

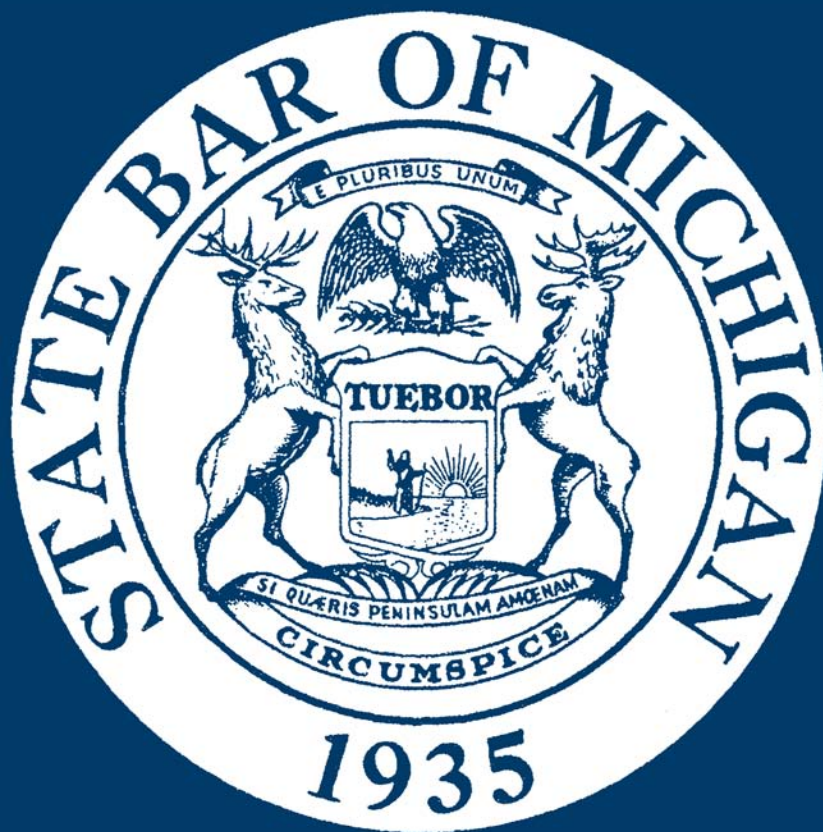
MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

TABLE OF CONTENTS

Vol. 22 M Fall 2002 M No. 1

Feature Articles

- Facilitative Mediation—A Good Option
Catherine A. Jacobs2
- Let the Dodge Brothers Drive You
Home—Using the Dodge Act and
Facilitative Mediation to Resolve
Probate and Trust Litigation
John W. Allen.....6
- The Probate Judge Ordered
Mediation—Now What?
Patricia Gormely Prince and
Shaheen I. Imami.....10
- The Caucus in Mediation—It's More
Than Shuttle Diplomacy
Tracy L. Allen14
- ADR: The Grand Traverse Experience
George F. Bearup19



Subscription Information

The *Michigan Probate and Estate Planning Journal* is published quarterly by the Probate and Estate Planning Section of the State Bar of Michigan, with the cooperation of the Institute of Continuing Legal Education, and is sent to all members of the Section. Lawyers newly admitted to the State Bar automatically become members of the Section for two years following their date of admission. Members of the State Bar who are not yet 70 years old may become members of the Section by paying annual dues of \$20. Members 70 years of age or older and law school students may become members by paying annual dues of \$10. Institutions and individuals not eligible to become members of the State Bar may subscribe to the *Journal* by paying an annual \$25 subscription. The subscription year begins on October 1 and is not prorated for partial years. Subscription information is available from the State Bar of Michigan, Journal Subscription Service, 306 Townsend Street, Lansing, MI 48933-2083, (517) 372-9030. A limited number of copies of prior issues of the *Journal* are available beginning with Fall 1988, Volume 8, Number 1, for \$6 each, plus \$2 for postage and handling. Copies of articles from back issues cost \$7 per article. Prior issues and copies of articles from back issues may be obtained by contacting the Wayne State University Law Library, 468 Ferry Mall, Detroit, MI, (313) 577-3925.

Editorial Policy

The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria. Manuscripts and letters should be sent to Nancy L. Little, Managing Editor, *Michigan Probate and Estate Planning Journal*, 2125 University Park Drive #250, Okemos, MI 48864, (517) 706-5790, fax (517) 706-0500, e-mail nancy.little@fosterzacklowpc.com.

Opinions expressed in the *Journal* are those of the authors and do not necessarily reflect the views of the editorial board or of the Probate and Estate Planning Council. It is the responsibility of the individual lawyer to determine if advice or comments in an article are appropriate or relevant in a given situation. The editorial board, the Probate and Estate Planning Council, and the State Bar of Michigan disclaim all liability resulting from comments and opinions in the *Journal*.

Citation Form

Issues through Volume 4, Number 3 may be cited [Vol.] Mich Prob & Tr LJ [Page] [Year]. Subsequent issues may be cited Michigan Prob & Est Plan J, [Issue], at [Page].

Section Web Sites

<http://www.icle.org/sections/probate/>

<http://www.michbar.org/sections/>

Michigan Probate and Estate Planning Journal

Vol. 22 M Fall 2002 M No. 1

TABLE OF CONTENTS

From the Desk of the Chairperson

John A. Scott1

Feature Articles

Facilitative Mediation—A Good Option

Catherine A. Jacobs2

Let the Dodge Brothers Drive You Home—Using the Dodge Act and Facilitative Mediation to Resolve Probate and Trust Litigation

John W. Allen6

The Probate Judge Ordered Mediation—Now What?

Patricia Gormely Prince and Shaheen I. Imami10

The Caucus in Mediation—It's More Than Shuttle Diplomacy

Tracy L. Allen14

ADR: The Grand Traverse Experience

George F. Bearup19

Departments

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law

Hon. Phillip E. Harter24

Ethics, Unauthorized Practice of Law, and Image—Developments

Ramon F. Rolf, Jr.27

Probate and Estate Planning Council Q and A

Patricia Gormely Prince and Randall J. Soverinsky28

Miscellaneous

ICLE Page31

Section Council32

Section Committees33

Michigan Probate and Estate Planning Journal

Nancy L. Little, Managing Editor

2125 University Park Dr. #250

Okemos, MI 48864

(517) 706-5790, Fax (517) 706-0500

E-mail nancy.little@fosterzacklowepc.com

Editorial Board

Nancy L. Little, Managing Editor

Foster, Zack & Lowe, PC, Okemos

Douglas G. Chalgian

Chalgian Law, PLLC, East Lansing

Hon. James S. Casey

Smith, Koning, VanWagoner & Beck, PC, Portage

Amy Nehs Morrissey

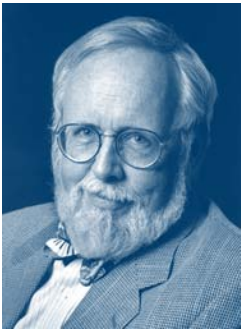
Westerman & Associates, Ann Arbor

Sarah R. Pinkelman, Copy and Production Editor

Institute of Continuing Legal Education, Ann Arbor

From the Desk of the Chairperson

By John A. Scott



As I write this, I am about to turn over the gavel to Dirk Hoffius of Grand Rapids as chair of the Section and convey to him personally my fond hopes for a successful year as chair. Hoffius brings years of experience in probate and estate planning practice, along with participation in community

charities, to his upcoming role. He will need all those professional skills to conduct the meetings of the Council, which is sometimes like attempting to herd cats. Without wishing to steal his thunder, I know he will continue his interest in long-range planning for the Section and Council. All of you with an interest in the Council's affairs are urged to provide input to this process.

The obvious role of the chair of the Section is to preside over the meetings of the Council. Less obvious is that the chair conducts the business of the Section. Scarcely a week goes by when there are not frequent demands made on the chair's time and attention to answer questions from the State Bar, from Section members, or from members of the public on referral from the State Bar. The question most frequently asked is, "Can I have the list of the members of the Section and their addresses or e-mail addresses?" The answer is a plain and simple "No." It has been the long-standing policy of the Council that the list is not available except to ICLE for use in connection with the annual probate seminar. Therefore, please know that it is not from the chair of this Section that brokers of low-interest mortgages, repairers of credit reports, or marketers of aluminum siding and herbal Viagra substitutes have gotten your e-mail address.

The chair, of course, has other roles. As chair, I presented the position of the Section to the supreme court on the issue of court reform. In addition, I was appointed by the State Bar of Michigan's president, Bruce W. Neckers, to a State Bar study committee on court reform. The Council, over a number of years, has steadfastly supported the position that Michigan citizens need probate judges and probate personnel to staff and preside over probate courts. There are a number of very interesting constitutional and judicial administrative questions that are

going to require review and attention at a number of levels. The Council and the Section can expect that these issues will be with us for quite awhile before there is resolution.

I had hoped that during my tenure, the Committee on Special Projects (formerly SCOPAR) would have completed and had the newest version of the Uniform Principal and Income Act before the legislature with a sponsor. We are, as I write this letter, almost there. In the coming year (probably after the election), we hope the legislation will be proposed, debated, and passed by the legislature and signed by the governor. Although principal and income questions are not very sexy, dealing with trust administration involves confronting the definitions and rules of the Uniform Principal and Income Act in whatever format the state has adopted. The 1997 Uniform Principal and Income Act is, by the Council's reckoning, a substantial improvement over Michigan's presently used earlier version. Recent IRS proposed regulations approve unitrust concepts, and the list of states that have adopted the 1997 Uniform Principal and Income Act keeps growing—these versions have either the language approving unitrusts or the language approving trustee discretion in characterizing principal and income in a unitrust manner.

Our Section has been active in many other ways. For example, under the able leadership of Kenneth Seavoy of Marquette, a number of new pamphlets describing various probate matters are being made available to the members of the State Bar for distribution to our clients.

I now look forward to joining that band of merry pranksters consisting of ex officio members of the Council, such as Patricia Gormely Prince, Brian Howe, John Bos, and others of their ilk, that add to the spicy and entertaining discussions of law, policy, and current events that make the Council meetings so enjoyable (and unpredictable). I am sure Hoffius joins with me in extending a heartfelt invitation to attend the Council meetings. The list of meeting dates and places is located on the back of each issue of the journal.

My fifteen minutes are now about up. I see the hook approaching.

John A. Scott

Facilitative Mediation—A Good Option

By Catherine A. Jacobs

In November 2001, as part of my duties as chairperson of the Ingham County Bar Association Probate and Trust Section, Judge R. George Economy asked me if I would put together a committee to develop an alternative dispute resolution (ADR) plan to be adopted by the Ingham County Probate Court pursuant to MCR 2.410.

I am embarrassed to say that before Judge Economy's request, I had given little thought to MCR 2.410 and 2.411, to MCR 3.216, or to the concept of facilitative mediation. During the committee meetings, I learned that at least two other attorneys in the Lansing area had taken the required 40-hour training course to qualify as facilitative mediators in general civil litigation. I immediately started looking for an approved course and soon completed the 40 hours necessary for mediating general civil litigation. I was so impressed that I took a second 40-hour course that was part of the qualification process to become a court-approved facilitative mediator in domestic relations.

Before the end of the first day of training, I realized that facilitative mediation is radically different from case evaluation (which used to be known as mediation). In case evaluation, case evaluators review the case presented by the lawyers and recommend a settlement amount; in facilitative mediation, the mediator is a truly neutral third party. Facilitative mediation also differs from the more familiar evaluative mediation. In evaluative mediation, the mediator or mediators encourage settlement by pointing out the weakness or strength of a case and by predicting what the particular judge or jury might do. By the end of the training, I had become convinced of the benefits of facilitative mediation. By the time I had completed my second 40-hour course, I knew it

was important that lawyers work to make facilitative mediation the preferred model of various ADR methods.

