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Erin Archerd

The Chair's Corner

By Erin R. Archerd

As we pass through the dog days of summer, I begin to look forward to the **ADR Section's Annual Conference and Meeting**, which will be taking place a week earlier than usual on **September 30 and October 1, 2022**. After many months of discussion, the Section has decided to keep much of the conference and meeting online, and to include an in-person dinner and cocktail reception on Saturday evening, October 1 at the Inn at St Johns in Plymouth. I cannot thank our Skills Action Team and Conference Organizing Taskforce enough for the countless hours they have poured into the planning for this event.

This combination of virtual programming with a live dinner reflects the best of both worlds in our endemic environment, allowing ADR practitioners and lawyers throughout our far-flung state to participate in the full range of panels and presentations, as well as our Section's Annual Meeting, remotely, while still providing a time for Section members and friends to come together and celebrate the accomplishments and contributions of so many people here in the Michigan ADR Community. Like many of you, I have fond memories of ADR Section Conferences past at the Inn at St Johns, and I am looking forward to being able to see many of you in person for the first time in several years at our Section dinner.

I hope you will save the date – September 30 and October 1, 2022 – on your calendar and that I will see many of you online and in person that weekend.

Thinking about our upcoming Annual Conference makes me think about the importance of community and our role as ADR professionals to help repair broken relationships within the community. I recently attended my first restorative justice training at the University of San Diego, and I was thrilled to be able to put into practice techniques like restorative circles and conferences that I had only ever heard about or seen on video.

Restorative justice seeks to repair harm in communities while at the same time allowing the person who committed the harm to, eventually, reintegrate into the community. Notably, the restorative justice framework is deliberate about not using the word "victim." Instead, it refers to the "person who was harmed," and that category can refer to more than just the person who was the direct object of the harmful act, such as other members of the community who were negatively impacted by the act. It also requires participation by those who were harmed, often asking those people to think about ways that they can contribute to the repair of the greater community.

Michigan has been a leader in the use of restorative justice, particularly by requiring that K-12 schools consider it as an alternative to suspension or expulsion. It is also being used in juvenile diversion programs in criminal courts. And, reflecting restorative justice's indigenous roots, tribal courts have long used restorative circles within their communities. Many schools are coordinating with their local Community Dispute Resolution Centers to run restorative practices in schools and Centers are beginning to train interested volunteers.

I would encourage those of you who already volunteer with a CDRC to consider adding restorative justice to your portfolio. As a mediator, I found many of the techniques relatively intuitive, while appreciating some important differences in philosophy, such as the requirement that the restorative facilitator be "multi-partial" rather than impartial. Restorative Justice is a useful paradigm shift in our thinking about conflict resolution and, I hope, will become a useful tool in our ongoing duty to use our skills as ADR professionals to help improve our communities.

As we are all too aware as lawyers, arbitrators, and mediators, enforcing one's legal rights can be a grueling process that weakens or destroys potentially valuable relationships. As courts become ever more sensitive to helping litigants resolve their disputes through more tailored options, we as a Section will continue to work with the courts and with the broader community to advocate for ADR.

As we begin to transition to a new State Bar year this fall, think about ways in which you might join in the work of our Section. Our many Section Action Teams are always looking for Section members to add their ideas and talents to our efforts.

Laura Athens

The Blame-Shame Game in Mediation

By Laura A. Athens

"Those who blame others have a long way to go on their journey. Those who blame themselves are halfway there. Those who blame no one have arrived." Chinese Proverb (with gender neutral language)

Our legal system, which focuses on determining fault, liability and culpability, encourages parties to make accusations and to blame one another. Anyone who has participated in mediation knows the blame game is common and can sabotage a successful outcome. To effectively manage blame, the mediator must help participants to recognize and address the shame that underlies it. Legal counsel can help manage the blame-shame dynamic by letting the mediator know, in advance, that this issue may exist in their case or by using some of the tools described in this article to work with their clients prior to mediation to increase the likelihood of a favorable outcome.

What is Shame?

You may wonder what is shame? What does it have to do with blame? And how is it distinguishable from guilt? Dr. Brené Brown, professor, researcher, author, speaker and preeminent expert on shame and vulnerability, describes shame as the painful emotion of feeling flawed, inadequate, and unworthy of love and belonging. According to Dr. Brown, shame is universal and the less we talk about it, the more control it has over our lives. She distinguishes shame from guilt: shame means "I am bad;" whereas, guilt means "I did something bad." [1]

Shame is humiliating, demoralizing and has a negative impact on our identity and sense of self-worth. It can lead people to believe they have an immutable, fundamental character flaw that cannot change. In contrast, guilt is about behavior and feeling bad about something said or done. Guilt involves empathy and requires us to put ourselves in the position of the person we harmed.

Guilt can be a powerful and constructive tool for change because it may motivate a person to express regret, apologize, or make amends. Guilt may also lead to meaningful, positive, long-term behavioral change. Shame, on the other hand, often leads to destructive, or harmful behaviors, such as abuse, addiction, aggression, or depression.

Common Reactions to Shame

Shame and blame are two sides of the same coin. Shame can lead to four basic responses: blaming others, blaming yourself, avoidance, or withdrawal. None of these responses are conducive to conflict resolution.

When shame becomes unbearable, there is a natural tendency to blame others as a defense mechanism. Someone who feels ashamed may externalize the blame by lashing out verbally or physically and projecting blame onto others to relieve the pain of shame, make themselves feel better or to escape responsibility. Those who blame others lose the opportunity to learn from mistakes and improve their interactions because they falsely believe they do not have any faults and fail to take responsibility for their role in a conflict.

In mediation, blamers may insist they are right, attempt to control, manipulate, intimidate, criticize, or insult others. They also may engage in "gas lighting," or lying to purposely create confusion in the other party causing them to question reality. Blaming others is easy; it is much more difficult to look beneath the surface to address subconscious feelings. Attacking others is likely to lead to defensiveness and undermine resolution of the dispute.

Those who respond to shame by blaming themselves and internalizing the pain may feel defective or unworthy. In mediation, they may express self-pity, feelings of failure, be overly critical of themselves, or dwell on the past. Some may be prone to perfectionism and may focus on pleasing others and gaining their approval. They may capitulate or easily compromise their own interests. Holding on to the victim role perpetuates helplessness and may result in the loss of an opportunity for positive change.

Others may respond to shame by trying to avoid or deny it. They may engage in addictive behaviors to numb the pain of shame. In mediation, they may resist talking about shame, may try to divert attention, change the subject, or create a distraction. This

approach to shame permits avoidance and may be more comfortable than dealing with the shame but does not promote resolution of a conflict.

Finally, some may withdraw, shut down, or isolate themselves to escape from the pain of shame. During mediation, they may appear distant, detached, and disconnected. They may sit apart from the group, fail to make eye contact, or assume a defensive posture with arms, and legs crossed. They may seem indifferent to praise or criticism or show little emotion. This approach to shame is also ineffective because emotions are intensified when they are hidden or repressed.

These four behavioral responses to shame typically occur on a continuum, from mild to severe; they also may manifest with some people, but not with others. For example, a person may blame those who are close to them, such as a spouse or children, yet may not demonstrate blaming behaviors with friends or co-workers. Blame may occur at different times, under different situations, or in response to certain triggers. None of these four responses to blame will fix the situation or resolve the conflict.

Strategies to Address Shame

When time and effort are devoted to addressing and working through shame and blame, mediation can be transformative for the parties.

Demonstrating Empathy and Compassion

Empathy is a powerful strategy to counteract shame. According to Dr. Brown, empathy is the antidote to shame. Empathy is distinguishable from sympathy. Empathy involves feeling with someone, whereas, sympathy involves feeling for another. Empathy has two basic components: emotional and cognitive. Emotional empathy is vicariously experiencing another's feelings. Cognitive empathy is experiencing the thoughts and perspective of another.

Professor Theresa Wiseman has identified four attributes of empathy: the ability to view a situation from another person's perspective, be nonjudgmental, understand another's feelings, and communicate your understanding of those feelings.[2]

A skilled mediator facilitates the parties' efforts to work through the pain of shame and move beyond blame. The mediator demonstrates empathy and compassion by listening to understand, rather than judge; by asking open ended questions to learn more about the parties' concerns; and by acknowledging their pain.

A useful strategy is to identify the emotions underlying a party's words. Naming the emotion is constructive because it tends to diffuse the emotion and serve as a bridge between feelings and thoughts. Research has demonstrated that verbally labeling an emotion decreases activity in the amygdala, the region of the brain associated with emotions, and increases engagement of the prefrontal cortex, the reasoning portion of the brain. This, in turn, creates an opportunity to reflect, consider options and select a response. Clinical Psychiatry Professor and author Daniel Siegel refers to this phenomenon as "name it to tame it."

Acknowledging or validating a party's painful emotions can be helpful. Validation is different from affirmation and does not require agreement or approval. Instead, validation conveys to others that their emotions and beliefs are heard and understood. Shame can be normalized and intense emotions can be neutralized by pointing out to the parties that they are not alone and others have dealt with similar struggles.

Exploring Underlying Emotions

Mediation offers a safe space for parties to vent anger, fear, sadness, shame, frustration, disappointment, and other uncomfortable emotions. By maintaining a calm, authentic, and consistent presence, the mediator and the parties' legal counsel can provide support for the expression of emotions that if left unsaid could interfere with resolving the conflict.

Demonstrating respect and expressing appreciation for the parties' sharing of painful emotions can lead to a better understanding of their needs. According to the Fundamental Interpersonal Relations Orientation (FIRO) theory of interpersonal behavior, everyone has three basic needs: the need to feel significant, competent, and likable. Underlying these needs are three corresponding fears of being ignored, humiliated, or rejected. These fears, in turn, lead individuals to seek inclusion, control, and affection, or connection.[3] Those who tend to blame others may have a need to feel competent, may fear humiliation and seek to control others. Conversely, those who tend to blame themselves may crave approval, fear rejection, and seek affection. Identifying which feelings and fears the parties are grappling with can lead to an understanding of what they need.

