

19

Alternative Dispute Resolution

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I. What is Alternative Dispute Resolution?

A. In General §19.1

Alternative dispute resolution (ADR) covers a wide variety of processes involving third-party neutrals intended to resolve disputes between parties without formal judicial proceedings. Outside of the spectrum of ADR processes at one end are unassisted direct-party negotiations; outside at the other end is formal adjudication to a binding decision by a court. ADR processes range from moderated dialogues to binding decisions by third parties in proceedings much like proceedings in court. In the main their distinguishing characteristics are that parties enter into such processes voluntarily (for the most part), they (usually) have a great say in designing the process and the manner in which its outcome will be formalized (if at all), and they involve a third party who conducts or oversees the process. In general, ADR is seen as offering opportunities to resolve disputes more quickly or more satisfactorily to the parties than conventional litigation. Further, recognizing that most cases settle before trial, the court system sees integration of ADR into litigation as offering the opportunity to achieve these “inevitable” settlements more quickly than would otherwise be the case.

The Michigan Court Rules define ADR broadly as “any process designed to resolve a legal dispute in the place of court adjudication” including process defined by the court rules or any other procedures “ordered on stipulation of the parties.” [MCR 2.410\(A\)\(2\)](#). The federal Alternative Dispute Resolution Act of 1998 defines alternative dispute resolution processes as those in which “a neutral third party participates to assist in the resolutions of the issues in controversy,” including early neutral evaluation, mediation, mini-trial and arbitration. [28 USC 651](#).

Stated broadly, an “environmental dispute” is any set of circumstances in which two or more parties have competing interests over some matter within the very broad ambit of the environment. The concept of dispute is broad. It encompasses typical environmental disputes like trespass, nuisance and toxic tort cases between private parties, environmental cost recovery cases, and environmental enforcement proceedings. These conventionally take the form of civil litigation. But many environmental disputes involve questions of federal, state and local public policy not usually resolved through litigation. They play out through a public consultation or public hearing processes as well as through less public lobbying efforts. Other environmental “disputes” are more amorphous and involve neither regulatory rights nor obligations. For example, there are occasions where an industry in compliance with all of its permits may find it advantageous to resolve a dispute with its neighbors, even when it is under no obligation to do so. Given the broad portal to the court system and the imagination of lawyers, often environmental disputes not initially within the scope of the legal or regulatory system morph into conventional lawsuits when a party concludes that protection of its interests so requires. Timely application of dispute resolution can avoid such litigation.

The federal government has defined “environmental conflict resolution” (ECR) as: “third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. The term ECR encompasses a range of assisted negotiation

processes and applications. These processes directly engage affected interests and agency decision makers in conflict resolution and collaborative problem solving. Multi-issue, multi-party environmental disputes or controversies often take place in high conflict and low trust settings, where the assistance of impartial facilitators or mediators can be instrumental to reaching agreement and resolution. Such disputes range broadly from administrative adjudicatory disputes, to civil judicial disputes, policy/rule disputes, intra- and interagency disputes, as well as disputes with non-federal persons/entities. ECR processes can be applied during a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicts between federal, state, local, tribal, public interest organizations, citizens groups and business and industry where a federal agency has ultimate responsibility for decision-making.” Office of Management & Budget & President’s Council on Environmental Quality, [Memorandum on Environmental Conflict Resolution \(November 28, 2005\)](#).

B. Advantages and Disadvantages of ADR §19.2

ADR has been shown to resolve disputes quicker and at less cost than litigation in many cases. Surveys generally show a higher satisfaction by ADR participants with the outcome than those who participate in litigation. See, *Lipsky & Seeber, Patterns of ADR Use in Corporate Disputes 54 Dis Res J 66 (1999)* ; and *Dispute-Wise Business Management – Improving Economic and Non-Economic Outcomes in Managing Business Conflicts*, [AAA \(2006\)](#). Often relief sought by a party is not a remedy recognized at law or within a court’s power to grant (e.g., an apology or an admission of fault with no further relief sought, or implementation of a reform not required by law). ADR permits the parties to fashion relief that may be outside remedies that a court can grant. The participants can structure the process to suit their needs and preferences. ADR processes can be structured to be completely private, unlike litigation where the proceedings are public. The presence of a skilled third party will change the dynamics of the situation and can help diffuse or direct strong feelings that would otherwise prevent negotiations from beginning or proceeding to conclusion. The third-party neutral may bring specialized subject matter expertise to bear on technical or complex disputes or special skills in promoting resolution. Finally, the parties have more control over the schedule.

ADR has potential disadvantages. Because the process is consensual, a party cannot be forced to reach a settlement. Thus ADR, except in the case of arbitration, does not provide a process certain to lead to a binding resolution. A truly recalcitrant party can abuse the ADR process. Where a right is seen by one party as essential to its interests, e.g., determination or enforcement of constitutional rights, there may be no substitute for the binding and final nature of a court judgment. While generally quicker and less costly, there are instances where the ADR process is neither. The control of cost and time should be a major consideration when the parties develop an agreement to use ADR processes. Finally, some third party neutrals are ineffective at best and counterproductive at worst. Careful screening a selection of the third party neutral is essential.

C. Principles Behind ADR §19.3

ADR is based on several key principles. First, consensual processes (participation, scope and structure) are more likely to result in outcomes satisfactory to the disputants than a solution imposed by a court. Inherent in this principle is the ability of the parties to structure a process

that is tailored to the situation and to the dispute at hand. There is ample experience demonstrating that disputants are more likely to achieve outcomes that serve all disputants' interests and purposes -- the "win/win" solution -- than solutions imposed by an outside decision maker.

The second key principle is the involvement of a third-party neutral whose presence can improve the dynamics of the dialogue needed to achieve a settlement and, in environmental disputes, knowledge and expertise to evaluate the merits and to help frame options for solution if so desired by the parties. The third party's role is to assist in the process, not to dictate the outcome. This individual is neutral in the sense of having no stake in the outcome or in the parties. A third-party neutral has no authority except as granted under the order or agreement defining the ADR process.

One of the principal objectives of the ADR process is to help the parties communicate with each other civilly, by providing a clear statement of the interests driving the dispute and, most importantly, by truly listening to the other side of the dispute. Parties often lack a clear idea of what they are fighting for, much less a good idea of what needs are driving their opponents.

Finally, ADR processes generally are confidential except as otherwise agreed by the parties, with the exception of public policy disputes that often facilitate in full public view. Agreements to engage in most ADR processes typically have a confidentiality clause. Mediation conducted in Michigan court proceedings is expressly made confidential by [MCR 2.411\(C\)\(5\)](#). As of mid 2010, the confidentiality provisions under MCR 2.411 are being considered for revision. [SCAO August 2010 Report on MCR 2.411](#).

When the ADR process is not ordered under [MCR 2.411](#), the parties must provide for confidentiality by agreement. Where disputes are mediated before or during civil litigation, [MRE 408](#) and [FRE 408](#) make settlement offers and conduct and statements made in settlement negotiations (i.e., during the ADR process), not admissible. These rules, however, do not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of settlement discussions.

The Michigan mediation rule expressly provides that a mediator may not disclose anything that transpired during the mediation to the trial judge except the date of completion of the process, who participated in the mediation, whether settlement was reached and whether further ADR proceedings are contemplated. [MCR 2.411\(C\)\(3\)](#). Best practice in drafting the mediation agreement should provide the express requirement that the mediator make his or her report to the court in writing with copies to the parties, so that the parties can be assured this rule has been observed. Note that this rule does not permit the mediator to report to the trial court whether any party appeared to be acting in good faith.

Likewise, communications made during ADR processes convened by a federal court are protected from disclosure, [28 USC 652\(d\)](#), although the scope of the protection is not as broad as under the Michigan Court Rules. See discussion in [§19.19](#).

D. Philosophy of the Role and Function of the Third Party Neutral §19.4

There is a wide and divergent body of scholarship and experience with regard to the philosophical, psychological and ethical bases for the manner and purpose under which a third party acts to mediate or facilitate disputes. This short summary cannot do justice to any of them. On the other hand, several of the principal models are relevant to structuring processes and giving the neutral clear direction as to the neutral's role.

