An Interview with Joe Torregrossa, Director and Senior Mediator for the Third Circuit Appellate Mediation Program

By Tom Salzer

The Third Circuit Appellate Mediation Program is showing the judicial system that mediation has a very meaningful role to play. Ten years ago I spoke with the program’s director and then sole, full-time mediator, Joseph Torregrossa. At that time, he took on about 40 percent of the civil cases that the appellate court clerk forwarded to him for review. Today, Joe and his full-time colleague Penny Conly Ellison, an experienced commercial litigation attorney, review and accept and mediate about 60-65 percent of all the cases forwarded to their office. Joe and his staff are located in Philadelphia, but are responsible for and take on cases from the entire Third Circuit — New Jersey, Pennsylvania, Delaware and the Virgin Islands.

Joe and his associate and staff take about 400 mediations a year. The time required for each one varies greatly — from a few hours to several days. Generally the office needs three hours for the actual mediation, plus additional time for pre-mediation review of case summaries and/or position papers.

Given this backdrop of a very full schedule, Joe appears to me to enjoy this environment every bit as much as he did 10 years ago and he has the same vigor, enthusiasm for the program and optimistic view of the future. And he really doesn’t even seem to have aged any.

When asked how anyone could keep up this pace over such a large geographic area, Joe said that about half of the mediations are conducted by telephone. Contrary to what many people might presume, mediation over the telephone involves a subset of mediation skills that he has mastered and found to be both efficient and positive. Using some mental math and rough statistical analysis, Joe concluded that mediation over the telephone brings about as many good outcomes as face-to-face mediations. As an aside, Joe’s successful use of telephone technology in mediations is confirmed and advanced by Michael Wolf’s experiences. Wolf, a mediator with extensive experience with the Federal Mediation Board, has used software (tested extensively in Europe) that allows him to use voice and video signals over the Internet to conduct mediation joint sessions, as well as to participate in caucus sessions. It is not uncommon for Mike and possibly one of the parties to be thousands of miles from another party. Moreover, Wolf is involved in a two-year fellowship to teach remote-mediation techniques for the American Bar Association and recently presented this topic to the Delaware Valley chapter of the Association for Conflict Resolution (ACR), a chapter he will lead as president in 2010.

Joe and I agreed that theory-oriented mediators are taught to spend a certain amount of time in the beginning of a mediation to foster and/or earn a party’s trust so that in a private caucus the party is more likely to

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Hall Street Associates, LLC v. Mattel, Inc., __US___, 128 S. Ct. 1396, 170 L.Ed. 2nd 254 (2008) was an opportunity for the Court to comment on the very limited basis for a party to appeal an arbitration decision. In a series of appellate directives that fold over themselves, this case concerns two parties disagreeing over an indemnification claim with the landlord, Hall Street, demanding a tenant, Mattel, clean up pollution on the leased real property. The parties agreed to use arbitration to settle this dispute including a provision that a court can only reverse an arbitrator’s decision if the arbitrator fails to follow the law [a court finding “the arbitrator’s conclusions of law were erroneous”]. The arbitrator made a reasoned decision for the tenant. Not surprisingly, the landlord asked a court to intercede because the arbitrator’s conclusion was legally in error. The trial court agreed with the landlord conclusion was legally in error. The Ninth Circuit still finds that the basis first set out in Wilco v. Swan, 346 US 427 is not valid upon further review; succinctly, “manifest disregard of the law is not an additional non-statutory basis to gain relief from an arbitrator’s decision.” 128 S. Ct. 1396, 1404 [March 25, 2008] Only extreme arbitrator conduct involving an “egregious departure from the parties agreed-upon arbitration” is sufficient to justify judicial review of an arbitrator’s decision.” Ibid, p. 1404

