



ARBITRATION & MEDIATION

A Newsletter of the PBA Alternative Dispute Resolution Committee

Interviews with Judge Leonard Sokolove, Lew Pepperman and Ed Bergman

By Thomas B. Salzer

Similar to a 2000 interview with Joe Torregrossa of the Third District Appellate Court in Philadelphia, the following interviews were the result of notes and tape recordings of first-hand interviews by the editor.

I interviewed these three gentlemen and attempted through tape recordings and notes to accurately reflect their thoughts. Accordingly, I have used quotation marks, where I thought there were exact phrases and the remainder are paraphrases of their thoughts. While these gentlemen have had limited time to review their portions of this article, I alone am responsible for its content, and to the extent there are misstatements, I alone am responsible.

As background, Judge Leonard Sokolove is retired from the bench but is far from retired from the justice system. He is an active mediator and arbitrator in Doylestown and “of counsel” with Eastman & Gray PC. His reputation was one of unusual patience and extreme attention to detail over his 21 years on the bench of the Bucks County Court of Common Pleas and Orphans’ Court. He never seemed to lose control of his courtroom while at the same time was not viewed as bullying or dominating the parties, truly a difficult tightrope to walk; always giving the parties and attorneys the sense that

their dispute was the most important event possible.

Judge Neil Shuster is the president judge for Mercer County Equity Division of the Superior Court and utilizes mediation without hesitation when he determines a case is appropriate. To this end, he has a few attorneys he suggests as mediators, including Edward J. Bergman of Bergman & Barrett in Skillman, N.J. and Lewis Pepperman, co-managing partner of Stark & Stark, L.L.P. in Lawrenceville/Princeton, N.J. Judge Shuster thought that it might be less than optimal for an active judge to give an interview, so he suggested I speak to these gentlemen, at least until he retires, which is not on the horizon. While neither Mr. Pepperman nor Mr. Bergman is a spokesman for the New Jersey court system, their reputation with the judiciary and their skills as mediators make them notable persons to interview. Mr. Pepperman is certified as a civil litigator by the New Jersey Supreme Court. Ultimately, he is very committed to furthering the practice of mediation as he mentors many attorneys. As evidence to his extreme patience, he has tried to pass on his skills to me more than a few times over the past couple of years.

Ed Bergman is an experienced attorney in the Princeton area with a general practice and a committed

practice as a mediator, as well as an adjunct professor at the Wharton School, University of Pennsylvania. His skills as a mediator are known so widely that he is called upon to mediate issues on a regional basis in the private sector.

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Interviews with Judge Leonard Sokolove, Lew Pepperman and Ed Bergman

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Judge Leonard B. Sokolove interview July 14, 2005

Some introductory remarks.

"Mediation is not a settlement conference. [When I was on the bench] in the orphans' court, a settlement conference had limitations. Most significant was the limit of time. If not successful, you were to move into the courtroom. There was not the luxury to go into depth, to look beyond [or behind] the legal positions of the parties. It usually boiled down to negotiating demands on one side and counter-proposals and merely trying to bring the parties closer together."

"Judges and lawyers not familiar with the mediation process should understand that it involves going into the dispute in greater depth, areas not limited to the legal claims and responses. Particularly in orphans' court where there may be family issues, there may be a hidden agenda." Mediation may find a resolution that is not limited to the legal issues.

"Mediation works best when a continuing relationship is sought by the parties. This is likely in orphans' court and family court matters. I am of the belief that resolution through mediation may be facilitated by parties recognizing the benefit in the long run when the instant dispute is ended, particularly in family, estates, employee/employer and neighborhood disputes."

"Mediation is not always successful. There are situations where the parties are too entrenched in their positions or their positions are too comprised of emotions. Their lawyers should not be using the

mediation merely to obtain discovery. If it is sensed by the mediator that the process is not a sincere effort at resolution, it may be discontinued, although the aborted mediation sometimes leads to later resolution after the parties have absorbed the discussion."

Should the role of mediator should be limited to lawyers?

"Yes, when the mediation is the alternative to pending litigation, the dispute is initially framed in legal terms and may require knowledge of the possible consequences of litigation."

Do experienced lawyers understand the nature and importance of these continuing relationship situations – family, estate matters, employee/employer and neighborhood matters, and share the outlook that mediation has the best potential to address continuing relationships?

"It really depends not so much who the lawyers are, but it depends on the parties in a particular case; the lawyers often know that the way to resolve the case is to sit the parties down. I was a mediator in another county [not Bucks] where a widow with grown children and stepchildren read an emotional statement about how she felt about the family. It really aided in getting a resolution and such a statement would not have been allowed or relevant in a courtroom proceeding. I think her lawyer encouraged her to make and read this statement. I, as the mediator, was asked if she could read the statement, but I didn't know what it contained at the time; however, I realized it was an opportunity. That is the advantage of mediation, you may take time to explore possibilities.