For two or three-party disputes, as distinguished from public policy disputes, there are at least two principal philosophies with regard to the function of the process and the neutral's approach to conducting the process.

The dominant theoretical model, which has been incorporated in the Michigan State Court Administrator Office's curriculum for training neutrals, is the facilitative model. It is based on the principle that it is up to the parties to reach their own decision and the best result from the disputants' point of view will be reached with minimal input from the neutral as to likely outcomes if the dispute were adjudicated. The neutral is there to facilitate the disputants' negotiations and not to add anything to those negotiations. This does not mean that the neutral cannot challenge the parties' assumptions or raise issues for the parties to consider. This approach puts an emphasis on direct discussions between the parties.

By comparison, the evaluative model permits or asks the third party neutral, at an appropriate time, to give the neutral's valuation of a likely outcome or range of outcomes in order to assist the parties to better determine the merits of their positions and likely outcomes if the dispute were resolved in court. As a variation, the neutral is asked to take an active role in fashioning a solution. Proceedings under Michigan's case evaluation rule, MCR 2.403, are purely evaluative. In factually complex disputes, there can be an advantage to using a process in which a third party neutral has a fact-finding function. For example, the role of a third party neutral in developing Superfund or Part 201 allocation recommendations is often as a neutral fact finder.

It is important when structuring the ADR process that the parties discuss and then reach an understanding with the neutral whether the neutral is to have an evaluative role.

The Western District of Michigan's ADR rules differentiate between Voluntary Facilitative Mediation and Early Neutral Evaluation. See [WD Mich LCiv R16.3](#) and 16.4, respectively.

E. Typical ADR Processes §19.5

A **process** is any procedure agreed to by the parties and the third party neutral by which the parties will work to resolve their dispute. Figure 19-1 illustrates the spectrum of ADR processes. For further discussion see SCAO's [Taxonomy of Alternative Dispute Resolution Processes](#). The most common ADR procedures are as follows.

Convening (also called **conflict assessment**) involves the use of a neutral third party to help assess the causes of the conflict, to identify the persons or entities that would be affected by the outcome of the conflict, and to help these parties consider the best process (for example, mediation, consensus-building, or a lawsuit) for them to deal with the conflict. The convener

may also help get the parties ready for participation in a dispute resolution process by providing educating the parties on the nature of the selected process.

Facilitation or Consensus Building is a process used to help a group of people or parties have constructive discussions about complex or potentially controversial issues. The facilitator helps the parties set ground rules for these discussions, promotes effective communication, elicits creative options, and keeps the group focused and on track. Facilitation can be used even where parties have not yet agreed to attempt to resolve a conflict.

Mediation is a process in which a neutral third party (the mediator) assists disputants in reaching a mutually satisfying settlement of their differences. Mediation is voluntary, informal, and confidential. The mediator helps the disputants to communicate clearly, to listen carefully, and to consider creative ways for reaching resolution. The mediator makes no judgments about the people or the conflict (unless requested under the evaluative model), and issues no decision. Any agreement that is reached must satisfy all the disputants. The Michigan Court Rules define mediation as a “process in which a neutral third party facilitates communication between parties, assists in identifying issue, and helps explore solutions to promote a mutually acceptable settlement.” [MCR 2.411\(A\)\(2\)](#). A mediator has no authoritative decision-making power. *Id.*

In Michigan, the terms mediation and facilitation are often used interchangeably to describe what is known generally elsewhere as mediation.

Case Evaluation is an ADR process created by [MCR 2.403](#) in which a three-person panel hears presentations by litigants and provides a written evaluation of the value of the case. If all of the parties accept, a final judgment is entered on all claims asserted in the case in the amount of the evaluation. If one or both parties reject, the rule provides for the imposition of sanctions in certain circumstances. The evaluation is limited to a monetary amount, so it is not well suited to resolving disputes seeking any form of injunctive or other equitable relief. Although case evaluation panels are usually assigned by the office carrying out a circuit court’s case evaluation program, see generally [MCR 2.404](#), in more complex disputes the parties often stipulate to specific panel members who the disputants believe have expertise in the subject matter involved in the dispute. This has the effect of giving the parties more confidence in the case evaluation award when made. This deviation from usual procedure should be undertaken after obtaining an appropriate court order.

Early Neutral Evaluation is an evaluative ADR process initiated early in a case, often at the direction of the court, in which the third party, who has experience or expertise in the subject matter of the suit, meets with the parties and may receive presentations, after which the neutral provides the parties with an evaluation of the likelihood of success and likely ranges of damages. The expectation is that an early evaluation from a knowledgeable, objective expert will prompt the parties to take a more realistic approach to settling their dispute. There are many variations on this process, including use of the process to simplify or focus issues. In some cases, the neutral may withhold the evaluation from the parties and proceed to mediate the conflict, revealing the evaluation only if the mediation is unsuccessful.

Mini and Summary Jury Trials involve advisory trial proceedings. In the first case, the dispute is presented to a third-party neutral. A summary jury trial involves impaneling an

advisory jury to whom the parties make an abbreviated presentation of their cases. The neutral or the jury, as the case may be, then deliberates and renders an advisory verdict. Where the credibility of key witness is central to a case, such a trial may provide valuable guidance to counsel about the likely success of their case.

Arbitration is an adjudicatory process in which a person or panel, other than a judge, controls pretrial procedures, takes evidence, and renders an award which is the equivalent of a verdict. To be enforceable in a court the award must be entered as a judgment in a court of competent jurisdiction. [MCL 600.5025](#) There are narrow grounds for appeal and the parties may agree that no appeal will be permitted. Although some treatises discuss “non binding” arbitration, any nonbinding process is some form of mediation and that the term “arbitration” is best used only for a binding process. Arbitration offers several advantages over adjudication by a court. First, the parties can assert more control in defining the procedure. Second, arbitrations are private although awards usually are entered as judgments by a court, making the terms of the outcome public. The process generally is quicker than court proceedings and is intended to be, and usually is, less expensive than litigation.

The American Arbitration Association (AAA) is a major arbitration service provider but there are many other service providers. The parties are free to fashion their own approach to arbitration but, unlike other ADR processes, the parties cannot withdraw from arbitration once it has been commenced. Because arbitration is binding, the parties should be very familiar with the [Michigan Arbitration Act](#) and the [Federal Arbitration Act](#) (discussed in [§ 19.19](#)) before agreeing to arbitration. In addition, because AAA’s arbitration rules are often incorporated into agreements whether or not the AAA is the arbitration services provider, parties should be familiar with these procedures before agreeing to be bound by them.

Practitioners should review the arbitrator’s authority to compel discovery and attendance of witnesses under any applicable statute and the procedures under which the arbitration is conducted. For example, the arbitrator’s authority is broader under the Federal Arbitration Act and narrower under the AAA’s procedures. The parties’ agreement to arbitrate may specify discovery obligations as a matter of contract.

If arbitration may be subject to international rules, particular care should be taken because these procedures may be very different from the American norm.

Med-Arb is an ADR process in which the parties agree in advance to commence mediation but to continue to binding arbitration of any issues not resolved by mediation. A different neutral generally is used for the arbitration after the mediation is completed. This process offers the advantage of achieving a final resolution if mediation does not fully settle all matters. It is not often used in environmental disputes.

F. Modes of ADR §19.6

The most common approaches in Michigan for environmental disputes are mediation (both evaluative and facilitative models), third-party neutral fact finding, and facilitated rule or policy development.

Most two-party environmental disputes utilize mediation at some point, whether initiated by the parties or ordered by the court. Participants usually include attorneys, party representatives and experts. Where the facilitative model is employed, the third-party neutral is usually one individual. Where the parties seek evaluative input, it is not uncommon to use a three-person panel. In some cases, the mediation follows the facilitative model but if the parties do not reach an agreement, the neutral is asked to provide an evaluation either as a general advisory number or in the form of an evaluation to be accepted or rejected by the parties. In the latter case, the evaluator receives the acceptance or rejections from each party in confidence. Only if both sides accept does the neutral disclose the parties' responses. This way, if only one party accepts, it does not lose any bargaining position by having its acceptance disclosed to the other side.