Dr. Susan David, Harvard Medical School psychologist and author of the book *Emotional Agility: Get Unstuck, Embrace Change, and Thrive in Work and Life*, believes that accurately identifying and labeling emotions helps individuals to determine the precise cause of their emotions. Once they understand the cause of the emotions, they are in a better position to choose actions that align with their values. Dr. David defines emotional agility as the ability to experience feelings with curiosity, compassion, and courage.[4]

To raise the parties' awareness of when they are experiencing shame or projecting blame, the mediator should encourage them to express their underlying emotions and take responsibility for their feelings and actions. At times, it may require some reality-testing to help them realize they may be over-reacting to the situation. Word choice can influence the experience, urging them to say: "I feel sad, angry, frustrated, alone," rather than stating: "I am sad, angry, frustrated, alone" helps them to separate their feeling from their identity and to understand the condition is not permanent. Choosing to say: "I feel ___ about or when" is preferable to "I feel ___ because." It reinforces the reality that a person is responsible for their own emotions, no one else causes them.

The other party or their representative may trigger certain emotions, but they do not cause the specific emotional or behavioral response because each of us has the power to choose our reaction. Describing the feelings triggered by the other person's conduct, talking about how they felt, and what could be done differently, or what could improve the situation is more productive than blame.

Facilitating Perspective Taking

The mediator can stimulate perspective taking by shifting the dialogue from a hyper-focus on disputed facts and fault to a discussion of the thoughts and feelings the parties experienced when the incident occurred.

It may be productive to ask the parties and their legal counsel: what is their understanding of the other party's perspective; what assumptions are they making; are they omitting any relevant facts or circumstances; and do they consider their statement to be the only accurate version of the events that transpired. Helping them to understand there is no absolute truth and people often have diverse, yet equally valid, perspectives will ease the transition from blaming to problem solving.

Separating the people from the problem is also useful in promoting joint problem solving. There is a difference between who a person is and the action she or he engages in. It is also essential to recognize that an individual's age, race, religion, culture, sexual orientation, gender identity, and personal history will have a significant impact on their perspective and behavior.

Encouraging Responsibility and Accountability

When each party takes responsibility for their own part in the conflict, they can move forward. This means taking responsibility for their choices, in terms of actions and inaction, and being accountable for the consequences of their actions, including intended as well as unforeseen results. Although their intent may have been honorable, or at least not pernicious, the impact can be harmful.

To promote responsibility and accountability, the mediator may ask the parties and their legal counsel whether they have faced a similar challenge and how they overcame it, what they would have done differently if they could go back in time, and what they plan to do in the future under similar circumstances.

For those who are feeling powerless or stuck in the past, it may be helpful to emphasize that although we cannot control our circumstances, we can control our reaction to those circumstances because, as Dr. Viktor Frankl, psychiatrist and Holocaust survivor, eloquently stated: "Between stimulus and response, there is a space. In that space is our power to choose our response. In our response lies our growth and our freedom."

Some individuals espouse a mistaken belief that it is too late to apologize, but it is never too late to ask for forgiveness and make amends. Apologizing addresses the harm, fosters repair and may restore or strengthen the relationship.

Working through shame can lead to courage. Those who are harmed face a choice to share their story, work through the pain, release the past and forgive to reach a place of inner peace or remain stuck in the past, harboring resentment, and being filled with regret. Forgiving heals the pain and releases anger and resentment. Forgiving is different from condoning or excusing the hurtful behavior. Instead, it is a choice that sets the harmed individual free and permits reconciliation and closure.

Focusing on the Future

An effective mediator will remind the parties they have choices. Part of the mediator's job is to teach the parties to replace blame with curiosity and adopt a mindset of learning from their mistakes, rather than blaming themselves or others or hiding from

shame. Blame and shame are deeply rooted in the past. The mediator can help the parties shift the focus from the past to the future, move toward a new, more positive narrative and have faith in the promise of tomorrow.

Hope and optimism are contagious. Capitalizing on strengths and mutual interests is empowering and gives the parties hope. Encouraging the parties to accept the past, which cannot be changed, and to anticipate and envision positive change, rather than dreading a disastrous outcome, becomes a self-fulfilling prophecy that has a beneficial impact on the ultimate outcome of the mediation.

A mutually satisfactory resolution can be accomplished by asking the parties, with guidance from their legal counsel, to clearly convey what they want in positive and specific terms, rather than expressing what they do not like or do not want. Once the parties have an opportunity to convey their wishes, it may help to take a break to allow time to reflect on the options, to consult with legal counsel and choose the path they wish to pursue.

Conclusion

Addressing shame and exploring the emotions that underlie shame and blame helps the parties to gain perspective about each other's needs and interests. Once they have deepened their understanding of one another's point of view and experience of the controversy, they are better able to acknowledge responsibility for their part in the conflict and focus on the future.

Honest communication and a desire to learn will uncover viable options for resolution of the dispute. Creating choices promotes a sense of control over the outcome. Focusing on finding a mutually agreeable solution, instead of focusing on who is to blame, is likely to lead to sustainable results more easily and much sooner.

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[1] Brown, Brené, Daring Greatly: How the Courage to be Vulnerable Transforms the Way We Live, Love Parent and Lead (2013)

[2] Wiseman, Theresa, A concept analysis of empathy. Journal of Advanced Nursing, 23. 1162 – 1167 (1996).

[3] Schutz, W.C., FIRO: A Three Dimensional Theory of Interpersonal Behavior (1958); see also, Tamm, J., Luyet, R., Radical Collaboration: Five Essential Skills to Overcome Defensiveness and Build Successful Relationships (2nd Ed. 2019).

[4] Susan David, The Gift and Power of Emotional Courage, TED Talk, Nov. 2017, available at https://www.youtube.com/watch?v=NDQ1Mi5I4rg. See also, Emotional Agility: Get Unstuck, Embrace Change, and Thrive in Work and Life (2016).

About the Author

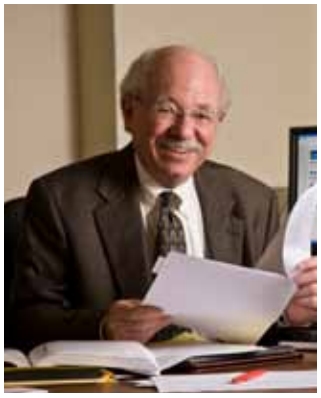
Laura A. Athens is an attorney, mediator, facilitator and arbitrator in Farmington Hills, Michigan, who has over 30 years of legal experience. Laura provides alternative dispute resolution (ADR) services in a variety of matters, including elementary and secondary education, higher education, university faculty grievance, employment, vocational rehabilitation, student discipline, eldercare, guardianship and disability rights cases. Laura currently serves as an arbitrator in automotive consumer and home warranty cases and previously served as a Hearing Officer in special education and vocational rehabilitation due process hearings.

As an Adjunct Professor at Wayne State University Law School, Laura taught education law, health law and bioethics. She also taught Legal Research and Writing at Washington University School of Law as a Visiting Assistant Professor.

Laura is an associate of Professional Resolution Experts of Michigan, LLC (PREMi) and has served on the State Bar of Michigan Alternative Dispute Resolution Council and as a former Chair of the Oakland County Bar Association ADR Committee. She is on the roster of DeMars & Associates, CAP Ford Motor, Porsche, RV and Home Construction Warranty Programs.

Laura has published numerous articles on arbitration, mediation, facilitation, education and employment law in the Michigan Bar Journal, Michigan Lawyers Weekly, Laches, Oakland County Legal News and ADR Quarterly. She frequently lectures and appears on cable TV programs regarding ADR and school-related topics.

Laura received her law degree from Washington University School of Law, her master's degree in social work from University of Wisconsin and her bachelor's degree in psychology, magna cum laude, from University of Michigan.



Sheldon J. Stark

Negotiation 101: What Parties Should Know about Negotiations at the Mediation Table

By Sheldon J. Stark, Mediator and Arbitrator

INTRODUCTION

For many, especially those new to the process of settling legal disputes, negotiations across the mediation table are like nothing the parties have ever experienced before. The purpose of this article is to better prepare participants in mediation for what to expect and to suggest ways they might take full advantage of their participation in the process.

ANTICIPATE A TROUBLESOME START

Lacking prior experience, many parties arrive at the mediation table only to find themselves shocked, disheartened and frustrated when the opening settlement offer from the other side is received. As every mediator knows, whether hyper-inflated or low ball, opening offers can result in outrage, pessimism, discouragement, consternation, threats to bring the process to a crashing halt, or all the above.

Emotional reactions to hard ball openings do not necessarily mean the mediation is over. Mediators can move the process forward and get past such hurdles by listening to participants vent, bringing calm into the room, and encouraging consideration of a longer perspective. What is that longer perspective?

(1) The first settlement offer is merely an opening figure; not the last.

(2) Mediation is frequently an all-day process; the first proposal is only a start.

(3) No one actually expects the first offer to be accepted, certainly not the offeror.

(4) Opening offers are rarely a true reflection of what a party is willing to offer or accept. And

(5) the other side's top or bottom line – which does predict whether settlement is possible - is unlikely to become evident until several offers and counteroffers back and forth throughout the day. If parties knew what to expect in advance, perhaps this time consuming and emotionally challenging effort wouldn't be needed.

Inevitably, unrealistic opening proposals lead to equally unproductive, unrealistic and reactionary counter proposals which in turn cause outrage and dismay back in the room where it started. Sometimes it helps to point out that they've just received the mirror image of their own unrealistic opening offer, or that the other side matched an unproductive number with its own unproductive number to create "book ends". But such reminders are not always heard or processed. Even for parties with experience negotiating legal disputes, opening rounds in the negotiation process can be disturbing and painful. Hardball tactics designed to achieve an advantage – especially when unexpected – generally result in the opposite of what was intended. Instead of sending a message about the true value of a claim or the appropriate ballpark, hard ball unproductive numbers prolong the negotiation process, increase costs, impair business-like thinking, cloud judgment, and reduce the chances of reaching resolution.

HARDBALL TACTICS ARE NOT UNCOMMON

Once past the challenge of frustrating opening proposals, the negotiations may continue at a glacial pace for several more rounds. Competitive and incremental, barely noticeable movement can be maddening. For many advocates and their clients, the negotiation "dance" itself becomes the source of grievance. There are many reasons even experienced negotiators do this, including:

- Some negotiators were trained to negotiate aggressively with hardball proposals to start.

- Some believe an aggressive, negative opening offer sends the right opening message: "Don't get your hopes up."
- Some seek to establish a favorable negotiation range before the other side can do so.
- Some believe in the power of anchoring, i.e., that the final number in a negotiation is generally closer to the first offer than the first counteroffer.
- Some believe an unproductive number can help lower the other side's expectations about the value of the dispute.
- Some actually believe that discouraging the other side early is an important step in the softening up the process.

