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THE PRACTITIONER

State Bar of Michigan Solo & Small Firm Section Newsletter

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From the Editors

By: Bill Cataldo & Joshua Van Laan

As you can see, we have made several changes to the Section Newsletter, starting with the title. What used to be known as *The General Practitioner* is now simply called *The Practitioner*. And while it may seem trivial, the updated title is designed to reflect the changes that our Section has undergone over the past few years.

The General Practitioner was appropriately titled for the General Practice Section of the State Bar of Michigan. But as time went on, we became the Solo & Small Firm Section of the State Bar of Michigan. And given our new Section name, the old title became somewhat obsolete. Yet for whatever reason, changing the name to *The Solo & Small Firm Practitioner* just didn't seem right. So, after many grueling hours of intelligent conversation, our Section Council and Editors ultimately came up with a title that we felt would adequately reflect this Section's purpose and members. Thus, the Solo & Small Firm Section Newsletter is now more aptly called *The Practitioner*.

While the title change, albeit far from drastic, may certainly be a noticeable one, it is clearly not the only update that has been made to this Newsletter. In fact, probably the most eye-catching is the addition of color to our Section publication! That's right, what was formerly only black and white now has an eye-pleasing and colorful theme. And along with the new title and added color, the Newsletter also has a new and improved layout! In addition, *The Practitioner* will have a few regular sections that we hope to include in almost every issue, and that are intended to be useful to you in your practice.

In sum, we understand that, in order to be relevant to solo practitioners and small firms, this Newsletter needs to be both relevant and current. As such, these changes were made to ensure that our members are receiving up-to-date and relevant information that will be useful to solo and small firms. We hope that you like what you see in *The Practitioner*, and if you have any comments, ideas, or recommendations that you think will be helpful, please let us know. And as always, thank you for being a part of the Solo & Small Firm Section of the State Bar of Michigan.

A Christmas Story

By: Elizabeth A. Silverman

"It's easy to become cynical in our line of work. We see people at their worst. It's important to remember that we are compassionate human beings willing to put ourselves out for others in need."

Gun violence, professional misconduct, and fraud dominate today's headlines. No one can be trusted. No one is safe. I reject this conclusion and refuse to live my life mistrusting my fellow man.

I have often been called naive for this viewpoint. I believe people are basically good and deserve respect and courtesy until they prove otherwise. My brother once complained to me that he thought we were raised to be too polite. I don't think that is true. Good people, good acts, don't grab headlines—but they should.

On December 23, 2015, I was meeting with a client reviewing the bank records of her deceased sister. The sister had previously adopted three of my client's children, but was later brutally murdered by her husband, who is now serving life in prison without the possibility of parole. After her sister's death, my client was appointed personal representative of the estate.

At the end of our meeting, my client told me that she had no money for Christmas gifts for her three children or her sister's child. I told her I would see if there were any organizations who could help her with a few gifts. But as she thanked me and left the office, I realized that I had no idea who, or where, to call.

At first, I posted a message on our Section's listserv, and was referred to the Salvation Army and Goodfellows. One section member, a former police officer, suggested I call the local police.

Next, I received many offers to buy presents for the children, wrap them, and bring them to my office. Others even chimed in with offers of money to buy more gifts, and several attorneys asked me to call them for more details. The Salvation Army took my information and told me where my client could go to pick up some presents. And the Westland Chief of Police, Jeff Jedrusik, personally answered my telephone call, presumably short-handed for the holiday, and promised to deliver gifts to my client's house.

On the morning of Christmas Eve, I began receiving wrapped presents at my office. That afternoon, warm coats, clothes, and gift cards arrived. Not only were those gift cards for food, but also for my client to spend $100 on each child. A $100 gift card for the movies along with boxes of candy were also donated by an attorney in the name of her step-niece. Needless to say, the response was overwhelming.

None of the generous donors asked for anything in return, and they were, to my client's family, anonymous strangers. While many people helped with advice, I would like to especially thank these individuals, who transformed Christmas for a wonderful woman and four children:

John Little, Karie Boylan (for Miss Brisa Alvarado), C. Michael Snyder, Jan E. Strand, Steve Lebowski, Sharon M. Fox, Lyle E. Dickson, James P. Ryan, Wendy Hipsky, Esq., Nan Casey, James A. Fink, the Salvation Army, Richard White, and Jeff Jedrusik.

It's easy to become cynical in our line of work. We see people at their worst. It's important to remember that we are compassionate human beings willing to put ourselves out for others in need. Never expect or demand, but never underestimate what is possible in our brotherhood of attorneys.

I have never before called upon my fellow Section members for help in this kind of situation. I was deeply touched and impressed at the response. My client and the children were absolutely thrilled. I'm sure it was one of their best Christmases. Thank you.

