Four tenets of mediation: engagement, authenticity, creativity and self-determination

By Robert A. Creo

Bob Creo has been a mediator and arbitrator for over 30 years. Since 2008, he has co-mediated complex cases with Monique McKay d/b/a Master Mediators LLC in Pittsburgh. They have co-founded the Master Mediator Institute and hold Immersion Courses to study the trans-disciplinary science of facilitated decision making, human behavior and conflict resolution. In this article, Creo talks about some of the tenets that guide their mediation process.

Monique McKay and I have worked together for over four years, and during that time, we have focused on mediating complex commercial, family business, medical malpractice and catastrophic loss cases. Our approach and our best practices have evolved. There are some core principles we follow when we bring people to the table, as we prepare for the substance of the case and as we are in the midst of mediating a claim.

Preparing your claims examiner and client for mediation: a defense attorney perspective

By John E. Toczydlowski

The discovery deadline just passed, and the long and arduous discovery process is complete. Written discovery and document production, thousands of pages, are finished. The long string of plaintiff and defense depositions is complete. The case is complex, with significant potential exposure and hotly contested liability. The client, with a significant self-insured retention (“SIR”), is concerned about potential excess exposure and negative press.

The claims examiner, on the other hand, believes the case can and should be won at trial and refuses to engage the plaintiff’s attorney in negotiations. All in all, it looks to be a long summer of trial preparation and trial.

Then magic happens: The plaintiff’s attorney calls and asks if the client and claims would be interested in taking the case to mediation! Mediation will solve all of my problems in this case, you think to yourself. “I will call and ask,” you tell the plaintiff’s attorney, already thinking about the round of golf you will soon be playing. Unfortunately, your work has only just begun.

Step 1. To Mediate Or Not To Mediate

Mediation is clearly a preferable option to trial for the defense, depending on the jurisdiction. Trials cost money; neither the insurance carrier nor the client likes to spend money on a trial. Trials involve risk; the insurance carrier

Continued on Page 19

Continued on Page 20
Message from the ADR Committee chair

By Stephen G. Yusem

Our PBA ADR Committee met in conjunction with the PBA Annual Meeting in Lancaster on May 10. With almost 40 members present, we had the best turnout of all PBA committees. Those present included Judge Kate Ford Elliott of the Superior Court, retired Judges Dick Klein and Abe Gafni (who received the Sir Francis Bacon Award at the PBA Awards Luncheon) and incoming PBA President Tom Wilkinson Jr.

We were also honored to have as our guest Ray Pepe, the Pennsylvania representative to the Uniform Law Commission. Pepe explained how important it is for us to ensure that Pennsylvania becomes the 17th state to adopt the Revised Uniform Arbitration Act (RUAA) as it updates the Pennsylvania Uniform Arbitration Act, now more than 30 years old, and facilitates the arbitration process for those disputants who prefer arbitration over litigation.

The legislation that would adopt the RUAA in Pennsylvania is House Bill 1159 (Printers’ No. 1261) which was unanimously passed by the House on Jan. 23 and is currently awaiting action by the Senate Judiciary Committee. As our committee strongly supports the enactment of the RUAA in Pennsylvania, we need our members to share our views with their respective state senators now and especially the members of the Senate Judiciary Committee, whose vote is required to get H.B. 1159 reported out of committee and onto the Senate floor. The Senate Judiciary Committee members are Mary Jo White, Daylin Leach, Joseph Skarnati, Richard Alloway, Jane Earll, John Gordner, Jeffrey Piccola, John Rafferty, Lisa Boscola, Lawrence Farnase, Vincent Hughes and Michael Stack.

To provide our members, and anyone else who is like-minded, with talking points in support of this effort, our Public Relations Subcommittee Chair David Feldheim has incorporated into our webpage of the PBA website a copy of the “Revised Uniform Arbitration Act Report to the Pennsylvania Judiciary Committee regarding House Bill 1159, Printers’ No. 1261” and a two-pager titled “Pennsylvania Should Adopt the Pennsylvania Arbitration Act,” prepared at the suggestion of Membership Subcommittee Chair Herb Nurick. In an article in this issue of the newsletter, Feldheim explains how to access documents such as these on our webpage.

In other business, the Conflict Resolution Day Subcommittee, chaired by Charles Shaffer and vice-chaired by Jim Kozuch, is moving forward with plans for Pennsylvania Conflict Resolution Day on Oct. 18. A proclamation is being submitted to Gov. Tom Corbett to alert the public to the event.

On the initiative of Cheryl Cutrona, an Ad Hoc Legal Services Subcommittee has been appointed to implement the Feb. 14, 2012, Cutrona Report, supporting a joint effort between our committee and the PBA Legal Services to the Public Committee to form a PBA Pro Bono Mediation Program.

I am pleased to report that our committee membership enjoyed a one-year increase of 38 percent to approximately 150 members – all of whom I encourage to join one or more of our dynamic subcommittees, the chairs and vice chairs of which form our Executive Council as published in this issue. Subcommittee membership enables our members to provide the ADR Committee with the benefit of their experience as they take their networking initiatives to the next level. In support of that objective, ADR Committee Vice Chair and Liaison Subcommittee Chair Jim Rosenstein has done a superb job implementing more than a dozen liaison connections with those PBA sections and committees that relate, directly or indirectly, to the work of our committee.

Our next meeting will be a regional meeting with telephone conference facilities in Pittsburgh, Harrisburg and Philadelphia on Wednesday, Sept. 5, with complimentary luncheon. The next PBA Committee/Section Day is scheduled for Thursday, Nov. 15, at the Holiday Inn East, Harrisburg.

Best regards,

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

Name our newsletter

Mediators are creative and imaginative. Arbitrators are deliberative and decisive. We are calling upon all of you mediators and arbitrators to offer suggestions to change the name of our Arbitration & Mediation newsletter to something a little more dynamic and catchy.

Please send your entry to Editor Mary Kate Coleman, at MKColeman@rhwrlaw.com, who will chair an arbitration panel with Committee Chair Steve Yusem and Vice Chair Jim Rosenstein as wing arbitrators to adjudicate the winning entry. And of course there will be a prize for the winner (in addition to bragging rights). Deadline for entries: Aug. 31.
Message from the editor

By Mary Kate Coleman
Arbitration & Mediation editor

The Newsletter Subcommittee is pleased to release our Summer 2012 newsletter. This newsletter contains many interesting articles, and we hope you enjoy reading it. Thank you to everyone who contributed content or otherwise assisted in its production. In particular, I greatly appreciate the dedication and hard work of subcommittee members: Clymer Bardsley, Stephen Hall, Chuck Kenrick and John Toczydlowski.

The next issue of our newsletter will be published in the fall, so this is the perfect time to start thinking about how you can contribute to our next issue! Remember, this is your newsletter and we would like to hear from you.

We would appreciate receiving articles, book reviews, case summaries, subcommittee reports, photos, news about you, etc. Additionally, Conflict Resolution Day is Oct. 18, and we would like to hear how local ADR groups celebrated the day. So, in addition to the above-mentioned items, please send information about Conflict Resolution Day activities to me at MKColeman@rhwrlaw.com.

Have a great summer. I look forward to getting together with everyone at our regional meetings in September.

Mary Kate Coleman
is a civil litigation attorney, mediator and arbitrator with Riley, Hewitt, Witte & Romano PC in Pittsburgh.

PBA Alternative Dispute Resolution Committee

Chair:
Stephen G. Yusem
600 W. Germantown Pike, Suite 400
Plymouth Meeting, Pa. 19462
syusem@syusem.com
610-940-1750

Vice Chair:
James A. Rosenstein
Fineman Krekstein & Harris PC
1735 Market St., Suite 600
Philadelphia, Pa. 19103
jrosenstein@finemanlawfirm.com
215-893-8709

Secretary:
Lindsey Bierzonski
Bierz Law LLC
P. O. Box 61644
Harrisburg, Pa. 17106-1644
Phone: 717-364-2625
lindsey@bierzlaw.com

Newsletter Editor:
Mary Kate Coleman
Riley Hewitt Witte & Romano PC
650 Washington Road, Suite 300
Pittsburgh, Pa. 15228-2702
MKColeman@rhwrlaw.com
412-341-9300

Newsletter Subcommittee Members:
Clymer D. Bardsley
Good Shepherd Mediation Program
5356 Chew Ave.
Philadelphia, Pa. 19138-2804
cbardsley@phillymediators.org
215-843-5413, ext. 32

Stephen A. Hall
Burns White LLC
Four Northshore Center
106 Isabella St.
Pittsburgh, Pa. 15212-5804
sahall@burnswhite.com

Charles W. Kenrick
Law Offices of Charles W. Kenrick
U. S. Steel Tower
600 Grant St., Suite 660
Pittsburgh, Pa. 15219
ck@kenricklaw.com
412-281-3417

John E. Toczydlowski
Strachan & Hatzell
1650 Market St., Suite 4100
Philadelphia, Pa. 19103
john.toczydlowski@chartisinsurance.com

PBA Newsletter Liaison:
Amy Kenn
800-932-0311, ext. 2217
amy.kenn@pabar.org

PBA Staff Liaison:
Louann Bell
800-932-0311, ext. 2276
louann.bell@pabar.org
Minutes of the ADR Committee meeting

May 10, 2012

By Lindsey Bierzonski,
ADR Committee Secretary

The May 10, 2012, meeting was held from 2:30 to 4:30 p.m. at the Pennsylvania Bar Association Annual Meeting at the Marriott Hotel, Lancaster, Pa.