Because many environmental disputes deal with not just a specific sum certain but often involve definition of the respective parties' duties and liabilities after the settlement, neutrals in environmental mediations may play a more active role than in more typical tort or contract disputes where the principal dispute is usually money. For this same reason, environmental mediation may result in numerous sessions conducted over a substantial time period.

II. Governing Laws, Rules and Policies

A. In General §19.7

Because many environmental disputes occur outside of the legal system and because ADR processes are consensual in nature, federal and state procedural law has little relevance to many disputes where no lawsuit has been filed. With the exception of state and federal law relating to arbitration, federal and state law and procedure related to ADR are limited to those circumstances where ADR has been ordered by a court during litigation.

B. Federal

1. Statutes

a. Alternative Dispute Resolution Act of 1998 §19.8

The Alternative Dispute Resolution Act of 1998, [28 USC 651 et seq.](#) gives Congress' encouragement for proactive use of ADR processes in the district courts. The ADR Act makes clear that the district court can employ a wide range of ADR processes for the cases before it. [28 USC 652](#). The statute requires the district court to develop process for making neutrals available and requires that the court insure that neutrals so identified are appropriately trained and qualified. [28 USC 653](#). The ADR Act provides for the referral to arbitration with the parties' consent of cases where less than \$150,000 is in dispute and provides for the powers of the arbitrators. [28 USC 654-655](#). The statute provides for the method of entering judgments on and appealing from arbitration awards delivered under this act. [28 USC 657](#).

Confidentiality protection for communications for ADR processes convened under the federal Act is not as broad as under Michigan law. See discussion in preamble to Confidentiality in Federal Alternative Dispute Resolution Programs, [65 Fed Reg 83085](#) (Dec. 29, 2000).

b. Federal Arbitration Act §19.9

Congress has established national law covering arbitration. Federal Arbitration Act, [9 USC 1 et seq.](#) The Act applies to any contract involving interstate commerce and, where it applies, it generally preempts any contradictory state law. *Southland Corp v Keating*, [465 US 1](#); 104 S CT 852 (1984). It may be enforced in state or federal court. See generally, [Drahozal, Federal Arbitration Act Preemption](#) It applies where the parties by contract have agreed to arbitrate the issues that are subject to dispute. A party may go to court under the Act to force the other party to a contract to arbitrate. When the arbitrator has made an award, a party may move to have the award confirmed by the court. There are limited grounds to challenge an arbitration award, [9 USC 10\(a\)](#), and are generally limited to fraud, arbitrator partiality, undue influence, certain procedural misconduct, and actions beyond the arbitrator's authority. The most recent U.S. Supreme Court decision on this issue, *Hall Street Associates, Inc v Mattel, Inc*, 552 US 576; [128 S Ct 1396](#) (2008), held that the review provisions of the FAA were exclusive. This has already spawned numerous lower court decisions providing varying views on its holding. There is substantial and continuing case law development under this statute that should be reviewed by the practitioner before proceeding under the statute.

c. Negotiated Rulemaking Act of 1990 §19.10

In 1990, Congress amended the Administrative Procedure Act to expressly sanction “negotiated” rule making. The Negotiated Rulemaking Act, [5 U.S.C. 561-570](#) allows a federal agency engaged in rulemaking to establish a collaborative process to engage with stakeholders in developing regulations. Negotiated rulemaking (or RegNeg) is a voluntary process for drafting regulations that brings together those parties who would be affected by a rule, including the government, chartered as an advisory committee under the Federal Advisory Committee Act, [5 USC App 2](#), to reach consensus on some or all of its aspects before the proposed rule is formally published. An impartial facilitator is used to promote intensive discussions among the participants, who operate as a committee open to the public. Regulations drafted using this process tend to be more technically accurate, clear and specific, and less likely to be challenged in litigation than are rules drafted by the agency alone without input from outside parties.

Closely related to the Negotiated Rulemaking Act is the Federal Advisory Committee Act, [5 USC App 2](#) which prescribes standards for the establishment and operation of such committees. For a description of process under FACA, see the EPA Website [here](#). A good example of this process is the development of the “All Appropriate Inquiry” Rule, [40 CFR Part 312](#), which established due diligence standards under CERCLA. [42 USC 9601\(35\)\(B\)](#) and [42 USC 9607](#). See EPA's website for the [RegNeg](#) process followed in developing those rules.

d. FR Civ P 53 Masters §19.11

The Federal Rules of Civil Procedure provide for appointment of masters whose role can include assistance in settling disputes. [FR Civ P 53](#); Advisory Committee Notes, 2003 Amendments, subdivisions (a)(1) and (b). The procedural issues involved in appointing a master and defining the master's role are beyond the scope of this chapter. When the court or parties consider such an appointment, practitioners should carefully read Rule 53, its comments and an appropriate treatise. The Comments note a particular need to define the scope of *ex parte* communications

(if any) to be permitted when the master is acting in the role of a mediator. Comment, subdivision (b). For a general discussion of issues related to appointment and use of masters under Rule 53, see [Federal Judicial Center, Reference Manual of Scientific Evidence \(2d ed\) \(2000\)](#) ; ALI-ABA, [The Art and Science of Serving as a Special Master in Federal and State Courts](#) (November 1 - 2, 2007).

In some cases, federal courts have appointed special masters under Rule 53 to address complex environmental or scientific issues and to perform fact-finding. See, e.g., Votteler & Moore, The Use of Masters in Environmental Litigation, ABA-Natural Resources & Environmental Journal, [V. 12, No. 2, p. 126](#) (1997). These efforts have not always been successful when an appellate court concludes the trial court has used to special master to avoid making its own independent determination. See, e.g., *Sierra Club v Clifford*, [257 F3d 444](#) (5th Cir 2001).

2. ADR in the Federal Courts in Michigan §19.12

There are two basic references for use of ADR processes in federal courts: the Judicial Conference of the United States, [Civil Litigation Management Manual. Ch.V.B, Alternative Dispute Resolution Procedures](#) (2001), and Niemic, Sienstra & Ravitz, [Guide to Judicial Management of Cases in ADR](#) (Federal Judicial Center, 2001). These are general references. Court rules and procedures give the individual judge broad discretion on how he or she may respond to a request for an order directing the parties to mediation. Thus these reports from the Federal Judicial Center are largely advisory.

While ADR is actively supported by judges in both the Eastern and Western Districts of Michigan, only the Western District has a formal ADR plan and process. See [WD Mich L CivR 16.2 et seq.](#) The Western District's ADR programs are set forth in detail on their [website](#). The Western District has an ADR department and maintains a roster of mediators and arbitrators. See or contact the ADR Department, 616-456-2381 or adr@miwduscourts.gov.

Under the rules of the Western District, the attorneys for the parties are personally responsible for the mediator's fees. [WD Mich LCivR 16\(g\)](#).

The only specific reference to an ADR procedure in the Eastern District's local rules is to provide for the referral of cases to the Wayne County case evaluation process under [MCR 2.403. ED Mich LCivR 16.3](#).

There is also guidance from the Federal Judicial Center on ADR processes in the circuit courts of appeal. Niemic, [Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers, Second Edition](#) (2006). The Sixth Circuit by local rule, [6 Cir R 33\(c\)](#), requires that all cases be reviewed for their suitability for further settlement discussions. If so, the rule permits the Sixth Circuit to initiate a settlement conference to consider the possibility of settlement and the simplification of issues and any other matters which may aid in the handling of the disposition of proceedings.

