

See You in Court! No, Meet You at Mediation

Ethical and professional consideration for the
government attorney

June 23, 2023

FINISHED FILES ARE THE
RESULT OF YEARS OF
SCIENTIFIC STUDY
COMBINED WITH THE
EXPERIENCE OF YEARS.

The Trend of Civil Trials in Michigan

- Number of Civil Cases filed in Michigan courts in 2021 – 90,000 +/-
- Civil Cases settled in 2021-- 18,500 +/-
 - Jury 649, i.e., 0.007% of filed, 0.04 of settled
 - Bench 278, i.e., 0.003% of filed, 0.02 of settled
- Other examples
 - E.g., Michigan Tax Tribunal
 - All domestic cases in Kent County

You Are A Mediator Whether You Realize It Or Not

1. You mediate between parties that are part of the government agency, e.g., among employees
2. You mediate between third parties not part of the government agency, e.g., abutting neighbors
3. You mediate among the government agency and non-government agency parties, e.g., non-government agency party suing the government agency, e.g., a tort claim
4. You are a mediator. MRPC 2.4

What Is Mediation?

- It's not a conventional trial, arbitration, or factfinding
- It's a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in negotiating their differences.
- Mediators are trained, but the parties may select non-trained mediators.
- Attorneys frequently represent the parties.

Cons To Watch Out For

- Abuse or intimidation between the parties;
- One of the parties dominates and wants to make all of the decisions;
- Parties have a hard time giving their ideas or opinions in mediation, e.g., non-English speaking or inarticulate
- The health or safety of one or both of you might be put at risk by mediation (but likewise with a trial);
- Lacking information to make informed decisions. It might be too early to try mediation.

Athenian Oath

We will never bring disgrace to this, our city, by any act of dishonesty or cowardice, nor ever desert our suffering comrades in the ranks. We will fight for the ideals and sacred things of the city, both alone and with many. We will revere and obey the city's laws and do our best to incite a like respect and reverence in those above us who are prone to annul or set them naught. We will strive unceasingly to quicken the public sense of civic duty. Thus, in all these ways, we will transmit this city not only not less, but greater and more beautiful than it was transmitted to us."

Lawyer's Oath (1 of 2)

- I do solemnly swear (or affirm):
- I will support the Constitution of the United States and the Constitution of the State of Michigan;
- I will maintain the respect due to courts of justice and judicial officers;
- 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;

- I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with my client's business except with my client's knowledge and approval;
- I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
- I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any cause for lucre or malice;
- I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed upon members of the bar as conditions for the privilege to practice law in this State.

See Also

- Michigan Court Rules 4.11 and 4.12
- Mediator's Standards of Conduct
- Michigan Rules of Professional Conduct

(1) All Should Understand

- Explain/inform MRPC 2.1
- The nature of the process/how it works
- Terms of the agreement and scope mediate
- The terms of the settlement or agreement

(2) Synergetic, Not Adversarial

- Decorum MRPC 3.5
- Always a counteroffer, "We can't accept that, but we can do this"
- Good faith negotiation techniques

(3) Participation is Voluntary

- The “Miranda” warnings of mediation
- Food and drink
- Even when court-ordered means just attend
- Take a break, or end the mediation
- Competent to participate

(4) Competent Attorneys At Mediation

- Know age and ability regarding the process
- Knowledge of the substantive issues
- Ability to negotiate
- Mentally and physically capable, e.g., the ability to hear

(5) Confidentiality Of The Process

- Explain
 - Mediator's role in maintaining the confidentiality
 - Information gained in caucus
 - Confidentiality in subsequent proceedings
 - Mandatory reporter's obligation
 - Mediator's notes
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- MRPC 1.6
 - Mediator standard V

(6) Impartiality of the process

- Avoid suggestions of bias. MRPC 2.4
- Avoid giving legal advice
- But legal information, e.g., the next step after mediation
- Disclose
- Withdraw

(7) Civility

- Maintain a conducive environment
 - Assert control
 - Separate into breakout rooms/shuttle mediation
 - Mute button
- MRPC 3.5,

(8) Withdraw Or Terminate The Mediation

- The parties or party is not able to mediate
 - Physical
 - Mental
 - Willingness
- The Mediator's disability to properly mediate

(9) When The Council Is The Client

- Early mediation should be considered
- Trial strategy or attorney's written opinion, focusing on mediation, should be discussed
- Delegation of authority to settle up to an amount
- The difficulty of non-financial, e.g., zoning, or employment
- Back in open session to approve the settlement

OMA and FOIA

- (e) To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body. MCL 15.268
- (h) To consider material exempt from discussion or disclosure by state or federal statute. MCL 15.268
- (g) [Written] Information or records subject to the attorney-client privilege. MCL 15.243

Find the nuggets and thank the “boss(s)” in writing.

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2.

3.

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