"These possibilities in mediation are the keys that judges and lawyers have to realize. It is an opportunity to use a cliché, to settle a matter by going outside the box or to look maybe for non-economic factors."

Do attorneys and potential parties [the general population] need to receive more education about mediation?

"I don't know but this article is part of the education process."

Does the mediator need to be educated in the area or topic of the mediation?

There is a question in orphans' court mediation – Should mediators in orphans' court be limited to those conversant in estate matters? Any mediator ought to be able to do it, but being knowledgeable in estate practice, "is beneficial because you cannot do this mediation strictly on a facilitative basis. Becoming evaluative is often necessary to move the parties along, to point out the weaknesses of a party's position and the strong points of another party. The mediator does this, not to set out the goals, but to use those points to get to the hidden agenda of the parties. In excusing a weakness, a party may point out a hidden interest. For instance, 'I know I cannot prove this, but if he [the opposing party] just says I'm sorry ...'."

Is one of the strengths of mediation the fact that it may be one of the only places a person can tell his story in his own words?

"It may be the only [dispute setting] place where instead of being asked, 'Where do you reside?', you can ask, 'Where do you live?' Similarly, in mediation you might hear events as being 'later' instead of the courtroom jargon 'subsequent to the occurrence'."

In the opinion of the editor, below are some truly unique and innovative aspects of Judge Sokolove's mediation practice.

Judge Sokolove requests a pre-mediation summary where some parties chose to attach case pleadings. From

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these materials, Judge Sokolove, as part of his introduction, creates a thumbnail sketch of his understanding of the dispute and each party's position and he finds this effort on his part is very effective to letting the parties know what he understands. He identifies key issues and arguments and rebuttals. Also, allowing parties to rebut whatever they hear, in joint or private session, is very important.

He also stresses to the parties in the introduction that if the matter goes on to court, it becomes a "winner takes all" situation; however, it is not up to him as the neutral mediator to decide these issues. Judge Sokolove adds, "But I'm sure your lawyer has explained how some documents may or may not be admissible in court. In court, it is very likely that one party will lose it all and one party will win it all. You do that and you see their eyes widen."

At the very beginning of the mediation when he sets out the introductions and the necessary establishment of confidentiality and process ground rules, Judge Sokolove discusses his synopsis of the dispute and hopes that the effort he puts into doing this homework is evident to the parties so they appreciate his understanding of their viewpoints without getting into whether he agrees with the parties various viewpoints. Certainly, a party is more willing in a private caucus to discuss a wider spectrum of issues and in more depth if they are confident that the mediator understands the situation with some sophistication. Judge Sokolove finds his rather unique introduction method to be "very effective." It should be noted that Judge Sokolove is very aware of not turning the mediation into a mini-

trial.

"To encourage compromise, the best thing you can do is point out what issues are uncertain. I don't decide anything. Frankly, I think it helps when there is a critical issue and you say, 'I'm not sure how that is going to be answered.' This is consistent with my role as a neutral and also puts into both sides minds' that there is an area of uncertainty."

Interview with Lew Pepperman Aug. 16, 2005

How is mediation growing in New Jersey and elsewhere, such as in Pennsylvania?

"Mediation is catching on. It generates its own momentum because it is helpful in settling disputes. It is a matter of people who have been through mediation talking to others and explaining their experiences, and attorneys telling other attorneys and their clients about the value of the mediation process."

"As to business or corporate disputes, in-house attorneys will often see the wisdom of engaging in mediation before going straight to court."

A successful mediation saves time, money and aggravation. Mediation will slowly grow from state to state.

How do you get the parties to take mediation seriously?

In general, there are two events that cause the process to be taken seriously; (1) when the attorneys and parties have had good experiences and results in past mediations; and (2) by making immediate progress early on in the process.

"There is nothing better than success breeding success. Once the attorneys and the parties feel that progress is being made, they will buy into the process, and then the case has a good chance of being settled. Depending on the personalities of the individuals involved, I may

focus more on the attorneys or sometimes directly on the parties. Once the parties and attorneys have been involved in a successful mediation, they will buy into mediation in the future."

Is court-ordered mediation a good idea or just a contradiction of terms since mediation is traditionally a voluntary process?

"Court ordered mediation is necessary."

The attorneys and clients need to become educated, to get exposed to mediation.

"Anytime you get the parties together something good may happen. In the many years that I have been involved in the mediation process, I can count on one hand the instances where the parties actually left the mediation within an hour or two and just gave up. On the other hand, I cannot count the times (there were too many) that the parties come into the session feeling that there was not any possibility of success and then walked away with a settlement by the end of the day. Mediation is still new enough that the court-ordered program is necessary."

Do you think attorneys see mediation as part of their practice?

"We are all trained to want to do battle in court; however, most attorneys are learning that mediation is a cost-effective way of having satisfied clients. They might not get everything they want, but if they are realistic they will get something that makes sense and something that they can live with."