Whatever the motivation, aggressive, hardball proposals reduce the other recipient's ability to exercise good judgment. No matter what message or encouragement accompanies an offer, the number itself is such a loud message it tends to drown out all other signals. Unproductive early numbers confirm a party's worst fears, crank up their emotions, foul their mood and darken their vision of where things are headed. Good will generated as the parties prepare for mediation is dissipated.

In my experience, when parties know what to expect, arrive at the mediation with a realistic perspective and a robust understanding of the process they will be better able to exercise patience, take hard ball tactics in stride, limit the power of emotions to cloud their judgment, and make good decisions about whether to settle and on what terms.

IMPATIENCE IS NOT YOUR FRIEND – THE OTHER SIDE IS COUNTING ON IT

Parties should not be discouraged by unrealistic, unproductive opening numbers. Proposals offered or demanded in Round One rarely predict where a dispute may settle. Parties get the most out of mediation when they listen, maintain an open mind and place trust in the process to achieve their goals and objectives. Good settlements require patience. Mediations are scheduled for the entire day for a reason. There may be as many as five, six, or seven rounds back and forth before the process is complete. Some disputes require a second day. In addition, there are structural reasons for optimism:

- *The process is generally voluntary.* People put their money where their mouth is. Rarely is someone willing to invest in a mediation process if they have no intention of settling. When mediation is court ordered or encouraged by the judge, most participants willingly engage nonetheless to take full advantage of the unique opportunity mediation offers to participate in a conflict resolution process.
- *Decision-makers are seated at the table.* Who is in the room for the other side? Have they sent a low-level place holder simply to make a show of participation? Or is the other side's representative a decision maker, company owner, officer or official? Are multiple people participating? The more people attending, the greater the commitment to seeing the process through. High level officials have other things to do. They generally come to the table with authority to settle. They are attending mediation for a reason: to reach agreement.
- *Statistics are cause for optimism.* Less than 1% of all lawsuits go to trial today. Less than 1%! The percentage of cases that resolve at the mediation stage is very high. That said, a high percentage of lawsuits are dismissed by the judge as not appropriate for trial. Mediators often help parties assess the risk of that happening in any given case. Weighing and examining the risks at mediation settles cases, and often settles them early before substantial fees and transactional costs are incurred. Mediation brings results, and results are the reason mediation has become so popular.
- *Patience is a virtue.* Being patient is a strategic advantage. Some competitive negotiators believe impatience on the other side is a vulnerability to exploit which, in turn, drives their hard ball tactics. No one should start feeling discouraged before Rounds Four, Five or Six. Of course, negotiations are a two-way street. Generally, a party must make a significant move to receive a significant move back. It's called reciprocity. Experienced negotiators are likely to reply to an unproductive offer with their own unproductive offer. Fortunately, reciprocity works the other way also: just as a dinner invitation from a friend encourages us to invite that friend to our house for a payback dinner, a good move at the mediation table encourages the other side to reply in kind.
- *Mediators have the right tools for the job.* Mediators have experience managing the process in even the most intractable, difficult and high conflict disputes. They are trained for it. They have time-tested tools, techniques and interventions that work. Even in late rounds where the gap between the parties is not narrowing appreciably, mediators have ways to move the process forward and help the participants to find an off ramp.

- *Information learned at mediation has value.* Sometimes cases do not settle. That happens. Sometimes two competent advocates reach very different conclusions about the value of a case. Sometimes parties don't have enough information to know whether they should settle, and on what terms. Sometimes parties are simply not ready to settle. The mediation process nonetheless provides value and generally makes the return on investment worthwhile. Mediation is, of course, a unique opportunity to step back from the conflict and engage in serious problem solving. Good faith efforts at peacemaking are rarely a mistake. More to the point, mediation is a powerful vehicle for the exchange of information. For a party willing to listen and listen with an open mind, the process often brings forward critical information such as the other side's perspective; their strongest evidence; their best legal arguments; and their number to settle the case. Information exchanges at the mediation table provide each side with fresh insight and critical information to better prosecute or defend their positions.

HOW PAST EXPERIENCE CAN MISLEAD

Many people arrive at the mediation table with some general experience negotiating. What's for dinner? Which movie will we see? Shall we vacation in the mountains or at the seashore? Who's responsible for the kids this weekend?

Party experience negotiating monetary issues is generally more limited. Experience negotiating lawsuit settlements is particularly limited, more often on the plaintiff side. Limited experience leads to unrealistic expectations; and unrealistic expectations lead to resentments.

Most parties have experience purchasing an automobile, new or used. Their experience is that the asking price or manufacturer's "sticker" price is rarely far from the final sale price. If a purchaser saves $1750 to $2500, for example, he or she feels good about the outcome.

Experience buying or selling a home, is not dissimilar. The gap between the list price and the final sale price at closing is rarely greater than 10-15%. If a seller receives an acceptable offer a few thousand dollars below the asking price, he or she might pat themselves on the back even if they initially dreamed of an offer above list. Low ball offers in real estate are so unusual, they are often flatly rejected, undignified with a counter-proposal.

In commercial litigation, parties often have had experience negotiating money. Examples include salary negotiations, the size of a bonus or raise, the price per part of a production contract, the size of a volume discount, or the purchase of a business. Here, too, experience tells the negotiator that the opening number and the final number will not be far apart. As a result, many participants expect the opening offer in their lawsuit will be a short distance from their top or bottom line.

Not so. In litigation this happens only rarely. In fact, the opposite is true. Initial proposals are often in different "ballparks"; and sometimes the ballparks aren't in the same city. Thus, parties are sadly disappointed. Expectations are resentments under construction. When expectations are dashed, the response is outrage, frustration, and resentment. Resentment poisons the well, smothers good will and roils the calm atmosphere generally required for settlement.

LOVE IS BLIND TO RISK

An additional cause of party frustration arises when the Mediator starts asking risk assessment questions. Even mediators who approach risk in a facilitative, non-judgmental mode risk losing party trust and confidence. Has the mediator lost his neutrality and taken sides? "Why is the mediator talking about my weaknesses and risks? Why isn't he in the other room beating up on them?" As it happens, mediators are nothing if not symmetrical. If they're "shaking the tree" to sow the seeds of doubt in one room, parties can count on mediators doing the same in the other. Mediators must start somewhere, however. It's traditional to start with the plaintiff.

Mediators do not spend time on risk assessment without good cause. Risk assessment is essential to the process of finding an off ramp from the dispute. Risk does and should have an impact on evaluation of the claim. The greater the risk, the more parties should be flexible. Does the claim have evidentiary support? Do the contentions make sense? Are the stories each side tells plausible? Are some claims stronger than others? Are the defenses persuasive? What is the legal foundation on which the claims and defenses rest? What are the weaknesses each side faces? Is there documentation? Are the parties and their witnesses credible? What are the risks presented? What's the likelihood of getting past summary judgment with this judge? Will the judge or jury be sympathetic?

Why do mediators explore these questions? There are multiple reasons:

- Opening numbers are generally developed and agreed upon by advocates and their clients well before arrival at the mediation table. Participants look at the strengths of their claims and defenses, and, sometimes, they look at their weaknesses – but generally not as skeptically as they should. Typically, the valuation process includes an assessment of exposure, i.e., the potential value of damage or loss. In preparing to make an opening, parties generally review the legal foundations, engage in some risk analysis and formulate a litigation budget to estimate attorney fees and costs. Regrettably, many participants fall in love with their claims and defenses, thereby coloring the numbers. What do we know about love? Shakespeare taught us that love is blind. Accordingly, valuations brought to a negotiation may be unrealistic, the result of someone sweeping the weaknesses and risks under the rug without giving them proper weight.

- Claim valuation is more realistic after critical weaknesses and risks have been examined. Why? The Mediator's job is to sow the seeds of doubt by shining light on those risks. If participants listen carefully with an open mind, their valuation of the case will and should necessarily change and change in the right direction. A top or bottom line at 9:30 in the morning, therefore, is rarely of any relevance. The top or bottom line at 3 o'clock after time spent examining weaknesses is very relevant.

- Fault and risk conversations soften the parties up and encourage flexibility.

- Settlement numbers that take risk into account and are communicated with the offeror's rationale are generally better received, more seriously considered, precipitate more productive counterproposals, and ultimately result in mutually agreeable settlement agreements.

- The parties are in mediation because they couldn't arrive at a settlement on their own. Fault and risk conversations led by a neutral mediator can assist participants in arriving at a better informed and more realistic understanding of risk and value.

CONCLUSION

If parties know what to expect, are patient and flexible, keep an open mind, plan strategically, listen carefully, make constructive and reciprocal proposals using an understandable rationale, the mediation process will bear fruit..

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About the Author

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*hearing referee with the Michigan Department of Civil Rights. He was a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010 and was listed in "*The Best Lawyers in America*" from 1987 until he left the practice of law in 2000. Mr. Stark received the ACLU's Bernard Gottfried Bill of Rights Day Award in 1999, the Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan in 2009, and the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. In 2015, he received the George Bashara, Jr. Award for Exemplary Service from the ADR Section of the State Bar. He has been listed in "*dbusiness Magazine*" as a Top Lawyer in ADR for 2012, 2013, 2015, 2016, 2017, 2018, 2019 and 2020.*

Lee Hornberger

The Successful Post-Hearing Brief in a Labor Arbitration

By Lee Hornberger

The post-hearing brief is an important part of the labor arbitration process. The post-hearing brief should clearly tell and remind the arbitrator of the advocate's viewpoint of the case and exactly how the advocate wants the arbitrator to rule. "The use of post-hearing briefs is quite common. Their purpose is to summarize and comment on evidence and present legal argument." [1]

Furthermore,

> As a matter of general practice, parties will file post-hearing briefs to summarize the important facts contained in the record and reiterate the arguments made at the hearing. … [A] clarifying and persuasive brief can be critical. … [T]he advocate should write a good brief based on the assumption that it might make a difference. [2]

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the

National Academy of Arbitrators, Federal Mediation and Conciliation Service, and American Arbitration Association provides the following guidelines for post hearing briefs and submissions:

1. An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.

    a. An arbitrator may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.

    b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.

2. An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party. [3]

Concerning the closing of the record:

If briefs or other documents are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. [4]

The post-hearing brief should be carefully prepared. The brief should let the arbitrator know the advocate's arguments in a clear and easy-to-read fashion. It should use subtitles. It is helpful if the subtitles are not all capital letters. Regular type with bolding would do quite nicely.