Even with the Hall Street decision, lower appellate courts are finding means to differentiate criteria for striking down an arbitrator’s decision. The Ninth Circuit still finds that the Federal Arbitration Act (FAA) [9 U.S.C. sec. 10(a)(4)] states that there is a statutory right to strike an arbitrator’s decision when he/she exceeds his/ her powers. See Comedy Club, Inc. v. Improv W. Assoc., 553 F.3d 1277, 1290 (2009); Stott-Nielsen SA v. Animalfeeds Intl. Corp., 548 F.3d 85, 94 (2nd Cir. 2009). In contrast with other circuits more strictly following Hall Street, see Citigroup Global Markets, Inc. v. Bacon, 2009 WL 542780 (5th Cir. March 5, 2009); Ramos-Santiago v. UPS, 524 F.3d 120, (1st Cir. 2008).

In conclusion, the court in Hall Street revisited its Wilco decision and as a result clarified an issue so its stance is now that an arbitrator’s decision will no longer be open to review by a lower court being allowed to cite that the arbitrator manifestly disregarded the law. Also, a lower court can no longer characterize such a basis [manifest disregard of the law] as an additional, non-statutory basis for relief as the FAA in 9 U.S.C. Sec. 10 cites expressly the basis for relief from an arbitrator’s decision.

PBA Working Group on Access to Counsel Seeks Volunteers for Landlord-Tenant Dispute Mediation

Former PBA president Andy Susko assembled a Limited Representation Working Group (comprised of Judge Thomas King Kistler, chair; Judge Anne Lazarus, Judge Karin Platt; former PBA President Ken Horoho; Joe Sullivan; Sam Milkes; Michelle Christian; Tom Wilkinson and PBA Pro Bono Coordinator David Trevaskis) to develop recommendations to expand access to counsel in limited scope engagements. The group presented its final report in June. One of the areas of need identified in the report was for mediation of landlord-tenant disputes. As noted in the report: “Self representation in this arena runs very high. This bogs down the system, slows proceedings and frequently leads parties to go into court with misapprehensions as to the law and with completely unrealistic expectations.” The Pro Bono Subcommittee proposes to develop a model or framework of a program for voluntary mediation of landlord tenant disputes, which could be tailored to the needs and procedures of each county and adopted on a county-by-county basis, as recommended by the Working Group. Volunteers are needed to develop a pilot program. For more information or to volunteer, please contact Laura A. Candris, pro bono subcommittee chair, at (412) 456-2891 or lac@muslaw.com, or the ADR Committee Chair Sally Cimini at (412) 394-6966 or scimini@bccz.com.
Homer C. La Rue PBA Presentation:
Diversity, ADR, & the AFA Bill in Congress; April 23, 2009, Camp Hill, PA

By Ross F. Schmucki

At the PBA ADR Committee quarterly meeting in Camp Hill on April 23, Professor Homer C. La Rue gave a 90-minute presentation on ADR, Diversity and the proposed Arbitration Fairness Act (AFA). La Rue’s presentation was well-received and the approximately 30 attendees had many stimulating questions. A reception followed the presentation. The presentation was arranged by the Diversity subcommittee (Chair Ross F. Schmucki and Vice-chair Cassandra Georges).

Homer La Rue has extensive credentials in the field of ADR. He is a professor of law and director of the ADR curriculum at Howard University School of Law in Washington, D.C., an experienced mediator and arbitrator with JAMS, and the president-elect of the ABA Dispute Resolution Section. He is a person of color and a nationally recognized leader in promoting diversity in the field of ADR. La Rue is the co-creator and designer of a JAMS-supported program to increase the diversity of mediators in the United States, known as ACCESS ADR.

On the topic of diversity, La Rue discussed barriers to entry for minorities, including the nature of relationship-based referrals, the credentialing process, the aversion of institutions to trying new neutrals and the dominance of practitioners with established reputations. The ACCESS ADR program was co-created by La Rue and Marvin Johnson through JAMS in order to promote inclusion of minorities in ADR work. La Rue described the benefits of inclusion to users of ADR and potential cross-cultural advantages. He emphasized the importance of opportunities to build relationships with gatekeepers on high volume and high-quality ADR matters. A critical way to create such opportunities is through mentoring. La Rue discussed the topic of diversity in the context of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Final Report, April 2006-February 2008. Providing diversity in neutrals promotes a quality ADR experience since the user populations often are diverse.