Facilitative mediation is not restricted to cases that are before the court (cases that have had either a petition or a complaint filed with the court). A lawyer would serve his or her client well by suggesting that the client consider facilitative mediation from the beginning of any dispute.

Facilitative mediation is a process by which a neutral third party, the mediator, facilitates communication between the litigants and assists them in identifying issues and developing various solutions in an effort to reach a mutually agreeable settlement. Facilitative mediation is good for both the legal system and the participants in the system.

In facilitative mediation, the focus is on active and meaningful participation by the litigants and not just their attorneys. The litigants, through discussions guided by the facilitator, are responsible for developing and crafting a resolution to the dispute. This results in a process that empowers the litigants and provides them with a sense of ownership in the resolution. For this reason, there is a stronger likelihood that the parties will adhere to the settlement reached than when a decision is made for them by a judge, a jury, an arbitrator, or a mediator given binding authority.

The facilitative process is generally informal and relaxed compared to other ADR methods. For instance, parties in facilitative mediation are allowed to bring to resolution issues that they would not be allowed to address in court, where the confines of court rules and rules of evidence limit the information presented to reach a decision.

The confidentiality of the entire process also factors greatly in the success of the

process. This encourages all parties to be open without the fear that something is being given up in the case. Another significant element is the neutrality of the mediator. This reduces the tendency of the parties and their counsel to posture and *Agame* the mediator as typically happens when the third party is a decision maker rather than a mediator. The parties are usually informed of these two elements at the onset of mediation and, if necessary, may be reminded of the elements during the mediation.

Facilitative mediation is particularly appropriate for cases in probate court. Few matters that come before the probate court lack an emotional element; many involve years of angst and bitter family feuds. Fights often involve more than just dollars. In many cases, it is the emotional element that has brought the case to court or hindered previous settlement attempts. Because facilitative mediation is designed to encourage parties to resolve issues, it is particularly well-suited to this type of conflict. It provides the parties with a non-threatening, neutral form in which to have their "side" heard and, once the venting is complete, often settlement is not far behind. Facilitative mediation is therefore a good option in almost all cases that come before the probate court. In particular, it should be the choice in all cases where there will be continued involvement of the parties, such as those involving guardianships, conservatorships, and trust administration.

In my conversations with a number of lawyers, I have discovered that there are some serious misunderstandings about the facilitative mediation process. These misconceptions undoubtedly contribute to these lawyers' resistance to recommending facilitative mediation to their clients. Contrary to the understanding of some lawyers, it is not a process that eliminates involvement of the lawyers. There is no rule that the lawyer should not be present and participate. When

parties are represented by counsel, it is my preference that the lawyers be present and participate in the mediation. It is the job of the mediator to keep the lawyers from taking over the mediation by posturing and advocating. The model taught in the course offered by ICLE, in which one of the trainers is Tracy Allen (one of the authors in this issue), always includes the presence and participation of the lawyer when parties are represented by counsel. Many times, the party is not willing or comfortable in the beginning of the mediation to speak. The lawyer may speak for the party. Inevitably, as the process continues, the party becomes more comfortable and, therefore, is willing to speak and actively participate. It is the encouragement of the active participation of the party that makes the facilitative mediation unique. How many times have you heard the complaint, "I don't know what happened—the lawyers went into a room and worked out the settlement"? How many times have you been challenged by a client who asks whether the mediator knew this or that? Facilitative mediation is designed to encourage full participation by the parties to resolve all issues between them, to give them ownership of the settlement they have crafted, and to result in an agreement that will have few, if any, post-agreement problems.

The goal of ADR should not simply be to settle cases and remove them from this month's docket. The goal is not only to settle cases but also to keep them from returning. This is the purpose of facilitative mediation. The participation of the parties, as well as the lawyers, is essential to this goal.

Lawyers are fearful they will lose revenue or, worse, they will lose control of their client by encouraging the client to participate in the facilitative mediation process. Regarding losing fees, it would be interesting to take a head count of the lawyers who have had to cut his or her fees as the case drags on and on. Sound familiar? Further, prior to a client set-

ting his or her case at mediation, the client will need to be made aware of the strengths and weaknesses of the case. This can be done only after full discovery, research, and assessment by the lawyer. Regarding the concern that the lawyer will lose control of the client, the lawyer continues to participate in the mediation process; however, the client also plays an active role in the mediation, something that either does not occur or happens only on a limited basis under other forms of ADR. The increased participation by the client will not cause the lawyer to lose control of his or her client. The client will be looking more to the attorney for guidance because of the client's expected participation.

Another misunderstanding or misconception is that this is the "touchy feely" process, and we litigators shrink from being labeled as "touchy feely." Nothing could be further from the actual practice. I am still waiting for my first "touchy feely" mediation. When personal feelings such as "Mom loved you more" enter into the case—which are frequently the underpinning of any dispute in probate court—"touchy feely" seems as distant as the planet Mars. At times you feel more like a referee than a facilitator. Frequently during training, instructors state that the mediator does not own the outcome, the parties do. We must keep in mind that, likewise, lawyers do not own the outcome and should not discourage clients from considering all ADR tools available to them. As lawyers we should welcome a process where winning at all costs and leaving a wake of rubble behind is not the ultimate goal. In facilitative mediation, we can use the law and legal system to assist clients in evaluating the strength and weakness of their position as well as the emotional and financial cost from sticking to that position all the way to trial. A client can probably get even in a trial for "Mom loved you more," but it is doubtful that the client will benefit from or be satisfied with the result. Facilitative mediation allows the parties to

hear the concerns of the others in a neutral environment. The mere acknowledgment of such feelings can cause the animosity to subside and allow the parties to resolve disputes. They probably will not leave hugging each other, but they will leave satisfied that they were allowed to present their issues and participate in the resolution of issues.

A client benefits from the process because the client has an opportunity to present his or her full case, including those issues that are not monetary issues, but are important, and sometimes crucial, to the client and the settlement of the case. The trial procedure seldom gives this opportunity. Clients who do go to court discover that their Aday in court[®] is less than a great experience. Clients really do not want to air their dirty laundry in a public courtroom. To the contrary, the thought of having to be in a courtroom and having to testify is repulsive to most people. How many times have you had a client beg to be placed on the stand and be cross-examined by opposing counsel? Facilitative mediation allows the client to have his or her opportunity to present all the important issues, and to do so, not only to a neutral party, but to his or her opponent. Many times this is the first opportunity or only opportunity for the client to do this.

The courts benefit from the easing of the court docket, both today and tomorrow, as cases are settled through the facilitative mediation process. Under the preexisting system of ADR (which was called mediation but is now known as case evaluation), the court frequently becomes tangled in litigation after the base dispute is settled. The hallmark of facilitative mediation is that the parties actively participate in the process and themselves formulate a settlement of disputes between them. The parties take ownership of the settlement they have crafted together, and the likelihood of disputes over the settlement is greatly reduced. Because the parties have participated and have crafted the agreement

together, the parties are inclined to live up to each of their obligations.

In the course for domestic facilitative mediators, one of the course participants was the Honorable Bill Callahan of the Wayne County Circuit Court Family Division. Judge Callahan took the course because he personally wanted to know more about the process to which he would be directing litigants. Judge Callahan's words are applicable to facilitative mediation regardless of the forum of the case. He wrote to the instructor and the participants after taking the facilitative mediation course and expressed this opinion:

During the role-playing sessions, my feelings about the mediation process changed significantly, opening my mind to a new way of bringing people with adverse positions together. By encouraging a cooperative process, a facilitative mediator is more likely to achieve a more satisfactory outcome whereby the participants can feel as if they controlled the outcome as opposed to a third party forcing them into an agreement.

I expect that the facilitative mediation process will become increasingly more popular with both family law practitioners and judges. I also expect that there will be exponential growth in the use of this technique.

. . . The working lives of attorneys will be much less stressful as these methods expand in popularity (emphasis added).

Is there anyone who would reject a process that has the potential to reduce stress?

I am enthusiastically convinced of the benefits of facilitative mediation and wish to make Michigan practitioners aware of this process and to encourage them to use it.

The authors who have volunteered to contribute to this issue come from different perspectives. John Allen writes as lawyer and facilitator, addressing the application of the Dodge Act and mediation to the probate practice. Patricia Gormely Prince and Shaheen

Imami give lawyers the basics on knowing when mediation is appropriate and preparing themselves and their client for the process. Tracy Allen has the most experience as a mediator. In addition, she has trained others in the art of facilitative mediation. Tracy Allen has written an informative article on caucusing as part of the mediation process. George Bearup reports on the experience of practitioners and facilitators in the northern counties of Grand Traverse, Antrim, and Leelanau, where facilitative mediation has been the successful norm for many years. Each author brings to this publication experience, quality, and variety. I encourage you to read each article and prepare for the sign of the times: facilitative mediation.



Catherine A. Jacobs practices with the firm Loomis, Ewert, Parsley, Davis and Gotting, PC, Lansing, Michigan, and concentrates in the areas of estate planning, estate taxation, estate and trust administration, probate and probate litigation, elder law, adoption, family law, and transportation law. She is a former member of the Council of the Probate and Estate Planning Section of the State Bar, a former member of the board of directors of the Ingham County Bar Association, and is the chairperson of its Probate and Trust Section. Ms. Jacobs served on the State Probate Rules Committee. She is a current member of the State Bar of Michigan's Judicial and Professional Ethics Committee and Multi-disciplinary Practices Committee. She is coeditor of *Trust Administration in Michigan* (ICLE 1999 & Supps) and is a contributing author to *Taxation of Estates and Trusts* (ICLE 1994 & Supps) and *Michigan Probate Litigation* (ICLE 2d ed 2001 & Supps). Ms. Jacobs is an approved mediator for both general civil litigation issues (probate and circuit courts) and family law issues.

Let the Dodge Brothers Drive You Home—Using the Dodge Act and Facilitative Mediation to Resolve Probate and Trust Litigation

By John W. Allen

John Dodge and his brother Horace are American legends. Together, they and the Dodge Company built an American industrial giant, yielding a brand still honored by the nameplate on many of the vehicles we drive today. Their ingenuity and hard work produced a family fortune that spawned a host of charitable good works as well as a monumental Michigan probate dispute.

At age 43, John Dodge remarried, taking Matilda Rausch as his wife, and fathered a second family of three children. After his death in 1921, his dual families and his brother-executor, Horace, launched into a series of legal battles that, over the ensuing years, filled many pages in the Michigan appellate reports.¹ Like the infamous case *Jarndyce v Jarndyce* in Charles Dickens' *Bleak House*, close observers could watch heirs born into and die out of the continuing struggle. For a long while, it seemed to have no end in sight.

The Dodge Act

Ultimately, the Michigan legislature provided the solution. In Public Act 249 of 1921, it amended what was then the Michigan Probate Code, adding a provision that permitted estate heirs and legatees to agree on an alteration of the distributive shares from those allocated by the instruments, thus allowing the long and entangled disputes of the John Dodge Estate finally to end. Today this statute is MCL 700.3914 of the Estates and Protected Individuals Code (EPIC); similar provisions for agreements among trust beneficiaries are now in MCL 700.7207, the revision and replacement for the Settlement of Trust Disputes Act. Aware of their historical antecedents, many lawyers still refer to these statutory provisions as “the Dodge Act.”

Together, these statutes permit virtually

unlimited discretion for interested parties to alter their interests under a will or under the laws of intestacy and for trust beneficiaries to resolve contests, controversies, and questions of construction or interpretation concerning the existence, administration, or termination of an irrevocable trust. Subject only to the rights of creditors and taxing authorities, good faith and reasonable settlements must be accepted by the court and are binding upon the fiduciaries.

Some may think this violates the fundamental principle of the law of wills and trusts, which holds that properly written directions of the testator or settlor should be followed to the letter. Others persuasively contend that the Dodge Act provides a desirable, and often necessary, method of dispute resolution and an essential tool for the twenty-first-century probate and trust practitioner. Together with facilitative mediation, the Dodge Act also allows Michigan lawyers to be healers in some of the most difficult family disputes.

