Breaking Impasse: How the Mediator Adds Value to Facilitated Negotiations - Part 1 of 2

By Mark Welge

Every mediation has at least one moment where an impasse looms. It is that point in time when either or both parties dig in their heels, fall back on positional bargaining or simply run out of creative ways to reach resolution. The impasse is a fact of life in negotiations and it is the mediator’s most significant challenge. Indeed, impasse is one of the primary reasons for selecting a mediator to facilitate negotiation. The ability to guide or assist the parties in overcoming impasse is one of the most sought-after skills in a mediator. Simply, the mediator adds value to the facilitation process through his or her faculty for breaking impasses.

This article will focus on ways to overcome the impasse hurdle without coercing or browbeating the parties into submission. It is important to note that the mediator’s objective is not to force resolution, but rather to assist the disputants’ negotiations, keep the lines of communication open and help each party realistically and constructively analyze its position.

Reality Testing

The most common method for breaking impasse is to engage in reality testing. The mediator probes the positions of the parties by asking tough “what if” questions. The goal is to move the parties away from litigation-style positional bargaining to a more realistic and objective analysis of their respective cases. Reality testing compels the parties to think about the weaknesses of their own positions and the potential strengths of their opponents’ arguments. The mediator discusses possible adverse consequences of pursuing a positional approach, i.e., litigating the case instead of settling it. Litigation is an inherently uncertain vehicle for resolving conflict. There are numerous potential downside risks associated with litigated outcomes, including cost, time, diversion from daily or business activities, damage to ongoing relationships and uncertain jury verdicts, to name just a few. When a mediator reviews these risks with a party, the objective is to replace the

(Continued on Page 2)

April 29 Meeting of Pew Trust Study Principals and Associated Professionals

On April 29, there will be a one-day conference in Philadelphia at the Sheraton on Rittenhouse Square to discuss the findings of the Pew Demonstration Mediation and ADR Project, which is part of the Project on Medical Liability in Pennsylvania funded by The Pew Charitable Trusts. The purpose of the conference is to bring together people in conflict management with those who have the responsibility to respond to medical errors and “serious events,” such as lawyers, risk managers, patient safety officers, hospital administrators, chiefs of services and insurance company representatives.

Lucian Leape will deliver the keynote speech. Attendance is by invitation only, so anyone interested in attending should e-mail Julie Poll at jpoll@law.columbia.edu for more information and include a paragraph about why they want to attend.

Note that those ADR professionals who met on June 20 in Philadelphia with Carol Liebman and Chris Hyman of Columbia University Law School assigned to the Pew Study have been invited already and need not e-mail Ms. Poll.
Breaking Impasse: How the Mediator Adds Value to Facilitated Negotiations -
Part 1 of 2
(Continued from Page 1)

rigidity of litigation-style bargaining with the more rational, reasonable and flexible interest-based negotiation associated with mediated settlements.

“Where Do You Go From Here?”
What options do the parties have when negotiation fails? The mediator can help the parties to overcome impasses by asking them, “Where do you go from here.” The parties’ options for continuing the conflict may be few and distinctly distasteful. If the parties are not already in suit, they will need to consider the litigation route, i.e., where and when to bring the lawsuit, claims to assert, facts and law to gather in support of claims or defenses and discovery to be conducted. If a statute of limitation is looming, then these considerations take on a sense of urgency.

The prospect of having to fight one another in court, with its attendant costs and time delays, may be enough to move the parties back into a more conciliatory mood. In appropriate circumstances, and at the right time, the mediator will explore with a party the psychological factors associated with continuing to “live with the case.” One interesting technique is to use the “unwelcome guest” analogy. Litigation is described as a distant, unwelcome relative who comes to live with you. Day after day he eats your food, sleeps in your bed and intrudes on your spare time. The “unwelcome guest” takes up space in your life. He expects you to sustain him, but in the short term, gives nothing in return. You want this person out of your life, but he will not go and you feel powerless to make him leave. The mediator reminds the party that mediation presents a unique, perhaps one-time opportunity to send the “unwelcome guest” packing. The time-

