Message from the Chairs

By Mark A. Welge Esq., and Kathleen L. Daerr-Bannon Esq.

During the last six months, the ADR Committee has been very active on the state and national levels regarding certain key ADR issues. The committee continues to be led by co-chairs Kathleen Daerr-Bannon and Mark Welge, and co-vice chairs Robert Creo and Thomas Salzer.

Last summer, a subcommittee was appointed to study the Revised Uniform Arbitration Act (UAA). Led by Lou Coffey of Philadelphia, the subcommittee prepared an excellent report. The report was sent to all ADR Committee members for a vote. A recommendation for enactment of the UAA was presented to and adopted (with one change) by the Pennsylvania Bar Association Board of Governors and House of Delegates. Our thanks to Lou Coffey and his subcommittee for all their hard work and for the terrific report they produced.

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Last fall, following a thorough presentation by subcommittee chair Bob Creo, the ADR Committee voted to oppose the Uniform Mediation Act (UMA). The ADR Committee’s Resolution opposing the UMA was thereafter presented to the PBA Board of Governors on Jan. 15, 2002. The resolution was unanimously adopted. The PBA’s resolution was delivered to its delegates and the UMA was debated before the American Bar Association’s House of Delegates at their midyear meeting in Philadelphia in February. The ABA House approved the UMA. However, the ADR Committee will continue to follow and monitor the submission of the UMA to the Pennsylvania Legislature.

A joint effort with the Pennsylvania Council of Mediators to plan and sponsor a symposium on the institutionalization of mediation practice in Pennsylvania is moving ahead. A focus group discussion is scheduled for June 14 at Dickinson Law School and will involve the Pennsylvania Council, the Allegheny Bar Association, the Philadelphia Bar ADR Committee and members of this committee.

Herb Nurick and Ann Begler lead a subcommittee, created following a presentation by the PBA’s Unauthorized Practice of Law Committee at our fall meeting, to explore the issue of whether, and under what circumstances, mediation might be considered the unauthorized practice of law. Herb, Ann and their subcommittee members are meeting with their counterparts within the next month.

The Lawyer Dispute Resolution Program continues to be active. Graham McDonald of our committee heads up that effort.

Due to the heavy demand for the ADR Committee newsletter, edited by Tom Salzer, increased funding for its publication has been requested as part of the committee’s 2002-03 budget.

The committee participated as a cooperating organization for the ABA’s Section of Dispute Resolution symposium in Philadelphia on Feb. 1. Titled “All in the Family: A Symposium on Family, Family Business and Intergenerational Disputes,” the symposium was a huge success and well attended.

Kathleen Daerr-Bannon served as course planner and several ADR Committee members (Bob Creo, Bob Ackerman and Mark Welge) were faculty members for a seminar entitled “Advocacy in ADR Arenas,” presented by PBI in March and April in Pittsburgh, Mechanicsburg and Philadelphia. The program was well received at all three locations.

Mark A. Welge is president of Welge Dispute Solutions LLC, Newtown Square, Pennsylvania. A full-time mediator and arbitrator, he is currently co-chair of the Pennsylvania Bar Association ADR Committee and a member of the International Academy of Mediators.

Kathleen L. Daerr-Bannon is a mediator and arbitrator with more than 12 years of ADR experience. She was significantly involved in such visible proceedings as Dalkon Shield, silicone breast implants and Piper Aviation.
PBA Committees Meet on Mediation/Unauthorized Practice of Law Issue

By Herb Nurick Esq.

Forest Myers and Joe O’Brien of the PBA Unauthorized Practice of Law (UPL) Committee attended the Nov. 29, 2001 meeting of the PBA Alternative Dispute Resolution (ADR) Committee to express concern that mediating may constitute the practice of law. Following discussion on this subject, it was felt that it might be valuable for some members of the ADR Committee to meet with members of the UPL Committee to learn from each other what may be involved, and determine what issues, if any, need to be addressed. Kathleen Daerr-Bannon and Mark Welge, co-chairs of the ADR Committee, appointed Ann Begler and Herb Nurick to co-chair a subcommittee to organize this meeting.

The subcommittee representatives are:

ADR Committee: Ann Begler, Herb Nurick, Tom Salzer and Joe Skelly. Kathleen Daerr-Bannon and Mark Welge are ex officio representatives.

UPL Committee: Bill Hoffmeyer, Jim Marsh, Forest Myers and Joe O’Brien.

