MEDIATION AND ARBITRATION CASE LAW REVIEW AND SOME ETHICS
ADVANCED MEDIATION VIRTUAL TRAINING
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
GRAND RAPIDS, MICHIGAN
MARCH 19, 2021

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Arbitrator and Mediator

Introduction

This update reviews Michigan appellate cases concerning mediation and arbitration. This review uses a short form citation style for Court of Appeals unpublished cases. MSA is short for Mediated Settlement Agreement.

State Bar of Michigan Diversity Pledge.

https://www.michbar.org/diversity/pledge

https://www.michbar.org/file/diversity/pdfs/commentary.pdf

Supreme Court Administrative Order No. 2020-23 – Professionalism Principles for Lawyers and Judges

https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2019-32_2020-12-16_FormattedOrder_AO2020-23.pdf

Disclosures, *Hartman*, and Report of AGC Hearing Panel

Report of Hearing Panel in Grievance Administrator, Attorney Grievance Commission, Case No 16-143-GA (August 8, 2019). This case arose under SCAO former Standards of Conduct for Mediators (effective until January 31, 2013), not SCAO's current Mediator Standards of Conduct (effective February 1, 2013). This is part of the ***Hartman v Hartman***, 304026 (August 7, 2012), saga.

Hartman concerned same person being arbitrator and mediator and post-arbitration/mediation conduct of arbitrator-mediator and defense counsel. When mediation failed, parties agreed to arbitrate using mediator as arbitrator. Arbitrator issued awards covering minor issues. Before arbitration on major issues, parties agreed to again mediate utilizing arbitrator as mediator. This mediation failed. Parties then reached settlement agreement on their own. At entry of judgment hearing, plaintiff said he had concerns about arbitrator acting as neutral. Hearing was continued. Plaintiff's counsel contacted arbitrator. Arbitrator told plaintiff's counsel arbitrator was going to Florida and staying at defense counsel's home while defense counsel would be present. Plaintiff's counsel contacted defense counsel to request new arbitrator. Defense counsel refused request.

Plaintiff filed motions to remove arbitrator, have new arbitrator appointed, and obtain relief from settlement. Defendant argued awards were moot because settlement had been reached and what occurred was hospitality and numerous attorneys, including judges, had stayed at his Florida home. Circuit Court denied motions, stating there was no appearance of impropriety, parties reached settlement, and trip to Florida occurred 30 days after mediation. Circuit Court held there was no evidence of clear or actual bias and no evidence to prove what occurred rose to level of clear actual partiality.

COA affirmed Circuit Court. COA stated:

> The totality of the circumstances … rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters. [T]he final matters that remained outstanding at the time of the arbitrator's and defense counsel's vacation together were settled by the judge. The arbitration awards issued before the settlement agreement became moot because the settlement agreement handled those matters. The only issue not moot is whether the settlement agreement can be set aside. We find that it cannot. … .

http://publicdocs.courts.mi.gov/opinions/final/coa/20120807_c304026_42_304026.opn.pdf

Hornberger, "Mediator-Arbitrator Conduct After Arbitration and Mediation," *The Michigan Dispute Resolution Journal* (Fall 2017), p 4.

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Fall17.pdf

> The State Court Administrator shall develop and approve standards of conduct for domestic relations mediators designed to promote honesty, integrity, and impartiality in providing court-connected dispute resolution services. These standards shall be made a part of all training and educational requirements for court-connected programs, shall be provided to all mediators involved in court-connected programs, and shall be available to the public. MCR 3.216 (k).

ADB Hearing Panel Report, Case 16-143-GA (August 8, 2019).

MCR 3.216(E)(5) Disqualification of [Domestic Relations] Mediator

> The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

MCR 2.003 Disqualification of Judge

> (A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to

judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B) Who May Raise. A party may raise the issue of a judge's disqualification by motion or the judge may raise it.

(C) Grounds.

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

(c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d) The judge has been consulted or employed as an attorney in the matter in controversy.

(e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

(g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification not warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.

691.1692 Disclosure by arbitrator.

Sec. 12.

(1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely **to affect the impartiality of the arbitrator in the arbitration proceeding, including** both of the following:

(a) A financial or personal interest in the outcome of the arbitration proceeding.

(b) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(2) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment **that a reasonable person would consider likely to affect the impartiality of the arbitrator**.

(3) If an arbitrator discloses a fact required by subsection (1) or (2) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based on the fact disclosed, the objection may be a ground under section 23(1)(b) for vacating an award made by the arbitrator.

(4) If the arbitrator did not disclose a fact as required by subsection (1) or (2), on timely objection by a party, the court under section 23(1)(b) may vacate an award.

(5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under section 23(1)(b).

(6) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a

condition precedent to a motion to vacate an award on that ground under section 23(1)(b). Emphasis added.

600.5075 Disqualification of [domestic relations] arbitrator.

(1) An arbitrator, attorney, or party in an arbitration proceeding under this chapter shall disclose any circumstance that may affect an arbitrator's impartiality, including, but not limited to, bias, a financial or personal interest in the outcome of the arbitration, or a past or present business or professional relationship with a party or attorney. Upon disclosure of such a circumstance, a party may request disqualification of the arbitrator and shall make that request as soon as practicable after the disclosure. If the arbitrator does not withdraw within 14 days after a request for disqualification, the party may file a motion for disqualification with the circuit court.

(2) The circuit court shall hear a motion under subsection (1) within 21 days after the motion is filed. If the court finds that the arbitrator is disqualified, the court may appoint another arbitrator agreed to by the parties or may void the arbitration agreement and proceed as if arbitration had not been ordered.

SCAO's former Standards (effective until January 31, 2013) indicated:

(4) Conflict of Interest.

(a) **A conflict of interest is a dealing or relationship that might create an impression of possible bias or could reasonably be seen as raising a question about impartiality.** A mediator **shall** promptly disclose all actual and **potential** conflicts of interest reasonably known to the mediator. ...

(b) The need to protect against conflicts of interest also governs conduct that occurs … **after** the mediation. **A mediator must avoid the appearance of conflict of interest … after the mediation.** Without the consent of all parties, a mediator **shall** not **subsequently** establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process. A mediator **shall** not establish a personal or intimate relationship with any of the parties that would raise legitimate questions about the integrity of the mediation process. Emphasis supplied.

SCAO's current Standards (effective February 1, 2013) provide:

Standard III. Conflicts of Interest

A. A mediator **should** avoid a conflict of interest or the appearance of a conflict of interest both during and **after** mediation. **A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an impression of**

possible bias or as raising a question about the impartiality or self-interest on the part of the mediator. …

G. **In considering whether establishing a personal or another professional relationship with any of the participants after the conclusion of the mediation process might create a perceived or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered**. Emphasis supplied.

https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf

Code of Ethics for Arbitrators in Commercial Disputes (March 1, 2004).

https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/Code_Annotated_Final_Jan_2014_update.pdf

CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS. …
C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, … arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. … .

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

https://naarb.org/wp-content/uploads/2017/03/NAACODE07.pdf

Mediation

Michigan Supreme Court Decisions

MSA concerning parental rights.

In re Wangler, 498 Mich 911; 149537 (2015) [Justice Markman dissenting], rev'd 305 Mich App 438 (2014). Circuit Court violated **MCR 3.971(C)(1)** by failing to satisfy itself that mother's plea was knowingly and voluntarily made. Manner in which Circuit Court assumed jurisdiction violated mother's due process rights. In 305 Mich App 438, (Hoestra and Sawyer [majority]; Gleicher [dissent]), Circuit Court ordered parties to engage in mediation immediately after preliminary hearing wherein it found probable cause to authorize petition and ordered temporary placement of children. Parties negotiated MSA signed by all participants. MSA set forth consequences of court's acceptance of admission plea. Respondent failed to comply with MSA ordered services. Pursuant to MSA, Circuit Court accepted plea and took jurisdiction over minor children. Respondent's attorney agreed MSA authorized court to take jurisdiction. Court said it was taking jurisdiction and authorized petitioner to file supplemental petition asking for termination of parental rights. On appeal, respondent argued her written plea that was incorporated into MSA was invalid and could not form basis for court to take jurisdiction. See generally ***In re Alston***, 328667 (March 17, 2016) (Because respondent's procedural due process rights were violated, her plea of admission, subsequent adjudication, and termination order were set aside).

COA Judge Gleicher's dissent said before court may exercise jurisdiction based on plea it must satisfy itself that parent knowingly, understandingly, and voluntarily waived rights. No dialogue between court and parent occurred. Mediation bypassed due process MCR protections. Circuit Court never obtained jurisdiction.

Supreme Court denied leave to appeal in "pressure to settle" case.

Vittiglio v Vittiglio, 297 Mich App 391; 303724 and 304823 (2012), lv den 493 Mich 936 (2013). COA affirmed holding audio recorded property MSA binding. "**[C]ertain amount of pressure to settle is fundamentally inherent in the mediation process.**" COA affirmed plaintiff liable for sanctions because plaintiff's motions filed for frivolous reasons. **Shuttle diplomacy**. **Domestic violence protocol**.

Confidentiality in mediation.

Detroit Free Press Inc v Detroit, 480 Mich 1079; 135841 (2008). There is no FOIA exemption for settlement agreements. Circuit Court did not abuse discretion when it dissolved non-disclosure provision and permitted disclosure of deposition. **Justice Kelly's concurrence** said communications between parties or counsel and mediator relating to mediation are confidential and shall not be disclosed without written consent of all parties. **MCR 2.411(C)(5)**. Although deposition recited statements made during mediation, because City did not request redaction, Circuit Court did not abuse discretion in not ordering it.

Michigan Court of Appeals Published Decisions

Mediation fee is taxable cost.

Patel v Patel, 324 Mich App 631; 339878 (June 19, 2018). COA affirmed Circuit Court award of mediation expense as taxable cost. MCR 2.625(A)(1). "[M]ediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee." **MCR 2.411(D)(4). MCR 3.216(J)(4).**

COA affirmed enforcement of custody MSA.

Rettig v Rettig, 322 Mich App 750; 338614 (January 23, 2018). Parties signed MSA concerning custody. Over objection of one parent that Circuit Court should have hearing concerning best interest factors and whether there was established custodial environment, Circuit Court entered JOD incorporating MSA. COA affirmed. Although Circuit Court not necessarily required to accept parties' stipulations or agreements verbatim, Circuit Court permitted to accept them and presume at face value parties meant what they signed. Circuit Court obligated to come to independent conclusion parties' agreement is in child's best interests, but Circuit Court permitted to accept agreement where dispute resolved by parents. Circuit Court not required to make finding of established custodial environment. "nonsensical." **This memorandum of understanding spells out agreement that we have reached in mediation. This resolves all disputes between parties and parties agree to be bound by this agreement.** Judge Markey on both *Rettig* and *Vial* panels.

Rettig *sub silentio* overruled ***Vial v Flowers***, 332549 (September 22, 2016). **COA reversed Circuit Court.** COA rejected contention parties had not entered into MSA concerning custody. December 2015 mediation resulted in MSA. COA held Circuit Court failed to adequately consider child's best interests before it entered custody JOD in April 2016. COA said party is bound by signature on custody MSA as long as Circuit Court agrees MSA in best interests of child. MSA signed by parties was binding on parties subject to Circuit Court best interests analysis. When parties enter into otherwise binding custody agreement, Circuit Court is not relieved of obligation to examine best interest factors. By entering JOD of custody, court implicitly acknowledges it has (1) examined best interest factors, (2) engaged in profound deliberation as to its discretionary custody ruling, and (3) is satisfied custody order is in child's best interests. Evidentiary hearing not necessarily required given custody MSA. COA indicated Circuit Court also erred by not considering whether established custodial environment existed.

Brown v Brown, 343493 (November 27, 2018). COA said indistinguishable from ***Rettig***.

Hornberger, "Court of Appeals Affirms Enforcement of Mediated Settlement in Custody Case," *Detroit Legal News* (January 19, 2019).

http://www.legalnews.com/detroit/1469845/

Michigan Court of Appeals Unpublished Decisions

COA reverses default judgment.

Nalcor, LLC v Condom Sense, Inc, 351764 (January 21, 2021). Kahn argued good cause to set aside default judgment existed because **failure to appear at mediation** and status conference was inadvertent. Kahn claims his counsel was retained just before mediation and status conference and was not provided copy of scheduling order. Kahn and his counsel failed to appear at mediation and status conference because they were unaware that mediation and status conference were scheduled. COA held abuse of discretion for Circuit Court to conclude Kahn failed to establish good cause to set aside default judgment. A lesser showing of good cause is required if moving party can demonstrate strong meritorious defense. **Circuit Court abused discretion by failing to recognize Kahn had potentially absolute defense to plaintiff's claim. Guarantor. LESSON: Maybe double notify everybody.**

COA affirms dismissal for failure to post bond.

Neff v Chapel Hill Condominium Ass'n, 349444, 349976 (January 14, 2021). Plaintiff argued Circuit Court, by ordering mediation, deprived her of right to jury trial. Plaintiff argued Circuit Court, which required her post security bond and $4,426 in mediator fees, deprived her of right to jury trial. COA held plaintiff was wrong. Damages was not only issue to be decided. Circuit Court denied summary disposition on plaintiff's contract claim, leaving open question of liability. Discovery was not reopened only for Chapel Hill and Mixer; court made no discovery order and mediator sought inspection of property only for purposes of conducting mediation. Mediation is form of ADR that civil cases in Michigan are subject to, unless otherwise directed by statute or court rule. MCR 2.410(A). If mediation fails, jury trial available. Mediation failed and, on Chapel motion to dismiss for refusal to participate in mediation, court ordered security bond in lieu of dismissal. When plaintiff did not post bond, case was dismissed. Record did not support plaintiff's suggestion that court order to mediate deprived right to jury trial. **Plaintiff's actions led to imposition of bond and plaintiff's failure to post security led to dismissal.**

COA affirms enforcement of MSA concerning carpet.

Mauch v Lambert, 349443 (December 17, 2020). Carpet case. Plaintiffs appealed Circuit Court partially granting and partially denying plaintiffs' motion to enforce MSA. **Circuit Court held carpeting as installed consistent with MSA. COA affirmed. LESSON: Words are important.**

COA affirms enforcement of probate MSA.

Tewell v Stoll, 352730 (December 10, 2020). Plaintiff appealed Circuit Court finding MSA valid, based on previous order denying plaintiff's motion to set aside MSA or for evidentiary hearing, in this estate-related dispute. Plaintiff argued Circuit Court

abused discretion when it refused to set aside MSA because it was entered into based on fraudulent or innocent misrepresentation, and Circuit Court should have conducted evidentiary hearing on these issues. COA affirmed. **Notarized statement by accountant**. Separate rooms.

Apparent oral agreement to mediate not enforced.

Kuiper Orlebeke, PC v Crehan, 348315 (November 12, 2020). Defendant argued **oral agreement to mediate** precluded Circuit Court grant of summary disposition in favor of plaintiff. Defendant provided no case law in support of argument that option of mediation precluded summary disposition. Appellant may not merely announce its position and leave it to COA to discover and rationalize basis for its claims, nor may it give issues cursory treatment with little or no citation of supporting authority. **LESSON: Agreement to mediate should be in writing.**

Attorney fee issue where party failed to mediate.

Daniels v Daniels, 348950 (September 17, 2020). Circuit Court said **defendant walked out of mediation causing "lost expense."** This may implicate MCR 3.206(D)(2)(b) because suggests defendant failed to comply with order to mediate. Circuit Court did not determine what "lost expense" was and said was awarding attorney fees because of disparity of income. COA affirmed JOD, but vacated attorney fee award. If parties choose to further litigate attorney fee issue, Circuit Court must make findings required by statute. **LESSON: Comply with orders to mediate.**

COA affirms holding party in contempt.

Teachout v Teachout, 349692 (August 20, 2020), **app lv pdg**. COA affirmed Circuit Court finding defendant in **contempt** for violating three orders: (1) order requiring defendant to pay temporary spousal support to plaintiff during pendency of divorce; (2) order regarding appraisals of property and required defendant to allow access to marital home for appraisal; and (3) scheduling order that set case for mediation. Circuit Court did not order MCR 3.216(I) evaluative mediation. **LESSON: Circuit Court can sua sponte order mediation. MCR 3.216(A)(1) and (C)(1).**

MCR 2.612 not applicable to outside of court case MSA.

Smith v Forrest, 349810 (July 30, 2020). Law firm partnership case. COA held that because MCR 2.612 regarding relief from judgment had no application to plaintiff's effort to challenge validity of MSA that was executed by parties outside of judicial or court proceeding, and because Circuit Court relied on MCR 2.612 in summarily dismissing plaintiff's lawsuit, COA reversed and remanded.

Mediation confidentiality.

Tyler v Findling, 348231, 350126 (June 11, 2020), **app lv pdg. Defamation case.** COA held Circuit Court abused discretion in granting defendants' motion to strike Wright's affidavit and motion in limine to preclude Wright's testimony based on finding that Findling's statements to Wright were inadmissible mediation communications. **Findling was nonparty mediation participant, not mediation party**. Findling attended mediation to be informed of progress of case. Findling's statements made outside mediation process. **Sitting in room designated for plaintiff neither made him party plaintiff nor did his presence in room start mediation**. MCR 2.411 and 2.412. See ***Hanley v Seymour***, 334400 (October 26, 2017). **LESSON: Maybe mediation confidentiality can be fuzzy.**

The SBM ADR Section has filed a brief amicus curiae.

Violation of orders to mediate.

Lang v Lang, 347110 (May 14, 2020). COA affirmed granting of **attorney fees**. Circuit Court did not award attorney fees because defendant exercised right to go to trial after failing, in good faith, to reach settlement agreement. Circuit Court awarded plaintiff attorney fees because, in regard to mediation and sale of marital home, defendant attempted to find loopholes in Circuit Court order, rather than participating in good faith.

