases) the parties in contested probate matters are typically family members.

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Understanding the family dynamics is key to being able to resolve the issues at hand. I find that most contested probate matters go "back to the sandbox" so to speak, in that they relate to deep childhood "wrongs" that a party feels has been done them. Figuring out how to get to the root of the issue rather than only dealing with the legal issues take experience and perception.

Procedurally, probate matters are unique in that there are "petitions" as well as "civil actions" brought in the probate court, sometimes on the same matter. Experience and familiarity with Chapter 5 of the Michigan Court Rules is a great advantage to the mediator in understanding what the potential outcomes can be in court, and in creating settlement options that may offer relief not within the scope of the court's remedies. Issues in contested probate matters are often equitable in nature, therefore, money awards don't always solve the problem. For example, sometimes agreeing to have an independent third party serve as fiduciary is the solution, which is outside the parameters of money awards.

Often times the dispute arises as a result of an alleged oral agreement or promise made by a decedent, or another scenario where documentation doesn't exist or has been lost. In these cases, knowledge of contract law is helpful, but knowledge of the Estates and Protected Individuals Code ("EPIC") is even more helpful.

Finally, each county and each judge can bring a completely different perspective to a case which makes probate litigation a more fluid area to practice in. Having a mediator who is experienced with the county and judge that is presiding over the case will help to manage party expectations as well.

While contested probate matters are not as common as cases like family law or employment law, when they do arise, it's helpful to have a mediator who is familiar with these issues to help reach resolution for the parties both emotionally and financially.

Sally D. Babbitt is an attorney and mediator Of Counsel at Laksy Fifarek, PC in Lansing, MI. She has been helping individuals and families navigate the legal issues of death an incapacity for over 14 years and has an AVVO rating of 10. She has experience in probate matters in many counties throughout the state. You can find more information at www.sallybabbittlaw.com.

A Summary Jury Trial Pilot Has Landed in Michigan

by Richard L. Hurford

On September 23, 2013, the Supreme Court Administrative Office convened an Early ADR Summit that was attended by well-respected litigators, judges and neutrals from across the state. During that summit, which culminated in a number of recommendations for counsel and the judiciary to increase efficiency and a reduction in litigation costs,[1] there was a discussion of the use of a summary jury trial as a potential ADR technique. Justice Bridget Mary McCormack, one of the attendees at the Early ADR Summit, suggested that a task force of litigators, judges and neutrals evaluate the wisdom of implementing such a process in Michigan. During 2013 through 2014, this Summary Jury Trial Task Force, chaired by Thomas W. Waun, evaluated the available literature and the efficacy of summary jury trials in a number of jurisdictions throughout the country. Following this evaluation, the Task Force universally endorsed the concept and submitted its proposed recommendation to implement a summary jury trial process on a pilot basis for a period of two years. At the conclusion of two years, the Task Force would review the results of the pilot project and recommend potential changes and potential implementation on a state wide basis. As a result, on March 25, 2015, the Michigan Supreme Court approved an Administrative Order authorizing the implementation of a Summary Jury Trial process that provides litigants with yet another option to consider for the efficient, cost effective and fair resolution of disputes.[2]

A number of courts outside Michigan have successfully employed binding "summary jury trials" as a form of alternative dispute resolution when the amount in controversy is not sufficiently large to justify the cost and expense of a full, traditional trial and the parties desire a binding decision from a jury rather than an arbitrator.[3] Perhaps the best known, widely embraced and successful example of this particular dispute resolution mechanism is that provided in the Charleston, South Carolina County Courts.[4] The South Carolina process involves the voluntary agreement of both parties who select a mutually agreeable hearing officer to preside over a summary jury trial. The jury's decision is binding upon the parties. Prior to the date set for the summary jury trial, the parties meet with the hearing officer and agree upon the ground rules, the jury instructions to be given, and the verdict form. It is the responsibility of the hearing officer to ensure the agreed upon ground rules will be followed and to make any evidentiary rulings that were not resolved or anticipated at the pre-trial conference. On the day scheduled for the trial, the parties appear at a court room in the Charleston court, empanel a jury drawn from the court's standard jury pool, and complete the trial in one day.