Focus on BATNA and WATNA
Long before mediation begins, parties and counsel should explore and write out the best (BATNA) and worst (WATNA) alternatives to a negotiated agreement. These alternatives provide the parties with limits on what they will offer or accept in settlement at the negotiation table. During impasse, the skilled mediator directs the parties’ attention to their respective BATNAs and WATNAs. When negotiation bogs down, it is sometimes due to the parties’ inability to use BATNA and WATNA as an effective bargaining aid. The mediator helps the parties to compare the last offer or demand on the table with the parameters or baselines set by BATNA and WATNA. Such comparisons assist the parties to know whether a proposed offer or demand meets their interests and whether continued negotiation is advisable.

Finding the End Zone
Just as a football team’s ultimate objective is to score a touchdown by putting the ball in the end zone, it is the negotiating parties’ goal to find the “settlement zone” where resolution of the conflict can be reached. Impasse diverts the parties from or frustrates achievement of that objective.

Negotiation can be viewed as a series of concentric rings or zones, the outermost of which reflects the parties’ positions. This relatively large “negotiation” zone represents each party’s belief in what a judge or jury will decide about their respective cases. This “negotiation zone” keeps the disputants relatively far apart because they are typically relying on a favorable litigation outcome. Litigation-style bargaining is based on the “certainty” that a judge or jury will deliver a “best day scenario” to the party.

The mediator injects doubt into the “best day” mindset by reminding the parties that the “best day scenario” is rarely achieved in court. More realistically, the vast majority of cases resolve in a gray area between the “best day” and “worst day” extremes. The mediator persuades the parties to bargain within the narrower concentric ring of negotiation known as the “settlement zone.” This zone presents more realistic resolution expectations for both parties. The outer limits of the “negotiation zone” are abandoned in favor of more realistic and flexible options.

Adjournment or “Cooling Off”
There are times when the parties need to step away from the negotiation table, re-evaluate their respective positions and devise other means, often creative or imaginative, to continue the bargaining process. The mediator must be alert to those occasions when an adjournment may be the only alternative to having the parties walk away completely from the negotiation. A skilled mediator must be able to distinguish between posturing and an authentic deadlock that cannot be overcome at the table. Adjournment is a rarely used method for overcoming impasse, and it is not recommended if the parties are merely posturing. The mediator should instruct the parties during an adjournment or “cooling-off” period to determine how best to return to bargaining, but this break can have a detrimental effect manifest by their never returning to the bargaining table or hardening their positions. The mediator should develop a “cooling-off agenda” and monitor the parties progress to help ensure the adjournment is used beneficially.

Part 2 of this article will continue to explore methods and means employed by mediators to break impasse and add value to the negotiation process.

Mark A. Welge is co-chair of the PBA ADR Committee and president of Welge Dispute Solutions LLC of Newtown Square. Questions or comments about this article should be directed to the author at 484-840-1610 or m.welge-disputesolv@att.net.
Standards of Reviewing an Arbitration Award

By Thomas Salzer

On Nov. 18, 2003, the Pennsylvania Superior Court issued a ruling in Raciot v. Erie Insurance Exchange, 2003 PA Super. 443, 837 A.2d 496, where the court found a trial court had abused its discretion when the trial court vacated the entire arbitration award rather than modifying an incorrect portion of the award. This conclusion was premised on 42 Pa.C.S. 7302(d)(2), which gives the court power to modify an award but not to vacate the entire award. Pennsylvania statute 42 Pa. 7301 et seq. addresses statutory arbitration and empowers a court to reverse or otherwise correct an error of law.

“The fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.”

Pennsylvania common law says a court shall “modify or correct the award where the award is contrary to law.” see Raciot Lexis P.8, and Nationwide Mutual Insurance Co. v. Heintz, 2002 Pa. Super. 196, 804 A.2d 1209, 1214-15. This determination is noteworthy in that it opposes the court finding stated in Boyce v. St. Paul Prop. & Liability Insurance Co., 421 Pa. Super. 582; 618 A.2d 962 (1992), where the court vacated the entire arbitration award as opposed to merely correcting or modifying it. Accordingly, the Raciot court found the only basis in common law arbitration for vacating an arbitrators’ award is stated in 72 Pa.C.S. 7341, which, in shorthand fashion, allows for vacating when “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.” see note No. 7 of Raciot. The Raciot court went on to note, “The fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.” [emphasis by the court].