COA reverses enforcement of MSA.

Estate of Brown, 342485 and 342486 (April 9, 2020). Barbara argued MSA should be set aside because Barbara did not receive notice of or participate in mediation. COA agreed and reversed Circuit Court's enforcement of MSA. See ***Dolan v Cuppori***, 345310 (September 12, 2019), and ***Peterson v Kolinske***, 338327 (April 17, 2018). **LESSON: Make sure all required persons are at mediation.**

COA affirms enforcement of recorded DR MSA.

Brooks v Brooks, 345168 (February 11, 2020). COA affirmed Circuit Court enforcement of recorded MSA. Apparently mediator recited MSA in open court. Parties agreed it was their agreement. Parties were sitting in judge's jury room and outlined agreement. MSA silent on pension issue. COA remanded case to Circuit Court to determine distribution, if any, of wife's pension.

COA affirms enforcement of domestic relations MSA even though domestic violence protocol not done.

Pohlman v Pohlman, 344121 (January 30, 2020), **app lv pdg**. In split decision, COA affirmed Circuit Court enforcement of domestic relations MSA **even though there was no domestic violence protocol utilization**. Because plaintiff did not allege or show she was prejudiced by mediator's failure to screen for domestic violence, any

noncompliance with MCR 3.216(H)(2) was harmless. MCR 3.216(H)(2). MCL 600.1035. **Shuttle diplomacy.**

Judge Gleicher's **dissent** said "trial court was obligated to hold a hearing to determine whether Jody was coerced into the settlement. Only by evaluating the proposed evidence in light of the statute and the court rule could the trial court make an informed decision regarding whether relief is warranted. … When there is a background of domestic violence, the reasons for a presumption against mediation do not magically evaporate because the parties use 'shuttle diplomacy.' That method may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment." **Self-determination.**

On November 25, 2020, Supreme Court ordered oral argument and supplemental briefing addressing (1) whether mediator's failure to perform domestic violence screening as required by MCL 600.1035(2) and (3) and MCR 3.216(H)(2) should be reviewed for harmless error; (2) if so, whether such error was harmless; and (3) whether Circuit Court properly denied appellant's motion for reconsideration arguing that she signed MSA under duress because of her attorney's actions.

The SBM ADR Section and Family Law Section have filed briefs amicus curiae.

COA affirmed dismissal with prejudice.

Pearson v Morley Companies Inc, 345547 (November 26, 2019). COA affirmed Circuit Court dismissing with prejudice plaintiff's hostile work environment lawsuit, as sanction for plaintiff's failure to comply with discovery and scheduling orders, including **"counsel's failure to adequately prepare for facilitation** … ."

COA held MSA invalid in quiet title action.

Dolan v Cuppori, 345310 (September 12, 2019). Spouses D and N owned property as **tenants by entirety**. N not party to lawsuit. It violated N's due process rights for settlement reached by D alone to effect non-party N's property rights. COA held Circuit Court violated N's due process rights when it added her to settlement agreement without N's consent. Settlement agreement invalid from outset. **LESSON: Who is bound by an MSA can implicate due process rights.**

COA reversed dismissal for failure to appear.

Corrales v Dunn**,** 343586 (May 30, 2019). Circuit Court ordered mediation of no fault case at Dispute Resolution Center. Because of communication glitch, plaintiff failed to appear at mediation. Circuit Court dismissed case. Was dismissal proper sanction under circumstances? COA said dismissal after over two years of litigation under circumstances was manifest injustice. MCR 2.410(D)(3)(b)(i). **LESSON: Counsel should personally prepare client for mediation and tell client of logistics.**

Non-signed or recorded MSA placed on record and agreed to is binding.

Eubanks v Hendrix, 344102 (May 23, 2019). **COA reversed Circuit Court.** Plaintiff contended Circuit Court forced her to comply with unenforceable MSA. Terms of any MSA were never reduced to signed writing or recorded by audio or video. MCR 3.216(H)(8). Purported MSA could not, absent other valid proof of settlement, be basis for JOD. At hearing, held one day after mediation, parties placed partial agreement on record. MCR 2.507(G). At hearing, relative to purported MSA, Circuit Court indicated its understanding as to "gist" of agreement was that parties to continue with joint physical and legal custody and equal parenting time. Plaintiff agreed on record with that statement. Circuit Court found arrangement in best interests of child. **Agreement placed on record and agreed to by plaintiff was binding on her. LESSON: Sign MSA.**

Non-MSA DR property settlement approved.

Nowak v Nowak, 339541 (August 23, 2018). COA affirmed enforcement of non-MSA settlement agreement. Kidnapping, gun safe, alleged duress and coercion, unconscionable, credibility. Not MSA case. **Two-day evidentiary hearing. FOFs**.

To settle or not to settle?

Smith v Hertz Schram, PC, 337826 (July 26, 2018), lv den ___ Mich ___ (2020). COA split decision. **Legal malpractice action arising out of post JOD proceeding**. Matter went to mediation. Mediator also served as "discovery master." Plaintiff did not go to Family Court to challenge discovery roadblock. Plaintiff decided to settle.

Jansen dissent said attorney should have advised plaintiff to walk away from $65,000 offered in mediation and to return to Family Court to pursue discovery matter further. Settlement should never have been serious consideration. Concerning language in settlement agreement that acknowledged neither party had relied on any "representation, inducement, or condition not set forth in this agreement," attorney should never have allowed it. Fact that attorney essentially released Leider from future liability for any material misrepresentations made in connection with settlement agreement was negligent. Attorney should have had plaintiff sign a release, indicating it was her intention to enter into settlement agreement despite her counsel's advice to contrary. **FN 5**. "**We are deeply concerned that company counsel may have been aware of all that was occurring inside the company when speaking to the mediator."**

"… **A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter**. … ." MRPC 1.2 (a).

Post-MSA surveillance okay.

Hernandez v State Automobile Mutual Ins Co, 338242 (April 19, 2018). **COA reversed Circuit Court granting plaintiff's motion to enforce MSA.** MSA signed by plaintiff. Claims representative for defendant said he would need approval from his superiors and Michigan Catastrophic Claims Association (MCCA) before signing MSA. MSA stated "… settlement is contingent on the approval of MCCA." MCCA did not approve MSA. Circuit Court did not err in concluding there was meeting of minds on

essential terms of MSA. MSA was properly subscribed. MCR 2.507(G). MCCA approval was **condition precedent** to performance of MSA. Defendant did not waive condition by conducting **surveillance** on plaintiff and submitting reports of surveillance to MCCA.

Probate MSA not approved.

Peterson v Kolinske, 338327 (April 17, 2018). **COA reversed Probate Court.** Probate MSA not approved. MSA said only persons who signed it had agreed to its terms. It did not indicate **daughter Theresa** agreed to its terms, agreed will was valid, or otherwise agreed to release claims against estate or its personal representative. If contract clear and unambiguous, must construe according to plain sense and meaning, without reference to extrinsic evidence. **LESSONS: Get everyone's signature. Are necessary people absent?**

Signature is a signature.

Krake v Auto Club Ins Assoc, 333541 (February 22, 2018), lv den ___Mich___ (2018). PIP benefits. "Facilitation Agreement." Plaintiff present at mediation. She initially denied she had signed MSA. She admitted she did "pen" her signature on MSA. She explained she signed "fake initials," and had done so because her attorney told her MSA was not legally binding document. Plaintiff explained she did not believe MSA to be final resolution of case. She believed amount of settlement was too low. Circuit Court enforced MSA. COA affirmed. **LESSONS: People unpredictable. Prepare for worst. Word "mediation" not in opinion.**

Party died after signed MSA but before judgment.

Estate of James E Rader, Jr, 335980 (February 13, 2018), lv den ___ Mich ___ (2018). After signed MSA in domestic relations case, one of parties died before entry of JOD. Because settlement agreement was to be incorporated into JOD, agreement had no effect, since decedent died before JOD could be entered. Entry of JOD served as condition precedent to enforcement of settlement agreement. Because entry of JOD became impossible following decedent's death, settlement agreement could not be incorporated or given effect as intended. **LESSON: Act quickly.**

Mediation confidentiality.

[Ex-H] Hanley v [ex-W] Seymour, 334400 (October 26, 2017). Defendant ex-wife sent to attorney suing her ex-husband's current wife financial information about current wife and defendant's ex-husband, who was attorney representing current wife. Plaintiff ex-husband sued defendant for **contempt**, claiming violation of protective order in their divorce that prohibited parties from disclosing financial information learned during discovery. Defendant argued unclean hands defense, claiming plaintiff had learned about contemptuous materials during mediation session and so could not use those materials in contempt proceedings. COA found communications received by attorney from defendant ex-wife were not part of mediation proceedings. Plaintiff ex-husband made aware of communications at conclusion of mediation in which plaintiff participated with opposing attorney. Opposing attorney received documents from defendant before

mediation was conducted. No violation of **MCR 2.412(C) confidentiality of mediation communications**. **COA affirmed Circuit Court. Fifth Amendment.**

MSA enforced.

Jaroh v Jaroh, 334216 (October 17, 2017). Defendant moved to set aside MSA, contending she signed MSA under duress because she had no food during nine-hour mediation and was pressured by her attorney and mediator to sign MSA. Circuit Court enforced MSA. Defendant argued MSA was obtained by fraud and Circuit Court abused discretion by failing to set it aside and by failing to hold evidentiary hearing when defendant asserted plaintiff had procured MSA by fraud. COA affirmed Circuit Court Circuit Court finding concerning validity of parties' consent to settlement agreement will not be overturned absent abuse of discretion. ***Vittiglio***, 297 Mich App 391. Defendant's allegation she did not eat during mediation and was pressured to accept terms of MSA by her attorney and mediator did not demonstrate coercion necessary to sustain claim of duress. Mediator provided parties with snacks. No evidence defendant was refused request to get something to eat or not allowed to bring her own food to mediation. Shuttle mediation. **LESSONS: Food important. Separate sessions can sometimes be helpful.**

Mediation and domestic violence.

Kenzie v Kenzie, 335873 (August 8, 2017). Attorney fees granted, in part, because husband initiated altercation with wife following mediation at which he called police and accused wife of domestic violence; and he obstructed mediation process that would have allowed case to reach settlement posture.

Spousal support language not in MSA.

Amante v Amante, 331542 (June 20, 2017). Plaintiff argued both counsel and mediator forgot to include provision barring **spousal support** in settlement agreement. Plaintiff argued under plain language of JOD, dispute regarding provision barring spousal support should have been decided by arbitrator. Under terms of judgment, "any disputes regarding the judgment language" should be submitted to arbitrator. Circuit Court did not abuse its discretion in following settlement agreement and entering JOD and denying plaintiff's motion for relief from judgment.

Binding settlement agreement in legal malpractice case.

Roth v Cronin, 329018 (April 25, 2017), lv den 501 Mich 910 (2017). Legal malpractice case. **Judicial estoppel**. **She understood (1) terms of settlement, (2) she would be bound by terms of settlement if she accepted it, and (3) she had absolute right to go to trial, where she could get better or worse result. She testified she understood terms and would be bound by settlement, and had right to go to trial. Plaintiff further testified that it was her own choice and decision to settle pursuant to terms that were placed on the record.** Bullet proof language.

Circuit Court Judge not disqualified.

Ashen v Assink, 331811 (April 20, 2017), lv den 501 Mich 952 (2018). **Quiet title case**. Plaintiff argued Circuit Court judge should have been disqualified because, as mediator over case, he would have had personal knowledge of disputed evidence concerning proceeding. Mediation scheduled for June 11, 2015, was cancelled on June 2, 2015. Judge never actually mediated case. Plaintiff failed to show what personal knowledge, if any, judge had of disputed evidentiary facts. MCR 2.003(C)(1)(c).

Can Circuit Court appoint Discovery Master?

Barry A Seifman, PC v Raymond Guzell, III, 328643 (January 17, 2017), lv den 500 Mich 1060 (2017). Defendant contended Circuit Court lacked authority to appoint independent attorney as Discovery Master and to require parties to pay Master's fees; and Circuit Court should have made determination regarding reasonableness of Master's fees. COA held **once parties accepted case evaluation award**, defendant lost ability to appeal earlier Discovery Master order. Sadek, "Special Masters Under the Michigan Court Rules," *The ADR Quarterly* (May 2013), p 5.

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As of January 1, 2020, parties may stipulate to or court may order mediation of discovery disputes. Court may specify that discovery disputes must first be submitted to mediator before being filed as motion unless there is need for expedited attention by court. In cases involving complex ESI issues, court may appoint expert under MRE 706. **MCR 2.411(H)**.

DR MSA enforced.

Kleinjan v Carlton, 328772 (January 19, 2016), enforced DR MSA. Circuit Court did not err by entering order based on parties' signed, handwritten MSA, despite defendant's attempt to disavow MSA. Defendant bound by terms of signed, written MSA. MCR 3.216(H)(7). She cannot dispute MSA based on change in heart. ***Vittiglio***.

Custody MSA not enforced.

Bono v Bono, 325331 (November 19, 2015). Circuit Court abused discretion by entering MSA JOD, which included custody, without first considering best interest factors. CCA requires Circuit Court to determine what custodial placement is in best interests of children, even if parties utilize ADR to reach MSA regarding custody. **Identical to *Vial* and contra to *Rettig*.**

MSA not binding contract.

In split decision, ***Control Room Technologies, LLC v Waypoint Fiber Networks, LLC***, 320553 (April 28, 2015), held Circuit Court erred in concluding MSA was binding contract. Majority said considering essential terms that were omitted from MSA, and

circumstances surrounding its execution, three-page handwritten MSA was so cursory in treatment of complex matters that parties did not intend document to be binding contract.

Dissent said MSA was sufficiently definite to be enforceable contract. MSA incorporated 50 page plus document which provided essential terms for agreement.

Repeated challenges to MSA sanctionable.

Annis v Annis, 319577 (April 16, 2015), affirmed Circuit Court's finding that plaintiff's challenges to MSA, after Circuit Court found it enforceable, violated MCR 2.114(D)(2), and affirmed Circuit Court's awarding of **sanctions** for this violation.

Unsigned MSA not enforced.

Central Warehouse Operations, Inc v Riffell, 319183 (March 24, 2015). Parties negotiated oral settlement agreement with aid of facilitator. Attorneys were not present. COA said, while parties acknowledged some form of agreement was made, agreement was nothing more than agreement to agree and not enforceable agreement.

COA set aside property MSA.

Heiden v Heiden, 318245 (February 26, 2015), vacated MSA. Parties signed **antenuptial agreement** describing husband's premarital personal injury settlement as his separate property. Twenty-four years later, wife filed for divorce. COA said Circuit Court incorrectly ruled antenuptial agreement applied only in event of death. Matter went to mediation. Parties failed to consider during mediation whether disputed property belonged to husband alone or became part of marital estate. Parties reached MSA predicated on inaccurate description of separate and marital property. Property division and spousal support award disparately favored wife. JOD entered reflecting MSA. COA vacated property division and spousal support award and remanded to Circuit Court. Antenuptial agreement applied to divorce proceeding.

Undisclosed pregnancy at mediation.

Cieslinski v Cieslinski, 319609 (November 13, 2014). Circuit Court should have set aside consent JOD when husband alleged (1) wife withheld information she was pregnant with another man's child before he signed consent JOD, and (2) knowledge of her pregnancy would have affected his decision to sign consent JOD because he would have been concerned about wife's ability to properly parent children. Circuit Court abused discretion when it failed to hold evidentiary hearing after husband in essence alleged wife fraudulently obtained consent JOD.

Incomplete MSA not enforced.

Kendzierski v Macomb Co, 316508 (September 23, 2014). Signed MSA that resolved only damages issue but left unresolved other issues not enforceable. Court cannot force parties to settle lawsuits and cannot make contract for parties where there is no contract. Plaintiffs failed to establish contract to settle existed. Mere discussions and

negotiation, including unaccepted offers, cannot substitute for contract requirements. Even if valid oral contract to settle resulted during facilitation, it was not enforceable because agreement was not made in open court and written evidence of agreement, subscribed by defendant or its attorney, did not exist. MCR 2.507(G).

MSA enforced.

Faustina v Town Center, 311385 (August 7, 2014). Plaintiff failed to comply with MSA. Plaintiff testified she signed MSA, but her medical bills, which she had tried to show attorneys, were not taken into account. Circuit Court held MSA was binding, ordered plaintiff to sign release, and ordered defendants not required to turn over settlement checks until plaintiff signed release. COA affirmed.

MSA set aside by COA.

Hayes v Morris, 315586 (July 29, 2014). MSA provided for largely equal division of marital estate. No JOD entered. **Then husband died**. In *Tokar v Albery*, 258 Mich App 350 (2003), parties, during divorce proceedings, arbitrated property issues. After filing of award but before JOD entry, husband died. *Tokar* held trial court correctly denied motion to enforce award because trial court retains ultimate control over divorce action. Award, standing alone, does not have full force and effect until court enters judgment based on award. Two possible exceptions under which award could be enforced: (1) if JOD entry would be ministerial and (2) if decedent acted in reliance on award. Court found JOD entry would not have been ministerial because there were issues remaining and, before JOD was entered, parties had option to reconcile or stipulate to agreement different from award. Court found no reliance by decedent. To show reliance, proof of conduct indicating parties in good faith believed they were divorced is required.

Mediation in parental rights case.

In re Vanalstine, Minors, 312858 (April 11, 2013). Court ordered mediation resulted in MSA concerning parental rights. Mother did not comply with MSA and Court terminated parental rights. COA said Circuit Court did not terminate rights solely for failure to comply with MSA. Circuit Court decision was based on mother's conduct, including failure to comply.

Circuit Court can enter judgment on property MSA.