The effective post-hearing brief is courteous and polite. It does not use any invective language. It is not tedious. There is a viewpoint

that the brief will tell the arbitrator where the brief is going, where it is, and where it has been.

The beginning of the brief should contain not more than one page summary of the case from the advocate's position. This summary can have an anchoring effect on the arbitrator. The arbitrator will subconsciously remember this summary as the arbitrator reads the remainder of the brief and writes the award. In addition, this summary can be adapted by the arbitrator to provide the advocate's position in the award document that the arbitrator will write.

If the advocate in the post-hearing brief is going to ask for a burden of proof other than the preponderance of the evidence, there should be discussion justifying that burden of proof and providing authority for that burden of proof.

The post-hearing brief should clarify the issues for the arbitrator. This will include both the substantive and procedural issues. In addition, the brief must clearly inform the arbitrator of the applicable sections of the collective bargaining agreement (CBA) and the page numbers of the CBA where those sections can be found. It is crucial that the arbitrator know exactly where in the CBA the arbitrator can go in order to better understand the case and the parties' viewpoints. If there is a transcript, point out and quote the most important and powerful portions of the transcript. The goal of the advocate is to make the arbitrator's job easier.

The post-hearing brief should thoughtfully outline the "who, what, where, how, and when" of the case. The brief should emphasize the important parts of the case. After reading the post-hearing brief, the arbitrator should have a clear understanding of who the main actors are, what happened to give rise to the grievance, where the situation occurred, how the situation unfolded, and the time line of the situation.

The post-hearing brief should be a concise presentation of the case in a professional and courteous fashion. It will summarize in a convincing way the advocate's main arguments, including what happened and precisely what the advocate believed was proven at the hearing.

There should be consideration of citing authorities such as Elkouri & Elkouri as well as published arbitration awards in the brief. If this is done, it is helpful to cite the most recent edition of Elkouri & Elkouri. In addition, if the advocate wants the arbitrator to read a cited arbitration award, a copy of the award should be provided to the arbitrator and the parties when the brief is filed.

The advocate should read some of the arbitrator's prior awards. This will help the advocate know whether the arbitrator considers or at least cites other awards. The advocate should be careful in citing an arbitrator's other awards back to the arbitrator in cases involving different parties. This is because the prior award arose from a different case and a different work environment than the subsequent case for which the brief is being written.

The post-hearing brief should address the unfavorable aspects of the case. The arbitrator should not read about these unfavorable aspects only in the other side's post-hearing brief. This gives the advocate the opportunity to present adverse facts in the best light.

The brief should try to anticipate and answer the arguments of the other side. For example, the brief could say "The other side says …. This does not control because …." Again, the goal is to make the arbitrator's job easy.

The brief should not contain new evidence or arguments that were not raised at the hearing. The advocate should think very carefully before raising new arguments or previously non-cited CBA provisions. "No new evidence should be included in post-hearing briefs …." [5] "… [T]he arbitrator's decision shall be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding." [6] However, under appropriate circumstances, the arbitrator has the discretion to amend the Record to admit appropriate evidence discovered by a party after the conclusion of the hearing. [7]

The advocate should provide a brief to the arbitrator that is easy for the arbitrator to use. In ad hoc and Federal Mediation and Conciliation Service cases, usually there will be simultaneous filing of a pdf and Word copy of the briefs with the arbitrator. Once the arbitrator has received the briefs from both parties, the arbitrator will exchange PDF copies with the parties. Unless the arbitrator indicates otherwise, size 12 Font, Times New Roman, and non-justified right margins should be used.

It can be counter-productive to put too many arguments in the brief. An excessive number of arguments can have a dilution effect. The dilution effect can result in the weaker arguments diluting the power of the better arguments. "… [C]luttering a … brief with flimsy or tangential arguments … can dilute an argument, making the stronger points less persuasive." [8] It has been said that an advocate submits twenty arguments because the advocate could not think of one good argument. Nevertheless, most arbitrators in

their awards will respond to every argument made by the losing party. [9]

The post-hearing brief should also tell the arbitrator the relief that the party is seeking. If the arbitrator knows what remedy the party is seeking, it is easier for the arbitrator to write an award section of the arbitration decision which is consistent with the needs of the parties. Carefully consider the wording of the last page of the brief. The end of the brief should tell the arbitrator exactly what the advocate wants the award portion of the award to say. This includes reminding the arbitrator of any 'split-fee' or 'loser pays all' arbitrator fee payment provision in the CBA. There should be no doubt in the arbitrator's mind as to exactly what a party is asking for and how the party wants that to be worded. This is crucial.

After the brief is written, it should be carefully edited by an individual other than the author. In addition, the advocate should consider having a "Devil's Advocate" available for these review purposes. [10]

The advocate should consider filing the brief with the arbitrator a day or two before the due date. With "simultaneous" filing, this can do no harm. And it might be helpful to the arbitrator.

In conclusion, the post-hearing brief should tell the arbitrator in a concise, courteous fashion exactly how the advocate wants the arbitrator to rule on the issues and exactly what relief is being requested.

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1 *Elkouri & Elkouri, How Arbitration Works (8th ed. 2016), p. 7-36.*

2 *Roger I. Abrams, Inside Arbitration: How an Arbitrator Decides Labor and Employment Cases (2013), pp. 137-138.*

3 *https://www.fmcs.gov/services/arbitration/arbitrator-code-professional-responsibility/*

4 *American Arbitration Association Labor Arbitration Rules, Rule 30. https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf*

5 *Elkouri & Elkouri, p. 7-36.*

6 *Federal Mediation and Conciliation Arbitration Policies and Procedures (29 CFR Part 1404), 29 CFR 1404.13. https://www.fmcs.gov/services/arbitration/arbitration-policies-and-procedures/*

7 *American Arbitration Association Labor Arbitration Rules, Rule 31.*

8 *Jennifer K. Robbennolt and Jean R. Sternlight, Psychology for Lawyers (2d ed. American Bar Association, 2021), p. 156.*

9 *Abrams, p. 160.*

10 *Robbennolt and Sternlight, p. 12.*

About the Author

Lee Hornberger is a former Chair of the State Bar's Alternative Dispute Resolution Section, former Editor of The Michigan Dispute Resolution Journal, *former member of the State Bar's Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of the Professional Resolution Experts of Michigan (PREMi) and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the ADR Section's George N. Bashara, Jr. Award. He received a First-Tier ranking in Northern Michigan for Arbitration by* U.S. News – Best Lawyers® *Best Law Firms in 2019 and 2020. He is in* The Best Lawyers of America *2018 and 2019 for arbitration, and 2020 to 2022 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for ADR. He holds his B.A. and J.D.* cum laude *from the University of Michigan and his LL.M. in Labor Law from Wayne State University.*


Larry J. Saylor

Supreme Court Limits Federal Court Jurisdiction Under the Federal Arbitration Act

By Larry J. Saylor

A federal court has ordered the parties to arbitrate their dispute. Can the parties go back to the same court to confirm, vacate or modify the arbitrator's award? The answer is—not necessarily.

In a little-noticed recent decision, a nearly-unanimous U.S. Supreme Court significantly narrowed the jurisdiction of the federal courts to confirm, vacate or modify arbitration awards under the Federal Arbitration Act (FAA), 9 USC 1 et seq. The decision, *Badgerow v. Walters*, ___ US ___, 142 SCt 1310 (2022) sets a jurisdictional trap for the unwary.

Some background: Section 2 of the FAA, enacted in 1922, requires enforcement of "a contract . . . involving [interstate] commerce" to settle controversies by arbitration. [1] Section 4 provides that a party "may petition any United States district court which, save for such agreement, would have jurisdiction under title 28" to compel arbitration. [2] Section 5 allows the same court to appoint an arbitrator if the parties fail to do so. [3] Sections 9, 10 and 11 allow a federal court "in and for the district within which such award was made" to confirm an arbitration award, or to vacate or modify an arbitration award on narrow grounds. [4] Under the Supremacy Clause of the Federal Constitution, the FAA "governs actions in both federal and state court. . . ." [5] Michigan has enacted the Unform Arbitration Act, which contains similar language requiring enforcement of agreements to arbitrate and empowering a court to compel arbitration, appoint an arbitrator, and confirm, vacate or modify an arbitration award. [6]

In *Hall Street Assoc. v. Mattel, Inc.*, 552 US 576, 581-82 (2008), the Supreme Court held that the FAA does not itself establish federal subject matter jurisdiction, but only venue. Thus, the petitioner must identify an "independent jurisdictional basis" for

the relief requested under the FAA. The next year, in *Vaden v. Discover Bank*, 556 US 49, 62 (2009), the Court held that federal jurisdiction over a motion to compel arbitration under Section 4 can be established by "looking through" the petition to determine whether the underlying arbitration involves diversity of citizenship or a federal question.

In *Badgerow v. Walters*, the Court held that "look-through" federal question jurisdiction is not available under Sections 9, 10 or 11 of the FAA. The petitioner in *Badgerow* argued that the arbitration award should be vacated under Section 10 because it was tainted by fraud, and respondent asked the court to confirm the award under Section 9. Although diversity was lacking, the district court held it had "look through" jurisdiction under *Vaden* because the underlying claim raised a federal question. The Fifth Circuit affirmed. Parsing the differences in language between the FAA sections, the Supreme Court reversed. Eight of the nine justices joined in the opinion. Only soon-to-be-retired Justice Breyer dissented.

Badgerow requires an action to confirm, vacate or modify an arbitration award to be filed in state court unless the petition shows that (1) there is complete diversity of citizenship between the parties and at least $75,000 in dispute; or (2) the action to confirm, vacate or modify the arbitration award itself raises a question of federal law. Neither the FAA nor the issues in the underlying arbitration will be sufficient to satisfy (2). 142 SCt at 1316. The *Badgerow* Court does not identify any federal claims that would satisfy (2). Instead, the Court explains—counter-intuitively—that a challenge to the arbitrator's application of federal law generally states a claim only under state contract law. This is so, reasons the Court, because arbitration is a creature of contract: "[C]laims between non-diverse parties . . . may have originated in the arbitration of a federal-law dispute. But the underlying dispute is not now at issue" in a petition to confirm, vacate or modify the award. "Rather, the application concerns the contractual rights provided in the arbitration agreement, generally governed by state law. And adjudication of such state-law contractual rights—as this Court has held in addressing non-arbitration settlement of such state-law contractual rights—typically belongs in state courts." 142 SCt at 1321-22.