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In Michigan, counsel may have some familiarity with summary jury trials that have been utilized as a settlement device in the Federal District Court for the Western and Eastern Districts of Michigan. The Western District practice is governed by a specific local rule:

> 16.7 Summary jury trials; summary bench trials
>
> a) Summary jury trial - The summary jury trial is an abbreviated proceeding during which the parties' attorneys summarize their case before a six-person jury. Unless the parties stipulate otherwise, the verdict is advisory only.[5]

Unlike the practice in South Carolina and the approved Michigan pilot project where the jury's decision is binding, the summary jury trial's decisions in the Western and Eastern Districts of Michigan are advisory only unless the parties otherwise stipulate.

The essential features of the Michigan pilot summary jury trial process approved by the Supreme Court include:

a. It will be piloted in Macomb County Circuit Court and other jurisdictions yet to be determined;

b. Each pilot court will establish guidelines for eligible cases;

c. The process is voluntary and the parties are called upon to stipulate to the summary jury trial – parties who so stipulate are bound to use the process unless the case is settled;

d. The parties mutually select the hearing officer who will preside over the summary jury trial and the trial court is prohibited from appointing, recommending, directing or otherwise influencing a party's or attorney's selection of the hearing officer;

e. The hearing officer will meet with the parties to tailor the procedures for the summary jury trial with reference to the general guidelines set forth in the administrative order;

f. It is anticipated the summary jury trials will be completed in one day;

g. The hearing officer ensures the procedures are followed as agreed to by the parties, makes any necessary evidentiary rulings, and instructs the jury;

h. The summary jury is selected from the standard jury pool in the circuit and the summary jury trial will be conducted in a courtroom at the county courthouse;

i. A jury of 6 will be empanelled by the following procedure: 10 prospective jurors will be seated and each party will have the opportunity to exercise 2 peremptory challenges -- there are no challenges for cause;

j. If the parties enter into a high-low agreement, that fact will not be communicated to the summary jury; and,

k. The verdict is binding and there are extremely limited bases for appealing the summary jury's decision.

While not necessarily appropriate for complex legal and factual disputes, the process has proven very effective in the Charleston experience and elsewhere for disputes of less than $150,000.00. The process is often coupled with the parties agreeing to a high-low arrangement. For example, if the plaintiff and defendant agree to a high-low of $100,000.00 - $20,000.00, even if the summary jury no causes the plaintiff, the plaintiff will still receive the agreed upon low of $20,000.00. In this example, if the summary jury enters an award of $150,000.00, the plaintiff's recovery is capped at the agreed upon high of $100,000.00. If the jury's verdict is between the agreed upon high-low, then the plaintiff's recovery is in the amount of the verdict. As indicated previously, the summary jury is not advised of any high-low agreement prior to its deliberations under the terms of the Administrative Order approved by the Michigan Supreme Court.

Although a summary jury trial can be a stand-alone ADR technique, it may also be incorporated into multi-staged ADR agreements very similar to the med-arb hybrid process that has gained recent popularity. If the parties stipulate to use the summary jury trial process, the trial court cannot order the parties to engage in other forms of ADR such as mediation or case evaluation. However, the parties could voluntarily agree to engage in mediation and might select a mediator who will act as the hearing officer should the mediation not resolve the entire case. Following the mediation, the mediator will become the hearing officer to preside over the summary jury trial (unless the parties desire a different hearing officer than the agreed upon mediator) to decide those issues that were not resolved at the mediation. Similarly, if the parties agree to a high-low arrangement, then, just like in the med-arb high-low hybrid, the parties will be bound by that agreement.

