The Michigan
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The Chair's Corner

by Betty Rankin Widgeon

"There is no limit to what a man can do
so long as he does not care a straw who gets the credit for it."
— Charles Edward Montague (1867-1928)

"It is amazing what you can accomplish
if you do not care who gets the credit."
— Harry S. Truman (1884-1972)

"It is amazing how much can be accomplished
if no one cares who gets the credit."
— John Wooden (1910-2010)

I had long attributed the first quote above, or some form of it, to the 33rd President of the United States—Harry S Truman. However, when I did the research, I found that the "sum and substance" is attributed to three different individuals: (1) Charles Edward Montague, a British journalist; (2) President Truman; and (3) John Wooden, legendary basketball coach of the UCLA Bruins. A reasonable and logical conclusion is that Truman's and Wooden's versions stem from Montague's. An application of this sentiment, however, is that it matters less who first penned or spoke those sage words; what really matters is whether we're able to internalize and benefit from them.

When I became Section Chair, I decided to adopt this philosophy as a part of my leadership style. However, even before Scott Brinkmeyer passed me the gavel, I saw the personification of the precept demonstrated by some Section members in their approach to planning and executing an entirely virtual Annual Conference in 2020. These members deserve full credit for generating and sustaining the enthusiasm of presenters and pulling off one of the most exciting and well-attended annual conferences this Section has achieved. In particular, I want to highlight the work of Mike Leib and Zena Zumeta. They have both been incredibly modest in their ways of evading the spotlights, but it is incumbent upon me at this juncture to highlight their contributions.

Mike— along with Ed Pappas—is a co-chair of the Section's Skills Action Team ("Skills"), the reins of which he took over from former Section Chair and Skills Chair, Shel Stark. Skills is and has been the Section's busiest action team, and we applaud it for bringing top national presenters in the ADR field to the Section each year for our Spring Summit event. It also does the important work of showcasing the many layers of talent within the Section and other local presenters in a number of exciting webinars, a lunch and learn series, and our Annual Conference. We have come to expect and look forward to stellar programming, and our Skills Chairs and team members have never disappointed. To lead this action team successfully, its Chair must be patient, have foresight, and learn to listen carefully to many voices. Mike possesses all of these qualities. If there is a roadblock, or the way is difficult, he searches until he can find a way around it. To say that 2020 "brought challenges" is an understatement. Mike knew his job: find a way to hold a meaningful Annual Conference without a roadmap. This was uncharted ground. Like every other SBM Section, National and local organizations, and the Courts, we were on our own to figure it out. Mike never flinched. Instead, early on, he prompted the Council to start thinking in terms of a Plan B. Then, he amassed the energy to oversee each step of the project and guide us to a perfect landing.

After the Council came to the understanding that Plan B was going to be our "new normal," one of Mike's first acts of delegation was to assign someone to lead the Plan B task force. When he asked for a volunteer, Zena stepped up to the plate, and said, in her signature steady, confident, assertive tone, "I'll do it." As it turned out, Zena was the perfect one to lead the Plan B task force. She

had previously worked closely with some members of the ABA leadership, which had planned a national program several months before and, as a result, they shared some helpful tips, tricks, and practices. Still, she was tasked with methodically scaling down what the ABA had done and translating its lessons learned to a vision for what would work best for the ADR section. Zena quickly established a planning meeting schedule and worked with Section Administrator, Mary Anne Parks and former Section Chair, Bob Wright to coordinate interviewing and selecting a videographer. In effect, Zena sketched an outline of what she perceived possible and brought it back to Mike and the other Skills members to mold, shape, and implement without any pride-in-authorship. Aside from leading the Plan B task force, Zena also coordinated the Section's family-law segment, assisted with developing the Diversity and Inclusion Action Team's presentation, and, as an added value, designed and directed our now popular *Networking Rooms*.

Kudos are due to all contributors whose hard work and assistance help bring this production to its successful fruition, and we give special recognition to Mike and Zena for their vision and fortitude in planning and executing such an excellent Annual Conference. Our hats are off to you—bravo, bravissimo!

ADR Section members will be happy to learn that Mike, Ed, Zena, Scott, Bob, Mary Anne, and many others are currently planning another spectacular online conference for October 8-9, 2021, so be on the lookout for registration information.

About the Author

Betty R. Widgeon is a retired Michigan District Court judge and the 2020-2021 Chair of the SBM ADR Section. She is the founder and president of Widgeon Dispute Resolution, PLC, which specializes in arbitration, mediation, factfinding, and consulting, focusing specifically on labor, employment, and consumer cases. She also serves as a member of the Special Master Hearing Officers' Roster for the Michigan Supreme Court. She has over 25 years of experience resolving civil and criminal disputes. Her practice is now national in scope and covers a wide variety of issues and industries. Judge Widgeon is a member of the National Academy of Arbitrators and the National

Lee Hornberger

Appreciation for Doug Van Epps

By Lee Hornberger

Douglas A. Van Epps left the State Court Administrative Office as of the end of May 2021. Doug has been one of the outstanding shining lights of alternative dispute resolution in Michigan for over thirty years. Doug has been Director of the Office of Dispute Resolution for the Michigan Supreme Court since 1989. Doug is nationally and internationally recognized as a leader in the field of dispute resolution.

As Director of the Office of Dispute Resolution, Doug oversaw the development, implementation, and evaluation of alternative dispute resolution efforts in Michigan's trial courts and administered Michigan's Community Dispute Resolution Program.

As the first and only Director of that office, he shaped the position in the 32 years he has held it, moving from creating a system of volunteer mediation centers around the state to being an articulate and powerful force for dispute resolution within state government and throughout the Michigan court system.

His 32-year tenure has been focused on designing, implementing, and evaluating alternative dispute resolution systems in Michigan's trial courts. Doug oversaw the Community Dispute Resolution Program, through which child protection, agricultural, special education, guardianship, general civil, and domestic relations mediation services were developed. Doug helped lead the Permanency Planning Mediation Program, Michigan Agricultural Mediation Program, and Michigan Special Education Mediation Program. Doug routinely convened and facilitated important task forces created to develop court rules, policies, and procedures that implement ADR services in the trial courts and coordinated activities designed to implement and evaluate ADR initiatives.

Doug coordinated the Michigan Supreme Court Task Force on Dispute Resolution that led to the creation of a series of dispute resolution court rules. Doug oversaw implementation of those rules and initiatives to integrate alternative dispute resolution processes into trial court case flow management practices.

Doug Van Epps

By overseeing development of the MI-Resolve online dispute resolution program, Doug, along with colleague Michelle Hilliker, made ODR available to Michigan residents 24/7 through laptops, smartphones, and tablets.

Doug is a member of the American Bar Association's Dispute Resolution Section, the State Bar of Michigan's ADR Section, and the National Association for Court Management. He routinely authors articles and presents on ADR topics at judicial education programs, law schools, and national conferences. He has served on the editorial board of the *Conflict Resolution Quarterly*. Doug previously served as an assistant prosecuting attorney in Lansing.

He received his JD from Wayne State University Law School in 1980 and his BA in political science from the University of Michigan in 1977.

Doug has been an active member of the State Bar's ADR Section. In addition, he has been a loyal and dedicated friend to all of us and to the ADR Section. He is always a delight to work with. He brings honor to our profession.

In 2019, he received the George N. Bashara, Jr. Award from the State Bar's ADR Section. The **George N. Bashara Jr. Award** (*a/k/a* the Chair's Award) is given in recognition of exemplary service to the Section and its members. He was a regular contributor of excellent articles to the Section's *The Michigan Dispute Resolution Journal* and presentations at the Section's Annual Meeting and ADR Conferences.

All of us in the ADR Section wish Doug the best of luck in the future. Doug has been a great professional colleague over the years. He did an awesome job and he will be missed.

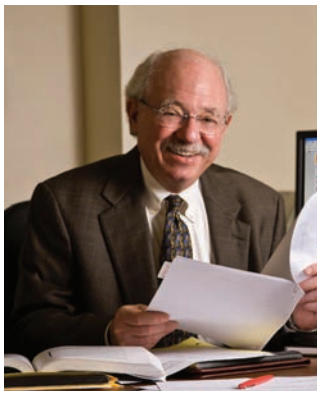
About the Author

Lee Hornberger was Chair of the State Bar of Michigan's Alternative Dispute Resolution Section, Editor of The Michigan Dispute Resolution Journal, a member of the State Bar's Representative Assembly, President of the Grand-Traverse-Leelanau-Antrim Bar Association, and Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation.

He has received the ADR Section's George N. Bashara, Jr. Award for exemplary service. He is in The Best Lawyers of America 2018 and 2019 for arbitration, and 2020 and 2021 for arbitration and mediation.

He is on the 2016, 2017, 2018, 2019, and 2020 Michigan Super Lawyers lists for alternative dispute resolution. He received a Second Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2021. He received a First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019 and 2020.

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



Sheldon J. Stark

Managing Opening Offers: "Are You Really Gonna Make Me Communicate that Number?"

By Sheldon J. Stark

Introduction

168,000,000: the number of search results on the web for the term *mediation*. When boiled down to its least common denominator, however, mediation is nothing more than an assisted negotiation. Mediators – neutral, unbiased, and objective – assist the parties in negotiations by removing impediments to resolution, improving communication and understanding, exploring needs and interests, and encouraging realistic assessments of risk.

Mediators explore the cost of continuing the conflict and refocus attention on the future. And, when the time arrives to exchange numbers, mediators help the parties recognize the way unrealistic, over-the-top opening offers can poison the process. This process is called negotiation coaching. (See, https://www.starkmediator.com/articles-links/i-know-what-your-job-is-reframing-the-role-of-mediator/)

If all mediators do is communicate numbers without push back or comment, mediators add little value.