“Irregularity refers to the process employed in reaching the result of the arbitration, not the result itself.”

The Raciot finding for when to vacate a common law arbitration in Pennsylvania reaffirmed a slightly earlier decision, Bridges PBT v. Chatta, 2003 PA Super. 122; 821 A.2d 590 (2003). In Bridges PBT, the court commented, “irregularity refers to the process employed in reaching the result of the arbitration, not the result itself.” McKenna v. Sosso, 1999 PA Super. 299; 745 A.2d 1, 4 (1999) “The arbitrators are the final judges of both law and fact, and an arbitration award is not subject to reversal for a mistake in either. A trial court order confirming a common law arbitration award will be reversed only for an abuse of discretion or an error of laws.” Sage v. Greenspan, 2000 PA Super. 398; 765 A.2d 1139, 1142 (2000). ■

Thomas Salzer is an attorney with construction litigation experience and is the general counsel for APG-America, Inc., a curtain wall manufacturer and installer.
A Brief Description of the Rush Hospital's Medical Malpractice Mediation Program

By Thomas Salzer

Often, around Pennsylvania, and particularly in Harrisburg, there are references to the “Rush model” (shorthand for Chicago’s Rush-Presbyterian Hospital’s Mediation Process to Resolve Disputes Between Patients and Medical Professionals) when the medical malpractice problem is brought up in conjunction with possible solutions. The Rush Hospital’s Medical Malpractice Mediation Program is most notable and differs from typical mediation programs in two aspects:

(A) The defendant physically at the mediation is a corporate official of Rush and not the treating medical professional if Rush owns the physician’s practice. (Rush owns a significant fraction of the practices with privileges to practice at Rush.)

It is this author’s hypothesis that using a corporate designee at the mediation and not the accused medical professional may be rationalized as minimizing emotions, but may also make the plaintiff feel alienated by not being able to face the one person they know best in this dispute. Furthermore, if there is a non-monetary settlement that involves an apology, it is easy to understand how a patient may want the apology from the actual medical professional and not a semi-anonymous hospital bureaucrat.

(B) The other salient aspect of the Rush model is a common option to use two co-mediators comprised often of plaintiff and defense attorneys trained as mediators. Note that the use of co-mediators increases the costs of the process to the participants. While not related to cost, it is also interesting to note that Rush always permits the plaintiff/plaintiff’s counsel to select both mediators, and this custom is seen by Rush as causing no problems.

With these two points highlighted, a general overview of the mediation program at Rush-Presbyterian Hospital follows, taken, for the most part, from Rush’s own document.

There is a written mediation agreement which covers: i) selection, role, and compensation of the mediators; ii) site selection for mediation; iii) withdrawal provision; iv) requirement that plaintiff and persons with settlement authority be in attendance; v) confidentiality provision and vi) immunity for mediators.

Rush attempts to train its own mediators. Rush views the training of mediators as absolutely crucial and views retired judges and experienced litigators as not automatically making good mediators. Litigators have a mind-set of winning disputes; mediators try to resolve differences with neither party winning over the other.

Rush typically has each party submit statements not to exceed six pages and share them with both the opposing party and the mediator at least 10 days prior to the mediation conference. The submissions include a statement of the facts, including a description of the injury, special damages, as well as past and future expenses; theories of liability and damages; references to reports of experts, consultants and witnesses; current status of the case and the last demand and offer.

Rush views site selection as important, and according to a Rush official, “not just any room with a conference table” will do. The environment should reflect the overall neutrality of the proceedings; Rush often uses a private club in downtown Chicago.

Each side has someone in attendance with settlement authority, often accompanied by the Rush risk manager and, in some cases, representatives from a structured settlement company. With the approval of plaintiff’s counsel, Rush has permitted representatives from insurance companies or other hospitals to observe.