"The high cost of litigation makes it hard for there to be any winners when a case goes all the way through the court system."

"While some cases have to be tried, mediations are considered to be successful even if only some of the issues are resolved."

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What makes a good, effective mediator?

“Patience. What a mediator really needs is patience. A mediator must be able to build a consensus, which takes time.”

A good mediator will first establish a sense of trust and then deal with the facts and law of the case. To do this, the mediator must be able to sit and listen.

“The mediator must not get frustrated by the frustration of the parties.”

Relevant legal experience helps in two ways. If the parties feel the mediator has “been there” they will be more confident with the mediator’s approach. Experience also helps the mediator come up with creative solutions.

What if one or both attorneys do not take the mediation as a serious resolution process but just an opportunity for “cheap” discovery?

It is the job of the mediator to put aside the motives of the parties and help them appreciate the benefits of the process. Just getting people together and talking to each other is a good start. A good mediator will help the parties realize the value of mediation and help them to take the process seriously, without regard to the attitude they came in with. The job of the mediator is to “push on.”

Is mediation the practice of law?

“Mediation of a legal dispute is the practice of law in my opinion. To be successful in the process, it is helpful if both sides are represented by legal counsel.”

What is the future growth of mediation in this area?

The mediation process will continue to grow. While some cases will have to be tried by a judge or jury, history shows us that most cases are ultimately settled.

“If mediation takes place early on in the process, everyone is a winner. As attorneys gain confidence in using specific mediators, the process will become more widely accepted.”

Interview with Ed Bergman

On the generalization of attorneys’ historical reluctance to embrace mediation.

“Until five years ago there was a knee-jerk reaction that mediation would take the bread out of our mouths because if mediation is that much more efficient, then cases that would take, for example, 2,000 hours to litigate may now take 1,200 hours to mediate to a resolution. The key is that if your client ultimately sees the mediation process as more humane than litigation, they will leave the encounter with the attorney in a better frame of mind and more likely to return on another issue. Look at your clients. Even corporate clients with deep pockets don’t like big, fat litigation budgets. Isn’t a client leaving in a better state of mind in the best interest of both the client and the practice of law? Happy clients are what make profitable law practices.”

“Note that the percent of discovery reduction varies for each mediation, but generally the number of billable hours on a mediated case is less than a court litigated one.”

On the education of attorneys in New Jersey about mediation.

The New Jersey court-ordered mediation program has really exposed a lot of attorneys to the potential of

mediation; we are a lot further along than we were even three years ago. Also, the better the mediator is, the better the client and his/her attorney will understand what mediation is. Primarily the role of a mediator is to be an educator — the mediator must convey there is a natural phenomena that the longer a party and his/her attorney is “married” to a position the harder it is to get off the morality prospective that we’re wearing white hats and the other side is wearing “black” hats — they are evil.

About 99 percent of parties/people see facts differently, a mediator just needs to get the parties to acknowledge that the other side feels strongly about their view of the facts.

Maybe five years ago attorneys in New Jersey were unwilling to stop from bringing the “WE MUST WIN EVERYTHING” litigation mentality in to the joint mediation room and even in the caucuses. That has changed, often the attorney uses the mediator as a helper to get his/her client back to reality.

On how mediation will get momentum if it comes into the public eye more.

“Mediation is so much better than a settlement on the courthouse steps or in a judge’s chambers because the parties can have a real voice and think about the possible outcomes and have time to talk with their counsel. So many clients do not fully realize before a trial how intrusive and painful the questioning and cross-examination can be.”

“Ninety percent of cases settle, so why not settle on better conditions than the courthouse steps? Mediation is efficient and humane. Try the analogy: surgery is to the practice of medicine as a trial is to the practice of law, both are very invasive procedures.”

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On how to make the parties themselves believe in the mediation process.

I try in both the joint meetings and in private causes to get the parties to speak for themselves, whether or not the attorneys take an active part. There is so much room in mediation for the party to decide for themselves what is relevant, something they cannot do in a trial.

Trials only permit parties to tell their stories as the rules of evidence and motion practice allow them to speak — the whole trial process frustrates people.

Life is more complex than the cause and defenses to the causes of action; but for the jargon that lawyers learn in law school, it is the lawyer who often makes the issues between the parties simple to the point of simplistic and this also leads to the parties finding litigation frustrating.

Have you ever walked out of a courtroom and said, "Now I understand that I was wrong."? Of course not, all that happens is the parties are more alienated.

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On different styles and theories of mediation.

“The textbooks and courses on mediation explain the spectrum of a mediator’s involvement and interaction with one end being facilitative and the other end evaluative. Really there is always a mix of facilitative mediation methods and evaluative because evaluation is what is going on when a mediator does ‘reality testing’ – a task all mediators utilize.”