In his dissent, Justice Breyer denies the result is mandated by the statutory language, and questions the practicality of the line the majority draws: "Where the parties' underlying dispute involves a federal question (but the parties are not diverse), the majority holds that a party can ask a federal court to order arbitration under Section 4, but it cannot ask that same court to confirm, vacate or modify the order resulting under that arbitration under Section 9, 10 or 11. But why prohibit a federal court from considering the results of the very arbitration it has ordered and likely familiar with. Why force the parties to obtain relief—concerning arbitration of an underlying federal-question dispute—from a state court unfamiliar with the matter?" 142 SCt at 1325 (Breyer, J, dissenting).

After the majority opinion in *Badgerow*, only an amendment to the FAA would bring about the result Justice Breyer advocates. Given the winds currently blowing in Washington, DC against "forced" arbitration, such an amendment is not likely.

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[1] 9 USC 2.

[2] 9 USC 4.

[3] 9 USC 5.

[4] 9 USC 10, 11, 12.

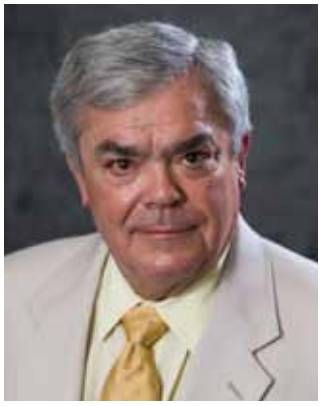
[5] Burns v. Olde Discount Corp, 212 Mich. App. 576, 580 (1995).

[6] See MCL 691.1685 to 691.1687, 691.1691, and 691.1702 to 691.1704. A discussion of the standards for review of arbitration awards under the FAA and MUAA is beyond the scope of this article.

[7] See Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub L No 117-90, 136 Stat 26; signed into law March 3, 2022, adding 9 USC 401 and 402, and amending several other sections of the FAA. Also see HR 963, Forced Arbitration Injustice Repeal Act of 2022, which if enacted would prohibit enforcement of pre-dispute agreements to arbitrate employment, consumer, antitrust, or civil rights disputes.

About the Author

Larry J. Saylor, senior counsel in Miller Canfield's Detroit office, is a neutral on the American Arbitration Association's commercial, large complex case and appellate panels, and a Fellow of the Chartered Institute of Arbitrators. He has more than 40 years' experience litigating complex business disputes in state and federal courts throughout the country, and in domestic and international arbitration. Larry currently serves on the Council of the ADR Section of the State Bar of Michigan, and formerly served as an adjunct professor at University of Detroit Mercy School of Law, as Chair of the Antitrust, Franchising and Trade Regulation Section of the State Bar, and on the Council of the Appellate Practice Section. He received his JD, magna cum laude, from the University of Michigan Law School, and clerked for Hon. George E. MacKinnon on the U.S. Court of Appeals for the D.C. Circuit.



Edmund J. Sikorski, Jr.

Mediating Insured Claims

By Edmund J. Sikorski, Jr., J.D.

OVERVIEW

Mediation of insured claims requires a different negotiating style and mediation approach from other negotiating and mediation styles because the dynamics of the participants are completely different from those involved in other areas of dispute resolution (such as commercial, probate, real property and family).

Mediators of insured claims quickly learn that creative problem-solving opportunities that appear in other types of controversies are rare in the mediation of insured claims.

The subject matter of the dispute does not lend itself to settlement in terms other than money. The parties rarely knew each other and will have no contact with each other after the matter is concluded. The negotiation is simply how much money one side will pay the other. It is position-based bargaining pure and simple - although it is anything but simple.

As a consequence of the nature of the beast, it is hard to get the process started.

This fact is reflected in the often-heard complaint that the carrier has never made a pre-mediation offer or has failed to respond to a pre-mediation demand. I have even heard the complaint that the plaintiff never made a pre-mediation demand. It is equally difficult to keep making concessions and adjustments. It is easy to get angry or disgusted, which impedes the process of resolution.

Otherwise normal discussion of an issue is abandoned early in the process and replaced with communication by numbers. Reasoned discussion of the strength and weakness of a case disappears after the second round of caucuses and instead turns to reacting to each other's monetary proposals. Communication dynamics are thus monetized.

We hear one side say "I want to send them a message" but do they say "here is the problem with your position?" No. They send a number.

An auction process then begins and the attorneys on both sides and their respective clients and carriers start the often-agonizing march of negatively reacting to the auction process. The auction process, however, is not the problem. That process is an integral part of all negotiations about money because the only resolution that an injured party can get is a monetary one.

Negative reactions are the problem. Negative reactions are characterized by annoyance and anger to proposals from the other side that are considered "out of the ball park" of settlement, and soon spiral into an emotional crash that deprives the parties of the opportunity to reach resolution before their best numbers are reached. This dynamic, more than anything else, is the cause of unnecessary impasse. The first party to lose emotional control, unless they can keep it in check early in the process, will lose the negotiating contest.

The parties may become angry with the mediator for not convincing the other side of the justification of the last proposal, and view the mediator as just a messenger. However, this view disregards that mediators are guardians of the process of resolution not the guarantors of resolution.

At this point, mediators are watching for and listening for kinks in the process, missteps that can occur, or problems that may develop. The mediator's job here is (1) to help the parties overcome their reactivity; (2) encourage confidence in the process; (3) refrain from stopping prematurely in reaction to the parties' frustrations and pessimism about the prospects of settlement; and (4) encouraging the parties to move through their range (employing the tool of bracketing) until the parties reach their best numbers or are sure that their best numbers will not settle the case.

SO, WHAT DO YOU DO TO MAKE MEDIATION MORE LIKELY TO SUCCEED?

1. Adequate Information Exchange

Information is power. Withholding information may also be power. Withheld information is one side's guard against the possibility that the case may not settle and they can spring the information on the other side at trial. However, given the discovery and disclosure rules, one has to assess the probability or risk that such surprise information may not be allowed into evidence. The tactical question is: how are you going to get it in over the almost certain objection of the other side?

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

It is a well-known fact that insurance carriers have vast networks of shared proprietary data on almost every conceivable insured claim. That is how they set premiums. In addition, they have a staff of claims managers and adjusters to utilize the statistical data and information that they obtain by a variety of means (including discovery) to come up with a committee case evaluation and set a "case reserve," or better said: "case value."

This case value does **not** mean that the carriers have a crystal ball—far from it. The carriers are hampered by their own internal requirements to set case reserves, and hence case value, very early in the claims process - often times prematurely acting on only preliminary information. An insurance company **must** determine **and** set a reserve on each claim when it occurs. This is a cash item and an immediate hit on working capital. The longer it stays on the books, two other things simultaneously happen: (1) the insurance company has fewer investible assets; and (2) the reserve has built-in resistance to expand at a later date. These reserves are set well before the defense attorney ever sees and evaluates the witnesses that may be called to support the claim. Once the reserve process happens, the only way the reserve value is going to get changed, is the receipt and evaluation of new information that legitimizes or discredits the claim. A late breaking change in the valuation calculus is usually not well received by claims managers and their supervisors – unless it is favorable.

The point of the foregoing discussion is that if the insurance carrier does not get the needed organized claim information well in advance of the mediation, they will not be in a position to make an informed decision and negotiate a settlement. Organized case presentation designed to persuade the carrier of the legitimacy of the claim is critical.

In addition to the inherent problems produced by the claims reserve practices and procedures of the insurance industry, withholding of information by the defense is a very high-risk game. Not only do they face the same evidentiary problems as plaintiffs, but they have the cloud of a bad faith claim hanging over them.

The mediation resolution process is heavily dependent on (1) a frank exchange of information; (2) justification of valuation; and (3) a genuine interest in resolving the claim and avoiding the risks of trial (including attorney client conflict over disappointing or unanticipated results).

The lesson learned for the foregoing discussion is that providing information to support the legitimacy of the claim is the touchstone to bringing a case to a mediated resolution.

2. Objective Case Valuation and Risk Analysis

Valuing a case is not an exact science, but the job of lawyers prior to mediation is to learn as much as possible about the case (rarely, if ever, can we know everything and miss nothing), compare it with similar cases that have produced settlements and verdicts, and reach a conclusion about the claim's value (more accurately, the range of value into which the case will fall – like a mediation bracket).

The noted mediation authority Laura Kaster begins her latest essay, "Addressing Impasse," with the "much overlooked but obvious point: Settling or mediating a case is, among other things a process for agreeing to the value of the claim. Impasse often occurs precisely because the parties do not agree on the value of the case." Kaster then goes on to cite Randall Kiser's much touted article, "Let's Not Make a Deal," for one of its many startling findings: that 61% of plaintiffs made errors in rejecting settlement offers with a mean loss of $42,000 and 24% of defendants made decisions errors in rejecting offers, with a mean loss of more than $1,000,000.

On the basis of that information, we may assume that there is a high likelihood that parties to mediation are misinformed about the objective value of the claim/defense.

No one wants to make an error in value assessment. We know that accuracy is hampered by (1) the phenomenon of "group think;" (2) cognitive dissonance (where we filter out what we do not want to hear); and (3) "sunk-costs" which prompts litigants and advisors to throw more money and effort into an endeavor in which they have already invested regardless of how unsuccessful that endeavor is.

How to Deal with Valuation

1. Work out a risk assessment protocol. Create an explicit list of the assumptions and calculations that underlie the value decision. Include the negatives as well as the positives.

2. Compare your case to similar cases.

3. Apply a decision tree risk analysis. Here is an example of how it works:

What is the likelihood of success at trial? *Slam Dunk.*

But what is the percentage of likelihood? *80%.*

And will the other side appeal? *Certainly.*

What is the likelihood of success on appeal? *Slam Dunk. 80%*

The probability percentages are then multiplied to determine the cumulative effect of the assessment on the predicted outcome. In the above example it means that there is only a 64% chance of winning, subject to further reduction of costs by experts, court reporters, trial exhibits attorney fees, etc.

Approaching the same subject another way, the basis of case analysis can be addressed by asking four questions:

1. What do you get if you go to court? What is the result in monetary terms?

2. What are your chances of obtaining that outcome?

3. What does it cost you to get that outcome?

4. What are the chances of collection of that judgment?

Here is an example of how this works:

Best Day in Court Jury Damage Award = $600,000 --$700,000.

Plaintiff thinks there is an 80% chance win, which = $480,000 -- $540,000 (less costs of $60,000).

To get to the best-case settlement, demand of $420,000--$500,000.

