In Memoriam: Mark A. Welge (1947-2007)

On Jan. 9, the conflict resolution field lost one of its leaders and all-around nice guys when Mark Welge succumbed to liver cancer. Listing Mark’s accomplishments, which were many and important, doesn’t adequately capture his personal qualities that made him so effective as a lawyer (for 27 years), subsequently as a mediator or arbitrator of over 1,000 commercial and personal injury disputes, and always as a leader who led by example. Mark was also an effective teacher, trainer and mentor of prospective neutrals and of lawyers representing clients in mediation and arbitration.

It quickly became obvious to anyone who came into contact with Mark that he cared deeply about others and one couldn’t help but become his friend. As expressed by one of Mark’s colleagues, Ann Begler, at his funeral, “His ability to welcome, to open, to be transparent, to be kind, to receive whatever the other person had to offer, his genuine ability to just connect and be engaged — those things took him immediately into my heart and, I know, into the hearts of many of you.”

Here are but a few examples of Mark’s leadership responsibilities in the conflict resolution field during the last few years:
- Co-chair of the Philadelphia Bar Association’s Alternative Dispute Resolution Committee;
- Member of the founding Board of Directors and second President of the Greater Delaware Valley Chapter of the Association for Conflict Resolution (ACR);
- Tri-chair of the Planning Committee for ACR’s 2006 Annual Conference;
- Fellow of the International Academy of Mediators; and
- A leader in the effort to promote conflict resolution in Pennsylvania that culminated in the Pennsylvania General Assembly establishing an Advisory Committee on Alternative Dispute Resolution, to which he was appointed.

Again, in the words of Ann Begler, “Mark’s graciousness and generosity were inspirational. He never promoted Mark, only … mediation....You know, to really be a good mediator our task is to help people who are in pain, or are lost, who are confused, to expand their own capacities to hold more than one view, to stretch to allow space for multiple realities to exist. It’s not possible to support our clients to do this if we can’t do it for ourselves. Mark’s capacity to do this — to honestly walk the walk — was remarkable … Mark was a peacemaker. It was the walk he walked. It was clear in all of our interactions, in all the ways he did his work … Mark would be the last person to understand how profound his presence was and always will be. His ego was so incredibly understated. I am a better, clearer, more whole person because of Mark. Because of Mark many of us are better people. Because of Mark and the way he lived, we will continue to be reminded that as human beings it is our nature to carry the light of the divine, to — if we can stay out of our own way — reach for what is good. With Mark’s influence integrated within us, and his ongoing presence alive for us, we will each continue to have the strength and conviction to more often live the words that were Mark [in Hebrew] – Anie Shalom – I am for peace.”

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(Continued from Page 1)

The Greater Delaware Valley Chapter of ACR, to which Mark was so devoted and in which he found many of his collegial friends, wants to memorialize Mark’s many unselfish contributions to the conflict resolution field. Initially, this will take the form of a fund to help Mark’s daughter, Caitlin, complete her college education (she is currently a sophomore). Contributions to the Mark A. Welge Memorial Fund should be made payable to ACR-GDV, identified as being for this purpose, and mailed to Phoebe Sheftel, Treasurer, 414 Barclay Road, Rosemont, PA 19010.

The Chapter is also exploring how appropriately to perpetuate the values that Mark personified, and will be publicizing its plan in the near future.

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Pennsylvania Public Utility Commission Administrative Law Judge Rules in Favor of Mediation Confidentiality

By Herbert Nurick

Cavalier Telephone Mid-Atlantic, LLC v. Verizon Pennsylvania Inc., C-20055343, involved a complaint case before the Pennsylvania Public Utility Commission (Commission). At one stage of the proceeding, the parties utilized the Commission’s mediation process; however, the mediation was terminated. Prior to the first mediation session, the parties had filed testimony in preparation for trial of the case. Following termination of the mediation, one of the parties filed a motion to re-open discovery and to supplement testimony on the basis that additional information exchanged between the parties during mediation revealed new evidence that would have a significant bearing on the case.

... he concluded that confidentiality must prevail if mediation is to be a legitimate alternative for resolving disputes.

In his Order Denying Motion to Re-Open Discovery and to Supplement Testimony, dated Sept. 20, 2006, Administrative Law Judge (ALJ) Robert P. Meehan considered the mediation privilege statute (42 Pa. C.S.A. §5949, Confidential mediation communications and documents) as well as the Commission’s Confidentiality Rule. He also examined, and gave a discourse on relevant cases in other jurisdictions. Based on his analysis, he concluded that confidentiality must prevail if mediation is to be a legitimate alternative for resolving disputes.

The following excerpts, from pages 16 and 17 of the Order, are particularly relevant:

The greater detriment … that will result from permitting the discovery or admission of information exchanged by, between or among a party during a mediation session will be the erosion of the imperative need for confidence and trust in the mediation process as a viable means of alternative dispute resolution. Few litigants will be disposed to attempt mediation to resolve a dispute if they know or believe that information exchanged during the mediation can be used against them in judicial or administrative proceedings. In turn, adversarial rather than amicable dispute resolution will result, litigation costs will increase and dockets will grow more crowded.