The Sir Francis Bacon Award was presented to Judge Abraham J. Gafni (ret.) at the Awards Luncheon after which approximately 40 members attended the ADR Committee meeting. An award of appreciation was provided to Immediate Past Chair Sally Griffith Cimini for her four years of dedicated service to the committee. In attendance were Judges Richard Klein (ret.) and Kate Ford Elliott, of the Superior Court and Frederick Hatt, president, Berks County Bar Association, who are great ADR supporters.

A motion was made by Ross Schmucki, seconded by Mason Avrigian and carried to adopt the minutes of the March 13, 2012, meeting. Conflict Resolution Day Subcommittee Chair James Kozuch reported that the subcommittee continues to plan for Conflict Resolution Day on Oct. 18, 2012. A gubernatorial proclamation is being prepared.

As chair of the Continuing Legal Education Subcommittee, Ross Schmucki discussed plans to overlap ADR initiatives with other areas of the law. The subcommittee hopes to participate in the Civil Litigation Section’s major retreat in Gettysburg in 2013. The subcommittee is looking for potential presenters for CLEs. Schmucki also suggested CLEs with a balance of ADR supporters and opponents.

Lawyer Dispute Resolution Program (LDRP) Subcommittee Chair Mel Shralow presented a comprehensive report on the American Bar Association’s model rules for requiring arbitration of fee disputes. The report will be added to the ADR Committee website. Most states have mandatory fee arbitration, but the majority have developed their own model. Shralow recommends taking no action on the ABA model and that Pennsylvania develop its own model.

A new subcommittee was created for Ad Hoc Legal Services chaired by Cheryl Cutrona. She will work closely with Sandy Ballard to coordinate a pro bono mediation program. Liaison Subcommittee Chair Jim Rosenstein welcomed 15 active liaison members. He anticipates that the new chairs of the other sections and committees will open opportunities for more ADR members to be liaisons to those other groups.

Membership Subcommittee Chair Herb Nurick discussed the number of PBA members on the ADR Committee. The committee had a one-year increase of 38 percent in membership prior to the renewal of annual memberships. Nurick made another push for each current ADR Committee member to encourage at least one PBA colleague to join the ADR Committee.

The Newsletter Subcommittee has been working extremely hard and produced a stellar product. Chair and Editor Mary Kate Coleman encouraged everyone to submit articles for publication in the next newsletter by June 15, 2012. The next newsletter will be available in July via e-mail to ADR members and via the PBA e-brief to all members. Committee members were encouraged to attend the Ninth Annual Lawrence W. Kaplan Lecture in Conflict Resolution with speaker Frances Johnston, Ph.D., at the Omni William Penn Hotel in Pittsburgh, PA on Thursday, May 31.

Public Relations Chair David Feldheim discussed the website for the ADR Committee. The website now lists an About page, Archives, Awards, External Links, How to Join, Lawyer Dispute Resolution Program, Publications/News Releases and Legislative Updates.

The Revised Uniform Arbitration Act (RUAA) is still in the review stages by the Pennsylvania Senate’s Judiciary Committee. Its main objective is to advance the overall desirability of arbitration as a method to resolve disputes but not to make it simply another form of litigation. It will provide more procedural detail than currently exists. The RUAA will provide third party discovery, provisional remedies to maintain the status quo during a dispute, provide for summary disposition, provide preliminary determinations and conform to current technology standards regarding electronic records and signatures. So far, 16 states have adopted the RUAA. Judge Mason Avrigian (ret.), chair of the RUAA Action Subcommittee, strongly encouraged all ADR members to call their Pennsylvania senators with a request to move the bill onto the floor of the Senate.

A motion was made by Ross Schmucki and seconded by Avrigian to delete “Alternative” from “Alternative Dispute Resolution Committee” and the motion went to the floor for debate and vote. The motion was defeated by one vote.

The American Arbitration Association has made a request for neutrals having experience in asbestos matters. Any members having dealt with asbestos matters are encouraged to apply via Chairman Yusem. The next meeting will be scheduled by the committee chair as a regional meeting in September. Committee members should also mark their calendars for Committee/Section Day on Nov. 15, 2012, at the Holiday Inn East, Harrisburg.

Lindsey Bierzonski is owner of Bierz Law LLC in Harrisburg and is a contract specialist for the National Institutes of Health in Rockville, Md.
The Pennsylvania Bar Association Alternative Dispute Resolution Committee presented its Sir Francis Bacon Alternative Dispute Resolution Award to Villanova University School of Law Professor Abraham J. Gafni on May 10 during the association’s Annual Meeting at the Lancaster Marriott at Penn Square, Lancaster.

The Sir Francis Bacon Award recognizes an individual who has made a significant impact in bringing mediation and other forms of dispute resolution to Pennsylvania. Sir Francis Bacon (1561-1626) was a Renaissance writer and served British monarchs in a legal capacity as knight, attorney general and solicitor. He authored the essay, “Of Negotiating,” which featured the frequently-quoted line, “It is generally better to deal by speech than by letter, and by the mediation of a third than by a man’s self.”

Since 1994, Gafni has been a professor of law at Villanova University School of Law, where he teaches courses in dispute resolution, negotiation and mediation advocacy, interviewing and counseling, trial practice and evidence. In 1994, Gafni also joined ADR Options Inc. in Philadelphia as an arbitrator and mediator. He has handled hundreds of civil cases involving professional negligence, personal injury, product liability, construction defects and commercial and employment matters.

Gafni previously served for 17 years as a Philadelphia Court of Common Pleas judge, including two years as court administrator of Pennsylvania. He was the deputy district attorney of Philadelphia County, supervising appellate and legislative matters. He also worked part-time for more than 20 years at Villanova University School of Law and Temple University Beasley School of Law teaching courses about professional responsibility, trial practice and the administration of criminal justice. From 1966 to 1973, Gafni maintained a private law practice. He began his career as an attorney for the U.S. Securities and Exchange Commission and then was a law clerk for Pennsylvania Superior Court Judge J. Sydney Hoffman.

From 2000 to 2007, Gafni served as president of the Arbitration Tribunal of the International Commission on Holocaust Era Insurance Claims. From 2003 to 2007, he also was the chair and a member of the Appeals Panel established under an agreement among the Foundation “Remembrance, Responsibility, and Future,” the International Commission on Holocaust Era Insurance Claims and the German Insurance Association.

In 2002 and 2003, Gafni was chair of the Governor’s Task Force on the Medical Malpractice Insurance Crisis. He currently serves on the Appellate Court Procedural Rules Committee of the Supreme Court of Pennsylvania.

Active in professional and civic organizations, Gafni is a member of the PBA Commission on Judicial Independence, is a former chair of the PBA Alternative Dispute Resolution Committee and the PBA Professionalism Committee. He has served as chancellor of the Louis D. Brandeis Law Society Foundation.

Gafni has written and lectured extensively on various topics of law and conflict resolution.

Gafni is a graduate of Hebrew University in Jerusalem, Yeshiva University and Harvard Law School.
Kaplan Lecture in Conflict Resolution draws 75

By Tracy Carbasho

Concepts presented by the speaker at this year’s Lawrence W. Kaplan Lecture in Conflict Resolution will be further incorporated into the work of local mediators and arbitrators.

“I will strive to use my own emotional responses to improve the emotional reactions of my clients and those in a negotiation,” said Chris Stachtiaris, who chairs the Allegheny County Bar Association (ACBA) Collaborative Law Committee and was a founding member of the Collaborative Law Association of Southwestern Pennsylvania (CLASP).

“I will also be more careful not to let my emotions negatively influence my client or the group.”

Approximately 75 people attended the ninth annual lecture in late May to listen to the keynote address by Frances Johnston, co-founder of the Teleos Leadership Institute in Elkins Park, Pa. As the co-author of Becoming a Resonant Leader, she is well-known for her expertise in emotional intelligence and leadership development. Her presentation was titled “The Intervener’s Emotion: Its Influence on Outcome.”

Johnston’s goal for the lecture was to have participants “walk away with increased curiosity about the role their whole self plays in the art and craft of mediation and to be motivated to try different self-management strategies to support their full engagement in this important work.” Those who attended believe she achieved her objective.