Mediations are generally begun around 9:30 a.m. The mediator provides a short introduction to the mediation process with a brief mention of his or her professional background.

Each side is then given the opportunity to make a brief presentation. The speakers are encouraged to speak to the other side as well as to the mediator. At the conclusion of each presentation, the mediator may pose questions. Mediators with extensive malpractice trial backgrounds may size up each side’s case. However, mediators know it may be preferable to withhold any comment, if one is ever given, until the breakout sessions and then only if necessary to break impasses in later stages of the mediation. Whether the mediators ever express their personal evaluations in a private session is a constant source of debate among professional mediators as there is the constant threat of a mediator losing his or her neutrality.

The introductions and opening joint meeting with opening statements usually take 60 to 90 minutes to complete. Collectively, these steps help to validate the mediation process by encouraging participation by all parties, at the expense of some potential for redundancy.

(Continued on Page 5)
A Brief Description of the Rush Hospital’s Medical Malpractice Mediation Program
(Continued from Page 4)

The mediator(s) meet individually with the respective parties in the breakout sessions where the mediator(s) continue a three-fold strategy of gathering information, communicating information and encouraging movement. Typical communication tactics exercised by the mediator may include: 1) the conduit tactic, in which the mediator reports, with a party’s permission, the settlement proposals from each side to the other; 2) the surrogate tactic, where the mediator helps a party to articulate a settlement proposal and 3) the reshaping tactic, a more extreme approach in which the mediator substantively alters or embellishes the proposals.

Finally, a mediator guides the parties in writing out any agreed-upon settlement. The entire process typically takes a half-day to a full day.

Three final notes: 1) Rush very logically believes that some discovery is necessary before mediation so that the parties are confident they have a fair picture of what may have happened before they try to settle the dispute. The challenge is to have some discovery without wasting time and resources going to the extreme efforts associated with trials. Rush has observed that allowing for about a year for discovery seems fair to everyone; 2) Rush has a backlog of mediations with a recent average of 12 mediations per year out of a universe of 36 disputes identified per year and 3) Rush has seen the aggregate dollar amounts over the last three years, both reserved and paid out, for malpractice disputes soar seven-fold. It seems that Cook County is following in Philadelphia County’s footsteps.

ADR — With an Example of Arbitration in the American Workplace

By Thomas Salzer

With his wife only one month away from giving birth to their first child, Michael Kenney, a digital technician at Eastman Kodak, learned that his position was vanishing and he would soon be jobless. Mr. Kenney took his dismissal to a newly-created, entirely private arbitration program administered within Eastman Kodak. The program uses panels of either one or five trained arbitrators as the plaintiffs determine. In this particular situation, the arbitrator was an executive in another part of Eastman. Ultimately as a result of this hearing, Mr. Kenney was given a commensurate position at the facility.

In another case, another Kodak manager fired someone 24 hours after the worker made a costly mistake that the manager thought the employee had been trained to avoid. After the worker appealed, the manager learned that workers in that group had not received the level of training he had assumed and that the mistake was less costly than he had been led to believe. An arbitration panel overturned the firing, and the man returned to work. “Am I red-faced? Yes,” the manager said. “The decision I made was overturned. I’m not saying it made me feel good. But it’s a good thing.”

The Kodak program is the result of five years of experimentation with various dispute resolution systems. The company has long been regarded as progressive in its personnel practices, and its executives have said they view testifying against the boss as a career-enhancing move. However, this issue is counterbalanced by policies and positions such as the one of the chairman of Kodak who declared the company, “will not tolerate retaliation or retribution against anyone who participates in the process. As I’ve communicated to all our managers and supervisors, that kind of behavior has no place at Kodak – under any circumstances at any time.”

To further define the challenges that ADR programs in the workplace face, only about 13 percent of American workers belong to unions, which negotiate grievance procedures as part of a contract. So many non-union workplaces simply haven’t developed a good system for dealing with conflict, which may explain why employment discrimination lawsuits are the second-largest single source of civil litigation (after prisoner petitions) according to the Administrative Office of the U.S. Courts.

