The ADR Quarterly

Alternative Dispute Resolution Section of the State Bar of Michigan

Vol. 24
No. 4
October 2016

TABLE OF CONTENTS

The Chair's Corner

by Joseph C. Basta

As you read this, I will have handed my Chair's gavel to our new chair, Shel Stark, at our annual meeting September 23-24 in Grand Rapids, Michigan. What a great year it has been for me to serve as the ADR Section's chair, meeting and working with the committed ADR professionals who comprise our membership. Permit me to review here some of the section's 2016 highlights.

We start the new year with solid membership numbers and a flush bank account, both of which will enable the section to tackle the challenges of conflict resolution in our state with continued enthusiasm. Among our challenges is the automatic mediation initiative undertaken with earnest this past year by our Task Force. We are soliciting support from other sections of the bar and expect in the coming year to begin work on the necessary legislation or court rule changes to make mediation an even more common first step in our courts for resolving conflicts of all kinds.
This year the section also passed a resolution that Michigan adopt a statewide mediator roster to simplify mediator credentialing and availability in circuit courts throughout the state. We look forward to working with Doug Van Epps and his newly-formed committee on this project in the coming year.

We continued to improve our educational offerings to our members through the Spring Summit, the Annual Meeting, regional mediator forums, and quarterly Lunch & Learn programs. As but one example, look for Andy Little, nationally recognized mediator and author of the widely acclaimed Making Money Talk , to speak at the Spring Summit at Western's Cooley Law School in Auburn Hills on March 21, 2017. And our Judicial Action Team has developed a program to educate probate

Continued on Page 2

Continued from Page 1

judges on the benefits and efficiencies of mediation in probate litigation which we plan to offer in the coming year. Also in the works is a program on mediation advocacy.

The section has also undertaken in the past year a number of "infrastructure" improvements. We now have social media platforms on Facebook and Twitter and continue to improve the offerings on the section's web site. We are delighted to have hired Mary Anne Parks as our new section administrator, whom we will share with the Environmental Law Section. Mary Anne brings considerable experience to us in event planning and administration, public relations, and social media savvy that will enable us to improve all of our programs, analog and digital.

Although we have accomplished much, there is so much more we can do. Education is a continuing challenge. Too many members of the bar and the judiciary are still unaware of how early and regular use of ADR mechanisms can improve the efficiencies of the courts and the lives of our clients who seek real conflict resolution rather than litigation victory. Our demographic is still too skewed to a more seasoned and white demographic. We need to attract younger and more diverse members. And there is still a dichotomy between lawyer mediators and the highly skilled non-lawyer mediators who populate our Community Dispute Resolution Program Centers which disproportionately serve the poor and unrepresented. We need to find ways to better work and to learn together.

I plan to continue my work in the section as ex-chair and as a member of our Skills Team, helping Shel Stark and the Council in whatever way I can in the year ahead to meet these challenges and to continue our good work. I urge you to do so as well by joining one of our action teams or task forces. We depend on a steady infusion of new talent to get the job done.

Finally, I wish to thank my Executive Committee, the Council, and our Task Force and Action Team chairs for all of their hard work and support this past year. You have made my job a real pleasure. Perhaps more importantly, I have made host of new friends. It has been a joy to work with each one of you. Continued success to you in all your endeavors as we work together to make "difficult conversations" easier for all.

ADR Developments in Collaborative Law, Parenting Coordination, and Child Protection Mediation

by Doug Van Epps, Director, Office of Dispute Resolution

Three new initiatives signal increased interest in expanding the array of ADR options available to parties for resolving their conflicts in domestic relations and child protection cases, two of which are prompted by recently enacted legislation.

First, the Collaborative Law Rules Committee has been convened to provide recommendations to the Michigan Supreme Court for adopting a new court rule to guide the development of collaborative law in Michigan. The Uniform Collaborative Law Act (2014 PA 159; MCL 691.1331-691.1354) outlines a process through which parties retain attorneys for the sole purpose of mutually negotiating a consent judgment without using any adversarial court process. In fact, under the terms of their engagement of collaborative lawyers, should any party find it necessary to go to court over a contested matter, the lawyers automatically remove themselves from the case, and the case would move forward in the traditional manner. Both parties must agree to use this process; it cannot be ordered by a court.

The notion of using a problem-solving approach in domestic relations actions, already widely used in many types of cases, is expected to increase as more attorneys are trained in the process. It is also likely that parties in general civil cases will explore whether a problem-solving approach to their dispute may better suit their needs than a traditional adversarial process.

Related to the topic of problem solving outside of the courtroom, 2014 PA 526 (MCL 722.27c) created a structure for the practice of parenting coordination in the state. A parenting coordinator is someone appointed by a court for a specific period of time to help implement parenting time orders and to help resolve disputes that fall within the scope of the court's order of appointment. Just as with collaborative law, a parenting coordinator can only be appointed by agreement of the parties. The job of the parenting coordinator is to make fairly immediate recommendations regarding a variety of issues parents may not agree on, including transportation and transfers of children, vacation and holiday schedules, discipline, health care management, and other areas outlined in the statute.

