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The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

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Using Alternative Dispute Resolution in Public Sector Employment

— by Zenell Brown

America is a litigious society, and the workplace is a fertile breeding ground for lawsuits. "Employment rights are held dearly in our society, and their enforcement is demanded."[1] During the past two decades, there has been a proliferation of employment rights and, consequentially, an increase in lawsuits. One of the key activities of human resources (HR) management is to ensure compliance with laws and regulations. Therefore, managing the increase of employment law disputes is an ongoing challenge for the HR manager.

...it is time for public sector employers and employees to whet their palate instead of waiting in the overcrowded buffet line for courtroom resolution.

In the public sector, lawsuits range from discrimination in recruitment to wrongful termination. Federal, county, and municipal governments often find themselves named as defendants in lawsuits. Regardless of how the suits resolve, governmental entities invest substantial time in mounting defenses and pay substantial attorney fees and costs. The increased number of lawsuits is also burdensome on employees. They are denied timely resolutions and usually face economic hardships while their cases are pending in court. The proliferation of lawsuits also creates backlogged court dockets. Although the public sector employer may be helpless to control the number of disputes, alternative dispute resolution (ADR) offers the public sector HR manager an opportunity to manage employment disputes in a cost- and time-efficient manner. Some ADR processes may be used to stave off the filing of lawsuits; others may be more appropriate once the lawsuit has been filed. Some processes are informal; others are formal. The choices on the ADR menu are many: it is time for public sector employers and employees to whet their palate instead of waiting in the overcrowded buffet line for courtroom resolution.

Alternative Dispute Resolution Processes

The ADR choices include: mediation, arbitration, mediation-arbitration, conciliation, unilateral conciliation, cooperative problem-solving, dispute panels, fact-finding, mini-trials, summary jury trials, civil appeals settlement programs, early neutral evaluation, and confidential listening.[2] All forms of ADR motivate the parties to resolve their disputes, assist the parties to feel that they have been heard, create the opportunity for each side to hear the other side's story; and, hopefully, fashion a mutually acceptable settlement.[3]

Currently, two of the most common ADR processes used in the public sector are arbitration and mediation.[4] Both offer the benefits of limited cost and time as compared to litigation, and their

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Zenell Brown supervises the Dispute Resolution Unit of the Wayne County Friend of the Court, which provides mediation on referee and judge-referred cases, and screens each in pro per parenting time motion for possible mediation. An attorney with the Friend of the Court since 1997, she also trains peer mediators in the Detroit Public School system.

expanded use would offer the HR manager increased opportunities to resolve employment litigation.

Arbitration

Arbitration is similar to litigation. In arbitration, an arbitrator as neutral third-party hears the position and evidence of each party. Like a judge, the arbitrator follows procedural rules and makes a decision, called an award. The award is a reasoned decision based on the record. Arbitration may be binding or non-binding; therefore, the award may be binding or non-binding. If the award is binding, the parties may appeal the award only if the arbitrator exceeded the scope of his or her authority or for other narrowly defined reasons. The court which reviews an application to enforce the award generally does not conduct a plenary review; rather, the court has the right to review the arbitrator's award to determine if the award draws its essence from the agreement of the parties and does not require either party to engage in an unlawful act.[5]

Arbitration is a common ADR process found in the public sector because of the prevalence of unions and union contracts in the public sector. For instance, the American Federation of State, County, and Municipal Employees' Steward Handbook states that after step 4 in the grievance process, "If a grievance is still not resolved, the final step is a hearing with a professional arbitrator whose decision is final and binding."[6]

Some criticism of arbitration is based on myth. The critics state that arbitration ignores legal precedents and rules, is only good for claims involving major disputes, and is conducted in secret. In reality, most arbitrators are attorneys or retired judges who usually arbitrate matters in which they have some subject matter knowledge. Arbitrators tend to follow procedural rules including rules of evidence, although they are not bound to do so. Arbitrators, when alerted to the existence of outside law bearing on the subject matter of the case, tend to take due notice of the applicability of statutes and case law bearing on the disputed matter.

The mediation process is an overlooked HR tool.