This article suggests a different approach: where the goal is resolution, design a process wherein parties and advocates are open and receptive to mediator coaching about the exchange of numbers.

PART 1: SETTING THE TABLE

The Pre-Mediation Process

Setting the table for a well-managed negotiation begins long before first numbers are exchanged. A proper foundation must be laid starting at the instant all parties agree to our service.

My process is to initiate a pre-mediation conference call:

1) *Logistics*: Make disclosures, learn negotiation history, encourage advance exchange of information and documents, determine whether mediation is voluntary, identify participants and arrange scheduling, duration, and due dates.

2) *Process design*: Are the parties agreeable to a mediator's opening remarks? Do they prefer an all caucus/shuttle diplomacy model or are they open to joint sessions? Will they set aside traditional zealous advocacy in favor of a joint problem solver mindset? Can we begin with a facilitative approach, becoming more evaluative only after the process has unfolded and the parties approve?

3) *Dispute dynamics*: Obtain a preview of the conflict in order to tailor the process to the particular dynamics of each individual dispute. (To view the pre-mediation conference call agenda, see https://www.starkmediator.com/wp-content/uploads/sites/4/2019/06/Agenda-for-PreMediation-Conference-Call.pdf)

I encourage the lawyers to take full advantage of the unique opportunity presented by mediation to speak directly to the decision maker on the other side. Rather than default to an all-caucus, shuttle diplomacy model in every case, I suggest they take advantage of the opportunity to explore creative outcomes and at least give thought to how a joint session might be productive. I assure them I have the experience and skill set to manage the process safely. My experience is that joint sessions work, and work well. Rarely do I see the "nightmare" scenarios the advocates fear so much. If things start to go sideways, moving back to caucus quickly is easy. (See, https://www.starkmediator.com/why-you-should-consider-joint-sessions-in-your-next-mediation-2/)

I remind participants that mediation is not a fact-finding process. It is not an adjudicatory process. Mediation doesn't determine who is right and who is wrong. Nor does it establish who is telling the truth and who is not. Mediation is a dispute resolution

process. And I ask them to commit to being joint problem solvers. What does it means to be a joint problem solver? Joint problem solvers don't try to score every point. Joint problem solvers make reasonable concessions. They use the language of diplomacy. They try to *understand* each other's perspective whether they agree or not. Joint problem solvers listen to each other with an open mind. Mediation is an opportunity to learn information critical to proving claims and defenses should the matter not settle. And, of course, if the dispute does not resolve, they are free to return to zealous advocacy. I urge the lawyers to inform their clients of the changes they will see in their advocacy to avoid the impression counsel has lost faith or confidence in the representation.

I provide educational materials to assist the litigators and their clients in preparing for mediation. (See, https://www.starkmediator.com/wp-content/uploads/sites/4/2013/10/2013_Article_Making_the_Most_of_Mediation.pdf)

I offer suggestions for developing a strategic mediation plan to better achieve their goals. (See, https://www.starkmediator.com/a-success-primer-for-mediation-achieving-client-goals-through-strategic-preparation/) Parties who prepare for mediation by developing a strategic offer/concession plan in advance generally do better than those who "plan" to bargain reactively. Reactive bargainers may not exercise their best judgment in negotiation when buffeted by the winds of emotion. Negotiators who bring an offer/concession strategy to the table must be flexible, however, and prepared to make adjustments based on what they learn through the process.

If the parties are willing to participate in a joint session, I offer materials to assist them in putting their presentations together. (See, https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/Stark-Mediator-Effective-Presentation-Directions.pdf)

Helping the parties learn to get the most out of the mediation process gains their trust, gives them hope, improves their preparation, and helps them achieve more of their goals and objectives. Our professionalism and process assistance build their confidence in us, creating a willingness on their part to listen to our counsel when we put on our negotiation coaching hat.

PART 2: EXCHANGING INFORMATION

Written Mediation Advocacy

I encourage the lawyers to *exchange* their mediation summaries and to do it a week in advance. I do so because the more each is familiar with the theories, evidence, and arguments of the other, the better prepared they will be to respond to each other. Receiving the summaries in advance gives each side time to research and pull together their own information in response. It also prevents parties from avoiding discussion of a risk because, they assert, there wasn't time to investigate, or they hadn't anticipated an issue.

On the other hand, if the information in the written submissions is confidential and not exchanged, the mediator is "hand-cuffed," restricted in which risk issues to address. In an employment dispute, for example, defense counsel may point out confidentially that plaintiff falsified his application for employment, committing resume fraud. Perhaps they're saving it for the plaintiff's deposition or for cross examination at trial.

Since mediation settles most disputes and trials occur in less than 1% of all cases, saving information for trial makes little sense. Far better that plaintiff's counsel be aware that her client's credibility is compromised when evaluating the risk of non-resolution. Openly sharing the information gives the mediator a tool for exploring the risk to credibility.

I also provide an option to supplement shared submissions with a "mediator's eyes only" letter, particularly where advocates are not ready to share sensitive information such as client needs and interests. If the parties have particular non-money goals and objectives for the mediation process, this is an opportunity to let the mediator know in advance: an apology or acknowledgement, for example, or a letter of introduction or neutral reference, a *nunc pro tunc* resignation, retention of company car or computer, future contract opportunities, reputation repair, etc.

I also recommend focusing their writing on persuading *each other*. The decision maker on the other side should be their primary audience, not the mediator. (See, https://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/)

Regrettably, some advocates believe their own client is the principal audience. This generally results in a summary filled with verbal assaults and invective which only serves to antagonize or alienate at the very moment their goal should be getting through to the decision maker on the other side. Sometimes their zealous written advocacy pushes beyond what the evidence supports,

and – while it may earn kudos from their client - undermines their credibility with opposing counsel. If they have the "goods," they should highlight them with exhibits and attachments. If they don't, exaggerating and making unsupported inferences is not helpful. All these problems have an impact on opening numbers because they drive emotions – both ways. They "rev up" their own clients and create unrealistic expectations that the lawyer then asks the mediator to help walk back. And, it typically serves to further alienate or escalate readers on the other side.

Sometimes advocates close their written submissions with a settlement offer that is irritating at best, incendiary at worst. Numbers are always the loudest message, and an aggressive number in a mediation summary sends a powerful unintended message: *This case is not going to settle because I have a totally unrealistic assessment of its value!*

At times the number is orders of magnitude higher/lower than previously communicated. The message received: we're wasting our time. One side may have agreed to participate in mediation because the last offer was within a reasonable range. When the mediation summary has a far different number, the result is *bad.* It leads to outrage. Emotions escalate. Parties threaten to walk. Precious time, energy and capital is spent calming the waters and encouraging parties to give the process another chance.

Don't misunderstand me: If an advocate can blackboard significant numbers, their summary should surely disclose them. Their theory of damages and how the numbers were arrived at should be clearly provided: Lost wages and benefits in an employment case; medical costs, replacement services, economic loss and mental pain and suffering in an injury case; or lost profits in a commercial transaction gone bad. Opposing parties need to know in advance how damages are projected in order to evaluate the situation and obtain sufficient authority to settle. But, an over-the-top dollar figure at the end of the summary to "show how serious this case is"? Not so much! (See, https://www.starkmediator.com/wp-content/uploads/sites/4/2019/07/Why-You-Should-Avoid-Putting-A-Dollar-Demand-Offer-in-Your-Written-Mediation-Summary.pdf)

Spending the first hours of the mediation process dealing with consternation caused by a provocative written number is frustrating for the mediator and everyone else at the table. It is often followed by a whole litany of complaints and accumulated grievances about how the other side has handled every aspect of the litigation. "Shel, I need to put this number in context so you understand why we're so disappointed!" Provocative numbers undermine good will and derail our best efforts to reach an agreement – to say nothing of the added expense to parties forced to pay for the wasted hours in attorney and mediator time.

PART 3: MANAGING OPENING OFFERS

Who Goes First?

One of the most important questions for the day of mediation is whose turn it is to make the first offer. If there have been no prior negotiations, most negotiators and negotiation coaches believe it is the plaintiff's turn to put out the opening number. First, it is traditional for the plaintiff to start. (It confuses the defense when they don't want to; and not in a good way.) Second, plaintiff brought the case. Presumably, plaintiff knows the value of his or her claims. Accordingly, the plaintiff should tell the defense what he/she wants. Third, "anchoring" research shows going first is in plaintiff's best interest. Opening offers have a strong effect on negotiations. "The first offer typically serves as an anchor that strongly influences the discussion that follows. In research documenting this price anchoring effect, psychologists Daniel Kahneman and Amos Tversky found that even random numbers can have a dramatic impact on people's subsequent judgments and decisions." (See, the Harvard Program on Negotiation, https://www.pon.harvard.edu/daily/negotiation-skills-daily/price-anchoring-101/)

If a party made a settlement proposal before arriving at the mediation table, it is the offeree's responsibility to respond and throw out the first number once the mediation process kicks off. I liken it to a tennis match: One party lobbed the ball over the net by making an offer before mediation, the other party should lob it back with a counteroffer.

This should be simple, straight forward and commonsensical. Years ago, when I represented clients, I wouldn't have dreamed there was any controversy around this. Turns out, there is. The same arguments are made by advocates on either side of the "v.": "We didn't reply to the offer because it was outrageous. Tell them to give us a reasonable number and we'll answer it." Experienced mediators know this to be a fool's errand. Every advocate on the planet rejects such requests with righteous indignation: "I'm not going to negotiate against myself! This is the number. If they don't like it, we're done here!" As noted *infra*, there are techniques to help us move past this potential impasse.

