The Promise and Peril of a Joint Session in Mediation

By Dan Brookhart

Dan Brookhart, of Brookhart Law & Mediation, is an experienced civil trial attorney who provides full-time mediation and arbitration services in various areas of civil litigation including personal injury, business and commercial litigation, employment matters and construction disputes. He may be reached at 717-459-3948 or Dan@BrookhartMediation.com.

One of the distinguishing hallmarks of mediation, as compared to other forms of dispute resolution, is the opportunity for each party to address the other party directly and give their perspective on the case. This process, typically referred to as a joint session, has long been a staple of a litigated case mediation. The joint session affords each party (or more commonly their attorney) the opportunity to present the merits of their case, ideally in a manner that helps to facilitate eventual settlement.

However, there remain differing schools of thought on the efficacy of a joint session in a mediation. A joint session can easily spin out of control and, instead of advancing resolution of the case, can drive the parties further apart. The decision to have the parties engage in a joint session at the outset should be given careful consideration after examining the dynamics of the individual case.

What follows is a look at the potential benefits and possible perils of a joint session and some suggestions on traversing the joint session minefield each mediator must negotiate in the dispute resolution process.

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Mediation in Will Contests and Probate Disputes

(Excerpts from a paper presented at the 15th Annual Elder Law Institute, Hershey, PA, July 12, 2012)

By Ross F. Schmucki

Courts provide a powerful and essential process for people to enforce their rights in Will contests and probate disputes. However, the parties may have unrealistic expectations and not like the rough and tumble of litigation. Such disputes pit family members against each other in litigation that can be expensive, protracted, damaging to family reputation and destructive to relationships.

Mediation is a process that can help resolve disputes in privacy, for less money, in a shorter time and with the finality of a settlement. “Many probate disputes involve a history of the failure of family members to express anger or resentments toward the deceased or other relatives. Mediation provides a good forum for expressing those feelings. Sometimes that catharsis is all that is necessary.” See, Dominic J. Campisi, Using ADR in Property and Probate Disputes, Prob. & Prop., May-June 1995, at 48, 52.

Mediation is the only tool designed to improve understanding, allow family members to voice feelings and perspectives in a relatively safe environment, encourage the crafting of a new family configuration in the testator’s absence, and address the interests that the parties articulate with respect to the will. Lela P.

Continued on Page 8
Message from the ADR Committee chair

By Stephen G. Yusem

Congratulations to the Honorable Lawrence W. Kaplan and Robert J. Conroy both of whom submitted the winning entry for renaming our newsletter Resolution. Each of the prize winners will receive a copy of the very useful 1,100-page Pennsylvania Bar Association Lawyers Directory & Product Guide. We offer abiding thanks to Editor Mary Kate Coleman who developed the creative revolution that engendered Resolution.

As you know, our next meeting, one of only two centrally conducted in person, is scheduled for November 15, 2012, at 11:00 a.m. at the Holiday Inn East, Harrisburg, in conjunction with PBA Committee/Section Day. We have several dynamic initiatives that we look forward to discussing at that time.

Our Lawyer Dispute Resolution Program Subcommittee, under the leadership of Chair Mel Shralow and Vice-Chair Dave Halpern, has launched a major initiative to revitalize our LDRP system. The proposed LDRP Rules have been circulated to our membership and posted on our website following numerous endorsements and thoughtful comment at our Harrisburg meeting. Mel and Dave will lay out the rules and respond to questions and comments.

Conflict Resolution Day Subcommittee Chair Charles Shaffer and Vice-Chair Jim Kozuch circulated to our membership copies of the Pennsylvania Senate resolution and Governor Corbett’s proclamation designating October 18, 2012, as Conflict Resolution Day. The Subcommittee developed that initiative from a standing start and hopefully has succeeded in setting a precedent to be followed next year and thereafter.

At our November 15 meeting, we look forward to welcoming Amy Groff, chair of the Civil Litigation Section, or her designee, to discuss the Gettysburg Retreat scheduled for April 5-7, 2013. The Civil Litigation Section is partnering with our Committee, as well as the Federal Practice Committee and Labor and Employment Law Section to present an exciting program in the 150th anniversary year of the Battle of Gettysburg. Our Continuing Legal Education Subcommittee Chair, Ross Schmucki, has designated his Vice-chair, Judy Weintraub, to work with her counterparts from the other sections and committees. The ADR portion of the Retreat is scheduled for Friday, April 5 from 2:30 p.m. to 4:00 p.m.

Our committee membership continues to grow. Our current number is 179, and our goal is 300. Membership Committee Chair Herb Nurick and Vice-Chair Laura Cooper have invited our own Andy Anderson to present on how we can employ social media to recruit new members. More members mean more networking means more diversity means more influence means more idea generation means more synergism. Each time one of our members recruits a new member, the recruiter does himself/herself a favor and likewise does the recruit a favor. We are all recruiters and as such, we should be sure that the recruits understand that the benefit is priceless and the cost is zero.

Hon. Mason Avrigian and Mike McDowell, chair and vice-chair of the RUAA Action Subcommittee respectively, report that House Bill 1159 is still stuck in Senator Greenleaf’s Senate Judiciary Committee having passed the House unanimously. Mason and Mike are working on getting the bill unstuck. See Ray Pepe’s excellent August 10, 2012, “Response to Objections” on our website.

I look forward to seeing you all on November 15, 2012, at 11:00 a.m. We have a lot to talk about.

Best regards,

ADR Committee Chair Stephen G. Yusem is a full-time mediator and arbitrator in Plymouth Meeting.
Message from the editor

By Mary Kate Coleman
Resolution editor

The Newsletter Subcommittee is pleased to present our fall 2012 newsletter. We hope you enjoy reading the many interesting articles contained herein.