It is right in evaluative mediation to educate the party on the possible outcome or probability that a certain outcome may happen or be imposed – the successful evaluative mediator could stress what the non-monetary, more creative solutions may be and point out what remedies a court is really constrained to find. As a mediator, I don’t endorse the outcome but try to ensure an outcome or resolution is reached. It is like a physician getting informed consent.

With regard to the transformative school or style of mediation, in the right cases it is very good, but all too often devotees of transformative mediation say transformative methods or nothing at all.

Along this same line of evaluative mediation, how often have you been asked for an opinion by the party?

First, I never jump right to giving an opinion and obviously when I do, it is because the party asked in private and I felt that if I didn’t, the mediation would fail. Only in one out of 10 or 15 mediations does a party ask for my opinion. Then, even more interesting, on the points that are ultimately not settled in the mediation, they ask me to be an arbitrator.

The parties have agreed to me being the ultimate decider in a binding arbitration even though they might have been very candid in the mediation phase. *Editor’s note – This shows a high level of trust by the parties in Ed Bergman.*

On how you obtain mediation cases.

Often I am asked to be a mediator because the local judge knows me, and then again in more distant locales it is word-of-mouth referrals and/or my experience and credentials a possible party may deduce from my listing in Martindale-Hubbell.

On what you first tell a potential mediation party.

I talk to the parties to make them comfortable and impress on them that mediation is not just another hoop to get through and this mediation opportunity may not be seen again before a full trial gets underway. The mediation is not and should not become a head-knocking “settlement” meeting that often ends up as a blind-to-the-facts 50/50 division.

On whether a mediator must have practiced in an area to mediate in the area.

Mediator subject matter knowledge is a question that has come up more than once, and it is not all that it is cracked up to be. Subject matter is learned from one side or the other, so often a mediator who professes subject matter knowledge may be biased because they learned from a biased source. I prepare for a topic. In very particular instances, I may suggest that a neutral expert advise the mediator. Maybe some subject matter knowledge is necessary, such as bioethics in medical mediations/non-medical malpractice situations; however in general, I don’t need to listen to or talk to the parties’ experts so much, because as any experienced litigator knows, experts are hired

guns and are going to say something to support their party’s point of view.

On whether mediation is the practice of law.

Mediation is NOT the practice of law; such a notion that it is practicing law is oxymoronic. Where the parties are represented and the attorney is at the mediation, the parties are getting all of their advice on what to actually do from their attorney if they care to listen to them. In New Jersey, the New Jersey Association of Mediators is 30 percent non-lawyers, and the New Jersey court-appointed mediation program places non-attorneys on their approved list of mediators. Parties to a mediation are more often represented by counsel and a good mediator is always saying, “This is something I might say for your mutual benefit, but only your attorney can advise you as to what is best.”

As the mediator, I cannot give you legal advice but only you in concert with your advisor can make the decisions as to your course of action. “More often than not I, as the mediator, have to let them and their counsel ascertain how credible their witnesses may be. Trials are funny things and you never know how they will turn out. How often do you hear witnesses leave a courtroom and say, ‘Boy, I did not come across like I wanted to’? It happens all the time.” How can I as the mediator make it any clearer that I am not here as your lawyer, and I cannot tell you what you should do or whether you should go to court.”

On writing an agreement if there is a partial or full resolution at the mediation session.

Do you as the mediator write the settlement? “Yes, but only to the extent that the settlement is a memo. If a more comprehensive and legal docu-

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ment is needed, then the attorneys alone write this document. You must always have a writing of some kind at the end of any mediation that reaches any resolution. Here's what I generally do, because the settlement to the mediation could be elusive if there is only a sentiment that an agreement exists: I have the parties, as a normal rule of thumb, create a memorandum of understanding right there. Either one of the lawyers can make a formal draft, which is a legal document to be filed, or if they are going to file a joint stipulation of dismissal, then I would use a writing as a reference to the stipulation. Don't let the parties leave the room without a writing, but if it is going to take 10 hours to write because of the numerous issues discussed and settled, I will settle for a memo with bullet points. I, as the mediator, would write the memo because it is not a real legal document, I am not really creating anything, I am just a scribe to what the parties said in the mediation, and I don't think I am practicing law by carrying out this scribe function, in part, because it is not a formal written document. I leave this legal writing to the attorneys in the process."

On the criticism by some that mediation is not worth the time because the other side is using it as "cheap discovery."

I like the idea that maybe mediation may turn into just "cheap discovery" — so what. What's wrong with cheap discovery?

If anything, the parties are going to get the information anyway, but when they do, they are going to make the depositions so elaborate that it will not stay cheap. I've been in mediations once in 25 or 50 cases

where maybe, the party says something and his/her attorney says, "Hey, I understood it differently." No one was playing games but they genuinely made a mistake and understood or assumed something differently.

On the use of mediation to help resolve issues in the practice of medicine.