Many companies have learned “the hard way” that blocking debate and forcing workers to take their problems to court can cost everyone a great deal of money. Arguing a priv-
New Jersey’s Introspective Analysis of Court Ordered ADR

By Thomas Salzer

One approach New Jersey and some other state judicial systems have taken to help move cases to resolution is to order the opposing parties to mediate, even if they are in the midst of bitter and contentious cases. Apparently, these courts somehow believe that the mere process of mediating will, if nothing else, relieve the hostility and acrimony that the parties have for one another. Typically caught in the crossfire are the attorneys who must suddenly shift out of a litigation mindset and into the delicate role of compromising, a role that some otherwise competent litigators are ill-equipped or loath to play. These mandates by the courts to force mediation on parties who have not arrived at this decision mutually nor voluntarily raises the question of what purpose is served by compelling parties to participate in mediation.

For a process that is so inherently grounded in the philosophy of cooperation, it seems counter-intuitive that parties can be ordered to participate. The old adage that “it takes two to tango” applies to mediation, but not to litigation. In litigation, the defendant is not a voluntary participant. It is the rare person, who upon being named in a lawsuit, is seized with the desire to meet his antagonist and talk through their differences. How can courts go from encouraging mediation to ordering mediation?

It should not be ignored that, for all its positive aspects, mediation takes time to prepare for, and mediators — and other professionals, if utilized — must be compensated. Quality mediators command fees on par with quality lawyers, and parties almost always employ their own lawyers during these mediation sessions. Then, various facilitating administrative organizations charge noticeable fees for administering these mediation sessions. It is universally true that one uncooperative participant, either party or lawyer, can quickly cause the mediation to dissolve into chaos. Capable mediators are a finite resource and often have over-extended schedules, which can result in problems finding days all parties are available when and if extra days are needed. Therefore, blithely telling someone to go to a mediation session is an order that should not be given lightly.

It is difficult to decipher the meaning of statistics concerning the ultimate utility of mediation when the American Arbitration Association advertises that mediation results in settlements for 85 percent of commercial disputes and 95 percent of personal injury cases while at the same time, trial attorneys will tell you that those percentages are consistent with the settlement rates for cases that do not employ mediation.

Switching our examination from mediation to arbitration, the New Jersey State Bar Association has recently tried to stop mandatory arbitration, calling it “bureaucratic waste” in a report by an ad hoc committee sent to Chief Justice Deborah Poritz in early November 2003. In part, the bar association report said the arbitration system had too many inexperienced arbitrators, as well as a perceived bias in arbitrators. The report stressed that arbitration is just one aspect of alternative dispute resolution and recommended that mediation be used more.

It should be noted, however, that the New Jersey Administrative Office of the Courts disagrees with the bar association and finds the mandatory arbitration system to be a positive enterprise. Richard Williams, administrative director of the courts, took issue with the bar report stating, “Its conclusions are at variance with our experience and the views of numerous attorneys and local bar associations.”

To provide some quantitative aspects cited by the Bar Committee on Arbitration in their report, in the 12 months ending in August 2001 (the most recent year there is data, according to Tim O’Brien in his New Jersey Law Journal article on this topic), 19,774 of 27,285 cases decided by arbitration were appealed in de novo court hearings (although for a myriad of reasons), but 82 percent of all de novo requests were from defense attorneys. Some qualitative criticism of the current arbitration system focused on the arbitration hearings themselves because the hearings were scheduled for only 30 minutes, as well as on the frequent failure of parties to submit position statements 10 days before the hearings as requested.

ADR – With an Example of Arbitration in the American Workplace

(Continued from Page 5)

olous lawsuit in court can cost a company $50,000 to $100,000 just to get to the point where a judge will dismiss the baseless action. Costs to a company to successfully defend itself in a more substantive dispute, such as a sexual harassment lawsuit, often run in the neighborhood of $500,000.