3. ADR with Federal Agencies §19.13

The OMB and Council on Environmental Quality have reminded federal environmental agencies of the federal government's strong commitment to ADR. [Environmental Conflict Resolution Policy Memorandum](#) Joshua Bolten, Director, Office of Management and Budget, and James L. Connaughton, Chairman, Council on Environmental Quality November 28, 2005. There is also strong official support for ADR at the Department of Justice. [Reno, Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques.](#)

Links to the relevant policy statements on ADR from EPA, DOJ and other agencies are included in the reference section at the end of this chapter. While in general the principal federal environmental agencies express strong support for ADR at the headquarters level, it is not always evident that regional offices have embraced ADR processes.

4. Model Consent Decrees and Dispute Resolution Provisions §19.14

Federal consent decrees typically contain dispute resolution provisions. In general they do not contemplate ADR processes. See generally examples in dispute resolution sections of [pending federal consent decrees](#).

C. Michigan §19.15

The statutes and rules providing for ADR processes in civil litigation in Michigan are summarized in Effective Practices and Procedures Task Force of the Alternate Dispute Resolution Section Council, [Compendium of Statutes and Court Rule Relating to ADR](#) (August 2006).

As noted in [§19.7](#), unless the ADR process is part of a dispute which is pending in court, the court rules discussed in [§19.17](#) through [§19.19](#) will not apply unless the parties expressly incorporate some part of the rules' provisions into the agreement to undertake the ADR process.

1. Statutory Arbitration §19.16

Although common law arbitration has not been completely displaced in Michigan, only arbitration agreements that conform to Michigan's Arbitration Act (MAA), [MCL 600.5001 et seq.](#), are enforceable in court. That statute provides for enforceable arbitration when the parties have agreed in writing to arbitrate and their agreement provides that a judgment of any circuit court shall be rendered upon the arbitration. [MCL 600.5025](#) Such an agreement is valid, enforceable and irrevocable, except on grounds as exist at law or in equity for the rescission or revocation of any contract, with regard to any controversy arising under the contract not expressly exempt from arbitration by the terms of the contract. [MCL 600.5001](#). [MCL 600.5011](#) divests parties of the power to unilaterally revoke agreements made pursuant to MCL 600.5001. The statute provides that if a party fails to appear before the arbitrator after due notice, the arbitrator may nevertheless proceed to hear and determine the matter submitted for decision upon the evidence produced by the other party. [MCL 600.5011](#) A court may render judgment on the award even if relief given is such that it could not or would not be granted by a court of law or equity in an ordinary civil action. [MCL 600.5025](#)

Pursuant to [MCL 600.5021](#), the arbitration proceeds under the Michigan Court Rules. The arbitration court rule is [MCR 3.602](#). See *Konal v Forlini*, [235 Mich App 69](#); 596 NW2d 630 (1999). If the court's jurisdiction over the parties has not already been established by the filing of a civil complaint, a party who wishes to compel or stay arbitration or otherwise seek relief must first file a complaint. [MCR 3.602\(B\)](#). Once the court has jurisdiction, the parties may move for relief. If there is a question whether there is a binding agreement to arbitrate, the trial court must summarily try the issue. *Id.* The arbitrator has the power to issue subpoenas to require attendance of witnesses at the arbitration hearing and may also permit, on terms designated by the arbitrator, the depositions of witnesses who cannot be subpoenaed or are unable to attend the hearing. [MCR 3.602\(F\)](#). Beyond providing that an arbitration award may be made by a majority when there is an arbitration panel, the court rules say little about procedures before or at the arbitration hearing, leaving the parties considerable room to tailor the proceedings. An arbitration award must be filed with the clerk of the court within one year after the award was rendered and may be confirmed by the court unless vacated, corrected or modified. [MCR 3.602\(I\)](#). The procedures and grounds for vacating, modifying and correcting awards are set forth at [MCR 3.602](#) (J) and (K). See *Konal*. A complaint to vacate, modify or vacate an award must be filed within 21 days after the date of the award and, in most cases, a motion for relief must be filed within 91 days of the award. [MCR 3.602\(J\)](#) and (K).

If the parties agree to arbitrate but fail to comply with the requirements of [MCL 600.5001](#), the parties are said to have agreed to common-law arbitration. *Frolich v Walbridge-Aldinger Co*, [236 Mich 425](#), 429; 210 NW 488 (1926). What characterizes common-law arbitration is its unilateral revocation rule. 4 Am Jur 2d, Alternative Dispute Resolution, § 94, p 148. This rule allows one party to terminate arbitration at any time before the arbitrator renders an award. *Wold Architects and Engineers v Strat*, [474 Mich 223](#); 713 NW2d 750 (2006) (common law arbitration was not preempted by the MAA). The *Wold* case involved two aborted attempts at arbitration. Because the arbitration agreement did not provide that the award could be entered as a judgment, it fell outside the MAA, giving the recalcitrant party the right to back out of two different arbitration agreements.

The lesson from *Wold* is that any person who turns to arbitration to resolve an environmental dispute must be careful to do so by a writing which complies with the MAA, particularly its requirement that the arbitration award may be entered as a judgment in court.

2. Case Evaluation under MCR 2.403 §19.17

Case evaluation under [MCR 2.403](#) does not provide an attractive ADR process except for the most mundane of environmental disputes for several reasons. First, the technical nature of environmental disputes means the outcome may often hinge on issues outside the knowledge of the regular civil litigation attorney serving on regular case evaluation panels. Second, the complexity of the issues is often unsuited to explanation in the short time allotted to typical case evaluations. On the other hand, a court, if requested by the parties, will appoint a special panel and a special time for case evaluation that can greatly increase the efficiency of the case evaluation approach. Third, environmental disputes frequently seek equitable or non-monetary relief. The court rule provides that the case evaluation monetary award encompasses all claims

and relief sought. A party seeking damages and equitable relief will lose its right to equitable relief if it accepts the award.

3. ADR under MCR 2.410 §19.18

In 2000 the court rules were amended to include [MCR 2.410](#), which provides that all civil cases are subject to ADR. Under the rule, ADR means any process designed to resolve a legal dispute in the place of court adjudication. The rule envisions the court will enter an order directing the parties to undertake a specified ADR process. [MCR 2.410\(C\)](#). Counsel and representatives of the parties must attend and must have “information and authority adequate for responsible and effective participation” for all purposes including settlement. [MCR 2.410\(D\)](#). A failure to attend may be sanctioned with an order of dismissal. [MCR 2.410](#). If the parties wish to utilize mediation rather than some other ADR process, mediation normally proceeds under [MCR 2.411](#).

4. Mediation under MCR 2.411 §19.19

Once mediation is ordered under [MCR 2.411](#), the mediator is directed to promptly confer with the parties to schedule the mediation, considering factors like the need for limited discovery before mediation, the number of parties and issues, and the necessity for multiple sessions. [MCR 2.411\(C\)\(1\)](#). The mediator may require the parties to submit summaries, documents or other information before the mediation or bring them to the session. *Id.*

The rule instructs the mediator to meet with counsel and the parties, explain the process, and then get to work. [MCR 2.411\(C\)\(2\)](#). The mediator is directed to discuss the facts and issues involved. The mediation continues until a settlement is reached or the mediator determines that settlement is not likely. The rule recognizes that settlement may take several mediation sessions. [MCR 2.411\(C\)\(2\)](#).

Within seven days after the conclusion of mediation, the mediator is required to advise the court, “stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether further ADR proceedings are contemplated.” [MCR 2.411\(C\)\(3\)](#). This rule makes clear that the mediator is barred from sharing with the judge any information or opinion about the parties or their positions if the mediation does not yield a settlement.

If the case is settled through mediation, counsel are required to prepare and submit the documents to conclude the case within 21 days. [MCR 2.411\(C\)\(4\)](#).

The rule provides that the costs of mediation shall be divided between the parties on a *pro rata* basis unless otherwise agreed or ordered. The court has the power to enter an order enforcing payment of the fee. [MCR 2.411\(D\)](#).