Parenting coordinators are most typically engaged in high-conflict divorces, and their ability to quickly make recommendations without the need for a formal complaint filed in the Friend of the Court makes this process particularly helpful where parents need routine and quick

Continued on Page 3

Continued from Page 2

assistance in resolving disputes. The SCAO's Friend of the Court Bureau has convened a committee that will determine whether or not to recommend that the Michigan Supreme Court adopt any new court rules or amendments to guide the development of this practice in the state.

Finally, the SCAO has convened a Child Protection Mediation Court Rules Committee to develop court rule proposals for codifying best practices in mediating child protection cases.

Child protection mediation is not new. For over 15 years, a number of courts have been providing mediation in child abuse and neglect cases. The idea is fairly simple: instead of all parties appearing on the day of a hearing and meeting in separate rooms to discuss reunification objectives, services, and activities, these discussions take place with all parties at a single table, with the conversation facilitated by a trained mediator. Parents, GALs, attorneys, social workers, assistant prosecutors, and other interested parties all hear the same discussion at the same time, and all work toward developing a reunification plan that the parents can realistically work toward achieving.

In this setting, parties reach agreement in approximately 80 percent of the cases. A 2006 study of the service by the Michigan State University School of Social Work identified numerous positive outcomes, chief of which was that a mediator reduced the amount of time a child was in an impermanent setting by approximately 12 months.

With judges in over 20 jurisdictions recently expressing interest in also offering these services, the SCAO determined that future services might be best developed through court rule guidance on such topics as confidentiality, scheduling, party attendance, and other topics.

All three initiatives are expected to issue recommendations for rule proposals in 2017.

For additional information, contact Doug Van Epps, Director, Office of Dispute Resolution, at 517-373-4840 or vaneppsd@courts.mi.gov

http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/default.aspx

---

About the Author

Doug Van Epps is Director of the Michigan Supreme Court's Office of Dispute Resolution, and would like to take this opportunity to thank the ADR Section for its extraordinary efforts to implement and promote ADR services across the state and for its representation on the committees mentioned above. He can be reached at vaneppsd@courts.mi.gov.

Arbitration Clause Does Not Apply Retroactively to Previous Purchases

by Conor B. Dugan

An arbitration clause contained in an invoice for a later-executed artwork purchase cannot be applied to disputes arising under invoices from prior sales that did not contain the clause, held the Michigan Supreme Court in *Beck v Park West Galleries, Inc,* 499 Mich 40; 878 NW2d 804 (2016). The Court further held that a party cannot be required to arbitrate a dispute to which he has not agreed to arbitrate.

The plaintiffs in this case purchased artwork from the defendant on various occasions spanning 2003 to 2009 while on a cruise ship. The invoices from 2003 and 2004 for two of the plaintiffs (the "Oppenheims") did not contain an arbitration clause that defendant started to include on invoices beginning in 2007. Years after purchase, the plaintiffs discovered that their artwork was not worth the represented value and some was forged. They filed suit against defendant. Defendant filed a motion for summary judgment, but the trial court declined to dismiss the claims brought by the Oppenheims because their invoices from 2003 and 2004 did not contain the arbitration clause. The trial court also determined that the arbitration clause in the later invoices did not extend to the 2003 and 2004 purchases. On appeal, the Court of Appeals reversed the trial court in part and concluded that the arbitration clause in invoices for the later-executed purchases applied retroactively to the prior purchases for which the invoices did not contain the clause. *Beck v Park West Galleries, Inc,* No. 319463, 2015 WL 928682 (Mich Ct App, March 3, 2015). The plaintiffs filed an application for leave to appeal to the Supreme Court.

The Supreme Court concluded that the Court of Appeals erred because "'a party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration,' and there is no evidence from which this Court can conclude that the parties' intended to subject the earlier transactions to arbitration." According to the Court, Michigan law requires that separate contracts be treated as such, and therefore, each invoice, in this case, constituted a separate contract capable of independent enforcement. Significant was the fact that the plain language

Continued on Page 4

Continued from Page 3

of the arbitration clause in the later invoices did not contain language that referred to previous transactions between the parties. The Court dismissed the Court of Appeals reliance on a general policy of Michigan courts to resolve all conflicts in favor of arbitration and held that this general policy cannot trump the actual intent and the agreement of the two parties.

Accordingly, the Supreme Court reversed the part of the Court of Appeals decision that applied the arbitration clause to the parties' prior transactions and remanded the case for consideration of issues raised on appeal that the Court of Appeals did not address.