Defendant thinks there is a 20% chance of loss, which = $120,000--$140,000 (plus costs of $60,000) to get to the best-case settlement offer of $180,000--$200,000.

The settlement bracket is thus $180,000- $420,000.

Note that the foregoing process **starts** with a damage analysis and discounts **backwards** for liability, costs, present value, and trial uncertainties such as how the judge applies the law, how the facts come in, how well the experts will testify, how well the other side's lawyer tries the case, how the jury will react, etc.

The point here is that case evaluation starts with damages and discounts and with case and trial liabilities to establish the range of settlement value. This approach is a little counter-intuitive because lawyers are trained to think in the progressive elements of tort: duty, breach of duty, proximate cause, and (then) damages.

The foregoing exercises are designed and intended to help generate meaningful proposals from both sides that more clearly resemble the case analysis. Thus, the parties are less likely to make an outrageous demand that generates an equally outrageous counter-proposal that hurls the case in the direction of impasse.

3. Create a Plan of Movement through Your Negotiating Range

The mediation literature is replete with admonitions to disputing parties **not** to start negotiations with a number that is more than their best day in court given their own case analysis. Negotiation communications that start with a number higher (Plaintiff) or lower (Defendant) than their own case evaluations are inviting emotional reactive responses that shut down the process and leads to impasse for no good reason.

How many times have we heard the following volley? "Their demand is outrageous! We will make the equally ridiculous offer of $250. Send them that message."

What has been accomplished? All we now have is two sides who have traded an organized cognitive process for an emotional war of attrition.

The solution is to begin with "your best day in court" valuation and systematically movie through your negotiating range to your "walk away" number.

I have seen plans that divide the negotiating range by one-half on each move. A few moves and it is apparent to all where the range will end and identify the "walk away" number. The drawback of this approach is that it telegraphs the ending number and eliminates the possibility of settling at a number higher/lower than the party's best number. Another approach is to divide up the negotiating range into equal increments. At any point the range can be redivided into smaller equal increments to signal that the party is approaching its best number. Movement usually begets movement.

Lesson learned: Make a plan and stick to it. Stay in control of an otherwise reactive process calculated to be self-defeating. As in any military or sporting contest, victory is often achieved because of the self-inflicted wounds by the other side on itself.

About the Author

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

Lee Hornberger

Michigan Arbitration and Mediation Case Law Update

By Lee Hornberger, Arbitrator and Mediator

I. INTRODUCTION

This update reviews appellate decisions issued since April 2021 concerning arbitration and mediation. This update uses short citation style rather than official style for COA unpublished decisions.

YouTube of author's 2020-2021 update presentation at:

https://www.youtube.com/watch?v=9Q7deVlExDI

YouTube of author's 2019-2020 update presentation at:

https://www.youtube.com/watch?v=I0TkP8zs-A8

II. ARBITRATION

A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning arbitration during review period.

B. Michigan COA Published Decisions

There were no COA published decisions concerning arbitration during review period.

C. Michigan COA Unpublished Decisions

COA reverses Circuit Court ordering arbitration.

Chambers v. Catholic Charities of Shiawassee and Genesee Counties, 358103 (June 23, 2022). Plaintiffs brought an employment case against defendant. The signed employee handbook had a comprehensive arbitration agreement. The handbook also said "**The provisions of this arbitration procedure does [sic] not create any contract of employment, express or otherwise, and does [sic] not, in any way, alter the `at-will' employment relationship.**" The Circuit Court held that the court case should go to arbitration. In light of the exclusionary language, the COA reversed. Heurtebise v. Reliable Business Computers, 452 Mich. 405; 550 NW2d 243 (1996).

https://www.courts.michigan.gov/49f1a4/siteassets/case-documents/uploads/opinions/final/coa/20220623_c358103_29_358103.opn.pdf

COA affirms Circuit Court ruling defendant did not waive right to compel arbitration.

Cangemi v. Prestige Cadillac, Inc, 356069 (June 9, 2022). COA affirmed Circuit Court ruling defendant did not waive its right to compel arbitration of plaintiff's claims. Circuit Court ruled plaintiff's waiver argument failed because he did not address whether he was prejudiced. On appeal, plaintiff argued he is no longer required to show prejudice to establish that defendant waived right to arbitration. Morgan v. Sundance, Inc, 596 US ___; 142 S Ct 1708 (2022). Assuming plaintiff is correct he did not need to show prejudice in light of Morgan, Circuit Court did not err by ruling plaintiff failed to meet heavy burden of proving defendant waived its right to enforce arbitration clause for other reasons.

https://www.courts.michigan.gov/49ca68/siteassets/case-documents/uploads/opinions/final/coa/20220609_c356069_57_356069.opn.pdf

COA affirms Circuit Court denial of motion to correct judgment.

TSP Services, Inc v. National-Standard LLC, 356729 (May 12, 2022), **app lv pdg**. TSP argued Circuit Court should have granted its motion for summary disposition and corrected the revised judgment on the award to reflect that judgment was against DW-National Standard, not National-Standard. TSP also argued Circuit Court erred when it granted DW-National Standard's motion and dismissed TSP from the case. COA disagreed with TSP and affirmed Circuit Court. See **TSP Servs, Inc v Nat'l-Std, LLC**, 329 Mich. App. 615, 342530 (September 10, 2019).

https://www.courts.michigan.gov/49ac9b/siteassets/case-documents/uploads/opinions/final/coa/20220512_c356729_33_356729.opn.pdf

COA affirms Circuit Court denial of motion to vacate DRAA award.

Barnett [pro se on appeal] v. Barnett, 354668 (April 28, 2022), **app lv pdg**. COA affirmed Circuit Court denial of motion to vacate DRAA award. Before JOD was entered, plaintiff moved to vacate the award, MCL 600.5081(2), alleging (1) arbitrator refused to hear material evidence, (2) forensic evaluation report was not made available to parties until shortly before arbitration hearing and arbitrator denied plaintiff's request to adjourn hearing, (3) arbitrator denied plaintiff's request to adjourn hearing to consider 2019 accounting records for defendant's two businesses, which had been valued only on the basis of records from 2017 and 2018, and (4) arbitrator refused to consider that parties' 19-year-old child was disabled and cared for by plaintiff, and likely would need an adult's care for the remainder of his life. COA said "It was up to plaintiff's counsel, not the arbitrator, to explain any parts of the agreement or the arbitration process that plaintiff could not read or did not understand."

https://www.courts.michigan.gov/499417/siteassets/case-documents/uploads/opinions/final/coa/20220428_c354668_99_354668.opn.pdf

COA affirms vacatur of labor arbitration award.

Mich AFSCME Council 21 v. Wayne Co, 356320 and 356322 (April 21, 2022), **app lv pdg**. In split decision, COA affirmed Circuit Court vacatur of labor arbitration award. On verge of discharge, employee took cash-in retirement. Employee applied for retirement while awaiting outcome of disciplinary action initiated by employer arising from a work accident that resulted in injury to another employee. His retirement application required him to agree to a "separation waiver." The "waiver" stated he was terminating his employment and not seeking reemployment. Defendant employer terminated his employment the following day. Employee allowed his retirement application to proceed, but he also filed a grievance pursuant to CBA with employer, seeking reinstatement of his employment. In the meantime, Wayne County Employees' Retirement System (WCERS) approved employee's retirement. The employee thereafter transferred his defined contribution retirement account funds to an IRA. Arbitrator reinstated employee in spite of background IRS issues. Circuit Court and COA vacated reinstatement award in light of IRS issues. **Vigorous oral argument before COA**.

Judge Jansen dissent stated that because arbitrator did not exceed its authority in issuing award, Circuit Court should have confirmed the award. Applicability of defenses to arbitration, including waiver, is for arbitrator to decide. The only two issues before arbitrator where (1) whether employee was terminated for just cause, and (2) if not, whether remedy is limited to back pay rather than reinstatement. The separation waiver was raised before arbitrator as a defense, but not as a total bar to reinstatement. This issue was not raised by employer until after award was entered. Arbitrator properly treated it as an affirmative defense. Employer's argument that award was illegal or violated public policy because of possible tax code violations is irrelevant. Neither IRS nor county retirement commission are a party to this suit, and any argument about tax implications of the award was mere speculation.

The top link is the two-judge decision. The middle link is the dissent. The bottom link is the oral argument.

https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_57_356320.opn.pdf

https://www.courts.michigan.gov/4a2276/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_58_356320d.opn.pdf

https://www.courts.michigan.gov/496f07/siteassets/case-documents/uploads/coa/public/audiofiles/audio_356320_04122022_102538.mp3

As background information, ***Mich Family Res, Inc v. SEIU***, 475 F3d 746 (6th Cir 2007)(en banc), discusses standard for reviewing labor arbitration awards. In Mich, Union appealed District Court vacating award. Sixth Circuit reversed because arbitrator acting within scope of authority, company had not accused arbitrator with fraud or dishonesty, arbitrator was arguably construing CBA, and company had shown no more than arbitrator made error in interpreting CBA. Mich said following should be looked at in deciding whether to vacate labor arbitration award. Did arbitrator act outside authority by resolving dispute not committed to arbitration? Did arbitrator commit fraud, have conflict of interest or act dishonestly in issuing award? In resolving legal or factual disputes, was arbitrator arguably construing or applying CBA? As long as arbitrator does not offend any of these requirements, request for judicial intervention should be denied even though arbitrator made serious, improvident, or silly errors. Arbitrator exceeds authority only when CBA does not commit dispute to arbitration. On occasion, Michigan appellate courts give less deference to labor arbitration awards than Federal courts do.

III. MEDIATION

A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning mediation during review period.

D. Michigan COA Published Decisions

There were no COA published decisions concerning mediation during review period.

E. Michigan COA Unpublished Decisions

COA affirms Circuit Court interpretation of consent judgement

Foster [Seven Lakes] v. Charter Twp of Washington, 355650 (April 28, 2022). COA affirmed Circuit Court ordering Township to enter into cost-sharing agreement with Seven Lakes containing a payback agreement.

https://www.courts.michigan.gov/498e4b/siteassets/case-documents/uploads/opinions/final/coa/20220428_c355650_41_355650.opn.pdf

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About the Author

Lee Hornberger is a former Chair of the SBM Alternative Dispute Resolution Section, Editor Emeritus of The Michigan Dispute Resolution Journal, former member of the SBM Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation. He has received the George Bashara Award from the ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from the ADR Section. He is in The Best Lawyers of America 2018 and 2019 for arbitration, and 2020 to 2021 for arbitration and mediation. He is on 2016 to 2021 Michigan Super Lawyers lists for alternative dispute resolution. He received First Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2022; Second Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2022; Second Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2020; and First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019.