Considering the harm that will result to the public policy, as set forth in 42 Pa. C.S. §5949, from permitting or requiring discovery of data, documents, information and analysis learned during mediation, in contrast to any benefit Cavalier may derive from its disclosure, it is my opinion that the overall evidentiary detriment resulting from the denial of Cavalier’s motion will be modest. In this regard, I believe that 42 Pa. Code §5949 should be liberally construed and broadly applied so that unless the information sought to be discovered falls within one of the enumerated exceptions, mediation communications and/or mediation documents cannot be discovered or admitted into evidence in this proceeding.

“[The Commission’s Mediation Confidentiality Rule] … is all encompassing in its scope.”

There is a further reason supporting the denial of Cavalier’s motion to re-open discovery and supplement testimony — the Commission’s Mediation Confidentiality Rule. This rule … is all encompassing in its scope. ‘Everything’ that takes place in mediation is confidential and no person in ‘the mediation room’ may disclose ‘anything’ that takes place during mediation, ‘except as otherwise provided by law.’ In my opinion the ‘except as otherwise provided by law’ clause refers to the specifically enumerated exceptions in 42 Pa. C.S. §5949(b), and which are not applicable here.

This Rule was presented to the parties before the mediation commenced. The parties were required to accept and agree to the Mediation Confidentiality Rule before the commencement of the (Continued on Page 4)
mediation ... [H]ad not both parties accepted and agreed to that Rule mediation would not have occurred.

ALJ Meehan further commented: ... if the litigation does resume in this case, the parties will be left in the positions they had before the mediation occurred. This, however, is the necessary result to preserve, protect and promote the statutorily stated public policy of maintaining the confidentiality of the mediation process, because but for the mediation, the ‘newly available information’ and ‘facts’ now sought to be discovered would not have been known. (p. 18)

I offer ALJ Meehan’s discussion and analysis in this case as a basis for further discussion on confidentiality in mediation.

Herb Nurick is the mediation coordinator for the Pennsylvania Public Utility Commission and is co-chair of the Pennsylvania Bar Association Alternative Dispute Resolution Committee.

An European Perception of Arbitration

Synopsis by Thomas B. Salzer of an unsigned article that appeared in Inside Counsel in the May 2006 issue

According to a two-year survey by the publication Inside Counsel, formerly known as Corporate Legal Times, just over half of the corporate counsel felt arbitration was less expensive and quicker than a trial, with 83 percent finding it as fair or fairer than adjudicating a dispute. In-house counsel in Europe very recently thought arbitration was too long and too costly compared to trials, and most attributed this situation to the process becoming “too-Americanized” because of overuse of expert witnesses, insisting on depositions and extravagant document demands. To offer some specifics, the general counsel of the French concern, Alcatel Space Industries, critiqued her opposition trial attorney from the United States, “He would constantly say, ‘Objection, objection, objection.’ Finally, the Swiss president of the arbitration panel had to remind him he wasn’t in a U.S. court.”

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Another area of concern was the difficulty of locating skilled arbitrators for a three-member panel who collectively had time to attend to consecutive hearings in a timeframe that is reasonably soon to when the parties are ready. Too many potential arbitrators chose to be booked for two years in advance.

Finally, there are issues of the choice of law and the enforceability of the arbitrator’s award in the international arbitration process. When the contract’s arbitration clauses are not carefully drafted, the panel may be faced with using a law that is poorly understood by the parties, such as the law of Afghanistan. Then again, merely because the parties’ countries of incorporation may be signatories to an international arbitration convention, such as the New York Convention on Recognition of Arbitral Awards, does not mean arbitrations are without risks. For instance, a Saudi company had an arbitration award against it, but when the award was presented to a Saudi court for docketing and enforcement, the court refused to honor the award because a woman served on the arbitration panel, in stark violation of Shariah (Islamic law). While arbitration has many advantages, the risks or downsides of arbitration are most easily minimalized when the parties carefully draft contract provisions concerning arbitration.
Instances of Trying to Vacate an Arbitration Decision

By Thomas B. Salzer

With regard to an arbitrator’s freedom to fashion an award that is not strictly in keeping with the predominate law, the prevailing party in a construction contract dispute wanted to modify the award to include counsel fees as is mandated by an applicable statute (PA Contractor Payment Act – 73 P.S. sec. 512(b)). The appellant (Zipporah – the project owner) contends that the arbitrators did not award counsel fees and this omission was merely an excusable error of law which is not a basis for overturning the arbitrator’s decision.

The Appellate Court found that the arbitrator’s decision will stand and stated in incorporated in its decision, in part, a quote from Gargano v. Terminix International Co., 2001 Pa. Super. 282, 784 A.2d 188, 193 (Pa. Super. 2001). “The award of an arbitrator in a nonjudicial arbitration … is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.”

In keeping with the theme of arbitrators having a duty not to manifestly disregard the law, arbitrators have great flexibility to act independently without an overriding fear of having the decision overturned by a court, take notice of Hadelman v. DeLuca. In this case, the Connecticut Supreme Court allowed to stand an arbitrator’s decision in July 2006, to impose $500,000 in punitive damages and no compensatory damages when this decision is clearly not congruent with the principal set out by the U.S. Supreme Court in BMW v. Gore that punitive damages should bear a reasonable relation to compensatory damages.