I teach at the Wharton School and often lecture to medical professionals where mediation is presented as a very useful means to resolve medical ethics quandaries and an administration of medical issues apart from what makes the headlines — the medical malpractice questions. I don't think mediation is going to make much progress in the area of malpractice because malpractice carriers haven't even seen the usefulness of mediation until all the discovery is on the table, and when you get that far, the case is going to either settle or go to trial without a mediation. I was told recently that I was the only attorney and it only happened once, in Middlesex County, N.J., where a medical malpractice issue was mediated and the action was resolved. Right now, medical malpractice mediations are occurring, for the most part, very early in the discovery process and the insurance carriers are saying, "Hey, wait a minute, this is not right."

And you know they are right, it is not the way to go because not enough is known by both sides about what happened. Put them into mediation with the understanding there is going to be a fair amount of discovery, not some 60-day timeline. The apology issue is very interesting, the question of remedies in courts is so limited and mediation can be so creative. There has been in-depth research that an apology can be very powerful, but we all know why it is so problematic with a court action in the picture. ■

Thomas B. Salzer is an attorney with 11 years experience as a hospital board member and is the general counsel for APG-America, Inc., a curtain wall manufacturer and installer.

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The Eleventh Circuit Affirms the Superiority of a Contract's Arbitration Provisions

Where a contract between a lender, in this case, Green Tree Servicing, L.L.C. called for any disputes with the borrower to be arbitrated, the borrower attempted to have a court resolve the differences. The borrower argued that the existence of a statute, the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. Sec. 2601 *et seq.* (2005), addressed the

topic in controversy, and this statute did not require arbitration. Accordingly, the borrower rationalized that the court should take over the resolution of the action.

The court in its decision, *Blinco v. Green Tree*, 2005 WL 428422, rejected this argument and emphasized the strong federal policy in favor of arbitration, and the wording in the con-

tract/promissory note calling for arbitration was definitely broad enough to encompass this RESPA claim. ■

An Example of Evaluative Mediation

A former federal magistrate engaged by JAMS in two controversies dealing with large corporations that ultimately settled for \$134 million and \$960 million respectively, listened to months of negotiations and then issued written evaluations of the case's value. The mediator, Edward Infante, said he "basically

did a risk analysis of the litigation." He said he convinced all parties that he was neutral, engaged them separately in analyzing their risks and persisted until the parties re-examined their positions. Infante believes lawyers and parties fall in love with their cases so it takes a mediator to give them a wake-up

call. In the dispute that settled for \$134 million, the mediation sessions were dragging on without success until he demanded that a company executive sit in on a session which led to that party changing its position. ■

Arbitration in China

Two years ago professor in a U.S. law school was representing a client in a primary international commercial arbitration forum in China, China International Economic and Trade Arbitration Commission (CIETAC), and commented how the process was "grossly unfair." The professor learned after the hearing began that the opposing counsel had been appointed a vice-chairman of CIETAC just before the commencement of the hearings, resulting in the arbitrator working for the opposing counsel, and neither made this situa-

tion known to the other side. In May 2005, some reforms were instituted to address some common areas of concern, such as, CIETAC required the parties to appoint arbitrators from its panel only, and the quality of this panel's arbitrators is uneven. Now parties may choose arbitrators not on the CIETAC list as long as all parties and the CIETAC agree. CIETAC also requires the arbitrators to state in writing that they have no ties to any party that might raise suspicions about their independence. The professor notes that there are

still issues with arbitrations in China in that CIETAC rules do not prohibit the arbitrators from discussing the case with unauthorized outside parties. The professor notes he and colleagues have a continuing concern that Chinese arbitration, no matter what rules are changed, will remain unique in comparison to other international forums. ■

Class Action Arbitrations and JAMS

In November 2004, the private arbitration service, JAMS, issued a policy calling it improper for contracts to prohibit consumers and employees from forwarding class actions to arbitration. As an aside, it could be argued that these contracts are in effect contracts of adhesion because the employee or consumer are not on an equal playing field with the employer or presumably large corporate retailer when the average person must find some sort of employment or acquire a product as a necessity of modern life. JAMS

supports its policy, in part on a supreme court decision, *Green Tree Financial Corp. v. Bazzle et al.*, 539 U.S. 444 (2003), which allows arbitrators to decide the validity of aspects of arbitration clauses in consumer agreements.

Not surprising, corporate counsel see the JAMS policy as interfering in the world of commerce and contracting; the GC of Lowe Enterprises, Inc. said JAMS is "inserting itself as a guardian of social policy."

At least another private arbitration service, admittedly smaller than

JAMS, the National Arbitration Forum, said it is not following the JAMS policy. ■

Mediation & Real Estate Transactions

In a continuum to an article that appeared in the Fall 2004 edition, I am conveying some comments that were made at a Bucks County Bar Association meeting of about a dozen attorneys whose practice involves a great deal of real estate transactions and about 70 real estate agents. The realtors very loudly and almost unanimously expressed their dislike for mandatory mediation in that they felt there were enough professionals surrounding the buyer and seller to either or both facilitate communication and cut through the emotional component that may create impasses. They were very sensitive to the cost of mediation and felt that if the parties, associated realtors and attorneys advising the parties

felt that mediation would be constructive, then they would enter into this process voluntarily.