EDUCATE, EXPLORE, & ENGAGE: POINTERS TO PREPARE YOUR CLIENTS FOR FACILITATIVE MEDIATION

By: Richard A. Glaser

The Alternative Dispute Resolution (ADR) Section of the State Bar of Michigan held its annual meeting in early October, 2015 in Traverse City, Michigan. During session discussions, ADR practitioners swapped stories about successful outcomes and frequent frustrations. A common complaint was the lack of preparedness of the parties, leading to the perception that clients who were better educated about the process and what to expect made for more efficient mediations and higher success rates.

This article is offered as a reminder to counsel not only to prepare yourself for mediation, but to assure your client is ready to participate by implementing the following themes: Educate your client; Explore with your client; and Engage your client.

EDUCATE YOUR CLIENT ABOUT THE PROCESS

The client will be a more effective participant when she knows what to expect, what the objective is, and how to achieve it. Sometimes we find that attorneys don't fully explain to their clients the distinctions among litigation, arbitration, case evaluation and facilitative mediation, let alone the different techniques that mediators employ.

Explain the following features of facilitative mediation:

- It is not final and binding;
- The mediator has no power to punish;
- The mediator has solely one function – to help the parties settle;
- Plenary (common) sessions and private (caucus) sessions;
- The process is confidential;
- No information disclosed or statements made are admissible in court.

The reason for the last two points is to encourage candor. Positions may be taken, concessions made, values attached and even apologies offered in order to facilitate the negotiation without fear that they will later undermine the client's case.

Nonetheless, the client can expect gamesmanship, frustration, maybe some anger (e.g., when the client hears the opponent's opening offer or demand), and more than a little disappointment along the way. The client should expect the opponent and his counsel to be having similar reactions in their caucus room. Educate the client that the success rate for mediation is high and the general feedback from parties is that the process was worthwhile, even if not immediately successful.

Be patient.

Educate the client about your mediator. Certainly, if you have not worked with this mediator before, educate yourself about her techniques. During the pre-session telephone conference, you can ask questions directly to the mediator in order to then properly educate your client. Advise the client to be prepared for the mediator to express confidence in and be a champion for his case, and then come back to poke holes and cast doubt about its value. The mediator is not being duplicitous, but is playing devil's advocate as she is doing in the other room. The client would come to realize that on his own, but will be more comfortable and engaged if prepared for the exercise through your role-playing in advance of mediation.

As part of the role-playing preparation, educate the client about how the opponent is assessing the case and placing values on its different issues. Prepare a game plan for reaching a realistic settlement value, and then prepare Plan B. Even before the client asks, and certainly before the mediator raises it, educate the client about the cost, distraction and risks of not settling through mediation and proceeding to trial.

Emphasize that the mediation is not about trial lawyer advocacy or vanquishing the opponent. Resolving a dispute is usually good for you and your client. As Abraham Lincoln said: "As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." As counsel, your best service is to help the mediator help the clients to settle their case. The battle will resume if you cannot settle through mediation.

EXPLORE THE CLIENT'S FEARS AND EXPECTATIONS

Explore with the client the recesses and crevices of the case and her feelings about it and the other side. As counsel, you might sense such hostility and distrust that the plenary session should be truncated or the process would be better served by starting the day in separate sessions. But don't gravitate to that conclusion too quickly. Explore further. How can we work to restore enough trust to negotiate effectively? You might also learn that your client has unreasonable expectations

about the prospect of salvaging a relationship with the opponent.

This exercise is not to prepare the client for some cathartic experience. It is partially to assure that you as lawyer do not learn an important obstacle or lever for the first time during the mediation; although it is not necessarily a bad thing if you do.

A favorite example with a happy ending was the case between a small family owned supplier of automotive components to OEMs (Co. "A"), and a multinational manufacturer of consumer goods (Co. "B"), who wanted to try out its product expertise in the automotive market. In the second year of the relationship, B terminated the contract; A cried foul and sued for breach. The divisive forces of litigation took hold, positions hardened, and the chances for constructive dialogue between the parties diminished.

Within the first hour of mediation during the plenary session, A's young, second generation CEO voiced his belief that B, who had come to the dance with A, must have met someone else there (a competitor of A) and went home with that more attractive partner. This was the first anyone in the room, including A's CFO and its counsel, had heard about these suspicions.

B sincerely apologized for any misunderstanding, and explained that its project team had realized that the automotive market was outside of B's core competency. Thus, B severed the relationship as best it could under the contract and without causing too much disruption to A's supply chain. A, who had interpreted this break-up as a cynical version of "Really, it's not you, it's me," requested a one-on-one meeting with B's executive, and the case settled before lunch.

This "happy ending" example contains several lessons for preparing the client for mediation. While the spontaneity of A's revelation may have spurred the candid discourse that led to settlement, without counsel's advance awareness and ability to prepare, we can imagine scenarios how it instead could have gone badly.