Stachtiaris, an attorney at Frank, Gale, Bails, Murcko & Pocrass, said one of the most important points he took away from the lecture was an understanding that collaborators, mediators and negotiators can change the dynamic in a room based on how they display their own emotions. For example, energetic enthusiasm can motivate parties, while calm serenity can defuse a tense moment.

“Negotiations between people in conflict are so often much more than the issue they are fighting about. There are often personal dynamics, and therefore, emotional responses,” he noted. “The better one can understand the underlying issues and emotions, the more successful he/she can be in assisting the process to a satisfactory resolution.”

Co-sponsors of this year’s lecture were the ACBA Collaborative Law Committee, CLASP, the ACBA Alternative Dispute Resolution Committee, the Center for Victims of Violence and Crime, and the Mediation Council of Western Pennsylvania.

David Breen, a member of the Kaplan Lecture Committee who also serves as an arbitrator, mediator and founder of the Breen Law Firm, said attendees were impressed with Johnston’s ability to make it easy to understand the complex subject of emotional intelligence. He plans to more fully incorporate the concepts she mentioned into his practice.

Breen said he learned several very important lessons during the lecture. For example, to be an effective leader, mediator or other person dealing with conflict, you must be mindful of the situation in front of you at the moment.

“Individuals in conflict are looking for hope. They are looking for ways to resolve their conflict. Be optimistic and help them visualize where they want to go and encourage them that their goals are attainable,” said Breen. “Good leaders, mediators and collaborators truly show their compassion for themselves and others. Be empathetic and show them that you care about your role and their concerns. By modeling your sincere compassion, it gives them an example to follow. Modeling is an extremely powerful way to help people resolve conflicts and be better at what they do.”

Mary Kate Coleman, past chair of the ACBA Alternative Dispute Resolution Committee who has helped organize the lecture for five years, was pleased with the attendance. She said participants included not only attorneys, but also health care providers and human resources personnel.

Coleman already uses the information that Johnston provided in her practice.

“She was a good speaker for our
**Marmet Health Care Center, Inc., et al. v. Clayton Brown, et al., 565 U.S.-----(2012).**

*By Chuck Kenrick*

*Marmet*, a per curiam opinion of the United States Supreme Court, held that the Federal Arbitration Act (FAA) must be applied to all arbitration agreements covered by the statute and that the West Virginia Supreme Court erred in interpreting that federal statute in ruling all predispute arbitration agreements dealing with tort claims against nursing homes in that state unenforceable.

The underlying case involved three wrongful death actions against separate West Virginia nursing homes. In each case a family member of a patient had signed an agreement with the nursing home on behalf of the patient. Each nursing home contract included a provision requiring arbitration of negligence disputes. A state trial court dismissed two of the suits based upon the same agreements to arbitrate.

The West Virginia Supreme Court held in all three cases that “as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence that results in personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.” The West Virginia Court also found that state public policy in this context was not pre-empted by the FAA. What state public policy was violated is not articulated in the per curiam opinion summarized here.

The U.S. Supreme Court found the West Virginia Court’s interpretation of the FAA to be incorrect and inconsistent with its precedents. The court found that the applicable statutory text of the FAA to be clear and included no exceptions as to its applicability for personal injury or wrongful death claims. It noted that controlling precedents, where the FAA applied, required state courts “to enforce the bargain of the parties to arbitrate” and expressed “an emphatic federal policy in favor of arbitral dispute resolution.”

While the previous ruling of the state Supreme Court was vacated, the U.S. Supreme Court remanded the case for the West Virginia court to consider whether, absent general state public policy, the arbitration clauses in two of the three cases, were unenforceable under state common law principles of unconscionability or other law.

**Kaplan Lecture**

*Continued from Page 7*

...group because what she conveyed is part of basic mediation training,” said Coleman, a civil litigation attorney, mediator and arbitrator with Riley, Hewitt, Witte & Romano. “It is good to have those concepts reinforced and to be reminded of them.”

In particular, Coleman thought Johnston conveyed the importance of paying attention to the emotions being exhibited by all parties.

“The intervener or mediator has to show the parties they are being heard and empathize with their feelings. The intervener or mediator also has to be aware of his/her own emotions,” said Coleman. “It is important to convey optimism to the parties, for example, by letting them know they are making progress. Fran told us you have to look beyond the words to see what emotions are beneath what has been said.”

Ann Begler, who is a mediator, conflict resolution coach, organizational consultant and founder of the Begler Group, is responsible for bringing Johnston to the lecture. She met Johnston a few years ago when they were both participating in an organizational development program at the Gestalt Institute of Cleveland.

She describes Johnston as “an international thought leader” who understands the complex dynamics of being an intervener and facilitating people to work through conflicts and change.

“To be an effective leader, being smart isn’t enough. The difference between good and great rests on emotional intelligence,” said Begler, one of the founders of the lecture. “I believe that applies to us as mediators, collaborative lawyers and, frankly, lawyers in general.

“I’ve always had some awareness about the impact of my presence on the process,” she added. “The statistics and research Fran discussed confirmed my experience and increased my dedication to continue being clear about who I am and realizing that how I am impacts the people who work with me.”

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NAFCM publishes The State of Community Mediation

By Clymer D. Bardsley

The state of community mediation is solid, according to The National Association of Community Mediation. In their recent publication, 2011: The State of Community Mediation, Justin and Wendy Corbett provide a detailed and thorough look at the current trends in community mediation in the United States. What follows here is a gathering of some of the report’s findings and also input from three of Pennsylvania’s community mediation centers.

It is important to note two things at the outset. First, I work at a community mediation center (CMC), The Good Shepherd Mediation Program, in Philadelphia. Our work, I submit, is in the category of “fighting the good fight.” We help people in conflict by empowering them to find improved understanding and reconciliation. We help the courts by taking cases off their dockets and working with people for whom the courtroom may well not be appropriate in the first place. Even though our services are available to everyone, we tend to work with people who are marginalized and do not have ready access to attorneys.

Community mediation centers take many different shapes, are of many different sizes and offer many different services. No two are alike. That noted, 100 percent of the centers offer some type of mediation services and 80 percent provide trainings in mediation and other ADR processes.

Traditionally, community mediation was understood within the neighbor-to-neighbor context, so-called “parking and barking” cases. Now, community mediation services over 100 distinct case types across the realms of family, housing, school, commerce and the workplace, utilizing mediation, restorative justice and other ADR processes. Since 2009, in the wake of the economic downturn, 35 percent of mediation centers nationwide have had to reduce staff, while 19 percent have been able to increase staff.

Most CMCs are nonprofit, have an average of three full-time employees and work on an annual budget of between $150,000 – $200,000. Nearly half of the funding for community mediation programs comes from government funding. The rest of the revenue comes from foundations, training revenue, charitable giving and fees for services. According to Dawn Lehman of the Center for Victims of Violence and Crime in Pittsburgh, “Budget cuts have limited efforts specific to community mediation. There are difficult economic climates in both government and private funding.”

Volunteers are one key to the sustainability of CMCs. There are some 20,000 volunteer mediators nationwide, who volunteer on average 35 hours annually. Sometimes, however, the CMCs do not have enough work for the volunteers. Lehman says, “We are not able to fully utilize existing volunteers because we don’t have the staff capacity to handle incoming cases.”

To the extent community mediation programs are known to the public, they have become “one-stop-shops” for their communities’ conflict resolution needs. Why? According to the report, it is because new and varied partnerships have emerged — with both government and the private sector — and conflicts that fall through local service nets have been better identified. CMCs get referrals from courts, schools, other nonprofits, attorneys, police, prosecutors, local businesses and government agencies.

Turning to Pennsylvania specifically, it has over a dozen community mediation centers, placing it in the top 25 percent nationwide. In preparing this article, I canvassed some of the centers in the Commonwealth to provide a status update.

Tracy Hornig from Center for Resolutions, which services Delaware and Chester counties, provided the following information:

“CFR mediates neighbor, custody, landlord-tenant, family, school and business disputes, numbering about 50 cases per year. Our primary referral sources are: the courts, other county agencies and police officers. CFR offers Basic Mediation Training and Youth Aid Panel Training. About half of the individuals in our mediation trainings are attorneys. We’re seeing more HR departments sending their employees through the trainings, along with in-home health care providers. Our trainings have tripled over the past year. CFR draws from a pool of approximately 50 volunteer mediators to mediate our cases. Through our Apprentice Program, graduates from our Basic Mediation Trainings are paired with experienced mediators to help them develop the skills and tools to become a volunteer mediator. This program is highly successful, with more volunteers than cases to go around. A few challenges we face as a non-profit organization are increasing mediation referrals, a lack of funding and a lack of community awareness.”

Jenny Spicher, from Neighborhood Dispute Settlement in Harrisburg, reports:

“In summary, mediations are going well, and we’re receiving more referrals from different community organizations, particularly the Dauphin County Bar Association Legal Referral office. However, like many others, funding is a significant struggle right now, and we’ve had to cut back on staffing as a result. For community mediation in general, I think one of the biggest challenges is just to get the word out about mediation as an option in conflict situations. I continue to be amazed at how many clients have not heard of mediation, even though we’ve been working in the community for over 30 years! Making sure that other community and government organizations know what community mediation has to offer is vital.”

