September 27, 2007 ADR Committee Meeting Summary

Announcements

Congratulations were extended to Jim Rosenstein as he is expected to be the next president of ACR. All members were encouraged to vote for Jim for this position.

Planning is underway for the 2008 ADR Institute, to be held on Feb. 27 in Philadelphia and March 4 in Pittsburgh. Ann Begler advised that the Pennsylvania Bar Institute took a financial hit at the Pittsburgh site for the 2007 Institute. While the difference between the financial outcome in Pittsburgh and Philadelphia is due, in large part, to the PBI having its own site in Philadelphia, nevertheless, it is necessary to get the attendance up for the 2008 program. The keynote speaker will be Lela Love, president-elect of the ABA Section of Dispute Resolution. Workshop suggestions for the ADR Institute are being sought.

PBI will hold a four-hour program in Pittsburgh on Dec. 10, 2007, focusing on Advocacy in Mediation.

SR 160 Update – The SR 160 Subcommittees have begun meeting. A coordinating committee has also been formed. The possibility of having non-160 members join the subcommittees is being explored as part of a possible effort to broaden the input into the 160 process.

The ADR Society of Widener University School of Law is hosting the ABA Law Student Division Region 3 Negotiation Competition on Nov. 10-11, 2007, at Widener’s law school campus in Wilmington, Del. They are looking for judges from the Delaware and Philadelphia Bars.

Ann Begler and Herb Nurick advised members that the Committee will once again be asked to co-sponsor the 2008 PA Council of Mediators Spring Conference. The conference will be held the weekend of April 12 and will again be in the Harrisburg area.

The Pa. Medical Society Conference on Alternatives in Litigation will be held in Pittsburgh in March or April 2008. Some of the topics they

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Update on the Mark A. Welge Memorial Educational Fund

It is closing in on a year since many of us last saw Mark Welge at a meeting of the Delaware Valley chapter of the Association for Conflict Resolution – he was the founding president of the chapter. At that time, Mark knew he was not going to overcome the liver cancer that had spread, yet he took time to meet and share his thoughts with the chapter members in its best-attended get-together of the year. In my opinion, Mark was very weak, but as gracious and gregarious as ever. In an update on how Mark’s family is doing and the status of the Memorial Education Fund, a colleague and family friend who lives in the same general area as Mark’ wife, Louise (a professional editor/proofer), and his daughter, Caitlin (a student pursuing her undergraduate degree at a local college), reports, “Finally was able to get Louise on the phone today. She has been having a lot of trouble with her eyes and is still missing Mark terribly. Caitlin is still at the Moore College of Art. She will now graduate in 2009. Louise has had to take out loans to help with her tuition and Caitlin has loans herself. In short, they still need the financial assistance, so contributions to the Welge fund would help.”

Those wishing to make a donation to the fund should make their checks payable to the “Mark A. Welge Memorial Fund” and send them to Phoebe Sheftel, treasurer; 414 Barclay Road, Rosemont, PA 19010.
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will address are early intervention and planned mediation.

Subcommittee Reports

State Agency Programs – A subcommittee meeting will be scheduled in the near future. Judy Shopp reported that she has been working on the OGC Mediation Training Program scheduled for Oct. 11-13. She advised that a Web page was developed this summer and it can be used by each agency.

Court-Annexed Mediation Programs – No report.

Sir Francis Bacon ADR Award – John Salla reported that the 2007 award was presented posthumously to Mark Welge. Mark’s wife and daughter were there for the presentation.

Credentialing & Certification – The work of this subcommittee will dovetail with the SR 160 efforts. Judy Meyer reported that there is an international certification proposal being promoted by Fortune 500 Companies. Judy will keep Herb and Ann updated of this issue.

Collaborative Law – Connie Brunt provided a comprehensive report that addressed the Clark article on the use of CL in medical error situations; drafting of Uniform CL statute; ABA Ethics opinion rejecting Colorado’s opinion logic; IACP; CL Press; Interdisciplinary training on Nov. 15-16, 2007, in Harrisburg with Chip Rose; publications including an article in The Family Lawyer and an article for the ADR newsletter.

Committee Newsletter – Tom Salzer said he needs articles. Ann and Herb spoke about the need for the newsletter to become more institutionalized so that it is published more regularly. Please let Ann or Herb know if you have an interest. The hope is that there will be regular columns, and a wide array of articles. This newsletter carries importance not just for committee members: it is a way to educate the larger Bar.

Committee/Section Liaisons

Ann and Herb introduced the new liaisons from the various Committees and Sections. The question arose as to what would be expected of the liaisons. They were advised that one of the things they would be asked to do would be to work with the Committee in trying to incorporate ADR components in the CLE programs of the other Committees and Sections.