I am extremely grateful for the opportunity to have served as editor these past two years and have very much enjoyed working on the newsletter. It has been my pleasure to help our committee spread the word about ADR. My charge, when I began this job, was to “jumpstart” the newsletter because our committee had not had a newsletter for a couple of years. I must confess that I began this endeavor with some trepidation since I had never before put together a newsletter! However, I like to think that our subcommittee has accomplished that goal. In addition to sharpening my writing and editing skills, I have learned a lot — not just about putting together a newsletter — but also about ADR. Serving as editor let me strengthen my friendships with committee members and make new friends, as well.

However, it is now time to turn the editorial reins over to someone else. Therefore, this is my last “Message from the editor” column. I would like to thank everyone who has worked on the newsletter with me or contributed content during my term as editor. I enjoyed working with and appreciated the hard work of subcommittee members: Clymer Bardsley, Dan Brookhart, Stephen Hall, Rick Kidwell, Chuck Kenrick and John Toczydlowski.

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Minutes of the ADR Committee meeting
Sept. 5, 2012

By Lindsey Bierzonski,
ADR Committee Secretary

At noon, the chair, Stephen Yusem, opened the meeting, which was connected via conference call from locations in Pittsburgh, Harrisburg and Philadelphia.

The ADR Committee website now includes a search feature to make it possible to search the page for information. Each subcommittee is to plan its expenditures and submit a budget to the chair and Louann Bell by September 12 so that the cumulative budget may be forwarded to the PBA Finance Committee. Any reasonable request should be approved. Last year’s budget was $6,300.

Next, subcommittee reports were discussed. Charles Shaffer, chair of the Conflict Resolution Day Subcommittee, discussed the difficulty that he encountered in trying to contact Pennsylvania senators, the governor and the legislature because a resolution had to be passed first by the PBA Board of Governors. After a tremendous effort including many email communications among ADR Committee members, a resolution was passed by the PBA Board of Governors to designate the third Thursday in October annually as Conflict Resolution Day. Mr. Shaffer noted that the ABA has a large amount of information, program samples, and templates for Conflict Resolution Day available online. The Committee should connect with PBA staff liaisons to expedite having a proclamation signed.

The CLE Subcommittee presented in July at the Annual Elder Law Institute Conference in Hershey. ADR clauses are currently a hot topic in caregiver agreements because elder citizens may be vulnerable to onerous clauses. Elder law attorneys are in favor of ADR but encounter obstacles in drafting clauses. Subcommittee Chair Ross Schmucki stated that we were asked to work together with the Elder Law Section to draft a fair ADR clause to be included in caregiver agreements. The Elder Law Section is looking forward to opportunities to work with our Committee.

The CLE Subcommittee is also partnering with the PBA Civil Litigation Section to present at the section’s annual Retreat in Gettysburg being held on April 5-7, 2013, being the 150th anniversary of the Battle of Gettysburg. The ADR Committee has been allotted one and a half hours for a presentation. This will be a great opportunity to enlighten fellow PBA members about the advantages of ADR.

PBA attendees may have to choose ADR or another topic through a breakout session, so ADR may be competing against other topics for participants. One member mentioned that multi-member panels draw more interest than single-member panels. The Committee could also present to large law firms as a new approach for CLE events. Louann Bell mentioned that the ADR Committee must provide the PBI with the right of first refusal for CLE events. We cannot compete with PBI. The Federal Practice Committee and the Labor and Employment Law Section are also featured in the Civil Litigation Section Retreat. Consumer arbitration and Marcellus Shale may be the next big topics in ADR and have the potential to draw in large audiences.

The Lawyer Dispute Resolution Program Subcommittee has posted information on the ADR website. All Pennsylvania attorneys, both PBA and non-PBA members, may make use of this program to settle intra-law firm and fee disputes.

The Legislation Subcommittee is searching for new legislation of interest to the ADR Committee. The Liaison Subcommittee has almost filled liaison positions for PBA Committees and Sections relevant to ADR.

The Membership Subcommittee vice-chair, Laura Cooper, stated that membership is currently around 165 members. About 40 people have recently signed up for the Committee. We still need to recruit members. Each member is encouraged to recruit one new member. LinkedIn may be used as a great referral source. We also plan to partner with the Minority Bar Committee to target minority membership for the ADR Committee.

The RUAA Action Subcommittee is still facing opposition from trial lawyers who fear losing money through performing fewer trials if the use of ADR increases. We are seeking to persuade trial lawyers to think differently about ADR. The Newsletter Subcommittee is looking for new articles for the next newsletter. Submissions must be in by October 31. PBA President Tom Wilkinson plans to devote his next column to ADR.

The next ADR Committee meeting will be held on November 15, 2012, at 11:00 a.m. at PBA Committee/Section Day at the Holiday Inn East in Harrisburg, PA.

Lindsey Bierzonski is owner of Bierz Law LLC in Harrisburg and is a contract specialist for the National Institutes of Health in Rockville, Md.
Good Shepherd Mediation Program Honors 2012 “Shepherds of Peace”

Philadelphia mediators gathered to honor Pennsylvania Bar Association ADR Committee member Edward Blumstein and other Shepherds of Peace honorees at the 6th Annual Shepherds of Peace dinner and awards ceremony on Wed., October 17, 2012, at the Union League on Broad Street in Philadelphia. Each year, to kick off Conflict Resolution Day, Good Shepherd Mediation Program, Philadelphia’s community mediation center, names several “Shepherds of Peace” who have been instrumental in encouraging peace and social justice.