Unit 67, LLC v Hudson, 303398 (June 7, 2012), affirmed Circuit Court entry of consent judgment because defendant had agreed to terms of property consent judgment and mediator did not engage in fraudulent conduct. **Residential condo**.

Property MSA evidenced parties' mutual intent.

Roe v Roe, 297855 (July 19, 2011). MSA evidenced parties' mutual intent to value retirement assets and was enforceable. Property settlement provisions in JOD typically are final and cannot be modified by court.

MSA did not deprive court of its authority and obligations.

In re BJ, 296273 (January 20, 2011). Domestic relations mediation is not binding but is subject to acceptance or rejection by parties. Utilization of ADR does not deprive court of CCA authority and obligations. Cf *Rettig*.

Custody MSA rejected.

Roguska v Roguska, 291352 (September 29, 2009). Circuit Court did not err in rejecting custody MSA, finding no custodial environment existed, and applied proper custody standard. MSA signed by mediator, parties, and attorneys. Parties said JOD was consistent with MSA. Plaintiff testified defendant "lied" during mediation. COA held CCA required Circuit Court to determine custody that is in best interests of children. Cf *Rettig*.

MSA binding.

Miller v Miller, 282997 (March 24, 2009). Plaintiff moved to set aside MSA arguing she was tricked by her attorney, she misunderstood MSA, and MSA gave other party unconscionable advantage. Circuit Court denied motion. COA affirmed.

Arbitration

Michigan Supreme Court Decisions

Sexual assault and arbitration.

Lichon v Morse, 327 Mich App 375, 339972 (March 14, 2019), lv gtd 932 NW2d 785 (2019). In split decision, COA held sexual harassment claim was not covered by arbitration provision in employee handbook. Because provision limited scope of arbitration to only claims that are "related to" plaintiffs' employment, and because sexual assault by employer or supervisor cannot be related to employment, provision was inapplicable to claims against Morse and Morse firm. **"[C]entral to our conclusion … is strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault**."

Judge O'Brien's dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and claims arguably fell within scope of arbitration agreement.

Supreme Court granted leave to appeal. "The parties shall include among the issues to be briefed whether the claims … are subject to arbitration."

The Supreme Court oral argument was October 8, 2020.

Radtke v Everett, 442 Mich 368 (1993). Hostile work environment.

Rembert v Ryan's Family Steak Houses, Inc, 235 Mich App 118 (1999).

Hornberger, "Overview of a Pre-Dispute Employment Resolution Process," *ADR Newsletter* (February 2005).

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Waiver of right to arbitration.

Nexteer Automotive Corp v Mando Am Corp, 500 Mich 955 (2017), lv den 314 Mich App 391 (2016). Party waived right to arbitration when it stipulated arbitration provision did not apply. **Justice Markman dissent** agreed COA correctly held prejudice is not element of express waiver. Dissent said COA erred by holding defendant expressly waived right to arbitration by signing case management order that contained checked box next to statement: "An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable." He would have reversed COA on express waiver and remanded for consideration of whether defendant's conduct gave rise to implied waiver, waiver by estoppel, or no waiver. **LESSON: Be careful when checking boxes.**

Arbitration in underinsured motorist no fault case.

Nickola v MIC General Ins Co, 500 Mich 115 (2017), reversed portion of 312 Mich App 374 (2015), denying plaintiff penalty interest under Uniform Trade Practices Act, MCL 500.2001 *et seq*. COA discussed attorney fee and interest issues arising from uninsured motorist case that included an arbitration.

Does arbitrator decide attorney fee in lien case?

Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, 499 Mich 544 (2016) (Justices Viviano, Markman, McCormack, and Bernstein). Plaintiff can seek attorney fees under MCL 570.1118(2), of Construction Lien Act (CLA), where plaintiff received favorable award on related breach of contract claim but did not obtain judgment on construction lien claim. Arbitrator did not address attorney fee claim but reserved issue for Circuit Court. Circuit Court may award attorney fees to plaintiff because plaintiff was lien claimant who prevailed in action to enforce construction lien through foreclosure. Affirmed 306 Mich App 203 (2014).

Dissent (Justices Young, Zahra, and Larsen) said recovery of CLA attorney fees is permitted only to lien claimants who prevail on construction lien. Because plaintiff did not meet definition of CLA lien claimant, and because it voluntarily extinguished its lien claim before Circuit Court could have so determined, plaintiff was not entitled to fees.

Dispute with individuals within arbitration agreement.

Altobelli v Hartmann, 499 Mich 284 (2016). Plaintiff's tort claims against individual principals of law firm fell within scope of arbitration clause that required arbitration for any dispute between firm and former principal. Plaintiff, a former principal, challenged actions individual defendants performed in their capacities as agents carrying out business of firm. This was dispute between firm and former principal that fell within scope of arbitration clause and was subject to arbitration. Reversed those portions of 307 Mich App 612 (2014), which held matter not subject to arbitration.

Not all artwork invoice claims subject to arbitration.

Beck v Park West Galleries, Inc*,* 499 Mich 40 (2016), partially reversed COA 319463 (2015). Arbitration clause in invoices for artwork purchases did not apply to disputes arising from previous artwork purchases when invoices for previous purchases did not refer to arbitration. Arbitration clause contained in later invoices cannot be applied to disputes arising from prior sales with invoices that did not contain clause. Court reversed part of COA judgment that extended arbitration clause to parties' prior transactions that did not refer to arbitration. Court recognized policy favoring arbitration of disputes arising under CBAs but said this does not mean arbitration agreement between parties outside collective bargaining context applies to dispute arising out of any aspect of their relationship.

Parental pre-injury waivers and arbitration.

Woodman ex rel Woodman v Kera LLC, 486 Mich 228 (2010), five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, held parental pre-injury waiver is unenforceable under common law because, absent special circumstances, parent does not have authority to contractually bind his or her child. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167 (1987). In *McKinstry*, pregnant mother signed waiver requiring arbitration of any claim on behalf of her unborn child. Mother contested validity of waiver after child was injured during delivery. Court considered Medical Malpractice Arbitration Act, MCL 600.5046(2) (repealed 1993 PA 78), which provided minor bound by written agreement to arbitrate disputes upon execution of agreement on his behalf by parent or guardian. Minor may not subsequently disaffirm agreement. *McKinstry* held statute required arbitration agreement signed by mother bound her child. Justice Young said *McKinstry* acknowledged arbitration agreement would not have been binding under common law and *McKinstry's* interpretation of MCL 600.5046(2) was departure from common law that parent has no authority to release or compromise claims by or against child. He said common law can be modified or abrogated by statute. Child can be bound by parent's act when statute grants authority to parent. MCL 600.5046(2) changed common law to permit parent to bind child to arbitration agreement.

Failure to tape record DRAA hearing.

Kirby v Vance, 481 Mich 889 (2008), in lieu of granting leave, reversed COA (278731) and held arbitrator exceeded authority under DRAA when arbitrator failed to adequately tape record arbitration proceedings. Circuit Court erred when it failed to remedy arbitrator's error by conducting its own evidentiary hearing. Supreme Court remanded case for entry of order vacating award and ordering another arbitration before same arbitrator. **LESSON: Make sure audio recorder is working.**

Formal DRAA hearing format not required.

Miller v Miller, 474 Mich 27 (2005). DRAA, MCL 600.5070 *et seq*, does not require formal hearing concerning property issues similar to that which occurs in regular trial proceedings.

Michigan Court of Appeals Published Decisions

COA affirms confirmation of DRAA award.

Davidson v Davidson, 348788 and 348808 (January 28, 2021). Plaintiff argued arbitration void for lack of authority. Arbitrator derives authority from parties' arbitration agreement. **Arbitration agreement, entered into while there was active case, not affected by dismissal of divorce action.** Plaintiff failed to show arbitration was void or without authority. Plaintiff did not show from face of award how arbitrator exceeded authority or committed error of law.

COA affirms arbitration agreement forecloses court case.

Gray v Yatooma, 351360 (December 17, 2020). Plaintiff had compensation agreement and non-compete broad arbitration agreement. COA affirmed Circuit Court that arbitration agreement prevented court suit.

COA affirms denial of vacatur of award.

Rahaman v Ameriprise Ins Co, 349463 (November 24, 2020). Appellant argued award should be vacated because attorney, not party, signed agreement to arbitrate. **Attorney can enter into binding arbitration agreement on behalf of client.** MCR 2.507(G).

COA affirms denial of vacatur in disclosure case.

Wilson v Louis D. Builders, 351560 (November 19, 2020). Plaintiffs moved to vacate award because of arbitrator's alleged bias toward a party and party's attorney. Plaintiffs also alleged arbitrator and opposing counsel held municipal positions together, worked on township matters, and interacted socially. Plaintiffs asserted these interactions were substantial and material relationships. Circuit Court denied motion to vacate and the COA affirmed. MCL 691.1962.

COA affirms confirmation of award.

Kada v Nouri, 351402 (November 19, 2020). Plaintiffs appealed Circuit Court confirmation of award, and Circuit Court denial of attorney fees and costs. COA held Circuit Court did not abuse its discretion in confirming award and denying attorney fees.

COA affirms confirmation of award.

Soulliere v Berger, 349428 (October 29, 2020). COA affirmed Circuit Court confirmation of award because defendants' disagreement with award implicates arbitrator's resolution of evidence and defendants did not demonstrate error of law apparent from face of award.

Waiver of arbitration.

Wells Fargo Bank, NA, v Walsh, October 29, 2020 (350960). COA affirmed Circuit Court finding defendant waived right to compel arbitration. Defending action without seeking to invoke arbitration, constituted waiver of right to arbitration.

Settling case with help of arbitrator.

Estate of O'Connor v O'Connor, 349750 (October 15, 2020). Dispute over enforcement of settlement agreement. Defendant appealed Circuit Court granting plaintiff's motion for entry of judgment. Defendant argued parties agreed to arbitration and arbitrator lacked authority to broker settlement agreement. COA held defendant contributed to alleged error by seeking settlement, participating in settlement negotiations, and signing settlement agreement. COA affirmed Circuit Court.

COA affirms Circuit Court ordering arbitration in insurance case.

Fisk Ins Agency v Meemic Ins, 350832 (September 10, 2020). Circuit Court properly concluded, in accordance with terms of Agreement, matter must be returned to arbitrator and arbitrator must address 90-day contractual limitation in Agreement.

COA reverses vacatur of DRAA award.

Moore v Glynn, 349505 (August 27, 2020). Circuit Court erred by determining arbitrator exceeded scope of authority by looking beyond four corners of parties' settlement agreement. Circuit Court erroneously determined settlement agreement was not ambiguous. Circuit Court only had power to determine whether arbitrator acted within scope of authority and did not have power to interpret parties' contract. Because arbitrator did not exceed scope of authority, Circuit Court review should have ended and court should have confirmed award.

COA affirms Circuit Court denying arbitration in condominium case.

Copperfield Villas Ass'n v Tuer, 348518 (May 21, 2020). MCL 559.154(8) and (9) require condominium bylaws to include provision for arbitration at "election and written consent of the parties." Plural noun "parties" demonstrates all parties to dispute must elect and consent to arbitration in lieu of litigation. Word "consent" supports this interpretation. It takes two to consent to participate in arbitration. Circuit Court correctly determined Tuers not permitted to unilaterally demand arbitration.

COA affirms Circuit Court confirming award.

Altobelli v Hartmann, 348953 and 348954 (May 21, 2020), lv den ___ Mich ___ (2020). Plaintiff appealed Circuit Court confirmation of award. Award concluded plaintiff not entitled to relief because he voluntarily withdrew from membership with defendant firm and had not sufficiently proved proximate cause or amount of damages. Because Circuit Court properly determined award rested in part on issues of proximate cause and damages, which were beyond scope of judicial review, COA affirmed. See generally *Altobelli v Hartmann*, 499 Mich 284; 884 NW2d 537 (2016).

COA affirms Circuit Court denying arbitration.

Andrus v Dunn, 345824, 346897, and 348305 (April 9, 2020). Award, adopted in JOD, required arbitration of disputes that arose regarding **St. Martin property**. August 2015 order provided Andrus waived any claims she had relating to St. Martin, including pursuant to any prior awards and JOD, and Circuit Court had jurisdiction to enforce terms and conditions of settlement agreement regarding St. Martin property issue. Because JOD and August 2015 order covered same subject matter but contain inconsistent provisions regarding forum for resolving disputes on St. Martin property, August 2015 order reflects later agreement and supersedes JOD on that issue. Circuit Court properly denied Andrus's request to compel arbitration of St. Martin dispute.

COA affirms confirmation of DRAA award.

Shannon v Ralston, 350094, 350110 (March 12, 2020), lv den ___ Mich ___ (2020). COA affirmed confirmation of DRAA award that granted motion to change primary physical custody of minor child in this domestic relations action. Because plaintiff's refusal to provide required financial information and proposed FOF and COL led to delay, plaintiff barred from claiming she was entitled to relief on basis of this delay.

COA affirms granting of motion to compel arbitration.

Century Plastics, LLC v Frimo, Inc, 347535 (January 30, 2020). COA affirmed Circuit Court holding that parties validly incorporated General Terms and its arbitration agreement by reference. General Terms applied to parties' agreement even though defendant was not specifically listed entity.

COA affirms confirmation of DRAA award.

Daoud v Daoud, 347176 (December 19, 2019). COA affirmed Circuit Court confirmation of DRAA award. **Past domestic violence and PPO.** Where arbitrator provided parties equal opportunity to present evidence and testimony on all marital issues, recognized and applied current and controlling Michigan law, and explained uneven distribution of property, there was no basis for concluding arbitrator exceeded authority in issuing award.

COA reverses denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). COA reversed Circuit Court order denying defendants' motion for arbitration because arbitration terms in construction agreements sufficiently related to plaintiffs' claims to require arbitration, and defendants had not waived their right to arbitration. Any doubts about arbitrability should be resolved in favor of arbitration. Purpose of arbitration is to preserve time and resources of courts in interests of judicial economy.

Refusal to adjourn arbitration hearing approved.

Domestic Uniform Rental v Riversbend Rehab, 344669 (November 19, 2019). After overruling R's motion to adjourn arbitration hearing, arbitrator entered award against R. COA affirmed CC's confirmation of award. MCL 691.1703(1)(c). **Mentioning arbitrator's name to COA during oral argument.**

Incorporation of AAA rules.

MBK Constructors, Inc v Lipcaman, 344079 (October 29, 2019), lv den ___ Mich ___ (2020). Incorporation of AAA's rules in arbitration agreement clear and unmistakable evidence of parties' intent to have arbitrator decide arbitrability.

COA affirms confirmation of award.

2727 Russell Street, LLC v Dearing, 344175 (September 26, 2019), lv den ___ Mich ___ (2020). COA affirmed confirmation of award. Arbitrator's factual findings are not reviewable. **COA referenced "facilitation" and "statutory arbitration."** Med-arb.

Confirmation of award partially reversed in construction lien case.

TSP Services, Inc v National-Standard, LLC, ___Mich App ___, 342530 (September 17, 2019). Michigan law limits construction lien to amount of contract less any payment made. Although party suing for breach of contract might recover consequential damages beyond monetary value of contract, those consequential damages cannot be subject to construction lien. Arbitrator incorrectly concluded otherwise. This clear legal error had substantial impact on award. COA reversed with respect to confirmation of that portion of award.

COA affirmed order to arbitrate labor case.

Registered Nurses, Registered Pharmacisys Union v Hurley Medical Center, ___ Mich App ___, 343473 (April 18, 2019). Although defendant may present to arbitrator undisputed evidence that plaintiffs engaged in a strike, question of fact is for arbitrator to decide. Any doubt regarding whether question is arbitrable must be resolved in favor of arbitration. Circuit Court did not err in ruling CBA required arbitration.

Denial of motion to vacate affirmed.

Radwan v Ameriprise Ins Co, 327 Mich App 159, 341500 (December 20, 2018), lv den 503 Mich 1037 (2019). First-party no-fault case. COA held Uniform Arbitration Act, MCL 691.1681 *et seq*., not MCR, applied. Circuit Court did not err when it denied motion to vacate arbitration award on basis of collateral estoppel.

COA reversed order that denied motion to require arbitration.

Lebenbom v UBS, 326 Mich App 2019, 340973 (October 23, 2018). COA held parties' arbitration clause providing for FINRA arbitration encompassed plaintiff's claims alleging conversion against defendant.

Arbitration agreement did not have to be in warranty document.

Galea v FCA US LLC, 323 Mich App 360, 334576 (March 13, 2018). Plaintiff alleged new vehicle was a lemon. She sued seller and bank, asserting warranty claims. Defendants countered with signed arbitration agreement. Plaintiff argued Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*, prohibits binding arbitration of warranty disputes. This argument collided with *Abela v Gen Motors Corp*, 469 Mich 603 (2004), which held to contrary. Plaintiff also argued by failing to mention arbitration, warranty violated single document rule in 16 CFR 701.3, a Federal Trade Commission (FTC) regulation implementing MMWA. According to Plaintiff, this omission foreclosed arbitration. Majority (Gadola and O'Brien) interpreted *Abela* to mean binding arbitration provision need not be included in warranty. **Judge Gleicher's dissent** stated arbitration agreements outside warranty are not enforceable.

DRAA award partially vacated.

Eppel v Eppel, 322 Mich App 562; 335653, 335775 (January 9, 2018). COA held arbitrator deviated from plain language of Uniform Spousal Support Attachment by including profit from shares and stock options in employer. Deviation was substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361 (2010). Deviation was readily apparent on face of award.

Offer of judgment and subsequent award confirmation.

Simcor Constr, Inc v Trupp, 322 Mich App 508, 333383 (January 9, 2018). MCR 2.405, **offer of entry of judgment**, applied to District Court's confirmation of arbitration award, and offer of judgment costs were merited. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338 (2014) (case evaluation sanctions).