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Utilizing the summary jury trial as the penultimate dispute resolution step following an unsuccessful mediation avoids many of the various concerns that some parties and neutrals may have with the hybrid med-arb process when the mediator becomes the arbitrator.[6] The use of a summary jury trial may also appeal to parties who want to avoid the costs of a traditional jury trial but are more comfortable with a jury making the binding determination rather than a single arbitrator or an arbitration panel. As observed by the National Center for State Courts in its study:[7]

> Several of the programs examined in this study were initiated in response to broad dissatisfaction by both the plaintiff and defense bars with the fairness of mandatory arbitration decisions.

The *Vanishing Jury Trial* has become a concern to many commentators and the bane of associates and less experienced attorneys who are hard pressed to gain any jury trial experience. After all, in Michigan less than 1.4% of cases in 2014 were disposed of by a jury trial. As a result the summary jury trial process has been embraced by many practitioners and organizations in providing their clients another option to consider. In fact, the American Board of Trial Attorneys (ABOTA) passed a resolution in January 2012 that embraces the implementation of summary jury trials as a viable dispute resolution technique:

> It is therefore, RESOLVED, that ABOTA supports the concept of streamlined procedures and expedited jury trials and that ABOTA, through its leaders and members, should support existing expedited jury trial programs and encourage the adoption of similar programs throughout all jurisdictions.

Macomb County is prepared to pilot the program immediately and believes it will soon become a very beneficial dispute resolution tool in the appropriate cases. It is anticipated that other circuits will join the pilot program and the Summary Jury Trial Committee looks forward to collecting the data necessary to permit a determination if the process requires any modifications and will be made generally available throughout the state at the conclusion of the two-year trial program.

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1 http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/ADR%20Summit%20Report%20September%204,%202013.pdf

2 *See* http://courts.mi.gov/Courts/MichiganSupremeCourt/ rules/court-rules-admin-atters/Court%20Rules/ 2014-24_2015-03-25_formatted%20order_AO%202015-1_Summary%20Jury%20Trial.pdf.

3 *Short, Summary & Expedited, The Evolution of Civil Jury Trials*, National Center for State Courts, www.ncsc.org.

4 Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, 41 Loyola of Los Angeles Law Rev. 1585 (Summer 2008).

5 *See also*, LR 16.7 Federal District Court for the Eastern District of Michigan (specifically identifies the summary jury trial as an approved ADR process).

6 *See, e.g.*, Brian A. Pappas, Med-Arb: *The Best of Both Worlds May Be Too Good to Be True*, 3 Dispute Resolution Magazine Vol. 9 (Spring 2013); Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, 27 Willamette L. Rev. 661 (1991). See also, Richard A. Glaser, *The Unintended and Unexpected Consequences of Med-Arb, supra.*

7 *Short, Summary & Expedited, supra.*

Richard L. Hurford is vice chair of the Summary Jury Trial Task Force, President of Richard Hurford Dispute Resolution Services, P.C., a member of Professional Resolution Experts of Michigan (PREMi), Chair of the Macomb County ADR Committee, Chair of the Oakland County ADR Committee, and President of the Michigan Chapter of the Association for Conflict Resolution. He is also co-author of A Taxonomy of ADR: A Guide to ADR Practices & Processes for Counsel that can be accessed at http://hurfordresolution.com

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Upcoming Mediation Trainings

General Civil Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a). For more information, visit the SCAO Office of Dispute Resolution web-site, and select "Mediation Training" then "Upcoming Trainings": http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/Mediation-Training-Dates.aspx.

Bloomfield Hills: **July 23, 30, August 6, 13, 20**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call 248-348-4280 ext. 216

Plymouth: **October 8-10, 23-24**
January 14-16, 29-30, 2016
Trainings sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Domestic Relations Mediation Training

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

Holland: **August 3-8**
Training sponsored by Mediation Services
Register online at www.mediationservices.works or call 616-399-1600

Bloomfield Hills: **September 11, 18, 25, October 2, 9, 16**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call 248-348-4280 ext. 216

Advanced Mediation Training

Mediators listed on court rosters must complete eight hours of advanced mediation training every two years.

