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Michigan Mediation Update

BY LAWRENCE J. DAY

SPECIAL FEATURE

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This article, in its original form, first appeared in the April 1, 1996, Michigan Lawyers Weekly. Since that time, MCR 2.411 was promulgated and became effective in August 2000.

Many judges across the state are now routinely ordering civil cases into mediation under the authority of MCR 2.410(c)(1).

In numerous circuits, mediation is no longer a mere option, even for highly polarized litigants with their sights set exclusively on the road to trial. Along the way, however, many will, to their dismay, resolve seemingly intractable disputes through the remarkable process of mediation. As Voltaire said, "I was ruined but twice — once when I lost a lawsuit and once when I won one."

U.S. Supreme Court Justice Warren Burger once said, "The notion that ordinary people want black robed judges, well dressed lawyers and fine courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible." (See, "Our Vicious Legal Spiral," Judges Journal, Vol. 16, Fall 1977, pp. 22 and 49; quoted, in part, in Nancy H. Rogers and Richard A. Salem, "A Student's Guide to Mediation And The Law," p. 41, n. 5, Matthew Bender & Co., New York, 1987.)

In spite of this viewpoint, prospective clients often seek attorneys they perceive to be aggressive combatants. It is true that detailed, creative, costly, aggressive preparation and litigation of a client's case can often be effective.

Lawrence J. Day is a private practitioner in Flint. He has received mediation training at Harvard Law School and Nova Southeastern University, and through the ADR Section of the State Bar of Michigan.

Many people have great respect for trial lawyers. Litigation as a dispute resolution method is an honorable and valuable process. The "magnificent deliberateness of trial" is unparalleled in its truth-seeking capabilities. (See, "The Truth Of The 'Middle Way,'" Arbitration Journal, Vol. 39, September 1984, p. 4, Mario M. Cuomo, citing remark by Justice Holmes.)

However, to plow from client interview, through investigation, retention of experts, pleadings, discovery, the uncertainty of trial and appeal without assessing ADR techniques may be a disservice to the client. There are many ADR processes available to litigants, including settlement conferences under MCR 2.401, case evaluation under MCR 2.403, focus groups, mock or mini-trials, or arbitration.

Each of these alternatives has its benefits. However, experience indicates that mediation is the heavyweight of the ADR world. Mediation works and it's here to stay.

The purpose of this article is to describe the mediation process in Michigan and promote the effective use of mediation as an alternative dispute resolution process under MCR 2.410 and MCR 2.411.

Mediation By Neutral (Not Evaluation By Panel)

Although there is less confusion today than when this article was first published in 1996, it is important to note that "mediation" under MCR 2.411 bears no resemblance to "case evaluation" under MCR 2.403.

A mediator does not issue an evaluation and does not act as a judge or "fact-finder."

MCR 2.411(A)(2) provides an excellent definition: "'Mediation' is a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power."

Setting The Stage For Success

A key element to the success of mediation hearings is that all interested parties with ultimate decision-making capacity should be in attendance.

MCR 2.410(D)(2) states, in pertinent part, the court…"may direct that persons with authority to settle a case…be present…in person or by telephone." However, our court rule fails to define "persons with authority." This ambiguity can undermine the mediation process.

In the author's view, trial courts may want to further define the phrase "persons with authority" in orders referring cases to mediation. Courts may want to consider specifying that mediation attendees should include representatives of all parties having full authority to settle up to the amount of plaintiff's last demand or policy limits, whichever is less, without further consultation. Similar language is set forth in Florida Mediation Procedure, Rule 1.720(b)(3). Such language eliminates the so-called "home office problem," wherein settlement momentum is lost because a party has to seek authority from a superior who cannot be reached.

Clarifying the definition of "persons with authority" and requiring their attendance at the mediation hearing can go a long way in setting the stage for a successful mediation hearing. Mandating attendance of representatives of lien holders should also be considered by the court.

The court may also want to require

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the participation at mediation of essential non-parties who hold an interest in the outcome of the dispute. A prime example of this lately has been the Michigan Catastrophic Claims Association (MCCA) in first-party personal protection benefit attendant care cases. Frequently, the defendant no-fault carrier feels its hands are tied and is unable or reluctant to enter into a settlement because its statutory reimbursement from the MCCA may be rejected if the settlement is unilaterally deemed unreasonable by the MCCA.

This gridlock impairs settlement and wastes court resources. In the author's view, it would be better for all concerned if essential non-parties, such as the MCCA in this example, were ordered to participate in mediation. Interested non-parties should be encouraged at mediation to "speak now or forever hold their peace."