Fran Dunphy, head coach of the Temple Owls Men’s Basketball team, emceed the event, as he has for the past six years, in memory of his dear friend and former GSMP volunteer, Charles Dinsmore. One-hundred fifteen guests gathered to celebrate the good work of the 2012 honorees who were chosen for their dedication and compassion for peacemaking as evidenced by the conflict resolution education programs they have designed. The 2012 Shepherds of Peace are:

- Edward Blumstein — Family Mediator, creator of the Temple University Law School Domestic Relations Mediation Clinical Program, and mentor to hundreds of aspiring mediators
- Rev. George W. Bur, S.J. — Jesuit priest who initiated the Ignatian College Connection working with disadvantaged children and their families at Gesu School through Saint Joseph’s Prep and Saint Joseph’s University
- Tricia S. Jones, Ph.D. — Professor, Temple University College of Education, Department of Psychological Studies and Project Director of Conflict Resolution Education in Teacher Education (CRETE) and ACR Board Member

Good Shepherd Mediation Program is a neighborhood justice center that was established in 1984 to empower Philadelphia community residents to find meaningful and lasting solutions to their conflicts through the use of mediation and other constructive dispute resolution processes. Mediation is a voluntary, confidential process for resolving conflicts with the help of a third-party, neutral mediator. GSMP mediates neighborhood issues, like parking and barking disputes; small claims; landlord-tenant disputes; family issues such as divorce, custody, parent-youth matters; and issues involving the elderly such as living arrangements, quality of care, driving, health care and financial matters. GSMP serves more than 10,000 Philadelphians each year.

For more information about Good Shepherd Mediation Program, visit its website at www.phillymediators.org.

Article submitted by Cheryl Cutrona, executive director, Good Shepherd Mediation Program. Ms. Cutrona may be contacted at 215-843-5413 or ecutrona@phillymediators.org.
Welcome new committee members

The Pennsylvania Bar Association Alternative Dispute Resolution Committee extends a warm welcome to the following new committee members:

Patrick T. Barrett, Essig Valeriano & Fudeman PC, Wyomissing
Amy J. Blumenthal, Kutak Rock LLP, Philadelphia
Jonathan Dan, Babst Calland Clements & Zomnir PC, Pittsburgh
Angela Dobrinoff-Blake, Blake & Gross LLC, York
Lindsey Dragun, Law Student, University of Pittsburgh School of Law
Robert J. Edelmayer, Robert J. Edelmayer PC, Norristown
Camille Fundora, Stampone Law, Cheltenham
Howard Gallagher III, Law Offices of Howard J. Gallagher III, Media
Raymond E. Ginn Jr., Ginn & Vickery PC, Wellsboro
Richard M. Goldberg, Hourigan Kluger & Quinn PC, Kingston
John Gough, Gough Law Associates RLLC, Philadelphia
Judy Hayman, Eastburn and Gray PC, Doylestown
Melinda S. Joyce, Harrisburg
Susan Kilgore, Dechert LLP, Philadelphia
Lucille Marsh, Kreder Brooks Hailstone LLP, Scranton
Jane Maughan, Jane Maughan Law Office PC, Stroudsburg
Robert C. Morgan, Morgan Carlo Downs & Everett PA, Hunt Valley, MD
Charles Saul, Margolis Edelstein, Pittsburgh
Elizabeth N. Schneider, Clarks Summit
Howard J. Schulberg, Goehring Rutter & Boehm, Pittsburgh
William J. Taylor, Cozen O’Connor, Philadelphia
Tiffany Thomas-Smith, The Thomas Smith Firm, Yardley
Joseph Van Jura, Scranton
Andrew Varcoe, US Department of Agriculture OGC, Harrisburg
Tiffany Wong, Law Student, Washington University
Brett Woodburn, Caldwell & Kearns PC, Harrisburg

The committee hopes that these new committee members enjoy their committee membership and experience the many benefits of serving on the Alternative Dispute Resolution Committee.

Please help the membership subcommittee attain its goal of 300 members by May 2013. We already have reached 179. If each member would recruit just one new member, we will easily exceed this goal. AGAIN, PLEASE HELP! See form on page 7.

Message from the Editor

Continued from Page 3

They have contributed or obtained items for the newsletter, shared their insights with me, and lent another pair of eyes to proofread the newsletter. No matter what the task was, I could always count on them to help. I also wish to thank Steve Yusem, our ADR Committee chair, for his unwavering support. Steve has had great ideas for improving the newsletter, which we implemented, and always encouraged committee chairs to submit articles, which was much appreciated. Finally, I also wish to thank Amy Kenn and Tina Schreiber, our PBA newsletter liaisons for the fantastic job they did laying out the newsletter and Louann Bell, our PBA staff liaison, for her support. It was always a delight to work with Amy, Tina and Louann and they made my job an easy one!

I still plan to be an active member of the ADR Committee and hope to see you all at future meetings. And, don’t be surprised if you see me contribute a newsletter item in the future, as I encourage you all to do!

Best wishes for a wonderful holiday season!

Mary Kate Coleman is a civil litigation attorney, mediator and arbitrator with Riley, Hewitt, Witte & Romano PC in Pittsburgh.
Please help our subcommittee achieve its goal of 300 members — a figure which will enhance the value of the ADR Committee. More members will provide more value in terms of influence, idea generation, diversity and networking. And it’s free! Any PBA member can join our committee at no cost.

We all know lawyers who would be well advised to join us. Please nominate them for membership and, if you wish, contact them to suggest that they join either online or by simply calling our staff liaison, Louann Bell, at 800-932-0311, ext. 2276.

Please email or fax this form to Herb Nurick, chair, Membership Subcommittee, hnurick@pa.gov, fax 717-787-0481, or to Laura Cooper, vice chair, lcooper@libertylawgroup.us, fax 610-685-5151.