How many DRAA correction motions allowed?

Vyletel-Rivard v Rivard, 286 Mich App 13 (2009); lv gtd 486 Mich 938 (2010), stip dism ___ Mich ___ (2010). Defendant challenged Circuit Court order denying motion to vacate award concerning tort damages. COA affirmed denial because defendant's motion to vacate not timely filed. On March 28, 2008, defendant filed motion to vacate "arbitration awards" of November 13, and December 7, 2007. MCL 600.509(2). Party has 21 days to file motion to vacate in DRAA case. MCR 3.602 (J)(2). **Lesson: Think carefully before filing second round of reconsideration motions rather than notice of appeal.** *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

Michigan Court of Appeals Unpublished Decisions

COA affirmed confirmation of DRAA award.

Daoud v Daoud, 347176 (December 19, 2019). COA affirmed Circuit Court's confirmation of DRAA award. **Past domestic violence and prior PPO**. Where arbitrator provided parties equal opportunity to present evidence and testimony on all marital issues, recognized and applied current and controlling Michigan law, and explained his uneven distribution of property, there was no basis for concluding that arbitrator exceeded authority in issuing award.

COA reversed denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). COA reversed Circuit Court's order denying defendants' motion for arbitration because arbitration terms of construction agreements sufficiently related to plaintiffs' claims to require arbitration, and defendants had not waived their right to arbitration. Any doubts about arbitrability should be resolved in favor of arbitration. Purpose of arbitration is to preserve time and resources of courts in interests of judicial economy.

Refusal to adjourn arbitration hearing approved.

Domestic Uniform Rental v Riversbend Rehabilitation, 344669 (November 19, 2019). After overruling R's motion to adjourn arbitration hearing, arbitrator entered award against R. COA affirmed CC's confirmation of award. MCL 691.1703(1)(c). **Mentioning arbitrator's name to COA during oral argument.**

COA affirmed confirmation of award.

2727 Russell Street, LLC v Dearing, 344175 (September 26, 2019), lv den ___ Mich ___ (2020). COA affirmed confirmation of award. Arbitrator's factual findings are not reviewable. **COA referenced "facilitation" and "statutory arbitration."** Med-arb.

COA affirmed denial of sanctions.

Clark v Garratt & Bachand, PC, 344676 (August 20, 2019). COA affirmed Circuit Court order denying G's motion for sanctions. Language of arbitration award foreclosed G's ability to request sanctions because issue of sanctions was either not raised during arbitration or, having been raised, resulted in arbitrator declining to award sanctions. Language of judgment confirming award also foreclosed G's ability to subsequently request sanctions.

Circuit Court order to arbitrate confirmed.

Roseman v Weiger, 344677 (June 27, 2019), lv den __Mich ___(2019). To extent plaintiff argued arbitration agreement was unenforceable on ground that purchase agreement was invalid, these were matters for arbitrator. MCL 691.1686(3). Circuit Court did not err by concluding plaintiff's claims were required to be resolved in arbitration.

DRAA "jackpot" award confirmation confirmed.

Zelasko v Zelasko, 342854 (June 13, 2019), lv den ___ Mich ___ (2020). Was husband's winning of **$80 million Mega Millions jackpot** part of marital estate. Arbitrator ruled jackpot was marital property. **COA affirmed Circuit Court confirmation of award.** Courts may not review arbitrator's findings of fact and are extremely limited in reviewing alleged errors of law. Delay, arbitrator death, and alleged bias of arbitrator issues.

Zelasko v Zelasko, 324514 (2015), lv den ___Mich ___ (2016). Defendant appealed order appointing substitute arbitrator after agreed-upon arbitrator died. Same order denied defendant's request that interim arbitration orders be vacated. Indicating nothing in DRAA, MCL 600.5070 et seq., permits Circuit Court to appoint substitute arbitrator absent agreement of parties, COA reversed appointing of substitute arbitrator. COA agreed with Circuit Court there was no reason to disturb interim orders, which were either not contested or were affirmed by Circuit Court, and affirmed that portion of order.

DRAA custody dispute award confirmed.

Shannon v Ralston, 339944 (May 23, 2019), lv den ___ Mich ___ (2019). **32 page COA decision.** Agreement to arbitrate **"all issues in the pending matter."** COA affirmed confirmation of DRAA award that decided change of domicile issue. Arbitrator acted as mediator and arbitrator. Ex parte contact occurred while parties still mediating. At time of ex parte communication, arbitrator was acting as mediator, not as arbitrator, and prohibition against ex parte communications did not apply. Plaintiff belatedly alleged disparaging remarks (p to b) by neutral and neutral's financial interest in arbitration process. **Check cancelled.** Plaintiff ordered to pay fees associated with investigative GAL. Issue of arbitrator's alleged financial bias was of plaintiff's own making by stopping payment in violation of parties' agreement to split cost of arbitration and in violation of arbitrator's instructions.

DRAA award confirmed.

Hyman v Hyman, 346222 (April 18, 2019). Circuit Court's modification of DRAA award to include Monday overnights was error. Circuit Court lacked authority to review arbitrator's factual findings and alter parenting-time schedule without finding award adverse to children's best interests.

COA affirmed order to arbitrate labor case.

Senior Accountants, Analysts and Appraisers Association v City of Detroit Water and Sewerage Department, 343498 (April 18, 2019). Whether union complied with procedural requirements in CBA arbitration clause is procedural issue for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). Arbitration clause in parties' consent JOD named only A as arbitrator and did not provide for alternate, substitute, or successor arbitrators in property division case. A became disqualified due to conflict of interest. MCL 600.5075(1). Because Circuit Court was presented with no evidence that parties had agreed upon new arbitrator to be appointed, Circuit Court was permitted to "void the arbitration agreement and proceed as if arbitration had not been ordered." MCL 600.5075(2). Because parties had agreed only for A to arbitrate property division disputes, Circuit Court's refusal to appoint different arbitrator was permitted by DRAA. Original arbitrator had conflict of interest.

COA reversed confirmation of employment arbitration award.

Checkpoint Consulting, LLC (employer) v Hamm (employee), 342441 (February 26, 2019). No valid arbitration agreement because independent contractor agreement voided all prior agreements, including arbitration clause within employment agreement.

COA affirmed confirmation of employment arbitration award.

Wolf Creek Productions, Inc (employer) v Gruber (employee), 342146 (January 24, 2019). COA affirmed confirmation of **employment arbitration award**. Nothing on face of award demonstrated arbitrators precluded from deciding issue of whether just cause existed to terminate defendant's employment. Courts precluded from engaging in contract interpretation, which is question for arbitrator.

COA affirmed confirmation of exemplary damages award.

Grewal v Grewal, 341079 (January 22, 2019). **Family business dispute**. COA affirmed confirmation of award of exemplary damages in amount of $4,969,463.94 and correcting award by striking portion that ordered plaintiffs to provide accounting of assets in India. The stipulated order regarding arbitration specified that the Circuit Court, not arbitrator, had authority to adjudicate matters requiring equitable relief.

COA affirmed confirmation of award.

Hunter v DTE Services, LLC, 339138 (January 3, 2019). LCA. Four-day hearing. **Employment discrimination case**. COA affirmed confirmation of 11 page award. **Arbitrator did not exceed authority by failing to provide case citations.** *Rembert*, 235 Mich App 118.

COA affirmed confirmation of award.

Walton & Adams, LLC v Service Station Installation Bldg & Car Wash Equip, Inc, 340758 (December 18, 2018), lv den ___ Mich ___ (2019). COA affirmed confirmation of award. **Arbitrator not required to make FOF or COL**. Once court recognizes arbitrator utilized controlling law, it cannot review legal soundness of arbitrator's application of law. Courts may not engage in fact-intensive review of how arbitrator calculated values, and whether evidence relied on was most reliable or credible evidence presented. Even if award against great weight of evidence or not supported by substantial evidence, court precluded from vacating award.

Case evaluation sanctions after arbitration.

Len & Jerry's Modular Components 1, LLC v Scott, 341037 (December 13, 2018). In light of referral to arbitration order, Circuit Court can award case evaluation sanctions.

Scope of submission to arbitrator in breach of contract case.

Pietila v Pietila, 339939 (December 13, 2018). Breach of contract case. COA affirmed Circuit Court confirmation of award concerning **insurance agency**. Court may not disturb arbitrator's discretionary finding of fact that neither party prevailed in full and decision not to award attorney fees. Issue of commissions was submitted as claim under grant of power to arbitrator to determine legal enforceability of Agreement.

COA affirmed Probate Court confirmation of award.

In Re Estate of Gordon*,* 339296 (November 8, 2018), lv den 503 Mich 1020 (2019). COA affirmed Probate Court's confirmation of award regarding administration of decedent's trust. Because parties agreed to arbitrate their disputes and because arbitrator acted within scope of authority, challenges to administration of trusts lacked merit.

DRAA award confirmed.

Thomas-Perry v Perry, 340662 (October 16, 2018). Parties given opportunity to present evidence and testimony on all issues during arbitration. Because court is limited

to examining face of arbitration ruling, there is no basis for concluding arbitrator exceeded authority in issuing award.

Length of FOF in award.

Schultz v DTE, 338196 (September 20, 2018). COA affirmed Circuit Court's confirmation of **nine page employment arbitration award**. *Rembert*, 235 Mich App 118 (statutory employment arbitration awards in Michigan "must be in writing and contain findings of fact and conclusions of law").

COA affirmed awards and spoke to judicial review of awards.

Oliver v Kresch, 338296 (July 19, 2018). COA confirmed Circuit Court's confirmation of award. **Attorney referral fee case**. COA stated:

> "Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74 (1999). "A court may not review an arbitrator's factual findings or decision on the merits[,]" may not second guess the arbitrator's interpretation of the parties' contract, and may not "substitute its judgment for that of the arbitrator." *City of Ann Arbor v [AFSCME]*, 284 Mich App 126, 144 (2009). Instead, "[t]he inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator." *Id*. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed serious error." *Id*.

Mumith v Mumith, 337845 (June 14, 2018). COA affirmed Circuit Court's confirmation of award. Two to one arbitration panel award. **Ownership of car wash** and burden of proof issues. COA stated:

> "Judicial review of an arbitration award … is extremely limited." *Fette v Peters Const Co*, 310 Mich App 535, 541 (2015). "… '[a] court's review of an arbitration award "is one of the narrowest standards of judicial review in all of American jurisprudence." ' " *Washington*, 283 Mich App at 671 n 4, quoting *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999) … .
>
> An arbitrator may exceed powers by making material error of law that substantially affects outcome of arbitration. In order for court to vacate award because of error of law, error must have been so substantial that, but for error, award would have been substantially different. Any such error must be readily apparent on face of award without second-guessing arbitrator's thought processes, and arbitrator's findings of fact are immune to review altogether.

Demand for labor arbitration concerning prohibited subject of bargaining.

Ionia Co Intermediate Ed Assn v Ionia Co Intermediate Sch Dist, 334573 (February 22, 2018), lv den 503 Mich 860 (2018). COA affirmed Michigan Employment Relations Commission (MERC) order granting summary disposition, where Association engaged in unfair labor practice by demanding to arbitrate grievance concerning prohibited subject of bargaining under Public Employment Relations Act, MCL 423.201 *et seq.* MERC ordered Association to withdraw demand for arbitration and to cease and desist from demanding to arbitrate grievances concerning prohibited subjects of bargaining. See ***MEA v Vassar Public Schs***, 337899 (May 22, 2018).

COA affirmed confirmation of award.

Galasso, PC v Gruda, 335659 (February 8, 2018). Dispute over accounting and legal fees. COA affirmed confirmation of award because there was no clear error of law on face of award. UAA, MCL 691.1681 *et seq.* MCL 691.1703(1)(d). Arbitrator's reasons for declaring promissory note, mortgage, and service agreement void and unenforceable not apparent on face of award. Award did not, out of necessity, stem from error of law. **LESSON: LESS IS SOMETIMES GOOD.**

If parties agree, arbitrator can decide arbitrability.

Elluru [MD] v. Great Lakes Plastic, Reconstructive & Hand Surgery, PC, 333661 and 334050 (February 6, 2018). Parties may agree to delegate to arbitrator question of arbitrability, provided arbitration agreement clearly so provides. UAA, MCL 691.1681 *et seq*. "[P]arties may vary the effect of the requirements of this act to the extent permitted by law." MCL 691.1684(1). Parties' employment agreement incorporated AAA rules that called for arbitrating arbitrability.

COA considers waiver of arbitration agreement.

Miller v Duchene, 334731 (December 21, 2017). COA reversed Circuit Court's decision rejecting plaintiffs' contentions that defendants waived defense predicated on arbitration agreement and arbitration agreement did not encompass some defendants. With respect to initial defendants, issue was whether their waiver can be forgiven or set aside on basis that plaintiffs subsequently filed amended complaint. COA concluded waiver survived amended complaint and amended complaint did not revive initial defendants' ability to raise arbitration agreement as defense. Amended complaint did not significantly alter scope or thrust of plaintiffs' allegations or general nature of case. Same conclusion cannot be made with respect to subsequent defendants. They were not and could not be bound by waiver made by other parties. Defense of agreement to arbitrate raised in timely fashion by subsequent defendants, where they raised it in motion for summary disposition filed before their first responsive pleading.

COA reversed partial vacatur of DRAA award.

Roetken v Roetken, 333029 (December 19, 2017), lv den 503 Mich 858 (2018). COA reversed Circuit Court vacating portion of DRAA award regarding spousal support. MCL 600.5081. *Washington v Washington*, 283 Mich App 667 (2009). Arbitrator considered applicable factors in awarding support. **Powerful pro-award language.**

Amended award confirmed.

Ciotti v Harris, 332792 (December 12, 2017). Automobile accident. COA affirmed Circuit Court confirmation of reasoned award issued after motion to arbitration panel concerning nonreasoned award. **LESSON. Be careful what you ask for. Do not interfere with other side while it is making a mistake.**

COA reversed vacatur of award.

Cook v Hermann, 335989 (November 21, 2017). Breach of contract case. COA held Circuit Court erred by vacating award. Circuit Court improperly substituted its judgment for that of arbitrator.

Claims subject to arbitration.

Administration Sys Research Corp Int'l v Davita Healthcare Partners, Inc, 334902 (November 16, 2017). Circuit Court properly held defendants' claims were subject to arbitration and were not preempted by ERISA.

*"**May" did not mean mandatory.***

Skalnek v Skalnek, 333085 (October 26, 2017), lv den 502 Mich 902 (2018). **Employment case**. COA agreed with Circuit Court that parties' agreement did not provide for mandatory arbitration because of use of word "may" in phrase, "Either party may submit a dispute for resolution…" and because other wording in agreement was unclear as to whether arbitration was only means of resolution contemplated by parties.

Arbitration, frozen embryos, and sua sponte analysis.

Karungi v Ejalu, 337152 (September 26, 2017), lv den 501 Mich 1051 (2018). COA split decision arose from frozen embryos. Never married parties disputed what to do with embryos. Circuit Court ruled for technical reasons it did not have jurisdiction over embryo issue. COA said parties and Circuit Court ignored that parties entered into contract that governed parties' interest in embryos and there was mandatory arbitration provision in previously non-cited contract. The per curiam (O'Brien) and concurrence (Murray) remanded to Circuit Court to determine whether it had subject-matter jurisdiction. **Dissent (Jansen)** would not have altered entire procedural posture, sua

sponte, to remand matter and allow parties to re-litigate theories they failed to properly raise.

Arbitration involving non-signatories to arbitration agreement.

Scodeller v Compo, 332269 (June 27, 2017), affirmed Circuit Court order to compel arbitration, even against defendants who were not parties to arbitration agreement. Arbitration agreement was broad enough to encompass each of those claims and, for policy reasons, it was expeditious to resolve those disputes in single proceeding. Plaintiffs, who were parties to arbitration agreement, were estopped from avoiding arbitration against those defendants who did not sign agreement where claims are based on substantially interdependent and concerted conduct by all defendants. If parties cannot agree on arbitrator, Circuit Court shall appoint arbitrator.

COA approved DRAA award.

Holloway v Kelley, 331792 (June 27, 2017). COA agreed with Circuit Court that arbitrator did not exceed authority, arbitrator followed law and did as was asked when he resolved division of each party's interest in retirement plans.

No issue for DRAA arbitrator to resolve, therefore no arbitration.

Amante v Amante, 331542 (June 20, 2017). Plaintiff argued that under plain language of JOD, dispute regarding provision barring spousal support should be decided by arbitrator. JOD said "any disputes regarding the judgment language" should be submitted to arbitrator. Dispute concerned whether judgment should include provision barring spousal support. JOD and settlement agreement were silent as to spousal support. **This was not a dispute concerning meaning of language within JOD**. Circuit Court did not abuse discretion in denying plaintiff's request that dispute go to arbitration.

Party did not waive arbitration by filing cross-complaint.

Universal Academy v Berkshire Dev, Inc, 330707 (June 20, 2017). Party did not waive right to arbitration by filing cross-complaint. “Except as otherwise provided in subsections (2) and (3), a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of this act to the extent permitted by law.” UAA, MCL 691.1681, *et seq*., at MCL 691.1684(1).

Supplemental labor arbitration award confirmed.

Dept of Transportation v MSEA, 331951 (June 13, 2017). COA affirmed Circuit Court confirmation of supplemental labor arbitration award. Arbitrator ordered reinstatement, make whole remedy, and retained jurisdiction. Arbitrator then had to decide post-award issue concerning some 401(k) issues. COA held this was appropriate.

Losing party used panel dissent to attack award.