Unfortunately, absent a court order requiring the public sector employer and employee to submit to arbitration, it is rarely used outside of the union-management grievance process. A motivated HR manager could capitalize by using arbitration as a means to resolve other disputes—especially non-union employee discharge cases—where legal structure and process are desired but without the costs and time of litigation.

Mediation

Mediation, another common form of ADR in the public sector, is a communication-based process. "Mediation is a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote mutually acceptable settlement. A mediator has no authoritative decision-making power." MCR 2.411(A)(2)

The mediator facilitates communications between the disputants to ensure that each side hears the other's point of view so that they can empathize and, hopefully, resolve the dispute. Mediation often begins with the parties giving their interpretation of events. One side will begin by telling its story, often venting the emotional burden of the story, and close by giving its rationale for the desired result. The mediator ensures that each side speaks and the other side listens. The mediator is unlike a judge and is not concerned about what the law may say on the issue or who appears to be right in light of the law.

After the venting stage, the mediator moves the parties' focus to their interests and needs. The disputants generate possible solutions based upon those interests and needs. The mediator does not judge any of the proposed solutions and allows the parties to decide which ones are acceptable. The mediator may meet with each party privately in a caucus to help the individual parties generate, clarify, and explore options. Caucuses are confidential and also allow the mediator to explore the possibility of hidden agendas and test the reality of proposed resolutions. If the parties reach agreement, the mediator drafts it. The agreement may be comprehensive, addressing concerns not directly related to those that prompted the mediation. If the parties do not reach agreement, the entire proceeding remains confidential, and the parties are free to progress to the next step in litigation or to use another ADR process.

The mediation process is an overlooked HR tool. It is rarely provided for in union contracts or mentioned in employee handbooks. It appears that the public sector employment dispute finds its way to mediation via court order after the employer and employee have incurred the expense and time of retaining counsel and filing suit. If the disputants sought out mediation prior to court filings, they would realize savings in both money and time.

One of the major criticisms of mediation is that the parties can spend a lot of energy in the process and not reach resolution. In some instances, resolution is not possible. In other cases, the parties are not forthright and truthful during the process, and only

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feign commitment to resolve the disputes. The mediator may not be able to discern this quickly, so the process continues until it becomes clear that a party is not genuinely interested in settling. Because mediation bears little resemblance to traditional legal processes, some lawyers are averse to using mediation in place of litigation.

Mediation not only offers parties who are truly interested in reaching a resolution an opportunity to do so, but it also offers an opportunity to retain full control over what the resolution will be. One of the major benefits of mediation is that agreements are customized and tailored to the parties' interests and needs. Therefore, the parties are more likely to adhere to the agreements reached. The resolutions are typically more comprehensive than lawsuit decisions or arbitration awards. Furthermore, mediation's mutually acceptable agreements help preserve the relationship between the parties, if that is a desired outcome. In employment situations, the parties may not wish to terminate the employment relationship. Because mediation does not have a win-lose outcome, it allows the parties to continue the employment relationship after mediation is completed.

Finally, the confidentiality of the mediation process allows each party to continue in the litigation process if no agreement is reached. No one has relinquished any legal rights by participating in mediation. In addition, as more courts are ordering cases to mediation to curb backlogged dockets, it would be strategically advantageous for public sector employers to offer mediation as early as possible, even prior to filing of lawsuits.

The public employer should not limit itself to arbitration and mediation. Other ADR processes offer cost savings, time savings, and other benefits. Interest-based bargaining is one example, where the employer can maximize the opportunity to negotiate with individual employees or union representatives (as applicable) and resolve disputes.

Interest-Based Bargaining

In interest-based bargaining, the first step is identification of interests. Both sides identify their interests. The interests are then grouped together on a master list. The parties agree which issue they will address first. Once that issue is identified, the parties move to step two: brainstorming. In brainstorming, both sides think of all the possible solutions to address the interest. No judgments are made on the suggested solutions. The parties may not seem to be able to come up with many possible solutions after the obvious ones are identified, but should press on to ensure that all possible solutions are identified.

During the brainstorming step, one person will act as scribe to write down all of the possible solutions, and they should be posted for all participants to view.