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Nominator:

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Mediation in Will Contests and Probate Disputes

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The Parties and Counsel must overcome obstacles to mediation, such as pessimism about reaching agreement and fear of signaling weakness. At the outset of a dispute Counsel should obtain an Agreement to Negotiate on a Confidential Basis. Once such an Agreement is in place, it can be invoked to protect negotiations at any stage of the case. To give it additional power, the Agreement to Negotiate in Confidence can be put into the form of a Stipulation approved by the court. An early Agreement to Negotiate in Confidence is essential to protect the parties. Offers or counter-offers made before, after, or outside of mediation generally are not privileged.

AGREEMENT TO NEGOTIATE ON A CONFIDENTIAL BASIS
(To Be Signed and Dated by Parties and Their Counsel)

1. The public is served by speedy and amicable resolution of private disputes. It is in the interests of the Parties to negotiate and discuss possibilities for settlement in confidence and thereby resolve their dispute in an efficient and fair manner.

2. The Parties and Counsel agree that they, and their representatives, shall not disclose negotiations in this matter except to the Parties themselves and their Counsel (or as the Parties and their Counsel jointly agree to disclose such negotiations).

3. If the Parties and the Counsel jointly agree to disclose some aspects of the negotiations, it shall not be considered a waiver of confidentiality of the other aspects of the negotiations.

4. Parties who decline to execute this Agreement shall not receive or review settlement offers or information about negotiations related to those offers. No offer is extended to any Party who declines to negotiate on a confidential basis.

5. The Parties and Counsel agree and promise that they (and their representatives or relations) shall not disclose to anyone (other than to Parties who have signed this Agreement and to Counsel) the fact of, or the substance of, negotiations.

6. This Agreement does not determine whether any settlement itself, would be confidential. This Agreement only determines that the negotiations shall remain confidential. Whether or not a settlement itself will remain confidential will be the subject of negotiation.

7. If any Party, Counsel or their representative breaches this agreement to negotiate in confidence, then any other Party shall have the power to void, revoke and terminate any discussions, negotiations, settlement offers or settlements and any other rights and remedies available at law or in equity.

8. All persons who sign this Agreement (and their Counsel and agents) agree to honor, both in spirit and in letter, the promise of confidentiality of negotiations contained in this Agreement.

With the protection of the Agreement to Negotiate in place, Counsel can safely negotiate the terms of a mediation. The following is a list of key issues to consider when drafting the mediation agreement.

1. When and where will the mediation take place?

2. Who must attend to make the mediation effective?

3. Will the mediator call, or meet, with Counsel or parties separately (ex parte) before the mediation?

4. How many mediation sessions will be involved?

5. What mediation submissions and statements will be required or permitted?

6. Will the parties or counsel be expected or permitted to make an opening statement?

7. Will the mediation be conducted in joint session with separate caucuses, or in another format?

8. Who will have authority to bind the parties to any agreements?

9. How will the parties select the mediator or co-mediator?

10. Who will serve as the mediator or co-mediator, what will be their qualifications, and will the mediator narrow the discussion to the legal issues, or facilitate broader discussion of family relations and interests?

11. What conflict-of-interest disclosures will the mediator be required to make before selection?

12. What continuing duty of conflict disclosure will apply to the mediator?

13. What code of ethics and professional practices will bind the mediator?

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14. If the parties believe a mediator conflict of interest has arisen after selection, what rights do the parties have to request replacement of the mediator at what stage?

15. What will the mediator be permitted to report to the court?

16. Are there form release terms that can be agreed to in advance of the mediation, or are there important disputed release terms that should be negotiated at the mediation?

17. How will any agreements at mediation be memorialized, and will the parties or the mediator draft the settlement agreement?

18. What type of mediation communications and materials will be included under the protection of the mediation privilege and at what stage of the process?

19. What is the duration of the authority of the mediator, and how do parties or attorneys contact the mediator at a later stage for more mediation sessions or continuing help?

20. How will the costs of the mediation facility and the mediator be allocated and paid?

When you interview mediators, in addition to their experience, rates and availability, you should make certain the mediator agrees with your positions on each of the key issues listed above. An important question is whether the mediator receives case assignments in a balanced way from parties on “opposite sides of the aisle.” A critical initial question is whether the parties want a mediator who will narrow the discussion to the legal issues, or facilitate broader discussion of family relations and interests.

[M]ediation may well enable a family to create a more collaborative, less litigious relationship going forward. The fulfillment of this objective, however, dictates that some care be used in selecting the type of mediation and the particular mediator because an evaluative mediator who essentially dictates an outcome, keeps the parties separate from one another during the course of the mediation, and addresses only the narrow range of issues cognizable in litigation, is far less likely to promote any family harmony objective.” Love, supra, at 568-569.

If the parties have negotiated in confidence, agreed on the key issues, and selected a mediator with the desired approach, they will come out of the mediation satisfied and pleased with the wisdom of their Counsel for recommending mediation.

Ross Schmucki is an attorney, arbitrator and former Corporate Counsel. He serves as Chair of the CLE subcommittee of the PBA ADR Committee. He has substantial experience in negotiating dispute resolution and settlement agreements.

LEGISLATIVE ACTION CENTER

Legislative contact from individual constituents is an invaluable way to impact the legislative process. The PBA Legislative Department has created a new Legislative Action Center to enable PBA members to contact their legislators quickly and easily.

The Action Center allows members to send emails to their senators or representatives on important legislative issues facing the legal profession. Members also can create a message and download it to send via postal mail. Talking points on legislative topics and sample letters also are available. Visit the Legislative Action Center today at www.pabar.org/public/legislative/legismain.asp or email the Legislative Department with questions at legislative@pabar.org.
The PBA website & the ADR page: a valuable resource for ADR Committee members

By David A. Feldheim

In the last issue of our newsletter I reported to you about the many useful ADR resources available at the PBA website. In this issue I would like to dig a little deeper and give you examples of several specific items at your fingertips.