Good Shepherd Mediation Program, whose executive director is Cheryl Cutrona, provides community mediation, victim-offender conferencing, divorce and custody mediation, elder dispute services, and training and consulting. The number of staff and volunteers used has remained

Continued on Page 10
Welcome new committee members

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

Sandra A. Ballard, Dauphin County Bar Association, Harrisburg
John C. Becker, State College
Vincent Candiello, Post & Schell PC, Harrisburg
Damian A. P. del Pino, Law Offices of Wm. Bruce Hemphill, Esq., PC, Elkton, Md.
Susan V. Edwards, Berwyn
David J. Evenhuis, Caldwell & Kearns PC, Harrisburg
David Feldheim, Plymouth Meeting
Ellen S. Fischer, Law Office of Ellen S. Fischer, Willow Grove
Michael D. Fox, Strassburger McKenna Gutnick & Gefsky, Pittsburgh
David C. Kennedy, Governor’s Office of General Counsel, Pennsylvania Department of Agriculture, Harrisburg
John Noble, Greensburg
Benjamin Ryan Picker, McCausland Keen & Buckman PC, Radnor
Michelle Polato, Bellefonte
Diana L. Sacks, Harrisburg
John S. Sherry, John S. Sherry & Associates, McMurray
Judge A. Michael Snyder (Ret.), Dispute Resolution Institute, Philadelphia
Debra K. Wallet, Camp Hill
Juliette Zaengle, Ephrata

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.

NAFCM publishes The State of Community Mediation

Continued from Page 9

steady since 2009. The funding comes from government contracts, some grants, private donations and fees for services, primarily trainings. GSMP provides a number of in-house trainings: basic mediation, divorce and custody mediation, restorative justice, multiparty mediation and conflict coaching. Off-site, GSMP consults with organizations in the area of conflict management and school-based services. Outreach, community awareness and financial stability continue to be the GSMP’s biggest challenges.

In conclusion, it is safe to say that community mediation centers play a vital role in dispensing access to justice throughout the country and in Pennsylvania and that the people working and volunteering for these centers strive to keep the doors open and continue to look for new ways to serve the public. Increased funding for CMCs is essential so that the good fight can continue to be fought. For me, there is no place I’d rather be in my professional life than in the middle of someone else’s conflict, helping the parties to reach a resolution. I hope when NAFCM releases its next State of Community Mediation, it reports that the state of community mediation centers has never been better.
Allegheny County attorneys teach courses on American law in Cuba

By Tracy Carbasho

Three local attorneys recently traveled to Cuba to share their knowledge of the American legal system.

Making the trip in January were Vivian Curran, Karen Engro and Jules Lobel, who serves on the board of the Center for Inter-American Legal Education in New York.

“The center was looking for individuals to conduct introductory courses on various aspects of American law, comparing it to the civil law system in Cuba,” said Lobel. “I saw it as a great opportunity to talk with Cuban law professors and judges.”

They taught classes at the University of Havana over a four-day period to an audience that consisted of law professors, judges, legal practitioners, journalists and individuals from the Foreign Ministry. Each class was attended by approximately 120 people.

The attorneys presented topics that showcased their expertise with Engro discussing alternative dispute resolution (ADR), Lobel talking about constitutional law, and Curran offering information about tort law, contract law and criminal law. Both Lobel and Curran are professors at the University of Pittsburgh School of Law. Engro, who is Lobel’s wife, is the ADR coordinator/consultant for the U.S. District Court for the Western District of Pennsylvania.

“One of our objectives was to develop a dialogue with the Cuban legal community and impart knowledge to them about our legal system,” said Lobel, who is also president of the Center for Constitutional Rights in New York City and serves in an of counsel capacity at Healey & Hornack. “I was surprised by how open the Cubans were to discussing legal concepts and issues on a range of topics.”

Teaching in another country is not foreign to the threesome. Lobel has taught classes in Italy, England, Spain, Germany and Serbia. Curran has given lectures at universities in France, Germany, Italy and Holland. Engro has conducted mediation training in Italy.

“This was an exciting opportunity to introduce our court system to law professors and judges,” said Engro. “They were active practitioners who had a genuine interest in learning about the complexities of the American legal system.

“Cuba has a civil law system with codes and they set up five-person panels with a judge, two lawyers and two lay people as something that is comparable to our jury system,” added Engro. “They were fascinated by our jury system, especially the fact that no legal experts participate on juries and the decisions are made by people with no legal training.”

Engro describes the trip as an interesting experience where she and her colleagues not only taught classes, but also learned something about themselves and the U.S. legal system.

“It was exciting to break down the law and our system into component parts and look at it in ways you don’t always get to,” she said. “Mediation is fairly new to the Cuban mindset, so they were very interested in learning about it.”

Curran was eager to participate in the project because of her expertise in explaining the common law system to people who have a civil law system. She gave an introduction on common law methodology and how it differs from civil law. Cuba derives its code-based legal system from Roman law.

“My goal was to explain to them the mentality and context of the common legal system and the common law methodology,” said Curran. “I focused on contract law, tort law and a bit on criminal law. They said many contracts they use are based on a common law model, so they need to understand common law. I was a little surprised by their idealistic view of their own legal system.”

Curran speaks French, German and Spanish and was hoping to teach her classes in Spanish. However, the Cuban participants preferred to use translators and have the instructors teach in English.

The attorneys estimate that about 50 percent of the students spoke English to some degree. However, the language barrier did present challenges, even with the use of translators. Engro noted that she chose her words very carefully to ensure that they could be translated in a way that was easy to understand. Still, there were times when some necessary legal terms were difficult to translate.

The use of technology was very rudimentary with minimal PowerPoint displays that were difficult for all of the students to see due to the layout of the classroom. The attorneys compared the teaching environment to a 1950s classroom in the United States with no technological innovations. “The students didn’t have laptops, and they were all absorbing every word we said,” said Curran. “It was a great experience.”

Lobel believes the trip resulted in new friendships. In fact, one professor from the University of Havana may teach a class at the University of Pittsburgh in the future.
By David A. Feldheim

Our Alternative Dispute Resolution Committee has useful resources available at the Pennsylvania Bar Association website that could prove to be very valuable to you. I know, because I spent time this month exploring the PBA website and the ADR resources at the website. These resources are just a few clicks away.

Best of all, because you are a PBA member, you are able to access almost all the information contained on the PBA website for free. I say “almost” because there are a few resources at the PBA Website that are available only by subscription (more about that later), but all of the ADR resources are free. There is a treasure trove of helpful information, ADR-related or otherwise, available to you at the PBA website.

Let’s start at the beginning. Visit the PBA Website at www.pabar.org. Don’t make the mistake I committed and try to log on to PBA.org; you will find yourself at the home for Atlanta’s Public Broadcasting Stations.

Once you arrive at www.pabar.org, you will find a dizzying array of choices. At the top right there is a “Member Login” button to click, which I strongly recommend you do first. 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.”

Across the top of the PBA website are eight buttons providing you instant access to:

(1) Welcome, which is the home page.
(2) Legal Links, which lists hyperlinks to about 25-30 other websites, including websites for the Circuit Courts, county bar associations, Lawyer Referral Services, the Pennsylvania Bar Foundation, the Pennsylvania Bar Institute, and Pennsylvania law schools, among others.
(3) Media Center, where the PBA makes available copies of various press releases.
(4) PBA Event Photos, a link that might enable you to find your picture if you attended a PBA event and if you are lucky enough to have had your picture taken.
(5) Pennsylvania Bar Foundation, which provides considerable background and current information about the foundation’s activities and includes a “Slide Show” of foundation events.
(6) Pennsylvania Bar Institute, our famous PBI source for continuing legal education credits, where you will find a list of publications and a schedule of courses. (A search feature, too.)
(7) Lawyer-to-Lawyer Network, which enables you to look up other members, but only if those members have paid to be listed. There is a $100 fee to be listed. It is free to look, but it costs $100 to be found!
(8) Online Lawyers Directory, which also requires a subscription in the amount of $45 per year.

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 partners.

The good stuff, in my opinion, can be found on the left-hand side of the PBA website. There you will find about 20 choices, which I will encourage you to explore on your own. But, here we go, the reason I am writing this article for the ADR newsletter is to tell you about the “Committee/Commissions” button, which, when clicked, provides you with a list of nearly 50 PBA committees. Happily, the list is alphabetical and, right near the top, just below the Agricultural Law Committee, 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

If you are like me and time is precious, you may have to postpone a thorough exploration of the PBA website. On the other hand, if, like me, you need quick access to information about our ADR Committee and related matters, e.g., an article about the reasons the Pennsylvania Legislature should adopt the “Revised Uniform Arbitration Act,” you are four clicks away, i.e., (1) www.pabar.org; (2) Committees/Commissions; (3) ADR Committee; and (4) Legislative Updates. Most recently, an article was added with an analysis by committee member M. Melvin Shralow, addressing the ABA Motion To Adopt Amendments To Model Rules For Fee Arbitration.