The role of "apology" should never be underestimated, even in a business dispute. Explore with the client whether an apology from the opponent would be meaningful, or whether one from the client would be forthcoming if helpful to the process. Attention to the details of empathy – having you and your client step into other side's shoes – can pay important dividends.

As the mediator, I learned from this example the potential of the plenary session where the parties, rather than their counsel, are actively engaged. The example also illustrates the value of alternative settings for negotiation in addition to the plenary and caucus sessions. The client should be prepared to understand how separate discussions between the clients, with or without counsel, or with or without the mediator, can break through barriers and facilitate progress.

Other areas to explore are sensitive topics or "hot buttons" about which the mediator should be aware, including any cultural customs or protocols. Inadvertent offense by the mediator or the other side can impede progress.

And, of course, does the client have full discretionary authority or is there a necessary stamp of approval (i.e., from a governing board) in order to seal the deal? Understand the procedures and how long it takes so everyone is on the same page before starting the session.

Review in advance with the client the elements of a prospective settlement agreement, including the boilerplate that is often taken for granted. Some parties will have predispositions or regulatory requirements about confidentiality and disclosure of settlement terms that can throw a wrench in the works if not discussed until all other terms have been hammered out.

ENGAGE THE CLIENT TO ACTIVELY PARTICIPATE

While not literally so, facilitative mediation affords your client's most meaningful "day in court" to tell its story, unrestrained by the rules of evidence and risks of cross examination. Plus, as shown by the above example, the benefits can be immediate. Rehearse the client's story. Review the contexts in which it might be most effectively presented. Is this a situation where the client's message should be conveyed face-to-face (most likely), or is the parties' relationship so strained that it will be better communicated with the mediator's deft touch?

Remind the client that her target audience is not the mediator, but the other side, which presents another opportunity to exercise empathy. Simply to ask the client how the adversary is likely to react to the client's message probably will not yield a helpful response. Explore with more probing and specific questions.

- How did the dispute get started?
- Why did it accelerate or fester?
- Was it through neglect, or is there an antagonist?
- Who is viewed here as the victim, and why?

- What might have been done to avoid the divide and its deepening?
- What are the benefits and downsides of settling?
- Whose interests are served by continuing the fight, and why?

What is needed in a settlement to satisfy the interests at stake?

These types of questions may not have much use or relevance to how the issues will be presented at trial, but they are central to the mediation process. By asking your client to answer these questions thoughtfully from both her and the opponent's perspective, empathy is actively cultivated and common ground should come to the surface. These will be the building blocks for a productive mediation.

Rich Glaser has practiced civil litigation in Detroit and Grand Rapids for 38 years, and has provided mediation, arbitration and other ADR services as a neutral since the 1990s. He was selected by the Western District of Michigan Federal Court to serve on its inaugural VFM roster in 1996, and has taught International Commercial Arbit-ration in an adjunct capacity. Rich is a member of the Board of Directors of Business Mediation Network, LLC where he directs BMN's "Lincoln Initiative;" a lawyer training program for mediation advocacy and cust-omizing dispute resolution.

2014-2015 Michigan Arbitration Case Law Update

By: Lee Hornberger

This is a review of the significant arbitration cases in Michigan from 2014 to 2015. For the sake of brevity, this article uses a short citation style rather than the official style for the unpublished decisions of the Court of Appeals.

Michigan Supreme Court Cases

Dispute with individuals not within arbitration agreement.

Altobelli v Hartmann, ___ Mich ___ (November 13, 2015) (SC 150656) directed scheduling of oral argument on whether to grant application for leave or take other action. Defendants are principal members of a law firm. The operating agreement for the law firm contains a mandatory arbitration agreement covering any dispute, controversy or claim between the law firm and a current or former principal.

The parties were directed to file supplemental briefs addressing whether the COA correctly affirmed the Circuit Court's denial of defendants' motion to dismiss based on the agreement's arbitration provision because the plaintiff's claims are directed at the individual defendants, rather than the law firm. *Altobelli v Hartmann*, 307 Mich App 612 (2014). The COA affirmed the Circuit Court's order denying defendants' motion to compel arbitration, reversed the Circuit Court's order granting partial summary disposition in favor of plaintiff, and remanded for further proceedings. The Circuit Court found that the dispute did not fall within scope of arbitration clause. The COA agreed with the Circuit Court that the dispute between the plaintiff and the individual defendants was not arguably within the arbitration clause.

Does the arbitrator decide attorney fees in a lien case?

Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, ___ Mich ___; 861 NW2d 630 (2015), granted leave to appeal and ordered the parties to address whether the COA erred in holding that the plaintiff contractor, who filed claim of lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, and then filed Circuit Court action against property owner, alleging breach of contract, foreclosure of lien, and unjust enrichment claims, was entitled to an award of attorney fees as MCL 570.1118(2) "prevailing party," when the plaintiff prevailed in arbitration on contract claim, but neither the arbitrator nor the Circuit Court resolved plaintiff's foreclosure of lien claim.