Please start by visiting the PBA website at www.pabar.org. At the top right of the Home Page there is a “Member Login” button to click. You must be logged in to have full access to the entire PBA website, including features that are available to Members only. The top right corner of the PBA website also has a “Search” feature and an “Events Calendar.”

Along the right side of the PBA website you will find several convenient buttons, placing you just one click away from (1) the PBA InCite research facility, which is free with your PBA membership, (2) Facebook; (3) Twitter; and (4) a rotating list of PBA affinity partners.

Along the left hand side of the PBA website, there are about 20 choices, one of which is the “Committee/Sections” button. When clicked, this button provides you with a list of about 50 PBA Committees. The list is alphabetical and, near the top, you will discover a button for the Alternative Dispute Resolution Committee. It is a gold button and, if you tap the button, you will find 11 more gold and blue buttons, affording you more opportunities to learn about our Committee.

Here are the buttons you will find on the ADR Committee page of the PBA website:

(1) Search the ADR Web Area (New!)
(2) About the Committee
(3) Archives
(4) Awards
(5) External Links
(6) How to Join
(7) Lawyer Dispute Resolution Program

(8) Listserv Sign-up
(9) Membership
(10) Publications/News Releases
(11) Legislative Updates

Under About the Committee, you will be able to read the Committee’s Mission Statement:

The Alternative Dispute Resolution Committee shall address current issues of mediation, arbitration and other alternative dispute resolution processes, including mediation and arbitration of private and court-connected ADR programs. The Committee shall conduct professional education programs in alternative dispute resolution, and study and recommend standards of practice for neutrals. The committee shall propose and monitor legislation regarding alternative dispute resolution.

Under Awards you will find the recipients of the Committee’s Annual Sir Francis Bacon Dispute Resolution Award. This award is given for excellence in alternative dispute resolution. Also listed are the winners of Special Recognition awards in 2008, 2010 and 2011.

Under Publications and News Releases you will find interesting articles, one titled “A Survey of International Arbitration Laws and Institutions” and another titled “Effective Advocacy in Mediation.”

Under Legislative Updates you will find an article about the reasons the Pennsylvania Legislature should adopt the “Revised Uniform Arbitration Act,” and an analysis of the ABA “Motion To Adopt Amendments To Model Rules For Fee Arbitration.”

These are samples. There is much more. I encourage you to explore the PBA website and the ADR page for items that may be of particular interest to you.

ADR Committee member David A. Feldheim is a sole practitioner in Plymouth Meeting, where he chairs the Business, Banking and Corporate Counsel Committee of the Montgomery Bar and devotes his time to corporate and transactional matters. He can be reached at David@Feldheimlaw.com.
By M. Melvin Shralow

As most of the members of the ADR Committee know, our Lawyer Dispute Resolution Program (LDRP) program has been substantially quiescent for several years. We have had few cases and those of us who have asked to become members of the mediation panel have been put on hold while new standards of eligibility were to be developed.

We now have the opportunity to revive and stimulate the program into greater activity, primarily by simplifying the process and adding interested and qualified lawyers to the mediation panel.

As the chair of the subcommittee, I have put forward an outline of such a program. The outline has been circulated first to the LDRP subcommittee and then to the entire ADR committee. It also is available on our website. This has stimulated an encouragingly large number of comments, almost all favorable with a few suggestions for modifying a few of the details. Once we have discussed the proposal at our ADR Committee meeting in Harrisburg, PA on Committee/Section Day on November 15, 2012, we can begin to flesh out the program with proposed rules and forms.

As I described in an email message to the committee, the main concepts of the proposal are simplifying the process by opening up the eligibility for the panel, having the committee appoint mediators, and having the appointed mediator administer the mediation. The consequences are to give more qualified lawyers the opportunity to mediate these disputes, to have more mediators available for the program, and to eliminate intermediate administrators in the conduct of the mediation. Uniform agreements and fee structure will assure uniform treatment of all participants.

The details of the program will be worked out in proposed rules and forms, to be developed by members of the LDRP subcommittee and reviewed by the ADR Committee. Once agreed upon, which I hope will happen promptly, our job will be to sell the program to lawyers and judges throughout the commonwealth. I hope to develop a campaign to solicit the cooperation of our judges by asking them to refer cases that involve issues within the domain of our program to us for mediation before the litigation progresses to trial. We also should solicit cooperation of county bar programs whereby members of their lawyer dispute programs join us and we make referrals to each other of appropriate cases.

We also should become alert to press reports of lawyer dispute cases and should contact counsel and the judges involved to suggest referral to our mediation program.

We have a chance to create a simplified, streamlined program that can work to acquaint lawyers and judges with the merits of mediation, and to give qualified lawyers the opportunity to use their skills in the mediation of cases that are meaningful to our profession and which should be resolved by lawyers without the public display of disharmony within our profession.

My thanks to all who are helping to reinvigorate this important program.

M. Melvin “Mel” Shralow, principal of Shralow ADR LLC of Bryn Mawr, mediates and arbitrates commercial disputes, as well as serves as a judge pro tem in the Commercial Case program and in major civil cases in the Court of Common Pleas of Philadelphia County.
By Richard P. Kidwell

With election campaigns in full swing, there has been no action by the legislature on any ADR issue. An attempt failed in the House to amend the Bill passed by the Senate to include language of the previously proposed Apology Law.