5. SCAO §19.20

The Michigan State Court Administrative Office (SCAO), Office of Dispute Resolution, is an excellent resource for ADR information. The Office of Dispute Resolution is an active proponent of ADR, oversees implementation of circuit court ADR plans, establishes training

criteria for neutral, and keeps statistics on ADR outcomes. Numerous ADR forms can be found on the [Office of Dispute Resolution](#) website. ADR staff can provide a great deal of help and assistance on ADR issues as implemented under the court rules.

6. ADR at DNRE §19.21

For many years DNRE has used facilitated stakeholder processes to address a number of public policy and rulemaking issues including streamlining the air permit-to-install process in 2004, addressing issues with the [implementation of Part 201 in 2006](#), and revising the Part 201 rules. Some divisions within DNRE have also instituted informal dispute resolution processes. See, for example, [AQD Permit to Install Dispute Resolution Process](#). The Attorney General's office has been willing to enter into mediation of environmental disputes in appropriate circumstances as well. In addition, the administrative law judges from the State Office Administrative Hearings and Rules who hear contested case hearings under NREPA strongly support ADR processes.

III. Common Applications to Environmental Disputes

A. Special Considerations in Environmental ADR §19.22

Environmental disputes pose powerful challenges to civil societies. More often than not, they are complex and hard fought affairs that present urgent and practical problems to be solved. Frequently, they are laden with contested scientific and technical information and important collisions of social and economic values. Inevitably, they are also political fault lines in larger ideological wars.

Environmental conflicts often tend to be broad in their scale of impacts and laden with values that seemingly at odds. Environmental disputes are also emotional. The parties may include both "conscience" as well as "beneficiary" constituents. At issue in many cases are matters of culture, economics, justice, health, risk, jobs, power, uncertainty, and professional and bureaucratic politics. Elections are sometimes won or lost because of environmental conflicts. In some cases, the outcomes of specific conflicts have inter-generational or global impacts.

Adler, et al., *Managing Scientific and Technical Information in Environmental Cases*, at [5. USIECR 2000](#). The US Institute for Environmental Conflict Resolution is a federally chartered program for assisting all parties in federal environmental disputes. It maintains a roster of reviewed environmental dispute resolution and consensus building professionals as well as providing independent conflict management service to federal and other stakeholders in environmental disputes. Their research and consultative service can be invaluable for disputes involving federal action.

Environmental disputes, like many technical disputes, have special problems in evidence, experts, regulations, values and policy:

- *Multiple scientific and technical problems.* Few disputes turn on a single problem in a single field of science. The problem can begin in engineering, move to chemistry, then to geology and then to biology or toxicology and then to risk assessment. Disagreements between parties happen all along the way to defining the environmental problem and thereafter the choices for solution multiply. The ADR professional can often provide significant assistance in structuring the scientific analyses that the parties need to complete in order to define a set of solutions.
- *Organizing the data into a structure for decision.* Testing information is often collected by multiple organizations, usually under standard protocols, but is not always quality controlled and shared among all the parties. This leads to one-upmanship with the most current data as well as distrust among the parties. Agreements on data sharing and quality control can contribute to more consistent evaluations of problems and solutions by all parties.
- *Identifying the regulatory issues and the discretionary ranges available.* Structure and organization of the issues through an ADR process will often assist the parties in exploring their options for settlement.
- *Identifying the value issues for the parties.* Environmental issues are often highly value laden. Identifying those values can provide options for satisfying both parties because their goals can be significantly different. Environmental disputes are not always the zero sum game they are often perceived to be.

Other environmental disputes include resource allocation (such as fishing rights), facility siting and expansion (such as landfills), the environmental impact and disparate impact of permitting, and governmental action decisions.

B. Conventional Two-Party Dispute §19.23

The normal two-party dispute involves contamination in some media, an assignment of responsibility, options for cleanup, options for correction of the results, methods of dealing with the other impacts including public impacts, and future actions by both the responsible parties and the affected parties towards the property and people involved. Other chapters of this Deskbook detail the specific requirements of the statutory scheme for the media, the contaminant, and available remedies as well as common law liability and general remedies available. The use of the ADR process in such disputes has some common characteristics:

- *Identifying a common technical base of data* on the identity of contaminants, how much has been distributed, who may have been exposed, what the risks may be under various scenarios and the competing assessments for joint review. In other words, what are the numbers and where did they come from? EDR professionals often help work through methods for mutual assurance of quality data, exchange of data under appropriate

restrictions, and methods for third-party data assessment as a way of establishing a negotiation and problem description floor for the parties.

- *Identifying and qualifying remedial goals for both sides* to any environmental dispute. Mediators often are employed to work with each side in a dispute to refine and quantify the goals for a resolution. That process often yields an opportunity to work through tradeoffs between goals.
- *Hearings and an opportunity to be heard.* Particularly in cases of individual exposure to contaminants, a neutral forum provides significant benefits for working through the emotional component of the claim with an experienced neutral party to assist, hear, and acknowledge the concerns beyond the financial which drive many contamination disputes.
- *Strategy and solutions.* Contamination remediation is almost always a long-term process. Short-term solutions for making contamination go away (take it somewhere else), buy my house (get me out of here) and insure my health forever are not often within the financial resources of the parties. Crafting solutions which proceed stepwise to provide short-term action to remove hazards, and then to assess injury, and then to compensate injury often employ neutrals to monitor the process and provide a way to keep the parties together.

An innovative use of ADR was documented by Paul Zuger in the Michigan Environmental Law Journal, [26 Mich Env L J No 1](#), p8 (2008), reviewing *MDEQ v Vreba-Hoff Dairy LLC*, where facilitative mediation with a former judge resolved the permit and application of the prior consent judgment. The mediator assisted the parties in segregating technical issues on compliance activities from those related to reporting, fines and costs. In addition, the mediator was asked to evaluate and propose settlements on specific issues. Those proposals along with the agreed portions resulted in a settlement

C. Allocation Disputes under CERCLA and State Variants §19.24

The passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (aka Superfund) in 1980, [42 USC 9601 et seq.](#), created a massive strict liability scheme for cleanup of sites with few, but more often hundreds to thousands of contributing parties. The Manual for Complex Litigation, Fourth, available from the Federal Judicial Center [www.fjc.gov] devotes a full chapter to litigation and management of the technical issues under Superfund. The statute encourages EPA to notify parties, after assessing their potential liability, with the goal of having them conduct and pay for the problem assessment (the Remedial Investigation and Feasibility Study (RI/FS)), and the ultimate remedy. Groups of these Potentially Responsible Parties (PRPs) found that one of their first problems was finding a rough justice method for paying for the long process of cleaning up the site.

One innovative solution for many sites was the use of third party neutral “allocators” to function as a database consultant, or facilitator, or mediator up to acting as a private special master for assessing shares of liability for the cleanup. Functions of the allocator include:

- Develop the evidence database. This included all kinds of transactional information, particularly at landfills: manifests, shippers, driver interviews, depositions accounting records, and Christmas card lists.
- Assemble and review that evidence for accuracy or assumptions.
- Organize group process for review of the evidence by parties for their own evidence.
- Presentation of papers on group issues.
- Decisions on shares.
- Organization into PRP groups for remedy performance: majors work parties, majors cash parties, tiered buyouts with tiered releases, de minimis.
- Agency assistance or obstacles.
- Gore Factor allocation assessments and description.
- Remedy differentiation and toxicity differentiation.

While the cost and cleanup standards to which the remedy will aspire have been of great concern to PRPs, the conflicts and representation issues have also received some attention. [Michigan Ethics opinion R-16](#) (1993) describes the multiple representation conflict during allocation at Superfund sites and resolves the issues by allowing multiple representations within classes of PRPs (major, de minimis, or owner or operator) as long as the clients consent. The neutral allocator facilitates this representation by providing at least one degree of separation for decisions on each client's share.

Mediating the decisions on remedies has not been successful at either the state or federal level.