As to arbitration, the attorneys present were almost but not quite as unanimous in their generally positive outlook on arbitration as opposed to a trial, and the real estate agents were somewhat in favor but generally not as experienced with arbitration as mediation, so they were more reserved. While the attorneys had favorable views of arbitration, they warned about two phenomena they perceived, presumably from personal experience: (1) arbitrators tend to split remedies down the middle (a conclusion I personally have never experienced), and (2) very importantly, arbitrators from

established national ADR organizations such as AAA and ENJAMS become consciously or sub-consciously aligned with big businesses who tend to be or are hoped to be repeat customers of their services. The "their" refers to both the organization and the individual arbitrator. ■

Protecting Apologies—A Growing Trend

By Jacqueline O. Shogan, Esq.
and Jason L. Lichtman

As part of efforts to combat rising medical malpractice insurance and litigation costs, states are increasingly changing an important aspect of the evidentiary rules that govern litigation between patients and their doctors. As shown in Table 1, 15 states have enacted legislation that prohibits expressions of benevolence (e.g., “I’m sorry”) to be used as evidence of a medical professional’s liability. Most of this legislation has been passed within the past five years. At least 10 other states have considered similar provisions. These changes in the evidentiary rules can be viewed as an extension of the move toward the greater use of alternative dispute resolution (ADR) techniques in medical malpractice disputes. In much the same way, where apologies offered in the course of mediation are inadmissible, states have reasoned that allowing doctors to express such expressions of benevolence immediately after an adverse event might avoid some conflicts in their entirety. It is also logical to believe that such rules may help those parties who do not resolve their differences early on to proceed with a more informed and conciliatory posture towards each other.

Laws regulating the admissibility of expressions of benevolence vary in scope. Some are only applicable to healthcare or medical malpractice disputes,

while others apply to any personal injury case. They also vary in terms of exactly what is inadmissible. For example, the Colorado statute excludes both expressions of sympathy and any accompanying admission of fault. See Colo. Rev. Stat. sec. 13-25-135. Conversely, a number of states specifically legislate that an admission of fault is admissible. See, e.g., Cal. Evid. Code sec. 1160. Other state laws are less clear in their coverage by using a term “expressions of benevolence.” See Mass. Gen. Laws Ch. 233, sec. 23D. At least one author has examined the pros and cons of the different approaches. See Cohen, J., “Legislating Apology: The Pros and Cons,” *University of Cincinnati Law Review* 2002, 70:819-895.

If the goal of these statutes is to encourage open communication between doctors and patients, it seems that approaches such as the one in Colorado may be the most effective. However, some are concerned about both excluding such arguably relevant evidence and having a broad exception which applies to only one segment of the population.

Case law is sparse on this topic. No cases could be found that directly discuss statutory law or specific rules. In addition, no case could be found that involves a physician’s apology being used against him or her where the apology made a difference in the outcome. However, there are a few cases that have examined apologies

and questioned the probative value of such statements.

Prior to the enactment of any statutory law, a Massachusetts court held that evidence of an apology was inadmissible because it had no probative value. See *Denton v. Park Hotel, Inc.*, 180 N.E.2d 70 (Mass. 1962). More recently, the Pennsylvania Superior Court in *Schaaf v. Kaufman*, 850 A.2d 655 (Pa. Super. 2004), appeal denied, 872 A.2d 1200 (Pa. 2005), found the trial court’s exclusion of evidence that the defendant physician had apologized was, at most, harmless error. Although the trial judge had reasoned that such evidence was unduly prejudicial, the appellate court seemed to rely primarily on the record’s lack of information regarding whether the apology contained any indication of fault, or whether it was merely an expression of sympathy. *Id.* at 664. As stated by the court, saying “I apologize” or “I’m sorry,” without more, is ambiguous. *Id.* at n.9. The court thus focused mainly on whether the testimony would have added new information rather than on creating a global evidentiary standard regarding the admissibility of apologies. See also, *Harper v. Robinson*, 589 S.E.2d 295 (Ga. 2003), noting that an admission of feelings of culpability does not necessarily equate to legal liability.

Regardless, it is important to note that no state will allow a doctor or hospital to shield

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Protecting Apologies — A Growing Trend

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information from being used in court by repeating that information to a patient. It is the statement itself that is inadmissible, not the underlying factual information. This is perhaps one reason that such legislation or rule change does not seem to have attracted the same controversy as other tort reform measures.