Estate of James P Thomas, Jr v City of Flint, 331173 (April 20, 2017). COA affirmed Circuit Court order denying motion to vacate award of arbitration panel. Arbitration panel, **by split vote**, ruled in favor of defendant. Plaintiff argued Circuit Court erred in denying plaintiff's motion to set aside award based upon lack of impartiality by neutral arbitrator or by allowing limited discovery on issue of lack of impartiality. COA stated mere fact one arbitrator disagreed with another does not establish, nor even "fairly raise," possibility that either arbitrator lacked impartiality.

Labor arbitration award confirmed.

Village of Oxford v Lovely, 331002 (April 13, 2017). COA affirmed Circuit Court order granting defendant's motion to confirm award. Arbitration was conducted pursuant to CBA between plaintiff employer and union and resulted in a decision that in part reinstated employee's employment with plaintiff.

Cases ordered to arbitration.

Spence Bros v Kirby Steel, Inc, 329228 and 332083 (March 14, 2017). Arbitration provision of parties' agreement mandated matter involving alleged breach of agreement be submitted to arbitration. Circuit Court erred by determining otherwise. Remanded to Circuit Court for entry of order ordering matter to arbitration.

Rozanski v Findling, 330962 and 332085 (March 14, 2017). Plaintiffs appealed Circuit Court order granting defendant's motion to compel arbitration and Circuit Court confirmation of award. Plaintiffs argued Circuit Court erred in granting summary disposition in favor of defendant where attorney fee agreement that contained arbitration provision was invalid. COA affirmed. MCL 691.1703.

Lawsuit not barred by agreement to arbitrate between other entities.

Pepperco-USA, Inc v Fleis & Vandenbrink Engineering, Inc, 331709 (February 21, 2017). Whether claim is subject to arbitration is reviewed de novo. Pepperco, not being party to arbitration clause, is not subject to arbitration with respect to its claims, even though related corporate entity, MP, would be subject to clause. Michigan law respects separate corporate entities, "absent abuse of the corporate form." Circuit Court erred in ruling that Pepperco's lawsuit was barred by agreement to arbitrate.

Arbitrator may decide res judicata and estoppel as to grievances.

AFSCME Local 1128 v City of Taylor, 328669 (January 19, 2017). Dispute arose over number of Local employees to be employed by city. Arbitrator held grievance, which implicated CBA, was not timely per CBA. Despite finding grievance untimely,

arbitrator stated "if the merits of such claims were to be decided, the decision would be that the ostensibly perpetual 100-employee guarantee was terminable at will and [the City] effectively did terminate it in June 2011" by laying off employees. Arbitrator relied heavily on ALJ's examination of CBA, concluding that ALJ "carefully, persuasively and correctly analyz[ed] and answer[ed] the underlying question of the fundamental nature" of parties' agreement with respect to city's obligation to maintain staffing levels in perpetuity. To extent union's grievance implicated CBA articles, grievance was denied.

Following arbitration of first grievance, union requested arbitration of arguably related grievances. City refused to arbitrate, arguing res judicata and collateral estoppel precluded "rematch" on issues that were litigated before in first grievance. Circuit Court determined issue in one of the additional grievances had not been decided. Preclusion issue was "close question" to be decided by arbitrator. **COA affirmed**. Unless otherwise specified in CBA, whether arbitration is precluded under res judicata and collateral estoppel is for arbitrator to decide. Because CBA contained no indication res judicata and collateral estoppel should be addressed by court, rather than arbitrator, Circuit Court properly submitted matter to arbitration. In determining preclusion issues should be decided by arbitrator, COA offered no opinion on merits of city's preclusion arguments. City is free to assert during arbitration that res judicata and collateral estoppel bar arbitration of grievances. Should arbitrator reach merits of case, submitting matter to arbitration will not prevent City from asserting, after arbitration, that there was impermissible conflict between MERC decision and arbitration decision.

COA affirmed Circuit Court that collateral estoppel not applicable.

Ric-Man Constr, Inc v Neyer, Tiseo & Hindo Ltd, 329159 (January 17, 2017), lv den 501 Mich 942 (2017). NTH contended Ric-Man was collaterally estopped from seeking lost profits because in its arbitration against OMIDDD, arbitration panel declined to award same lost profits to Ric-Man. Collateral estoppel applies to factual determinations made during arbitration. Circuit Court found issue decided by arbitration panel was not identical to that at issue in this case and collateral estoppel did not apply. Basis for arbitration panel's ruling is not entirely clear. Collateral estoppel applies only when basis of prior judgment can be clearly and unequivocally ascertained. COA affirmed Circuit Court that collateral estoppel not applicable.

COA reversed order to compel arbitration.

Shaya v City of Hamtramck, 328588 (January 5, 2017). Circuit Court held plaintiff's claims for employment discrimination under Civil Rights Act ("CRA"), MCL 37.2101 *et seq*., and retaliatory discharge under Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq*., subject to arbitration provision in parties' employment agreement and referred claims to arbitration. **COA reversed**. Arbitration clause provided, "Any controversy or claim arising out of or relating in any way to this agreement shall be settled exclusively by arbitration administered by [AAA] … Rules for the Resolution of Employment Disputes … . This agreement to be submitted to binding arbitration

specifically includes, but is not limited to, all claims that this agreement has been interpreted or enforced in a discriminatory manner. … .” COA stated arbitration clause, with respect to discrimination claims under CRA or retaliatory discharge under WPA, to be valid only if (1) parties agreed to arbitrate such claims, (2) statutes in question do not prohibit agreement to arbitrate, and (3) agreement does not waive substantive rights and remedies of statute and the procedures are fair. COA said arbitration clause **did not provide clear notice to plaintiff** that he was waiving right to adjudication of statutory discrimination claims under CRA, and plaintiff was not on notice that terms of employment contract constituted waiver of right to bring statutory discrimination claim in court. *Rembert*, 235 Mich App 118.

About the Author

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

He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 and 2021 for arbitration and mediation. He is on the 2016, 2017, 2018, 2019, and 2020 Michigan Super Lawyers lists for ADR. 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 received a Second Tier ranking in Northern Michigan for Mediation by *U.S. News – Best Lawyers*® Best Law Firms in 2021.

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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State of Michigan
Michigan Supreme Court

JODY POHLMAN, Plaintiff-Appellant, v	MSC No. 161262 Court of Appeals No. 344121 Trial Court No. 17-853588-DO
JAMES G. POHLMAN, Defendant-Appellee.	Oakland Circuit Family Court Hon. Lisa Langton

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Amicus Brief in Support of Plaintiff-Appellant's Application for Leave to Appeal

Submitted by:

The Alternative Dispute Resolution Section of the State Bar of Michigan

Robert E. L. Wright P32279

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APPENDICES

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Statutes

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Statement of Jurisdiction

Amicus ADR Section adopts the Statement of Jurisdiction found in the brief filed by *Amicus* Family Law Section ("FLS Brief") at page iii.

Statement of Question Presented

Should leave to appeal be granted in a matter of first impression, where there is a significant jurisprudential question concerning the effects of a mediator's failure to conduct screening for coercion and violence mandated by statute and court rule, where such failure is alleged to have impeded a voluntary and uncoerced resolution of issues in the mediation of a domestic relations matter, and the trial court refused to conduct a requested evidentiary hearing to determine the voidability of a settlement agreement reached in the presence of alleged coercion and involuntariness arising from an unexplored history of coercion and violence.

Amicus Answers: Yes

Trial Court: Did not address leave, but denied Plaintiff an evidentiary hearing

Court of Appeals: Did not address leave, but upheld denial of an evidentiary hearing

Statement of Interest

The Alternative Dispute Resolution Section is a voluntary membership section of the State Bar of Michigan which is comprised of 769 members. The Section consists of individuals interested in conflict resolution, peacemaking, and improving the climate in Michigan for mediation, arbitration, and other forms of ADR. Members include lawyers, law students, and non-lawyers dedicated to providing better alternatives to the public through improvement of ADR practices and techniques. Part of the mission of the Alternative Dispute Resolution Section is to advance and improve the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

The Alternative Dispute Resolution Section has a public policy decision-making body with 24 members. On August 14, 2020, the Section adopted its position after a discussion and vote at a scheduled meeting. Fifteen members voted in favor of the Section's position, 0 members voted against this position, 3 members abstained, and 6 members did not vote due to absence. The Alternative Dispute Resolution Section is not the State Bar of Michigan and the positions expressed herein are those of the Alternative Dispute Resolution Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on these positions.

The opinion of the Court of Appeals in this matter involves issues of fundamental importance to *amicus curiae*.

The Statute and the Court Rule

MCL 600.1035

Submission of contested issue in domestic relations action; history of coercive or violent relationship or presence of coercion or violence; inquiry and screening by mediator; "domestic relations action" defined.

*** * ***

(2) In a domestic relations mediation, the mediator shall make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. A reasonable inquiry includes the use of the domestic violence screening protocol for mediation provided by the state court administrative office as directed by the supreme court.

(3) A mediator shall make reasonable efforts throughout the domestic relations mediation process to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues.

(The "Statute").

MCR 3.216(H)(2):

The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the state court administrative office as directed by the Supreme Court.

(The "Rule").

Overview

For want of a nail, the shoe was lost.
For want of a shoe, the horse was lost.
For want of a horse, the rider was lost.
For want of a rider, the battle was lost.
For want of a battle, the kingdom was lost,
And all for the want of a horseshoe nail.

(*13th Century, Anon.*)

This appeal involves a matter of first impression: what is the remedy for a mediator's failure to undertake reasonable efforts to screen for the presence of coercion or violence in a domestic relations mediation, as required by MCL 691.1345 (the "Statute") and MCR 3.216(H)(2) (the "Rule.") In the present case, the court-appointed mediator in a domestic relations matter, failed to screen for the presence of coercion or violence which would make mediation physically or emotionally unsafe for any participant or would impeded achieving a voluntary and safe resolution of the issues.

Plaintiff alleges she signed a settlement agreement she could not read due to vision problems, in order to gain her freedom from the mediator's office. Immediately thereafter, she sought to revoke her consent on the basis of involuntariness and coercion which should have been discovered and addressed by the mandated screening. Thus, the entire proceeding described by the Plaintiff was a mediation in name only. Yet, the trial court refused Plaintiff's multiple requests to conduct an evidentiary hearing to determine the impact of the mediator's undisputed failure to investigate Plaintiff's capacity to enter into an agreement voluntarily and without coercion.

On appeal, the Court of Appeals refused to consider the impact of the mediator's failure to perform his statutory duty on the Plaintiff's ability to knowingly and voluntarily enter into an uncoerced settlement agreement. The Court of Appeals also refused to remand the case for an evidentiary hearing to determine the extent of such impact on the Plaintiff's ability to voluntarily participate in mediation without coercion or duress from a history of domestic violence.

In any domestic relations matter where a party alleges a mediator's failure to screen for domestic violence, coupled with a claim of involuntariness or duress due to domestic violence, an evidentiary hearing should be held to determine the voluntariness of any agreement reached in such a mediation.

Statement of Facts

Amicus ADR Section adopts the Statement of Facts found in the *FLS Brief* at pages 3 to 4.

Standard of Review

Amicus ADR Section adopts the Standard of Review found in the *FLS Brief* at page 5.

ARGUMENT

This application involves a significant jurisprudential question of first impression concerning the effect of non-compliance with a statute and a court rule, both mandating screening by mediators for coercion and violence prior to and during conduct of a mediation in a domestic relations action, and the appropriate remedy for failing to conduct such screening.[1]

Leave to appeal should be granted. This case involves the failure to conduct screening for coercion and violence mandated by statute and court rule for court-annexed domestic relations mediations. The complete absence of the mandatory screening – the duty of the mediator – and the failure to conduct an evidentiary hearing on the impact of that absence – the duty of the trial court – is a material error requiring reversal and remand for an evidentiary hearing.

A. The Importance of Screening for Domestic Violence in Mediation.

Over the past decade, Michigan has averaged 30,000 divorces per year.[2] Although statewide mediation statistics are not available, a substantial number of those cases were referred

[1] *Amicus* ADR Section adopts the Arguments found in Sections A-E of the *FLS Brief* at pages 5 to 22 to the extent they support remand for an evidentiary hearing.

[2] Appendix A: Michigan Divorce and Annulments Statistics, Division for Vital Records & Health Statistics, Michigan Department of Health & Human Services (2019). https://www.mdch.state.mi.us/osr/Marriage/Tab3.5.asp

to mediation. For example, in 2018, of 1,945 divorces filed,[3] Kent County judges referred 775, nearly 40%, to mediation.[4] Thus, a significant number of the 30,000 Michigan divorce cases filed annually will be subject to screening under the Statute and Rule.

The importance of screening for self-determination in mediation of divorce cases cannot be refuted. Indeed, in 2013, the State Court Administrative Office ("SCAO") promulgated the *Michigan Mediator Standards of Conduct*, including two standards which bear on the importance of screening:

> **Standard I, Self-Determination**, provides:
>
> A mediator shall conduct mediation based on the principle of party self-determination. Self-determination is the act of coming to a **voluntary, uncoerced decision** in which each party make free and informed choices as to process and outcome, including mediator selection, process design, and participating in or terminating the process. [*Id*. at 2, emphasis added.]
>
> **Standard VI, Safety of Mediation**, provides:
>
> Consistent with applicable statutes, court rules, and protocols, reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues. Examples of impediments to the mediation process include: domestic abuse; … mental illness or other mental impairment; … .
>
> ***
>
> 2. In domestic relations cases, "reasonable efforts" should include meeting separately with the parties prior to a joint session and administering the "Mediator Screening Protocol" for domestic violence, published by the State Court Administrative Office. [*Id.* at 5.]

Notably, self-determination is the very first standard promulgated by SCAO. There is a reason it is the first standard: it is critical for mediators to ensure that any settlement agreement

[3] Appendix B: Michigan Marriage and Divorce Statistics by County, Division for Vital Records & Health Statistics, Michigan Department of Health & Human Services (2019). https://www.mdch.state.mi.us/osr/Marriage/Tab3.5.asp

[4] Appendix C: 2018-2019 *Kent County Divorce Mediation Statistics*, 17th Circuit Court (2020). https://www.accesskent.com/Courts/17thcc/mediate.htm

reached at mediation is achieved through the voluntary, uncoerced participation of all parties to the agreement. SCAO again emphasized the importance of requiring mediators to ensure a safe and voluntary mediation process in Standard VI. Accounting for an increased likelihood of "domestic violence" in domestic relations cases, Standard VI recommends mediators conduct screening using the *Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts* (the "*Protocol*") promulgated by the SCAO.[5]

Four years later, in 2017, the Statute was enacted, codifying a requirement for screening in domestic relations cases, and the Rule was adopted to make the rules for mediation of domestic relations matters consistent with the Statute. The Statute and the Rule both reference the *Protocol* as an acceptable tool for mediators to use to fulfill their mandatory screening requirements. However, neither the Statute nor the Rule provide any remedy for a mediator's failure to conduct adequate screening for coercion and violence in a domestic relations mediation. While no data has been collected to provide firm numbers, anecdotal evidence received by *Amicus ADR Section* suggests few mediators are using the *Protocol* to screen for domestic violence as required by the Statute and Rule. Despite the potential for coercion to invalidate settlement agreements, there is currently no effective remedy for parties affected by a mediator's failure to screen.

In this case, while the Court of Appeals recognized the mediator had violated the mandates of the Statute and the Rule, the violation was held to be "harmless error." *Pohlman v Pohlman*, unpublished per curiam opinion of the Court of Appeals, issued January 30, 2020 (Docket No

[5] The *Protocol* is a carefully constructed, lengthy handbook to aid mediators in discovering the presence of coercion and violence. Once discovered, the default setting is to not attempt to mediate the matter unless the abused party wishes to proceed and adequate safeguards to ensure self-determination can be implemented. Only with adequate screening can domestic relations mediators ensure voluntary, uncoerced, self-determination by all participants. While the primary objective for screening is to determine whether mediation is appropriate, a secondary objective is to determine whether the mediator is right for the parties. Had the screening occurred in this case, Ms. Pohlman may have determined that mediation or the mediator were not appropriate for her dispute, eliminating the settlement agreement. A copy of the *Protocol* was filed by *Amicus FLS* as an appendix to its brief and is available at https://courts.michigan.gov/administration/scao/officesprograms/odr/pages/resources.aspx

344121), p 4. This holding must be reversed to prevent mediators from blithely ignoring the mandates of the Statute and the Rule, thereby putting victims of domestic violence in peril.

For this Plaintiff and similarly situated victims of abuse among the 30,000 divorces filed annually who are not screened for domestic violence, the only effective relief available to them is to automatically require an evidentiary hearing to allow them to withdraw from an agreement whenever a mediator's failure to conduct the mandated screening is alleged to have allowed coercion or violence to influence a settlement agreement.

B. An Evidentiary Hearing Is Required to Determine Whether the Settlement Agreement Is Valid or Void.

A domestic mediator's failure to screen for coercion and violence should render an agreement voidable, but not absolutely void. In the absence of the mandated screening, when a party claims an agreement was involuntary or coerced, an evidentiary hearing must be conducted by the trial court to determine whether the agreement is valid or void.