Lawyer Dispute Resolution Program

The revised LDRP rules were reviewed and discussed. It was decided to adopt the rules with the suggested revisions made during the meeting. Louann Bell will work with Ann to confirm all the agreed-upon revisions for final submission to the PBA Board of Governors for their approval.

Ann said the next step would be to decide how to expand the panel of mediators and arbitrators for the LDRP as well as organize a training program for them.

ADR Committee Survey

Tom Salzer provided an update on the proposed ADR Committee survey. The survey had been discussed at the June 2007 meeting and a decision was made not to distribute the survey due to a number of questions related to intent and whether the survey, as constructed, could really accomplish what was intended. Due to Tom’s absence from the June meeting, and his strong feelings about the survey, the co-chairs, after talking to Tom after the June meeting, agreed to have the survey again discussed at the September meeting. The survey was not sent out again before the September meeting and several people at the meeting did not remember it from the prior year when it was first discussed. While there were again many questions and concerns raised about the survey at the meeting, it was decided the survey would again be sent to committee members for review, and a final determination made at the Nov. 29 meeting. Tom encouraged members to send the survey out and once the results were received, to decide at that time how to proceed, if at all. Tom will need to get the Dec. 31 deadline for distribution of the survey extended. It was suggested that an expert review the survey design.

Legislative Report

HB 311 – Benevolent Gestures Bill – not going anywhere right now. It may be discussed at the November meeting.

SB 678 – Alternative to medmal legislation – this legislation has not moved. The Senate Judiciary Committee may give it a hearing at some point. It was suggested that this bill be sent, with a three to four sentence explanation from Steve Loux, to the Committee for comment.

HB 1343 – The Committee, in advance of the June meeting and via e-mail, strongly voted against supporting mandatory arbitration in medical malpractice cases. The Committee did support the use of early intervention, particularly the use of mediation as an initial step. If this legislation is going to move, Ann will draft a formal resolution that can be forwarded to the Board of Governors.

Several pieces of legislation were sent out in advance of the September meeting. The committee did not reach that portion of the agenda and the legislative items were not reviewed. Ann and Herb would like to have various committee members volunteer to review the legislation and report to the full Committee.

New Business

Conflict Resolution Day – Members were encouraged to do something in their area for Conflict Resolution Day.

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Arbitration & Mediation

Inside Counsel Article: Addendum

By Tom Salzer

In the May 2007 issue of Inside Counsel magazine, an article appeared entitled “System Slowdown: Can Arbitration Be Fixed” by Mary Swanton. The article made certain statements/criticisms, such as:

(1) A partner in a very large firm hypothesized that major commercial disputes may not be faster or cheaper to arbitrate than trying the matter ... because attorneys are allowed to import the procedural complexity of litigation into arbitration.

(2) A former head of litigation at Motorola agreed with the partner noted above and added that “the quality of arbitrators is all over the map.”

(3) It was further noted that all too frequently arbitrators either chose to or are allowed to not follow the Rules of Evidence and do not give reasoned decisions on their own.

(4) There is also the valid criticism that arbitrators keep their calendars very full so hearings are often not on consecutive days and are sometimes spread over weeks of lapsed time — compounded if there is a three-member panel — with the added complaint that “these people are handling three or four arbitrations simultaneously.”

It is my opinion that all of these complaints/criticisms may be solved by corporate attorneys taking more responsibility for:

(A) Accurately planning just enough days for a reasonable hearing.

(B) Drafting the ADR clauses and selecting the arbitrators.

(C) Selecting arbitrators who are willing to reserve time for the arbitration process and give it priority.

(D) Demanding the ADR use rules of evidence.

(E) Demanding a reasoned decision of no less than “X” pages will be sent within “X” days of concluding the hearing.

One of the most unsophisticated actions a corporate attorney or corporate officer can make is to ignore the fine (but still necessary) points in drafting dispute resolution clauses and to cede the arbitration process to an outside organization. Too often, corporate general counsel and/or corporate officers do not want any fingerprints on the arbitration process, should criticism be leveled at a later date.

In closing, all the complaints in the Inside Counsel article concerning commercial arbitration are immediately solvable with the attention of the corporate counsel to drafting the agreement and selecting the arbitrator(s). ■

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PAC – There is a lot of legislation that has an impact on ADR.

The PBA Legislative Department is seeking coordinators from the different Committees and Sections to encourage participation of the members of their respective groups in the PABAR-PAC. Nevin Mindlin will be offering training for the coordinators. Ann and Herb would like a member of the Committee to volunteer for the training, and then for developing and executing a plan to encourage ADR Committee members to become members of the PAC. Please let Ann or Herb know if this is something of interest and something you are willing to do.