Happily, I am able to report to you that a “Search” feature was recently added to the ADR page on the PBA

Continued on Page 16
News from the ADR
Conflict Resolution Day Subcommittee
By James J. Kozuch

Conflict Resolution Day (CRD) this year will be observed on Oct. 18. The purpose of CRD is to promote awareness of mediation, arbitration and other means of resolving conflicts and to promote the use of conflict resolution in schools, families, businesses, communities, governments and the legal system.

The ADR Conflict Resolution Day Subcommittee has submitted a proposed Proclamation (see Page 18) for signature by Gov. Tom Corbett, proclaiming Oct. 18 as “Conflict Resolution Day” in the Commonwealth of Pennsylvania. As soon as the necessary approvals within PBA are obtained, the Proclamation will be forwarded to the Office of the Governor.

The subcommittee also is planning to send information about CRD and conflict resolution means to local bar associations throughout Pennsylvania. Such information may also be distributed to the law schools and other schools in Pennsylvania.

In addition, information about CRD will be submitted to various PBA publications, including The Pennsylvania Lawyer, the PBA website and various PBA newsletters. The information also will be provided to various legal and business publications throughout Pennsylvania, including The Legal Intelligencer and Pennsylvania Law Weekly.

Finally, if you are interested in joining the ADR Conflict Resolution Day Subcommittee or assisting with any of the above plans and activities to promote CRD, please contact Louann Bell at Louann.Bell@pabar.org.

James Kozuch, vice chair of the ADR Conflict Resolution Day Subcommittee, is a shareholder in the Philadelphia firm of Caesar Rivise, which specializes in intellectual property (IP) law and IP litigation. He is an arbitrator for the U.S. District Court for the Eastern District of Pennsylvania, serves on the Commercial Roster of Neutrals of the American Arbitration Association (AAA), and is a member of four AAA specialty panels – National Patent Arbitration Panel, Pharma Panel, Hi-Tech Panel, and Intellectual Property Panel. He may be reached at 215-567-2010 or jjkozuch@crbcp.com.

ADR Continuing Legal Education Subcommittee News

Retired Judge Richard Klein presents on “Why Arbitrate? Why Mediate?”

On May 2, retired Judge Richard Klein and Peter Dunn presented an informative lunch program for the Philadelphia Bar Civil Litigation section, sponsored by the Philadelphia ADR subcommittee of that group, on the topic “Why Arbitrate? Why Mediate?”

Elder Law Institute session on “Undue Influence: The Alternative Resolution Solution”

The 15th Annual Elder Law Institute, sponsored by PBI and held July 12 at the Hershey Lodge, featured a session on “Undue Influence: The Alternative Resolution Solution.” Speakers included Keelin Barry, Mary Ann Plankinton, Ross Schmucki and Professor Nancy Welsh. They explored the use of mediation in cases of undue influence. Schmucki has written a paper on the topic for PBI, which is available upon request.

Barry practices law in Philadelphia with an emphasis on guardianship matters. She successfully employs a highly experienced mediator (Kathryn Mariani) as a guardianship care coordinator and paralegal. Barry is a mediator herself and served as the first director of the Philadelphia Family Court Custody Mediation Pilot Project and for 10 years as co-director of the Friends Conflict Resolution Program.

Plankinton practices estate and probate law with MacElree Harvey in Kennett Square. She is a founder and chair of the Chester County Orphan’s Court mediation committee and serves as a mediator for the Chester County Court and the Delaware Chancery Court.

Schmucki is chair of the PBA ADR Continuing Legal Education Subcommittee regarding mediation and arbitration. As former DuPont corporate litigation counsel, Schmucki successfully used post-dispute agreements to negotiate, mediate and arbitrate litigation involving thousands of parties. He serves as an arbitrator in AAA Commercial cases and as a volunteer mediator for the Philadelphia Court of Common Pleas.

Welsh is the William Trickett Faculty Scholar and professor of law at Penn State University’s Dickinson School of Law and a nationally recognized academic leader in the field of dispute resolution. She is a member of the governing council of the ABA’s Section of Dispute Resolution. Welsh directed a dispute resolution program before becoming a law professor, and she serves as a mediator.

Continued on Page 16
Report of ADR Lawyers Dispute Resolution Program Subcommittee

By M. Melvin Shralow

The Lawyers Dispute Resolution Program Subcommittee was asked by the president of the Pennsylvania Bar Association and the chair of our Alternative Dispute Resolution Committee to review and comment upon an American Bar Association motion to adopt amendments to the ABA Model Rules for Fee Arbitration. The chair of the subcommittee submitted a memorandum to the chair of the committee with analysis, comments and a recommendation that the PBA not recommend adoption of the proposed amendments. That memorandum has been posted to the ADR Committee’s web page, a part of the PBA website. It can be found here.

The request to review the ABA proposal provides an incentive for us to look more carefully at what we want our program to do and how it should do it.

The ABA Model Rules are addressed only to fee disputes between clients and lawyers. Our rules currently apply only to disputes between lawyers and lawyers, or lawyers and law firms. Should we change our rules to include both categories? County programs usually are addressed to fee disputes. Should we leave fee disputes to county bar programs and concentrate, as now, only on inter-lawyer disputes? Should we try to act as a coordinating program that integrates county and state bar programs and steer disputes to the program most appropriate to the individual dispute?

The ABA Model Rules are for a program directed by the highest court in the state. Our program is directed by our state bar association. Do we want to involve the Supreme Court? The ABA Model Rules do it through legislation. Do we want to get the legislature involved? Would the Supreme Court tolerate legislative interference with matters governing the conduct of attorneys?

There are some ways in which Supreme Court assistance might be sought, but the ABA approach is not one that appears helpful.

The ABA Model Rules are mandatory for lawyers; voluntary for clients. It might be helpful for our program if, by rule, the Supreme Court would require mandatory participation in mediation, and perhaps arbitration, by lawyers, for disputes covered by our program, however we define those disputes. Or the Supreme Court might recommend or require that judges refer cases to our dispute resolution program before allowing lawsuits to go forward as litigation.

It also would be helpful if we developed standard language for insertion in law firm governing documents providing for participation in our program, via mediation and/or arbitration of disputes among attorneys inter se or with the firm and between the firm and other firms or attorneys. It also would be helpful if we developed standard language for engagement letters and fee agreements providing for participation in our program or appropriate county bar programs for dealing with disputes between lawyers and clients other than malpractice claims.

There are many details in our existing rules and many others that should be considered. But the details have to follow the major decisions of the type of program we want to have and how we want it to be presented to the bench and bar. These are questions that the ADR Committee will be asked to consider at the regional meetings and telephone conference on Sept. 5. When we have consensus, our subcommittee can work on detailed rule amendments for consideration by the ADR Committee and eventually for appropriate recommendations to the PBA.

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.

Avoiding Legal Malpractice Seminars — Seminars are held across the state to help members recognize and avoid malpractice situations. Seminar attendees may qualify for a 5 percent discount on their liability insurance (underwritten by Westport) and receive up to 1.5 hours of CLE ethics, professionalism or substance abuse credit. If you have questions, call 1-800-932-0311, Ext. 2240.

Continuing Legal Education — Through the PBA’s partnership with the Pennsylvania Bar Institute (PBI), CLE is offered to members at substantial savings. Courses are made available throughout the year at a variety of convenient locations and online. Members receive discount coupons to attend PBI CLE seminars.
**Report of the ADR Legislative Subcommittee**

By Richard P. Kidwell

With the Legislature focused on the budget with an eye toward the summer recess, there is nothing of substance happening in Harrisburg regarding Alternative Dispute Resolution. In Washington, however, the new Bureau of Consumer Financial Protection issued a “Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements” on April 27. Federal Register, Vol. 77, No. 82, 25148. The bureau was tasked in the Dodd-Frank Act (12 USC Section 1028 (a)) with providing a report to Congress on the subject of arbitration of disputes between consumers and providers of financial products or services. This notice calls for suggestions on how best to conduct the study which will serve as the basis for the congressional report. The comment period closed June 23. The bureau specifically noted that it is not seeking comments on whether to exercise its rule-making authority to prohibit or to impose conditions on pre-dispute arbitration agreements.

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).