Supporters of legislative or rule changes for shielding apologies also cite the unique policy concerns, and early information on the effect of this agreement appears to be favorable. For example, the University of Michigan Health System in Ann Arbor reports that its attorneys' fees have been cut by two-thirds since instituting a program of full disclosure to

patients, with its annual number of malpractice claims and lawsuits decreasing by approximately 50 percent over a three year period. See Huff, Charlotte, "The Not-So-Simple Truth," *Hospitals & Health Networks (HHN) Magazine*, August, 2005. While there is not yet data on the relationship of these laws to the use of ADR, it seems that any rule that limits using evidence in a trial may have a positive impact on the use of ADR. Mediation is most likely to be successful when parties are open to finding common ground. By encouraging open relationships between doctors and their patients, it is more likely that mediation could be successfully utilized to resolve any ensuing dispute.

Many healthcare and legal professionals have theorized that lawsuits against healthcare professionals are often motivated by anger as much as by

potential financial compensation. A breakdown in communication between a health care professional and patient after an adverse event only fuels such anger. Laws that, at a minimum, seek to protect healthcare professionals who reach out to console patients after an adverse event are deserving of serious consideration in Pennsylvania and other states that have yet to act in this area. ■

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TABLE 1 APOLOGY STATUTES AND RULES

ARIZ. REV. STAT § 12-2605	(Arizona)
CAL. EVID. CODE § 1160	(California)
COLO. REV. STAT. § 13-25-135	(Colorado)
FLA. STAT. CH. 90.1026	(Florida)
2005 ILL. LAWS 677	(Illinois)
MD. CODE ANN. § 10-920	(Maryland)
MASS. GEN. LAWS CH. 233 § 23D	(Massachusetts)
N.C. GEN. STAT. § 8C-1, RULE 413	(North Carolina)
TENN. EVID.R. 409.1	(Tennessee)
TEX. CIV. CODE ANN. § 18.061	(Texas)
ORC ANN.2317.43	(Ohio)
63 OKL. ST. § 1-1708.1H	(Oklahoma)
OR. REV. STAT. § 677.082	(Oregon)
WASH. REV. CODE § 5.66.010	(Washington)
WYO. STAT. § 1-1-1-130	(Wyoming)

Alternative Dispute Resolution Committee Meeting Summary — September 15, 2005

SUBCOMMITTEE REPORTS/UPDATES

State Agency Programs — Justina Wasicek stated that the work of the subcommittee is to monitor the ADR efforts being made in the different state agencies. In that regard, she reported that the Insurance Department has an active medical malpractice mediation program. Their program encourages claimants to do mediation early on in the process. While they don't have their own mediators, they do approve the mediators that are used to be sure that they have medical malpractice experience. To date, they have handled about 175 disputes, with 60-70 of them being done so far this year. Any one interested in the work of this subcommittee should contact Justina at jmwasicek@excite.com.

Collaborative Law — No report.

Court-Annexed Mediation Programs — Ann Begler reported that this subcommittee will be pulling together information gathered from the county bar associations to be included on the ADR Committee's Web site.

Credentialing/Certification — Subcommittee Co-Chair Bob Ackerman advised that he is going to contact ACR, in follow-up to Mike Wolf's June 10 presentation to the committee, to determine what is currently happening with that organization in this regard.

Ethics and Standards — Herb Nurick commented that the ABA and ACR have approved the revised Model Standards of Conduct for Mediators.

The committee is not aware of any approval, so far, by the AAA.

Committee Newsletter — Newsletter Editor Tom Salzer reported that the fall edition will be ready for distribution mid-October. Currently he has seven articles for this issue. Any member who has an article to submit for this issue or a future issue is encouraged to send it to Tom or to Louann Bell.

Sir Francis Bacon ADR Award — Subcommittee Chair John Salla advised that the committee would be presenting the Sir Francis Bacon ADR Award for the third year in 2006. Any members interested in participating on this subcommittee and in the selection process should contact John Salla or Louann Bell as soon as possible.

Diversity — Ann Begler advised that, to date, no members have signed up for this subcommittee. The purpose of the subcommittee is to examine and develop ways to foster greater diversity in the ADR field through efforts that will include, but are not limited to, contact with other PBA committees, such as the PBA Minority Bar Committee, in this regard and provide education to the ADR Committee to increase the level of cultural competency that exists among committee members. Any members interested in chairing or serving on this subcommittee are encouraged to contact Louann Bell.

PROPOSED RESOLUTIONS

Statewide Mediation Study — A pro-

posed resolution requesting PBA support of Senate Resolution 160, which calls for the creation of a joint state task force to conduct a statewide study on mediation and other forms of dispute resolution, was presented to the members present for discussion. It was reported that currently there were enough senators to move the resolution forward. Senator Greenleaf has expressed a desire to have PBA support of this issue.

Special thanks was given to all involved in moving this concept to this point including Gail McGloin, president of PCM.

After some discussion on the ADR Committee's resolution and procedures necessary to provide the Senate and House with a PBA position quickly, it was decided to officially send the proposed resolution, following technical corrections, to the PBA Board of Governors for consideration early in October. Louann Bell will have the resolution sent to the Board as well as to other PBA committees and sections for their review and comment.