La Rue provided a close look at current developments regarding the proposed federal Arbitration Fairness Act (AFA). His discussion included the House and Senate versions of the bill and Congress’ concern for consumer lack of understanding of arbitration, lack of choice, repeat players, accountability, judicial review, transparency, unfair procedures and costs.

La Rue described problems with the bill and unanticipated consequences if it is passed — exceptions to the validity of arbitration agreements, doubt as to enforceability, change in 80 years of precedent, ancillary or satellite litigation over validity and effect of arbitration, and damage to the U.S. reputation as a forum that enforces arbitration.

The bill would preclude businesses and employers from requiring binding pre-dispute arbitration agreements and preclude such agreements between franchisors and franchisees. The bill would increase the authority of courts to rule on the authority of arbitrators. La Rue described problems with the bill and unanticipated consequences if it is passed in its present form — exceptions to the validity of arbitration agreements, doubt as to enforceability, change in 80 years of precedent, ancillary or satellite litigation over validity and effect of arbitration, and damage to the U.S. reputation as a forum that enforces arbitration.

La Rue described changes that could permit the bill to protect consumers while preserving business arbitration. He shared the current ABA position on the bill. (Paraphrase — ABA generally supports the remedial objectives of the bill to protect consumers, but the objectives must be achieved in a way that does not adversely affect domestic and international commercial arbitration. Bill must not amend Chapter 1 of the Federal Arbitration Act. Bill must have clear, narrow definitions to avoid affecting commercial arbitration.)

Credentials

La Rue received his academic degrees from Purdue University (B.A.), Cornell University School of Law (J.D.) and the Cornell University School of Industrial and Labor Relations (M.I.L.R.). He has taught at the Howard University School of Law, the City University of New York School of Law, District of Columbia School of Law, the University of Maryland and the Extension Division of the Cornell School of Industrial and Labor Relations.

In addition, La Rue has been a member of The International Academy of Mediators, an arbitrator/mediator with the Federal Mediation & Conciliation Service, a neutral with the American Arbitration Association, a fellow in the College of Labor and Employment Lawyers, a member of the National Academy of Arbitrators, a member of the Chartered Institute of Arbitrators, a chair of the Maryland (Continued on Page 5)
The Future of Apology Legislation in Pennsylvania

By Richard P. Kidwell, Senior Associate Counsel, UPMC

The ADR Committee of the Pennsylvania Bar Association reviewed two pending Apology bills, SB 208, introduced by Sen. Pat Vance, and SB 626, introduced by Sen. Stewart Greenleaf. While each purports to protect benevolent gestures or expressions of empathy by health care providers to patients or families, they do so in dramatically different ways.

Under SB 208, any benevolent gesture by a health care provider is not admissible as evidence of liability or as an admission against interest. The bill defines benevolent gestures as “[a]ny and all action, conduct, statement or gesture that conveys a sense of apology, condolence, explanation, compassion or commiseration emanating from humane impulses.” Assisted living or personal care home personnel are protected by the provisions of this bill as well. In contrast, the protection afforded by SB 626 is limited to a health care provider as defined by Section 3 of the MCare Act, and is further limited by the definition of an expression of empathy, “a statement, as construed by the Pennsylvania Rules of Evidence that specifically expresses concern for the harm which occurred to the patient and which cannot be construed by the finder of fact as an admission of liability or as supporting an inference of responsibility.” SB 626 thus specifically does not shelter admissions of liability or inferences of responsibility.

Not only would such statements be admissible, these statements, under section (b), create a rebuttable inference of negligence in a professional liability action against providers who uttered them.