The House did pass Resolution 247 authorizing the Joint State Government Commission to review the practice of administrative law within the commonwealth. Although the Resolution itself does not address ADR, we hope that some of our members will be involved in the review to incorporate ADR practices into the recommendation of the study group due in October 2013. It is safe to predict that nothing substantive will take place in the lame duck session of the legislature.

Richard P. Kidwell is chair of the PBA ADR Legislative Subcommittee and senior associate counsel and vice president of risk management at University of Pittsburgh Medical Center (UPMC).
PBA ADR Subcommittee News

News from the ADR
Conflict Resolution Day Subcommittee

By Charles Shaffer

The Conflict Resolution Day Sub-Committee was successful in having both the governor and the legislature designate the third Thursday in October as Conflict Resolution Day. Pennsylvania Bar Association policy requires that any request to the governor or the legislature for a resolution by a committee or section must first be approved by the Pennsylvania Bar Association Board of Governors. In order to submit the request to the Pennsylvania Bar Association Board of Governors, the Committee must first vote on it in order to determine the level of support among Committee members.

Louann Bell emailed the resolution to all Committee members and asked for approval by return email. The Pennsylvania Bar Association Board of Governors met by conference call on August 22, 2012, and I participated in that call. What I expected to be a routine rubber stamp turned out to be a debate. However, the Board of Governors finally did approve our request and, through the efforts of Louann and Steve Loux, the legislature passed a resolution and the governor proclaimed October 18 to be Conflict Resolution Day in the Commonwealth of Pennsylvania. The Conflict Resolution Sub-Committee, again with the help of Louann, followed up by sending copies to all of the county bar associations. We sent each county a letter explaining what Conflict Resolution Day is, giving the addresses of websites with information for planning Conflict Resolution Day observances and asking them to facilitate the observance of Conflict Resolution Day in their county.

Conflict Resolution Day next year will be observed on October 17, 2013. It is not too early to begin thinking about plans for its observance.

Charles A. Shaffer is a partner with the law firm of Pugliese, Finnegan, Shaffer & Ferentino L.L.C. in Kingston, Pa., and serves as a mediator and arbitrator for various court/private provider panels.

ADR Continuing Legal Education Subcommittee News

ADR Presentation at Spring Civil Litigation Retreat

By Judy Weintraub

The ADR Committee will be partnering with the PBA Civil Litigation Section at its upcoming retreat, April 5-7, 2013, in Gettysburg, PA. The ADR Committee will be hosting a panel discussion entitled “Avoiding a Battle — When ADR Is Appropriate & How to Make It Effective”, which will be held on April 5, 2013 from 2:30 p.m. — 4 p.m., for 1.5 Substantive CLE credits.

Judy Weintraub, Vice Chair of the ADR CLE Subcommittee, is the founder of Accord LLC, in Valley Forge, PA, offering commercial mediation and arbitration services. She is a certified mediator with the IMI and a member of the mediation and arbitration rosters of the AAA and CPR.

Log on to www.pbi.org for the latest CLE Classes and Course Calendar.
Whereas, The board of directors of the Association for Conflict Resolution adopted a resolution designating the third Thursday in October as “Conflict Resolution Day”; and

Whereas, The Association for Conflict Resolution is a professional organization focused on enhancing the practice and public understanding of conflict resolution; and

Whereas, The Association for Conflict Resolution is the nation’s largest professional association for mediators, arbitrators, educators and other conflict resolution practitioners; and

Whereas, Conflict Resolution Day was conceived to:

(1) promote awareness of mediation, arbitration, conciliation and other creative, peaceful means of resolving conflicts;

(2) promote the use of conflict resolution in schools, families, businesses, communities, governments and the legal system;

(3) recognize the significant contributions of peaceful conflict resolvers; and

(4) obtain national synergy by having celebrations happen across the country and around the world on the same day;
Whereas, The first Conflict Resolution Day was celebrated in 2005; and

Whereas, The importance of Conflict Resolution Day is further underscored by the American Bar Association’s designating the third week in October as ABA Mediation Week; therefore be it

Resolved, That the Senate designate October 18, 2012, as “Conflict Resolution Day” in Pennsylvania.

I certify that the foregoing is a true and correct copy of Senate Resolution No. 344, introduced by Senators Stewart J. Greenleaf, Elizabeth J. Becton, Christine M. Tartaglione, Mary Jo White, Michael J. Stack, John C. Rafferty, Jr., Patrick M. Browne, Andrew S. Dinniman, Edwin B. Erickson, Richard Alloway, II, Wayne D. Fontina, Timothy J. Solcy, Judith L. Schwank, Jay Costa, Dominic Pileggi, David B. Regall and Jim Fuso, and adopted by the Senate of the Commonwealth of Pennsylvania the twenty-fourth day of September, in the year of our Lord, two thousand twelve.

Attent:

Megan Tokino Conedine, Secretary
Commonwealth of Pennsylvania

Governor's Office

PROCLAMATION

CONFLICT RESOLUTION DAY
October 18, 2012

WHEREAS, Conflict resolution encompasses mediation, arbitration, facilitation, conciliation, collaborative decision-making and other formal responses to conflict; and

WHEREAS, conflict resolution processes empower individuals, families, communities, organizations, businesses and nations to foster communication and devise solutions that are tailored to their particular needs and interests; and

WHEREAS, conflict resolution is being taught and practiced by children and adults of all ages in many school systems, colleges, universities and graduate programs throughout the world, not only as a way of solving individual disputes, but also as a means toward a more peaceful society; and

WHEREAS, community-based programs are fairly and equitably resolving neighborhood and community conflicts, thereby strengthening community relationships; and

WHEREAS, collaborative responses to conflicts are being used by administrative agencies, businesses and courts to effectively and efficiently resolve disputes; and

WHEREAS, professional associations of conflict resolvers are promoting the peaceful and creative resolution of disputes; and

WHEREAS, Conflict Resolution Day helps to promote awareness of mediation, arbitration, conciliation and other creative, peaceful means of resolving conflict in schools, families, businesses, communities, governments and the legal system.