The History of Lawyers as Healers

The history of lawyers—even trial lawyers—is not to do battle, but to prevent it. In the early twelfth century, faced with increasing incidents of violence and local nobles assembling private armies, Henry II systemized the earlier experiments of his grandfather, Henry I, by sending his “court” (in the form of traveling justices) on regular circuits throughout his realm.² The purpose was to substitute peaceful resolutions of disputes for the old method of trial by battle.³ Advocates soon emerged to represent those appearing at the local “court,” and the tradition of Anglo-American lawyering was born. From the beginning, the intended role of lawyers

was to remove the sting and cleavings of trial by battle. Thus, even for litigators, history emphasizes the lawyer's role to resolve disputes, not to create them.

This duty continues today in the Michigan Lawyer's Oath, which states:

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.⁴

Modern leaders of the profession have reaffirmed our duty as healers. Twenty years ago, U.S. Supreme Court Justice Warren Berger, frequently a candid and healthy critic of our profession, observed:

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. . . . Law schools have traditionally steeped the students in the adversary tradition rather than in the skills of resolving conflicts.⁵

More Probate and Trust Contests

Probate and trust conflicts are on the rise. In its time, John Dodge's estate had unusual characteristics. The testator and settlor had died with two families. And the assets were enough to make the fight seem worthwhile. In twenty-first-century Michigan, these characteristics are not unusual. Approximately half of all estates will involve a decedent with two families. And, due to decades of healthy economics, most estates will have plenty of assets worth fighting about. Probate and trust adversary litigation has become a growth business.

But the harm to the families is fundamental and profound. The wounding hurt of the loss

of a parent or loved one is only exacerbated by contested, adversary proceedings. The sting of a legal battle may sometimes yield catharsis but only at a substantial price, both financially and emotionally.

Will contests and trust contests often revolve around dissatisfaction by one or more legatees and beneficiaries with the allocations dictated by the terms of the will or trust. While the Dodge Act provides a statutory method for modifying those allocations, it still requires, as a precondition, that the legatees and beneficiaries agree on those modifications. This is where facilitative mediation can play a crucial role.

Facilitative Mediation—Essential Elements of a Different Animal

Facilitative mediation is not the misnomered "Michigan mediation" (now case evaluation) that has existed under MCR 2.403. In fact, case evaluation is not mediation at all. Rather, that procedure represents a form of evaluation coupled with potentially large sanctions to a rejecting party; in appropriate cases, such evaluation may be useful in ending the court contest and closing the file, but it does little to assist the parties in repairing the human damage caused by the dispute. Especially in disputes involving family members, we should expect and do more.

Facilitative mediation is a different animal, the structure of which may be designed by the parties themselves; resolution comes only from the parties' agreement with each other and is never imposed by the mediator. Successful facilitations frequently share some commonly employed methods and characteristics. These include a skilled facilitator, adequate time, perseverance, and closure by enforceable agreement.

A skilled facilitative mediator does not attempt to impose any particular resolution on any one. Instead, through proven techniques honed by formal training and experience, the

facilitative mediator assists the parties in finding their own solutions.

Facilitative mediations take time. Under the former Michigan mediation and the current case evaluation of MCR 2.403, many courts schedule case evaluations to be held on a machine like basis, frequently permitting only 15 to 30 minutes per case. While even John and Horace Dodge might be proud of such production-line efficiency, it is extremely rare that a facilitative mediation can succeed in less than one-half to a full day and often will take even longer. The parties need time to vent their frustrations and strong feelings and to find their own routes to what each individually recognizes as a reasonable result.

Facilitation also requires perseverance. Although no one should ever be required to reach an agreement, it is reasonable that the parties and their counsel be strongly encouraged to stay the course until the methods of facilitation are given a reasonable chance to work. The parties and their counsel often agree not to depart from the mediation until first giving the mediator adequate notice and an opportunity to persuade them to stay.

Finally, any agreement by the parties should be marked by closure with an enforceable agreement. Any agreement reached at the mediation should be reduced to a signed written evidence of settlement before the parties depart. This makes the settlement enforceable under Michigan law, even when a court appearance is not immediately practicable.⁶ If not preserved by an enforceable writing or a recital on the court record, yesterday's agreement can be overcome by tomorrow's buyer's remorse; closure is lost, and the facilitative mediation will have been wasted.

Because facilitative mediations often conclude after normal business hours, court appearances are not always available when the parties want to memorialize their settlement agreement. One alternative is to draft a written memorandum that is signed before

departure and then later converted into a more formal agreement.

Under Michigan law, a "writing" can also include an electronic recording.⁷ Thus, another alternative to comply with MCR 2.507(H) might include reciting the settlement terms onto a magnetic audio recording tape or disc, with the parties and attorneys signing an attestation, incorporating by reference the contents of the tape recording. Later, the transcript of the tape can be used as the settlement document or as the basis for a more formal writing. An example of the written evidence of settlement is attached as exhibit A.⁸

Conclusion

The high emotional stakes of family disputes place a special obligation on probate and trust practitioners to use nonadversary alternatives to dispute resolution. The Dodge Act and facilitative mediation offer special opportunities to Michigan lawyers to serve not only their clients but also the best goals of the profession as a healing art.



John W. Allen is a partner with Varnum, Riddering, Schmidt & Howlett, LLP, in Kalamazoo, Michigan. He is a Certified Facilitative Mediator, chair of the State Bar of Michigan Grievance Committee, and incoming chair of the American Bar Association Tort and Insurance Practice Section Professionalism Committee. Special thanks and acknowledgment go to Catherine Jacobs, Dirk Hoffius, and Kristen Beutler who gave valuable assistance to the preparation of this article.

Notes

1. *In re Dodge's Estate*, 242 Mich 156, 218 NW 798 (1928). *Dodge v Detroit Trust Co*, 300 Mich 575, 2 NW2d 509 (1942).
2. Theodore F. T. Plucknett, *A Concise History of the Common Law* 103 (5th ed 1956).
3. Thomas Pitt Taswell-Langmead, *English Constitutional History* 58 (1960).
4. Rules Concerning the State Bar of Michigan, Rule 15, §3(1).

5. Justice Warren Berger, "Annual Report on the State of the U.S. Judiciary," given to the American Bar Association Annual Meeting in Chicago, Illinois, on January 24, 1982, as reported by the ABA Journal 68, 274-277 (March 1982).
6. See MCR 2.507(H).
7. See MRE 1001(1).
8. Original credit for this device goes to facilitative mediator Sheldon Larky, of Bingham Farms, Michigan.

Exhibit A

STATE OF MICHIGAN
 _____ COUNTY PROBATE COURT

IN THE MATTER OF:

Petitioner,

v.

Respondent.

File No.: _____

_____ /

EVIDENCE OF SETTLEMENT AGREEMENT

Facilitative Mediator: [insert name]

Date: [insert date]

Pursuant to MCR 2.507(H), the undersigned parties have entered a settlement agreement according to the terms described in the electronic recording, a copy or transcript of which is incorporated by reference.

This is intended to be the **Evidence of Settlement** required by MCR 2.507(H) and may be used by the court to enter judgment or any other appropriate order.

Petitioner

Respondent

APPROVED:

APPROVED:

Attorney for Petitioner

Attorney for Respondent

The Probate Judge Ordered Mediation—Now What?

By Patricia Gormely Prince and Shaheen I. Imami

Attorneys involved in probate litigation are well aware that contested dockets are becoming increasingly congested (at least in the Detroit metropolitan area). It is not uncommon for even relatively straightforward cases to take years to resolve due to the strain on judicial resources. Recently, however, probate judges are taking advantage of MCR 5.143(A) more actively in an attempt to alleviate some of this congestion and give many parties the opportunity to resolve their differences over a period of days rather than months or even years.

Specifically, MCR 5.143(A) allows the court to “submit to mediation, case evaluation, or other alternative dispute resolution process one or more requests for relief in any contested proceeding.” In practice, probate judges usually rely on mediation (also referred to as “facilitation” by many practitioners) as the alternative dispute resolution (ADR) process of choice. Mediation is the only ADR procedure (outside of the often laughable process of case evaluation) for which the Michigan Court Rules provide an explicit and ready-made procedure. This article will briefly outline the provisions and procedures of court-ordered mediation as well as considerations that should be taken into account by attorneys and their clients alike.

What Is Mediation?

This is actually something of a trick question. Because of the amendments to the Michigan Court Rules that became effective in August 2000, the meaning of the term *mediation* is no longer what it once was (a very familiar concept to those of us getting older). Before the amendments, *mediation* meant submitting the issues to a panel of three mediators who would evaluate the facts and law

and then render an award based on the perceived merits of the case (or so it went in theory). After the amendments became effective in August 2000, this old method of mediation was renamed “case evaluation,” and a process formerly known as “facilitation” was tweaked and renamed “mediation.” It was much like the reinvention of Coke Classic after the introduction of the much-reviled abomination known as New Coke.

This article will only address mediation as we now know it and not any of the other forms of ADR permitted by MCR 2.410, including case evaluation and arbitration, or the Coke debacle for that matter. With this in mind, the idea of mediation is rather simple. In short, mediation is merely a negotiation between two (or more) sides with a neutral third party (the mediator) acting as a go-between and, in some cases, a buffer. The formal definition provided by the Michigan Supreme Court in MCR 2.411(A)(2), however, is somewhat more lengthy:

“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.

Mediation is not a process by which the mediator acts as an arbiter in deciding who is ultimately right or wrong. Moreover, the mediator has no power to make any binding award or decision in favor a particular side. These facts are clear from MCR 2.411(A)(2) and should be made abundantly clear to clients so they understand that they are not giving up any rights to have the issue decided by the court (or possibly a jury). In explaining the idea and process to a client, it might be helpful for attorneys to liken a mediator to a marriage counselor. It is also important to tell

clients that any statements made by either side throughout the mediation cannot be used in other proceedings, including trial.

Do We Have to Go?

Unfortunately, in some instances the reality that the mediator has no decision-making authority can lead to reluctance by the client regarding participation. In fact, many clients might ask, "What's the point?" Unfortunately for the often petulant client, the probate judge's order carries with it the same force and effect of Captain Picard's instruction to Number One: "Make it so." Hence, even if you and your client and the other side consider mediation to be an act of futility, it must be done; everyone might sit on their hands and stare at the table without speaking to each other, but it must be done.

What Happens Now?

Now that your client knows mediation is unavoidable, the issue becomes whether he or she will give the idea of mediation at least a fair chance to work or will he or she merely sulk. Faced with the fact that over 90 percent of civil cases settle, no attorney should be shy in discussing with his or her client, in very frank terms, the possibility and ramifications of settlement. Although it is true that probate litigation is more likely to involve "principles" or personal animosity rather than other types of civil litigation, in the end, cost and fatigue still drive the vast majority of parties to settle their disputes. This does not mean, however, that we should ignore factual and legal issues that support our client's position. Instead, it means that our role as attorneys should be to temper zealous representation with well-known and anticipated practical considerations. Sometimes this means forsaking a drawn-out fight (and additional fees) in exchange for a more expedient (and ultimately less expensive and emotionally draining) resolution. Like any other negotiation, a suc-

cessful mediation requires a win-win situation. It also requires a level of client trust, control, and focus that many attorneys find difficult to achieve given the basic nature of probate disputes. So, for those attorneys who view mediation as a genuine opportunity for resolution and can successfully convey this to their clients, there are three basic considerations that must be addressed.