Advance Preparation

Most participants reach the table on the day of mediation with a top or bottom line or range for what they hope to achieve. Some have a plan in the form of an offer/concession strategy. The best are also flexible: They have a plan, but they listen and adjust based upon fresh insight or new information. Typically, they have conducted a thorough review of their file, analyzed the facts and law, diagnosed the risks as then understood, calculated potential damages or loss and assessed the amount of their claim or exposure. Sometimes the lawyers have negotiated with their own clients about settlement value. (Settlement negotiations are often a three-ring circus. In the left ring, plaintiff's counsel is negotiating with her client, trying to rein in overly optimistic expectations. In the right ring, defense counsel is pressing defense representatives for more authority to reach a settlement number. In the center ring, the advocates negotiate with one another over a final resolution.) Most often, based on their top or bottom line, they establish their opening number and obtain client approval. As mediator, are you ready to hear it? I suggest not. I recommend investing time in risk assessment *first* before soliciting a party's previously prepared opening number.

Here's why:

No one can exercise good judgment about whether to settle and on what terms unless and until they have as much information as possible. Mediation is an excellent process for the transfer and sharing of information. Mediators are responsible for making certain each side has all the information available so the parties can exercise good judgment. Assuming the participants are open minded and flexible, their opening numbers *after* a robust discussion of risk will be far more productive than not. Such information includes *inter alia*:

- What is the story each side tells and is that story plausible? If plausible, what are the chances a decision maker will find it persuasive? Is the story sympathetic and easy to tell? Will the jury have the patience necessary to listen to the end? If the story is believed, what is the most likely outcome?

- What is the best evidence each side can marshal? How persuasive is it? What is the risk such evidence will be excluded by a motion in limine? Does exclusion of the evidence increase the likelihood and risk of an appeal – requiring more time, more attorney fees, more risk – and possible reversal?

- How credible are the witnesses – the parties in particular – and how do they come across? Will a jury like them? How likely are they to motivate a jury their way? What impeachment material is available? Does anyone *appear* to be lying even if they are not? (When Jack Lemon was a young actor coming up in Hollywood, George Burns took him under his wing. "Kid," he supposedly advised, "in this business sincerity is everything... (pause)… And if you can fake that, you've got it made!")

- What's the judge's predisposition? What's the court's track record granting or denying dispositive motions in similar cases? What's the risk this dispute will be dismissed, or the sails trimmed in some crucial fashion?

- What might jurors be like in the venue where trial will be held? In employment cases, for example, Wayne County jurors generally believe an employer must have good cause to terminate an employee. In Kent County, by contrast, every juror is familiar with the employment at will doctrine. Do verdict sizes in Genesee County differ from verdict sizes in Ottawa County?

- As no more than 1% of all cases in state and federal court make it to trial, what is there about this dispute that might be different? And, in the wake of the COVID-19 pandemic, when does anyone expect to see a jury trial at the courthouse?

- What are the big risks for each side? Where are the holes in the claims or defenses? Perfect cases are few and far between. Rarely is liability a "lay down hand" or the defense a "slam dunk". Longtime trial lawyer turned mediator William "Bill" Sankbiel, likes to say, "I've never seen a case I couldn't lose." If the parties try the case 10 times, how many times would the plaintiff recover a verdict? How many times a "no cause"?

The "Softening Up" Process

In my experience, litigators focus on their strengths and minimize their weaknesses. Parties sometimes convince themselves they have *no* weaknesses. Parties and advocates are both prone to fall in love with their claims and defenses leading them to sweep

potential "warts" under the carpet. As Shakespeare taught us, "love is blind." *The Merchant of Venice, Act 2 Scene 6.* For that reason, the opening numbers parties bring to the table may reflect a myopic – and therefore unrealistic - vision of risk. Risk impacts valuation. Most people prefer to manage their risk rather than take a chance on the outcome of a dispositive motion or trial. As a result, the more appreciation a party has for risk, the more reasonable their numbers. Mediators help the parties examine their risks in large part to challenge their certainty about the outcome and enhance flexibility in a productive direction. Accordingly, the numbers they had in mind at 9:30 a.m. are not as relevant as their numbers several hours later after engaging in risk assessment. *Then* is the time to bring them out on the table for consideration.

After examining their risks, a party may remain resolute, stubbornly attached to the numbers they came with. We should understand why. For example, was the original number approved by a committee or significant other who is not available to discuss making a change? Perhaps an adjournment is in order. Parties may prefer to take their chances at trial notwithstanding the risks. No problem. That's their right.

Mediation is a voluntary process. Settlement is voluntary. Mediators assist in the negotiation, not compel resolution. While the parties may request a mediator's proposal and some of us are willing to provide one, it is not generally our job to tell the parties what their case is worth.

This is their conflict; their right; their risk; their money. But, before they choose between settling and rolling the dice, it's our responsibility to identify and help them weigh those risks realistically. If they remain steadfast, that is their choice. On the other hand, if the parties and counsel have been doing things right, they have been listening and processing what they heard. They have learned invaluable information. Perhaps they learned something new, or arrived at a fresh understanding, or recognized a risk previously overlooked, or increased concern for a problem they minimized. If it is unclear how much a party has been educated by the process, it can be helpful to ask them in a private caucus setting to articulate where the other side is coming from in their own words. It can also be helpful to ask parties to list the risks they themselves face.

After several rounds of offers and counteroffers, they probably have a much better appreciation of how far apart they really are. In other words, they have received value for their investment in the mediation process.

When is the Right Time?

Knowing when to solicit an opening number is a judgment call. While we are engaged in "softening them up" the parties may grow impatient. "Can't we cut to the chase? Look what time it is!" Impatience can be driven by many factors: attorney and mediator hourly rates; frustration with progress; resentment that their beloved theories are challenged, etc. Impatience can be very real. Pressure to move faster, however, can also be an effort to hijack the discussion and avoid facing hard truths.

To address impatience, I remind them that if the case doesn't settle, there is great value in letting the process play out. Enhanced risk assessment, better understanding of how the other side will present their claims or defenses, a sense of the other side's best numbers, and appreciation for where each side is coming from are invaluable. Good advocates want and need this information. It helps them do the ir jobs. Good lawyers are often helpful in tamping down client impatience. They recognize the value of information. Party impatience nonetheless must be respected. Accordingly, I make strategic decisions: which risks to discuss first, what to save for later rounds, and when to back off. Strategic mediators always save a few good risk questions for later rounds to generate additional movement when needed.

"After You, My Dear!"

When the time comes to open the exchange of numbers, it is helpful to know the negotiation history. What numbers have previously been exchanged, if any? Most parties are willing to share. (Practice tip: Always ask about negotiation history with both lawyers present. It's remarkable how often they do *not* agree as to who made the last offer or how much it was! As a matter of routine, I ask for negotiation history in the pre-mediation conference call when all lawyers are on the call. If they've exchanged offers in writing, I ask for copies.) As noted above, if there have been no discussions, the first number should come from the plaintiff.

Sometimes, however, plaintiff counsel wants the defense to throw out the first number. I try to discourage that. "In the history of American jurisprudence," I like to say, "no plaintiff's lawyer has ever been happy as a result of making defendant go first." It confuses defense counsel. It undermines plaintiff's credibility and reduces respect for counsel's judgment. It sharpens suspicion. "What are they up to?" As discussed earlier, because an opening defense number is likely to "anchor" the negotiation at a

disappointing level, making the defense go first is rarely in the plaintiff's best interest.

In situations where the defense should open because plaintiff presented a demand prior to mediation, the defense sometimes demands a *new* number from plaintiff. If defendant treated the demand as unserious and refused to respond, they may be equally reluctant to do so at the mediation table. "We're not in the same ballpark. Our ballparks aren't even in the same city! How do we respond to that? We can't!" To avoid impasse before we've even started, I am generally willing to request a new number from plaintiff "for purposes of mediation." "Yes, it's their turn," I say in plaintiff's caucus room, "but your number didn't reflect *any* risk. Much time has passed. A lot of water under the bridge. You have a lot more information. You acknowledge the number was your best day in court – and maybe then some. They're been unwilling to reply. They remain reluctant. Now that we're here and we've had a good discussion of risk, will you at least consider proposing a more productive number that takes at least some of that risk into account?" Sometimes, after consulting, plaintiff counsel agrees.

If not, I return to the other room and seek flexibility from the defense side. There are several ways to move forward.

- "What number *would* you respond to? If they started with a better number, what would your counter have been? Can I offer your hypothetical counter and explain that you've authorized me to make it on the basis that you're trying to show good faith not respond to an unrealistic demand?"
- "You think this is a ridiculous, unrealistic number and you're worried about the message you're sending if you reply. Why not respond with an equally ridiculous number and send the same signal back?"
- "What if we pretend this is already Round 2? Where would you expect to be to get Round 2 off to a good start? If you authorize a good counter, I'll work hard to get you a number you haven't heard before that you maybe also won't like, but you'll see it as progress."

When the parties have agreed to mediation voluntarily, it is rare that one or the other intervention doesn't get the negotiation moving.

Communicating Unrealistic Numbers – or Not!

Because opening numbers can threaten to derail the entire process, I am a strong believer in pushing back for more productive ones.

Often, opening offers reflect battles fought long before we arrived at Mediation. Opening offers may be hampered by this history. Sometimes the mediation proposal is a significant departure from a number previously communicated. Perhaps someone offered a modest number "way back when" intended for a "quick and dirty" resolution at the beginning of the litigation process. Even though rejected at the time, "quick and dirty numbers" retain an emotional power. Offerees in this situation consider the new numbers "negotiating backwards," and express deep resentment.