THEREFORE, In recognition of the significant contributions of peaceful conflict resolvers, I, Tom Corbett, Governor of the Commonwealth of Pennsylvania, do hereby proclaim October 18, 2012 as CONFLICT RESOLUTION DAY.

GIVEN under my hand and the Seal of the Governor, at the City of Harrisburg, on this twenty-sixth day of September in the year of our Lord two thousand and twelve, and of the Commonwealth the two hundred and thirty-seventh.

TOM CORBETT
Governor
The Alternative Dispute Resolution Committee of the Pennsylvania Bar Association is seeking nominations for the 10th Annual Sir Francis Bacon Dispute Resolution Award. This Award is given for excellence in alternative dispute resolution. The award will be given at the Annual Meeting Award Luncheon we expect to take place on May 8, 2013.

Sir Francis Bacon (1561-1626) was a Renaissance writer and served British monarchs in a legal capacity as knight, attorney general and solicitor. He is also regarded as an author and philosopher. Sir Francis Bacon is the author of the essay “Of Negotiating.” The opening line from this short essay is frequently quoted: “It is generally better to deal by speech than by letter, and by the mediation of a third than by a man’s self.”

Each nominee must satisfy the following criteria:

1. Must be an individual who excels in the area of alternative dispute resolution in the Commonwealth of Pennsylvania, and
2. Must have had a significant professional impact in the Commonwealth of Pennsylvania in the area of alternative dispute resolution.

The Nomination Deadline is February 8, 2013.

*PLEASE NOTE: If you desire to nominate a previously nominated candidate, you can re-nominate by way of a letter with any additional new information relevant to the candidate.

Past Recipients:

<table>
<thead>
<tr>
<th>Year</th>
<th>Recipients</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004 1st Annual Sir Francis Award</td>
<td>Judy Shopp, Esquire</td>
</tr>
<tr>
<td>2005 2nd Annual Sir Francis Award</td>
<td>Chief Justice Ralph Cappy</td>
</tr>
<tr>
<td>2006 3rd Annual Sir Francis Award</td>
<td>Edward Blumstein, Esquire</td>
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<tr>
<td>2006 Special Recognition Award</td>
<td>Senator Steward J. Greenleaf</td>
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<tr>
<td>2007 4th Annual Sir Francis Award</td>
<td>Mark A. Welge, Esquire</td>
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<tr>
<td>2008 5th Annual Sir Francis Award</td>
<td>Cheryl F. Cutrona, Esquire</td>
</tr>
<tr>
<td>2008 Special Recognition Award</td>
<td>Honorable Donetta W. Ambrose</td>
</tr>
<tr>
<td>2009 6th Annual Sir Francis Award</td>
<td>Ann L. Begler, Esquire</td>
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<tr>
<td>2010 7th Annual Sir Francis Award</td>
<td>James A. Rosenstein, Esquire</td>
</tr>
<tr>
<td>2010 Special Recognition Award</td>
<td>Honorable Kate Ford Elliott</td>
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<tr>
<td>2011 8th Annual Sir Francis Award</td>
<td>Herbert R. Nurick, Esquire</td>
</tr>
<tr>
<td>2011 Special Recognition Award</td>
<td>John N. Salla, Jr., Esquire</td>
</tr>
<tr>
<td>2012 9th Annual Sir Francis Award</td>
<td>Honorable Abraham J. Gafni</td>
</tr>
<tr>
<td>2013 10th Annual Sir Francis Award</td>
<td></td>
</tr>
</tbody>
</table>
Alternative Dispute Resolution Committee
Sir Francis Bacon Dispute Resolution Award Nomination Form - 2013

Instructions:

1. Complete Parts I and II and return by February 8, 2013 to:

   2013 ADR Sir Francis Bacon Award
   Attention: Louann Bell
   Pennsylvania Bar Association
   100 South Street
   P.O. Box 186
   Harrisburg, PA 17108
   (800) 932-0311 extension 2276
   lbell@pabar.org

2. This form must be returned with a copy of the nominee’s curriculum vitae, and any other information and/or materials that will support your nominee’s selection.

   Part I.

   Complete the Following:

   1) Nominee’s Name and Title:

   2) Nominee’s Firm/Business, Address and Telephone Number:

   3) Nominated by (include address and telephone number):

   Part II.

   On a separate sheet of paper, indicate why you believe your nominee is deserving of the Award. Please consider the following: (1) the legal or law related professional accomplishments which demonstrate the nominee’s professional impact in Pennsylvania in the area of alternative dispute resolution, (2) the accomplishments of the nominee which identify the nominee as a leader in the area of alternative dispute resolution, (3) the nominee’s activities which demonstrate a long-term commitment to advancing alternative dispute resolution, (4) community-related activities and achievements of the nominee which identify the nominee as a leader in the community, (5) the nominee’s mentoring activities in the area of alternative dispute resolution, (6) how the nominee has evidenced scholarship in the area of alternative dispute resolution, (7) other memberships, activities, achievements and/or awards not previously specified.

   *PLEASE NOTE: If you desire to nominate a previously nominated candidate, you can re-nominate by way of a letter with any additional new information relevant to the candidate.
The Promise and Peril of a Joint Session in Mediation

Continued from Page 1

The Potential Benefits of a Joint Session

The dual purpose of an initial joint session is to allow each party the opportunity to highlight the merits of their case or defense while also listening to another perspective on the dispute. Executed well, the joint session combines subtle advocacy and reflective listening. The content of a joint session can range from a short statement to an elaborate PowerPoint presentation.