In *Ronnisch Const Group, Inc*, 306 Mich App 203 (2014), the plaintiff appealed from the Circuit Court's denial of its request for CLA attorney fees. Because the Circuit Court erroneously concluded that it was precluded from considering awarding attorney fees, COA vacated portion of order dealing with attorney fees and remanded. The arbitrator declined to address plaintiff's request for attorney fees as prevailing lien claimant and reserved that issue for the Circuit Court. The Circuit Court denied attorney fees because defendant had complied with the award.

The COA held the plaintiff was prevailing lien claimant; fact that lien amount was determined by the arbitrator instead of the court or jury does not compel different conclusion. The COA vacated denial of attorney fees, and remanded matter to the Circuit

Court to decide whether to grant attorney fees or not.

Duty to defend in arbitration.

Hastings Mut Ins Co v Mosher Dolan Cataldo & Kelly, Inc, 497 Mich 919 (2014), in lieu of granting leave to appeal, reversed the COA (COA 296791). According to the Supreme Court, COA erred in holding that insurer did not have duty to defend insured in arbitration case. Duty to defend is broader than duty to indemnify. Insurer has duty to defend, despite theories of liability asserted against insured that are not covered under policy, if there are any theories of recovery that fall within policy. The claimants in the arbitration case alleged water damage that was not excluded from coverage by the insurance policy exclusions. Because the insurer had duty to defend, it was not entitled to restitution. The Supreme Court remanded the case to the Circuit Court for further proceedings.

Is arbitration award "verdict" for case evaluation purposes?

Acorn Investment Co v Mich Basic Property Ins Ass'n, 495 Mich 338 (2014). Michigan Basic rejected case evaluation and appraisal panel's award was less favorable to Michigan Basic than case evaluation. See MCR 2.403(O)(2)(c). In this case, the action proceeded to judgment as result of a ruling on a motion when the Circuit Court granted Acorn's motion for entry of judgment. Acorn may recover its actual costs because the motion for entry of judgment caused the case to "proceed to verdict" when the Circuit Court ruled on motion. Because the Circuit Court had discretion to award such costs to Acorn, the Supreme Court reversed the COA and remanded the case to the Circuit Court for further proceedings.

COA vacates second award and confirms first award.

City of Holland v French, 495 Mich 942 (2014), denied leave to appeal from *City of Holland*, 309367 (June 18, 2013). Justice Markman dissented. The initial arbitrator determined that the City lacked "just cause" to terminate the defendant and that it must reinstate her with back pay. The Circuit Court vacated this award and required a second arbitration. The second arbitrator ruled in favor of the City, and the Circuit Court affirmed. In a split decision, the COA reversed the Circuit Court's vacatur of the first arbitration award and remanded for entry of order enforcing the first award.

Michigan Court of Appeals Published Decisions

Arbitration in UIM No Fault Case

Nickola v MIC Gen Ins Co, ___ Mich App ___, 322565 (September 24, 2015). This case discusses attorney fee and interest issues arising from a protracted Uninsured Motorist case that included an arbitration.

COA Partially Confirms and Partially Vacates Award in Defamation Case

In *Hope-Jackson v Washington*, ___ Mich App ___ , 319810 (August 18, 2015), the COA affirmed confirmation of that part of an award in a defamation case concerning tolling, defamation, presumed damages, actual malice, and $360,000 in per se damages; and reversed confirmation of that part of the award concerning $140,000 exemplary damages. Since there had been no request for a retraction, the COA ruled that arbitrator's granting of exemplary damages was an error of law on the face of the award. MCL 600.2911(2).

Pre-arbitration hearing submission of exhibits.

Fette v Peters Constr Co, 310 Mich App 535 (2015). Michigan Arbitration Act (MAA), MCL 600.5001 *et seq*, controlled this case; not Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*. The COA concluded the record did not support plaintiffs' contention that the arbitrator considered exhibits that the defendant electronically shared before the hearing in making the award determination. Even if the award were against the great weight of evidence or was not supported by substantial evidence, the COA would be precluded from vacating the award. Allowing parties to electronically submit evidence prior to the hearing did not affect plaintiffs' ability to present any evidence they desired.

Lay-offs go to court, not STC or CBA.

Baumgartner v Perry Public Schools, 309 Mich App 507 (313945, 314158, 314696) (March 12, 2015), *lv dn* ___ Mich ___ (2015). The COA held that the Legislature exercised its constitutional authority con-cerning teacher layoffs. The Legislature made merit, not seniority, controlling factor in layoff decision making. It did this by removing teacher layoffs as subject of collective bargaining and this removed unions and administrative agencies from dispute-resolution process in this specific realm of public-sector labor law. The Legislature gave school boards power to make layoff decisions, and gave courts sole and exclusive power to review school boards' decisions.

Pre-award lawsuit concerning arbitrator selection.