The very first is selecting the mediator. In choosing a mediator, MCR 2.411(B) permits the parties to either stipulate to a particular individual or have one chosen for them from a list of court-approved individuals. Importantly, if the parties agree on a mediator, the court *must* appoint that individual. So the goal, unlike in case evaluation, should be to find someone who is reasonably unbiased so neither side feels shortchanged even before discussing the issues. Keeping in mind the ultimate goal of settlement, the chosen mediator should also possess an ability to control what often can become a three-ring circus of unbridled emotion and visceral expressions of dislike by the parties. Certainly, no attorney even offhandedly familiar with probate litigation will disagree that postdeath disputes are among the most hostile, rivaled only by divorces. Clearly then, the parties' agreement on a mediator becomes quite important when the alternative is a court-appointed mediator who, although qualified on paper, might be unable or unwilling to assert the necessary calming control to move settlement discussions forward effectively.

The second consideration is cost (and it goes hand in hand with the first) because mediation can be expensive to clients. Not only are the clients paying for the attorneys' time, but they are also incurring an hourly charge for the mediator's time. These costs can range from \$150 per hour to more than \$300 per hour. Fortunately, costs can be minimized (relatively, of course) if the clients are serious about settlement. Regardless, the fact

remains that a successful mediation is almost always cheaper than even a successful trial.

The final consideration involves the client's expectations. It is impossible to represent a client effectively in settlement negotiations without knowing the differences between deal breakers and throwaway items. Getting to this point will require a serious conversation with your client, during which you discuss the strengths and weaknesses of your case, as well as the things that your client can live with and without. You and your client must understand that this is a negotiation; its success lies in compromise.

How Do I Prepare?

This may sound like a quote from Yogi Berra, but the best way to prepare is to be prepared. As the attorney, you must be very familiar with the nuts and bolts of your case because your negotiating position is derived from the strengths and weaknesses of your case. Fortunately, a skilled mediator will be able to consider your case from a neutral position and give you constructive feedback to supplement your own view.

Aside from preparedness, there are several practical steps to take in getting ready for mediation. First, if the mediator is someone with whom you are not familiar, definitely talk to other attorneys to get a variety of opinions.

Second, contact the mediator and ask what types of materials he or she wants. More likely than not, the mediator will want a summary that concisely presents the issues, facts, and laws applicable to your case. Although you should certainly present your case persuasively, you should work hard to avoid sounding overly biased and appearing ignorant of obvious weaknesses. Also, if the mediator does not specialize in probate law or estate planning, the limited use of citations can be useful (but avoid using string cites). With regard to supporting documentation, ask the mediator or the mediator's staff what to

include and (sometimes more important) what to exclude. For instance, some mediators might be content with quotes from deposition testimony, while others like to have the entire transcript so statements can be placed in the proper context.

Third, ask the mediator whether opening statements are expected or permitted. Even though a skilled and conscientious mediator reads each party's submitted materials, it is still common to permit opening statements so that each side can highlight the strengths of his or her case. In truth, this is probably more important to the clients than it is to the attorneys or the mediator (unless, of course, you get stuck with an ill-prepared mediator). So, prepare something short and sweet that hits the highest points of your case, probably no more than five minutes.

Finally, sit down with your client and discuss your negotiating strategy as well as what the client *must* have to be willing to settle the case. Remember: the entire idea behind negotiation and settlement is that all sides make concessions to get what they really want. It is also important that you share the outlines of your negotiating strategy (e.g., deal breakers versus throwaway items) with your client in terms that he or she will find easy to understand to avoid unnecessary confusion or anxiety.

The Day of Reckoning

On the day of mediation, the mediator will usually address, at the outset, all of the parties together as a group. The mediator will outline his or her rules, procedures, and expectations for the mediation and make certain that everyone understands that the goal is settlement. At this point, if your client is not serious about settlement, by all means let everyone else know so that no more time than necessary is wasted.

After each side finishes giving an opening statement, the mediator will normally hold

breakout sessions to address the parties separately and better identify expectations. It is during these sessions that the mediator truly begins to gauge the possibility and requirements of settlement. It is also the time when the mediator tells you and your client what difficulties you will likely face if the case goes to trial. The mediator will usually go back and forth between the parties until a settlement is reached or until it becomes obvious that the parties are too far apart in their expectations. Depending on the circumstances and the commitment of the parties, the mediation can take as little as an hour or as long as a day or more.

It's Over—Now What?

Obviously, the case either settles or it does not. Either way, pursuant to MCR 2.411(C)(3), the mediator is required to report the results to the court within seven days of conclusion of the process. If a settlement could not be reached, the parties march on toward trial. If a settlement has been reached, it is very important to reduce the agreement to writing. The writing need not be a tome, but it should at least outline what each party will get under the settlement and the time for each party's performance. If at all possible, this agreement should be completed while still with the mediator. This will help prevent any buyer's remorse that might crop up later. Further, after a successful settlement, MCR 2.411(C)(4) requires the attorneys to "prepare and submit to the court the appropriate documents to conclude the case."

Conclusion

Certainly, no alternative dispute resolution method is foolproof and a sampling of experienced attorneys will undoubtedly yield a variety of opinions about the effectiveness of mediation. Yet, if approached with the proper frame of mind by the parties and handled by a skilled mediator, the process of mediation can

and does provide a viable alternative to trial, even for some of the ugliest cases. In such instances, mediation more often than not saves everyone a great deal of time, money, and aggravation. This is confirmed by our own experience. (In fact, Pat Prince has not only had a number of cases reach settlement through mediation, she has also successfully mediated several cases.)



Patricia Gormely Prince, of Patricia Gormely Prince, PC, Farmington Hills, Michigan, practices in the area of probate and estate planning. She is a former chair of the Probate and Estate Planning Section of the State Bar of Michigan.

Ms. Prince is a member of the Women Lawyers Association of Michigan and of the Real Property, Probate and Trust Law Section of the American Bar Association. She is a past managing editor of the *Michigan Probate and Estate Planning Journal*, is a supplement author for Lawyers Cooperative Publishing Company, and contributes to several ICLE publications.

Shaheen I. Imami, of Patricia Gormely Prince, PC, Farmington Hills, Michigan, practices in the areas of probate litigation, real estate law, commercial law, immigration law, energy law, fiduciary income tax law, and general practice. Mr. Imami is a member of the Detroit, Federal, and American Bar Associations, the State Bar of Michigan, and the American Immigration Lawyers Association.

The Caucus in Mediation—It's More Than Shuttle Diplomacy

By Tracy L. Allen

With the adoption of MCRs 2.410 and 2.411 almost two years ago, mediation formally arrived in Michigan. Since then, Michigan lawyers have learned to use the new alternative dispute resolution (ADR) court rules to their advantage. They have figured out how to select the appropriate mediator. By necessity, they have changed their advocacy style to be effective in mediation. They are even counseling and preparing their clients to be civil, empathetic, and persuasive in mediation. In fact, many attorneys firmly believe this “ADR stuff” has merit.

Imagine yourself embroiled in a continuing probate adventure. The case has been languishing in the court system for 13 months. It occupies an entire corner of your office. Emotions and tempers are running almost as high in your office as the level of mistrust pervading the family unit. After seeing the decedent's estate dissipating to cover legal fees, the judge, cognizant of the impact of “Father Time,” orders the case to mediation. There is some skepticism about the process because the parties have not spoken to each other in two years. The clients are apprehensive about being in the same room with each other. Nevertheless, you have confidence. You believe the opening joint session will provide fertile ground for self-expression by the parties. You believe facilitated communications will drive the participants toward closure. You also know that if that doesn't work, the mediation caucus will provide a safe haven; the parties can be separated.

The mediation begins. After each participant is given the opportunity to express his or her views on the case, the mediator continues the joint session. The mediator begins to ask questions and delve into areas that make the clients and the lawyers feel uneasy. You say to yourself, “This family is dysfunctional. No

one has gotten along in ten years. The estate settlement process has become an annuity for our office. The relatives can't agree on anything. It's a real toss-up whether or not they can remain in the same room with each other. How soon can we go to caucus? This case will collapse if we don't break into a caucus.” The other lawyer suggests a caucus. The mediator keeps going. No caucus. What is happening?

The “Limited” Caucus Model

The rules of the new game have changed again, but perhaps no one has told the lawyers. Before the new court rules, the majority of Michigan mediation participants expected to spend most of the mediation session in separate rooms, away from each other. This is not the model being taught to mediators desiring to do court-ordered mediation under the new court rules. Just as there are many styles of mediators, there are also different models of mediation. The model many came to know before the court rules has limited, if any, opening statements and joint sessions and relies heavily on caucus negotiating. This approach keeps the parties apart, thus requiring the mediator to be both messenger and receptacle. Not surprisingly, this model is not always effective or appropriate.

As mediation gains favor in the litigation arena, trends across the country are also adapting to change. Experience shows that many rewarding settlements are reached in mediation without a caucus. In fact, Harvard is teaching a mediation model that has no caucus. Following the global wave while remaining true to visionaries of the mediation process, Michigan has adopted a model under the new court rules that leaves much of the mediation process in the hands and control of the participants. Consequently, when

the State Court Administrative Office (SCAO) set forth its guidelines for training court-appointed mediators, it chose a mediation model that uses the caucus sparingly.

Some lawyers and mediators may argue that the SCAO model is “perceived madness.” These are lawyers and mediators who may only know how to mediate through shuttle diplomacy. Their model of mediation ignores the fundamental feature and value of mediation as a joint conflict-resolving process. As the Model Standards of Conduct for Mediators states, mediation is “based on the principle of self-determination.”¹ The process relies on the parties working together to reach a voluntary, uncoerced agreement with the aid of a neutral third party who guides the negotiations.

To better achieve these principles, the fundamental philosophy that solutions “stick” better and longer when parties are jointly contributing to the solution design and implementation is at the core of the SCAO model. When it comes to persuasion, personal experiences beat facts and logic. Personal experiences work because they keep the parties engaged. The parties therefore pay attention and process the information. From personal experience, participants are able to form opinions without depending on others with suspect motives.² Keeping parties physically together and focused on the possible solutions furthers their personal experiences.

In this design there also exists assumptions and recognitions regarding basic human tendencies and simple rules of interest-based negotiation. For disputants to reach a mutually agreed-on solution, they need to be informed of and understand the needs, interests, and concerns of the opposition. Successful results in mediation do not require the participants to agree with each other’s needs, but only to acknowledge them. Through this recognition, participants are better able to brainstorm and propose solutions that address the particular obvious and not-

so-obvious interests of each party. These goals are difficult to achieve if the parties are separated and working through the mediator as an interpreter.

The Caucus Should Have a Purpose

What is the purpose of the caucus? Some users of mediation have never given this question a single thought. They just expect to end up in a caucus shortly after the mediation begins. Most have never analyzed the reasons for, or the effectiveness of, the caucus.

Admittedly, there are many reasons for going to caucus, but it may surprise even sophisticated users of mediation that there are a variety of types of caucuses. Both the type and timing of a caucus in mediation must be purposeful. Early in the development of mediation in Michigan, it was thought that the caucus was a private meeting of the attorney, client, and mediator. It was also assumed that once the caucus occurred, the participants would not return to joint session. These practices frequently resulted in participants spending six to ten hours of a mediation separated from each other, waiting for the mediator to return with news and counterproposals from the other room. At a minimum, this pattern is counterproductive to the notion of self-determination through joint corroboration.

There is good news. This somewhat old-fashioned approach is giving way to newer, more creative uses of joint sessions and caucusing. The caucus can be a meeting just between lawyers with or without the mediator. It can be a conference between one lawyer and the mediator. Often the caucus can be a meeting of the parties with or without counsel, with or without the mediator, etc. There are no fixed rules. The use of the caucus should be based on the perceived needs of the participants at the particular moment in the process. There is no model that says joint sessions cannot occur after a caucus. In fact, the SCAO model encourages returning to joint

session after the purpose of the caucus has been achieved.