The joint session is often the only opportunity for a party to speak about their case directly to the opposing party. To be able to express how their life, business, etc. have been impacted by the facts giving rise to the dispute can be quite cathartic and set the stage for resolution. At the heart of every case is a story needing to be told. An effective joint session allows that story to be expressed in a safe, structured and confidential environment.

On the other side of the joint session coin, is the opportunity to engage in some reflective listening. People in litigation tend to see things perfectly from their own perspective. By really listening to another perspective on the litigated events reveals that indeed there are at least two sides to every story. Depending on the level of disclosure exhibited in the presentation, the “listening” party may get a preview of what they are likely to encounter at trial. A receptive listening ear can raise the potential for settlement and resolution. Of course, all of this presupposes a party capable of engaging in reflective listening in a potentially emotionally charged and tense situation.

Thirdly, a joint session allows for a more informed evaluation of the overall case. For an opposing party or principal to spend time with the other party, listening and observing, can be very beneficial in making case resolution decisions. In many respects, mediation is an assisted conversation about making informed decisions. To have the parties interact in the same room, in a carefully structured environment, enhances the quality of the decision making.

Peril of a Joint Session

The chief peril of a joint session is that it denigrates into an adversarial exercise that drives a stake in the heart of settlement. The joint session, and indeed the entire mediation, can be hijacked by a party/attorney intent on demonstrating how they are going to crush the opposing party at trial. Subtle and effective advocacy is a necessary element to an effective joint session as it is important for the opposing party to understand what they are up against. However, over the top chest-thumping advocacy will often do nothing more than drive the opposing party away from the negotiating table.

It can be difficult for parties and counsel who have been engaged in the adversarial process of civil litigation, complete with the required tenet of zealous advocacy, to suddenly transform to a conciliatory process designed to find common ground. The wrong word or gesture at the wrong time can cause an otherwise well-intended joint session to spiral out of control.

Negotiating the Mine Field

It can be a delicate journey from the mediator opening to the private caucus as the parties cross the minefield of the joint session. The first inquiry should be whether to hold a joint session. This question can often be resolved by simple advance preparation. Know the nature of the case: Does the underlying case have the potential to be emotionally charged or is it a dispute involving an arm’s-length transaction? Speak to all counsel about the dynamics of the case. Ask for counsel’s opinion on whether a joint session is advisable. Counsel has lived with the case for a far longer period of time and can be helpful in determining the wisdom of a joint session. Know the attorneys: Seek to understand their approach to a joint session and their overall litigation temperament.

If a decision is made to commence with a joint session, it is important for the mediator to set a positive tone in the opening remarks. The mediator’s opening remarks can be critical to success. It is in this moment that the mediator begins to plant the seeds of resolution. The overarching goal of the mediator’s opening is to create a positive environment of optimism, safety, conciliation and mutual respect.

During the opening remarks prior to the joint session, it is important for the mediator to protect the process. Explain the purpose of the joint session; to respectfully advance the merits of the case while listening to another perspective. Encourage the parties that mediation provides an opportunity to remove the litigation boxing gloves for a day and work jointly toward a resolution of the case.

Conclusion

A joint session can hold much promise for settlement of a case including the opportunity to be heard and the potential for hearing a different perspective. However, the joint session can unintentionally sabotage a mediation if allowed to proceed in an overly adversarial environment with unchecked emotion.

The decision to engage in a joint session is made in the prism of inquiring whether it will advance the cause of resolution and settlement (just like most decisions in the context of
PBA ADR Committee Members in the News

James Kozuch, a shareholder of Caesar Rivise, a Philadelphia law firm specializing in IP law and litigation, was recently invited to join the panel of arbitrators of the International Centre for Dispute Resolution (ICDR). ICDR is the international division of the American Arbitration Association (AAA). The selection process for ICDR’s panel of arbitrators includes an extensive review of a candidate’s qualifications, including international expertise and reputation. Mr. Kozuch also is an arbitrator for the U.S. District Court for the Eastern District of Pennsylvania, serves on the Commercial Roster of Neutrals of the AAA, and is a member of four AAA specialty panels – National Patent Arbitration Panel, Pharma Panel, Hi-Tech Panel, and Intellectual Property Panel.

The Promise and Peril of a Joint Session in Mediation

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...mediation! If the decision is made to engage in joint session, the potential for maximizing the promise and purpose of a joint session can be achieved by engaging in careful preparation, setting the tone in opening remarks and protecting the overall process.
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We have the clients . . . you have the expertise.
Join the PBA Lawyer Referral Service today.
It’s a win-win situation!
For additional information, contact the PBA LRS at 1-800-932-0311, Ext. 2209.
To subscribe, log in on the PBA website with your PBA member username and password, select the “Committees/Sections” tab, then the “Committees” tab, then the “Alternative Dispute Resolution Committee” tab, then the “Listserv Sign-Up” tab. The subscription form can also be accessed directly at www.pabar.org/public/listservform.asp.

Once subscribed to the listserv, you will get the following confirmation message:

“File sent due to actions of administrator traci.raho@pabar.org.”

To send a message to members of the listserv, address your email to adr@list.pabar.org.

To reply only to the sender, hit “Reply,” and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can manually add other recipients outside of the sender or the membership.

To reply to the entire listserv membership, hit “Reply to All,” and type your response. This response will go to the sender and to the entire listserv membership.

To unsubscribe, send a message to listserv@list.pabar.org with “unsubscribe adr” in the body.

To change your email address, you must unsubscribe the old email address using the old email address and subscribe the new email address using your new email address. Sending an email to the list will not change your email address on the listserv.

For customer service, contact Traci Raho, PBA internet coordinator, (800) 932-0311, ext. 2255.