D. Public Policy Disputes §19.25

Michigan has a history of engaging in facilitated discussion of policy proposals. DNRE Remediation Division (RD) recently undertook an effort to redefine and merge the Cleanup (Part 201) and Tank (Part 213) programs in a two-year process of stakeholder meetings. The effort had the direct involvement of senior managers and the DNRE Director along with a stakeholder group of over 50 participants. DNRE engaged a facilitator to staff both the 201 Workgroup as well as the Environmental Advisory Council. The minutes and recommendations have been posted on [DNRE website](#).

There are other examples of collaborative partnerships between DNRE and private parties. The Michigan Chemical Council led an effort to clean up a backlog in air permits. The Memorandum of Understanding (MOU) developed by DNRE and the group specified the terms of access and review by independent consulting engineers paid by the group and supervised by DNRE. The project reduced the backlog dramatically. A value-stream mapping project was

undertaken jointly by DNRE Air Division and a group led by the Michigan Manufacturers Association (MMA). The re-engineered process cut approximately 66% off the time required to process a permit. One particular innovation was the use of an informal pre-meeting between the permit engineers and the facility engineers to generally define the information and documentation necessary prior to submitting the application.

Critical to both efforts was the direct involvement and commitment by the DNRE director senior managers in DNRE, and senior management in the regulated community.

IV. Engaging in the ADR Process

A. Is the Dispute Ready for ADR? §19.26

A party seeking to resolve a dispute through ADR processes should consider the following questions in an effort to decide whether the time is right for ADR, the suitability of part or all of the dispute for resolution by ADR, and the structure of a suitable ADR process.

- What interests predominate? – legal, factual, substantive, procedural, psychological, emotional (Superfund practitioners can attest to the emotional component of liability and allocation disputes under CERCLA).
- What does the client really want to achieve? – which is not necessarily what the client framed at the outset of the dispute.
- What ADR process would be best suited to accomplish that end? A mediation may yield an apology, arbitration will not.
- Are the parties' interests suitable for settlement?
 - Are there rights or principles that one party wants to establish as a matter of law or precedent?
 - Does this type of case usually settle?
 - Is a speedy or inexpensive resolution desired?
 - Are there issues that could be resolved by summary disposition?
 - Can relief be obtained through ADR that could not be achieved in litigation?
 - How will the parties' interests be advanced by settlement?
- What are the obstacles to negotiation; can ADR overcome them?

- Are the relationships between counsel or the parties such that a third party neutral may be needed to permit discussions to occur?
- Are one or both parties' expectations unrealistic and would the parties benefit from evaluative ADR?
- Does litigation or some other alternative offer a party a better outcome than a negotiated settlement?
- Do both parties appear willing to pursue settlement?
- Will ADR offer a substantial cost savings to the parties?
 - What is the amount of the dispute?
 - What are likely trial and discovery expenses?
 - What economic losses will be incurred or opportunities foregone during the pendency of the dispute?
- Are complex factual issues central to the dispute?
 - Can an ADR structured to help the parties reach a consensus on key factual issues?
 - Would a third party neutral with expertise be preferable than a judge or jury for assimilating and deciding complex factual matters?

Before initiating a facilitation process where public disputes are being resolved, a very important consideration, once a participant has suggested ADR, is defining those who have a real interest in the outcome and whose support is essential to resolve the dispute with finality. These interested parties are usually described as stakeholders. For example, in a controversial zoning dispute, the stakeholders may be everyone in the community in addition to the developer and various city bodies and employees. In public policy disputes, the stakeholders often are selected and participate on a representative or typicality basis. The committee engaged in the EPA's AAI RegNeg process included, for example, representatives from organizations representing banks and lenders, real estate developers, environmental consultants, and environmental regulators. Often the first step in initiating a facilitation process is a conflict assessment to identify the spectrum of issues, the stakeholders and their respective interests, conditions needed for a productive process, whether the process is ripe, and the prospects for settlement. Most of the questions posted above that are relevant to other ADR processes, modified for context, are also relevant to this conflict assessment inquiry.

B. Initiating the ADR Process §19.27

The discussion in this section assumes for simplicity a mediated two-party dispute. Multiparty disputes will tend to follow the same steps, albeit with more complexity. Facilitation of public policy disputes and convening processes may differ significantly and are tailored to the specific circumstances.

In a mediation process a typical sequence to initiate the process is:

- The parties identify those issues subject to resolution, the form of ADR process desired and the qualifications and style of the third party neutral(s).
- If the dispute involves issues beyond a relatively simple dispute over money damages, and there is not a preexisting agreement to mediate or arbitrate, it is good practice to enter into a written understanding covering the parameters of the mediation or arbitration, including issues to be resolved and the scope of relief that may be awarded. When the mediator or arbitrator is engaged, this understanding typically will be expanded into a more formal agreement to which the mediator will be a party.
- The parties identify and interview candidate mediators.
 - Generally candidate mediators are requested to perform preliminary conflict checks based on a disclosure of the identity of parties to cut short the selection process if there are obvious conflicts.
- The parties tentatively select a mediator and a full conflict check and disclosure are made. The parties may want the conflict check to include not only the parties and their counsel but also related businesses, key witnesses and experts.
- Once conflicts are cleared, parties work with the mediator to finalize the parameters of the mediation, which should be memorialized in a written agreement between the parties and the mediator. Key topics include:
 - Issues in dispute.
 - Fees – amount, allocation between the parties, whether the engaging attorneys are responsible for the mediator’s fees (recommended), advance payments, minimum charge, and cancellation charge.
 - Schedule of submissions and meetings.
 - Time for completion, particularly if specified in a court order.
 - Persons required to be in attendance and scope of settlement authority (usually full settlement authority).

- Ex parte contact between the mediator and counsel and their clients before and during mediation.
- The need for and scope of written submissions.
- Confidentiality.
 - Keep in mind that where one party is a governmental entity, public disclosure laws such as the Open Meetings Act and the Freedom of Information Act, and political considerations may put limits on the scope of confidentiality to which the governmental party may be willing or legally able to agree.
 - Keep in mind that the confidentiality protection under EPA's policy as discussed in [§19.8](#) is not as broad as under the Michigan Court Rules.
- Incorporation of standards of conduct for the mediator.
- If mediated under [MCR 2.411](#), incorporation of the limited reporting requirement to the court on the completion of the mediation.
- Mediation style – whether or not evaluative, and whether the mediator will render a case evaluation award under [MCR 2.403](#) if settlement is not achieved.
- Acknowledgment that neither the mediator nor the mediator's law firm, if the mediator is a lawyer, is not acting as attorney for either side, that statements made by the mediator in the course of the mediation do not constitute legal advice, and that the parties have been advised to seek and rely on the advice of their own counsel.
- It may be appropriate to provide or require a waiver by the parties of any future conflict if the mediator and the mediator's law firm are retained after completion of mediation as counsel by a party in a matter unrelated to the subject matter of the mediated dispute.
- A provision barring the parties from taking any form of discovery or testimony from the mediator or seeking any statement or finding by the mediator related to any factual or legal matter at issue in the dispute.
- Boilerplate: execution by counterpart, law applicable to the agreement, entire agreement, binding on parties, their representatives and those present during the mediation.

Mediation agreements are typically executed in advance of the mediation session. The mediator may have the agreement also signed or acknowledged by those who attend the mediation session so it is clear that terms such as the confidentiality provisions are binding on those who attend.