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc, 304 Mich App 46 (2014) (Saad and Sawyer [majority]; Jansen [dissent]), is an example of the viewpoint that "[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision[,]" Elkouri & Elkouri, *How Arbitration Works* (7th ed), p 4-37, and "[c]hoosing an arbitrator may be the most important step the parties take in the arbitration process." Abrams, *Inside Arbitration* (2013), p 37.

In *Oakland-Macomb Interceptor Drain Drainage Dist*, the AAA did not appoint a member of the arbitration panel who had specialized qualifications required in the agreement to arbitrate. The agreement modified the AAA rules by mandating qualifications for the panel and outlining manner in which the AAA must appoint panel. The plaintiff brought suit against the defendant and the AAA to enforce these requirements. The Circuit Court ruled in favor of the defendant and the AAA. The Court of Appeals in a split decision reversed.

The issue was whether the plaintiff could bring a pre-award lawsuit concerning the arbitrator selection process. According to the majority, courts usually will not entertain suits to hear pre-award objections to arbitrator selection. But, when a suit is brought to enforce essential provisions of the agreement concerning criteria for choosing arbitrators, courts will enforce such mandates.

According to the majority, the agreement to arbitrate made specialized qualifications of the panel central to entire agreement; and, when such a provision to arbitrate is central to the agreement, the Federal Arbitration Act (FAA), 9 USC 1, et seq, provides that it should be enforced by courts prior to the arbitration hearing. "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed … ." 9 USC 5.

According to the majority, a party may petition a court before an award has been issued if (1) the arbitration agreement specifies detailed qualifications arbitrator(s) must possess and (2) the arbitration administrator fails to appoint an arbitrator that meets these qualifications. The court may issue an order, pursuant to § 4 of FAA, requiring that the arbitration proceedings conform to the terms of the arbitration agreement. The majority awarded the plaintiff its Circuit Court and COA costs and attorney fees.

Judge Jansen's dissent said that a party cannot obtain judicial review of the qualifications of arbitrators prior to an award. There was no claim that the selection of the panel member involved fraud or any other fundamental infirmity that would invalidate the arbitration agreement, or any claim that the appointee had an inappropriate relationship with a party. Although the appointee might not have had the requirements for appointment set forth in the agreement, the plaintiff was required to wait until after the issuance of an award in order to raise the issue in a proceeding to vacate. 9 USC 10.

Michigan Court of Appeals Unpublished Decisions

Court Appointment of DRAA Substitute Arbitrator Reversed

In *Zelasko v Zelasko*, 324514 (December 8, 2015), defendant appealed an order appointing a substitute arbitrator after the agreed-upon arbitrator died. The same order denied defendant's request that the interim arbitration orders be vacated. Indicating nothing in the DRAA, MCL 600.5070 et seq., permits a Circuit Court to appoint a substitute arbitrator absent agreement of the parties, the COA reversed that portion of the order appointing a substitute arbitrator. The COA agreed with the Circuit Court that there was no reason to disturb the interim orders, which were either not contested or were affirmed by the Circuit Court, and affirmed that portion of the order.

Race to the Courthouse

New River Construction, LLC v Nat'l Mgt & Preservation Svs, LLC, 324465 (July 21, 2015). COA, after considering the totality of the circumstances, held that the Circuit Court abused its discretion when it denied the motion to set aside a default judgment. The plaintiff is bound to arbitrate its breach of contract claim and the defendant would have been entitled to summary disposition on these matters.

COA confirms binding "mediation" award.

In *Cummings v Cummings*, 318724 (May 19, 2015), the plaintiff appealed the Circuit Court order which denied the plaintiff's motion to vacate a "binding mediation award." The COA affirmed. The COA held binding mediation is equivalent to arbitration and subject to same judicial review.

According to the COA, the parties agreed to binding mediation, which like arbitration, does not require a certain degree of formality. Relief from untimely award was not warranted where the appellant failed to allege what substantial difference would have resulted from a timely award. In addition, according to the COA, cases where award was vacated due to ex parte communication involved a violation of arbitration agreement prohibiting such conduct.

The binding mediation agreement did not contain a clause prohibiting ex parte communication, so there was no indication that the mediator exceeded his powers by acting beyond the material terms of the parties' contract. The COA said "Plaintiff also asserts that the mediator badgered witnesses, but the only example he gives is that the mediator poked a witness with a pencil. While poking a witness with a pencil, if that is exactly what occurred, is inappropriate, it does not show a concrete bias."

The COA pointed out the hearings were often hostile or aggressive. Although there were times where the mediator's behavior was not indicative of 'a good mediator' or necessarily professional, the mediator did the best he could to control the situation he was presented with

and keep calm when hearings became aggressive."

COA confirms award in spite of discovery and witness interview issues.