Fundamental Principles of the Caucus

The fundamental assumption in using the caucus (when the mediator meets with only one counsel and client) is that a party and his or her attorney will be more forthcoming with information, admissions, and concessions in the privacy of a separate room, outside the view of the opponents. In the caucus, parties are able to communicate concessions and fears without being vulnerable. The information shared in the privacy of a caucus may be useful to the mediator in gaining a sense of the range of possible settlement options by understanding the “smoking gun,” the “true” feelings, and the “below-the-line” needs of the party that may help to advance toward settlement. Frequently the mediator wants to ask questions or develop a line of thinking in a party that, if done in the presence of others, might suggest a lack of neutrality. It is often in the caucus setting where tough “reality testing” of the elements of a case can be explored without the risk of loss to the participants. In these instances, the mediator times the use of the caucus and directs the content of the caucus discussion to serve the needs of the parties in the process.

Breaking into a separate session also provides people with the opportunity to evaluate settlement options and arguments without the pressure or influence of the opponent. It allows time to think, to cool off, to regroup, and to respond thoughtfully, not necessarily emotionally. In family and probate cases, where emotions often run high, particularly with respect to nonlegal issues, the caucus can be an opportunity for reflection on the reality of the situation vis-à-vis the logic of the dispute. The caucus also gives time to restructure a proposal and to evaluate a counterproposal. In short, the caucus offers breathing room.

While the use and value of a caucus changes case by case, one fundamental feature works against mediation goals. Once away from the opponent, parties are much freer to communicate deceptively and untruthfully. The confidential, protective cloak of communication with the mediator in a caucus creates temptation. Caucuses can become a breeding ground for deceptive techniques because the risk of being caught is substantially reduced.³ When the mediator or opposing counsel suspects information or reactions exchanged in a caucus, a return to the joint session may be useful to test the sincerity of the positions being espoused privately.

The Value of Joint Sessions

From the mediator’s perspective, joint sessions are purposeful. From the parties’ perspective, they are insightful. Much can be explored with the aid of the mediator if the tenor and safe surroundings of the joint session are effectively established in advance by the mediator. Although the caucus is a useful tool if used wisely, it should not be the fallback position after opening statements when the issues are flying all over the place, the parties are miles apart, and the mediator cannot get a grasp on an agenda. Rather, the caucus can be used to generate new or revised settlement options but only when the parties are not willing to explore them in a joint session. It is a common mistake for new mediators to separate into a caucus too early. As emotions climb and people become uncomfortable, the fleeing instinct sets in. Everyone wants to run from his or her uneasiness and the caucus provides a way of escape. Often, this is precisely the point in the process when the mediator needs to remain calm and confident, listening for needs and interests and then using them to assist and direct the joint discussion toward exploring the resolutions the parties seek. Excited utterances can be very revealing. Many opportunities for discussion fre-

quently surface when the parties are forced to confront and manage their own weaknesses and challenges in a joint session.

In the SCAO training model, mediators are taught to identify the purpose of a caucus and then use it to develop a specific goal. Once the goal is accomplished, the model encourages the participants to return to the joint session. From the mediator's perspective, this is quite economical and effective. If a party has a reasonable settlement offer, why should the mediator be the messenger? Give credit in the process where credit is due. Often attorneys attempt to "game" the mediator and make him or her the scapegoat. If counsel is insistent on making an offer the mediator considers unproductive, why should the mediator's credibility be at risk? When parties are in the depths of exchanging settlement proposals, is it efficient for the mediator to continue shuttle diplomacy, acting merely as a courier pigeon of one side's one percent move in response to the other side's one percent move? If the message is sincere, even if it isn't productive, should the mediator be the courier? If a great idea is proposed, why should the mediator take ownership of it? Why not let the idea maker present the option?

In evaluating the different models of mediation as well as the different styles of mediators, it is clear that no one model and no one method is a panacea. Each case has its unique characteristics and must be dealt with in an individual manner. Note, however, that the true spirit of mediation anticipates a process that belongs to the parties, not to their lawyers and not to the mediator. Most psychologists opine that in family or probate-related disputes, there is an obvious need to address nonlegal, highly emotional issues before resolution can occur. Mediators call it "venting." Sometimes this occurs in a caucus but experienced mediators will agree that much of it occurs, and needs to, in a joint session. This ties into basic human needs to be

understood, to feel heard, to seek revenge, and to win. Once this occurs, the door to resolution often opens widely. Much of this cannot occur if the parties are separated.

The Economy of Joint Collaboration

The mediator is also the catalyst for brainstorming settlement options. This is difficult to do if everyone is in different rooms and the mediator has to go from room to room with the ideas. In separate caucuses, each argument or proposal from a party may seem reasonable until the mediator presents it in the next room and hears why it is not so reasonable (only to find himself or herself subconsciously agreeing), and then returns for round two of what will and will not work. The ping-pong game begins. This is inefficient. It is a process that "games" the mediator and often results in little being accomplished except increasing frustration on the part of everyone in the mediation.

There is also the strong possibility that sooner or later, the mediator may misinterpret or miscommunicate the message. Although it is true that the mediator acts as a filter of information and processes it in a way to make a deal, sometimes he or she makes mistakes. In an effort to soften a threat or bolster an argument, the mediator delivers it inappropriately. Mediators who are guilty of this (and we all are) know how long it takes to unwind the mistake. Using the mediator as messenger provides a scapegoat. Parties can also hide behind the armor of the mediator, creating a false sense of security that sometimes must be shaken if the case is to settle. Before mediation, parties and lawyers hide behind legal arguments and theories as well as the security of the unknown. What they have been doing throughout the course of the dispute has not gotten them to resolution, so why should they remain in the zone that is not delivering the closure they may honestly seek? The caucus also leaves some parties feeling as though they have stepped away

from or gone outside of the decision-making process and have lost their direct influence on the result. They are missing out on their own personal experience. Separating parties may calm emotions, but direct participation in the resolution is frequently the critical ingredient needed to reach settlement.

Conclusion—A New Look to Mediation

The caucus has very specific and valuable uses in mediation. It can be a communication tool for the mediator to connect with counsel and parties. It creates a risk-free environment to challenge behavior, theories, or assumptions. It provides time to evaluate, reevaluate, and respond. It also creates a safe harbor for saving face and making concessions. But mediators and lawyers must not overlook the value of joint sessions, nor should users of the process fall victim to mediators who believe shuttle diplomacy is the only mediation model.

The beauty of the mediation process is its flexibility coupled with the mediator's style. It is through effective adoption of these key characteristics that value and successful results are brought to the participants. At the core of the mediation process is the foundational principle that ultimately, the process and the outcome rest in the hands and hearts of the participants. It is a corroborative process that requires not only their active joint participation but also their mutual understanding of positions, needs, and interests. Separating parties into caucuses not only slows this process, it often interferes with the parties' perceptions. Success in mediation for Michigan mediators, attorneys, and parties requires all concerned to take a new look at mediation models and make conscious decisions about the role of a caucus. Keeping ownership of the process and the settlement options in the joint hands of those who are relying on the mediation process to resolve their conflicts is a great beginning and ending to a successful mediation process.

Notes

- 1 The Alliance for Education in Dispute Resolution, "Model Standards of Conduct for Mediators." See http://www.ilr.cornell.edu/alliance/model_standards_of_conduct_for_m.htm for the full text.
2. Gene Bedell, *Three Steps to Yes—The Gentle Art of Getting Your Way* 194 (2000).
3. Jeffrey Krivis, *The Truth About Deception in Mediation*, Mediate.com (March 2002), at <http://mediate.com/articles/krivis11.cfm>.



Tracy L. Allen, of Sommers, Schwartz, Silver & Schwartz, PC, Southfield, Michigan, practices as a full-time neutral commercial mediator and arbitrator. She specializes in corporate, business, securities, tax, employment, and real estate matters in addition to designing strategic management processes for litigators and conflict resolution programs for employers. Ms. Allen has authored numerous articles and training materials on ADR in the areas of real estate, tax, securities, employment, technology, estate planning, and business planning for a variety of professional organizations, including the American Bar Association and ICLE. A former college and law school professor, Ms. Allen serves on the roster of several dispute resolution organizations, including state and federal courts, the National Association of Securities Dealers, the American Arbitration Association, the Chicago Board Options Exchange, and the National Center For Dispute Resolution. She is a fellow of the International Academy of Mediators and serves as the secretary/treasurer of the organization. Ms. Allen is a contributor to *Michigan Residential Real Estate Transactions* (ICLE 1999 & Supps) and *Michigan Basic Practice Handbook* (ICLE 5th ed 2001 & Cum Supp). She is a trainer in ICLE's 40-hour hands-on mediator training program.

ADR: The Grand Traverse Experience

By George F. Bearup

For some time now, Traverse City has attracted the reputation of being a bit ahead of the curve when it comes to the implementation of facilitative mediation as an effective dispute resolution mechanism. Across the state many attorneys and judges are puzzled about why facilitative mediation appears to work so well in Traverse City. They ask, "Why is Traverse City different from other parts of Michigan when it comes to the successful implementation of an alternate dispute resolution process?"

Dumb luck may be the short answer. A more serious albeit highly subjective analysis suggests that the Grand Traverse region's good fortune is the product of a fortuitous confluence of people, interests, and events, helping it to get the jump on the rest of the state in the implementation of an effective facilitative mediation regime. Several interviews with lawyers, judges, and court personnel helped to explain why the Grand Traverse–Leelanau–Antrim Bar Association is a step ahead in the integration of facilitative mediation as a viable option in dispute resolution. What follows is a brief chronology and some personal conclusions that hopefully shed light on this apparent success.

The Conflict Resolution Service (CRS), which appeared on the Traverse City scene in the late 1980s, was a precursor to the current court-mandated facilitative mediation. The CRS was formed by nonattorneys Tom and Darlene Shea. The Sheas had obtained training in conflict resolution services to carry out their personal conviction of pursuing peaceful solutions to broad social problems. They brought their personal belief to fruition with the creation of the CRS. In its early years, the CRS was community focused and far less concerned with more formal litigation-type disputes. Instead, the CRS focused its ener-

gies and resources on smaller neighborhood disputes like barking dogs, spite fences, loud radios, and driveway encroachments.

In the early 1990s, MaryAnne Macy moved from Valparaiso, Indiana, to Traverse City. Macy, also a nonattorney, brought with her exposure to the Victim Offender Reconciliation Program (VORP) used in Valparaiso. Macy's self-training as a facilitator rose from her personal interest in the Mennonite tradition of problem solving: Listen to what the victim has to say and then give the aggressor the opportunity to make amends to the victim by saying, "I'll fix it." Macy's background was first put to good use by her employer, the Council of Governments, in its Community Corrections Program.

Yet another critical innovator in the Traverse City ADR approach to problem solving was the city attorney for Traverse City, Peter Doren. Doren quickly became involved with the CRS through his friends the Sheas. In his capacity as city attorney, Doren had firsthand exposure to the need to provide a noncourt dispute resolution mechanism to deal with small conflicts in Traverse City. In 1989 Doren became president of the Grand Traverse–Leelanau–Antrim Bar Association. Shortly after Doren's election, Doren and the Sheas initiated a dialogue on behalf of the CRS with the State Court Administrative Office. They successfully obtained a grant to staff the CRS and implement its elemental community dispute resolution program. This \$10,000 grant from the State Bar of Michigan was one of six throughout the state for a three-year period.

The next thread in this abbreviated history was, and continues to be, that the Grand Traverse–Leelanau–Antrim Bar Association has only two circuit judges, both of whom con-

tinue to “ride circuit” over three counties. When Philip Rodgers was elected circuit judge in 1990, he brought with him the conviction, quickly borne out of necessity, of the need for greater docket control. This case management perspective prompted Judge Rodgers to explore and implement many options, admittedly outside the judicial mainstream, to control the burgeoning circuit court docket.

By 1993 some of these disparate threads began to come together. Macy applied for and became law clerk to Judge Rodgers. One reason Judge Rodgers hired Macy was because he planned to use her skills in conflict resolution at his protracted settlement conferences, which became notorious throughout the local circuit. Judge Rodgers’ settlement conferences were all day pressure cookers with clients and attorneys confined to the courthouse on a day scheduled thirty days prior to trial, with trial briefs and jury instructions in hand. All of these requirements were calculated to require lawyers to learn their cases, to educate their clients, and to narrow issues, all with the intent to extract concessions and ultimately induce settlements. Critical to the success of this calculated settlement conference process was the use of a trained facilitative mediator who was capable of keeping the dialogue moving during long, protracted hours at the courthouse.