The consensus of the ADR Committee is to support the principles advanced by SB 208 that encourage ongoing dialogue between provider and patient even after an unanticipated or adverse outcome. A provider should not have to worry about the legal implications of how to say, “I’m sorry.” The committee views the continuing interactions between provider and patient as a form of alternative dispute resolution that addresses a patient’s needs to know what happened, why it happened and, most importantly, what can be done to remedy the situation and to provide for the patient’s future care needs.

Pennsylvania is in the minority of states (16 states) that do not have an Apology Law. Thirty-six states do afford protection to apologies by health care providers. (See Appendix A of Sorry Works!, Doug Wojcieszak, James W. Saxton, Esq. and Maggie M. Finkelstein, Esq., 2008.) SB 208 is modeled after the Colorado statute (Colo. Rev. State Ann. § 13-25-135 (West 2003)) that renders inadmissible any benevolent gesture by a provider. SB 626 is more akin to the Maryland Statute (Md. Code Ann., Courts and Judicial Proceedings Article, § 10-920 (West 2004)) that does permit admissibility of statements acknowledging fault but not mere expressions of apology. SB 626 and the latter type of statutes, unfortunately, don’t achieve the result of open and frank dialogue between patient and provider. The provider must still be careful about how he or she expresses sympathy, and a patient may parse any such statement to find an admission of fault. Moreover, should SB 626 be enacted, it would certainly lead to trials within trials, where plaintiffs would seek to have admitted every apology and defendants would file Motions in Limine to exclude any apologies. The judge would then have to make a decision about letting the jury hear and interpret any apology.

As with any law affecting admissibility of evidence, a policy decision must be made. Either it is more important to encourage discussions between patient and provider after an adverse outcome or the admission at some potential future trial of the provider’s apology is superior. The ADR Committee carefully considered these policy matters and concluded that the loss of admissibility of an apology is far outweighed by the benefits to be gained by an open, unguarded discussion between provider and patient when a patient is even more in need of his or her doctor. More enlightened institutions and individuals will acknowledge when they commit an error and will address issues such as ongoing treatment, reimbursement and compensation in a timely and responsible manner.

Fortunately, the prospects of any Apology legislation being passed are very dim. On April 15, representatives of the health care industry and the lobbyists for the Pennsylvania Association for Justice (PAJ), formerly known as the Pennsylvania Trial Lawyers Association (PATLA), met in Harrisburg with counsel for the Senate Judiciary Committee to discuss the two bills. Sen. Greenleaf is chair of this committee and counsel wanted to make SB 626 the starting point for legislative hearings. Health care representatives unanimously favored SB 208 and thought it better to have no law than to see SB 626 enacted. The PAJ lobbyists insisted that SB 208 was unacceptable, and PAJ may be willing to support SB 626 only if concessions were made on sev-

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An Interview with Joe Torregrossa, Director and Senior Mediator for the Third Circuit Appellate Mediation Program

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be candid with the mediator. Joe was modest but did admit that the Mediation Program has a well-earned reputation around the Third Circuit so that attorneys, some of whom he sees more than twice, know what to expect of the process, resulting in minimal time he may spend to earn a party’s trust.

Again reflecting on telephone mediations versus in-person mediations, Joe added that the parties being together face-to-face (or not) may be a minor difference because often in civil cases the parties are in private caucus because they have interacted or heard the opposition’s stances many times before, such as at depositions or trial, and do not need these joint sessions as much as when parties in mediation are just starting out to define and grasp the controversy.

Joe wanted to point out the key role federal magistrate judges play in mediations at the federal district court level, and a related fact that before Ellison joined his office, senior judges used to handle 50-100 mediations a year whereas now they take on about 10 a year.

Some Diverse Issues

Joe noted that the Third Circuit is made up of vastly different party and attorney populations, from northern New Jersey to Western Pennsylvania to the Virgin Islands. In his experience, the Third Circuit mediation program is not that much different from other circuits around the country although the Third Circuit (and maybe more so the Philadelphia region) uses federal magistrate judges more for mediation as opposed to using private mediators at the trial level.