The third step is finding the best option. The parties will determine the criteria by which they will evaluate each of the possible solutions. Some possible criteria include best practices and industry standards. The parties will then evaluate each of the possible solutions against the standards. The chosen solution must meet the parties' mutual interests, and the parties must agree that it is the best solution under the circumstances. After one issue is resolved, the parties move on to the next interest until all issues are addressed and a solution is chosen for each.

The public employer should not limit itself to arbitration and mediation. Other ADR processes offer cost savings, time savings, and other benefits.

As with mediation, it is not uncommon that, after much time and effort is spent on the issue, the parties will decide that the best resolution is either to maintain the status quo or to drop the issue.[7] The benefits of interest-based bargaining are similar to those associated with mediation. Therefore, it might work well in the contract negotiation process where the employer and unions will have an ongoing relationship and both parties have interests and concerns in how the relationship will mature.

New Jersey's Early Settlement Program

Arthur D. Finkle[8] shares the story of the State of New Jersey's implementation of its early settlement program: The program used mediation to resolve major disciplinary actions involving employees represented by collective bargaining units. From 1992 to 1999, the state estimated it would have spent $4,500, and the unions would have spent $3,500, on each case routed through the Office of Administrative Law (OAL). The cost of mediation was $450 total for each case. Also, in the early settlement program, cases were typically resolved within 5 months as opposed to the 14 months for cases referred to the OAL. New Jersey resolved an average of 197 cases yearly, saving the state $800,000 annually. Management favored the program since it allowed for a fast remedy and empowered the disputants. Even when there was not a resolution, management saw the process as providing a better view of the employee's perspective, interests, and concerns.

Even when there was not a resolution, management saw the process as providing a better view of the employee's perspective, interests, and concerns.

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The unions expressed similar opinions.

Conclusion

In a complex workplace of employment laws and rights and in a society that is litigious, it is incumbent that the human resources managers in the public sector become knowledgeable about different types of ADR processes. They then need to identify areas where these processes would be effective in resolving disputes and stave off the filing of lawsuits or promote a more rapid resolution of lawsuits. ADR processes offer the public sector employer several tools to manage employment related disputes and to ensure that public resources are expended on forwarding the organization's mission rather than on draining away time and money in litigation.

Endnotes:

1 Mathiason, Garry G., Achieving Workplace Justice Through Binding Arbitration (1994), available at www.shrm.org.

2 Finkle, Arthur L., Alternative Dispute Resolution: Variations on a Theme (2001), available at www.ipma-hr.org.

3 ibid.

4 Buford, James A., & James R. Lindner, Human Resource Management in Local Government (Ohio: South-western, 2000)

5 Maurer, Keith, "The Truth About Arbitration," Michigan Bar Journal (May 2003), p. 23.

6 AFSCME Steward Handbook, available at www.afscme.org.

7 Pennington, Alan D., Interest Based Bargaining, available at www.ipma-hr.org.

8 Finkle, supra.

Upcoming Mediation Trainings

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of the mediation court rules, MCR 2.411 (general civil) or MCR 3.216 (domestic relations). Please note that participants must attend all of the dates listed for each training session in order to complete the 40-hour training. For more information, visit the SCAO web-site at www.courts.michigan.gov/scao/dispute/odr.htm.

General Civil

Training sponsored by Institute for Continuing Legal Education:

Grand Rapids: **June 3-5, 18-19**
Register online at www.icle.org/mediation, or call 1-877-229-4350.

Training sponsored by Oakland Mediation Center:

Bloomfield Hills: **April 20, 22, 24, 27, 29, May 1**
Contact: Nanci Klein at 248-338-4280

Training sponsored by Dispute Resolution Center of Central Michigan:

Lansing: **April 29-30, May 1, 14-15**
Contact: Karen Beauregard at 517-485-2274

Training sponsored by The Dispute Resolution Center

Ann Arbor: **October 15-17, 22-24**
Contact: Kaye Lang at 734-222-3788

Domestic Relations

Trainings sponsored by Mediation Training and Consultation Institute:

Ann Arbor: **April 21-25**

Ann Arbor: **July 25-29**

Ann Arbor: **December 1-3, 6-7**

Domestic Violence Screening Protocol Training

Saginaw: **April 18**

Ann Arbor: **April 28, August 10 (tentative), December 8**

Register online at www.learn2mediate.com, or call 1-800-535-1155

Comments From the Chair

— by Deborah L. Berecz

Deborah L. Berecz, ADR Section Chairperson

THE POWER

If I can listen to what he can tell me,
If I can understand how it seems to him,
If I can see its personal meaning for him,
If I can sense the emotional flavor which it has for him,
Then I will be releasing potent forces of change in him.
- Carl Rogers

Kenneth Cloke provided the above quotation at last month's 3rd Annual Negotiation & Dispute Resolution Institute (ANDRI), co-sponsored by the ADR Section and ICLE. Two nationally recognized speakers, Ken Cloke and Raye Rawls, and an outstanding panel of our home-grown experts made the 2004 ANDRI informative, thought-provoking and instructive.

I'd heard Ken Cloke at an ACR (Association for Conflict Resolution) conference in San Diego a couple years ago. A lawyer, judge, and mediation trainer, with a Ph.D. in history, Ken Cloke is the kind of thinker/speaker with whom you'd like to spend a couple days, simply taking in a portion of the wisdom he's stored up after years in the conflict resolution field.

But does the Rogers quotation sound plausible? Does being understood really free a person to change, to compromise? Dr. Cloke and Carl Rogers contend that being understood functions as a crow bar which breaks open the possibility for change and compromise. He cites the example of how a parent who sees her six year old son run onto a busy street to retrieve an errant ball, reacts with anger when snatching up that child to safety. Any parent has been there and was likely even surprised at feeling anger. Why anger? Because the parent feared for the child's safety. And why is the fear present? Because the parent loves and cares for the child.

Bottom line: underlying all conflict or anger is fear. And underlying fear is care and concern, i.e., a need to love and be loved.

How does this help me as a mediator? I had mediation clients in my office this morning who illustrated the utility of Dr. Cloke's proposition. These clients were initiating a divorce proceeding and their emotions were still pretty raw. At the previous session, the husband was so angry he walked out. I met with him separately the following week and he immediately began to vent and fume. I simply listened, seeking clarification periodically, and he continued for some time. When he had exhausted the litany of his wife's crimes, I asked him why he thought those things made him so upset. At first he simply reiterated the complaints but when pressed again as to why those complaints made him so angry, he acknowledged that he felt hurt and even stunned that his wife was leaving him. When gently (I hope) pressed as to why that hurt so much, he acknowledged that he still loved his wife and did not want the divorce. Fresh out of the classroom of Ken Cloke, I tried to empathize and did not rush him as he explained the loss he was experiencing. We then talked about whether it might be helpful if his wife understood the "space" he was in and how that might best be communicated to her.

Confession: When this husband bolted out of our prior session, I thought it likely that all future sessions with this couple would need to be conducted only by caucus. But I took a calculated risk and put them together-even on the same side of the table. The difference in this man, who had earlier stormed out of the room, was remarkable. When his wife acknowledged his hurt and loss, the atmosphere in the room immediately changed. He began focusing on problem solving rather than chronicling her crimes. For the remainder of the session I was struck by the difference in the tone of the discussion. It still got heated at times, and tears flowed for both, but they had turned a corner. The crow bar of understanding had broken open the possibility of change and compromise.

Some time ago, I remember mediating a dispute between a city and a business owner. I can't recall the precise nature of the complaint, but through the lens Cloke provided, I recall how important it was to the business owner that the city's representative understand how upset he was at the city's action (anger), how he worried about the impact on his business (fear). But most important to him, was the injury to his reputation (the need to be cared for/loved). After reflecting on a variety of other cases I've handled, as either advocate or neutral-insurance defense, family, business disputes-I realize that Rogers and Cloke nailed it. Anger and conflict usually derive from a more basic human need-the need to be cared for.

Sometimes we expect to go to a conference or seminar and walk away with some new trick or gadget to get our clients to more quickly and easily resolve their disputes. But it's imperative that we also get a healthy dose of theory and philosophy periodically so that we can more thoughtfully analyze the dynamics in a mediation session. Ferreting out the real interests fueling clients' disputes requires a tool (or a dozen tools) from our technique store room. But it also requires a philosophical understanding of conflict so that we know which tools to employ when-and how vigorously.