The language of the Statute and Rule concerning screening is mandatory: both state a mediator "shall" make "reasonable inquiry" and "reasonable efforts throughout" the mediation process to screen for coercion or violence which would either make the mediation physically or emotionally unsafe or impede a voluntary and safe resolution. Neither the Statute nor the Rule provide a remedy for a mediator's failure to obey the law requiring them to conduct a screening.[6]

Although the Court of Appeals recognized the language in the Statute and the Rule does not leave screening to the mediator's discretion and the mediator violated those requirements by failing to conduct any screening for violence or coercion, the majority nevertheless held the failure

[6] A mediator may be removed from a court's list of approved mediators for "incompetence, bias, … or for other just cause." MCR 3.216(F)(4). While disobeying the Statute and the Rule should qualify as "just cause," a court's list of mediators is primarily used to select mediators when the parties do not designate one. Parties are free to designate anyone to serve as their mediator, regardless of whether their names appear on a court list. Thus, while removal from a court list may protect future mediation participants from random assignment of a mediator who fails to screen for violence and coercion, it provides no relief for parties like the Plaintiff in this case who allege they were put into a position where they felt coerced into signing an agreement as a result of the mediator's failure to properly screen for domestic violence.

was “harmless error.” *Pohlman v Pohlman*, unpublished per curiam opinion, issued January 30, 2020 (Docket No 344121) p 5. But as noted in the dissent:

> Respectfully, I question whether this Court should declare the mediator's violation of the law "harmless" absent full consideration of the facts. Jody's preliminary showing, combined with James's affidavit and the State Court Administrator's guidelines for domestic violence screening, suggest that the mediator's error was not harmless.
>
> In 2014, before the enactment of MCL 600.1035, the SCAO Office of Dispute Resolution published a "Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts." The protocol describes its purpose, addresses "[w]hy mediating cases involving domestic violence is problematic," and sets forth a "[p]resumption against mediation if domestic violence exists", SCAO Office of Dispute Resolution, *Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts* (June 2014), p 2:
>
> > Cases in which domestic violence is present are presumed inappropriate for mediation. This presumption can be overcome, but only if the abused party desires to participate in mediation and the circumstances of the individual case indicate that mediation will be a safe, effective tool for all concerned. The decision whether to order, initiate or continue mediation despite a presumption against mediation should be made on a case-by-case basis. The most important factor to consider in deciding whether to proceed with mediation is whether the abused party wants to mediate. Mediation should not proceed if the abused party does not want to participate. Other factors to consider are:
> >
> > a. Ability to negotiate for oneself.
> >
> > b. Physical safety of the mediation process for all concerned.
> >
> > c. Ability to reach a voluntary, uncoerced agreement.
> >
> > d. Ability of the mediator to manage a case involving domestic violence.
> >
> > e. Likelihood that the abuser will use mediation to discover information that can later be used against the abused party, or to otherwise manipulate court processes.
> >
> > *Parties should be fully and regularly informed that continuing the mediation is a voluntary process and that they may withdraw for any reason.* [*Id*. at 6 (emphasis added).]
>
> When there is a background of domestic violence, the reasons for a presumption against mediation do not magically evaporate because the parties use "shuttle diplomacy." That method may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment.

Id. (GLEICHER, J., dissenting) at 5-6.

In upholding the trial court’s decision to dismiss the impact of the mediator’s failure to screen, the majority of the Court of Appeals relied heavily upon *Vittiglio v Vittiglio*, 297 Mich App 391 (2012). However, *Vittiglio* was decided prior to the enactment of the Statute and does

not address screening at all. Indeed, it was decisions such as *Vittiglio* which led to the enactment of the Statute. Thus, *Vittiglio* has no bearing upon the appropriate remedy for a mediator's failure to comply with a statutory mandate to screen for domestic violence.

The Statute reflects a legislative determination that continuous screening for the effects of domestic violence is required in all domestic relations matters to ensure that any agreement reached is voluntary and uncoerced. These salutary requirements are premised on the understanding that a truly voluntary resolution may not be achievable where one party is negotiating under duress and feeling coerced; whether by a spouse, the mediator, or the very nature of the mediation process itself. Indeed, as noted in the dissent, "Although mediation may yield an agreement, the goal is a *voluntary* agreement. Intimidation, coercion, and duress must play no part." *Pohlman*, (GLEICHER, J., dissenting), unpub op at 2.

The trial court clearly erred in denying the Plaintiff's requests for an evidentiary hearing to determine the impact of her mediator's failure to make the foundational inquiry into the parties' history. Beyond that, the trial court should have conducted an evidentiary hearing of its own accord after the Plaintiff objected to entry of the judgment, disclosed her history of domestic violence, and made the court aware of the mediator's failure to conduct any screening.

The Court of Appeals erred in affirming the trial court. While the majority simply brushed aside the mediator's acknowledged failure to screen, stating, "Because plaintiff has not asserted or demonstrated that she was prejudiced by the mediator's failure to screen for domestic violence during mediation, any noncompliance with MCR 3.216(H)(2) was harmless." *Id.* at 5. However, Plaintiff raised the issue of her lack of voluntariness due to coercion in her objection to entry of the judgment and requested an evidentiary hearing.

In Catch 22 fashion, the Court of Appeals asserted that Plaintiff's failure to create a factual record in the trial court foreclosed review of the evidence of her abuse, the impact of the

mediator's failure to screen, and the trial court's obligation to have considered it. But, "[Plaintiff] asked for an evidentiary hearing and her motion was denied. She need have done nothing more to preserve her request to present facts supporting her claim of duress." *Id.* (GLEICHER, J., dissenting), at 5. The Court of Appeals further stated that once parties reach a settlement agreement, "it should not be set aside merely because one party had a change of heart.'" *Id.* at 5. The Plaintiff in this case described something well beyond a "change of heart." She described a "mediation process that not only violated the statute and the court rule, but offended basic notions of decency." *Id.* (GLEICHER, J., dissenting), at 5. That ill-conceived process, coupled with her history of abusive and controlling behavior by her husband, likely robbed her of the capacity to reach a truly voluntary agreement out of uncoerced self-determination.

Unfortunately, our courts' pattern of analyzing claims of involuntariness and undue pressure in mediated settlement agreements of domestic relations matters is mired by a history of analyses of duress in the context of commercial contract claims. In ordinary contract disputes, while parties may not be on an equal financial footing, there is usually no history of abusive or coercive conduct between the parties. But in domestic relations matters, one partner may have exerted a significant degree of economic, emotional or physical coercion and control over their domestic partner, often over many years. The impacts of such a history of coercion and control go beyond mere physical violence. The effects of coercion and control insinuate themselves deep into the core of the non-coercive partner's psyche; a mere look, a raised eyebrow or a subtle vocalization can signal further abuse lies ahead if the coercive partner's demands are not met. The effects often go beyond the parties' relationship to instill a fear of authority in general, making it more difficult to assert one's rights in the face of an authority figure, such as a mediator.

The Statute and Rule promote self-determination by supporting a foundation of safety upon which a mediation may be constructed. "[The Statute and the Rule] represent legislative and

judicial recognition that victims of domestic violence may be subject to pressures emanating from the marital relationship that cloud judgment or weaken resolve." *Id.* (GLEICHER, J., dissenting) at 3. These are the situations which the Statute and Rule were intended to address, establishing mediators as gatekeepers to prevent vulnerable parties from entering into mediation without adequate safeguards in place. The Statute and Rule were intended to protect vulnerable parties by placing a duty on the mediator to screen for a history of violence or coercion. They even provide mediators with a tool to do so.

A mediation absent the foundational screening is more likely to result in a vulnerable party signing an agreement out of fear of retribution, rather than acting voluntarily in their own, knowing self-interest. A mediation constructed on such an inadequate foundation can result in constructing an agreement which should not be enforced by Michigan courts.

However, a determination of voidability should not be presumed, but must be made by the trial court only after conducting an evidentiary hearing. Nor should agreements be automatically voided due to the absence of screening, where there was no history of coercion or violence to be discovered. A *per se* rule automatically voiding agreements reached in the absence of screening goes too far. If there was no domestic violence in the parties' relationship to deprive them of self-determination, then the absence of screening may have had no effect on their capacity to enter into an agreement with their spouse.

An evidentiary hearing is needed to determine the impact and a *per se* rule avoiding settlement agreements is not supported by *Amicus ADR Section*. Without conducting an evidentiary hearing, no court can properly determine the extent of prejudice the mediator's failure to screen had on a party's capacity to consent to the terms of a settlement agreement; an agreement the Plaintiff claims she felt forced to sign in order to gain her freedom.

CONCLUSION

Domestic violence screening is a required element of the domestic mediation process. Screening is required by both Statute and Rule. The mediator's failure to screen — a *per se* violation of the Statute and Rule — resulted in a flawed mediation process, potentially obviating the voluntariness of the settlement which would render the settlement agreement void. Only by conducting an evidentiary hearing may the trial court determine the extent of the impact created by the mediator's error.

Because he conducted no screening, the Pohlmans' mediator was unaware of the history of violence, coercion and control suffered by the Plaintiff. Because he was ignorant of that history, he took no steps to ensure Ms. Pohlman's safety or her capacity for self-determination. Because the trial court refused her an evidentiary hearing and the failure of the Court of Appeals to correct the trial court's error, her pleas for relief from the mediator's mistakes have gone unanswered. Even her ex-husband supports her request for leave to appeal in the face of what happened to her. [Docket #48.]

So, with apologies to the unknown author quoted in the introduction:

For want of a screening, their history was lost.
For want of their history, knowledge of coercion was lost.
For want of knowledge, the process was flawed.
For want of the process, consent *may* be lost.
For want of consent, the agreement *may* be lost.
For want of an agreement, the judgment *may* be lost.
And all for the want of a screening.

RELIEF

The ADR Section requests leave to appear as *amicus curiae* and to file this brief in support of the Plaintiff's motion for leave to appeal in order to establish a remedy addressing the effect of a mediator's failure to comply with the elements of the Statute and Rule.

Respectfully submitted,

Dated: September 23, 2020

/s/ Robert E. L. Wright
Robert E. L. Wright
On behalf of the State Bar of Michigan –
Alternative Dispute Resolution Section

STATE OF MICHIGAN

IN THE SUPREME COURT

B.A. TYLER,

Plaintiff-Appellant,

v

DAVID M. FINDLING, and THE FINDLING LAW FIRM PLC,

Defendants-Appellants.
_____/

Supreme Court No. 162016

Court of Appeals No. 348231

Oakland County Circuit Court
LC No. 18-165238-NZ

STATE BAR OF MICHIGAN ALTERNATIVE DISPUTE RESOLUTION SECTION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

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Amicus Curiae State Bar of Michigan Alternative Dispute Resolution Section ("SBM ADR Section") requests leave to file the accompanying brief amicus curiae in support of Defendants-Appellants' application for leave to appeal. In support of its motion, the SBM ADR Section states as follows:

1. This Court has said that it is "always desirous of having all the light it may on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae." *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921).

2. The SBM ADR Section is a voluntary membership section of the State Bar of Michigan, comprised of 765 members. The members are individuals interested in conflict resolution, peacemaking, and improving the climate in Michigan for mediation, arbitration, and other forms of alternative dispute resolution. The majority of ADR Section members serve as mediators in court-annexed disputes. Members include lawyers, law students, and non-lawyers dedicated to providing better alternatives to the public through improvement of ADR practices and techniques.

3. The ADR Section's Council is a public policy decision-making body with 24 members elected by the Section's membership. Effective September 28, 2020, the Section Council voted to support the filing of this amicus brief in support of Defendants' application for leave to appeal. However, the Section is not the State Bar of Michigan and the positions expressed herein are those of the ADR Section only and not the State Bar of Michigan. To date, the State Bar has not taken a position on the issues in this case.

4. A key mission of the ADR Section is to advance and improve the use of alternative dispute resolution processes in our courts, government, businesses, and communities.

The Section performs its mission by providing services to its membership in the form of educational seminars, quarterly publication of *The Michigan Dispute Resolution Journal*, reviewing and advocating concerning proposed legislation and court rules relating to alternative dispute resolution, and, as here, filing amicus briefs in select Michigan cases involving important alternative dispute resolution issues.

5. The Court of Appeals opinion in this case raises an important issue of first impression concerning the proper scope of MCR 2.412's confidentiality provision. See MCR 2.412(C) (providing in relevant part the "[m]ediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants").

6. In finding that the statements at issue—*made by a mediation participant at the mediation as it was about to begin*—were somehow *not* "made for purposes of . . . preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation," MCR 2.412(B), the Court of Appeals gave short shrift to the rule's expansive confidentiality protections, which this Court adopted in 2011 for the specific purpose of shielding from disclosure—with limited exceptions not applicable here—*all* communications made in connection with a mediation. The Court of Appeals' contrary decision undermines those protections.

7. The SBM ADR Section is uniquely situated to address the serious ramifications of the Court of Appeals' decision in this case. Although the Court's decision is unpublished, the reality is that the bench and bar rely on the Court of Appeals' opinions for guidance whether they are published or not. The Court's decision in this case strips confidentiality protections from statements that clearly fall within the scope of the rule, and will undoubtedly have a chilling

effect on frank communications by mediation participants, thereby threatening the important role that mediation plays in resolving disputes.

WHEREFORE, the SBM ADR Section requests leave to file the accompanying brief amicus curiae, which is attached as **Exhibit A**.

Respectfully submitted,

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Dated: December 2, 2020

Exhibit A

STATE OF MICHIGAN

IN THE SUPREME COURT

B.A. TYLER,

Plaintiff-Appellant,

v

DAVID M. FINDLING, and THE FINDLING LAW FIRM PLC,

Defendants-Appellants.
_____/

Supreme Court No. 162016

Court of Appeals No. 348231

Oakland County Circuit Court
LC No. 18-165238-NZ

BRIEF AMICUS CURIAE OF STATE BAR OF MICHIGAN ALTERNATIVE DISPUTE RESOLUTION SECTION IN SUPPORT OF DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING ORDER APPEALED AND RELIEF SOUGHT

Amicus Curiae State Bar of Michigan Alternative Dispute Resolution Section ("SBM ADR Section") concurs in Defendants' statement of the order being appealed and relief sought.

STATEMENT OF QUESTION INVOLVED

Should the Court grant leave to appeal to address the Court of Appeals' erroneous construction and application of MCR 2.412's confidentiality provision?

The Court of Appeals would answer:	No.
Defendants-Appellants answer:	Yes.
Plaintiff-Appellee answers:	No.
Amicus SBM ADR Section answers:	Yes.

STATEMENT OF INTEREST[1]

Amicus Curiae State Bar of Michigan Alternative Dispute Resolution Section ("SBM ADR Section") submits this brief in support of Defendants' application for leave to appeal from the Court of Appeals' June 11, 2020 opinion in this case.

The SBM ADR Section is a voluntary membership section of the State Bar of Michigan, comprised of 765 members. The members are individuals interested in conflict resolution, peacemaking, and improving the climate in Michigan for mediation, arbitration, and other forms of alternative dispute resolution. The majority of ADR Section members serve as mediators in court-annexed disputes. Members include lawyers, law students, and non-lawyers dedicated to providing better alternatives to the public through improvement of ADR practices and techniques.

The ADR Section's Council is a public policy decision-making body with 24 members elected by the Section's membership. Effective September 28, 2020, the Section Council voted to support the filing of this amicus brief in support of Defendants' application for leave to appeal after a discussion. However, the Section is not the State Bar of Michigan and the positions expressed herein are those of the ADR Section only and not the State Bar of Michigan. To date, the State Bar has not taken a position on the issues in this case.

A key mission of the ADR Section is to advance and improve the use of alternative dispute resolution processes in our courts, government, businesses, and communities. The Section performs its mission by providing services to its membership in the form of educational seminars, quarterly publication of *The Michigan Dispute Resolution Journal*, reviewing and

[1] This brief was not authored by counsel for a party to this case in whole or in part, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. MCR 7.315(H)(4).

advocating concerning proposed legislation and court rules relating to alternative dispute resolution, and, as here, filing amicus briefs in select Michigan cases involving important alternative dispute resolution issues.

The SBM ADR Section is uniquely situated to address the serious ramifications of the Court of Appeals' decision in this case, which raises an issue of first impression concerning the proper scope of MCR 2.412's confidentiality provision. See MCR 2.412(C) (providing in relevant part the "[m]ediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants").

In finding that the statements at issue—*made by a mediation participant at the mediation as it was about to begin*—were somehow *not* "made for purposes of . . . preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation," MCR 2.412(B)(2), the Court of Appeals gave short shrift to the rule's expansive confidentiality protections, which this Court adopted in 2011 for the specific purpose of shielding from disclosure—with limited exceptions not applicable here—*all* communications made in connection with a mediation. The Court of Appeals' contrary decision undermines those protections.

And while the Court's decision is unpublished (despite meeting the requirements for publication set out in MCR 7.215(B)(2)),[2] the reality is that the bench and bar rely on the Court of Appeals' opinions for guidance whether they are published or not. And this one, stripping confidentiality protections from statements that clearly fall within the scope of the rule, will

[2] MCR 7.215(B)(2) provides that an opinion "must" be published if it "construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule." That is the case here, as no published opinion has previously construed MCR 2.412(C). Indeed, as the Findling Defendants point out, the trial court even noted the lack of precedent.

undoubtedly have a chilling effect on frank communications by mediation participants, thereby threatening the important role that mediation plays in resolving disputes. If nothing else, the Court of Appeals' decision creates uncertainty warranting this Court's review.

I. STATEMENT OF FACTS

Amicus curiae the SBM ADR Section relies on the Findling Defendants' statement of facts.

II. STANDARD OF REVIEW

The SBM ADR Section relies on the Findling Defendants' statement of the applicable standards for reviewing their application for leave to appeal.

III. ARGUMENT

The Court of Appeals made two critical mistakes in applying MCR 2.412's confidentiality provision:

First, the Court's entire analysis proceeded on the faulty assumption that "[t]he expectation of confidentiality belongs to the mediation parties." COA Op at 5. The rule doesn't say that, and the Court of Appeals erred in reading such a limitation into it. By its terms, the confidentiality protection extends to statements made by *all* mediation participants, which included Defendant David Findling as court-appointed receiver for Samir Warda, who was the plaintiff in the no-fault personal injury protection (PIP) action that was the subject of the mediation.

Second, in holding that Findling's statements to Warda's counsel, Anna Wright, were not "mediation communications," the Court of Appeals viewed relevance and timing far too narrowly. Warda's potential involvement in drug-related activities bore directly on whether he would be a credible witness if his PIP case wasn't settled and instead went to trial. Findling's statements were also made while "sitting in a room designated for plaintiff" while waiting for a mediation session to start. Thus, there can be no question that Findling's statements relating to that issue were, at the very least, made while "preparing" for the mediation session.