Even when much time has passed, significant sums have been expended on attorney fees in the interim, or lost profits or lost wages have accumulated, the offeree can't stop thinking about that earlier offer. Of course, "nothing is more expensive than a missed opportunity." H. Jackson Brown, Jr. "That was then," I like to say. "It didn't happen. This is now. Mediation is a forward-looking process. Let's try to move forward from here."

Thomas Jefferson famously preferred "… dreams of the future to the history of the past."

Recognizing Unrealistic Opening Numbers

How do we know when a number is too aggressive? I try hard to remain neutral as long as possible. I try not to form an opinion about the merits *or* the value of the case until I know significantly more than I'm likely to know when the first numbers are communicated. I do not know "the right number." Ultimately, the "right number" is for the parties to determine. Nonetheless, it's generally clear as day when an offer is significantly out of whack.

First, of course, offerees *tell* us as the mediator what's wrong with the number. They may or may not be spinning us. Listen to their reasoning. Does it make sense? After years of experience as a litigator and mediator, I may not be ready to say what the case is worth, but I generally can tell whether we're dealing with a five, six, or seven figure claim. If a demand is multiples of projected economic damages alarm bells should be going off. If a demand exceeds policy limits, it doesn't take a ton of experience to question how it will be received. If the goal is to keep the negotiation going, something must be done.

Accordingly, I ask permission to push back. Will they consider whether there's a better way to open? (I often hear criticism of mediators who simply carry numbers back and forth. Litigators tell me they *want* a mediator who pushes back and offers suggestions for more productive proposals. "That's what we hired *you* for!") No one has ever refused to engage in reconsideration – whether they ultimately change their number or not.

- "Why would you choose to start with an over-the-top, hyper-aggressive offer?" The answer usually begins with "They need to understand that this is a serious case and we're not fooling around!" In fact, such numbers send the opposite message. "What do you think will be their reaction? What if you were in their shoes? Whatever message you intend, what message will they receive?" "Is there a risk they're going to walk out?"

- Or, I ask them to anticipate the number they'll hear back. "What number do you expect in reply?" Experienced plaintiff's lawyers generally acknowledge it will be in the "insult" range. "If that's the case," I ask, "why start there?" If the demand exceeds policy limits, I ask their experience with previous insurance carriers. "Have you *ever* settled a case in excess of policy limits? Let me ask it another way: when was the last time you settled a case *for* policy limits without a trial?" And, of course, the bigger the disparity, the easier it is for the other side to say no. The recipient might just as well spend the money on defense, take the risk and hope for a better offer down the road.

- "Is the number an 'outlier?' Won't they recognize it as such? Isn't this number many multiples of your actual losses? What's their incentive to continue the process?"

- If the offeror initially won't recognize their numbers risk ending the negotiation, I share the reaction I anticipate based on past experience. Overly aggressive numbers cause consternation. They aggravate. They inflame. They incite a reaction and it won't be pretty. The other side may well conclude that they're wasting their time. The wheels can come off the bus. Over-the-top numbers can bring the process to a screeching halt with the parties even more escalated than they were before. This escalation violates Canadian mediator Allen T. Stitt's "First Rule of Mediation: Do No Harm." Stitt cautions that mediation should not make the relationship between parties or counsel worse than it was before. He believes it is our job to manage the process and attempt to *prevent* escalation. Ask, "Isn't it a bit early to start down that path? Do you want to run that risk? Or would you like to try something else?"

I don't tell parties what they should settle for. It's their case, their claims, their lives, their money. My coaching addresses first numbers, not last. (Where necessary, of course, I am always ready to coach closing numbers when necessary as well.) I tell plaintiffs I don't know what their bottom line is, and don't want to know. Dick Soble taught me not to ask. The answer is rarely honest and generally paints the party into a corner it's difficult to get out of. I've heard their "bottom line", their "bottom bottom line", and their "bottom, bottom, bottom line." Moreover, as noted, the top or bottom line in the morning is far less important than the one modified by rigorous risk assessment. Surely, they've built enough water into their opening number that there is ample room to move in the early rounds of negotiation. I urge taking a small risk to see if their "generosity" is reciprocated. If it isn't, there's ample room left to slow down and dig in.

I know I'll never know the case as well as the advocates. "If you don't follow my advice, it doesn't hurt my feelings. Feel free to ignore what I've said. There's no price to pay. I hope I don't have to tell you 'I told you so!'"

If the party *insists* I communicate an over-the-top offer I will do so. Before the other side explodes, however, I remind them they have three options:

1). They can pack up and bring the negotiation to a halt. I encourage rejection of this option.

2). They can stay and proffer an equally unproductive counteroffer mirroring the offer.

3). They can remain and propose a number that gets the process back on track. "You be the mature, sensible party this morning. Accompany the number with an explanatory message. I'll even help you craft it. For example, "To us, your last number was unproductive. We thought about leaving, but we want to show our good faith and willingness to reach resolution. We came here to settle, but we obviously have serious disagreements about value. We've authorized the mediator to communicate the right number for *this* round. And, we still have room to move. This is not a "take it or leave it" proposal. Please don't read this as a sign of weakness, but a sign of our resolve: an effort to keep the process going in a case that really should be settled."

Unfortunately, even when the party selects Option 2 or Option 3, the atmosphere may be poisoned and the foundation for a sound, productive negotiation jeopardized. Ironically, if the counteroffer is the equal opposite (Option 2), it is almost inevitably met with disbelief, consternation and complaint from the very negotiators who started it. Competitive bargainers don't like it when the other side fights fire with fire. It sometimes helps to ask the offeror, now visibly upset, to "join me on the balcony", look down from a process perspective, and recognize that the other side has its own valuation. "This probably isn't the number they planned to start with. They are simply responding to an unrealistic demand with an equally unrealistic counteroffer simply to close the round. Don't jump to the wrong conclusion about where they really are." As you might expect, before communicating an equally aggressive counteroffer, I push back in that room. Mediators must be symmetrical and even-handed. I consider it equally my obligation to manage opening counteroffers.

Sometimes, over-the-top offers and matching counteroffers can result in multiple rounds where the parties move in inches, continuously antagonizing and frustrating each other. This is human nature. We act reciprocally. Too many reciprocal baby steps and our mediator optimism starts to lose its attraction for the participants. I ask whether the lawyers would like to avoid such a "death spiral." Instead, I suggest that it might be worth taking a risk and starting with a more realistic demand. "Reciprocity works both ways," I explain. (See, for example, the second chapter of Robert Chialdini's book *Influence, The Psychology of Persuasion.*) "If you make them a productive offer, I'll do what I can to persuade them to return the favor. We call that making reciprocal concessions. If they don't reciprocate with a number that affords you optimism, it's still early. You won't have given away much, you retain ample room to move and you can slow back down in the next round. They will get *that* message." This approach encourages both parties to "fast forward" the process, reward good behavior and reinforce productive proposals.

Developing a Rationale for Each Offer

Offers that come "packaged" with a solid rationale or explanation are the most productive. If the offeror has not brought one to the table, I help develop one. A rationale avoids the dead end of "my (arbitrary) gut feeling is better than your (arbitrary) gut feeling." In an employment discrimination case, for example, plaintiff should pull together a breakdown of economic losses, past and future.

- What assumptions is the breakdown based upon?
- When do you expect plaintiff will find comparable employment or get back on her feet?
- If future damages are an element, how many years are projected and why?
- In an age case, for example, when did plaintiff plan to retire?
- Attorney fees are recoverable as an element of damage in discrimination and civil rights cases. Accordingly, I typically ask the lawyers to check their billing records for a precise accounting of attorney fees and costs to include in the explanation. Attorney fee dollars complete the plaintiff's rationale.

A much more productive negotiation results when the defendant can see the assumptions and address them from the defense perspective. By laying out *its* assumptions, the defense presents a rational basis for a counter number. Rationales provide the basis for a productive discussion.

The same principles apply in a commercial case. If experts have been retained, I encourage the lawyers to exchange their damage reports. If they haven't hired experts, I ask them to bring lost profit documentation and how they expect to project damages at trial. Again, an exchange over specific numbers and assumptions is more productive and less frustrating than stubborn generalized "gut feeling" proposals and counterproposals without a rational basis.

If the mediator can get the first exchange of numbers off to a good start, chances are subsequent rounds will also be productive and less frustrating. A properly managed opening round lays the foundation for a resolution both sides can accept.

Conclusion

The mediator's role is to assist the parties in negotiating resolution of their conflict. Negotiation coaching is an essential component of that. As the only person who spends time in both rooms, the mediator is uniquely situated to give insightful coaching advice in the negotiation process. Mediators choose the best time to introduce the exchange of numbers. Mediators anticipate how offers will be received and what the reaction might be. Experienced counsel *ask* for the mediator's take on such questions. Parties willingly

consider mediator coaching *because* we have gained their confidence in us and our judgment. They have placed their trust in us and *want* to know what we think. We have provided them with a good process, read their papers, listened to their stories, asked good questions, understood their perspective, and explored the cost of continuing the conflict. We helped identify and weigh their risks neutrally and objectively. We explained why we think they should modify their proposals or buttress them with additional rationale. As a result of the effort we have displayed, parties are willing to listen to us and follow our counsel. Coaching makes a difference. Managing opening offers matters. Coaching may not guarantee success but it does reduce contention, encourage rational exchange, and dramatically improve the prospects for a WIN/WIN resolution.