About the author

Conor B. Dugan is senior counsel in the appellate practice group of Warner Norcross & Judd LLP. He successfully represented clients in the U. S. Supreme Court, the Michigan Supreme Court, numerous federal courts of appeals, and the Michigan Court of Appeals. Conor also has significant trial experience, including serving as co-counsel for the federal government in two felony criminal prosecutions, both which resulted in convictions. He would like to thank Amber Underhill for her contributions to this article.

Michigan Supreme Court Holds That Agency Principles Apply to Determining the Scope of an Arbitration Clause

by Phillip J. DeRosier

It is well established that whether a particular dispute falls within the scope of an arbitration clause depends on the language of the parties' agreement. In the recent case of *Altobelli v Hartmann,* 499 Mich 284; ___ NW2d ___ (2016), the Michigan Supreme Court further clarified that when a dispute involves actions taken by officers and agents on behalf of a corporation and is otherwise within the scope of an arbitration agreement to which the corporation is a party, the arbitration clause controls even if the plaintiff has sued the officers and agents individually.

The Facts

Altobelli was a former principal of a law firm. Altobelli claimed that despite having been promised that he could take a temporary leave of absence "to pursue a new opportunity as an assistant coach for the University of Alabama football team," the firm considered him to have withdrawn and "shorted [his] income as a result." In response, Altobelli filed a demand for arbitration under the firm's operating agreement, which provided for "[a]ny dispute, controversy or claim . . . between the Firm or the Partnership and any current or former Principal" to be resolved by arbitration.

While the arbitration was pending, Altobelli also filed a lawsuit naming several individual managing directors and principals of the firm. The defendants moved to dismiss the lawsuit in light of the arbitration agreement, but the trial court and court of appeals both concluded that the agreement only applied to disputes between "the Firm" and "a principal." See *Altobelli v Hartmann*, 307 Mich App 612; 861 NW2d 913 (2014).

The Supreme Court's Decision

On appeal to the Michigan Supreme Court, the defendants argued that under application of ordinary agency principles, any lawsuit against firm officers or agents acting within the scope of their authority was a dispute with "the Firm." The Supreme Court agreed, explaining that "[a]lthough no Michigan court has explicitly applied agency principles when interpreting an arbitration clause, it is well established that 'corporations can only act through officers and agents.'" Moreover, the court reasoned, the principle applies equally to limited liability companies. The court held that because Altobelli's claims were all based on actions allegedly taken by the individual defendants acting on the firm's behalf – as provided in the firm's operating agreement – "the individually named defendants must be included within the meaning of 'the Firm' in the arbitration clause." Because the nature of Altobelli's claims otherwise placed them within the broad scope of the arbitration agreement, the court concluded that the parties' dispute "must be resolved by the arbitrator."

About the author

Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Chief Justice Robert P. Young, Jr. He is a past chair of the State Bar of Michigan's Appellate Practice Section. He can be reached at pderosier@dickinsonwright.com or 313-223-3866.

Mediation Matters
The Mediation Code

by Shon Cook

In February 2013, the Office of Dispute Resolution of the State Court Administrative Office of the Michigan Supreme Court (affectionately known as the ODRSCAOMCA), issued Mediator's Standards of Conduct. As mediators, we should all know and love these standards and be well-versed. But a review can always be helpful, and if broken down into its basic parts, they are easy to remember.

1. **Self-determination:**

While a mediator can offer direction and options, he or she must stop short of telling parties what to do and how to do it. Mediators should never argue their own position or advocate for the position of either party. The parties must reach their own agreements without any coercion or forced direction from the mediator. Simply put, resist the urge to control the process. This does not mean a mediator cannot caucus or ask questions that might help a party realize a potential problem or find a potential solution.

2. **Impartiality:**

Don't like one party better, or one attorney better. If you do, don't show it. And most important, be aware that it may bias you. The parties must believe at all times that the mediator is not on anyone's side and is simply there to reach resolution without judgment or favoritism. If you actually feel that you cannot be impartial due to a very strong hostility or dislike of a party, you must withdraw.

3. **Conflicts of Interest:**

Avoid the appearance of impropriety at every turn. If you have a special relationship or friendship with one of the attorneys or parties, you must disclose it, and in some circumstances, you should probably not be the mediator. In *Hartman v Hartman*, MI Ct of Appeals NW2d 304026; 2012 Mich. App. LEXIS 1554, (Ct App, Aug. 7, 2012), the Court of Appeals did not set aside the mediator/arbitrator settlement agreement, but certainly raised significant questions about the mediator/arbitrator's vacation with defense counsel and the appearance of a conflict of interest. The Court held that no evidence of clear or actual bias was proven. But, it would be hard to convince the plaintiff that a fair deal was reached in the course of the mediation or that the mediator/arbitrator was neutral.

4. **Mediator Competence:**

Get trained. It is incredibly important to understand different mediation techniques and the role that domestic violence and power struggles play out in mediation. You also need to have decent social skills, with the ability to listen and understand the pain that individuals are going through as they try to resolve their conflicts.