A. It is irrelevant whether Findling was a mediation party because his alleged statements were "mediation communications."

In finding that Findling's statements were not protected from disclosure, the Court of Appeals first asserted that Findling was attending the mediation "as a Receiver, not a mediation party." COA Op at 5. But whether or not Findling was a "mediation party" is irrelevant. Without citing any authority, the Court of Appeals asserted that "[t]he expectation of confidentiality belongs to the mediation parties." *Id*. Yet nowhere in MCR 2.412 is there any such limitation.

On the contrary, the rule protects *all* "mediation communications," which include all statements "that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation." MCR 2.412(B)(2). Such statements "are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants" except under circumstances not at issue here. MCR 2.412(C).

This is entirely consistent with how both parties and mediators alike approach the mediation process—with the expectation that confidentiality protections extend beyond the communications made when the mediator meets with the parties at a mediation session. It is also vitally important to afford confidentiality protections to communications made throughout the mediation process, whether by mediation parties or other participants.[3]

By inventing a limitation on MCR 2.412's confidentiality provisions that doesn't exist, the Court of Appeals plainly erred. The rule's confidentiality protection extends to all "mediation participants," not just the parties. And here, there is no dispute that Findling was a

[3] The expanded definition of "mediation communications" in MCR 2.412(B)(2) comports with the notion, which practitioners adhere to, that mediation really begins as soon as the mediator is retained, and that communications from that point forward are considered to be confidential.

"mediation participant," which the court rule defines as "a mediation party, *a nonparty*, an attorney for a party, or a mediator *who participates in or is present at a mediation*." MCR 2.412(B)(4) (emphasis added). As court-appointed receiver for Warda and with settlement authority, Findling was both present at, and participated in, the mediation.

B. In concluding otherwise, the Court of Appeals misconstrued the definition of "mediation communications."

The Court of Appeals' analysis of whether Findling's statements fall within the definition of "mediation communications" was also misguided. MCR 2.412 does not limit the confidentiality protection to statements made "during the mediation process." MCR 2.412(B)(2). Again, the rule defines mediation communications to *also* include statements made "for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation." *Id*.

As the Court of Appeals acknowledged, Findling appeared at the mediation as the court-appointed receiver for Warda, and made his statements to attorney Wright while "sitting in a room designated for plaintiff" as they were waiting for the mediation to start. COA Op at 5. The Court of Appeals further acknowledged that Wright initiated the conversation with Findling by "stating that she believed she had an obligation to find out whether Warda was involved in any drug related activities and if other attorneys were involved." *Id.*

Where the Court of Appeals' analysis went astray was in apparently missing the point of Wright's inquiry, which was to ascertain Warda's credibility as a witness in the event the case didn't settle and went to trial. As Wright explained, she would "want to know" because "I don't want this to go to trial because this could come out." Joint Appx 48a. Findling responded that it was important to ask Warda about his involvement in any criminal activity "because these things can have a way of, you know, they send private investigators out." *Id*. Wright agreed that she

needed to find out "before I tell him let's go to trial." Joint Appx 51a. Weighing the pros and cons of going to trial versus settling is a key component of any mediation.

The Court of Appeals, on the other hand, dismissed the notion that Findling and Wright's conversation had any bearing on the PIP action because, according to the Court, "Wright and Findling were not going to learn from the mediation whether Warda was involved in drug related activities." COA Op at 6. "Instead," the Court surmised, the "purpose of the discussion was related to future discovery that needed to be done in the PIP action, and not the mediation." *Id*. at 6.

These statements show that the Court of Appeals failed to appreciate that the reason for the conversation was to discuss Warda's potential credibility issues as impacting any settlement of the PIP action during the mediation. Thus, Findling's statements, made in the context of that discussion, clearly were made "for purposes of . . . preparing for" the mediation. "Prepare" is commonly defined as to "get ready," which is precisely what Findling and Wright were doing. *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/prepare> (accessed 11/28/20).[4] There is no other reasonable way to view Findling's statements without taking them out of context, which is what the Court of Appeals appears to have done. It certainly cannot be said that Findling's statements were somehow unrelated to the subject of the mediation, i.e., potential settlement of Warda's PIP action, or that they had no bearing on it. Thus, the Court of Appeals erred in finding that Findling's statements were outside MCR 2.412's confidentiality provision.

[4] When a court rule does not define "individual words contained within it," it is appropriate to consult dictionary definitions to "giv[e] undefined terms their plain and ordinary meanings." *People v Warren*, 505 Mich 196, 208; 949 NW2d 125 (2020).

The Court of Appeals' insistence that Findling's statements were not protected from disclosure sets a dangerous precedent because it introduces uncertainty into when mediation participants' statements will be kept confidential as MCR 2.412(C) intends. And it does not matter that the Court of Appeals' opinion isn't published, as it is the first to comprehensively address the scope of MCR 2.412(C). As a result, parties and lower courts will no doubt rely on it (and likely other Court of Appeals panels). The Court of Appeals' strained view of when mediation participants' statements are entitled to confidentiality is troubling and requires the Court's guidance before it has consequences that cannot be undone.

IV. CONCLUSION

The SBM ADR Section respectfully submits that the Court should grant leave to appeal, reverse the Court of Appeals' decision, and reinstate the trial court's decision affording confidentiality protection to the statements that Defendant David Findling made "for purposes of . . . preparing for . . . mediation."

Respectfully submitted,

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Dated: December 2, 2020

MEDIATOR STANDARDS OF CONDUCT

OFFICE OF DISPUTE RESOLUTION
State Court Administrative Office
Michigan Supreme Court

Effective February 1, 2013

Michigan Standards of Conduct for Mediators

Applicability.

These Standards of Conduct apply to cases managed under the Michigan Court Rules. Failure to comply with an obligation or prohibition imposed by a standard is a basis for removal of a mediator from a court roster under MCR 2.411(E)(4) and MCR 3.216(F)(4). The standards do not give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a standard. In a civil action, the admissibility of the standards is governed by the Michigan Rules of Evidence or other provisions of law.

Standard I. Self-Determination

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

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

3. A mediator shall continuously assess the capacity of the parties to mediate. A mediator shall make appropriate modifications to the process if there is concern about a party's ability to make voluntary and uncoerced decisions. A mediator shall terminate the mediation process when a mediator believes a party cannot effectively participate.

B. A mediator's commitment is to the parties and the mediation process. A mediator shall not undermine party self-determination for reasons such as obtaining higher settlement rates, ego satisfaction, increased fees, or outside pressures from court personnel, program administrators, provider organizations, or the media.

Standard II. Impartiality

A. A mediator shall conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality. "Impartial manner" means freedom from favoritism, bias, or prejudice in word, action or appearance, and includes a commitment to assist all participants.

1. A mediator should act with impartiality and without prejudice based on any participant's personal characteristics, background, values and beliefs, or performance during mediation.

2. A mediator should neither give nor accept a gift, favor, loan, or other item of value that raises a question as to the mediator's actual or perceived impartiality.

B. A mediator shall decline a mediation or withdraw from mediation if the mediator cannot conduct it in an impartial manner, regardless of the express agreement of the parties.

Standard III. Conflicts of Interest

A. A mediator should avoid a conflict of interest or the appearance of a conflict of interest both during and after mediation. A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an impression of possible bias or as raising a question about the impartiality or self-interest on the part of the mediator.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. The duty to make reasonable inquiry is a continuing duty during the mediation process.

C. A mediator shall promptly disclose conflicts of interest and grounds of bias or partiality reasonably known to the mediator. A mediator should resolve all doubts in favor of disclosure. Where possible, such disclosure should be made early in the mediation process and in time to allow the participants to select an alternate mediator. The duty to disclose is a continuing duty during the mediation process.

D. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest could be reasonably viewed as undermining the integrity of the mediation process, a mediator shall withdraw from or decline to proceed with the mediation regardless of the express agreement of the parties to the contrary.

F. A mediator shall not establish another relationship with any of the participants during the mediation process that would raise reasonable questions about the integrity of the mediation process, or impartiality of the mediator, without the consent of all parties.

G. In considering whether establishing a personal or another professional relationship with any of the participants after the conclusion of the mediation process might create a perceived or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered.

H. A mediator shall not use information about participants obtained in mediation for personal gain or advantage.

Standard IV. Mediator Competence

A. A mediator should be qualified by training, education, or experience to undertake a mediation. A mediator should make information regarding the mediator's training, education, experience, and approach to conducting mediation available to the parties.

B. If a mediator cannot conduct the mediation competently, the mediator shall advise the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, requesting appropriate assistance or withdrawing.

C. If a mediator's ability to conduct mediation is impaired by drugs, alcohol, medication, or otherwise, the mediator shall not conduct the mediation.

D. A mediator should attend educational and training programs, and engage in self-assessment and peer consultation to maintain and enhance the mediator's knowledge and skills related to mediation.

Standard V. Confidentiality

A. Consistent with MCR 2.412, a mediator shall maintain the confidentiality of information acquired by the mediator in the mediation process.

1. As soon as practicable and as necessary throughout the mediation process, the mediator should:

a. inform the participants of the mediator's obligations regarding confidentiality;

b. discuss with the parties their expectations of confidentiality; and

c. discuss confidentiality of private sessions with parties or participants prior to those sessions occurring.

2. The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate.

B. If ordered or requested to testify or to produce documents, a mediator shall promptly inform the parties or their counsel. The mediator should consider confidentiality obligations in determining how to respond.

C. If a mediator participates in teaching, research, or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by the obligations and agreements regarding confidentiality.

D. If a mediator, as authorized by law, court rule, or professional code of ethics, reveals information acquired in the mediation process, the mediator should consider the safety of persons at risk of physical harm by the release.

Standard VI. Safety of Mediation

A. Consistent with applicable statutes, court rules, and protocols, reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues. Examples of impediments to the mediation process include: domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; mental illness or other mental impairment; and inability to understand or communicate in the language in which mediation will be conducted.

1. In general, "reasonable efforts" may include meeting separately with the parties prior to a joint session or administering screening tools.

2. In domestic relations cases, "reasonable efforts" should include meeting separately with the parties prior to a joint session and administering the "Mediator Screening Protocol" for domestic violence, published by the State Court Administrative Office.

3. If an impediment to mediation exists and cannot be overcome by accommodations that specifically mitigate it, the mediation process should not be continued unless:

    a. After being provided with information about the mediation process, a party at risk freely requests mediation or gives informed consent to it;

    b. The mediator has training, knowledge, or experience to address the impediment;

    c. The mediator has discussed with the party at risk whether an attorney, advocate, or other support person should attend the mediation; and

    d. The mediator has assessed that a party can determine and safely convey and advocate for his or her needs and interests without coercion, fear of violence, or other repercussions or consequences that would put the party at risk.

B. Where it appears that minor children or vulnerable adults may be affected by an agreement, a mediator should encourage participants to consider their safety.

Standard VII. Quality of the Process

A mediator shall conduct the mediation in a manner that protects the quality of the mediation process.

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

1. Diligence and timeliness. A mediator shall mediate in a diligent and timely manner.

a. A mediator should agree to mediate only when the mediator can commit the attention essential to an effective mediation.

b. A mediator should accept cases only when the mediator can satisfy the reasonable expectations of the parties concerning the timing of mediation.

2. Participants and participation. A mediator shall facilitate the presence of the appropriate participants and their understanding of the mediation process, continuously assess the parties' capacity to mediate, and structure the mediation process to facilitate the parties' ability to make decisions.

a. Subject to the provisions for accommodation in Standard VI and unless otherwise ordered by the court, the presence or absence of persons at a mediation should be determined by the parties and the mediator.

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

c. If a party appears unable to understand or communicate in the language in which mediation will be conducted, or appears to have difficulty comprehending the process, issues, or settlement options, or appears to have difficulty participating in mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate, and exercise self-determination. If the mediator determines that a party does not have the capacity to mediate even with accommodations, modifications or adjustments, the mediator shall not continue the mediation process.

3. Procedural fairness. A mediator shall conduct mediation with procedural fairness.

   a. The mediator should provide participants with an overview of the process and its purpose, including distinguishing it from other processes, the consensual nature of mediation, the role of the mediator as an impartial facilitator who cannot impose or force settlement, the use of joint and separate sessions, and the extent of confidentiality.

   b. A mediator who has an obligation or policy to report suspected abuse or neglect of children or vulnerable adults should inform the participants of the obligation or policy to report at the first contact.

   c. The mediator should facilitate the acquisition, development, and disclosure of information to promote parties' informed decision-making.

   d. A mediator shall not knowingly misrepresent any material fact or circumstance in mediation.

   e. Where appropriate, the mediator should recommend that each party obtain independent legal advice before concluding an agreement.

4. Appropriateness of mediation. A mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unsafe or unable to effectively participate in mediation or for other compelling reasons.

   a. If a mediator believes that mediation is being used to further illegal or criminal conduct, a mediator should take appropriate steps including, if necessary, postponing a mediation session, withdrawing from, or terminating the mediation.

   b. If the mediator suspends or terminates the mediation, the mediator should take reasonable steps to minimize danger, prejudice, or inconvenience to the parties or others that may result.

B. Role of the mediator: A mediator shall facilitate communication between the parties, assist in identifying issues, and help explore solutions to promote a mutually acceptable agreement. A mediator shall remain neutral as to terms of a settlement.

1. A mediator should not simultaneously act in the role of any other profession while mediating. Acting in the role of another profession before or after mediation may also pose a conflict of interest or affect the impartiality of a mediator.

2. A lawyer serving as a mediator shall inform unrepresented parties that the mediator is not representing them. When the lawyer serving as mediator knows or reasonably should know that a party does not understand the role of the

mediator in the matter, the mediator shall explain the difference between the role of a mediator and a lawyer's role in representing a client.

3. A mediator should inform the participants that they may obtain independent advice from other professionals.

4. A mediator may provide information that the mediator is qualified by training or experience to provide if the mediator can do so consistent with these Standards.

5. Where appropriate, a mediator may recommend that parties consider other dispute resolution processes.

6. A mediator may undertake an additional dispute resolution role in the same matter, if the mediator:

   a. informs the parties of the implications of the change in process;

   b. receives the informed consent of the parties; and

   c. can do so consistent with these Standards.

7. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

Standard VIII. Advertising and Solicitation

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

B. A mediator should not claim to meet the mediator qualifications of a governmental entity or private organization unless that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

C. A mediator shall not use the names of persons served, without their permission, in promotional materials or other forms of communication.

Standard IX. Fees and Other Charges

A. A mediator shall provide each party or each party's representative information about mediation fees, expenses, and any other actual or potential charges that may be incurred in connection with a mediation.

   1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, and the time required.

2. A mediator should provide fee information early in the mediation process.

3. A mediator's fee arrangement should be in writing.

B. A mediator shall not charge or accept fees in a manner that impairs or may appear to impair a mediator's impartiality.

1. A mediator shall not enter into a fee agreement that is contingent upon the result of the mediation or amount of the settlement.

2. A mediator may accept unequal fee payments from the parties unless the fee arrangement would adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Standard X. Advancement of Mediation Practice

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this standard by:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis, as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback, when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting mediators through training, mentoring, and networking.

6. Participating in programs of self-assessment and peer consultation.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators, and work together with others to improve the profession and better serve people in conflict.

-- SCAO --

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

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 16-143-GA

SUSAN E. PALETZ, P 34445,

Respondent.
_____/

REPORT OF TRI-COUNTY HEARING PANEL #59

PRESENT: Steven J. Matz, Chairperson
William C. Gage, Member
Jeffrey Caminsky, Member

APPEARANCES: Jordan D. Paterra, Associate Counsel
for the Attorney Grievance Commission

Donald D. Campbell, Co-Counsel
Trent B. Collier, Co-Counsel
for respondent

I. EXHIBITS

Petitioner's Exhibit A	Letter from Howard N. Weiner to Susan E. Paletz, dated January 29, 2010.
Petitioner's Exhibit B	Statement In Response to Request for Investigation Filed By Michael Hartman.
Petitioner's Exhibit C	Various letters from the Paletz Law Firm, PC, indicating dates and times of mediation and arbitration in *Michael Hartman v Andrea Hartman*, 09-764033-DM.

Petitioner's Exhibit D	Order Confirming First Interim Arbitration Award, and Order Confirming Third Interim Arbitration Award, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit E	Matrimonial Arbitration Acknowledgment and Agreement, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit F	Stipulated Order Referring Domestic Relations Issues to Binding Arbitration, Domestic Violence Waiver, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit G	Letter from Susan E. Paletz to Frances A. Rosinski, Attorney Grievance Commission, regarding AGC File No. 1107-15, dated September 18, 2015.
Petitioner's Exhibit H	Various letters from Paletz Law Firm, PC, regarding *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit I	Mediation Settlement transcript, Acknowledgment of Consent Settlement, and Settlement Agreement, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit J	Faxed letter from Howard N. Weiner to Barbara B. Smith.
Petitioner's Exhibit K	Cover letter and Subpoena, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit L	Email from Howard N. Weiner to Barbara B. Smith.
Petitioner's Exhibit M	Transcript of March 14, 2011 hearing on motion, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit N	Various letters sent between Susan E. Paletz, Barbara B. Smith, and Howard N. Weiner regarding *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit O	Letter from Susan E. Paletz to Barbara B. Smith regarding *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit P	Email from Susan E. Paletz to Howard N. Weiner regarding *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit Q	Unpublished Court of Appeals opinion, *Michael Hartman v Andrea Hartman*, 09-764033-DM.