Pro Bono – Ann said that PBA President Andy Susko is making a strong effort to increase pro bono efforts. The resolution passed by the House of Delegates includes ADR as part of the pro bono service that will be targeted. Ann and Herb suggested the formulation of a Pro Bono Subcommittee. Please let Ann or Herb know if this is something of interest and something you would be willing to chair. Also, let them know if this is a subcommittee that interests you.

Next ADR Committee Meeting – The next meeting will be held on Nov. 29, 2007, at Committee/Section Day in Harrisburg. Please get any agenda items you have to Ann and Herb at least 10 days before the meeting, if possible. ■
Arbitration News from Across the Nation:

A Crack in the Dike Supporting Mediation Confidentiality

On Sept. 28, the New York Appellate Division of the 4th Judicial Department upheld a trial court ruling on a motion that effectively ordered a mediator in a divorce matter to honor a subpoena to be deposed. The mediator had held a session covered by a confidentiality agreement between the parties, a husband and wife where neither spouse was represented by attorneys. The mediation session itself concluded with the husband and wife signing a separation agreement.

After the separation agreement was in place, one of the spouses wanted to “establish the circumstances surrounding the execution of the separation agreement, and the court must determine in this action whether the terms of the separation agreement were fair and reasonable at the time of the making of the agreement.” [quote from the one-page Memorandum and Order from the Appellate Division – Docket No. CA 07-00659, Hauzinger v. Hauzinger.]

The mediator argued that the trial court abused its discretion in its refusal to enforce the confidentiality agreement and cited case law of Lynbrook Glass & Architectural Metals Corp. v. Elite Assoc., 238 AD2d 319, and the mediator also queried how the trial court could have ruled as it did and still give proper consideration to the public policy surrounding mediation confidentiality agreements. Ultimately, the New York Appellate Division upheld the trial division’s ruling, and stated in its Memorandum that even though the Uniform Mediation Act (UMA) contains confidentiality provisions, New York state has not adopted the UMA. Therefore, the judge would not overrule the trial court in any effort to support confidentiality agreements.

Arbitration in Health Care Act Becomes Law in North Carolina

On Aug. 31, the governor of North Carolina signed into law a measure that allows, in a formal way, for patients and their families in a dispute against care providers to agree to resolve the matter in arbitration with certain parameters assigned automatically to the process. First and primarily, there is a $1 million limit on the total monetary damages that can be awarded. The arbitration process is noticeably quicker than litigation in that the law requires that the arbitration hearing start within 10 months of the parties agreeing to arbitrate and a binding decision must be arrived at within two weeks of the hearing’s completion. Note that this law is patterned after a law in Washington state. While professional organizations representing both attorneys and physicians supported this measure, individual trial lawyers have pledged to fight efforts to limit or restrict seriously injured patients from litigating their disputes.

Internet Click–on Agreements Containing Arbitration Clauses Are Problematic

Web sites containing user agreements are ubiquitous these days, and it is common that they contain arbitration provisions as the sole means for resolving disputes. With this fact as predicate, a Pennsylvania-based telephone company, Talk America, changed the terms of its online service agreement. A customer then found himself in a California court applying New York law per the online agreement, making the argument that the agreement is unenforceable because he never had an opportunity to agree to a fundamental change in the agreements’ terms. Talk America argued that the customer’s consent to the change was implied because he should have seen the new term(s) imbedded in the click-online contract when the customer paid his bills online each month. The Appeals Court found for the customer, finding that the customer had no reasonable expectation to diligently check the telephone company’s Web site, as the customer authorized the company to pay bills automatically from his credit card.

In another setting, in August 2007, a California district court found a click-on agreement that had a mandatory arbitration clause to be unenforceable because it is a contract of adhesion. See Brazil v. Dell Computer.
Help With Using Your PBA Listserv

To subscribe, login on the PBA Web site 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/listserv-form.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 e-mail 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 e-mail address, you must unsubscribe the old e-mail address using the old e-mail address and subscribe the new e-mail address using your new e-mail address. Sending an e-mail to the list will not change your e-mail address on the listserv.

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

UPCOMING EVENTS

NOVEMBER 29, 2007, 1:30 p.m. - 4:00 p.m.
ALTERNATIVE DISPUTE RESOLUTION COMMITTEE MEETING
Part of PBA Committee/Section Day
Holiday Inn East, Harrisburg

JANUARY 29 - FEBRUARY 2, 2008
PBA MIDYEAR MEETING
El Conquistador Resort & Golden Door Spa, Puerto Rico

Check the PBA Events Calendar at www.pabar.org for more information, or call the PBA at (800) 932-0311.