The first meeting of this group took place on May 8, 2002, at the PBA headquarters in Harrisburg. Most of the representatives attended. Louann Bell and Peter Pokorny of the PBA staff also attended. Many items were discussed. The two most prominent appear to be (1) whether all or some types of mediation methods constitute the practice of law, and (2) whether drafting an agreement, resulting from the mediation process, constitutes the practice of law.

With regard to the first issue, views were expressed that maybe pure facilitative mediation does not involve the practice of law, but evaluative mediation (based on legal training and knowledge) might involve the practice of law. Concerning the second issue, there were observations that writing terms, exactly as dictated by the participants, does not involve the practice of law, but anything beyond that might involve such practice. These are merely some examples of the variety of complex matters that were discussed.

There were several suggestions as to what the next step should be. For instance, it was suggested that certain non-lawyer mediators meet with the group to give their input. After reviewing a number of ideas, the group concluded that the matter should be placed on the agenda for the next UPL Committee meeting, scheduled for July 17. Following that meeting, a memorandum will be given to the representatives of the ADR subcommittee, specifying concerns of the UPL Committee. These will be reviewed by the ADR subcommittee, and interaction between the two subcommittees will continue.

The meeting was an excellent starting point for a further cooperative effort. The goal is to formulate some conclusions about protecting the public from the unauthorized practice of law, while still utilizing non-lawyer mediators where their methods do not fall within the realm of law practice.

Herb Nurick is the mediation coordinator in the Office of Administrative Law Judge of the Pennsylvania Public Utility Commission and co-chairs the ADR subcommittee looking at the mediation/UPL issue.
Last summer, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Arbitration Act of 2000 (UAA). The UAA 2000 Act supplanted the 1955 act that had been enacted in whole or in part by 49 states. The UAA is now in the process of being reviewed by various state legislatures and, as of December 2001, it has been adopted by three states.

Section 21 is the general remedies provision of the UAA and, more specifically, this note is concerned with the act and how it relates to punitive damages. There is a concern that courts may use Section 21 to scrutinize arbitrators’ decisions using criteria that give less latitude to arbitrators and stress following common or statutory law. Subsections of Section 21 and commentary on these subsections both support and refute this concern.

In support, Section 21, subsection (a) allows an award of punitive damages or other exemplary relief only if such an award ‘is authorized by law in a civil action involving the same claim.’ In addition, subsection (e) provides that if an arbitrator awards punitive damages or other exemplary relief, the arbitrator shall specify in the award the basis in law authorizing the award and state separately the amount of punitive damages or other exemplary relief.” [See RUAA 21(c).]

Whether this heightened review is valid or not, there are at least two perspectives to highlight if we are to follow common/statutory law: (1) It may be argued that a review of decisions grounded in following the law results in a more uniform or consistent outcome whether the litigants chose arbitration or a court proceeding. This uniformity in the punitive damage portion of an award would be a benefit in that punitive damages awards often further public policy goals, which should have consistency as a hallmark. [See Doe v. Roe, 599 NYS 2d 350 (1993); Mulder v. Donaldson, Lufkin & Jenrette, 611 NYS 2d 1019 (1994); Espinosa v. Roswell Tower, 910 P.2d 940.]

(2) In the aforementioned Securities Arbitration Commentator, Paul Dubow speculates that Section 21’s heightened standard of review of an arbitrator’s punitive damage award would increase the cost and/or time expended writing awards and the securities arbitration industry is particularly aware of this effect. He further states, “the primary effect of the provision will be on the arbitrators and their decision writing (at least in cases where they wish to award punitive damages), but it will have a more substantial effect on practitioners. This is so because most arbitrators are not attorneys and even some who are attorneys are not litigators and may not be familiar with the law of punitive damages.”

While Mr. Dubow, as well as anyone else, is welcome to an opinion, I question whether a non-bar member who is an arbitrator cannot educate him- or herself in the area of damages and remedies and also whether an attorney must have a litigation background to effectively rule on and fashion remedies founded in the law.
Revisiting the *Circuit City* Decision in Employees and Federal Arbitration Act Jurisdiction

*By Thomas Salzer Esq.*

As a follow-up to a previous article concerning the Supreme Court’s March 2001 decision in *Circuit City Stores, Inc. v. Adams*, where the court ruled for arbitration in an employment contract setting, this note examines an upcoming appellate decision in the 4th Circuit, *Adkins, et al. v. Labor Ready Inc.* In the briefest of review, the defendant in *Circuit City* was trying to have an expansive reading of employees engaged in interstate or foreign commerce while the majority ruled that the Federal Arbitration Act (FAA) exclusion applied more narrowly to transportation workers.