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**Recent Activities of the ADR Liaison Subcommittee**

James A. Rosenstein, subcommittee chair, and Charles Kenrick, subcommittee vice chair

By James A. Rosenstein

Our subcommittee (the other members of which are vice chair Charles Kenrick, David Doto, Stephen Hall, retired Judge Richard Klein, James Kozuch, Victoria Madden and John Toczydlowski) is charged with recruiting and placing liaisons between the ADR Committee and other committees and sections of the Pennsylvania Bar Association. The role of these liaisons is to:

- Identify any matters being considered by either the ADR Committee or the other committee or section that are likely to be of interest or concern to that committee or section or to the ADR Committee, as the case may be; share this information with the leadership of each body; and assist both of them in addressing the matter in question to their mutual satisfaction; and
- Initiate and help implement any proposals for ways that the ADR Committee and the other committee or section can work together to advance our respective goals and objectives.

To date the following liaison placements have been made:

- Civil Litigation Section: Charles Kenrick
- Elder Law Section: Ross Schmucki
- Environmental & Energy Law Section: Sarah Silver
- Family Law Section: David Miller
- Labor & Employment Law Section: Lindsey Bierzonski
- Real Property, Probate & Trust Law Section: James Rosenstein
- Appellate Advisory Committee: Richard Klein
- Collaborative Law Committee: David Miller
- Corrections System Committee: Thomas Gould
- Federal Practice Committee: James Kozuch
- Government Lawyers Committee: Victoria Madden
- Health Care Committee: Richard Kidwell
- In-house Counsel Committee: Mel Shralow
- Judicial Advisory Committee: Ross Schmucki
- Minority Bar Committee: Herb Nurick
- Senior Lawyers Committee: Mason Avrigian

Efforts to engage the following other sections and...
ADR Continuing Legal Education Subcommittee News

Continued from Page 13

Other Potential CLE Projects

Judy Weintraub, vice chair of the PBA ADR Continuing Legal Education Subcommittee, is working on a program about “How to Assess Whether ADR is Appropriate for a Dispute, and, If Appropriate, How to Get the Parties to the Table.” Gerald Strachan has volunteered on this project. ADR Committee members interested in this topic should contact Weintraub.

Judge Klein, Steve Yusem and Lou Coffey are working on a program about “Resolving Probate Disputes - A View From the Bench.” ADR Committee members interested in this topic should contact Coffey.

Schmucki is working on a program about consumer arbitration. He is seeking advocates for plaintiffs and defendants, plus dispute resolution professionals, to discuss their positions for, and against, binding pre-dispute arbitration clauses in consumer contracts (e.g. AT&T Mobility v. Concepcion). Gerry Strachan and Jim Wizenreid have volunteered on this project. ADR Committee members interested in this topic should contact Schmucki.

David Evenhuis and Schmucki plan to develop a program on Marcellus Shale Dispute Resolution. Jim Koizuch has volunteered on this project. ADR Committee members interested in this topic should contact Evenhuis or Schmucki.

A panel consisting of Judy Meyer, David Burt and Yusem will present at the Business Lawyers Institute in November in Philadelphia on “Protocols for Expedientious, Cost-Effective Commercial Arbitration.”

Please feel free to join our subcommittee, volunteer as a presenter or suggest content for our programs by contacting Schmucki or Weintraub by e-mail (rschmucki@verizon.net or judy@weintraublegal.com).

Ross F. Schmucki, of Ross F. Schmucki, Esq., LLC in Swarthmore, is a nationally recognized attorney (former DuPont corporate counsel) who is known for fostering collaboration and teamwork, while achieving challenging dispute resolution goals in an innovative and cost efficient way.

Recent Activities of the ADR Liaison Subcommittee

Continued from Page 15

committees for liaison purposes are ongoing, but we have not yet succeeded in completing the “match” with them due to either the apparent reluctance of the other section or committee to participate or our inability to identify a mutually acceptable liaison:

• Administrative Law Section
• Business Law Section
• Intellectual Property Law Section
• Solo & Small Firm Practice Section
• Workers’ Compensation Law Section
• Access to Justice Committee
• Civil & Equal Rights Committee
• Community & Public Relations Committee
• Immigration Law Committee
• Insurance Staff Attorney Committee
• Law-Related Education Committee
• Legal Ethics & Professional Responsibility Committee
• Legal Services for Exceptional Children Committee
• Legal Services to Persons with Disabilities Committee
• Legal Services to the Public Committee

Please contact either Jim Rosenstein (jrosenstein@finemanlawfirm.com) or Chuck Kenrick (ck@kenricklaw.com) if you would like to serve as a liaison between our committee and any of the sections or committees for which matches have not yet been made. Of course, serving as a liaison not only helps each of the groups you are linking together, but also provides opportunities for you to network with potential referral sources in other parts of the bar association.

Jim Rosenstein divides his time between his commercial mediation and public policy facilitation practice and his real estate law practice with the Philadelphia firm of Fineman Krekstein & Harris PC. Charles W. Kenrick offers ADR services as part of his civil litigation practice. He may be reached at ck@kenricklaw.com.

The PBA website & the ADR page

Continued from Page 12

website. The Search button is located at the top left, titled “Search the ADR Web Area.” For example, if you enter “Revised Uniform Arbitration Act,” the search function will bring up the article referenced in the previous paragraph above.

Take a few minutes; get the hang of it; and you will have a free, great resource at your fingertips.

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.
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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Name:  

Contact Data:  

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Conflict Resolution Day Proclamation

The ADR Conflict Resolution Day Subcommittee has submitted a proposed Proclamation, which appears below, for signature by Gov. Tom Corbett, proclaiming Oct. 18 as “Conflict Resolution Day” in the Commonwealth of Pennsylvania. As soon as the necessary approvals within PBA are obtained, the Proclamation will be forwarded to the Office of the Governor. For more information about Conflict Resolution Day or the subcommittee, see the report on Page 13.

PROCLAMATION

WHEREAS, the Association for Conflict Resolution conceived Conflict Resolution Day in 2005 to be observed on the 3rd Thursday in October of each year; and

WHEREAS, Conflict Resolution Day was conceived to promote awareness of mediation, arbitration and other creative peaceful means of resolving conflicts and to promote the use of conflict resolution in schools, families, businesses, communities, governments and the legal system;

NOW, THEREFORE, I, Tom Corbett, Governor of the Commonwealth of Pennsylvania, do hereby proclaim the 3rd Thursday in October, October 18, 2012, “Conflict Resolution Day” in the Commonwealth of Pennsylvania. I call upon all citizens of the Commonwealth to recognize the significant contributions of peaceful conflict resolvers and to participate in the celebration of Conflict Resolution Day happening across the country and around the world on the same day.

IN WITNESS WHEREOF, I have hereunto set my hand this _________ day of May in the year of our Lord Two Thousand Twelve (2012).

TOM CORBETT, Governor
Commonwealth of Pennsylvania
Four tenets of mediation: engagement, authenticity, creativity and self-determination

Continued from Page 1

outcomes.

There are usually a lot of parties involved in complex cases and many factors to consider when setting up the mediation day. One of the things that we try to ensure is that all decision-makers are present in person at the mediation. In one case, the mother of an injured adult plaintiff wanted to attend. Although the defendants originally resisted having her at the mediation, our view was that if the plaintiff and his spouse were going to rely on his mother to help make a decision to settle, it was much better to have her there in person so she fully understood the dynamics, the changes in positions and all the factors involved in the decision whether to settle.

We talk to all counsel as soon as possible after a date is set so we can have the right people present to participate. For example, in a medical malpractice case, counsel for all parties, physicians and other representatives from the health care provider, insurers, the claimants and usually their family members are present. Sometimes a structured settlement broker is there, especially in cases involving minors. This is our best chance to have a frank conversation about the case in a comfortable environment where confidentiality is protected by law and all the decision-makers are actively involved in seeking a resolution.

In the last few years, I have started doing some things differently, especially at the start of the mediation. Often, we will meet with people separately before bringing them into a joint session. In the past, I usually started with a joint session and was more formal in my opening remarks. One of the benefits of co-mediating is that when one of us is talking, the other is observing and reflecting upon the dynamics in the room. It seems that we build a better rapport by being more informal and having the early private caucus sessions. It was a simple shift to start with a mini-caucus, where we introduced ourselves and oriented the participants to the process and what to expect. This is what I refer to as the engagement principle, which is basically to interact with people as people. In order to build rapport and to have credibility, the mediator must engage with the people in an authentic manner. Basic human rituals, such as shaking hands, small talk and treating people respectfully, are essential elements of engagement and authenticity. I believe mediators should be candid about their perspectives, goals and techniques during the mediation process. This transparency promotes engagement and authenticity.

The subject of authenticity and the tension between it and traditional notions of mediator impartiality has engendered much discussion between the two of us as well as with other mediators, counsel and professors. We have come down on the side of only saying what we really believe to participants, even if it conflicts with their perspectives or analysis of the case. This is my framing of the tenet of self-determination. We think the appropriate focus for impartiality is on the outcome and terms of the settlement. We do not become attached to a particular outcome to drive the case to a point in favor of one party or the other. This does not mean that we do not use our own experience to express our viewpoints on specific elements of the case. Mediators are human also, with the full range of experience of emotion and their own set of values honed by their experiences. The participants, including the lawyers, implement self-determination in the decision to continue the conflict or to resolve it. Mediators may acknowledge their sentiments on the wisdom of a settlement or continued conflict but the parties dictate the actual terms of resolution.