Thomas Power was elected the second circuit court judge in 1993. He brought with him many years of experience as a state representative. Judge Power knew the importance of compromise and consensus building in problem solving through his many years of dedicated service in the state legislature. He came to the bench with an open mind and quickly embraced Judge Rodgers’ rigorous approach to facilitative settlement conferences.

The fortunate confluence of people, procedures, and events all contributed to the initial

impetus for ADR in the Grand Traverse area: the pseudoauthority held by Doren as past bar president, Judge Rodgers’ decision to hire a trained facilitator as his law clerk, Judge Power’s eager support of the facilitative settlement conference procedure, and Tom and Darlene Shea’s passion for achieving peaceful resolutions in nonadversarial, extra-judicial channels.

Things began to move rapidly after 1993. By this time Macy, after 40 hours of training and countless hours of watching other mediations, became a CRS facilitative mediator, along with Doren, the Sheas, and several other publicly spirited nonattorney individuals. All of these citizens, too numerous to name, obtained their exhaustive facilitative mediation training to serve the Traverse City community through the CRS. Due to this broad community involvement, the CRS continued to enhance its local reputation as a viable option to the courts.

In 1994 Doren formally asked the local bar association to form an ADR subcommittee as an adjunct to the local bar’s Judicial Liaison Committee. Significant in this subcommittee’s formation, Macy, the Sheas, and other nonattorneys were encouraged to attend those early ADR subcommittee meetings. This subcommittee brought trained facilitators, without a predisposition toward adversarial solutions, into contact with members of the local bar. Doren’s foresight to include nonlawyers also sent a message to the community that the local bar association did not exclusively restrict dispute resolution to trained lawyers and, by including lay persons on a bar subcommittee, welcomed trained mediators to share their experiences and skills with lawyers. By 1996 Doren and Judge Rodgers persuaded the Grand Traverse–Leelanau–Antrim Bar Association to create a separate standing ADR committee. Again, CRS staff and lay mediators were encouraged to attend and participate in the ADR’s committee meetings.

Yet another step forward was the circuit judges' conviction to formally begin implementing ADR at the early stages of some civil litigation. While lawyers regularly yelped about the importance of pretrial discovery, the circuit judges held the equally strong conviction that many of the disputes filed in their court did not require extensive pretrial discovery as much as they required an occasion for the litigants to come together with a trained neutral present to help the disputants reach an accord. Consequently, by 1997, ADR referrals began to surface in prehearing court orders. Judges Rodgers and Power first began to suggest ADR to litigants in a specific limited number of cases, e.g., those that dealt with real estate, fence disputes, boundary disputes, and family contract litigation. Although it is fair to say that some members of the local bar were dubious about the judicial suggestion of facilitative mediation, with an intimate bar in a small judicial circuit with only two circuit judges, not too many lawyers were willing to openly wrangle with the judiciary on their suggestion. As time passed, this judicial encouragement of voluntary mediation evolved into a much more strongly worded prehearing court order, where ADR was seriously pressed upon the lawyers and litigants. While many attorneys quietly questioned whether the circuit judges possessed the authority to order parties to voluntary facilitative mediation, many attorneys were open-minded enough to at least explore mediation to see if the process actually worked. As a result, word began to leak back to other members of the bar that, in fact, ADR seemed to work reasonably well in limited cases that dealt with contracts, real estate, and other family disputes that were actually "hand-picked" by the circuit judges as ripe for this optional form of dispute resolution.

Finding mandatory ADR in the civil scheduling order shortly after civil litigation commenced suggested that while it was still vol-

untary, it was also expected to be used by the circuit judges. That "institutionalized" judicial expectation created a market for trained facilitative mediators. In 1997, the circuit judges first compiled a voluntary ADR mediator panel. Of significance was the judges' requirement that any ADR panelist had to have at least 40 hours of training and 50 hours of practical mediation monitoring before he or she would become eligible to act as an ADR facilitator who could be paid for his or her service. This heavy requirement of training and practical experience exposure invested by the mediators was equally critical to ADR's success in its early days, as it induced the local bar to accept facilitative mediation as a viable option. Not just anybody, no matter how friendly or popular they were in the bar, would qualify as a paid court-appointed facilitative mediator.

Practical training and experience were therefore critical to the success of the ADR plan. Judges Rodgers and Power created a credibility with their ADR panel by imposing this criteria five years before the Michigan Court Rules. By imposing this high level of training, they established integrity for the local ADR plan and afforded the early facilitators considerable credibility, which in turn added integrity and gained the bar's confidence in the ADR program.

As time passed, an actual ADR plan was put into place, years before the Michigan Court Rules ever required the need for a local court ADR plan. The judges and local bar also developed a close and continuing dialogue with federal Judge David McKeague from 1997 to 1999 on the utility of a court-endorsed facilitative mediation plan. Judge McKeague was instrumental in implementing a very successful ADR program for the Western District of Michigan; he encouraged the local bar to aggressively pursue the adoption of a comparable plan at the circuit court level.

As a result of this judicial activism, the local

bar quickly learned much about ADR, including its strengths and limitations. It helped to have 100 percent circuit court support for the ADR process, which created little room for a lawyer's dissent. While some lawyers still pouted about an anomalous judicial order that compelled litigants to a voluntary dispute resolution process, the rumors of the ADR plan's success added to the open-mindedness of many bar leaders who followed Doren and, coupled with a genuine fear of frustrating circuit judge expectations, sped the facilitative mediation process along in Traverse City.

By the time the State Bar endorsed facilitative mediation and the Supreme Court created its rules, the Grand Traverse circuit's plan had been up and running for several years. Not only was ADR part of the circuit court's civil scheduling order in nonpersonal injury cases, its effective use began to "trickle down" to the district and probate courts as well. For example, the CSR began to work actively with the district court and, in effect, took over much of the district court's small claims court docket. Now when a complaint is filed in the local small claims court, a CRS brochure is provided as a handout to the complainant to explain the option of facilitative mediation.

There is no single easy explanation for the successful evolution of facilitative mediation in the Grand Traverse region. Was it the coincidence of the president of the local bar association's friendship with the CRS founders? Was it stumbling across a small group of people who held a strong interest in peaceful solutions to social problems? Was it Judge Rodgers' innovative efforts at docket control? Was it Judge Rodgers' effective use of a trained facilitative mediator as his law clerk who succeeded at shuttle diplomacy on settlement conference days? Was it Judge Power's years of experience in the state legislature reaching consensus that prompted him to eagerly embrace ADR in the circuit court? Was it the circuit judges' desire to

move their calendars up six to twelve months in a case's life by requiring facilitative mediation early in the process before much, if any, pretrial discovery took place? Was it the successful use of the mandatory settlement conference technique, akin to directed mediation, that brought litigants together in the presence of a trained facilitative mediator at a settlement conference long before anyone really knew what ADR was all about? Was it the clear message the circuit judges sent to the local bar through their civil scheduling orders that they expected the bar to eagerly embrace voluntary facilitative mediation on behalf of their clients? Was it the time the circuit judges took to "handpick" cases that were ripe for ADR? Or, more cynically, was it the reality that there were, and continue to be, only two circuit judges in the three-county circuit, both of whom eagerly endorsed ADR (and who probably intimidated the local bar into prompt compliance)?

The success enjoyed by facilitative mediation in the Traverse City region is really the product of a few interested citizens committed to peaceful solutions interacting with a small but very open-minded and enterprising judiciary eager to explore and implement techniques to control dockets through creativity in their civil scheduling orders and a generally receptive local bar, which resulted in the ADR process taking hold at a relatively early date. While many corners of the state still struggle to cope with the facilitative mediation in the amended Michigan Court Rules, almost all the Grand Traverse–Leelanau–Antrim Bar members have been regularly exposed to facilitative mediation for over seven years. Concomitantly, given the judicially created demand for ADR, a "cottage industry" of trained mediators also developed at the local level, so that a large percentage of the bar has obtained the mandated training necessary to serve as mediators, all of which complemented the ADR process.

For all of these reasons, for better or worse, ADR works in “God’s Country.” Hopefully it will soon work well in other Michigan communities, too.

The opinions and conclusions are those of the author alone. Consequently, if they are in error, they are solely attributable to the author.



George F. Bearup, of Smith, Haughey, Rice & Roegge, Traverse City, Michigan, practices in the areas of estate and retirement planning, business law, and divorce law. He is a member of the Family Law and Labor and Employment Law

Sections of the American Bar Association as well as the Real Property, Probate and Trust Law Section. Mr. Bearup is also a member of the Family Law, Taxation, Business Law, and Probate and Estate Planning Sections of the State Bar of Michigan. He is the current chairperson for the Judicial Liaison Committee of the Grand Traverse–Leelanau–Antrim Bar Association. Mr. Bearup has written several articles on divorce and probate and estate planning and has served as a speaker and moderator for numerous ICLE seminars. He is a chapter author of *Michigan Revocable Grantor Trusts* (ICLE 2d ed & Supps). Mr. Bearup has been listed in *The Best Lawyers in America* for several years for his work in estates and trusts.

Departments

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law

By Hon. Phillip E. Harter

Summaries of new appellate cases, court rules, and statutes affecting the probate court may be found on the Calhoun County Web site at <http://courts.co.calhoun.mi.us>.

Holographic Will—Will—Codicil—Testamentary Intent

Korean New Hope Assembly of God v Haight (In re Estate of Smith), No 228127, 2002 Mich App LEXIS 994 (July 5, 2002).

On April 20, 1999, the day following the execution of her last will, the decedent executed a handwritten document that stated as follows:

I want to donate \$150,000 to God in order to build a church 1999/04/20.
Lee, Kilyon (deacon)

The decedent died on May 1, 1999. The petitioners contended that the handwritten document signed by the decedent was a holographic will and should be probated as a codicil to the decedent's existing will. The respondents contended that the document merely expressed a present intent to give money and thus is not a testamentary instrument. The probate court concluded that, on its face, the document at issue was not a testamentary instrument because it made no reference to death, a prior will, its effective date, or the intent of the decedent that it become effective on her death; nor was it physically attached to a will. The trial court opined that extrinsic evidence is relevant only if the document is admitted into probate. Concluding that the document was not a testamentary instrument,

the probate court denied its admission and granted summary disposition in favor of the respondents.

The court of appeals reversed the trial court and remanded. In reaching this decision, they decided that the Estates and Protected Individuals Code (EPIC) applies to this case. The probate court had opined that if MCL 700.8101(2)(b) applied, the probate court still would be precluded from considering the act because to do so would impair an accrued right that came into existence on the date of the decedent's death. According to the probate court, the accrued right would be the right of the heirs under the decedent's last will and testament to inherit the funds in dispute pursuant to that document rather than the purported codicil.

MCL 700.8101(2) states in pertinent part:

Except as provided elsewhere in this act, on this act's effective date, all of the following apply:

....

(b) The act applies to a proceeding in court pending on that date or commenced after that date regardless of the time of the decedent's death except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of applying this act's procedure.

....

(d) This act does not impair an accrued right or an action taken before that date in a proceeding. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that commences to run by the provision of a statute before this act's effective date, the provision remains in force with respect to that right.

In rejecting such argument, the court of appeals held that a devise under a will was not an “accrued right” under the act because it is not so fixed that it may not be changed. Rather, it could be changed in conjunction with a showing under EPIC that there is a more recent will, a partial or complete revocation, an addition or alteration of the decedent’s will, a partial or complete revival of a formerly revoked will, or a formerly revoked portion of a will. Therefore, the rights of beneficiaries of the will are contingent on the pending determination about whether there was a codicil and how such a codicil would affect distribution under the will. Because the instant proceeding commenced on May 10, 1999, and final judgment was not entered until June 8, 2000, this action was pending in the probate court on the effective date of the statute, April 1, 2000. Thus, MCL 700.8101(2)(b) renders EPIC applicable to the instant dispute.