As neutrals and users of ADR, we are fortunate in Michigan to have high quality ANDRI conferences sponsored by the Section and ICLE. Mark your calendars now for March 15, 2005!

This issue's Ask the Neutral column was answered by Kelly Reed, a mediator of both general civil and domestic relations cases who is a shareholder with the Lansing law firm of Loomis, Ewert, Parsley, Davis & Gotting.

Ask the Neutral

Q: Frequently, I notice that the participants look to me as the mediator to make a decision. It is as if the participants, including the lawyers, have selected me because they believe I am going to make a decision. My training is that the mediator remains neutral. Is there any time when a mediator has binding authority? If not, what should I do so they won't expect me to make a decision?

A: *The core of mediation is that the mediator is a neutral facilitator who keeps confidential the discussions during mediation and does not report the merits of the case to the court. A mediator does not have binding authority. If the parties are looking for a binding decision through ADR, they should be directed to arbitration.*

Unfortunately, the scenario described occurs frequently. Therefore, I would like to address what a mediator can do when the mediator believes that the parties are seeking a decision. How does the mediator assure the participants that the mediator is neutral, and guide the participants into forming their own settlement?

First, the opening statement must be clear: the mediator is neutral and will not make a decision regarding the outcome of the dispute. The mediator will assist the parties in reaching a solution. The mediator does have playing rules in order to allow ideas to flow among the participants. Once that is accomplished, the body language and demeanor of the mediator, including facial expression, tone and manner of speaking, i.e. content, continues the sense of neutrality. Bad: "What were you thinking when you sent this letter?" Neutral: "Could you tell us what you wanted to convey in this letter?" One of the more difficult mediation skills to master is the ability to ask questions and make statements in a neutral manner.

The position of neutrality must continue through caucus sessions. Even though the other party is not present and the caucus is confidential, it would be unfortunate for the mediator to give any hint of bias. You will destroy any confidence you have built during the group session. It would be easy for a party to assume you are favoring the other party when you are in caucus with that other party. Even if the party believes you favor him or her, it may encourage a resistance to move to settlement.

Clearly stating that the mediator will not make any decisions, and then maintaining a neutral tone throughout the mediation, will discourage parties from seeking a decision from the mediator and empower them to reach their own agreement.

Catherine A. Jacobs, a shareholder with Loomis, Ewert, Parsley, Davis & Gotting in Lansing, is a mediator and member of the ADR Section Council.

National Speakers Dialogue With Participants and Each Other at 3rd Annual ANDRI

— by Catherine A. Jacobs

The 3rd Annual Advanced Negotiation and Dispute Resolution Institute ("ANDRI"), co-sponsored by ICLE and the ADR Section of the State Bar, occurred on Thursday, March 18th, 2004, at the St. John's Golf & Conference Center in Plymouth. More than 125 participants attended this year's ANDRI, which included breakout sessions on topics pertinent to civil mediation, domestic mediation, and advocates and consumers of ADR.

Among the participants were experienced judges, lawyers, Supreme Court representatives, Friend of the Court representatives, and dispute resolution center directors. Many of the participants could be referred to as "recovering lawyers," meaning they no longer practice law but have dedicated their professional lives to mediation.

Deborah Berecz, Chairperson of our ADR Section, opened the Institute, inviting communication from all Section members to the Council. The participants then enjoyed a joint dialogue between Kenneth Cloke and Raytheon M. Rawls. Kenneth Cloke, the director of the Center for Dispute Resolution, in Santa Monica, California, is a mediator, arbitrator, consultant, trainer, and a nationally-recognized speaker. Among his publications are Mediation: Revenge and the Magic of Forgiveness and Mediating Dangerously: The Frontiers of Conflict Resolution. Raytheon Rawls of the Resolution Resources Corporation, Atlanta, Georgia, holds the status of Advanced Practitioner/Advanced Educator with the Association for Conflict Resolution. She has been

Deborah Berecz, Chairperson of ADR Section

an Administrative Law Judge and is a former dean of the Georgia State University College of Law. In 2003, she was appointed to the Georgia Commission on Dispute Resolution by the Supreme Court of Georgia.

Dale Iverson, Deborah Berecz and Raye Rawls.