Perry v Portage Pub Sch Bd of Ed, 319170 (March 12, 2015). In this AAA employment arbitration case, the plaintiff appealed the Circuit Court's order denying the plaintiff's motion to vacate an award. The COA affirmed. Prior to the arbitration, the employer retained an investigator who created a report. The employee requested a copy of the report before the arbitration hearing. The employer declined, indicating it would provide the report to the employee only if the employee realized this would make the document subject to public disclosure under the Public Records Act.

In addition, the employee asked authorization to interview potential employee witnesses. The employee did not request to take formal depositions. At the arbitration hearing, the employer utilized the investigator as witness. The arbitrator issued an award in favor of the employer. The Circuit Court refused to vacate the award. The COA agreed with the Circuit Court that (1) the employer did not refuse to produce the report but rather correctly conditioned such production on a realization of Public Records Act implications, and (2) the employee could have used the deposition procedure to interview witnesses but chose not to.

Dismissal order to permit arbitration is not final appealable order.

ITT Water & Wastewater USA Inc v L D'Agostini & Sons, Inc, 319148 (March 10, 2015). The Circuit Court entered a stipulation and order of dismissal without prejudice. The order stated that the parties entered into an arbitration and tolling agreement concerning their claims. The Circuit Court retained jurisdiction over the case and the case could be reopened under MCR 3.602(I) upon a party's motion "for purposes of confirming any award rendered pursuant to the arbitration agreement of the parties." The order also stated that it resolved the last pending claim and closed the case. MCR 2.602(A)(3). Then the defendant filed an appeal challenging the Circuit Court's prior orders granting partial summary disposition in favor of the plaintiff.

The COA held that the stipulated order of dismissal entered by the Circuit Court pursuant to the parties' agreement to submit their claim and counterclaim to arbitration is not appealable by right, and the COA lacked jurisdiction over the appeal. The COA noted that after entry of judgment on an award, the defendant could challenge in an appeal by right the Circuit Court's orders granting partial summary disposition in favor of the plaintiff.

All of artwork invoice claims subject to arbitration.

Beck v Park W Galleries, Inc, 319463 (March 3, 2015). The COA affirmed the Circuit Court's ruling that arbitration agreements were enforceable despite the challenge to the invoices as a whole, reversed the Circuit Court's ruling that all of the claims were not subject to arbitration, and remanded for entry of order granting defendants' motion for summary disposition.

The arbitration clauses in the parties' agreements provided that any issues of arbitrability should be resolved by an arbitrator, and not the court. Because the parties' agreements contained such a clause, and the basis for plaintiffs' challenge to validity of the agreements was not directed specifically to the agreements to arbitrate, the Circuit Court correctly held that plaintiffs' claims were subject to arbitration.

Judge Hoekstra's dissent said he agreed with the majority in concluding that the invoices containing arbitration clauses are subject to arbitration but he disagreed that the invoices that did not contain arbitration clauses were also subject to arbitration.

Successors have to comply with arbitration clause.

Marjorie Brown Trust v Morgan Stanley Smith Barney, LLC, 317993 (February 5, 2015), *lv dn* ___ Mich ___ (2015). The main issue was whether the dispute over investment account is subject to arbitration, as specified in the account agreement, or whether dispute can proceed in Michigan judicial system.

The plaintiff admitted her account with Smith Barney Shearson was subject to the arbitration agreement, but asserted that defendants Morgan Stanley Smith Barney and Citigroup Global Markets were not successors to Smith Barney Shearson, and were not parties to the arbitration agreement. The defendants produced evidence that Morgan Stanley Smith Barney and Citigroup Global Markets were successors of Smith Barney Shearson, through a series of consolidations. The COA agreed with the Circuit Court that the defendants were successors of Smith Barney Shearson and the agreement to arbitrate was binding on the plaintiff.

Labor arbitration award res judicata in subsequent court proceeding.

In Heffelfinger v Bad Axe Public Schools, 318347 (December 2, 2014), *lv dn* ___ Mich ___ (2015), a teacher was separated pursuant to a Last Chance Agreement. The LCA provided separation could be arbitrated. The separation issue went to arbitration. The arbitrator upheld the separation. The teacher filed a court action arguing that the LCA violated the Teachers' Tenure Act, MCL 38.71 *et seq*. The COA held that that award was res judicata and precluded the teacher's court case.

In a prior decision, the COA held that collateral estoppel applies to positions taken in a prior arbitration. *Thomas v Miller Canfield Paddock & Stone*, 314374 (October 21, 2014).

Past practice issues go to arbitration.

Wayne Co v AFSCME, 312708 (October 9, 2014). COA held that, if CBA covers term or condition in dispute, enforceability of provision is left to arbitration. The CBA grievance and arbitration procedures were bypassed. Scope of MERC's authority in reviewing claim of refusal-to-bargain when parties have a separate grievance or arbitration process is limited to whether CBA covers subject of the claim. When there is evidence that past practice has modified CBA, it is left to arbitrator to make determination on the issue and not MERC.