Bloomfield Hills: **September 25**
Domestic Violence Screening Training for Mediators
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call 248-348-4280 ext. 216

Traverse City: **October 2-3**
ADR Section Annual Meeting
Trainers: some of Michigan's best mediation trainers, selected by the ADR Section's Skills Action Team
Training sponsored by ADR Section of the State Bar of Michigan
To register, go to http://connect.michbar.org/adr/events/eventdescription/?CalendarEventKey=b8e20760-3027-4b79-9f96-512b4c41785a&EventTypeKey=&Home=/adr/events/upcomingevents/

Bloomfield Hills: **December 3**
Mediator Wisdom: Reflections, Imitation and Experience
Trainer: Kenzi Bizbing
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call 248-348-4280 ext. 216

How to Find Mediation Trainings Offered in Michigan

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

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

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

ADR Section Member Blog Hyperlinks

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

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

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

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

SAVE THE DATES

BASIC ARBITRATOR TRAINING November 18, 2015

The ADR Section, along with the American Arbitration Association, is sponsoring a basic arbitrator training course.

The trainers will be Mary Bedikian, Professor, Michigan State University Detroit College of Law, and Sam McCargo, ADR Section Council member, with additional commentary from Jan Holdinski, Vice President, American Arbitration Association, and Marty Weisman, ADR Section Chair, as the Moderator. This program will acquaint attendees with the basics on how to conduct an arbitration. Registration is limited to 24 attendees.

The program is scheduled for Wednesday, November 18, 2015, at the State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2012.

The registration fee is $250.00.

The agenda and registration information are at http://higherlogicdownload.s3.amazonaws.com/MICHBAR/19aeea9e-4ffe-48f5-91af-5059bc9b29bb/UploadedImages/pdfs/ADRRegNov.pdf

THE ADR SUMMIT RETURNS! 2nd ANNUAL ADR SUMMIT March 15, 2016

The State Bar of Michigan Alternative Dispute Resolution Section presents our 2nd Annual ADR Summit, a great training to kick up your skills, advance your practice and provide 8 hours of advanced mediator training credit.

The program is scheduled for Tuesday, March 15, 2016, at Western Michigan University, Thomas M. Cooley Law School, 2630 Featherstone Road, Auburn Hills, MI 48326.

The trainer is Nina Meierding.

We take great pride in announcing Nina's return. She is one of the most exciting and charismatic mediation trainers in the field. When Nina was last in Michigan for ANDRI, her reviews were off the charts. You won't want to miss this program. Mark your calendars now! Additional information about Nina is at http://www.mediate.com/ninameierding/ .

Nina has provided training and mediation services for almost thirty years, was the Director and Senior Mediator at the Mediation Center in Ventura, California, where she mediated over 4,000 disputes, has taught at Pepperdine University, Southern Methodist University, and Lipscomb University, and is a former president of the Academy of Family Mediators and served on the Board of Directors of the Association of Conflict Resolution.

Information about the agenda and registration will be available in the near future.

Connect With Us

The Alternative Dispute Resolution Section has launched a new website and interactive online community for its members—SBM Connect. This private community will enhance 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 ADR Quarterly
- FIND upcoming Section events
- NETWORK via a comprehensive member directory
- SHARE knowledge and resources in the member-only library
- PARTICIPATE in focused discussion groups

SBM Connect will eventually replace the current section website. Both websites will run concurrently to allow you time to discover the new tools and features available to members.

ADR Section Mission

The Alternative Dispute Resolution Section provides members of the State Bar of Michigan and the general public with creative leadership in the dispute resolution field. The Section fosters diversity in the profession; develops and offers educational programs; promotes access to dispute resolution alternatives; monitors legislative and judicial activity; and provides policy guidance, information, and technical assistance on ethical issues, dispute resolution techniques, and training design. The Section produces publications which promote wider use and excellence in the provision of alternative problem-solving techniques and dispute resolution services.