The four principles we use in mediation are not just for the mediators but for all of the participants. I often see how individuals are able to engage the claimants and their counsel in an authentic manner. For example, when a hospital administrator or other health care representative engages people in a sincere and humane manner, with a willingness to acknowledge errors and apologize when appropriate, that makes a big difference in the process. We all are innately empathetic. Empathy is a key element of human nature that facilitates us living in communities and cooperating with each other. There is no reason for mediators to suppress or otherwise treat their empathetic nature in a manner that is detrimental to engagement and authenticity. The participants are making holistic decisions based upon a balancing of economics, emotions, values, a sense of fairness, need for closure and avoidance of future conflict and direct and indirect costs.

I had a case years ago involving the tragic death of a man in front of his young son in a farming accident. I was unsuccessful in completely suppressing my tears in the opening joint session. I usually caucus with the plaintiff’s side first, so it was with trepidation that I entered the defense caucus room. I was greeted with smiles rather than a concern that I was not impartial. The defense representative said that he believed they had undervalued the case and knew it based upon my reaction. While I was with the plaintiff’s side, he had called and received additional authority which was ultimately sufficient to settle the case.

Flexibility and creativity are important in resolving cases. In addition to finding creative outcomes, I think we also need to be creative in terms of process and constantly adapt to changing circumstances throughout the day. It is important to have the ability to react quickly to unusual circumstances. A recent example of being flexible and creative occurred in a commercial case that was mediated a few months ago. The case involved over 20 parties. The parties were about
Preparing your claims examiner and client for mediation: a defense attorney perspective

Continued from Page 1

certainly abhors risk. Trials can break either way, and many times the make-or-break moments do not involve the substantive evidence presented at trial.

Not every case, however, can or should be mediated. For example, the following phone call takes place between claims and counsel: “Did you get into town for the mediation tomorrow?” “Yes, sir...just got here.” “So what is the plan for tomorrow ... what type of authority do we have to get the case resolved?” “Authority? I don’t have any authority to settle the case.”

Unfortunately, this phone call does and will happen. Mediation implies payment; in fact, it necessitates payment. You cannot in good faith go forward with mediation if there is no authority on the file (in fact, the Rules of Professional Conduct may bar you from going forward with mediation if there is no authority on the file). Whether the ultimate authority on the file is with the claims examiner or with the client, make sure this conversation takes place at the time the decision is made to mediate or not to mediate – and not the day before mediation. Explain the benefits of mediation: significantly reduced costs, particularly if the case settles; decreased risk and less unpredictability; days or weeks of trial saved, minimizing disruption on the claims examiner’s desk and of the client’s business. By discussing these issues up front, you can gain the trust of your examiner and client and assure a committed attempt to settle the case.

Step 2. Identify the Mediator

While this step on its face appears to fall more with the attorneys than with the examiner and/or client, it is important to consider the strengths and weaknesses of your examiner and/or client and the strengths and weaknesses of your case when picking your mediator. Claims examiners, by nature, prefer the back and forth of bracketed offers and demands. Perhaps your client will want an evaluative mediator versus a facilitative mediator. If your client is uncomfortable with joint sessions, a mediator who prefers caucus is preferable. It is important to understand both the strengths and weaknesses of your client and claims examiner as well as their respective comfort levels.

Step 3. Identifying the Decision-maker

Mediation without a decision-maker is like a trans-Atlantic flight without a pilot. Sometimes, the decision-maker is the claims examiner. Other times, the client is the decision-maker. In the short example above, for example, the client has a substantial SIR. Since the client is paying the initial freight, he/she is the decision-maker up to a certain level, and then the claims examiner picks up the exposure on the back end.

The search for a decision-maker is not just on the client/claims level. The lawyer must also make sure he has the right decision-maker for the client. While lawyers many times deal with internal risk managers or general counsel, those individuals may not have authority to settle claims. Many corporate clients are publicly held companies and need approval of the board of directors before extending monetary settlement authority or settling a claim. The treasurer of a smaller company may be the final say on monetary settlements. The lawyer must be sure he/she has the correct decision-maker present at the mediation.

Step 4. Preparing the Client and Claims for Mediation

Mediation is still outside the box thinking for many clients and claims examiners and can be an uncomfortable process. Many lawyers still approach mediation as though it is a day off from work. Failure to prepare for mediation, however, leads to two potential outcomes: The case does not settle, or the case settles for a number that is well beyond what your client or claims examiner was willing to pay.

First, walk the client and claims examiner through the weaknesses of the case, the strengths of the opponent’s case, the costs of going to trial (monetary and otherwise) and the other “hot button” issues the client and claims do not want to hear. The last thing an attorney wants is for the client or claims to hear these issues for the first time at the mediation. Moreover, hearing them during preparation, then hearing them again during the joint session, will provide claims and the client with confidence in the lawyer and will alleviate any sense of surprise and anxiety.

Second, prepare the client and claims examiner for the probing questions the mediator will ask during caucuses. While the mediator is neutral, his/her job is to find a way to reach a compromise. Probing questions on difficult issues, such as how the case will play in front of a jury, how a particular witness will be viewed, etc., will be one tool by which to evaluate the client and claims, and the realistic nature of the responses to those questions will go a long way toward determining how, and for how much, a deal can be done.

Third, understand the client’s and claims examiner’s agendas and goals. Is the claims examiner under pressure to keep the case under a specific reserve? Is the client in a position to offer an apology? Is there a “drop dead” number past which no settlement can be reached (the “true” bottom line)? Learning about these issues at preparation time, rather than mediation time, can save the lawyer, the client and the claims examiner significant stress and surprise.

Conclusion

While courts encourage mediation, and while clients and claims organizations appreciate the safety,
Four tenets of mediation: engagement, authenticity, creativity and self-determination

Continued from Page 19

$75,000 apart, and it looked like we were at an impasse. I recalled in the mounds of documents that one of the claimants had mitigated damages in about the same amount. Presto, the obvious solution of offsetting this sum was embraced by all participants, and a settlement was reached.

At times, mediators may make their own creative proposal. My rule of thumb is the mediator should have a very good expectation that the majority of the parties are likely to accept it. Any creative or unusual terms in the proposal should be vetted with the parties in advance. There are other examples of being creative that do not involve economics. A common theme I have heard over the years from patients claiming medical malpractice is that they do not want what happened to them to happen to anyone else. As mediators, we try to create resolutions that focus on the future needs of the parties. I have been involved in cases where the claimants came back into the hospital and participated in educational programs with physicians and staff to improve training and quality of care. These individuals really feel they are making a significant contribution to prevent something bad happening to someone else, and it has a deep impact on them.

Mediation works best when mediators focus on process principles rather than the techniques and tactics and acting in a formalistic manner. I believe the human qualities such as compassion, empathy, humility, guilt, shame and grief should not be suppressed when engaging in a process involving people making holistic decisions under risk and uncertainty. Mediators who express themselves with authenticity and transparency benefit the participants and the process.

Preparing your claims examiner and client for mediation: a defense attorney perspective

Continued from Page 20

security and cost-savings of mediation, the decision to mediate is not one to be made lightly or without due consideration. Preparing the claims examiner and client for mediation throughout the case, rather than just moments before the decision needs to be made, can be the difference between mediating a case successfully and wasting time and money, and weakening your relationship with claims and the client in the process.

John Toczydlowski is a trial attorney with Strachan & Hatzell, staff counsel for Charter U.S. Inc. in Philadelphia. Toczydlowski is the vice chair of the Legislative Subcommittee of the Pennsylvania Bar Association ADR Committee and is incoming 2012-2013 vice chair of the ABA Tort Trial and Insurance Practice Section Alternative Dispute Resolution General Committee.

PBA ADR Committee Members in the News

Frederick K. Hatt, a long-time member of the Pennsylvania Bar Association Alternative Dispute Resolution Committee, took office as the president of the Berks County Bar Association in January. In 1997, Hatt and other members of the bar association created the Berks County Bar Association Alternative Dispute Resolution Program, using Berks County lawyers to mediate and arbitrate cases pending or that could be pending in the Berks County Court of Common Pleas. The Berks County model has been used as a prototype by other counties around the state. The Berks County Bar Association currently has a membership of more than 600, with programming that a recent ABA Strategic Plan Survey found to be comparable to that of much larger bar associations throughout the country.