About the Author

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Lisa Okasinski

Is the FAIR Act Fair to Arbitration?

By Lisa Okasinski

The Forced Arbitration Injustice Repeal Act ("FAIR Act") is proposed comprehensive federal legislation that would prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. The FAIR Act also proposes to ban delegation clauses in arbitration agreements, under which arbitrability questions are decided by the arbitrator rather than the court. If passed, the act would invalidate current agreements that have already been signed, but only for disputes that come up after the law goes into effect.

The FAIR Act was re-introduced by Congressman Hank Johnson (D-GA) and Sen. Richard Blumenthal (D-CT) at the beginning of 2021. The act was originally introduced in 2019 against the backdrop of the Google Walkout and the Me Too movement, and passed the House of Representatives on September 20, 2019. However, the Senate never voted on it, and President Trump at the time stated that he would veto the bill in the unlikely event that it passed in the Senate. Proponents of the FAIR Act are hoping to have better luck this time around with a new presidential administration and with Democrats in control of both chambers of Congress.

While proponents of the Act argue that it would help consumers and ensure a right to access the legal system, many vocal opponents of the Act argue that it would do just the opposite. The U.S. Chamber of Commerce, for example, argues that the only ones who would benefit from the Act are class-action attorneys (not their clients) and that the Act is based on a fundamental misunderstanding of how arbitration process is set up:

> Proponents of this legislation attempt to justify those consequences by distorting or ignoring the fairness and due process protections built into the design of consumer and employment arbitration systems. The American Arbitration Association (AAA), the country's largest arbitration provider, imposes detailed fairness protocols for employment and consumer arbitrations, and will not accept a case unless the arbitration agreement complies with those standards. These requirements mandate that arbitrators must be neutral and disclose any conflict of interest; give both parties an equal say in selecting the arbitrator; limit the fees employees and consumers must pay to $300 and $200 respectively

– less than the filing fee in federal court; empower the arbitrator to order any necessary discovery; and require that damages, punitive damages, and attorneys' fees be awardable to the claimant to the same extent as in court. And the AAA rules require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, requires similar protections. [1]

The passage of the FAIR Act in its current form would also be a blow to the Federal Arbitration Act, which has evidenced a national policy favoring arbitration since its passage 1925. While there are certainly improvements that should be made to ensure fairness and accountability in arbitration, Congress should be careful not to throw the baby out with the bathwater. More middle ground solutions may be able to address concerns about fairness while still preserving the advantages of arbitration. For example, barring specific types of claims rather than broad categories of claims or allowing parties to opt out of arbitration rather than banning arbitration provisions outright may be possible solutions.

Endnotes

[1] Bradley, Neil. "U.S. Chamber Letter on the 'Forced Arbitration Injustice Repeal (FAIR) Act'", 21 Mar. 2021.

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Erin R. Archerd

In Case You Missed It: SCOTUS Rules *in GE v Outokumpu*

By Erin R. Archerd

Justice Clarence Thomas is, perhaps, more famous for his concurring opinions in arbitration cases before the United States Supreme Court, but last summer he wrote for the majority in the case of *GE Energy Power Conversation France SAS, Corp. v Outokumpu Stainless USA, LLC* (2020). In the case, the court looked at the interaction between the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, and American common law doctrines of equitable estoppel, asking whether GE Energy, a non-signatory to an arbitration agreement, could compel arbitration.

The Supreme Court found that the New York Convention did not conflict with equitable estoppel, though it did say that lower courts are free on remand to consider whether the doctrine would, in fact, permit GE to enforce the agreement to arbitrate.

The parties' dispute arose over the performance of steel mill roller engines produced by a predecessor of GE Energy. Neither GE Energy nor Outokumpu were parties to the contracts governing the initial purchase of the engines that contained the agreements to arbitrate. Instead, those original contracts had been entered into by ThyssenKrupp Stainless USA, the original owner of the Alabama steel manufacturing plant at which the engines were installed, and F.L. Industries, who was tasked with constructing the plant. F.L. Industries subcontracted with Converteam (the predecessor of GE Energy) to provide the motors for the engines.

The arbitration agreement between the buyer ThyssenKrupp and the seller F.L. Industries called for arbitration of disputes and specified that the "seller" included subcontractors, appending a list of subcontracts to the agreement that included GE Energy's predecessor. However, by the time the issue with the mill engines' performance arose, the steel mill had been acquired by a new owner, Outokumpu Stainless USA, who objected to GE Energy's efforts to remove the case from state to federal court and have the federal court dismiss Outokumpu's case and compel it to arbitrate with GE.

The District Court granted GE Energy's motion to compel, reasoning that both entities were parties to the agreements containing the arbitration provision. The Eleventh Circuit reversed the order to compel arbitration because it interpreted the New York

Convention to require "that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." (emphasis in original). Because GE Energy was not a signatory to the original contracts, it could not compel arbitration. The Eleventh Circuit also held that GE Energy's equitable estoppel argument as to why it should be allowed to enforce the arbitration agreement was in conflict with the New York Convention's signature requirement. This created a Circuit split, and so the case was taken up by the Supreme Court.

The New York Convention provides the enforcement mechanism for much of the world's international commercial arbitration. It allows entities in member states to enforce arbitral awards and feel secure that those awards will be enforced by courts in other countries.

Thomas, in his opinion, framed the Convention as primarily a means of enforcement of awards, and not as legal authority that has much to say about the formation of the obligation among parties to arbitrate in the first place.

Outokumpu's arguments for why they should not be required to arbitrate their claims against GE Energy were rooted in Article II of the Convention, which, as Thomas also took time to note, is only three sentences long. Specifically, Article II(2) of the Convention says that "[an] 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters of telegrams." Such language seems open to a reading broader than that given by the Eleventh Circuit, since an exchange of letters or telegrams does not explicitly require signatures.

While the Court did not give a lengthy analysis of Article II(2), Thomas deemed the Convention silent on the issue of non-signatory enforcement and found nothing in the text of the Convention prohibiting the application of U.S. equitable estoppel doctrine.

In terms of enforcing agreements to arbitrate, Article II(3) of the Convention says that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The court read that provision to require that arbitration agreements be enforced when arbitration agreements are formed as called for under the Convention, but to allow domestic courts to refer parties to arbitration under domestic rules as well. In other words, if the arbitration agreement is formed properly under domestic law, even if it is in a different manner than set forth in the Convention, the U.S. courts can still enforce the agreement to arbitrate without conflicting with the Convention.

Indeed, points out Thomas, the Convention leaves it to domestic law to figure out issues like whether an arbitration agreement is null and void, inoperative, or incapable of being performed. Those readers familiar with U.S. arbitration jurisprudence know that it takes a very robust challenge to the enforceability of an arbitration agreement in order for a court, particularly the Supreme Court, not to find it enforceable. Though Ronald Mann on SCOTUSblog noted after listening to oral arguments in the case that an unusually small number of justices seemed predisposed to compel arbitration in this instance.

Outokumpu also attempted to argue that the drafting history of the Convention called for a "rule of consent" that would displace the use of domestic estoppel doctrine from compelling it to arbitrate, but the Court found no textual basis for the claim and found that the statements Outokumpu relied on failed to "address the specific question whether the Convention prohibits the application of domestic law that would allow non signatories to compel arbitration."

The court also found persuasive the application of the Convention in other countries and UN guidance on the interpretation of Article II of the Convention, though it questioned how much weight to give any sources created decades after the Convention had originally been ratified. Thomas dodged the question of whether federal administrative guidance about the Convention (guidance which supported applying the arbitration provision to non-signatories) should be given deference by the Court, saying that since the guidance was consistent with the Court's own reasoning, no deference was needed.

Justice Sotomayor concurred in the judgment, emphasizing that any enforcement of an arbitration agreement must "be rooted in the principle of consent to arbitrate." Sotomayor noted that equitable estoppel varies from jurisdiction to jurisdiction and cautioned that it should not be applied in a way that does not reflect a party's consent to arbitrate.

In many ways, this is a straight-forward decision. The Supreme Court views the New York Convention as a treaty largely focused on the enforcement of arbitral awards and consistent with the Court's interpretations of the FAA that favor enforcement of

agreements to arbitrate.

Practically speaking, this means that entities should assume that they inherit the arbitration agreements pertaining to contracts connected with asset purchases and that even if the entities are based in a foreign country they may still be subject to U.S. law regarding the enforceability of arbitration agreements. The New York Convention, at least, will give them little room to avoid proceeding to arbitration.

Companies purchasing assets, therefore, should be vigilant about assuming arbitration obligations, and aware that it may be well-nigh impossible to assume the asset and the rights sufficient to bring a claim while somehow stripping the obligation to arbitrate. Perhaps there may still be the possibility of bringing alternate claims not based on the contract in court, such as tort-based claims, but current American arbitration jurisprudence seems likely to delegate those claims to arbitrators.

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Edmund J. Sikorski Jr.

Be Prepared: What Mediation Counsel Can Learn from the Boy Scouts of America

By Edmund J. Sikorski Jr.

Introduction

Most problems encountered in any endeavor come from lack of preparation. In the context of mediated case resolution, there are two separate but inter-related and inter-dependent preparation activities simultaneously in play. The first is counsel preparation. The second is client preparation. Failure to do either or both will result in almost certain disaster. Any attempt to "just wing it" will meet the same consequences as did Icarus.

1. Six Components of Counsel Preparation

First: Select a mediator with subject matter knowledge.

A 2009 study by the ABA Section of Dispute Resolution Task Force on Mediation Quality found that "to a very substantial degree users endorsed the importance of subject matter knowledge" by mediators.