If the mediation is being conducted in federal or state litigation, much of the subject matter of the agreement may be incorporated into a court order

There are special considerations for arbitration agreements. Often the arbitration agreement is part of a agreement executed long before the dispute and “arrives” as a given to counsel engaged to represent the parties in the dispute. As a general observation, standard arbitration clauses often are unsuited to the exact dispute that has arisen. Where possible when the parties are faced with a boilerplate arbitration clause, they are well advised to amend the contract containing the clause to provide for a procedure more appropriate. Drafting an appropriate arbitration agreement is outside the scope of this treatise. There are numerous treatises and articles on drafting arbitration clauses. See, *e.g.*, Domke on Commercial Arbitration, 3d, Vol I, pt III (West 2010) ; [AAA, Drafting Dispute Resolution Clauses, A Practical Guide \(2007\)](#); Townsend, Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins; ABA Dispute Resolution Journal [Vol. 58, No. 1](#) (Feb/April 2003) [Gattusa, Drafting Arbitration Provisions for LLC Agreements.](#)

C. Selecting and Retaining the Neutral

1. Sources §19.28

For mediation under [MCR 2.411](#) each circuit court’s ADR clerk is required to maintain a list of mediators, [MCR 2.411\(E\)](#), who meet the qualifications set forth at [MCR 2.411\(F\)](#). When the parties have not stipulated to a mediator, the court is required to select a mediator from the roster according to the court’s local ADR plan. The plan directs the ADR clerk to assign mediations in a rotational manner that assures as nearly as possible that each mediator is assigned approximately the same number of cases. [MCR 2.411\(3\)](#). In environmental cases, we recommend that the parties agree upon a mediator who can bring suitable environmental expertise. In most cases, a random draw for a court’s ADR list is less likely to result in the best mediator for an environmental dispute.

The Environmental Law Section of the State Bar of Michigan maintains a [roster](#) of lawyers holding themselves out as mediators with expertise in environmental disputes.

The American Arbitration Association maintains a roster of mediators as well as arbitrators. <http://www.aaamediation.com/>. AAA’s office in Michigan is 27777 Franklin Rd # 1150, Southfield, MI 48034 (248) 352-5500.

The Michigan State Bar Journal and Lawyer’s Weekly contain advertisements by lawyers holding themselves out as arbitrators and mediators.

Word of mouth among environmental lawyers is often a productive source of recommendations.

2. Qualifications §19.29

The Michigan Court Rules establish standards for training and qualification of mediators certified under [MCR 2.411\(F\)](#). These include completing a training program approved by the State Court Administrator. [MCR 2.411\(F\)\(2\)](#). The rule permits certifications of other individuals with specialized experience or training upon application to the circuit court clerk.

[MCR 2.411\(F\)\(3\)](#). These qualifications apply only to individuals wishing to be listed on mediator rosters developed pursuant to circuit court ADR plans. The rule establishing specified qualifications for mediation does not apply when the parties stipulate the third party neutral. [MCR 2.411\(B\)\(1\)](#). The court must appoint a mediator stipulated to by the parties so long as the court's trial schedule will not be affected. *Id.*

When selecting a facilitator, remember that you will want someone who:

- serves as a facilitator rather than a lecturer,
- remains impartial, shows respect for all opinions, and does not use the position to influence the outcome of the discussion,
- creates opportunities for everyone to speak,
- helps participants look for common ground, but avoids pushing for a consensus,
- keeps the conversation moving and on track by occasionally summarizing points, and bringing the discussion back to the topic if it wanders unproductively,
- raises views that have not been considered by the disputants,
- asks questions that challenge old assumptions, and
- deals effectively with any problems or conflicts that arise.

3. Standards of Conduct for the Third Party Neutral §19.30

The Michigan Court Rules direct the State Court Administrator to develop [standards of conduct](#) for mediators “designed to promote honesty, integrity, and impartiality.” [MCR 2.411\(G\)](#). These standards are under review in 2010. [SCAO June 2010 Proposal for Revising Michigan's Standards of Conduct for Mediators](#).

The ABA has adopted policies addressing a variety of the issues arising from the mediation and arbitration process. See generally, the ABA's [Section of Dispute Resolution website](#). Three organizations, the ABA, ACR and AAA adopted a common [Model Standards of Conduct for Mediators](#).

The American Arbitration Association has adopted a code of ethics for AAA arbitrators. The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. In 2003, an ABA Task Force and special committee of the AAA revised the Code. Both organizations approved and recommended both the original 1977 Code and the [2003 Revision](#).

4. Attorney as Mediator §19.31

When an attorney serves as a third party neutral in any ADR process, there are several ethics issues to be considered.

a. Is the Third Party Neutral Acting as a Lawyer? §19.32

First and foremost, in acting in an ADR role is the lawyer acting as a lawyer for the parties? Although the subject of much debate ten years ago, the settled view today is that when the lawyer is acting as a mediator, he or she is not acting as an attorney by providing mediation services. The Michigan Supreme Court does not consider provision of mediation services as the practice of law because the court rules specifically permit non-lawyers to serve as mediators. [MCR 2.411\(F\)\(2\)](#). See also [MRPC 2.2](#), Comments: “The rule [governing lawyers acting as intermediaries] does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role, the lawyer may be subject to applicable codes of ethics such as the Code of Ethics for Arbitration for Commercial Disputes”

The ABA Section of Dispute Resolution has adopted the position that mediation services are not the practice of law. ABA Section of Dispute Resolution, [Resolution on Mediation and the Unauthorized Practice of Law](#) (adopted February 2, 2002).

There may be duties and standards of conduct arising under Michigan’s Rules of Professional Conduct that apply to a lawyer who acts as a mediator, but they will not arise out of or pertain to the attorney client relationship.

A very important caution attaches, however. The attorney mediator can undertake actions that could well be determined to amount to the assumption of the lawyer’s role, for example, by drafting substantive provisions of any settlement agreement that the parties reach or offering legal advice during the mediation that falls outside of the context of evaluative statements made during the process. As another example, a statement to a disputant that a settlement would receive a specific tax treatment might be heard very differently by the party than the statement that the party would be well advised to consult his or her attorney as to the tax consequences of the settlement. This risk increases if one or both parties are unrepresented by counsel. Best practice is to have the ADR agreement specifically acknowledge that the mediator is not acting as an attorney for any party. An additional signed acknowledgement at the outset of the first mediation session may also be warranted.

Michigan’s Code of Judicial Conduct provides that “a judge should not act as an arbitrator or mediator, except in the performance of judicial duties.” [Canon 5\(E\)](#). The Canon, however, does not address how it might apply to a retired judge who regularly sits as a visiting judge.

b. Are There Conflict of Interest Issues? §19.33

The second issue is how conflict of interest rules apply when a lawyer is asked to serve as a mediator in a dispute concerning a present or former client or if a party to the ADR process later seeks to engage the lawyer in general or to represent the client with regard to some matter that was subject to or related to the dispute subject to the ADR process.

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

Michigan's Standards of Conduct require that if a potential conflict is identified the mediator must decline to mediate unless all parties choose to retain the mediator. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation unless the conflict of interest casts serious doubts on the integrity of the process, in which case the mediator must decline to proceed. [SCAO Standards of Conduct for Mediators, Sec. 4](#). Other codes of conduct have similar requirements. The Michigan Court Rules provide for disqualification of case evaluators under [MCR 2.403\(E\)](#) on the same grounds as for disqualification of a judge pursuant to [MCR 2.003](#). Although this rule does not expressly refer to mediators under [MCR 2.411](#), it seems likely that if an issue of disqualification were to arise, a court would look to [MCR 2.403](#) for guidance.

Michigan Rule of Professional Conduct [MRPC 1.12\(a\)](#) provides that a lawyer shall not represent anyone in connection with a matter in which the lawyer participated as an arbitrator or other adjudicative officer, subject to limited exceptions pursuant to [MRPC 1.12\(c\)](#). This rule does not address mediators. The SCAO's Code of Conduct for Mediators, however, does address mediators. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process. SCAO, [Standards of Conduct for Mediators](#), Sec. 4.

Because the SCAO's Standards apply as a matter of course only to mediations under [MCR 2.411](#), the parties to a mediation agreement are well advised to incorporate those standards into their agreement with the mediator.

D. Preparing for the ADR Process §19.34

Prepare for ADR recognizing several truths. First, neither you nor the other side would be pursuing settlement if one side's position were strong enough to prevail outright. Because neither side has a "lay down hand," persuasion not dominance is more likely to yield the best outcome in the settlement process. Second, the ADR process gives an opportunity to exercise persuasion directly on the decision maker on the other side, unfiltered by opposing counsel. Likewise, your client will be forced to listen to others about the merits of the case. Third, the odds of settling will be increased to the extent the other side gets what it needs; the trick is figuring out how to satisfy the other side's bottom line needs while maximizing what your client achieves. Finally, you have engaged a third-party neutral who can help identify outcomes that work for both and can help each side persuade the other to reach a settlement that offers something to both. Whatever the facts, law, and subject of the dispute, mediation preparation and participation by the client and its attorney that does not reflect and take advantage of those truths will be inadequate.