As to mediation, about 83 percent of workers filing claims with the Equal Employment Opportunity Commission are amenable to mediation, while about 30 percent of employers would agree to the process. Of companies that have already participated in mediation proceedings, 96 percent said they would do it again.
Utah’s Arbitration of Medical Malpractice Statute

By Thomas Salzer

The Utah statute dealing with mandatory arbitration of medical malpractice disputes has had a lot of recent press – just look at local newspaper articles over the last few months. Two Utah Senate bills, SB 0117 and SB 0226, have been proposed, one as recently as Jan. 30. (For those readers who are not familiar with the existing Utah mandatory medical malpractice arbitration law, it can be reviewed at www.utah.gov/government/legislative.)

One very abbreviated highlight of the existing statute is that a physician may refuse to provide medical services except in emergency settings if a patient does not sign an agreement before being treated that the patient will only arbitrate and not sue in court concerning any malpractice allegations.

The recent press releases, summaries and other shorthand verbiage may seem, on their face, contradictory or confusing, or lead to the assumption that the concept of arbitration for medical malpractice disputes is not working in Utah. There are even summary notes at the end of SB 0117 that might cause a neutral reader to conclude that the Utah Senate has reservations about the federal constitutionality of the Utah medical arbitration act, regardless of its form.

It would be presumptive and maybe arrogant to state here that everything is false except this newsletter article. The following is an attempt to cut through the fog of print and electronic reports. In perspective, there has been a law in one form or another in Utah for some time that arbitration is expressly available to resolve medical malpractice claims. By 1999, the trial attorneys asked for some “modifications” which may be classified by observers as improvements to past actions involving patients signing agreements to only use arbitration. These 1999 changes resulted, in part, to there being written records of patient’s decision to choose arbitration, and to there being a 30-day period where the patient could reverse his or her decision to use arbitration after initially agreeing to do so.

In 2003, there were a couple of legislative amendments offered that affected trial attorneys and physicians that, in the usual course of making laws and negotiations, can only be reviewed in the end result. One amendment that passed in 2003 modified the medical arbitration act so existing agreements to only arbitrate medical malpractice claims could be circumvented only in the event that emergency medical services were provided (this feature of the existing arbitration statute was noted in the second paragraph of this article). The other amendment which did not pass was to graduate or tier the contingency rates attorneys may charge in personal injury cases. An observer can only speculate why one amendment passed and the other didn’t, or what kind of horse trading went on.

Now there is an effort being mounted in Utah to re-introduce and broaden the amendment that didn’t pass in 2003 so a patient may ignore an agreement to arbitrate any medical malpractice claims for any medical treatment, not just emergency situations.

Without delving into personal opinions that are not newsworthy, a review of quotes from some Utah personalities may provide some insight to the current controversies over medical arbitration legislation. “The Arbitration Alliance says its survey of 600 people shows two-thirds of patients will sign a mandatory medical arbitration agreement and 64 percent feel arbitration is faster, less expensive and just as fair as a jury trial. The other side doesn’t provide numbers for its survey but says people overwhelmingly oppose mandatory, binding medical arbitration.” from a Desert News article on Feb. 1, 2004 by Lois Collins and Elaine Jarik.

The article quotes a surgeon, Scott Leckman, “Medical arbitration can help keep vital medical services available to Utahns by reducing skyrocketing medical malpractice insurance premiums.” Leckman then goes on to state, “Foes counter that mandatory arbitration is unfair, even unconstitutional, and will cost patients too much money. They invoke Thomas Jefferson and his devotion to the value of a jury of peers. So far, courts in other states examining the constitutionality of pre-dispute binding mandatory arbitration have rendered mixed rulings.”

“The arguments are a little hollow on both sides,” says Karin Hobbs, of the Utah State Bar.

As the author of this article, I personally note that there are plenty of opinions and some statistics to question whether malpractice premiums are driven more by the state of the general economy, the growth of the GNP and the long-term bond interest rates, and less by runaway jury awards. Medical malpractice policy expert Maxwell Mehlmann, professor of law and bioethics at Case Western Reserve University agrees, “The astonishing thing is that we don’t know a lot about medical arbitration. There’s a sad lack of good data to back up any of these assumptions or counter assumptions.”