5. **Confidentiality:**

Your confidentiality agreement needs to be in writing and explained at the beginning of every mediation. One of the huge benefits of mediation is the ability of parties and their attorneys to disclose information that actually resolves cases, rather than escalate the litigation. The silence of the mediator is a powerful force in learning what really motivates a party to resolve conflict. The confidentiality must be kept unless: a. You are subpoenaed, the parties waive the confidentiality, and the judge, orders the testimony. b. There is information of harm to a child, vulnerable adult, or safety issues to other individuals in the home that could result in immediate harm. c. You are filing the boring little mediation status report, or notice of mediation.

6. **Safety of Mediation:**

Screen for safety. Use the domestic violence protocol and make each party independently fill it out before they meet with you to truly evaluate if there is a domestic violence concern. The court form that is submitted is simply not enough to give a true evaluation of how parties communicate and resolve conflict, or if there has been past domestic violence, which includes emotional abuse. Mediate in separate rooms, if necessary. If you sense someone about to escalate to a boiling point, stop it in a calm and serious way and provide separate rooms, exits and places for parties to regroup and regain composure.

Continued on Page 6

Continued from Page 7

Quality of Process:

Be ready to wait and sit. Mediation is not a race. Every person comes to decision making in his or her own way and at their own pace. Be prepared for silence, hostility, and some yelling. Listen to proposals and stories that might not make sense, but are part of the exploration and understanding process. Try to maintain civility, and ask everyone to use inside voices when things get heated. Conflict can promote resolution, if done carefully. Ask questions that get people thinking about outcomes.

Have an agreement to mediate that outlines your job, the attorneys' jobs, the fees, confidentiality, and the length of each mediation session. If you feel that someone cannot understand or respect the process, don't conduct the mediation. Don't force an agreement, or make assessments about what a judge or referee would or would not do.

7. **Be neutral:**

Don't wince, flinch, growl, or let out huge sighs at peoples' positions and thoughts. If parties are talking, that is usually a positive direction. Don't judge an agreement that the parties enter into based upon your own bias or experience. Only intervene in an agreement if you sense that it is done out of fear of safety. Make sure everyone in the room clearly understands your role as a mediator, not an attorney or counselor or private investigator. If for some reason, you are asked what a judge would do, or what a party should do, you must be clear that you cannot give that advice.

8. **Advertising and Solicitation:**

Mediators may not call themselves "certified mediators." The advertising simply may state that the mediator has taken certain training. The mediator cannot promise results or guarantee resolution or agreement. The mediator can indicate what types of cases are mediated, the years of mediating, and the training received to mediate. The advertising cannot promise results or guarantee agreements.

9. **Fees:**

Put your fee agreement in writing and send to clients/ attorneys in advance of mediation. Discuss at the beginning of mediation the fee structure and have the parties determine how the mediation fees will be paid. Put the fee arrangement in the actual mediation agreement. And, under no circumstances may there be a contingency fee agreement based upon the results at the mediation.

10. **Advancement of Mediation:**

As mediators, we have an obligation to promote resolution and agreement and try to reduce conflict. Stand on a mountain and shout out the fact that mediation is so much better than litigation for families. Help to train, observe, and better the mediation profession. We need good mediators, and good mediations, and good agreements that our esteemed courts of higher knowledge will accept and endorse, so that parties can rely on our services and reach finality in their conflicts.

Now go forward and serve the Code.

About the author

Shon Cook has been practicing family law for twenty years and is finally starting to get it right. With a combination of humor, negotiation, decent people skills and the ability to still throw down a good legal objection or two, Shon has deemed herself "The Good Witch of the Law." Shon is determined to help people in a positive way get through the worst times of their life and give back some respect and dignity that the legal process seems to erode. Shon is the owner of Shon Cook Law, PC, which operates out of a very cool building in Whitehall, Michigan, which was the first library in the city. Shon Cook Law, PC has a total of three attorneys covering Family Law, Bankruptcy, Estate Planning, Real Estate and Business Formation.

The ADR Section at the Young Lawyers Section Annual Summit

By Shel Stark, Chair
Skills Action Team

The ADR Section had the honor of presenting a program on mediation advocacy and serving as a financial sponsor at the Young Lawyer Section Annual Summit at the Crown Plaza Hotel in Novi, June 4, 2016. The Skills Action and Section to Section Teams demonstrated how mediation advocacy differs from traditional principles of zealous advocacy in the context of a contentious, highly escalated commercial dispute. The case study used, *Zack Baskets & Bags, Inc. vs. HardPress Manufacturing Corporation,* can be found after this report.

Toni Raheem played the role of mediator. I played Richard Zack, CEO of plaintiff Zack Baskets & Bags. Peter Kupelian played the role of plaintiff's counsel. Joe Basta was Dan Lion, CEO of Defendant/Counter-Plaintiff HardPress Manufacturing Corporation and Mike Leib played his counsel.