In *Adkins*, so far, a District Court in West Virginia has found for the defendants and gave a ruling to compel arbitration. In an ultimately futile attempt to limit the scope of *Circuit City*, Adkins argued, in the words of the defendant’s counsel, “because the arbitration agreement was contained in an application form — as distinguished from, say, an employment agreement that was entered into post-employment or contemporaneous with an offer and acceptance — that arbitration should not be enforced.” Clearly, the District Court found this distinction between an application and a contract without any substantive difference and followed the *Circuit City* decision to compel arbitration through the agreed upon provision.

The facts surrounding and making up the dispute in *Adkins* center on a union whose members are employed by a temp agency, Labor Ready, that uses an application form that includes an arbitration consent provision to ultimately settle any issue. The union sees the arbitration provision as one of many onerous obligations, such as only paying workers through company-owned cash machines that charge use fees, that Labor Ready forces on the temp workers who, arguably, are in an inferior bargaining position.

The District Court found a common law criteria of a “gross inadequacy in bargaining power” rather than a mere “inequity of bargaining power” was necessary before a contract of adhesion situation would call into question the validity of the arbitration provision. The District Court said it does not “appear” that the arbitration provision at issue “is unduly favorable to Labor Ready.”

precision in Arbitration Agreements

*By Thomas Salzer Esq.*

In an Ohio Court of Appeals decision, *Montgomery County Community College v. Donnell*, 141 Ohio App.3rd 593, 752 N.E.2d 342 (2001), the court gave no deference to a party alleging that another party added a third party into a dispute and thereby intentionally created a situation where the third party’s refusal to participate in an arbitration would frustrate the arbitration agreement made between the two original parties.

One of the two original parties argued to the court that while their agreement to arbitrate did not expressly address the situation of a third party being added and that new party then refusing to arbitrate, the agreement was unclear and any ambiguity should be construed against the drafter, thereby giving no weight ultimately to the third party’s reluctance to arbitrate. The court was very strict in its finding that an agreement to arbitrate should be read strictly or literally to the point that there was no room for an ambiguity to exist.

The court incorporated another Ohio case, *Schory v. Society National Bank*, 662 N.E.2d 1082-1083 (1996), and stated, “Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of ‘good faith’ ... The contract was between two commercial entities, which had bargained at arm’s length. Neither the fact that Sinclair (the plaintiff) prepared the contract nor the fact that Donnell did not anticipate that Sinclair would act as it did can invest Donnell with some right of protection ...” at Page 588.

All that can be concluded from this Ohio decision is you cannot be too careful in the precise wording of an arbitration agreement.
Managing Conflict in the Workplace: A Systems Approach

By Mark Welge Esq.

The costs of unresolved workplace conflicts are well known to corporate America: lawsuits, unfavorable publicity, diverted corporate resources, out-of-pocket defense costs, rising insurance premiums and various problems with the workforce, suppliers, customers and the community at large. What is less well known, however, is that these costs can be controlled through a systematic approach to conflict management. This article explores the emerging crisis in workplace conflict and the steps businesses, large and small, can take to avoid the adverse consequences of unresolved employment-related disputes.

The Crisis


As claims and verdicts increase, there is also a crisis looming in the employment practices liability insurance (EPLI) marketplace. Premiums and deductibles are up and some insurers are bailing out of EPLI entirely, leaving employers with fewer insurance options. This crisis follows $250 million in awards and settlements in 2001 for wrongful employment practices. Abelson, supra.

The Choices

There are essentially four ways to resolve conflict: (1) do nothing, which usually results in a bigger problem down the road; (2) let the courts decide, an unsatisfactory option in view of recent increases in verdict amounts; (3) use management power, which is basically an executive decree that conflict must stop, an apparently ineffective option in light of the increase in claims; and (4) collaborative resolution which involves cooperation of all company employees and control over the resolution process. Of the four options, clearly collaboration is the most advantageous way to resolve workplace conflict.

Conflict Management System Design

Collaborative resolution involves the hands-on management of conflict; that is, the organization confronts it systemically with both a company-wide plan and a procedural framework. An effective system, however, is one that is designed to channel conflict through collaborative processes and is supported by internal collaborative components.