Depending on the nature of the case, for a mediator to come up with the right questions to facilitate resolution may well require that the mediator have significant experience in a particular field. Mediators with knowledge and experience in that area not only can provide those questions, but do so with the respect of the parties, based on that experience and expertise. A key hallmark of an effective mediator is the ability to hear what is not being said in order to cut through the real motivating issues.

Second: **Identify and require the presence of the real decision maker(s).**

If the real decision maker(s) is not a participant, the entire process becomes meaningless, an exercise in futility, and a waste of time and money.

Third: Provide and require adequate exchange of information.

The entire mediation model is predicated on ALL of the parties having ALL of the SAME information. If all of the cards and supporting documents are not "on the table" it is unrealistic to think that there can be a satisfactory result or at least resolution on terms acceptable to all.

Adequate information means sufficient information to make an informed settlement decision. If one withholds information, one must answer the question whether the withheld information adds to or detracts from the legitimacy of the claim or defense during the mediation process. The mediation process is after all an opportunity to convince the other side of the legitimacy of the claim and value of the case.

Fourth: Prepare an effective mediation brief.

Mediation briefs are NOT repaginated motions for summary judgment. Mediation briefs are an opportunity to persuade the other side by presenting facts, arguments, and summaries of evidence in visually embedded form without the constraints of the formal rules of evidence that make the opposition reluctant to proceed to trial and willing to consider why resolution on your suggested terms is in their best interest.

Do everything in your power to objectify the claim, position, or defense. Make the content EASY and SIMPLE to understand. Scientific and psychological studies advise that the most persuasive presentations are those that can be readily understood, grasped, and adopted by a sixth-grade elementary school student.

Fifth: Make an objective case valuation and risk analysis.

A risk assessment protocol is an explicit list of the assumptions and calculations that underlie the value derived. Support this protocol with Jury Verdict Research and decision tree probability analysis of the possible litigation outcomes. (See "Decision Analysis as a Mediator's Tool" David P. Hoffer; Harvard Negotiation Law Review Vol 1:113 Spring 1996.)

Sixth: Develop and stick to a negotiating plan.

Negotiation communications that start with a number higher (plaintiff) or lower (defendant) than the parties own case evaluations are inviting emotional reactive responses that shut down the process and lead to impasse for no good reason. All that will be accomplished is an argument between two or more sides that have traded an organized cognitive process for a war of attrition.

Start with a plan beginning with your "best day in court" and systematically moving through your negotiating range to your walk away number.

Stick with the plan and stay in control of an otherwise reactive process calculated to be self-defeating. As in any military or sporting contest, victory is often achieved because of the self-inflicted wounds by the other side upon itself. (See Nancy E. Hudgins' Civil Negotiations & Mediations Blog post "Script Your Moves".)

2: Ten Components of Client Preparation

An unprepared client may very well become a "difficult" client in the midst of mediation and either precipitate or contribute to impasse when in fact the case should have settled despite.

The following is a ten-item check list to prepare the client for the mediation experience thus enhancing the prospect of case resolution.

First: The client must understand the purpose of mediation.

MCR 2.410(A)(1) states that "All civil cases are subject to alternative dispute resolution process unless otherwise provided by statute or court rule". The remainder of the rule provides for a description of an ADR plan, the ADR Order, required attendance at ADR proceedings and penalties for failure to attend ADR proceedings, and relief from and supervision of the ADR plan.

MCR 2.411 applies to cases that the court refers to mediation provided in MCR 2.410 and distinguishes from civil mediation from MCR 3.216 which governs mediation of domestic relations cases and MCR 3.970 that governs mediation in child protective proceedings.

MCR 2.411(A)(2) defines "Mediation" as a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. It specifically states that a mediator has no authoritative decision-making power.

The remainder of the rule governs among other items such as mediator selection, conduct of mediation, payment of mediator services, mediator qualifications, development of standards of conduct for mediators, and mediation of discovery disputes.

On February 1, 2103 the Michigan SCAO Office of Dispute Resolution published the current Mediator Standards of Conduct, which are summarized below:

Standard 1: **Self-Determination**

Part A provides in material part: "A mediator shall conduct mediation based on the principle of self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome, including mediator selection, process design, and participating in or terminating the process"

Standard 2: **Impartiality**

Freedom from favoritism, bias, or prejudice.

Standard 3: **Conflicts of Interest**

Dealing or relationship that could be viewed as creating bias, impartiality, or self-interest on the part of the mediator.

Standard 4: **Mediator Competence**

Mediator should be qualified by training, education, or experience to undertake a mediation.

Standard 5: **Confidentiality**

A mediator shall maintain and explain confidentiality of information acquired in the mediation process.

Standard 6: **Safety of Mediation**

Reasonable efforts shall be made throughout the mediation process to screen for impediments that would impede achievement of a voluntary and safe resolution of issues i.e. domestic abuse or mental impairment.

Standard 7: **Quality of the Process**

A mediator shall conduct mediation in accord with these Standards in a manner that promotes diligence, timeliness, safety, presence of appropriate participants, party participation, procedural fairness, party competency, and mutual respect of all participants.

Mediation should be conducted pursuant to a written agreement to mediate that includes the mediator's fee, a description of the process, the role of the mediator, and the extent of confidentiality.

Standard 8: **Advertising and Solicitation**

A mediator shall be truthful and not misleading when advertising, soliciting, or communicating the mediator's qualifications and shall not guarantee outcomes.

Standard 9: **Fees and Other Charges**

A mediator shall provide each party or their representatives information about mediation fee, expenses, and any other actual or potential charge that may be incurred in connection with a mediation.

Standard 10: **Advancement of Mediation Practice**

A mediator should act in a manner that advances the practice of mediation.

MCR 2.412 defines Mediator, Mediation communication, Mediation party, and Mediation participant. It also defines confidentiality and the exceptions to confidentiality.

Second: The client must understand the mediator's role, *i.e.*, what a mediator does and does not do.

The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate authority, however, rests solely with the parties.

Simply put, the client must understand that the mediator owns the process, but the parties own the result.

Third: The client must understand the process and know what to expect procedurally and substantively.

Procedurally, the client needs to know that traditional caucus-based mediation follows a format:

a) Mediator opening statement. It explains the process and remind the parties of the ground rules of civility.

b) Joint meeting statements of the parties. This is perhaps the first and last time that the parties will actually have the opportunity to "tell their story as they see it" to the other side without interruption.

c) Caucus. This is where the real work begins, and preparation pays off. Unless the client is well prepared, the negotiation over what amount of money will be paid may very well be perceived as a frustrating auction process of concessions and adjustments that stimulates emotional responses rather than reasoned assessments that soon spiral into an emotional crash that deprives the parties of the opportunity to reach resolution before their best numbers are reached. A predetermined plan of negotiation is essential to combat the natural reaction of emotionally responding to the offer and counter-offer process. It is absolutely essential to make a negotiating plan and stick to it.

d) Impasse or written settlement agreement. Impasse is in theory a point when despite the efforts of the parties, they cannot come up with a solution or number that one party will pay to the other to settle the case. One or both parties leave the meeting, and the mediator files a report with the judge of the case limited to the simple fact that no agreement was reached.

But are we really done with mediation? Probably not. We know that only a small percentage of cases actually go to trial. Perhaps one side or the other needs to think, re-think, digest, and re-evaluate what they really want or need. Many mediators follow through with the parties' counsel after a short period of time to see if they can rekindle the process of resolution. It is common to find that although the parties want to continue to seek resolution, they are reluctant to initiate the process for fear of being perceived as weak. A mediation agreement must be formalized by the parties in writing to be enforceable.

Fourth: The client must understand the confidentiality of the entire process.

MRC 2.412(C) is straight forward: "Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in subrule (D)."

In short, what is said or shown in mediation stays there. This is not to say that otherwise discoverable or admissible evidence cannot be used in later proceedings or trial. Mediation is designed to provide a form in which the client can "tell their complete story, point of view and express emotions and concerns that may not come out because of the rules of evidence or trial procedure.

Fifth: The client must understand the relevant facts and what evidence is or is not likely to be admissible.

For example: what a client believes about the other party's intentions is not fact. What one part may have heard about the other party is not admissible evidence. Claim criteria must be objective to credibly support the claim or allegation.

Sixth: The client must be prepared to understand what the law can or cannot give him/her.

Saying it differently, the client needs to understand the remedy the client hopes/wants to achieve. Not all wrongs have an earthly remedy much less a legal remedy. Aside from Constitutional and Statutory interpretations or determinations, court can only do two things:

1) grant or deny personal liberty, and/or;

2) order transfer of property (including money) from one person to another.

If the remedy the client is expecting is other than 1) or 2) above, adjustment of expectations is in order.

Seventh: The client must be informed of the facts in possession of the adversary.

The corollary of this proposition is: "make sure the other side has all the information in your possession."

The mediation process is heavily dependent on:

1) A frank exchange of information;

2) Justification of value; and

3) A genuine interest to resolve the claim and avoid the risks of trial including attorney client conflict over disappointing or unanticipated results.

Eighth: The client must be given reasonable expectations of case value and/or realistic outcomes AND THE REASONS WHY.

Valuing a case is not an exact science, but it is the job of a lawyer prior to mediation to learn as much as possible about the case (it is usually not possible to know everything), compare it with similar cases that have produced settlement and verdict, and reach a conclusion about the range of value into which the case will fall.

Case valuation STARTS with an assessment of damages, and then DISCOUNTS with case and trial LIABILITIES including costs, present value, trial uncertainties such as how the judge applies the law, how the facts come in, how well the experts will testify, how well the other side's lawyer tries the case, how the jury will react to the witnesses and the attorneys along with a myriad of other contingencies and contingencies. The mediation is sure to fail and create attorney-client friction if the attorney and client just "wing it and see what happens."