Toni began the program by summarizing the case study. She introduced the demonstration by explaining where we were in the process: she had previously convened a pre-mediation conference call with the lawyers to decide logistical questions and process design; she had received and reviewed written mediation statements a week or so earlier; spoken privately with each advocate by telephone a day or so before mediation; and caucused privately at the venue that very morning with plaintiff Richard Zack and counsel Peter Kupelian.

Our role play itself opened with Toni sitting down privately with the HardPress CEO and his counsel in caucus. She asked defendant's CEO to describe his goals for the mediation process and share his perspective. As Dan Lion vented his anger and frustration, Toni demonstrated empathy and understanding while gently reminding Dan to be positive and focus on of the benefits mediation can offer. She built momentum by pointing out the ways Zack and Lion shared common interests and background. She reminded Dan that Zack had a different perspective in regard to liability, which presented important risks. She brought Mike Leib into the discussion by asking for counsel's assessment of the risks. Mike noted that liability was far from clear, that damages were speculative because HardPress had no signed contracts with Volkswagen, costs were mounting and HardPress was concerned VW might be dragged into the litigation, thereby damaging any chance for future business. Because the parties had previously agreed to make opening statements, Toni solicited Dan's commitment to listen to Zack's comments respectfully with an open mind, promising that Zack would do the same when Dan presented his perspective. She asked to "preview" Dan's presentation and helped him reframe using more productive words.

In joint session, Toni delivered a short but effective opening statement explaining that mediation provided the parties a golden opportunity to manage their risks and encouraged everyone to work cooperatively to jointly find a business solution.

She invited Zack to make his opening presentation. Zack thanked Lion for attending mediation in person because he could have delegated to a low level subordinate. Zack used the opportunity to deliver a personal apology for the present state of affairs: "I wanted to call you when I first learned about this," he said, "but the lawyers told me I couldn't." He recounted their long-standing business relationship and past HardPress satisfaction with Zack's delivery, pricing and quality. "I'm here to make this right," he promised. As Zack spoke, Lion visibly relaxed, recognizing Zack's sincerity and willingness to find a business solution that might just lead to a new contract with VW. In his own opening, Lion thanked Zack and suggested they move immediately to discussing ways they might do the later before discussing who should pay what to whom.

Toni stopped action at that point and the presenters identified key teaching points:

- The importance of avoiding words that antagonize;
- The value of looking to the future for solutions rather than backward at grievances;
- Ways to build momentum by identifying common ground;
- How crucial it is to focus on underlying needs and interests which often drive party positions;
- Managing strong emotions without derailing the process;
- Previewing party presentations; and
- Underscoring the many ways in which mediators add value by keeping the parties working together constructively.

There were many good questions from the audience and the presentation was well received.

MEDIATION ADVOCACY

CASE STUDY: Breach of a Commercial Contract

Zack Baskets & Bags, Inc. vs. HardPress Manufacturing Corporation

By Shel Stark, Chair, Skills Action Team, ADR Section

Zack Baskets & Bags, Inc. is one of Michigan's leading manufacturers of industrial containers and materials installed on or attached to manufacturing equipment to hold spare parts and necessary materials during press operations. HardPress Manufacturing Corporation is a small but highly successful machine tool manufacturer. Zack has done business with HardPress for more than 20 years. Unbeknownst to the other, the two company presidents have something in common. Zack president, Richard Zack, is grandson of Berzilius Zack who founded the business immediately after World War II. Richard grew up in the business and followed his grandfather and father into top management. The president of HardPress, Daniel Lion, is also a grandson, but he did not grow up in the family business. He became an accountant, CPA and senior partner at KPMG. When his father passed away, Daniel took over temporarily to help find a new CEO. Daniel discovered he was good at the job and decided to stay on. He has been president 15 years.

In late 2014, HardPress secured a contract from Volkswagen to build emission testing machines for a new VW plant being built in Metro Detroit. Attached to the machines would be industrial strength plastic bags to hold testing compounds and filters. As Volkswagen had not previously used emission testing machinery, there were repeated design changes after the contract was signed. HardPress subcontracted the bags to Zack. Zack and HardPress engineers met repeatedly to discuss VW demands and specifications. After several initial – and frustrating – meetings, they began emailing each other specific requirement changes. Eventually, Zack engineers recommended that the bags be constructed of industrial plastic 3/8 inch thick as the appropriate material with the necessary strength. HardPress accepted the recommendation and placed an order for $140,000.

Shortly after the machines were installed, the Zack bag components began to break. The bags weren't strong or thick enough to hold the steel cylinders containing test compounds. To date, HardPress has been unable to secure new business from VW, which lost confidence in HardPress when the bags were the wrong material. HardPress refused to pay Zack after spending $175,000 to secure replacement bags elsewhere. VW has indicated to HardPress that since one full year has passed since the problem occurred, it will be entitled to once again bid on the next Request for Proposals to be issued July 15. If the HardPress pricing is aggressive enough, VW engineers have assured Dan Lion his bid will be accepted.