USAF pension consideration in DRAA arbitration.

Torres v Torres, 314453 (August 19, 2014) (Gleicher and O'Connell [majority]; and Hoekstra [dissent]), *lv dn* ___ Mich ___ (2015). Parties submitted divorce case to arbitration. Evidence submitted to arbitrator revealed that husband was entitled to USAF pension. Arbitrator's initial decision overlooked USAF pension. When wife brought this omission to arbitrator's attention, he acknowledged existence of unvested pension but refused to value or equitably divide it. As a result, award on its face improperly treated pension as husband's separate property. The COA reversed Circuit Court's affirmance of award and remanded for reconsideration of the pension distribution.

Award from hearing with one party absent confirmed.

Blue River Financial Group, Inc v Elevator Concepts Ltd, 315971 (July 29, 2014). Arbitration hearing took place. Defendants did not attend. There was no answer or response to plaintiff's demand for arbitration. There was no transcript of arbitration. Arbitrator issued award in favor of plaintiff. Plaintiff filed motion to enforce award. Defendants argued there was no agreement to arbitrate, and arbitrator had no authority to issue award against them. Plaintiff contended that defendants waived any challenge to award because they never objected to plaintiff's demand for arbitration.

The Circuit Court granted plaintiff's motion to enforce award. COA affirmed and indicated that to determine arbitrability, court must consider whether there is arbitration provision in parties' contract, whether dispute is arguably within arbitration clause, and whether dispute is expressly exempt from arbitration by terms of contract, and doubts about arbitrability are resolved in favor of arbitration. COA indicated that court may not hunt for errors in award, and facially valid damage award should not be disturbed.

Arbitrator failed to comply with arbitration agreement.

In *Visser v Visser*, 314185 (July 15, 2014), a domestic relations matter, parties agreed to arbitration in order to resolve issues relating to child custody, parenting time, child support, and property. Parties agreed that, pursuant to MCL 600.5077(2), if child custody, child support, and/or parenting time were at issue, a court reporter would be hired to transcribe portion of arbitration proceedings affecting those issues. They agreed that arbitrator must adhere to MRE.

After successfully mediating custody and parenting time issues, arbitration was held to decide child support and property issues. Without presence of court reporter, and without adhering to MRE, arbitrator entered award and proposed judgment.

Defendant argued arbitrator exceeded his authority in failing to apply MRE and failing to hire court reporter. Circuit Court ruled in favor of plaintiff, entered arbitrator's proposed judgment and denied defendant's motion to vacate award. COA held that because of arbitrator's failure to comply with arbitration agreement by neither utilizing MRE nor obtaining court reporter, Circuit Court erred in refusing to vacate provision of award and proposed judgment concerning child support.

Does arbitrator or Court decide sanctions issue?

G&B II, PC v Gudeman, 315607 (July 15, 2014), *lv dn* ___ Mich ___ (2015). An attorney-fee dispute resulted in arbitration, where parties negotiated a payment plan. Plaintiff returned to Circuit Court seeking sanctions against defendant's counsel, contending that counsel's defense was frivolous. The Circuit Court denied sanction request, ruling that it should have been directed to arbitrator.

The COA affirmed, for reasons different than those used by Circuit Court. Plaintiff could have sought sanctions in arbitration. It did not do so. Given the brief time Circuit Court "conducted" the underlying action, COA declined to disturb Circuit Court's conclusion that it could not reasonably assess a sanction. Arbitration agreement gave arbitrator authority to resolve any disagreement between the parties "in connection with, or in relation to this Agreement, or otherwise."

The imposition of sanctions in arbitration for attorney misconduct during arbitration proceedings is consistent with language of arbitration agreement, broad powers granted to arbitrators, and court rules. AAA Rules governing commercial arbitration do not prohibit sanctioning attorney for arguing a frivolous defense. AAA, Commercial Arbitration Rules & Mediation Procedures, R-58(a). Regardless of arbitrator's power to sanction an attorney, Circuit

Court did not clearly err by refusing to do so.

Court must resolve dispute regarding validity of arbitration agreement.

Queller v Young and Meather Properties, LLC, 315862 (June 17, 2014). Circuit Court granted defendant's motion to compel arbitration. Circuit Court determined that alleged fraud in the inducement claim could be raised in arbitration. COA reversed. According to COA, before court can order party to arbitration, court must resolve any dispute regarding validity of underlying agreement; existence of arbitration agreement and enforceability of its terms are questions for court, not arbitrator.

CBA must be exhausted before court action.

Gliwa v Lenawee Co, 313958 (May 27, 2014), concerned termination of plaintiff's employment. Defendants appealed from Circuit Court order denying their motion for summary disposition. COA reversed. According to COA, Circuit Court erred by failing to grant summary disposition in favor of defendants on plaintiff's claims of wrongful discharge; plaintiff's position was in collective bargaining unit; he was bound by CBA; and his failure to utilize CBA grievance procedure required summary disposition in favor of defendants. Where CBA mandates that internal remedies be pursued, a party must exhaust those remedies before filing a court action.