The speakers fashioned a remarkable forum where they encouraged questions and statements from the participants. In opening the session Kenneth Cloke made a statement near and dear to me: "There is no such thing as a dumb question." This immediately set the invitation to participate. Ms. Rawls and Mr. Cloke shined as they displayed the depth of their skill, experience and knowledge in responding to spontaneous questions from attendees. The dialogue forum between speakers and participants provided an excellent learning experience. Where else would you have captive such highly qualified ADR advocates?

Kenneth Cloke continued his presentation in the civil litigation track, covering topics such as responding to intense emotion in mediation and techniques for dealing with and understanding the role of organizational systems in creating conflict. Raytheon Rawls, on the domestic relations track, discussed topics such as understanding the mind and moves of the mediator and how the mediator can establish empathy with a particularly difficult party.

The other speakers for the advocate and consumer breakout sessions came from the pool of talent we are fortunate to have in Michigan.

In the advocates and consumers track, there were two panel discussions. One was between Circuit Court Judges Chad Schmucker and Cynthia Stephens and Mediators Edward Hartfield and Amy Glass. The paramount issue, "How Judges and Mediators Can Best Help Each Other," was covered well and remains for further discussion as we all promote mediation among litigators.

ICLE Education Director, Shel Starke.

The other panel consisted of Alan M. Kanter, Richard Hurford, Asher Tilchin and Sam Morgan, discussing the economics of ADR, providing information indicating that mediation is much less expensive than litigation, and pointing out that several major companies are requiring mediation in all areas before litigation. Judges participating in the Institute were particularly interested in this session as the most frequent resistance to mediation is that it adds a layer of costs to the litigation.

Amy Glass and Tracy Allen

In addition, Naomi Woloshin of Ann Arbor provided helpful strategies to assist parties to communicate effectively, and Douglas Van Epps, director of the SCAO Office of Dispute Resolution, provided his annual update on how Michigan courts are using ADR.

Nearly 150 practitioners attended.

Compared with other seminars and institutes I have attended, the planners of the 3rd Annual ANDRI gave the participants a unique opportunity to pause and network with those in attendance during a mid-afternoon 30-minute break. Those of us who insist on arriving at the last minute are grateful for the opportunity during the Institute to say hello to our colleagues.

Near the end of the opening dialogue, Raytheon Rawls reminded the participants that, "No one method fits all." For this reason, professionals taking part in ADR are fortunate to have the annual ANDRI to be exposed to the varying methods of ADR and to discuss the topics which are being addressed in Michigan and nationally.

The all-day event included a delicious lunch buffet.

The **ADR** Newsletter

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

For comments, contributions or letters, please contact:

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ADR Section's Annual Meeting Has Grown Up!

Historically the ADR Section has held its Annual Meeting in conjunction with the State Bar of Michigan's. But ADR has grown so dramatically over the last few years in Michigan and attendance at the Annual Meeting has grown as well. So, the Section's Annual Meeting is growing up and moving out of the parents' home!

On September 9 and 10, 2004, join us at the Soaring Eagle Resort in Mt. Pleasant for a retreat meant to not only inform but also provide opportunities for conversation, camaraderie and even some fun! Harry Goodheart III, President of the American College of Civil Mediations, will be joining us to facilitate an Open Forum Discussion on Thursday, September 9 from 5:30 - 7:30. This promises to be an excellent opportunity to dialogue with leaders of various sections of the Bar and judges and justices active in the ADR field.

On Friday, September 10, following the Business Meeting, Mr. Goodheart will give a presentation on:

HOW TO KICK START THE USE OF ADR

- Proven techniques for ADR Professionals and the Courts to generate interest in and increase the use of Mediation in Michigan
- a look at what's going on in other jurisdictions where Mediation is new
- how ADR Professionals and Advocates can be prepared for a geometricincrease in ADR usage; and why the Courts are going to love it when it happens.

Don't forget about the Friday afternoon Golf Scramble at the beautiful Pohl Cat Golf Course! If golfing isn't your thing, the Soaring Eagle offers many other activities and events. So bring the family and join the growing community of ADR providers and users for a fall break from the routine. See the green information and registration forms included in this Newsletter for further details.