Zack's engineers firmly believe the bags they recommended met VW specifications. They assume the specs were changed (again) after their recommendation was made and HardPress failed to give them notice. HardPress engineers believe just as firmly that they hired Zack for it's expertise and accepted Zack's recommendation accordingly. Zack should have alerted them to be on the look out for specification changes that might impact bag strength.

Zack sued in Oakland County Circuit Court for breach of contract seeking $140,000.00. HardPress has countersued for $175,000 plus $1 million for loss of additional Volkswagen business. The Business Court judge ordered the case into early facilitative mediation. The parties have exchanged documents and interrogatories but have taken no depositions.

Mr. Lion has never been so angry. He's mad at Zack Baskets & Bags for "screwing up" his order. He's mad at Zack for not making the problem go away by replacing the defective bags. He blames Zack for the loss of an important new customer. He's mad at Zack for bringing the lawsuit. He's madder still for the way Zack lawyers have prosecuted the litigation. On top of that, the "aggressive pricing" admonition he received privately from VW has filled him with dismay. He's concerned about regaining VW business only to lose money on the deal. By the time the case has reached mediation, Lion is beside himself. "We're never doing business with those people again," he shouted when Zack bid on a new HardPress Request for Proposals. Lion will arrive at the mediation table frustrated and disgruntled. His impulse is to litigate the case because he believes Zack should pay for loss of business with VW.

Richard Zack only learned about the problem when he was asked to authorize filing suit. Engineering never brought it to his attention, hoping the issue would go away. Zack considered calling Daniel Lion initially, but – on the advice of counsel – he decided against it. Zack was stunned when he read the counter-suit. HardPress accounts for 15% of his business; and over the last five years generated many hundreds of thousands of dollars in revenue. He hopes to retain HardPress as a customer. He will arrive at the mediation table hoping to mend fences and find a "business solution," where, he hoped, HardPress would award Zack Baskets & Bags the new contract on which the company just bid.

Introduction To The Use of Dispositive Motions in Arbitration

by Martin C. Weisman

Recently, arbitration has come under fire as not being sufficiently time and cost effective and that the arbitrators have not used all of the tools at their disposal to streamline the process. Dispositive motions are one of those tools. Some are urging a greater use of early resolution of issues which could streamline proceedings and eliminate the necessity for much evidence, briefing and pleading and therefore reduce the cost of arbitration or even push the parties to an early settlement. In practice, however, arbitrators are reluctant to hear and grant dispositive motions. This hesitation is caused by several factors including (1) the fact that many arbitration rules lack explicit rules authorizing arbitrators to entertain dispositive motions, (2) dispositive motions of a case may render the resulting award vulnerable to challenges before courts, (3) the absence of the right of an appeal in an arbitration creates a hesitation to abbreviate the process and (4) concerns about the appearance of justice or lack thereof. This seminar is designed to review the arbitrator's authority to decide dispositive motions and some of the cases in which have dealt with petitions to vacate arbitrator's awards as a result of granting dispositive motions.

RUAA and FAA

The Federal Arbitration Act ("FAA") does not expressly provide for dispositive motions; however, based upon flexibility and discretion granted to arbitrators, courts have found that arbitrators have the authority to grant such motions. See for example *Sherrock Brothers, Inc. v Daimler Chrysler Motors Company, LLC*, 260 Fed App 497, 502 (3rd Cir. 2008). In that case, the Court stated "Granting summary judgment surely falls within the standard of broad discretion to the arbitrator and fundamental fairness is not implicated by an arbitration panel's decision to forego an evidentiary hearing because of its conclusion that there were not genuine issues of material fact and dispute. An evidentiary hearing will not be required just to find out whether real issues surfaced in the case."

The ability of an arbitrator to decide dispositive motions was recognized and expressly incorporated in the Michigan Revised Uniform Arbitration Act ("RUAA") (MCL 691.1695(2)(a) and (b)). The RUAA provided "An arbitrator may decide a request for summary disposition of a claim or particular issue if either of the following applies: (a) all interested parties agree; (b) on request of one party to the arbitration proceeding if the party gives notice to all other parties to the proceeding and the other parties have reasonable opportunity to respond."

Summary disposition by arbitrators have been sanctioned by the courts. Generally, parties challenging an arbitration panel's decision to grant the dispositive motion have contended either that the arbitrators had exceeded their power and/or they engaged in misconduct in refusing to hear evidence pertinent and material to the controversy. These are two of the grounds for vacatur stated in Section 10(a) of the FAA and Section 23(1)(c) of the RUAA (MCL 691.1703). In addition to these statutory grounds, parties have also raised challenges based on a "manifest disregard of the law" in violation of public policy.