In applying EPIC, the Court held that the probate court was in error in refusing to admit extrinsic evidence, which denied petitioner the opportunity to prove the requisite testamentary intent of the document and thus incorrectly granted summary disposition. They pointed out that MCL 700.2502(3) provides, “Intent that a document constitutes a testator’s will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator’s handwriting.”

They also opined that EPIC places the burden of proof on the proponent of a document to show by clear and convincing evidence that the decedent intended the document to constitute a will or codicil pursuant to MCL 700.2503.

Clearly, this case may be read to show that the procedural rules and rules of construction of EPIC control proceeding pending after April 1, 2000. However, the final pronouncement concerning clear and convincing evidence should not be read too broadly. The

burden of clear and convincing evidence should only be applied to writings intended as wills, etc., under MCL 700.2503, and not other sections of EPIC.

Wrongful Death—Statute of Limitations—Personal Representative

Miller v Mercy Mem’l Hosp Corp, No 118701, 2002 Mich LEXIS 1050 (June 4, 2002).

The decedent underwent a CAT scan on August 27, 1993. It was alleged that the CAT scan was misinterpreted and failed to identify a suspicious mass in the decedent’s upper hemithorax. Another CAT scan was again performed in December 1995 due to the decedent’s persistent cough and hemoptysis. A needle biopsy of the lung was performed in January 1996, and the decedent was diagnosed with lung cancer on January 10, 1996. The decedent died on January 24, 1996. Plaintiff was appointed personal representative, and letters of authority were issued February 22, 1996. Plaintiff filed a wrongful death claim on October 23, 1997.

Plaintiff’s suit was dismissed by the trial court granting summary disposition on statute of limitations grounds. The court of appeals affirmed and held that the six-month discovery rule for medical malpractice actions was not incorporated by the wrongful death saving statute relying on *Pottenbarger v Kaplan*, 224 Mich App 1, 568 NW2d 131 (1997). The Michigan Supreme Court reversed the judgments of the trial court and the court of appeals and overruled *Pottenbarger* to the extent that it held that MCL 600.5852 does not incorporate the six-month discovery rule.

In reaching its decision, the court discussed two statutes: MCL 600.5838a(2) and MCL 600.5852. The pertinent provisions are in a portion of MCL 600.5838a(2):

Except as otherwise provided in this subsection, an action involving a claim based

on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

And MCL 600.5852:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

In the present case, the general two-year period of limitations for medical malpractice pursuant to MCL 600.5805(5) would have run, making use of the saving provision of MCL 600.5852 inapplicable. However, if the limitation was deemed to be the six months after discovery, MCL 600.5852 could be applied. Therefore, the issue was whether the six-month discovery provision in MCL 600.5838a(2), applicable to medical malpractice claims, is incorporated in the wrongful death saving statute as a "period of limitation."

The Michigan Supreme Court held that the six-month discovery rule is a "period of limitation" within the meaning of the saving statute. They stated that the plain language of MCL 600.5838a(2) provides two distinct periods of limitation: two years after the accrual of the cause of action and six months after the existence of the claim was or should have been discovered. As an alternative to the other periods of limitation, it is itself a period of limitation. As a saving statute, MCL 600.5852 applies to whatever period of limitation is or may be applicable in a given case, be it a pro-

fessional malpractice claim or a breach of contract action. In this case, the underlying claim was a medical malpractice action brought under the six-month discovery period.

Had plaintiff's decedent not died, he would have been able to bring suit for six months or until July 1996. Suit would have been timely, not under MCL 600.5805(5) but under MCL 600.5838a(2) and not as an exception to the two-year statute but as an additional period of limitation. Letters of authority were issued on February 26, 1996. Plaintiff therefore had two years from that date, or until February 26, 1998, to commence suit as long as suit was commenced within three years of July 1996, the date signifying the end of the applicable six-month limitation period. Because suit was commenced on October 23, 1997, it was timely.



The Honorable Phillip E. Harter is chief probate judge with the Calhoun County Probate Court, Battle Creek, Michigan. Judge Harter is a former chair of the Michigan Supreme Court Task Force on Guardianships and Conservatorships and of the Michigan Supreme Court Bar Examination Staff (1976–1991). He is a member of the Calhoun County Bar Association, a fellow of the Michigan Bar Foundation, and a member of the Bar of the U.S. Court of Appeals and the Bar of the U.S. Supreme Court. Judge Harter is a former council member of the State Bar of Michigan Probate and Estate Planning Section, a former chairperson of the Probate Law Committee, and a former chairperson of the Probate Rules Committee of the Michigan Probate Judges Association. He is a frequent lecturer and author on probate topics.

Ethics, Unauthorized Practice of Law, and Image—Developments

Ramon F. Rolf, Jr.

Multidisciplinary Practice

In January the Representative Assembly adopted recommendations by the State Bar of Michigan's Multidisciplinary Practice Committee. The proposal to allow fee sharing with non-lawyers is now pending before the Michigan Supreme Court. Under the proposal, Rule 1.5 of the Michigan Rules of Professional Conduct (MRPC) would be modified to allow the inclusion of nonlawyers in project bids. The client would receive one combined bill from the law firm and nonlawyer firm. The attorney's duty of loyalty, duty of competent representation, duty of communication, duty of diligence, and duty of confidentiality are not compromised under this proposal. The committee did not recommend a change in the rules affecting law firm ownership. Members of a professional corporation must be in the same profession.

Unauthorized Practice of Law—Ethics

The Attorney Disciplinary Board recently suspended an attorney's license to practice for 180 days. Case number 02-21-GA was issued July 8, 2002, against Petoskey attorney A. Craig Klomparens. This is perhaps the first case of an attorney affiliated with a will or trust kit seller being disciplined. The hearing panel found that "Respondent was retained to prepare a trust and failed to review the contents of the trust with his clients or to undertake reasonable efforts to explain the trust to the extent reasonably necessary to permit them to make informed decisions regarding their representation." Violation of MRPC

1.2(a), 1.4, 8.1(b), 8.4(a), and 8.4(c) were found.

For the state bar to proceed against non-lawyers engaged in the unauthorized practice of law and to proceed against licensed attorneys aiding and abetting the unauthorized practice of law, your help is needed. If you become aware of situations in your community involving the unauthorized practice of law or ethical violations by licensed Michigan attorneys, please contact the State Bar of Michigan.

American Bar Association Report of the Commission on Multijurisdictional Practice

The American Bar Association proposal concerning multijurisdictional practice is predicated on dynamic changes in communication, transportation, and technology. Today clients often have multistate contacts and multistate legal matters. Among several proposed changes, the commission is recommending a change to the Model Rules of Professional Conduct that would allow an attorney to engage in nonlitigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. This would appear to sanction a California attorney preparing a will or trust for a Michigan resident but would not allow practice in a Michigan court without association with a Michigan lawyer. Another proposal by the committee would establish a model rule on admission by motion to facilitate the licensing of a lawyer. However, the lawyer must be admitted to practice in another U.S. jurisdiction where the lawyer has been engaged in an active practice of law for a significant period of time and is in good standing in all jurisdictions where admitted. Stand by—we may all be practicing in Miami Beach next year.



Ramon F. (Fred) Rolf, Jr., is the chair of the Sections Ethics, Unauthorized Practice of Law, and Image Committee. He is a member of the Midland/Saginaw firm of Currie Kendall Polasky Meisel, PLC. He is a past president of the Northeastern Michigan Estate Planning Council. Mr. Rolf is a fellow of the American College of Trust and Estate Counsel.

Probate and Estate Planning Council Q and A

Patricia Gormely Prince and
Randall J. Soverinsky

Question: What types of small estate proceedings are available under EPIC?

Answer: There are four small estate proceedings available under EPIC. They are as follows:

1. Cash less than \$500 and clothes (§3981):

Hospitals, convalescent or nursing homes, morgues, and law enforcement agencies may deliver cash up to \$500 and clothes to an individual furnishing identification and a sworn statement that he or she is the decedent's spouse, child, or parent and that there is no application or petition pending for administration of the decedent's estate.

The agency making the delivery is released from liability to the same extent as if the delivery were made to a legally qualified personal representative. In addition, the agency making delivery is not required to see to the property's disposition.

Note, however, that the individual who

receives the property is answerable to a person with a prior right and accountable to a personal representative of the decedent's estate appointed after delivery.

2. Small estate distributed via court order (§3982):

To qualify for this procedure, the value of the decedent's gross estate minus funeral and burial expenses must be \$17,000 or less for decedents dying in calendar year 2002 (the amount is indexed for inflation annually), and the petitioner must supply the court with a copy of the decedent's funeral bill.

If the estate qualifies for this procedure, the court may order that the assets be turned over to the surviving spouse or, if there is no surviving spouse, to the decedent's heirs.

An heir who receives property through an order pursuant to this procedure, except for a minor child or children or a spouse who qualifies for allowances under the act, is responsible for unsatisfied debts of the decedent up to the amount he or she received for 63 days after the date of the small estate order.

3. Personal property collected via affidavit (§3983):

This is a small estate procedure that does not require court involvement. It applies to resident and nonresident decedents. It also applies to a Michigan domiciliary's intangible personal property wherever located.

The requirements are as follows:

- There is a waiting period of 28 days after decedent's death.
- The successor must present a death certificate and sworn affidavit meeting certain requirements to a person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, an obligation, stock, or a choice in action belonging to the decedent. The State Court Administrative Office has developed a standardized affi-

davit form. However, the successor may use his or her own form.

- The person in possession of the above item is required to deliver the tangible personal property or instrument or to pay the debt to the successor. If the person refuses to honor the affidavit, the affiant may compel delivery in court. The person delivering property under this section is discharged from liability to the same extent as if he or she dealt with a personal representative (§3984). He or she is not required to see to the application of the property and is not required to inquire into the truth of the statements in the affidavit.
- There must be no real property in the estate.
- The value of the entire estate, wherever located, net of liens and encumbrances, must not exceed \$17,000 for decedents dying in calendar year 2002 (subject to an annual cost-of-living adjustment).
- There must be no application or petition for the appointment of a personal representative pending, and there must not have been one granted in any jurisdiction.
- The successor must be entitled to payment or delivery of the property. (According to the *Estates and Protected Individuals Code with Reporter's Commentary* by John H. Martin, successor includes a person eligible to take under the exempt property and allowances provisions and a person succeeding to assets under intestate provisions. It may also include a beneficiary under an unprobated will.)

Note that the person receiving property under this section is answerable and accountable for the property to a personal representative of the estate or other person having a superior right.

4. Summary administration (§3987):

An estate qualifies for this proceeding if the

value of the entire estate based on inventory and appraisal (minus liens and encumbrances) does not exceed (1) the homestead allowance, (2) the family allowance, (3) exempt property, (4) administration costs and expenses, (5) reasonable funeral expenses, and (6) reasonable and necessary medical and hospital expenses of decedent's last illness.

If the estate qualifies, the personal representative, without notifying creditors, may immediately distribute the estate to those entitled and file a closing statement pursuant to EPIC §3988.

The closing statement may be filed any time after the estate is distributed. It is a sworn statement that must say all of the following:

- To the best of the personal representative's knowledge, the value of the estate, minus liens and encumbrances, did not exceed the homestead allowance, family allowance, exempt property, administration costs and expenses, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of decedent's last illness.
- The personal representative has fully administered and distributed the estate.
- The personal representative has sent a copy of the closing statement to all distributees and creditors or other claimants known to the personal representative whose claims are neither paid nor barred.
- The personal representative has furnished a full written account of the estate administration to the distributees whose interests are affected.

If no objections to the closing statement are filed within 28 days, a certificate of completion will be issued.