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 Newsletter, participate in programming, further the activities of the Section, receive Section listserv announcements, and participate in the Section's discussion listserv.

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.

The membership application is at:

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/19aeea9e-4ffe-48f5-91af-5059bc9b29bb/UploadedImages/pdfs/sectionapp.pdf .

The ADR Quarterly

State Bar of Michigan
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The ADR Quarterly 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 ADR Quarterly seeks to explore various viewpoints in the developing field of dispute resolution.

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or Phillip A. Schaedler - ***517-263-2832***

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

Editor's Notes

The ADR Quarterly is looking for articles on ADR subjects for future issues. You are invited to send a Word copy of your proposed article to The ADR Quarterly Editor Lee Hornberger at leehornberger@leehornberger.com .

Articles that appear in The ADR Quarterly 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 ADR Quarterlies are at **http://connect.michbar.org/adr/newsletter** .

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

2015 Annual Meeting and Conference

Friday – Saturday, October 2-3, 2015

Park Place Hotel, 300 East State Street, Traverse City, MI 49684, (231) 946-5000

Registration deadline is September 11, 2015

Advanced Mediation Training: For 2015, the ADR Section has cooked-up a series of *tapas* ("small plates") with updates from the institutions which influence ADR as well as skills and wisdom developed from experiences around the dispute resolution table. Each *tapa* is prepared and delivered by some of Michigan's most experienced and respected ADR practitioners. And we have built in menu choices to fit your palate. The SCAO has approved the menu for 8 hours of Advanced Mediation Training credits.

Join your colleagues at this outstanding program of professional development and networking.

Friday, October 2, 2015

Noon – 12:30 PM — Registration (in the first floor lobby of hotel)

12:30 – 5:15 PM — Advanced Mediation Training (in the Leelanau Room)

- The Role of Mediation in Resolving the City of Detroit Bankruptcy – *Eugene Driker*
- Michigan's State of the Law of ADR – *Lee Hornberger*
- Business Development and Marketing Your ADR Practice Using Social Media – *John F. Reed*
- Recent Developments in the Science of Negotiation – *Barry Goldman*

5:15 – 6:00 PM — Hotel Check-in

6:30 – 7:30 PM — Networking and Cocktail Hour at The Top of the Park

7:30 – 9:30 PM — ADR Section Annual Awards Banquet at The Top of the Park

- George Bashara Award
- Nanci S. Klein Award
- Distinguished Service Award

Saturday, October 3, 2015

8:00 – 8:30 AM — Registration and Continental Breakfast (in the Leelanau Room)

8:30 – 9:00 AM — ADR Section Annual Business Meeting

- Annual Reports
- Election of Officers and Council Members

9:00 – 12:30 PM — Advanced Mediation Training Continues – Registrant Choice

Room 1 Menu	Room 2 Menu
New Ideas in Process Design: Meeting the Parties Needs – *Hon. Alton T. Davis and R. Jay Hardin*	LGBT Issues in Mediation: The Same but Different – *Angie Iglisia Martell*
Why Your Market Should Consider Joint Sessions – *Steven Barney, Daniel P. O'Neil and Sheldon J. Stark*	Collaborative Negotiation Skill Building – *Thomas B. Darnton and Zena D. Zumeta*
Apology, Forgiveness & Reconciliation: The Mediator's Role in Reparative Discourse – *Lee Taft*	The Administrative Side of Mediation: ADR Practice from Paperwork to Payment – *Linda Marsh Raetz*

Register in one of three easy ways. See Registration form at http://tinyurl.com/ADR-AnMtg for details.

If you would like to receive special recognition as a Sponsor of the conference, see the Sponsor form at http://tinyurl.com/ADR-AnMtg for details.

Registration Fees: (Seating is limited, so register early to reserve your seat.)

- ADR Conference Fee: $150 regular; (law/graduate students $75, sitting judges no-charge)
- Friday Award Banquet: $50 /ea (not included in conference fee) No Discounts

Registration for Conference and Friday Awards Banquet must be received at SBM by 3 PM, Friday, September 11, 2015. Refunds will only be provided for cancellations received in writing at SBM by 3 PM Friday, September 11, 2015.