Joe noted that he doesn’t see a lot of parties declining to mediate their cases with his office because they are going to use a private mediation firm such as JAMS. The Third Circuit Court of Appeals Mediation Office is challenged by the fact that the Third Circuit Court of Appeals sends most cases to Joe to screen. He is left to convince these parties to try mediation whereas when parties seek out a private mediation service, the parties are already convinced of the value of mediation. As the years roll on, Joe’s office’s reputation with appellate attorneys helps him get over this hurdle.

Joe has seen that during the last 10-12 years, attorneys handling appellate work from all parts of the Third Circuit have become much more familiar with the mediation process.

While appellate cases vary, cases taken on by the Third Circuit Court of Appeals Mediation Office are more often civil commercial disputes, and the remedies are often monetary in nature. Sometimes the remedies have involved agreeing on what arbitration procedures will be used, or a remedy may be some form of community recognition to settle a civil rights dispute. Joe noted that few medical-malpractice cases come across his desk as these cases are more often filed and decided in state judicial systems.

As to Joe’s own style and organization of his office, he practices a blend of facilitative and evaluative mediation, depending on the facts and parties before him. While he does not co-mediate with his colleague, Joe reviews all case summaries with Penny before taking on a case, and they both share their experiences after a mediation while maintaining confidentiality rules.

After about an hour, I left the mediation office wondering what the future would bring and glad that I’d gotten back to see such a productive operation.

Apology Legislation

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eral other points of interest to the trial lawyers (juries in bad faith cases, unenforceable pre-litigation arbitration agreements, etc.) that were totally irrelevant to the Apology bills. Even if SB 208 were to be passed by the Senate, it would face tough going in the House. Finally, even if passed by the Legislature and signed by the governor, which itself is no sure thing, the lobbyists for PAJ stated the organization would file suit to have the statute struck down as encroaching on the judiciary’s rights to control Rules of Evidence. Given these many hurdles, it is difficult to envision an Apology bill becoming law in Pennsylvania now or anytime in the near future.

Homer C. La Rue

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State Labor Relations Board, a regional director of the New York State Public Employment Relations Board and an assistant U.S. Attorney in the Eastern District of New York.

He has served as a neutral in more than 1,000 disputes in employment, airlines, automotive, beverage, chemicals, clothing, communications, construction, education, electronics, food (manufacturing/processing/service), government (local and federal), health care, hotels/motels, hospital/nursing home, maritime, nuclear energy, organizations, packaging, petroleum/petrochemicals, pharmaceuticals, plastics, police and fire, postal service, public utilities, transportation (bus and rail).

Contact Homer C. La Rue at La Rue Dispute Resolution Services, 5430 Lynx Lane, Suite 339, Columbia, MD 21044, phone (301) 596-4808, fax (301) 596-4836, hclarue@earthlink.net
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PBA Alternative Dispute Resolution Committee

CHAIR:
Sally Griffith Cimini
Babst Calland Clements & Zomnir PC
Two Gateway Ctr
603 Stanwix St Ste 8W
Pittsburgh, PA 15222-1425
E-mail: scimini@bccz.com
(412) 394-6966

VICE-CHAIR:
Stephen G. Yusem
Morris & Clemm PC
527 Plymouth Rd Ste 416
Plymouth Meeting, PA 19462
(610) 825-0500

NEWSLETTER EDITOR-IN-CHIEF:
Thomas B. Salzer
APG-America
70 Sewell St
Glassboro, NJ 08028-2419
(856) 863-6620, Ext. 212
tomsalzer@verizon.net

NEWSLETTER ASSISTANT EDITOR:
Susan Kay Candiello
Law Firm of Susan Kay Candiello
4010 Glenfinnan Pl.
Mechanicsburg, PA 17055-6771
(717) 724-2278
SKC_LAW@yahoo.com

NEWSLETTER LIAISON:
Patricia M. Graybill
(800) 932-0311, Ext. 2289
patricia.graybill@pabar.org

PBA STAFF LIAISON:
Louann Bell
(800) 932-0311, Ext. 2276
louann.bell@pabar.org

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