

Some Reflections on Automatic Mediation

by Lee Hornberger

Introduction

Welcome to the world of alternative dispute resolution. In the world of ADR, there are many mansions. Among these mansions are arbitration, collaborative law, early neutral evaluation, fact-finding, med-arb, mediation, peacemaking, and summary jury trial. *Michigan Judges Guide to ADR Practice and Procedure* (SCAO 2015).

<http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf>

The ADR Section has historically been at the forefront of administrative and legislative ADR activities including the Uniform Collaborative Law Act, MCL 691.1331 *et seq*; the Michigan Uniform Arbitration Act, MCL 691.1681 *et seq*; and the Mediator Standards of Conduct (effective March 1, 2013).

We will briefly review a refreshing and promising part of the developing ADR field: the world of automatic mediation.

Many ADR Section members, including Joseph C. Basta, Mary A. Bedikian, Lisa Taylor, William L. Weber, Martin C. Weisman, and Robert E. Lee Wright have worked long and hard in helping to draft proposed automatic mediation language.

White Paper on Automatic Mediation

Professor of Law Mary A. Bedikian discusses automatic mediation in her excellent *White Paper on Automatic Mediation*. The *White Paper* is elsewhere in this *Journal* and at:

<http://www.leehornberger.com/files/WhitePaper-AutomaticMediation.pdf>

The *White Paper* discusses why Michigan should have automatic mediation.

The *White Paper* gives the following reasons.

1. Mediation offers an opportunity to address more than the legal claim.
2. Mediation provides superior outcomes.
3. The parties consider mediation results as generally fairer.
4. Diverting cases to mediation provides faster and less expensive resolutions.
5. Trained mediators increase the likelihood of settlement.
6. Early intervention in the case increases the potential for resolution and avoids multiple court proceedings.
7. Compulsory process already exists in Michigan.
8. Mediation preserves the parties' ability to exercise self-determination.
9. Automatic mediation removes the discretionary factor from case referral.

Thirteenth Circuit Court

The 13th Circuit (Grand Traverse, Leelanau, and Antrim counties) has had automatic mediation for many years. Absent domestic violence-related situations, all civil cases in the 13th Circuit are subject to automatic mediation. The 13th Circuit does not have mandatory case evaluation. The 13th Circuit ADR plan is at:

<http://www.13thcircuitcourt.org/DocumentCenter/View/27>

Under the 13th Circuit Court Plan, the Court can refer any civil case to mediation unless otherwise provided by statute or court rule. The Court relies upon mediation as an ADR process because mediation enables the Court to streamline its docket by enabling people to take advantage of this timely and affordable alternative to the litigation process. Through mediation, people are empowered to control the outcome

of their disputes. “ADR helps reduce costs to taxpayers due to a reduction of an overall need for jurors, compensation for lay and expert witnesses and the need for additional judges and courtrooms.” Thirteenth Judicial Circuit Court Annual Report (2016 ed.), p. 18.

Alternative Dispute Best Practices for Judges

The SCAO *Alternative Dispute Best Practices for Judges* is at:

<http://courts.mi.gov/Administration/SCAO/Resources/Documents/bestpractice/ADR-BestPracticesForJudges.pdf>

The Best Practices provides that:

1. Consider ADR in all cases.
2. Consult with the parties as early as possible about the best ADR process for their case.
3. Have the parties identify a mediator early in the case.

Conclusion

In the fullness of time, Michigan will have automatic comprehensive alternative dispute resolution. This is because:

1. Mediation works to help expeditiously settle cases in a confidential and professional environment with lower costs.
2. Automatic mediation has worked well where it has been implemented such as the 13th Circuit Court. In the 13th Circuit, the parties are free to select their mediator as well as the general timing of the mediation.
3. Mediation recognizes the real interests of the parties which might be different than what the law might say is to be the imposed resolution.

4. Mediation provides practical solutions that limit risk and can look at the future as well as the past.
5. Experience has shown that a mediated settlement is more likely to be followed and implemented than a court-imposed decree.
6. Up to now, the implementation and use of mediation in Michigan courts has been haphazard and not uniformly available. The practice of referral of cases to mediation should be uniform throughout the state (at least in those courts with approved ADR plans) in order to make the benefits of the mediation process available to more Michigan citizens.

The views, opinions, and conclusions in this article are those of the author and do not necessarily reflect the position or opinion of the State Bar of Michigan or the ADR Section of the State Bar of Michigan.

About the Author

Arbitrator and mediator Lee Hornberger received the George N. Bashara, Jr. Award from the ADR Section in recognition of exemplary service. He is a member of The National Academy of Distinguished Neutrals, included in The Best Lawyers of America 2018 for his work in arbitration, and on the 2016 and 2017 Michigan Super Lawyers lists for alternative dispute resolution.

He is Chair of the ADR Section, former Editor 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), an invitation-only group of Michigan's top mediators.

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

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.

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