Sheldon J. Stark

From the Field: Building Trust and Confidence

Part 1: Parties

By Sheldon J. Stark, Mediator and Arbitrator

Introduction

In this column experienced mediators share the techniques they employ to build trust with parties.

Antoinette R. Raheem

Toni meets privately with parties and counsel ahead of time to get acquainted and initiate trust building.

- First, she focuses on listening. She uses reframing to show she hears and understands what parties are communicating. She demonstrates through word and deed that she cares. She asks what is important and what, if anything, they need to get off their chest. She approaches her role with humility, making certain parties understand she is not a judge and will not judge them or their actions. Nor is she going to solve their problems. She will not tell them what to do. Her role is not about power; it's about helping parties to decide whether to settle and on what terms.

- Critically, Toni strives to be *worthy* of trust. She keeps confidences. She acts respectfully. She doesn't push a particular resolution. She eschews manipulation. She remains neutral no matter the provocation. If her buttons are pushed, she doesn't react. Rather, she takes a break to recenter and calm herself. If a short break isn't sufficient, she discusses rescheduling. If she can't get past an issue, she is prepared to withdraw. Toni readily admits when she makes a mistake and asks the parties if they are willing to continue with her service.

- Toni does not speak negatively in one room about the parties and lawyers in the other. She recognizes parties will quickly wonder if she is doing the same about *them.*

- Toni does not guarantee equal time in private meetings; only that if she meets with one side she will meet with the other.

- Toni wants to understand what the parties need to gain trust and builds a connection from there: are they looking for subject matter expertise? Process expertise? Is it important she understand how things work in their world? Do they want a mediator they believe is a good person? Knowing what the parties need is key to building trust and gaining confidence.

In joint session, Toni treats everyone respectfully or equivalently. When speaking, she makes eye contact with everyone at the table.

Robert E. L. Wright

- In his general civil practice, Bob also meets with parties and counsel ahead of time, generally after reviewing their written submissions. This meeting usually occurs on the morning of mediation, but earlier if the lawyers will agree. If there are multiple parties, as in a probate dispute, he staggers the meetings to have individual time with each.

- Bob strives to give the parties his undivided attention. He treats everyone with respect, listening carefully, making eye contact, and demonstrating his grasp of their perspective.

- In business disputes, he asks what things were like with the opposing party when they first got into a relationship and were hopeful for the future. His goal is to establish a positive foundation upon which to build.

- He is careful to ask "softball" questions in the beginning without challenging assertions or emphasizing weaknesses. "Help me to understand…." is a common start to open discussion and permits parties to explain their perspective.

- He is quick to identify commonalities between himself and a party such as common neighborhood haunts, favorite restaurants, entertainment preferences, etc. He asks about work and families, their experience and their business.

- He uses humor to encourage participants to relax and, in his avuncular manner, is always empathetic about their concerns.

Sheldon J. Stark

- In addition to the things Toni and Bob do, I schedule a preliminary, get-acquainted session, where I ask parties to tell me about themselves. "I only know a little bit about you from the mediation summaries. Sometimes it is important to have a better understanding of who you are." Do they have a family? What do they like to do when not working? What's their work history and education? What do they like to read? If the party represents a business enterprise, I ask them to tell me about their business: how it started, how it grew, what it does. Like most mediators, I look for common ground here, as well: "I have 4 grandchildren, also," for example. "Are you able to be involved in their lives?"

- Eventually, I ask what their goals and objectives are. What do they hope to gain from the mediation process "today?" When they've finished making the list, I ask the lawyers if they have anything to add. If they don't mention it, I ask whether "closure" is a goal we can add to the list.

- I place great store in education and believe it to be a primary tool for gaining party trust.

    - I want to understand what the parties know about mediation and what expectations they bring to the table for the process. I ask what they've done to prepare. "Other than discussions with counsel, have you read any books or articles? Did you do an internet search? What do you expect will happen today?"

    - The goal of education is to assist parties make the most of the experience. I ask if I can share my perspective, which I call "Mediation 101". "No two mediators are alike. No two mediations the same. Here's how I view the role of mediator and what you can expect from the process of mediation."

    - "First, as a team, we will try to uncover the best numbers or proposals available today. Because no one ever honestly reveals their true top or bottom line, we will need to figure it out. That requires negotiating back and forth, making proposals and counterproposals. To receive a productive proposal, however, requires *you* making a productive proposal. People are competitive. If you make an unproductive offer, you will get a matching one in return. After 3 or 4 "rounds", we should be able to start assessing where the other side really is."

    - "Second, it's totally up to you to decide whether to accept the best number available today." Like Toni and Bob, I don't believe it my job to tell a party what to do or how to settle their case.

    - Instead: "My job is helping you make the best decision possible today about the resolution of your dispute. This is your case. Your life. Your business. Your experience. No one will force you to accept an offer. Mediation is entirely voluntary. You decide. It's up to you to exercise good judgment. No one can exercise good judgment, however, without all the information available. My job is to bring that information to you, including, among other things, the story the other side intends to present and whether it's plausible; the perspective the other side brings to the table – what's important to them; the strengths and weaknesses of the claims and defenses; a realistic assessment of the magnitude of the risks presented; the legal landscape; and the costs, both economic and non-economic, if the suit does not resolve today. Whether you settle and on what terms is totally up to you. Once you have all the information, with input and advice from your lawyer, I'm confident you will make the best judgment possible, and, I am hopeful unclouded by emotions."

Conclusion

Dispute resolution requires trust. Building trust requires that mediators gain party confidence in the efficacy of the process and the skill, integrity and trustworthiness of the mediator. This is accomplished by having a thoughtful and deliberate approach.

About the Author

Sheldon J. Stark *offers mediation, arbitration case evaluation and neutral third party investigative services. He is a Distinguished Fellow of the National Academy of Distinguished Neutrals, a Distinguished Fellow with the International Academy of Mediators and an Employment Law Panelist for the American Arbitration Association. He is also a member of the Professional Resolution Experts of Michigan (PREMi). He is past Chair of the council of the Alternative Dispute Resolution Section of the State Bar and formerly chaired the Skills Action Team. Mr. Stark was a distinguished visiting professor at the University of Detroit Mercy School of Law from August 2010 through May 2012, when he stepped down to focus on his ADR practice. Previously, he was employed by ICLE. During that time, the courses department earned six of the Association for Continuing Legal Education's Best Awards for Programs. He remains one of three trainers in ICLE's award-winning 40-hour, hands-on civil mediation training. Before joining ICLE, Mr. Stark was a partner in the law firm of Stark and Gordon from 1977 to 1999, specializing in employment discrimination, wrongful discharge, civil rights, business litigation, and personal injury work. He is a former chairperson of numerous organizations, including the Labor and Employment Law Section of the State Bar of Michigan, the Employment Law and Intentional Tort Subcommittee of the Michigan Supreme Court Model Civil Jury Instruction Committee, the Fund for Equal Justice, and the Employment Law Section of the Association of Trial Lawyers of America, now the American Association for Justice. He is also a former co-chairperson of the Lawyers Committee of the American Civil Liberties Union of Michigan. In addition, Mr. Stark is chairperson of Attorney Discipline Panel #1 in Livingston County and a former hearing referee with the Michigan Department of Civil Rights. He was a faculty member of the Trial Advocacy Skills Workshop at Harvard Law School from 1988 to 2010 and was listed in "*The Best Lawyers in America*" from 1987 until he left the practice of law in 2000. Mr. Stark received the ACLU's Bernard Gottfried Bill of Rights Day Award in 1999, the Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan in 2009, and the Michael Franck Award from the Representative Assembly of the State Bar of Michigan in 2010. In 2015, he received the George Bashara, Jr. Award for Exemplary Service from the ADR Section of the State Bar. He has been listed in "*dbusiness Magazine*" as a Top Lawyer in ADR for 2012, 2013, 2015, 2016, 2017, 2018, 2019 and 2020.*

Larry J. Saylor

Supreme Court Rejects Prejudice Requirement for Waiver of Arbitration Agreement

By Larry J. Saylor

In *Morgan v. Sundance, Inc.*[1], decided May 23, 2022, a unanimous Supreme Court clarified the standard for determining whether a party has waived its right to arbitrate a controversy by first engaging in litigation. Overruling decisions in nine circuits, the Court held that waiver could occur whether or not the adverse party has suffered prejudice. The Court explained, but left standing, its previous opinions holding the Federal Arbitration Act (FAA) adopts a "policy favoring arbitration". The Court's analysis presages issues for future litigation under the FAA.

The facts in *Morgan* were egregious. Morgan, an hourly employee of Sundance, a Taco Bell franchisee, filed a nationwide collective action alleging that Sundance violated federal law requiring overtime payment. Although Morgan's employment agreement contained an arbitration clause, Sundance litigated the case for more than seven months. Morgan filed an answer and affirmative defenses that failed to mention arbitration. After Morgan's motion to dismiss was denied and mediation was unsuccessful, Sundance reversed course and filed a motion asking the court to stay the case and compel arbitration under the FAA. Morgan opposed the motion, arguing that Sundance had waived its right to arbitrate by engaging in litigation for so long. The district court agreed with Morgan, but the Eighth Circuit reversed, holding Sundance's tardiness had not caused Morgan prejudice because discovery had not begun.

The Supreme Court reversed, noting that there is no similar prejudice requirement for waiver of other contractual rights. The Court recognized that its previous opinions have repeatedly held the FAA adopts a federal "policy favoring arbitration." It explained, however, that policy "is merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding

refusal to enforce agreements to arbitrate and place such agreements on the same footing as other contracts. . . . Accordingly, a court must hold a party to its arbitration contract just as the court would any other kind. But a court may not devise novel rules to favor arbitration over litigation." [2] The Court resolved a split among the circuits, observing that nine circuits, including the Sixth Circuit, had required prejudice for waiver of an agreement to arbitrate, while two had rejected the requirement. [3]

The immediate takeaway from *Morgan v. Sundance* is unsurprising: To avoid waiver, an agreement to arbitrate should be enforced without delay. The eventual impact of the case, however, may be broader. The *Morgan* Court does not identify any other "novel rules . . . favor[ing] arbitration" that are in jeopardy. But the Court itself has said that in construing an agreement to arbitrate, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." [4] Does *Morgan* signal that in the future, the Court will construe agreements to arbitrate by applying normal state-law rules of contractual interpretation, without a thumb on the scale from the FAA? Perhaps, as the Court stated: "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." [5]

This issue will no doubt continue to percolate in the courts.