COA reverses Circuit Court order to disqualify arbitrator.

Thomas v City of Flint, 314212 (April 22, 2014) (Donofrio and Cavanagh [majority]. During the course of pending arbitration, neutral arbitrator inadvertently sent e-mail to plaintiff's counsel that was intended for one of arbitrator's own clients. Plaintiff's counsel then requested neutral arbitrator to recuse herself and she declined. Circuit Court granted plaintiff's motion to disqualify neutral arbitrator. Plaintiff appealed. COA indicated arbitrator should be disqualified if, based on objective and reasonable perceptions, arbitrator has serious risk of actual bias, the appearance of impropriety standard is applicable to arbitrators; and arbitrators are not judges and are not subject to Code of Judicial Conduct.

Unintentional e-mail did not give rise to objective and reasonable perception that serious risk of actual bias existed. MCR 2.003(C)(1)(b). COA reversed Circuit Court's order granting plaintiff's motion to disqualify.

In concurrence's viewpoint, if plaintiff wished to challenge impartiality of neutral arbitrator, he was required to wait until after award was issued and file a motion to vacate. MCR 3.602(J)(2)(b).

COA reverses Circuit Court vacatur of award.

Hillsdale Co Medicare Care and Rehabilitation Ctr v SEIU, 310024 (April 22, 2014). Plaintiff discharged employee LPN because she allegedly used inappropriate language concerning residents. Employer self-reported situation to Michigan Department of Community Health's Bureau of Health Systems (BHS). Without interviewing employee, BHS concluded that "resident verbal abuse was substantiated to have occurred by" employee. SEIU took matter to arbitration.

Arbitrator found there was not just cause for discharge and reinstated employee with back pay. Arbitrator did not give deference to BHS conclusion because BHS had not interviewed employee. Employer filed complaint seeking to have award vacated on grounds that reinstating employee would violate Section 20173a(1), Public Health Code. MCL 333.20173a. Employer argued that award was inconsistent with BHS conclusion. Because of BHS conclusion, Circuit Court vacated award. COA held that Circuit Court should have considered arguments that BHS had denied due process to employee and had not complied with its own investigatory requirements.

The COA reversed Circuit Court order and remanded for evidentiary hearing concerning whether there was substantiated BHS finding that employee engaged in abuse and, if so, whether that finding was made pursuant to appropriate investigation.

COA reverses Circuit Court confirmation of award.

In *Rogensues v Weldmation*, Inc, 310389 and 311211 (February 11, 2014), *lv dn* ___ Mich ___ (2014), the defendant appealed Circuit Court judgment confirming an arbitration award. COA held that Circuit Court erred in confirming award and that defendant did not enter into an arbitration agreement with plaintiff and was not bound by employment agreement plaintiff had with defendant.

Defendant was not required to file motion to vacate award under MCR 3.602(J) in order to affirmatively defend against confirmation of award. Circuit Court erroneously failed to consider defendant's defense that no arbitration agreement existed before confirming award. Defendant was not required to arbitrate dispute plaintiff had with defendant. Arbitrator exceeded her authority when she concluded that defendant was bound by plaintiff's employment agreement to arbitrate plaintiff's claim that he was entitled to a severance payment.

COA affirms Circuit Court vacatur of awards.

In *AFSCME v Charter Twp of Harrison*, 312541 (January 16, 2014), COA affirmed Circuit Court vacatur of arbitration award. CBA provided, "[i]n the event that either

party fails to answer or appeal within the time limits prescribed, the grievance will be considered decided in favor of the opposite party." Employer failed to answer grievance within required time limits, but award did not decide grievance in AFSCME's favor. According to COA, this was erroneous. Employer's failure to respond to grievance within 10 days triggered CBA's default provision. Award was beyond scope of authority granted arbitrator under CBA, and did not draw its essence from CBA.

Lee Hornberger is an arbitrator and mediator in Traverse City, Michigan. He received the George N. Bashara, Jr. Award from the State Bar's Alternative Dispute Resolution Section in 2014 in recognition of exemplary service. He is a member of the State Bar's Representative Assembly and Alternative Dispute Resolution Section Council, Editor of The ADR Quarterly, Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, a former President of the Grand Traverse-Leelanau-Antrim Bar Association, and Chair of the Traverse City Human Rights Commission. He is an arbitrator with the American Arbitration Association, Federal Mediation and Conciliation Service, Financial Industry Regulatory Authority, Forum, Michigan Employment Relations Commission, and National Futures Association. He is a Hearing Officer, Grand Traverse Band of Ottawa and Chippewa Indians; and on the Hearing Officer list, Little Traverse Bay Bands of Odawa Indians. He can be reached at 231-941-0746 and leehornberger@leehornberger.com.

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