There are several advantages to a collaborative design over other models of conflict resolution. First, collaboration incorporates elements of individual initiative, negotiation and mediation into the resolution scheme. Individual initiative involves one-on-one contact, the stage where conflict generally begins and where it can be most directly and efficiently addressed. Negotiation is the process by which those in conflict resolve their issues with or without outside help. Mediation is a facilitative, collaborative process, using a neutral third party facilitator in which the parties are empowered to build their own solution. Second, collaborative design involves decision-making by the parties in conflict, unlike the courts, which take away that power and vest it in a judge or jury. Third, collaboration has an interest-based focus. It deals with the parties’ needs rather than their positions. Fourth, the outcome is win-win, unlike adversarial processes, which are always win-lose or, in some instances, lose-lose.

The design of a collaborative system has been meticulously blueprinted by Slaikeu and Hasson, in Controlling the Costs of Conflict (Jossey-Bass, 1998). At the heart of any conflict management design is what Slaikeu and Hasson refer to as “The Preferred Path.” Supra at 44-50. The Preferred Path aims to control costs while offering diverse choices for parties to resolve conflict. It encourages conflict prevention or early dispute resolution through development of a company-wide approach to conflict management. Supra. The path has several steps.

The path begins with the collaborative methods already discussed: individual initiative, negotiation and mediation. These methods should resolve most workplace disputes if

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all company employees are encouraged to use them, know of their availability and are trained in how to use them. Supra at 46. The next two steps involve invocation of higher authority, both internal and external, or the use of power or force. The resort to these two steps should occur only when collaborative methods have failed. For example, referring the dispute to someone higher in the chain of command, or outside the company entirely, increases the expense and time necessary to resolve the conflict, while reducing the options available for resolution of the problem. Supra at 45. However, the resort to higher authority is still preferable to the last step in the path, which is either avoidance of the problem, a one-sided solution or loss of control over the method of resolution. Force is not to be confused with physical violence. It simply means that the dispute is handed over to a third party or government agency for decision. The parties in conflict relinquish the power to decide how their dispute is to be fixed. Obviously, the power play/force step should be used only as a last resort.

The Preferred Path is flexible, allowing for disputants to loop backward and forward through the steps as circumstances and the parties’ choices dictate. As such, The Preferred Path offers multiple options and opportunities to the parties to either collaboratively resolve conflict or resort to the authority of others to resolve it for them.

When incorporated into a comprehensive system design, The Preferred Path presents a dynamic resolution process that can save companies time and money. As outlined by Slaikeu and Hasson, the comprehensive design begins with site-based resolution, encompassing The Preferred Path’s collaborative elements. Supra at 56. Site-based resolution is supported internally by the use of specialists and procedures to assist those in conflict. These may include ombudsmen, human resource professionals and internal mediators. Procedures could include internal investigation, peer review, internal appeal, conflict resolution training and legal consultation. Supra.

If the dispute cannot be resolved internally, the design allows for external ADR, including outside mediation, arbitration, mini-trials and fact-finding, among other methods. Last, if external ADR fails, or is not desired, then the parties may resort to an external higher authority; i.e., the courts or governmental agencies like the EEOC. Supra. Of course, the parties are not bound to proceed first with internal collaboration, then to external ADR and on to external higher authority. They are free to loop backward or forward as they see fit.

Merely having a conflict management design in place is not enough. It must be supported by structural subsystems or foundation al supports. Supra at 78. Most organizations lack these essential supports. They must be implemented. There are seven elements which must be in place for a collaborative systems design to succeed. Supra. They are:

1. Policy: The organization must have an established conflict management policy that supports The Preferred Path. Everyone in the organization should know that the policy exists.

2. Roles and Responsibilities: The company must define the roles and responsibilities that are critical to effective conflict resolution. This means that the roles of managers and employees in site-based resolution must be clearly explained and defined and the expectations for each person involved must be articulated.

3. Documentation: The organization’s policy and the definition of roles and responsibilities must be documented in contract clauses, employee manuals, company records and postings. The organization should encourage in writing the use of the system by everyone in the company.

4. Selection: The company must determine what criteria will support the collaborative system. Moreover, it must decide how internal mediators, ombudsmen and other specialists will be selected and qualified.

5. Training: Employees and managers must be trained to use the system, to know how it works and what options are available. Conflict resolution skills training is necessary on an ongoing basis.

6. Support: The organization must decide on the support systems required to encourage early resolution of conflict and then implement those systems.

7. Evaluation: The organization must collect data and information and then analyze it to determine whether the system is working. If it is not, the company must find out why and promptly make changes. Supra.