'Typical' Events At Mediation

With the ultimate decision-makers convened at one location or available by phone, the stage is set for mediation. What follows is a typical sequence of such a meeting:

In joint session with all parties, introductions are made and the mediator describes the process. The mediator explains that mediation is a voluntary, non-binding settlement negotiation process. The mediator has no function in evaluating or judging the case, but is merely there to facilitate communication between the parties.

Documents are signed assuring that any comments made are totally privileged and confidential as settlement negotiations and as provided by MCR 2.411(c)(5).

During the initial joint session, in addition to the written materials, which have usually been provided to the mediator beforehand, each side gives a verbal presentation, usually through counsel, of their position. The parties are encouraged to direct their remarks to each other rather than to the mediator because the mediator's opinion on the merits is unimportant in the negotiation process. The mediator also attempts to curtail harsh, aggressive and polarizing advocacy, which might personalize the dispute and impair settlement. In fact, the mediator endeavors throughout the process to "separate the people from the problem" and get the parties to "focus on interests, not positions." (See, "Getting To Yes," Roger Fisher, William Ury and Bruce Patton of the Harvard Negotiation Project, Penguin Books, 2d ed., 1991.)

After the initial joint session, the mediator usually separates the parties and meets with them privately in what is called a "caucus" or a closed meeting. During this phase, confidentiality is again emphasized. Everything will be held in strict confidence unless the mediator is directed to communicate it to the other side. During these private sessions the mediator may also, through polite Socratic method, serve as an "agent of reality," helping parties identify their objective interests rather than subjective feelings. (See, "The Mediation Process," p. 18, Christopher Moore, (Jossey-Bass, 1987).)

This helps to avoid mere positional, reactive bargaining, wherein the parties arbitrarily chop the "negotiation salami" from each end. For example, the mediator, as the agent of reality, could inquire about the cost of expert witness testimony if the matter is taken through trial. During the caucus the mediator continues to attempt to depolarize the parties if need be and help them identify their true interests. The mediator may lead the parties to "invent options for mutual gain." (Fisher, supra.) This is the so-called "win-win" situation.

Although scenarios may vary with mediators or particular cases, eventually at least one party will want to explore settlement figures. Offers, counter-offers and the normal "tire kicking," "haggling" and posturing will commence with the mediator going back and forth as a shuttle diplomat between opposing camps, divulging only what is explicitly authorized.

If the parties eventually appear to be reaching an impasse they may benefit from one of the chief attributes of mediation — the ability of the mediator to "float" a settlement offer. Each party is asked by the mediator in private to confidentially tell the mediator what their absolute ("no kidding") bottom line settlement figure is. The mediator assures each party that the number will not be disclosed to the other side unless it meets the other side's number.

This allows each party to give its best settlement figure without getting hurt if the figure is not accepted because the "bottom line" positions will not be disclosed unless a settlement is reached. This avoids the parties' concern that they are eroding their negotiation position in the future. "One-on-one negotiating can't duplicate this." (See, "USA&M's Mediation Program," prepared by United States Arbitration & Mediation.)

If the elements of a settlement appear to have been reached or are close, the mediator will draw up a memorialization of the agreement for presentation in caucus, and/or return to joint session with all parties to work out details.

The variables are, of course, infinite, but the usual closing document hassles can be anticipated and dealt with in advance. Otherwise, afterthoughts such as lien problems, indemnity agreements, secrecy agreements and so forth can destroy a settlement momentum.

Key Benefits Of Mediation

Medation has several benefits, including following:

- allows the parties and the ultimate decision-makers to meet and communicate face-to-face;
- preserves the relationship of the parties;
- maintains privacy;
- reduces fees and costs;
- reduces stress on the litigants;
- avoids delays; and
- helps the parties reach a "win-win," consensual solution, the terms of which they control, rather than one side suffering a loss in a "zero-sum game" determined by a judge, jury or appellate court.

In the author's experience, mediation results in settlement approximately 75 percent of the time. Even if a substantive settlement is not reached, mediation frequently leads to an agreement for an alternative procedure that will streamline issues and/or resolve the matter cost effectively. Parties at gridlock often agree upon an arbitration process with a "hi-lo" protection.

Conclusion

My mother's favorite biblical quote is "Blessed are the peace makers...". Nonetheless, some controversies simply have to be decided by a judge or jury. Our civil trial process provides a necessary and valuable system for resolving such matters.

However, we should not allow our courts to become overburdened. It is essential that we reserve our courts for resolution of only the most significant and intractable disputes. Adherence to a "scorched earth litigation policy" is seldom in the best interests of the parties. Experienced trial lawyers know this and embrace mediation in good faith while, at the same time, meticulously preparing for trial.

If the stage is properly set for mediation by assembling all interested parties with proper authority the potential for settlement is great.