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[1] ____ US ___, 142 SCt 1708 (2022).

[2] 142 SCt at 1713 (internal quotation marks omitted), quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302 (2010).

[3] See 142 SCt at 1712 & nn. 1, 2, collecting cases. In *O.J. Distributing, Inc. v. Hornell Brewing, Inc.*, 340 F.3d 345, 355-56 (6th Cir. 2003), the Sixth Circuit held that prejudice was required, but readily found prejudice on facts analogous to those in *Morgan v. Sundance*.

[4] Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 475–76 (1989) (citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)).

[5] 142 SCt at 1709.

About the Author

Larry J. Saylor, senior counsel in Miller Canfield's Detroit office, is a neutral on the American Arbitration Association's commercial, large complex case and appellate panels, and a Fellow of the Chartered Institute of Arbitrators. He has more than 40 years' experience litigating complex business disputes in state and federal courts throughout the country, and in domestic and international arbitration. Larry currently serves on the Council of the ADR Section of the State Bar of Michigan, and formerly served as an adjunct professor at University of Detroit Mercy School of Law, as Chair of the Antitrust, Franchising and Trade Regulation Section of the State Bar, and on the Council of the Appellate Practice Section. He received his JD, magna cum laude, from the University of Michigan Law School, and clerked for Hon. George E. MacKinnon on the U.S. Court of Appeals for the D.C. Circuit.

Action Team Updates

The ADR Section's Diversity & Inclusion Action Team (DIAT)'s "What can ADR practitioners do to promote Diversity and Inclusion in the ADR profession?" presentation to a plenary session at the September 30, 2022, ADR Section Annual ADR Conference. This presentation will touch on the following topics.

What can ADR practitioners do to promote Diversity and Inclusion in the ADR profession?

The ADR Section is firmly committed to promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias. This presentation will explore why it makes sense to promote diversity and inclusion and what we can do to bring diversity and inclusion into the ADR room. We will discuss:

What does diversity and inclusion mean in the ADR practice?

How does diversity and inclusion enhance the ADR profession?

Why should neutrals and attorneys representing parties in ADR promote diversity and inclusion in the practice of ADR?

How can ADR practitioners welcome and reach out to women and people of color who want to build and grow a neutral practice?

How can diversity and inclusion become a reality?

How can co-mediation, collaboration, and partnering advance the diversity and inclusion ball?

The Moderator will be Shawntane Williams, Williams & Associates Law Firm, PLLC, Farmington Hills.

The presenters will be:

Earlene R. Baggett-Hayes - Panelist
The Law & Mediation Center PLLC, Pontiac

Lee Hornberger - Panelist
Arbitrator and Mediator, Traverse City

Michael S. Leib – Panelist
LeibADR LLC, Bloomfield Hills

Antoinette R. Raheem - Panelist
Law & Mediation Offices of Antoinette R. Raheem PC, Bloomfield Hills

The DIAT Book Club provides an opportunity for Section members to meet and discuss books concerning diversity and inclusion. The May 3, 2022, Book Club featured Civil Rights Queen: Constance Baker Motley and the Struggle for Equality by Tomiko Brown-Nagin.

DIAT is working on a diversity video project and other projects.

DIAT promotes and support diversity in the field of ADR, increase the cultural competence of ADR providers and enlarge opportunities for minorities in ADR. The four current objectives DIAT are to:

1. Increase the diversity of the ADR Section Council and the ADR Section Council's Action Teams and Task Forces;
2. increase the quality and improve the quantity of ADR trainings for providers regarding understanding, relating to, and meeting needs of diverse clients and consumers of ADR services;
3. support for ADR providers in developing their practices, enhancing their skills, and increasing their visibility in supplying ADR services; and
4. assisting the ADR Section Council with resource availability and for understanding and embracing diversity issues.

You are invited to join DIAT and help with its activities. For further information, you can contact Co-Chair Shawntane Williams at sw@williamspllc.com or Co-Chair Lee Hornberger at leehornberger@leehornberger.com .

ADR Section: The Ins and Outs of Employment and Labor Arbitration for Arbitrators and Advocates

When: Aug 16, 2022 from 12:00 PM to 01:15 PM (ET)

No Cost to Register

https://us02web.zoom.us/webinar/register/WN_iiY-YbddQ3-Tz-O5zph5lQ

Experienced arbitrators will present an interactive discussion on the ins and outs of employment and labor arbitration.

- What are the major differences between the two?
- How does a successful arbitrator conduct a labor arbitration as opposed to an employment arbitration?
- Are the evidence rules different?
- Are information obtaining processes different?
- How does the Federal Arbitration Act apply?
- How does the Michigan Uniform Arbitration Act apply?
- What is the Due Process Protocol and what is the Protocol's impact on employment arbitration? Is the burden of proof different in each, and, if so, why?
- Does Michigan have unique case law applicable to employment arbitration of statutory claims? How does the arbitrator prepare differently for the employment arbitration than the labor arbitration?
- Is the audience of the labor arbitration award different than the audience of the employment arbitration award?

Betty Rankin Widgeon — Betty Rankin Widgeon is the Immediate Past Chair of the State Bar of Michigan Alternative Dispute Resolution Section. In 2017, she was appointed to the Michigan Supreme Court Panel of Special Masters to preside over alleged judicial misconduct hearings. She is a former Chief Judge of the 14A District Court, Washtenaw County, Michigan. She is a member of the National Academy of Arbitrators and the National Academy of Distinguished Neutrals.

She holds her B.A. and MAEd Degree in Education from Wake Forest University and her JD from the University of Michigan. While in law school, she co-authored The Relevance of "Irrelevant" Testimony: Why Lawyers Use Social Science Experts in School Desegregation Cases, Law and Society Review, 1981-82. She arbitrates labor, employment, commercial and consumer cases, and mediates for private firms and corporations.

She is on the labor, employment, and commercial arbitrator panels and rosters for the American Arbitration Association, the Arbitration and Mediation Service the Federal Mediation and Conciliation Service, the Financial Industry Regulatory Authority, and the National Mediation Board. She is trained in videoconferencing and competent to conduct hearings, mediations, fact findings and facilitations in ZOOM and other virtual platforms.

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

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He is included in The Best Lawyers of America 2018 and 2019 for arbitration, and 2020 to 2022 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for alternative dispute resolution. He has received a First Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2022; and he a Second Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2022. He received a Second Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2020 and a First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019.

He holds his B.A. and J.D. cum laude from the University of Michigan and his LL.M. in Labor Law from Wayne State University.

Upcoming Mediation Trainings

The following training programs have been approved by the State Court Administrative Office. The list is updated periodically as new training dates become available. Please contact the training center for further information.

https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/

Advanced Mediator Training

16-Hour Eldercare and Adult Guardianship
ONLINE DATES: September 20-23, 2022
Hosted By: Oakland Mediation Center
Registration and additional information: https://events.r20.constantcontact.com/register/eventReg?oeidk=a07eja1iiw73bfc25a6&oseq=&c=&ch=

16-Hour Eldercare and Adult Guardianship
ONLINE DATES: October 11-12, 18-19, 2022
Hosted By: Oakland Mediation Center
Registration and additional information: https://events.r20.constantcontact.com/register/eventReg?oeidk=a07eja1iiybe93962e9&oseq=&c=&ch=

16-Hour Eldercare and Adult Guardianship
ONLINE DATES: November 29 - December 2, 2022
Hosted By: Oakland Mediation Center
Registration and additional information: https://events.r20.constantcontact.com/register/eventReg?oeidk=a07eja5lu9853042ed2&oseq=&c=&ch=

4-Hour Writing Sustainable Agreements
ONLINE DATE: September 16
Hosted By: Northern Community Mediation
Registration and additional information: https://www.northernmediation.org/workshops-trainings/

4-Hour Standards of Conduct
ONLINE DATE: October 14
Hosted By: Northern Community Mediation
Registration and additional information: https://www.northernmediation.org/workshops-trainings/

48-Hour Domestic Relations Mediator Training

DATES: August 22-24, 26, & 29-30, 2022
Location: Holland, MI
Hosted By: Mediation Services
Registration and additional information: https://mediationservices.works/trainings/

ONLINE DATES: November 1-3, 7-9, 14-16, & 21-23, 2022
Hosted By: Oakland Mediation Center
Registration and additional information: http://mediation-omc.org/48-hour/

40-Hour General Civil Mediator Training Program

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

ONLINE DATES: September 12-14, 19-20, 2022
Hosted By: Resolution Services Center
Registration and additional information: https://www.rsccm.org/trainings-1

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 website:

https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mediator/mediation-training-dates/

MICHIGAN PLEDGE TO ACHIEVE DIVERSITY AND INCLUSION

WE CAN,
WE WILL,
WE MUST

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

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

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

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

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

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

SBM
State Bar of Michigan

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

https://www.tribeunltd5.com/

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STATE BAR OF MICHIGAN

ALTERNATIVE DISPUTE RESOLUTION SECTION

ADR Section's 2022 Annual Conference, Awards Ceremony, and Annual Meeting September 30 - October 1, 2022

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MEMBERSHIP APPLICATION 2021-2022

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

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

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

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

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

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

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

NAME: _____

FIRM: _____

ADDRESS: _____

_____

CITY: _____ STATE: _____ ZIP CODE: _____

PHONE:_____

E-MAIL: _____

State Bar No. _____(if applicable)

Have you been a Member of this Section before:_____

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

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

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

Non-members must submit payment by check.

Please make check payable to:
STATE BAR OF MICHIGAN

Enclosed is check #_____

Mail your check and completed membership form to:

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

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

Revised 01/2021

SBM Connect
State Bar of Michigan

Connect With Us

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

The ADR Section SBM Connect hyperlink is:

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

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

ADR Section Mission

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

1. Providing training and education for ADR professionals;
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3. Promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging the elimination of discrimination and bias; and,
4. Advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

Join the ADR Section

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

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

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

Editor's Notes

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

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

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

ADR Section Member Blog Hyperlinks

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

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

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

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

ADR Section Social Media Links

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

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

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

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

ADR Section Homepage

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

Dispute Resolution Journal

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

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

For comments, contributions or letters, please contact:

*Erin Archerd - archerer@udmercy.edu – **313-596-9834***

*Lisa Okasinski - lisa@okasinskilaw.com – **313-355-3667***

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