If there is no action or proceeding involving the personal representative pending in court one year after the closing statement is filed, the personal representative's appointment terminates.

Question: How do the small estate proceedings under EPIC differ from those available under the Revised Probate Code (RPC)?

Answer: As follows:

1. Cash less than \$500 and clothes (§3981):

This procedure is identical to its RPC counterpart in §103 of the RPC, except that the dollar limit increased from \$100 to \$500.

2. Small estate distributed via court order (§3982):

This is the same small estate procedure as the one in RPC §102, except that the threshold amount is now indexed for inflation. In addition, the 63-day claims period was only 60 days under the RPC.

3. Personal property collected via affidavit (§3983):

This is a new procedure with no RPC counterpart.

4. Summary administration (§3987):

EPIC's summary administration proceeding is virtually identical to the summary administration proceeding in RPC §325. The requirements for the sworn statement provided in EPIC §3988 are similar to those in RPC §326. However, RPC §326 did not include the 28-day objection period provision or the provision regarding the termination of the personal representative's appointment one year after filing the closing statement.



Patricia Gormely Prince, of Patricia Gormely Prince, PC, Farmington Hills, Michigan, practices in the area of probate and estate planning. She is a former chair of the Probate and Estate Planning Section of the State Bar of Michigan and is a member of the Women Lawyers Association of Michigan and the Real Property, Probate and Trust Law Section of the American Bar Association. Ms. Prince is a past managing editor of the *Michigan Probate and Estate Planning Journal*. She is a supplement author for Lawyers Cooperative Publishing Company and contributes to several ICLE publications.



Randall J. Soverinsky, of Patricia Gormely Prince, PC, Farmington Hills, Michigan, practices in the areas of estate planning and estate administration. He is a member of the Probate and Estate Planning and Real Property Law Sections of the State Bar of Michigan. Mr. Soverinsky is a contributor to *Trust Administration in Michigan* (ICLE 1999) and *Michigan Probate Litigation* (ICLE 2001). He has also written articles for the *Michigan Bar Journal*.

State Bar of Michigan Members of Section Council—2002–2003

Officers

Chairperson:

Dirk C. Hoffius
333 Bridge St., NW
PO Box 352
Grand Rapids, MI 49501-0352

Chairperson-Elect:

Henry M. Grix
38525 N. Woodward Ave., Ste. 2000
Bloomfield Hills, MI 48304-2970

Vice-Chairperson:

Hon. Phillip E. Harter
Calhoun County Probate Court
161 E. Michigan Ave.
Battle Creek, MI 49014-4005

Secretary:

Michael J. McClory
1305 City-Country Bldg.
Detroit, MI 48226

Treasurer:

Douglas A. Mielock
313 S. Washington Sq.
Lansing, MI 48933-2193

Council Members

Term Expires 2003:

Christopher L. Edgar
333 Bridge St., NW, Ste. 800
Grand Rapids, MI 49504

Robin D. Ferriby

333 W. Fort St., S-2000
Detroit, MI 48226

Harold G. Schuitemaker

P.O. Box 520
Paw Paw, MI 49079-0520

Kenneth J. Seavoy

128 W. Spring
Marquette, MI 49855-4608

Lauren M. Underwood

200 E. Long Lake Rd.
Bloomfield Hills, MI 48304-2361

Darryl M. Coon

2241 Oak St.
Wyandotte, MI 48192-5317

John N. Seaman

1301 N. Hagadorn Rd.
P.O. Box 4279
East Lansing, MI 48826-4279

Julian E. Hughes

176 Higman Park
Benton Harbor, MI 49022-3558

Raymond T. Huetteman, Jr.

2698 Salisbury Ln.
Ann Arbor, MI 48103

Joe C. Foster Jr.

2125 University Park Dr. #250
Okemos, MI 48864

Russell M. Paquette

19701 Vernier Road, S-220
Harper Woods, MI 48225

James A. Kendall

6024 Eastman Road
P.O. Box 1846
Midland, MI 48641-1846

James H. LoPrete

1700 N. Woodward Avenue, #A
P.O. Box 587
Bloomfield Hills, MI 48013-0587

Everett R. Zack

2125 University Park Dr. #250
Okemos, MI 48864

Term Expires 2004:

George A. Cooney, Jr.
43902 Woodward Ave., Ste. 100
Bloomfield Hills, MI 48302-5021

Sebastian V. Grassi, Jr.

888 W Big Beaver Rd., Ste. 750
Troy, MI 48084-4765

Lynn L. Marine

615 Griswold St., Ste. 1509
Detroit, MI 48226-3992

Hon. John R. Monaghan

St. Clair County Probate Court
201 McMorran Blvd., Rm. 2600
Port Huron, MI 48060-4006

Richard A. Shapack

100 Bloomfield Hills Pkwy, Ste. 200
Bloomfield Hills, MI 48304-2949

Douglas J. Rasmussen

500 Woodward Ave., Ste. 3500
Detroit, MI 48226

Susan S. Westerman

345 S. Division Street
Ann Arbor, MI 48104-1317

Fredric A. Sytsma

333 Bridge Street, N.W.
P.O. Box 352
Grand Rapids, MI 49501-0352

Hon. Wendell L. Schoder

251 Martha Drive
Battle Creek, MI 49015-3805

Stephen W. Jones

200 East Long Lake Rd., S-110
Bloomfield Hills, MI 48304-2361

John E. Bos

2400 Lake Lansing Rd.
Lansing, MI 48912

W. Michael VanHaren

111 Lyon St., N.W., #900
Grand Rapids, MI 49503-2489

Robert B. Joslyn

200 Maple Park Blvd., Ste. 201
St. Clair Shores, MI 48081

Robert D. Brower, Jr.

800 Calder Plaza Building
Grand Rapids, MI 49503

John D. Mabley

31313 Northwestern Hwy., #215
Farmington Hills, MI 48334

Term Expires 2005:

John R. Dresser
112 S. Monroe St.
Sturgis, MI 49091-1729

Mark K. Harder

170 College Ave., Ste. 300
Holland, MI 49423-2982

Nancy L. Little

2125 University Park Dr. #250
Okemos, MI 48864

Ramon F. Rolf, Jr.

6024 Eastman Rd.
P.O. Box 1846
Midland, MI 48641-1846

Andrew M. Savel

400 W. 4th St.
Royal Oak, MI 48067-2557

Raymond H. Dresser, Jr.

112 South Monroe Street
Sturgis, MI 49091-1729

John H. Martin

400 Terrace Plaza
P.O. Box 900

Muskegon, MI 49443-0900

Patricia Gormely Prince

31300 Northwestern Highway
Farmington Hills, MI 48334

Brian V. Howe

23409 Jefferson Ave., Ste. 104
St. Clair Shores, MI 48080

Richard C. Lowe

2125 University Park Dr., #250
Okemos, MI 48864

Kenneth E. Konop

840 W Long Lake Rd., Ste. 200
Troy, MI 48098-6358

John A. Scott

1000 S. Garfield, Ste. 3
Traverse City, MI 49686

Commissioner Liaison

Kimberly M. Cahill
Schoenherr & Cahill, PC
24735 Van Dyke Ave
Center Line, MI 48015-2314

Probate and Estate Planning Section 2001–2002 Committee Assignments

NOTE: As this volume of the *Journal* reaches you, committee appointments for 2002–2003 are being finalized. The next issue will reflect the 2002–2003 committees. Anyone interested in participating on a committee should contact Dirk Hoffius at Varnum, Riddering, Schmidt & Howlett, LLP • P.O. Box 352 • Grand Rapids, MI 49501-0352 • Telephone: 616-336-6807 • Fax: 616-336-7000 • E-mail: dchoffius@varnumlaw.com.

Internal Governance

Budget

Hon. Phillip E. Harter, Chair
Michael J. McClory

Bylaws

Lauren M. Underwood, Chair

Michael W. Irish Award

Brian V. Howe, Chair
Raymond H. Dresser, Jr.
John H. Martin
Patricia Gormely Prince
Fredric A. Sytsma

Long-Range Planning

Dirk C. Hoffius, Chair
Richard C. Lowe
Kenneth E. Konop

Nominations

Brian V. Howe, Chair
Richard C. Lowe
Kenneth E. Konop

Relations with State Bar

Harold G. Schuitmaker, Chair
Catherine A. Jacobs
Kenneth E. Konop
Richard C. Lowe
Douglas A. Mielock
Susan S. Westerman

Services to Section Members

Amicus Curiae

Ramon F. Rolf, Jr., Chair
Marie R. Deveney
Lauren M. Underwood

Annual Meeting

Christopher L. Edgar, Chair

Continuing Education &

Annual Probate Seminar

Henry M. Grix, Chair
Sebastian V. Grassi, Jr.
Catherine A. Jacobs
John H. Martin
Lauren M. Underwood

Ethics, Unauthorized Practice, and Image

Ramon F. Rolf, Jr., Chair
Robin D. Ferriby
Catherine A. Jacobs
Richard A. Shapack
Teresa Schafer Sullivan

Opinion Bank

Hon. John R. Monaghan, Chair
Hon. Phillip E. Harter
Hon. Gerald J. Supina

Section Journal

Nancy L. Little, Editor
Hon. James S. Casey
Douglas G. Chalgian
Amy Nehs Morrissey

Section Pamphlets

Kenneth J. Seavoy, Chair
Michael J. McClory

State Bar Journal

Michael J. McClory, Chair
Amy Nehs Morrissey

Specialization and Certification

Richard A. Shapack, Chair
Robin D. Ferriby
Sebastian V. Grassi, Jr.
Stephen W. Jones
Robert B. Joslyn

Technology & Home Page

Douglas M. Mielock, Chair
Thomas Kyros
John D. Mabley
Robert H. Pytell
Susan S. Westerman

Legislation and Lobbying

Harold G. Schuitmaker, Chair
Robin D. Ferriby
Bruce M. Groom
Catherine A. Jacobs
John H. Martin
Douglas A. Mielock

Practice Issues

Advising the Fiduciary

Bruce M. Groom, Chair
Christopher L. Edgar
Sebastian V. Grassi, Jr.
Michael J. McClory
W. Ward Wilson

Charitable Giving/Exempt

Organizations
Robin D. Ferriby, Chair
John E. Bos
Henry M. Grix
Brian V. Howe
Ellen Sugrue Hyman
Catherine A. Jacobs
James E. Mulvoy
Richard A. Shapack
Teresa Schafer Sullivan

Court Rules and Forms

Hon. John R. Monaghan, Chair
Hon. Phillip E. Harter
Michael J. McClory
Douglas G. Chalgian
Hon. Gerald J. Supina
Everett R. Zack

Elder Law

George Cooney, Jr., Chair
Douglas G. Chalgian
Lynn L. Marine

Guardianships and Conservatorships

Lynn L. Marine, Chair
George Cooney, Jr.

Probate Litigation & Standard Jury

Instructions

Michael J. McClory, Chair
Donald Carney
Hon. Phillip E. Harter
Nancy J. Little
Richard A. Shapack
Hon. Gerald J. Supina
W. Ward Wilson

Transfer Tax

Christopher L. Edgar, Chair
George Gregory
Stephen W. Jones
Richard C. Lowe
Walter V. Marsh
Patricia M. Ouellette
Thomas F. Sweeney

Uniformity of Practice

John E. Bos, Chair
Hon. Phillip E. Harter
Hon. John R. Monaghan
Robert H. Pytell
Hon. Gerald J. Supina

Related Practice Issues

Family Law Section Liaison

Hon. John R. Monaghan

Real Property Issues & Liaison

Donal R. France

Tax Section Liaison

George Gregory

Trust Institutions and Liaison with MBA

Teresa Schafer Sullivan, Chair
Daniel E. Cogan
Bruce M. Groom

Committee on Special Projects

Douglas A. Mielock, Co-Chair
Lauren M. Underwood, Co-Chair

Cynthia S. Andrews
Et al (a committee of the whole)