Apology Rule — The members were advised that the committee leadership has been meeting with the chairs and vice chairs of the Health Care Law Committee and the Medical and Health Related Issues Interdisciplinary Committee to discuss the issue of transparent communication between health care providers and patients. The members were also advised that the chair of the Civil Litigation Section has asked

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that the section only be included in the discussions once the three committees have come to a consensus on this issue.

A great deal of discussion ensued as to the inclusion (or not) of "fault" in the following proposed formal Rule of Evidence.

No statement, affirmation, gesture or conduct expressing an apology, accountability, responsibility, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence related to any discomfort, pain, suffering, injury, or

death of an alleged victim as a result of the unanticipated outcome of medical care when made by a health care provider or an employee of a health care provider during the course of treatment shall be admissible as evidence of an admission of liability or an admission against interest in any civil court action or arbitration, nor shall it be used for any other purpose. The provision shall be applicable whether to statements made directly to an alleged victim, to a relative of an alleged victim, or to a representative of the alleged victim.

The majority of members present approved the proposed apology rule resolution (17-yes/9-no/4-abstain). The resolution will be sent to the Health Care Law Committee and the

Medical and Health Related Issues Interdisciplinary Committee for the review and consideration. Once responses are received from them a decision will be made as to how proceed.

Mediation And Other Forms Of Early ADR Processes In Medical Malpractice — Due to the lack of time, it was decided that for now, the ADR Committee members should review this resolution and send comments to co-chair Ann Begler. This may be considered at a future meeting. ■

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PBA Board of Governors Supports Senate Resolution 160

PBA ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

RESOLUTION IN SUPPORT OF SENATE RESOLUTION 160 OR COMPARABLE LEGISLATION TO CREATE A STATEWIDE STUDY OF MEDIATION AND OTHER FORMS OF DISPUTE RESOLUTION

WHEREAS, the Pennsylvania Bar Association represents approximately 27,500 lawyers across the Commonwealth of Pennsylvania; and

WHEREAS, the field of alternative dispute resolution, and particularly the field of mediation, has been rapidly growing over the last 20 years and is being embraced by more people as a way to resolve disputes and conflicts; and

WHEREAS, a large number of lawyers have taken training to be mediators and have dedicated some or all of their practice to mediation; and

WHEREAS, ADR processes such as mediation, facilitation, structured dialogue, consensus building, neutral case evaluation, arbitration and mini-trials are being utilized more by the courts and agencies and, thus, more lawyers are becoming involved in ADR processes as both consultants to and advocates for clients in those processes;

WHEREAS, some law firms have now established ADR practice groups, and lawyers as both in-house counsel and as outside counsel have been called upon to assist clients in formulating and imple-

menting ADR processes as in-house programs to address workplace situations; and

WHEREAS, many companies and organizations continue to use arbitration clauses in agreements and have begun to include provisions for mediation and other dispute resolution processes in those agreements; and

WHEREAS, there are many ongoing issues in the field of ADR, nationally, that are being addressed by organizations that have a primary focus on ADR, including but not limited to those focused on mediation, and these organizations, as well as organizations such as the American Bar Association, are actively exploring issues such as certification, credentialing, program design, confidentiality and other critical issues that impact the practice of mediation and other forms of ADR within the commonwealth; and

WHEREAS, the PBA has had a very active ADR Committee for a number of years and has informally partnered with ADR Committees in other bar associations such as Allegheny and Philadelphia counties, and with the Pennsylvania Council of Mediators to support ways in which to make Pennsylvania a more mediation-friendly state; and

WHEREAS, the Pennsylvania Senate formulated a Resolution directing the Joint State Government Commission to establish a bi-partisan task force and an advisory committee;

(1) to conduct a comprehensive review of the current status of ADR services within the panoply of methods of conflict resolution available in this commonwealth;

(2) to identify relevant best practices in the delivery of ADR services locally and nationally and how to

improve conflict resolution in this commonwealth by incorporating these best practices;

(3) to develop a plan for educating the citizens of this commonwealth about conflict resolution in general and ADR services in particular and ensure access to needed ADR services utilizing best practices;

(4) to propose legislation as may be required to implement the proposed plan and advance the use of innovative conflict resolution methods statewide, not only in the civil courts but also in schools, businesses, government, criminal and juvenile justice systems and other community settings; and

WHEREAS, the components of Senate Resolution 160 will benefit members of the PBA and their clients;

NOW THEREFORE, it is hereby RESOLVED that the Pennsylvania Bar Association supports Senate Resolution 160 or a comparable resolution or legislation directing the Joint State Government Commission to establish a bi-partisan task force and advisory committee to study mediation and other forms of ADR within the commonwealth and to make recommendations regarding the best practices and use of such processes.

Ann L. Begler, Esq., Co-Chair
Herbert R. Nurick, Esq., Co-Chair
PBA ADR Committee