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Retired Judge Diane M. Welsh, former United States magistrate judge and currently with JAMS – The Resolution Experts, has been named as one of the top three “Best Individual Mediators” in the United States in a survey published by the National Law Journal. She specializes in resolving complex commercial disputes, employment litigation and catastrophic personal injury cases.
## 2012-2013 ADR COMMITTEE EXECUTIVE COUNCIL

<table>
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<tr>
<th>Name</th>
<th>Role</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stephen G. Yusem</td>
<td>Chair</td>
<td>600 W. Germantown Pike, Suite 400 Plymouth Meeting, Pa. 19462 <a href="mailto:syusem@syusem.com">syusem@syusem.com</a> 610-940-1750</td>
</tr>
<tr>
<td>James A. Rosenstein</td>
<td>Vice Chair</td>
<td>Fineman Krekstein &amp; Harris PC 1735 Market St., Suite 600 Philadelphia, Pa. 19103 Phone: 215-893-8709 <a href="mailto:jrosenstein@finemanlawfirm.com">jrosenstein@finemanlawfirm.com</a></td>
</tr>
<tr>
<td>Lindsey A. Bierzonski</td>
<td>Secretary</td>
<td>Bierz Law LLC P.O. Box 6164 Harrisburg, Pa. 17106-1644 Phone: 717-364-2625 <a href="mailto:lindsey@bierzlaw.com">lindsey@bierzlaw.com</a></td>
</tr>
<tr>
<td>Hon. Mason Avrigian Sr.</td>
<td>Chair</td>
<td>Wisler Pearlstine LLP 460 Norristown Road, Suite 110 Blue Bell, Pa. 19422-2323 Phone: 610-825-8400 Fax: 610-828-4887 <a href="mailto:mason@wispearl.com">mason@wispearl.com</a></td>
</tr>
<tr>
<td>Sandra A. Ballard</td>
<td>Co-Chair, Ad Hoc Legal Services</td>
<td>Dauphin County Bar Association 213 N. Front St. Harrisburg, Pa. 17101-1406 Phone: 717-232-7536 Fax: 717-234-4582 <a href="mailto:sandy@dcba-pa.org">sandy@dcba-pa.org</a></td>
</tr>
<tr>
<td>Edward Blumstein</td>
<td>Vice Chair</td>
<td>Edward Blumstein PC 1528 Walnut St., Suite 1100 Philadelphia, Pa. 19102-3621 Phone: 215-790-9666 <a href="mailto:edmediates@hotmail.com">edmediates@hotmail.com</a></td>
</tr>
<tr>
<td>Mary Kate Coleman</td>
<td>Editor, Newsletter Subcommittee</td>
<td>Riley Hewitt Witte &amp; Romano PC 650 Washington Road, Suite 300 Pittsburgh, Pa. 15228-2702 Phone: 412-341-9300 <a href="mailto:mkcoleman@rhwrlaw.com">mkcoleman@rhwrlaw.com</a></td>
</tr>
<tr>
<td>Laura E. Cooper</td>
<td>Vice Chair, Membership Subcommittee</td>
<td>Liberty Law Group LLC 505 Penn St., Floor 4 Reading, Pa. 19601 Phone: 610-685-1800 Fax: 610-685-5151 <a href="mailto:lcooper@libertylawgroup.us">lcooper@libertylawgroup.us</a></td>
</tr>
<tr>
<td>Cheryl F. Cutrona</td>
<td>Co-Chair, Ad Hoc Legal Services</td>
<td>Good Shepherd Mediation Program 5356 Chew Ave. Philadelphia, Pa. 19138-2804 Phone: 215-843-5413 Fax: 215-843-2080 <a href="mailto:ccmed8r@aol.com">ccmed8r@aol.com</a></td>
</tr>
<tr>
<td>David A. Feldheim</td>
<td>Chair, Public Relations Subcommittee</td>
<td>600 W. Germantown Pike, Suite 400 Plymouth Meeting, Pa. 19462-1046 Phone: 610-940-1640 <a href="mailto:david@feldheimlaw.com">david@feldheimlaw.com</a></td>
</tr>
<tr>
<td>M. David Halpern</td>
<td>Vice Chair of Lawyer Dispute</td>
<td>Resolution Program Subcommittee 8 Sheraton Drive, Altoona, Pa. 16601 Phone: 814-940-8322 Fax: 814-940-8323 <a href="mailto:mdhalpern@halpernmediation.com">mdhalpern@halpernmediation.com</a></td>
</tr>
<tr>
<td>Neil Hendershot</td>
<td>Co-Chair, Fiduciary ADR Subcommittee</td>
<td>Serratelli Schiffman &amp; Brown PC 2080 Linglestown Road, Suite 201 Harrisburg, Pa. 17110 Phone: 717-540-9170 <a href="mailto:nhendershot@ssbc-law.com">nhendershot@ssbc-law.com</a></td>
</tr>
<tr>
<td>Charles W. Kenrick</td>
<td>Vice Chair, Liaison Subcommittee</td>
<td>Law Offices of Charles W. Kenrick U.S. Steel Tower 600 Grant St., Suite 660 Pittsburgh, Pa. 15219-2801 Phone: 412-281-3417 <a href="mailto:ck@kenricklaw.com">ck@kenricklaw.com</a></td>
</tr>
<tr>
<td>Richard P. Kidwell</td>
<td>Chair, Legislative Subcommittee</td>
<td>UPMC 200 Lothrop St., Suite 7015-A Pittsburgh, Pa. 15213 Phone: 412-647-7398 Fax: 412-647-1081 <a href="mailto:kidwellrp@upmc.edu">kidwellrp@upmc.edu</a></td>
</tr>
<tr>
<td>Hon. Richard B. Klein</td>
<td>Co-Chair, Fiduciary ADR Subcommittee</td>
<td>Two Logan Square, Suite 660 Philadelphia, Pa. 19103-2765 Phone: 215-656-4374 Fax: 215-656-4089 <a href="mailto:richardklein61@yahoo.com">richardklein61@yahoo.com</a></td>
</tr>
<tr>
<td>James J. Kozuch</td>
<td>Vice Chair, Conflict Resolution Day Subcommittee</td>
<td>Caesar Rivise Bernstein Cohen &amp; Pokotilow Ltd Seven Penn Center 1635 Market St., Floor 11 Philadelphia, Pa. 19103-2212 Phone: 215-567-2010, ext. 133 Fax: 215-751-1142 <a href="mailto:jikozuch@crbcp.com">jikozuch@crbcp.com</a></td>
</tr>
</tbody>
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Continued on Page 23
Continued from Page 22

Michael David McDowell,
Vice Chair, RUAA Action
Subcommittee
McDowell & Associates
P.O. Box 15054
Pittsburgh, Pa. 15237-0054
Phone: 412-260-5151
mmcdowell@arbitrationsandmediations.com

Herbert R. Nurick,
Chair, Membership Subcommittee
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pa. 17105-3265
Phone: 717-783-5428
Fax: 717-787-0481
hnurick@pa.gov

Ross F. Schmucki,
Chair, Continuing Legal Education Subcommittee
218 Rutgers Ave.
Swarthmore, Pa. 19081
Phone: 610-242-4350
rschmucki@verizon.net

Charles A. Shaffer,
Chair, Conflict Resolution Day Subcommittee
Pugliese Finnegan & Shaffer LLC
575 Pierce St., Suite 500
Kingston, Pa. 18704-5732
Phone: 570-283-1800
Fax: 570-283-1840
shaffer@pfslawyer.com

M. Melvin Shralow,
Chair, Lawyer Dispute Resolution Program Subcommittee
Shralow ADR LLC
930 Montgomery Ave., Apt. 101
Bryn Mawr, Pa. 19010-3037
Phone: 215-603-0076
melsralow@shralowadr.com

John E. Toczydlowski,
Vice Chair, Legislative Subcommittee
Strachan & Hatzell
1650 Market St., Suite 4100
Philadelphia, Pa. 19103
Phone: 215-255-6396
joe@toczydlowski@chartisinsurance.com

Judith W. Weintraub,
Vice Chair, Continuing Legal Education Subcommittee
P.O. Box 352
Valley Forge, Pa. 19481-0352
Phone: 610-783-4519
Fax: 610-783-7131
judy@weintraublegal.com

Young Lawyers Division Summer Meeting/New Admittee Conference
July 27-29, Rocky Gap Lodge & Golf Resort, Flintstone, Md.

ADR Committee Regional Meeting
Sept. 5, noon, at the following locations:
Philadelphia, PBI CLE Conference Center
Pittsburgh, The Office of Sally Cimini (Leech Tishman Fuscaldo & Lamb LLC) and Harrisburg, PBA headquarters, 100 South St.

Workers’ Compensation Law Section Fall Meeting
Sept. 13-14, Hershey Lodge, Hershey

7th Annual Diversity Summit
Oct. 26, Omni William Penn Hotel, Pittsburgh

PBA Board of Governors Meeting
Nov. 14, Holiday Inn East, Harrisburg

PBA Committee/Section Day
Nov. 15, Holiday Inn East, Harrisburg

ADR Committee meets at 1:30 p.m.

PBA House of Delegates Meeting
Nov. 16, Sheraton Harrisburg Hershey, Harrisburg
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.

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