Ninth: BATNA and WATNA –DECISION TIME

BATNA is an acronym meaning Best Alternative to a Negotiated Agreement. It represents the available alternatives when a party is unable to negotiate an agreement. It usually means going to trial.

WATNA is an acronym meaning Worst Alternative to a Negotiated Agreement. It represents the available alternative when a party is unable to reach an agreement on what the party thinks they want. It ALWAYS means going to trial.

In addition to the myriad uncertainties of going to trial, there has recently emerged another reason why adopting the position "I'll take my chances in court," is an unrealistic emotional response to be avoided. It suggests that your BATNA is really your WATNA.

In 2008 Vanderbilt University Law School conducted and published a study based on a survey of 295 Florida state circuit court judges. The study concluded that judges rely heavily on intuition when making decisions on the bench and allow distractions to influence their decisions. In other words, decisions are reached and then the reasons for the decision are established rather than the other way around.

Tenth: The client must understand that they must prepare themselves for the mediation session by:

1) Participating in at least one pre-mediation session with his/her/their attorney.

2) Arranging for appropriate child care and time off work.

3) Turning off all personal electronic devices.

4) Discussing the case with affected 3rd parties and/or bringing them to the mediation.

5) Remembering to depersonalize mediator and party comments and keeping reactive emotions in check. Mediation takes 10% courage and 90% commitment to the process.

Conclusion

If you ask a lawyer to answer most questions, the response will most often be preceded by the statement "that depends…" There are of course exceptions to most if not all rules.

Mediation preparation is one of those exceptions. Mediation success is totally dependent on preparation.

BE PREPARED!

(Thank you to Robert Baden-Powell, Founder & Chief Scout of The Scout Association)

About the Author

Edmund J. Sikorski Jr. is an attorney and civil mediator in Ann Arbor. He is a member of the State Bar of Michigan Alternative Dispute Resolution Council and a member of its Skills Action Team and Co-Chair of the Washtenaw County Bar Association ADR Section. He is a recipient of the 2016 National Law Journal *ADR Champion Trailblazer Award and a past member of the Board of Directors of the Florida Academy of Professional Mediators (2014-2015) and a Florida Supreme Court Civil Circuit and Appellate mediator (2011-2016). He has litigated in Michigan and federal trial and appellate courts at all levels for more than 45 years. He has published more than 40 articles relating to civil mediation practice in Journals of the ABA, SBM, and other professional publications and has earned in excess of 200 hours of advanced mediation training. He can be reached at: edsikorski3@gmail.com, www.edsikorski.com, or (734) 845-4109*

Robert E. L. Wright

Supreme Court Orders Evidentiary Hearing Requested by ADR Section:

Alleged Absence of Mandatory Domestic Violence Screening at Issue

*By Robert E. L. Wright**

In a case of first impression, the Michigan Supreme Court has ordered a trial court to conduct an evidentiary hearing to determine whether a signed mediated settlement agreement was obtained under duress and without the domestic violence screening mandated by MCL 600.1035(2) and (3).

The plaintiff wife, Ms. Pohlman, has alleged a history of coercive and violent behavior as a juvenile at the hands of her father which was repeated by the defendant-husband over the course of their near 30-year marriage. She claims the mediator did not screen for domestic violence before or during a lengthy mediation session which ran until 7:00 p.m. when she finally signed the settlement agreement.

She alleges she was coerced into signing the settlement agreement, claiming she was essentially held prisoner and not allowed to leave the offices of the mediator until she signed the agreement. At one point, she says she tried crawling under the conference table to escape from the conference room, but was prevented from leaving by the mediator and her own attorney. In desperation, she shouted, "Let me out of here. I want to go home."

In an affidavit, the husband, Mr. Pohlman, supported his then wife's claim that neither party was screened for domestic violence and that he heard her yelling for help and felt guilty for not trying to assist her. He added a claim that on his arrival he was assured

by his attorney, "It's all arranged with your wife's attorney and mediator. They are going to beat the s**t out of your wife. They're not going to let her leave without signing the agreement. She won't find another attorney." Mr. Pohlman went on to aver, "No meaningful mediation took place on this date, or any subsequent date, regarding my divorce action."

In describing her experience in her own affidavit, Ms. Pohlman claims she was held incommunicado for six hours and blocked from leaving one of her attorney's office where the "mediation" was being held, despite multiple attempts.

Due to long-standing vision problems, Ms. Pohlman was unable to read the document and requested her primary attorney be present to read it to her. However, unbeknownst to Ms. Pohlman, her primary attorney had been told by her other second attorney, who was hosting the mediation, to not attend the mediation.

Again, Mr. Pohlman's affidavit affirms hearing her demanding to review the agreement with her primary attorney and to be allowed to leave, only to hear the host attorney say, "You're not leaving here until you sign. If you don't sign, I quit. You won't get anyone else to take your case." After her calls for help went unanswered, she reluctantly signed the agreement and left the building. In his affidavit, Mr. Pohlman affirms hearing her cry for help and says he castigated himself for not responding.

The next morning, Ms. Pohlman contacted her primary attorney to report what had happened and seeking to disavow the settlement agreement. Hearing the level of stress in her client's report, her attorney immediately referred her to a therapist who saw Ms. Pohlman the same day. Upon hearing Ms. Pohlman's story, her therapist administered psychological tests for PTSD. Ms. Pohlman scored 57 on the test; anything over 38 meets the PTSD diagnosis and scored highest on the subcategory for "Avoidance." Thus, her therapist reports the events at the mediation caused Ms. Pohlman to sign the settlement agreement without the ability to read it as the only perceived way of escaping a situation which triggered her "survival brain."

The trial court refused Ms. Pohlman's multiple requests to conduct an evidentiary hearing to allow proofs as to what happened to her on the day of the mediation and to determine the impact of the mediator's failure to screen for domestic violence. Instead, the trial court held the mediator's failure to conduct the screening was insufficient cause to set aside the settlement agreement.

In a split decision, the Court of Appeals' male majority upheld the lower court, refusing to allow Ms. Pohlman to supplement the record with her ex-husband's affidavit on technical grounds, decided there was insufficient proof of duress (because there was no evidentiary hearing in spite of four request by Ms. Pohlman) since the mediation was conducted in caucus format. In her dissent, Judge Gleicher stated, "When there is background of domestic violence, reasons for presumption against mediation when there is domestic violence do not go away because parties use 'shuttle diplomacy.' That may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment."

On these facts, a majority of the State Bar Alternative Dispute Resolution Section Council voted to support Ms. Pohlman's application for leave to appeal the decision of the Court of Appeals. The Section's Legislation and Court Procedures action team was authorized to file a motion for leave to file a supporting amicus brief which was granted by the Supreme Court.

In its April 15, 2021, amicus brief, the ADR Section asked the high court to overturn the Court of Appeals decision and remand the case to the trial court with direction to hold an evidentiary hearing on the alleged failure to conduct a screening and whether failure to conduct adequate screening obviated the voluntariness required to support the settlement agreement.

The Section cited the prevalence of domestic violence in Michigan (36% of Michigan women experience physical violence from an intimate partner during their lifetimes), the number of divorces filed annually (30,000 average over last 10 years) and the increasing use of mediation in domestic relations cases (e.g., referral of 40% of divorce cases filed in Kent County), the Section urged the Supreme Court to require an evidentiary hearing whenever a party moves to void a settlement agreement for lack of voluntariness, alleging a failure to screen for domestic violence and a history of domestic violence.

On April 23, 2021, the Michigan Supreme Court entered an order remanding the matter to the trial court and directing it to conduct an evidentiary hearing by June 18, 2021, focusing on the plaintiff's allegation the settlement agreement was obtained under duress and without the domestic violence screening mandated by the statute and a complementary court rule. The high court's order retained jurisdiction to consider the circuit court's report on the evidentiary hearing. The ADR Section will continue to monitor the progress of the case.

Pohlman v Pohlman, 344121 (January 30, 2020), lv app pdg LINK TO POHLMAN ORDER

*This article was written by Robert Wright who authored the amicus brief filed on behalf of the ADR Section. A copy of the brief is available at: LINK TO ADR SECTION BRIEF

About the Author

Robert ("Bob") Wright is a past Chairperson of the Alternative Dispute Resolution Section of the State Bar of Michigan, actively involved in many mediation initiatives throughout Michigan, and serves on numerous boards and task forces in support of mediation and other forms of ADR. He has taken or conducted thousands of hours of advanced training and also spent thousands of hours mediating hundreds of disputes. He can be reached by phone at (616) 682-7000 and email at bob@thepeacetalks.com.

FROM INTERSECTIONALITY TO ALLYSHIP

A Presentation by Dr. Tsedale M. Melaku author of *You Don't Look Like a Lawyer: Black Women and Systemic Gendered Racism*

Dr. Tsedale M. Melaku

September 9, 2021, Noon - 2:00 p.m. | Virtual via Zoom | **No admission charge**

The Diversity and Inclusion Action Team of the ADR Section of the State Bar of Michigan is proud to present Dr. Tsedale M. Melaku.

Her presentation examines the concept of intersectionality and how its understanding plays a critical role in (re-)defining allyship. The presentation addresses why organizations should care about intersectionality and its importance on the workplace experiences of Black, Indigenous, and People of Color (BIPOC). Building on this foundation, the presentation further examines the role of privilege (the power to bring people to the table) and how it can be deployed to help BIPOC and other marginalized colleagues in the workplace and personal settings. Dr. Melaku will address how last year's national conversations surrounding police brutality, structural inequality, and white supremacy have led organizations to make public statements and declarations to uproot system racism. Her presentation will conclude with an accountability framework for organizations and actionable steps to promote allyship.