While there are numerous cases which confirm that arbitrators have the authority to consider motions for summary, the arbitrator must take great care in exercising this power. The arbitrator should consider (1) whether the motion is sound and what is the likelihood of success, (2) they must consider whether there are issues of fact that would preclude ruling in favor of the motion and (3) whether the motion, if granted, would really reduce costs and expedite the arbitration or lead to the opposite result. Consideration of motions not likely to succeed is a waste of time and money. Arbitrators should discuss the issue of dispositive motions in the first preliminary conference to determine the parties plan and to consider, with the parties, whether there are appropriate motions to be made. Secondly, arbitrators must ensure that they apply the appropriate standard for summary disposition, i.e., that there are no genuine issues of fact that are material to the decision in dispute. Arbitrators must also ensure that they have carefully considered any discovery requests that might be material to the motion which could potentially alter the result and impact whether or not a fair proceeding can be held. Finally, if a dispositive motion is granted, it would best serve the parties as well as the arbitrator, and diminish the likelihood of vacatur, by writing a reasoned award explaining the basis for the decision and why any evidence that was not considered, or discovery not permitted, were not material nor would not change the result.

Continued on Page 9

It is clear that there are many fact patterns in which dispositive motions may be appropriate. These include, inter alia, res judicata, collateral estoppel, statute of limitations, standing and preemption, waiver, estoppel, failure to comply with a condition precedent or notice procedure, and statute of frauds are a few.

Conclusion

Each case must be viewed in light of its own individual and particular facts. A grant of a dispositive motion later vacated by a court will occasion even more cost and delay and deny the parties the benefits that arbitration was intended to provide. But, they are also a tool to streamline the proceedings. Therefore arbitrators shouldn't always automatically shy away from meritorious dispositive motions. In short, the arbitrator should discourage the filing of unproductive motions, limit dispositive motions to those that hold a reasonable promise for streamlining or focusing the arbitration process.

About the Author

Martin C. Weisman has served as a neutral, court, or party-appointed arbitrator and mediator and has written and lectured on numerous alternative dispute resolution and other topics. He is a former Chair of the SBM ADR Section, a member of PREMi, and a member of the AAA Panels of Neutral Arbitrators and Mediators and the National Academy of Distinguished Neutrals. He has been recognized as a Michigan "Super Lawyer" and "dBusiness Top Lawyer."

13th Circuit Court ADR Clerk Julie A. Arends Retires

by Lee Hornberger

It was sad to hear that long term 13th Circuit Court ADR Clerk and Deputy Court Administrator Julie A. Arends has resigned. She did an outstanding job for Grand Traverse County and the Thirteenth Circuit Court.

Thirteenth Circuit Court Judges Thomas G. Power and Philip E. Rodgers, Jr. indicated that "Julie has been our mediation clerk for many years and has created procedures and policies that have been copied throughout the state. Case management could not occur without mediation, and this Court will always be in her debt."

As Chair of the Grand Traverse-Leelanau-Antrim Bar Association's Alternative Dispute Resolution Committee, I worked extensively with Ms Arends. She was a loyal and dedicated professional employee of Grand Traverse County. She was always dependable, reliable, hard-working, and courteous. She treated everybody with dignity and respect. Her leaving is great loss. She will be missed.

THE ANNUAL SUMMIT RETURNS!
Third Annual ADR Summit
March 21, 2017

On March 21, 2017, the ADR Section of the State Bar of Michigan is proud to present our Third Annual ADR Summit, an outstanding 8-hour advanced mediation training. Building on the success of our First Annual ADR Summit in March 2015 and our Second Annual ADR Summit in March 2016, we are bringing in one of the best national trainers in the ADR field. Mark your calendar today! You do not want to miss this one.

WHAT: Third Annual ADR Summit: Elevate Your Mediation and Negotiation Skills to the Next Level

WHEN: March 21, 2016, from 9:00 a.m. to 5:00 p.m.

WHERE: Western Michigan University, Cooley Law School, 2630 Featherstone Road, Auburn Hills, Michigan

WHO: Andy Little is the author of "Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes." He led the efforts of the North Carolina Bar Association to implement mediation into the courts of North Carolina. He served as the initial Chair of the North Carolina Bar Association Dispute Resolution Section, served two terms on the North Carolina Dispute Resolution Commission, the body which certifies and regulates certified mediators in the court system, and served as the Commission Chair by appointment of the Chief Justice of the North Carolina Supreme Court. He is a national mediator and advanced mediator trainer.

WHY: One of the leading mediation and negotiation teachers in the country, Andy will discuss the successful techniques from his book "Making Money Talk." He will demonstrate how to move the mediation process forward by asking really good, thoughtful, open ended questions.
He will discuss negotiation principles for mediators - how we can be better negotiation coaches - and how litigators might take these techniques and apply them as negotiation strategies when they are representing clients and negotiating directly without the use of a mediator. He will do demonstrations of his mediation and negotiation techniques and skills. If you need 8 hours of SCAO advanced mediator training to remain on your court list, this program is for you. If you want to improve your skills as an ADR provider by learning from one of the best mediation trainers in practice, this is your chance!