Hotel Registration: Contact the Park Place Hotel directly at (231) 946-5000 and reference "Alternative Dispute Resolution Section/State Bar of Michigan." A limited number of rooms are reserved at a reduced rate of $189.95/ ngt plus taxes. Reduced rate, if remaining, is available only for reservations made by August 20, 2015.

SBM State Bar of Michigan

ALTERNATIVE DISPUTE RESOLUTION SECTION

REGISTRATION

2015 Annual Meeting & Conference

October 2-3, 2015
Park Place Hotel
300 East State St., Traverse City 49684

Register online at http://e.michbar.org

P #:_____ (if applicable)

Name:_____

Dinner Guest Name: _____
(If applicable)

Your Firm/Company: _____

Address:_____

City:_____ State: ____ Zip: _____

Telephone: (_____) _____

E-mail Address: _____

Enclosed is check # _____ for $ _____

Please make check payable to: State Bar of Michigan

Please bill my: ❑ Visa ❑ MasterCard for $_____

Debit/Credit Card #:_____

Expiration Date:_____

Please print name as it appears on debit/credit card:

_____

Authorized Signature: _____

Hotel Information

Hotel reservations cannot be made with this form.
A limited block of rooms is being held for conference attendees at the Park Place Hotel until August 20, 2015. The reduced room rate is $189.95 per night (plus sales, use and occupancy tax). Rooms are limited so reserve early. You must make reservations directly with the hotel at 231.946.5000 and reference "Alternative Dispute Resolution Section/State Bar of Michigan."

Cancellation Policy: Registration and Payment must be received at the SBM on or before 3PM on September 11, 2015. Refunds will be provided only for Cancellations received in writing at the SBM by 3PM on September 11, 2015. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.)

REGISTRATION DEADLINE: September 11, 2015

Cost

- ❑ Annual Meeting ONLY (does not include training or banquet) .....FREE
- ❑ Conference Registration ..... $150 x___= _____
- ❑ * Law/Graduate Students ..... $75 x___= _____
- ❑ * Sitting Judges ..... FREE

*Registration fee for sitting judges is waived. Judges MUST register by mail or fax and MUST pay for dinner if attending Friday night's award banquet.

* Law/graduate students and judges must register by mail or fax ONLY.

Friday Evening

- ❑ Awards Banquet ..... $50 x____=_____
  - ❑ Stuffed Chicken Breast.....#_____
  - ❑ Broiled Great Lakes Whitefish .....#_____
  - ❑ Char-Grilled Filet Mignon.....#_____
  - ❑ Cheese Ravioli in Wild Mushroom Sauce.....#_____

Grand total = $_____

Questions

For additional information regarding the conference, contact Lee Hornberger at 231.941.0746 or leehornberger@leehornberger.com.

Sponsorship

To be a Sponsor of the conference and received special recognition, complete the Sponsor form at http://tinyurl.com/ADR-AnMtg.

Register One of Three Ways

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

Mail your check, or debit/credit card information, and completed registration form to:

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

Fax (ONLY if paying by debit/credit card) the completed form and debit/credit card information to: Attn: Seminar Registration at (517) 372-5921

ALTERNATIVE DISPUTE RESOLUTION SECTION

SPONSORSHIP FORM

2015 Annual Meeting & Conference

October 2-3, 2015 • Park Place Hotel • 300 East State St., Traverse City

Sponsorship Registration Deadline August 28, 2015

Primary Sponsor Contact: _____

Company Name: _____

Address:_____

City:_____ State: ____ Zip: _____

Telephone: (_____) _____

E-mail Address: _____

Enclosed is check # _____ for $ _____

Please make check payable to: State Bar of Michigan

Please bill my: ❑ Visa ❑ MasterCard for $_____

Debit/Credit Card #:_____

Expiration Date:_____

Please print name as it appears on debit/credit card:

_____

Authorized Signature: _____

Payment and Logo/Artwork Due Dates

Submit payment with this completed form to the SBM by 3:00 PM on Friday, August 28, 2015.