Conclusion
As the costs of unresolved workplace conflict rise, companies must be proactive to protect themselves from harm. Unresolved conflict is bad for business and could result in the economic death of the organization. A systems approach to conflict management makes sense because it controls the cost of dispute resolution at the time or before conflicts arise. This reduces the risk that the conflict will escalate and move outside the organization to the courts or governmental agencies where the company will have little or no control over the process or resolution.
COMMITTEE/SECTION DAY REPORT

Editor’s Note: The following is a report on the committee’s meeting on May 2, as recorded on that day by PBA Committee Liaison Louann Bell. For copies of any attachments mentioned, please contact Louann at Louann.Bell@pabar.org or 800-932-0311, X2276.

I. Major Points Discussed

1. Uniform Mediation Act: While the PBA and the Philadelphia Bar Associations both opposed the UMA, the ABA passed the UMA during their meeting in February 2002. The UMA was drafted for states who have no mediation confidentiality statutes in place. The drafters did not expect Pennsylvania to adopt the UMA.

2. Revised Uniform Arbitration Act: The PBA Board of Governors voted to support the enactment of the Revised Uniform Arbitration Act at its April 30 meeting. The resolution is being presented to the House of Delegates at its May 3 meeting. [Editor’s Note: The resolution to support the act was approved by the PBA House on May 3.] The report and recommendation had been sent to the full committee for their review and vote.

3. Newsletter: Tom Salzer is the editor of the newsletter and will be publishing the spring issue in the next couple of weeks. The newsletter is distributed to local bars and committee and section chairs in addition to the committee members.

4. Dispute Resolution Program: Program Administrator Graham MacDonald reported that a reconsideration of an arbitration decision was filed (see attached). There was some discussion on whether the rules need clarification since there is no option for correcting a mistake in a decision. To date, no feedback as been received on any of the past cases. Graham is planning to send out a questionnaire to the counsel and clients of past cases to get their thoughts on any problems with the program and how it could be improved.

5. UPL Subcommittee: Ann Begler reported that the subcommittee will be meeting with the PBA UPL Committee on May 8 following their committee meeting. The main question to be discussed is whether mediators are indeed practicing law. The family and custody matters are a real problem to the PBA UPL Committee.

6. OGC: Bob Creo reported that during a three-day training session in November 2001, Dickinson trained 20 OGC lawyers to be mediators. Cases have been assigned.

7. Institutionalization in Pennsylvania: It was noted that Pennsylvania is far behind in the use of mediation.


9. Mediation Program in Superior Court: Judge Klein reported that there is so much case volume in Superior Court that it is hard to get the cases identified early enough for mediation.

10. PA Council of Mediators: The subcommittee is proceeding. A focus group of mediators at Dickinson is being planned.

II. Action Items

1. Uniform Mediation Act: Bob Creo and the subcommittee will continue to monitor the UMA and when it is introduced to the legislature.

2. Newsletter: All members are encouraged to submit articles to Tom Salzer for publication.

3. Dispute Resolution Program: The committee voted to mail a questionnaire to past clients and counsel of the program. Graham will create the questionnaire and distribute it accordingly.

4. UPL Subcommittee: Herb Nurick, Joe Skelly and Mark Welge will meet with the co-chairs of the PBA UPL Committee on May 8 and will then report back to the ADR Committee.

5. Institutionalization in Pennsylvania: The committee would like to put together a plan to change things in Pennsylvania through legislation, etc. Input and suggestions from committee members are encouraged.

III. Recommendations and Resolutions to the Board of Governors & House of Delegates

Bob Creo is presenting the Revised Uniform Arbitration Act to the House of Delegates on May 3 for their approval. It was adopted by the Board at their April 30 meeting. [Editor’s Note: The resolution to support the act was approved by the PBA House on May 3.]

IV. New Business/Future Projects

1. Institutionalization of ADR in Pennsylvania.

2. Mediation Program in Superior Court.

V. Tabled Discussions

None

VI. Next Meeting Date

Nov. 21, 2002 – Committee/Section Day
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Help with Your PBA Listserv

The following instructions should help in your effective use of the committee's listserv.

To subscribe to the listserv, complete the form linked to from the front page of the PBA Web site (www.pabar.org). Once subscribed to the listserv you will get the following confirmation message: "File sent due to actions of administrator traci.klinger@pabar.org"

To unsubscribe, send a message to ADR-request@list.pabar.org with "unsubscribe" in the subject.

If you change your e-mail address, you must unsubscribe the old e-mail address using the old e-mail address and subscribe the new e-mail address using your new e-mail address. Sending an e-mail to the list will not change your e-mail address on the listserv.

To post a message to the listserv, address your e-mail to ADR@list.pabar.org.

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