This program will be approved by the State Court Administrative Office
(SCAO) for 8 hours of advanced mediator training credit.

The link for additional information and registration will be available in the near future.

Editor's Notes

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

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

Prior *ADR Quarterlies* are at **http://connect.michbar.org/adr/newsletter**.

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 ADR Quarterly Editor Lee Hornberger at leehornberger@leehornberger.com with the word BLOG and your name in the Subject of the e-mail.

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

Upcoming Mediation Trainings

General Civil Mediation Training

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

Paw Paw: **October 14-15, 21-22, 28**
Training sponsored by Citizens Mediation Services
For more information, contact Sarah Dempsey, 269-982-7898

Mt. Clemens: **October 20-21, 27-28, November 4**
Training sponsored by The Resolution Center
Register online at www.theresolutioncenter.org

Bloomfield Hills: **November 3, 10, 17, December 1, 8**
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Plymouth: **February 16-18, March 3-4, 2017**
Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Petoskey: **May 3-5, 10-12, 2017**
Training sponsored by Northern Community Mediation
For more information, call Jane Millar, 231-487-1771

Domestic Relations Mediation Training

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

Domestic Relations Mediation Training
Kalamazoo: **October 7, 8, 14, 21, 28, Nov 5**
Training sponsored by Dispute Resolution Services (Gryphon Place)
Contact: Tanja Fagan at tfagan@gryphon.org

Ann Arbor: **October 6-8, 19-21**
February 9-11, 16-18, 2017
Training sponsored by Mediation Training and Consultation Institute
Contact: info@learn2mediate.com or call (800) 535-1155
or (734) 663-1155

Lansing: **October 12-14, 20-22**
Training sponsored by Resolution Services Center of Central Michigan
Contact: mediate@rsccm.org or call 517-485-2274

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 on mediation for both general civil and domestic relations mediators.

Bloomfield Hills: **December 2 (8 hours)**
"Mediator Wisdom"
Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org
or call 248-348-4280 ext. 216

Domestic Violence Screening

Ann Arbor: **October 21, 2016**
February 11, 2017
Training sponsored by Mediation Training and Consultation Institute
Contact: info@learn2mediate.com or call (800) 535-1155
or (734) 663-1155

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 | ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION 2016-2017

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 Section's mission is:

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

The Section's annual dues of $40.00 entitle you to receive the Section's Newsletter, participate in programming, further the activities of the Section, receive Section listserv announcements, and participate in the Section's discussion listserv, 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 December 31.

APPLICATION TYPE: _____ Member _____ Affiliate NAME: _____ 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 ADR Quarterly? _____	All orders must be accompanied by payment. Prices are subject to change without notice. Please return payment to: William D. Gilbride Jr. Abbott Nicholson PC 300 River Place Dr Ste 3000 Detroit, MI 48207-5066

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.

Make checks payable to State Bar of Michigan: Enclosed is check # _____ for _____

Or charge my ☐ VISA ☐ MasterCard

Credit Card # _____ Amount: _____

Expiration Date: _____ Authorized Signature: _____

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 ADR Quarterly
- FIND upcoming Section events
- NETWORK via a comprehensive member directory
- SHARE knowledge and resources in the member-only library
- PARTICIPATE in focused discussion groups

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

In implementing its vision, the ADR Section is comprised of various Action Teams. You are encouraged to participate in the activities of the Section by joining an Action Team.

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

SBM | Alternative Dispute Resolution Section

Thanks to the Sponsors of the 2016 Annual Meeting!

Cocktail Hour Sponsored By

VARNUM ATTORNEYS AT LAW

Platinum Sponsor

KITCH Attorneys & Counselors

Gold Sponsors

ABBOTT NICHOLSON PC ATTORNEYS AT LAW

American Arbitration Association

CLARK HILL

Mika Meyers

Warner Norcross & Judd ATTORNEYS AT LAW

Silver Sponsors

Basta Resolutions PLLC

ALTON T. DAVIS

Fraser Trebilcock

LeibADR LLC

Oakland Mediation Center

Peace Talks YOUR MEDIATION OPTION

PREMi PROFESSIONAL RESOLUTION EXPERTS OF MICHIGAN, LLC

SDRS

Southeastern Dispute Resolution Services

SHELDON J. STARK Mediator and Arbitrator

Visser and Associates

Weisman Young & Ruemenapp, P.C.

WL&K

Bronze Sponsors

Anne Bachle Fifer

Gallagher

Lee Hornberger Arbitrator & Mediator

Paula K. Manis

The ADR Quarterly

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

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

For comments, contributions or letters, please contact:

*Lee Hornberger - leehornberger@leehornberger.com - **231-941-0746***
*Joseph C. Basta - jcbasta@yahoo.com - **313-378-8625***
*Sheldon Stark - shel@starkmediator.com - **734-417-0287***

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