Dr. Melaku is a Sociologist, Postdoctoral Research Fellow at The Graduate Center, CUNY, and author of You Don't Look Like a Lawyer: Black Women and Systemic Gendered Racism, which reflects the emphasis of her scholarly interests on race, gender, class, workplace inequities, intersectionality, and organizations. You Don't Look Like a Lawyer focuses on how race and gender play a crucial role in women of color's experiences in traditionally white institutional spaces. Dr. Melaku's work has been featured in the Harvard Business Review, The New York Times, Bloomberg Law, Inside Higher Ed, Forbes, Fortune, Teen Vogue, and other outlets. Dr. Melaku is currently working on her second book, The Handbook on Workplace Diversity and Stratification, while also researching the impact of COVID-19, racial upheaval, and political polarization on the experiences of women of color in the workplace. To learn more, follow her on Twitter, @TsedaleMelaku, or visit her website, https://www.tsedalemelaku.com .

Dr. Melaku's *"Why Women and People of Color in Law Still Hear 'You Don't Look Like a Lawyer' "* article is at:

https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer

Additional information and registration are at:

https://connect.michbar.org/adr/events/eventdescription?CalendarEventKey=e14ef32b-f809-41a4-8116-7668bf14869e&CommunityKey=8aa9f208-87ad-4434-8e05-bb1982c6b20d&Home=%2fadr%2fevents%2frecentcommunityeventsdashboard

Please Save the Date
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at our
2021 Annual Conference and Meeting
Friday, October 9 and
Saturday, October 10

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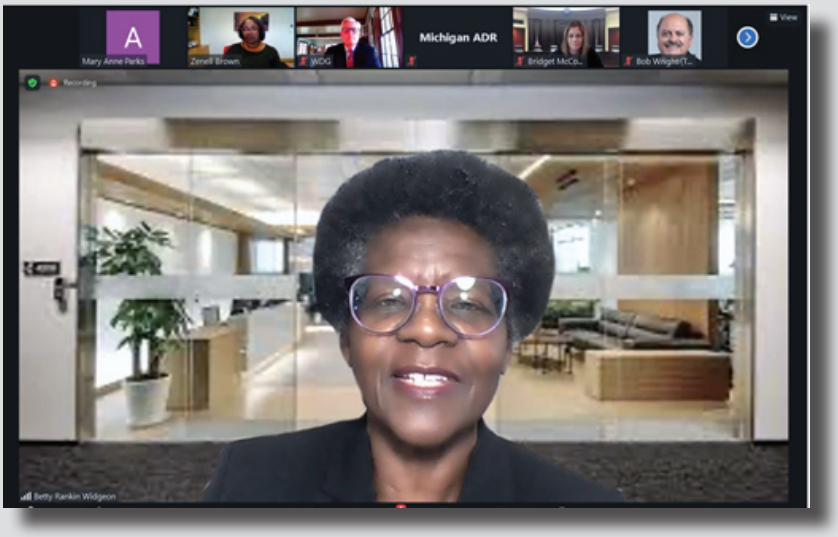

MICHIGAN PLEDGE TO ACHIEVE DIVERSITY AND INCLUSION

WE CAN,
WE WILL,
WE MUST

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

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

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

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

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

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

SBM
State Bar of Michigan

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

SBM | Alternative Dispute Resolution Section
State Bar of Michigan

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Upcoming Mediation Trainings

40-Hour General Civil Mediation Training

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

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

ONLINE: July 12-16, 19-23, 2021
Hosted by Oakland Mediation Center
Register now, visit mediation-omc.org or contact the training department at **(248) 338-4280**, **Ext 214** for additional information.

ONLINE: November 1, 2, 3, 4, 8, 9, 10, 15, 16, 17, 2021
Hosted by Oakland Mediation Center
Register now, visit mediation-omc.org or contact the training department at **(248) 338-4280**, **Ext 214** for additional information.

8-Hour Advanced Mediation Training

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

ONLINE: August 10-11 & October 20-21, 2021
Mediator Wisdom: Reflection, Imitation, and Experience
Hosted by Oakland Mediation Center

Both new and seasoned mediators will learn mediator wisdom with this highly reflective and experiential advanced mediator training. Through mediation role-plays participants will utilize facilitated reflection to capture learning moments, learn new skills and techniques from observing their peers, and gain hands on mediation experience.

Register now or visit mediation-omc.org or contact the Training Department at **248-338-4280, Ext 214** for additional information. Repeats October 20-21

Domestic Relations Mediation Training

SCAO requires 40-hours of mediation training for divorce and custody issues as well as an 8-hour Domestic Violence Screening Training for mediators. The trainings below include both the 40-hour domestic training and 8-hour screening training unless otherwise noted.

ONLINE: June 28, 29, 30 and July 1 & 2, 2021
Hosted by Citizens Mediation Service
Visit https://www.northernmediation.org/workshops-trainings/

ONLINE: July 8 & 9, 15 & 16, and 22 & 23, 2021 from 8:30-5:30
Hosted by Wayne County Dispute Resolution Center and the Community Dispute Resolution Center
Visit https://www.mediation-crc.org/training

ONLINE: Three virtual trainings in June/August, August/September, and September 2021
Hosted by SCAO
Visit https://www.northernmediation.org/wp-content/uploads/2021/06/Registration-Form-DR-Relations-3.216.pdf

How to Find Mediation Trainings Offered in Michigan

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

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

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

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION 2020-2021

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

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

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

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

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

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

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

NAME: _____

FIRM: _____

ADDRESS: _____

_____

CITY: _____ STATE: _____ ZIP CODE: _____

PHONE:_____

E-MAIL: _____

State Bar No. _____(if applicable)

Have you been a Member of this Section before:_____

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

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

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

Non-members must submit payment by check.

Please make check payable to:
STATE BAR OF MICHIGAN

Enclosed is check #_____

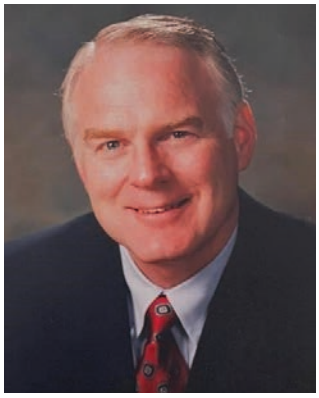
Mail your check and completed membership form to:

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

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

Revised 01/2021

In Memoriam: Jon R. Muth (1945-2021)



By Erin R. Archerd

Jon Muth passed away peacefully on January 29, 2021, after a years-long battle with pulmonary idiopathic fibrosis. A graduate of Kalamazoo College and Wayne State University School of Law, Jon spent his entire 43-year career at Miller Johnson, PLLC. A former president of the State Bar of Michigan (SBM), he was the recipient of the ADR Section's 2020 Distinguished Service Award.

His family has requested any memorial be in the form of contributions to the Kent County Legal Assistance Center, an organization that Jon helped found, and which now helps over 18,000 people each year: https://legalassistancecenter.org/donate/

I never had to opportunity to get to know Jon Muth well, but many members of the ADR Section have spoken to me about how much they have benefited from Jon's support and encouragement through the years. I can only imagine what it must have been like to have had the opportunity to work with him and learn from him in person, though I have had one tiny taste of his powers as a neutral: I use a video he made many years ago with Zena Zumeta in my General Civil Mediation Trainings and from those few minutes I spend with Jon every year, I am impressed by his wit, his warm neutrality, and his commitment to the field of mediation.

When I speak with members of our Section about Jon's passing, I feel a palpable sense of loss. He contributed mightily to the fields of law and ADR here in Michigan, and I wish we had more time with Jon to learn from one of the best. — *Erin R. Archerd, ADR Section Chair-Elect*

Memories of Jon R. Muth

By Michael A. Dettmer

George Googasian called the night of Jon's death to give Teckla and me the news that was not unexpected but news that I couldn't digest. George and Phyllis, Jon and Carol became dear friends during and after our years in Bar leadership. We remain close friends.

Traveling together as couples or Jon and I doing years of summer cycling trips — the Midwest, Canada, Erie Canal, Vermont, and New York, and 5 Michigan DALMACs [the Dick Allen Lansing to Mackinaw Bridge Bicycle Tour]. When you spend seven or eight hours a day pedaling, camping, or sharing a third-rate motel room, you can and do solve every political issue facing not just the law profession but America as well.

(He was) truly a smart and civil man and really funny. And I have to acknowledge (that) he never forgot or forgave me for allowing him to serve half of my term as president! A lot of evenings in restaurants and bars that I bought the dinners or drinks simply out of my guilt in giving him the opportunity of being the Bar's longest serving president!

SBM Connect
State Bar of Michigan

Connect With Us

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

The ADR Section SBM Connect hyperlink is:

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

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

ADR Section Mission

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

1) Providing training and education for ADR professionals;

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

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

Join the ADR Section

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

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

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

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

Editor's Notes

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

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

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

ADR Section Member Blog Hyperlinks

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

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

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

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

ADR Section Social Media Links

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

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

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

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

ADR Section Homepage

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

Dispute **Resolution** Journal

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

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

For comments, contributions or letters, please contact:

*Betty R. Widgeon - bwidgeon@gmail.com – **734-645-6107***
*Erin Archerd - archerer@udmercy.edu – **313-596-9834***
*Lisa Okasinski - lisa@okasinskilaw.com – **313-355-3667***

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