In poker terms, if you are dealt four aces, you do not have to analyze how your opponent bets, you lay down your hand and rake in the pot. In litigation with a lay down hand, you move for summary judgment and claim victory. Your client is engaged in settlement, however, because the client does not have a lay down hand. You and your client must learn a little about the other player's hand and how he or she bets if you want to intelligently maximize the possible outcome. Utilized well, the ADR process will serve this function. This process requires a focus on the other player. In ADR processes this focus involves listening carefully and asking questions to

understand the other side's position better and to more realistically assess the strengths and weaknesses of your hand.

Further, unlike poker, settlements mostly are not "zero-sum" games where whatever one party gains the other must lose. This is particularly true when litigation costs, opportunity costs and management distraction are factored in. Effectively engaged, ADR processes offer the promise of persuading your opponent to accept a solution beneficial to you and to identify a settlement that offers both sides more than could be achieved in litigation.

It cannot be overemphasized that there is a difference between winning an argument and persuading the other side to adopt your point of view, as anyone who reflects on his or her own response to losing an argument can attest. Stereotypically lawyers are trained to win arguments, not persuade. Clients come to most disputes convinced they are right and intent on focusing on imposing that view on the other side. Effective participation in ADR processes may require a reorientation of both the lawyer's and client's instinctive approach.

These truths mean that preparing and engaging in the ADR process requires:

- Helping your client clearly identify what it really needs to achieve.
- Probing the other side to learn what the other side needs to achieve.
- A willingness and open mind to listen to the other side, to acknowledge the other side's legitimate interests, and to consider creative solutions.
- Use of the facts and law to persuade the other side of the strengths in your case and the weakness in their case.
- Identifying solutions that address each side's interests.
- Persuading the other side that outcomes satisfactory to your client will also be satisfactory to them.

There is nothing about the foregoing that is unique to ADR processes; it applies to all negotiations. The point is that the parties have engaged a third party neutral because the parties and their counsel have been unable to get it done by themselves or expect that a third party neutral will make it easier, quicker or more productive to achieve a settlement.

Certainly, in preparing yourself and your client for mediation, mastery of the facts and the law is important. This is what lawyers are trained to do. But unlike a motion for summary disposition or a trial, this preparation will not dictate the outcome. The lawyer and the client must identify how the law and facts work for and against each party. Because the ADR process (except arbitration) will not yield a binding determination, the facts and law will not dictate the outcome; they are the materials to be used to persuade the other side to accept a settlement that works for your client.

V. Enforcing the ADR Outcome §19.35

A settlement achieved through ADR becomes a contract between the parties in which the compromises made by each side are consideration supporting the compromises made by the other. When achieved outside of litigation, settlements are enforceable according to standard contract principles. No writing is required, although obviously highly recommended. When a settlement is achieved in litigation, the court rule [MCR 2.507\(G\)](#) requires either that it be placed on the record in open court or that it be reduced to a writing and subscribed by the party against whom the agreement is offered or its attorneys. *Fear v Rogers*, [207 Mich App 642](#); 526 NW2d 197 (1994); *Kloian v Domino's Pizza*, [273 Mich App 449](#); 733 NW2d 766 (2006) (settlement agreement not signed at bottom, is not “subscribed” and not enforceable). Thus when a settlement of a litigated matter is achieved as the product of an ADR process, the parties and their third-party neutral must exercise the discipline to reduce the material terms to a writing to be signed by the parties *before* the ADR process is terminated. The *Kloian* case makes clear that courts will enforce settlement agreements where a subscribed (*i.e.*, signed at the bottom) writing includes the material terms, even though a more complete or formal document was intended to follow.

VI. Resources and Further Reading

A. Federal Agency ADR Websites

a. DOJ §19.36

DOJ Office of Dispute Resolution: <http://www.usdoj.gov/odr/>.

Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution: <http://www.usdoj.gov/crt/adr/notice.html>.

b. EPA §19.37

EPA Final ADR Policy, published at 65 Fed. Reg 81858 (12/27/2000):
<http://www.epa.gov/adr/epaadrpolicyfinal.pdf>.

Key EPA websites on ADR are:

USEPA web portal: EPA ADR Web Portal <http://www.epa.gov/adr/>

EPA, Compliance and Enforcement: <http://www.epa.gov/Compliance/civil/adr/index.html>

Use of ADR in Compliance and Enforcement :
<http://www.epa.gov/oecaerth/civil/adr/usingadr.html>.

EPA, Conflict Prevention and Resolution Center: <http://www.epa.gov/adr/index.html>.

EPA Conflict Prevention and Resolution Center Documents:
http://www.epa.gov/adr/cprc_documents.html

EPA Region 5 has two dispute resolution experts on staff: <http://www.epa.gov/cgi-bin/r5experts.cgi?category=Compliance%20and%20Enforcement&subcategory=Dispute%20Resolution>

c. Coast Guard §19.38

DOT general policy Interim Statement of Policy on Alternative Dispute Resolution, 65 Fed Reg 69121 (11/15/00): http://consensus.fsu.edu/ADR/PDFS/USDOT_DR_Policy.pdf (applicable to the Coast Guard before it was transferred to the Department of Homeland Security).

d. DOI §19.39

Office of Collaborative action and Dispute Resolution: <http://www.doi.gov/cadr/>

Bureau of Land Management: <http://www.blm.gov/wo/st/en/prog/more/adr.html>

B. ADR Organizations §19.40

Many organizations have worked in conflict resolution in environmental and public policy disputes. Their websites contain a great deal of valuable information and reports. A few of the leading organizations listed below. Any student of conflict resolution and environmental disputes will find a visit to their websites worthwhile. The publications available will provide valuable insights and much practical advice on how to move through an environmental dispute to a successful resolution.

RESOLVE. RESOLVE is a non-profit organization dedicated to advancing the effective use of consensus building in public decision making. RESOLVE specializes in mediating and facilitating complex issues in the areas of energy, drinking water, rivers and watersheds, health and biotechnology, environmental quality, natural resources, and community land use and transportation and in helping individuals and organizations build their capacity to engage diverse interests in collaborative problem solving. <http://www.resolve.org/>

U.S. Institute for Environmental Conflict Resolution. “The U.S. Institute for Environmental Conflict Resolution, an independent and impartial federal program, has a mission and history of helping people find workable solutions to tough environmental conflicts . . . anywhere in the U.S.” <http://www.ecr.org/>

National Policy Consensus Center – Policy Consensus Initiative (PCI). PCI builds and supports networks that provide states with leadership and capacity to achieve more collaborative governance. <http://www.policyconsensus.org/>

Federal Interagency ADR Working Group. Congress and the President established the Working Group to coordinate, promote, and facilitate the effective use of ADR throughout the federal government pursuant to the Administrative Dispute Resolution Act of 1996, Publ. Law 104-320 and 5 USC 571 *et seq.* www.justice.gov/adr/pdf/adra.pdf, and a White House Presidential Memorandum. <http://www.adr.gov/1998.05.01.CLINTON.pdf>

Association for Conflict Resolution (ACR). The Association for Conflict Resolution is a professional organization dedicated to enhancing the practice and public understanding of conflict resolution. <http://www.acrnet.org/>

ABA Section of Dispute Resolution. The Section's objectives include: providing information and technical assistance to members, legislators, government departments and the general public on all aspects of dispute resolution; studying existing methods for the prompt and effective resolution of disputes; adapting current legal procedures to accommodate court-annexed and court-directed dispute resolution processes; activating state and local bar involvement in dispute resolution; and conducting public and professional education programs. <http://www.abanet.org/dispute/home.html>

State Bar of Michigan, ADR Section. <http://www.michbar.org/adr/>

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