To ensure proper recognition in written materials, e-mail your logo or artwork by Friday, August 28, 2015 to Robert E. Lee Wright at bob@thepeacetalks.com.

To register for the conference without becoming a Sponsor use the form at http://tinyurl.com/ADR-AnMtg.

Payment Methods

MAIL: your check or debit/credit card information and this completed form to State Bar of Michigan, Attn: Seminar Registrations, 306 Townsend Street, Lansing, MI 48933.

FAX: (only if paying by credit card) this completed form with debit/credit card information to Attn: Seminar Registration at (517) 372-5921.

Conference Sponsorship Levels

❑ **Bronze Sponsor.....$100**
- Written recognition on Conference Manual and Room Signage

❑ **Silver Sponsor.....$250**
(Please complete page two of this form)
- Written recognition on Conference Manual and Room Signage
- Verbal acknowledgement from the podium at Conference and Awards Banquet
- One Complimentary Admission to Conference

❑ **Gold Sponsor $500**
(Please complete page two of this form)
- Written recognition on Conference Manual and Room Signage
- Verbal acknowledgement from the podium at Conference and Awards Banquet
- One Complimentary Admission to Conference
- Two Complimentary Admissions to Awards Banquet

❑ **Platinum Sponsor $1,000**
(Please complete page two of this form)
- Written recognition on Conference Manual and Room Signage
- Verbal acknowledgement from the podium at Conference and Awards Banquet
- Three Complimentary Admissions to Conference
- Two Complimentary Admissions to Awards Banquet

Questions

For additional information regarding sponsorships, contact William Gilbride Jr. at 313.566.2500 or wdgilbride@abbottnicholson.com or Lee Hornberger at 231.941.0746 or leehornberger@leehornberger.com.

Cancellation Policy

Completed form and payment must be received at the SBM on or before 3PM on August 28, 2015. Refunds will be provided only for Cancellations received in writing at the SBM by 3PM on August 28, 2015. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.)

ALTERNATIVE DISPUTE RESOLUTION SECTION

SPONSORSHIP FORM

Page Two for Silver, Gold, & Platinum Sponsors

Sponsorship Registration Deadline August 28, 2015

Silver Sponsor Details

- One Complimentary Admission to Conference

One Complimentary Conference Admission

Name: _____

P # (if applicable):_____

Gold Sponsor Details

- One Complimentary Admission to Conference
- Two Complimentary Admissions to Awards Banquet

One Complimentary Conference Admission

Name: _____

P # (if applicable): _____

Two Complimentary Awards Banquet Admissions

(1) Name:_____

P # (if applicable):_____

(2) Name:_____

P # (if applicable):_____

Banquet Entrée Selections:

- ❑ Stuffed Chicken Breast #_____
- ❑ Broiled Great Lakes Whitefish #_____
- ❑ Char-Grilled Filet Mignon #_____
- ❑ Cheese Ravioli in Wild Mushroom Sauce #_____

Platinum Sponsor Details

- Three Complimentary Admissions to Conference
- Two Complimentary Awards Banquet Admissions

Three Complimentary Conference Admissions

(1) Name: _____

P # (if applicable):_____

(2) Name: _____

P # (if applicable):_____

(3) Name: _____

P # (if applicable):_____

Two Complimentary Awards Banquet Admissions

(1) Name:_____

P # (if applicable):_____

(2) Name:_____

P # (if applicable):_____

Banquet Entrée Selections:

- ❑ Stuffed Chicken Breast #_____
- ❑ Broiled Great Lakes Whitefish #_____
- ❑ Char-Grilled Filet Mignon #_____
- ❑ Cheese Ravioli in Wild Mushroom Sauce #____

You MUST submit page one and two at the same time.