Petitioner's Exhibit R	Michigan Supreme Court Order, reappointing Barbara B. Smith to Attorney Grievance Commission and appointing her as chairperson, dated September 18, 2013.
Petitioner's Exhibit S	Email chain of Attorney Grievance Commission regarding Paletz RI 1107-15.
Petitioner's Exhibit T	Attorney Grievance Commission meeting minutes, April 19, 2016, redacted.
Petitioner's Exhibit U	Various invoices and accountings from Paletz Law Firm, PC, stemming from *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Petitioner's Exhibit V	Michigan Supreme Court State Court Administrative Office Standard of Conduct for Mediators, effective January 4, 2001.
Petitioner's Exhibit W	Section 12 - Disclosure by Arbitrator, of the Uniform Arbitration Act.
Petitioner's Exhibit X	Public Act No. 419, Judicature Act - Arbitration Proceedings - Domestic Relations Matters, 2000 Mich. Legis. Serv. P.A. 419 (H.B. 4552) (WEST).
Petitioner's Exhibit Y	Letter with attachments to Michael A. Hartman from George A. Leikin, Plaintiff's First Amended Complaint, Answer to Plaintiff's First Amended Complaint, *Paletz Law Firm, P.C. v Michael A. Hartman*, 28th District Court 15-0764-GC.
Petitioner's Exhibit Z	Transcript of February 18, 2011 settlement agreement hearing, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Respondent's Exhibit 1	Verified Motion to Remove Arbitrator, Vacate Arbitration Awards In This Matter Pursuant to MCR 3.602(J)(2), Appoint A New Arbitrator, Award Sanctions, Attorney Fees and Costs, *Michael Hartman v Andrea Hartman*, 09-764033-DM.
Respondent's Exhibit 2	Plaintiff's Amended Verified Motion to Remove Arbitrator, Vacate Arbitration Awards In This Matter Pursuant to MCR 3.602(J)(2), Appoint A New Arbitrator, Award Sanctions, Attorney Fees and Costs, *Michael Hartman v Andrea Hartman*, 09-764033-DM.

Respondent's Exhibit 5	Plaintiff-Appellant's Reply Brief, Oral Argument Requested, Proof of Service, *Michael Hartman v Andrea Hartman*, Michigan Court of Appeals, 304026.
Respondent's Exhibit 6	Plaintiff-Appellant's Brief on Appeal, Oral Argument Request, Proof of Service, *Michael Hartman v Andrea Hartman*, Michigan Court of Appeals, 304026.

II. WITNESSES

Victor J. Zanolli
Barbara B. Smith
Hon. Joan Young
Julia A. Perkins
Daniel B. Bates
Kurt E. Schnelz
David C. Anderson
Hon. Martha Anderson
Susan E. Paletz, Respondent
Howard N. Weiner

III. PANEL PROCEEDINGS

This exceptionally well-briefed and well-argued case involves the Grievance Administrator's complaint against attorney/mediator/arbitrator Susan E. Paletz, P 34445. The panel wishes to extend its compliments to the professionalism, skill, and mutual courtesies of both sides, and for arguing the case in the best traditions of the profession.

A.

This matter is before the panel after the filing of Formal Complaint 16-143-GA. The substance of the allegations contained in the Grievance Administrator's formal complaint are discussed below. Respondent filed an answer to the formal complaint on May 9, 2017, and, after a number of pretrial motions were filed and decisions rendered, the hearing for this matter commenced on October 12, 2018.

The basic facts are not in dispute. In 2010 and 2011, Respondent Susan E. Paletz was the mediator and then the arbitrator of *Michael Hartman v Andrea Hartman*, a contentious divorce action pending in the Oakland County Circuit Court. While a mediator and subsequent arbitrator, Petitioner alleges that Respondent had a personal relationship with counsel for Andrea Hartman (Mr. Weiner) and, while the litigation was pending, accepted an offer to stay at the Florida Condominium of Mr. Weiner without properly disclosing her vacation plans. Petitioner claims that this failure on the part of Ms. Paletz created an unethical conflict of interest and appearance of

impropriety for which Respondent should be sanctioned. At a hearing on October 12, 2018, there was testimony from Michael Hartman's original attorney as to a conversation he had with Respondent approximately eight years earlier questioning Respondent's relationship with defense counsel. Michael Hartman's attorney, Mr. Zanoli, recalled a question he asked Respondent during the second mediation hearing on May 27, 2010. Mr. Zanoli recalled asking Respondent if she had a relationship with opposing counsel. The question stemmed from his client's observation of a conversation Ms. Paletz was having with Mr. Weiner in which they seemed to be friendly. Mr. Zanoli recalls Respondent indicating that she was not friends with opposing counsel. Respondent did indicate that she and opposing counsel had had cases together and that Respondent had been hired by opposing counsel as a mediator for 20 to 30 years. Mr. Zanoli recalls explaining to his client that Respondent and opposing counsel had a long history together as opposing counsel or mediator/attorney.

In her testimony Ms. Paletz also recalled a conversation she had with Mr. Zanoli. "He asked me something about, you know, how did I know Howard (Weiner), how well did I know him, what was my relationship, something like that. And I said, we're -- you know, we're colleagues, we're friends, we're associates. You know, I've mediated for him. He's been opposing counsel." (Tr 01/10/19, pp 87-88.)

The argument made by Respondent's counsel is that Mr. Zanoli was not credible when he testified that Ms. Paletz failed to indicate that she and opposing counsel Weiner were friends - and that Ms. Paletz's recollection of the conversation is more credible.

We decline to find that either attorney is a more credible witness than the other. Discrepancies in the exact language used in a conversation that occurred almost 9 years ago are easily explained by the passage of time, as well as the fact that no one anticipated the relevance the exact language may have had in a disciplinary proceeding nine years later. There is no contemporaneous recording or memorandum for the panel to rely upon in determining which version of the conversation is more believable. Had Mr. Zanoli been so inclined he could have explored Ms. Paletz's relationship with Mr. Weiner further. He could have asked more questions or made a record of his concerns. He chose not to do so.

It is conceded that at some point prior to her responsibilities ending as a mediator/arbitrator in the Hartman divorce, Ms. Paletz (and her husband) accepted a long-standing invitation from opposing counsel, Mr. Weiner, to stay at his condominium, along with his wife and Oakland County Circuit Court Judge Martha Anderson and her husband, attorney David C. Anderson. It was the unrefuted testimony of the various witnesses that the expenses associated with that trip to Florida were shared equally by all parties. There is no indication that the Hartman divorce was ever discussed during the Florida vacation.[1]

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[1] It is undisputed that the three couples staying at the condo, Mr. Weiner and his wife, Ms. Paletz and her husband, and Judge Anderson and her husband shared all expenses. The meals were shared equally by the Andersons and Paletzs. The additional meal expenses were intended as compensation to the Weiners for the accommodations. No business or cases were discussed.

For a more specific timeline as to the events and circumstances which led to the Florida vacation and subsequent filing of the Grievance Administrator's complaint, please see the 382 page Grievance Administrator's Closing Argument in Support of a finding of Misconduct, filed February 21, 2019, and the 499 page Closing Argument on Behalf of Susan E. Paletz, filed March 25, 2019.

B.

The Grievance Administrator alleges as follows:

1. Respondent engaged in conduct prejudicial to the administration of justice, in violation of MCR 9.104(1) and MRPC 8.4(c).

2. Respondent's failure to properly disclose her planned vacation exposes the legal profession and the courts to obloquy, contempt, censure or reproach in violation of MCR 9.104(2).

3. Respondent, as both the mediator and arbitrator in the Hartman divorce, engaged in conduct involving deceit or misrepresentation, in violation of MRPC 8.4(b), when she failed to disclose her planned vacation with Mr. Weiner, when she purchased her ticket, and when Mr. Zanoli specifically inquired about her relationship with Mr. Weiner.

4. Respondent engaged in conduct that violated the standards or rules of professional responsibility adopted by the Supreme Court, in violation of MCR 9.104(4).

5. Respondent violated or attempted to violate the rules of professional conduct, knowingly assisted or induced another to do so, or did so through the act of another, in violation of MRPC 8.4(a).

6. Respondent failed to disclose a circumstance that may have affected an arbitrator's impartiality, in violation of MCL 600.5075.

7. Respondent's vacation was not ordinary social hospitality.

Little discussed, but of relevance to the panel, is the fact that at no time did any of the litigants or their attorneys come to the conclusion that Susan Paletz acted inappropriately in her rulings or suggestions as both mediator or arbitrator. Indeed, the individual who initiated the complaint against Susan Paletz, Dr. Hartman, did so only after he received Ms. Paletz's bill for services rendered.

Since there is no allegation of actual prejudice to any party, the panel will confine itself to what seems to be the guts of the complaint, "the appearance of impropriety" and "conflict of interest."

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

C.

The Grievance Administrator alleges Respondent engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1), and MRPC 8.4(c).

The Grievance Administrator alleges that the Standards of Conduct for Mediators were violated when Ms. Paletz did not disclose her trip to Florida and intent to stay with Mr. Weiner before February 18, 2011.

On January 28, 2011 a hearing was held in the Oakland County Circuit Court before family court Judge Joan Young. The record reflects that after 12 hours of mediation a resolution of ALL issues had been reached. The case was originally assigned to Ms. Paletz for mediation and then converted to arbitration "...but after spending some time together and with the help of other experts we have reached an agreement which is a CONSENT settlement..." (Petitioner's Exhibit I, emphasis added.)

The terms of the settlement were then recited for the court. Thereafter, the parties to this contentious divorce action, Michael Hartman and Andrea Hartman, agreed that this was a settlement, voluntarily entered into and intended to be non-modifiable. Each party waived their right to a trial in front of the judge and agreed that all issues were resolved. (Petitioner's Exhibit I.) It is worth repeating that this was a settlement achieved through mediation, not arbitration, and that according to the parties and their legal representatives all issues had been resolved. This hearing took place more than a month before Ms. Paletz was scheduled to vacation in Florida.

The Grievance Administrator alleges that at all times relevant to the complaint the Standards of Conduct for Mediators contained the following conflict of interest section:

4. Conflict of Interest

(a). A conflict of interest is a dealing or relationship that might create an impression of possible bias or could reasonably be seen as raising a question about impartiality. A mediator shall promptly disclose all actual and potential conflicts of interest reasonably known to the mediator.

(b). The need to protect against conflicts of interest also govern conduct that occurs during and after the mediation. A mediator must avoid the appearance of conflict of interest both during and after the mediation... A mediator shall not establish a personal or intimate relationship with any of the parties that would raise legitimate questions about the integrity of the mediation process.

The Grievance Administrator also argues that the use of the terms of "may" and "might" show that Respondent's duty to disclose was not triggered by something she believed, in fact, would cause bias or impartiality, but rather anything that could create the possibility of bias or impartiality in the eyes of a reasonable person.

It is the opinion of the panel that such a broad and unstructured interpretation of the conflict of interest rules would make it almost impossible for any attorney to serve as a mediator or arbitrator, and in fact would be counterproductive to the concept or execution of alternative dispute resolution. That this is true becomes apparent upon considering the practical realities facing practitioners in the real world --- including the experience of members of this very panel.

Unlike the assignment of judges to a particular case, which are generally done by blind draw, the parties to a divorce action select their own mediator. The parties are free to investigate the training, experience and preferences of an individual before selecting them to serve as a mediator. As a plaintiff's personal injury attorney, this panel's chairman is frequently called upon to select the mediator/facilitator in his own cases. Recognizing that this is a voluntary process, he typically looks for a mediator-facilitator with prior experience --- often including a personal or professional relationship with the defendant's insurance company. Assuming confidence in his own assessment of the claim, it is apparent that one of the responsibilities of the mediator/facilitator is assisting to persuade the other side that his arguments and case evaluations are correct.[2]

Human nature being what it is, this is often more easily accomplished by selecting a mediator/facilitator who has the ear of the insurance company, and often someone whom the insurance company has relied upon in the past. It is not uncommon for this panel's chairman to select a mediator/facilitator who has previously worked for the opposing insurance company. Again, this is a purely voluntary process and if persuaded that the mediator was not acting in the best interest of resolving the claim, it would invariably result in the end the mediation. In this case, however, the fact that these parties did not discontinue the mediation but voluntarily agreed to convert the mediation to a binding arbitration and have Ms. Paletz remain as the binding arbitrator suggests that both parties had confidence in her abilities, judgment, and wisdom.

Attorneys who have successfully cultivated a mediation practice take enormous steps to insure that all sides to the mediation are treated fairly. It would be professional suicide to favor one side over another for personal reasons. In the small community of Oakland County divorce lawyers, particularly in this era of the internet and instantaneous electronic communication, it would take no time at all for any prejudice shown by a mediator for personal reasons to become common knowledge. The fact that these parties did not discontinue the mediation, but voluntarily agreed to convert the mediation to a binding arbitration and have Ms. Paletz remain as the arbitrator suggests that both parties had full confidence in her abilities, judgment, and wisdom. As discussed elsewhere in this report and opinion, the parties resolved all of the issues in the Hartman divorce by way of agreement, and not arbitration. The divorce settlement was placed on the record in the Oakland County Circuit Court a month before Ms. Paletz left for Florida. And there has never been an allegation that Ms. Paletz was anything other than fair and equitable as to all parties and their counsel.

It can reasonably be argued that any prior relationship a mediator has with any attorney *might* create an impression of possible bias. But this construction of "conflict of interest" is so over-broad as to make the entire standard impossible to follow, and therefore useless. Without specific language describing what does and does not constitute a "conflict of interest," the Standards of Conduct for Mediators does not adequately inform a mediator/arbitrator as to what kind of prior relationship will subject the mediator to a charge of an unethical conflict of interest at the whim of the Grievance Administrator. It is only after the alleged "violation" and subsequent Grievance Administrator's complaint that the issue gets better defined, with the outcome of the case depending on the subjective opinions of the disciplinary panel. This is the antithesis of due process. In addition, it does a disservice to all attorneys, as well as their clients, since it discourages the kinds of cordial relationships that can encourage the parties to resolve their

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[2] This thinking is doubtless present in the opposing side as well, making the choice of a fair and well-respected mediator something that both sides strive to accomplish.

differences amiably, rather than by declaring litigational war. It also fails to recognize the distinction between appearances that can lead to disqualification in a particular case, and unethical action that can lead to professional sanctions.

In the legal profession an "appearance of conflict of interest" can be found wherever anybody looks. In a practice that spans over 40 years each member of this panel has established personal and professional relationships with many of our legal colleagues --- often colleagues who appear as opposing counsel in court. We have worked on judicial campaigns, contributed to judges running for office, and attended innumerable seminars and Bar Association functions where plaintiff attorneys, defense attorneys, prosecutors, mediators, facilitators, and judges all mingled and shared experiences. Establishing personal relationships between colleagues promotes collegiality which leads to less conflict in and out of the courtroom.

There are obviously some "bright lines" that, if crossed, create an immediate conflict of interest. Had Mr. Weiner treated Respondent and her husband to an expenses-paid second-honeymoon vacation in Hawaii, for example --- or if there appeared to be some relationship between the trip to Florida and the outcome of the mediation --- the panel might be inclined to view the matter differently. However, the facts as established in this hearing do not constitute a "bright line;" in fact, in the opinion of this panel, they do not come close.

D.

In this case, though Respondent did not volunteer plans to accept Mr. Weiner's long-standing invitation to use his Florida property as a base of operations for a vacation, she showed no reluctance to acknowledge it, and the event did not raise eyebrows among other practitioners in the affected legal community, who deemed it an offer of ordinary social hospitality. In addition, nothing in the record shows that Respondent acted --- or was in danger of acting --- in other than a fair, impartial, and professional manner in dealing with her professional responsibilities in this manner. The panel was, however, impressed with the respect and esteem other members of the legal community showed her, her reputation as a fair and insightful mediator and arbitrator, and the confidence of her colleagues that she would never permit herself to be compromised in the performance of her duties in any way.

In particular, as far as the allegations contained in the formal complaint are concerned:

1. The panel rejects the allegation that Respondent engaged in conduct prejudicial to the administration of justice, in violation of MCR 9.104(1) and MRPC 8.4(c).

2. The panel rejects the allegation Respondent's failure to properly disclose her planned vacation exposes the legal profession and the courts to obloquy, contempt, censure or reproach in violation of MCR 9.104(2). It was, at most, a small oversight that was corrected upon inquiry.

3. The panel rejects the allegation that Respondent, as both of the mediator and arbitrator in the Hartman divorce, engaged in conduct involving deceit or misrepresentation, in violation of MRPC 8.4(b), when she failed to disclose her planned vacation with Mr. Weiner, when she purchased her ticket, and when Mr. Zanoli specifically inquired about her relationship with Mr. Weiner.

4. The panel rejects the claim that Respondent engaged in conduct that violated the standards or rules of professional responsibility adopted by the Supreme Court, in violation of MCR 9.104(4).

5. The panel firmly rejects the claim that Respondent violated or attempted to violate the rules of professional conduct, knowingly assisted or induced another to do so, or did so through the act of another, in violation of MRPC 8.4(a).

6. The panel finds that Respondent did not fail to disclose a circumstance that may have affected an arbitrator's impartiality in violation of MCL 600.5075.

7. The panel also finds, as a matter of fact, that Respondent's vacation was an example of ordinary social hospitality.

E.

For the foregoing reasons, the panel finds that the charges of misconduct set forth in the formal complaint have not been established by a preponderance of the evidence and that the complaint be dismissed.

V. ITEMIZATION OF COSTS

Attorney Grievance Commission:	
See Itemized Statement filed 08/02/19	$ 124.14
Attorney Discipline Board:	
Hearing held 06/15/17	$ 267.50
Hearing held 10/12/18	$ 1,036.50
Hearing held 10/18/18	$ 970.00
Hearing held 01/10/19	$ 691.00
TOTAL:	**$ NOT ASSESSED**

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #59

By: _____
Steven J. Matz, Chairperson

Dated: August 8, 2019