Message from the Chairs

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

The ADR Committee continues its activities this fall with several ongoing initiatives, and some new ones as well.

The committee continues to address many of the “hot button” ADR issues confronting lawmakers, the courts and the public. Committee members are actively involved in local, state and national ADR initiatives, including the Revised Uniform Arbitration Act, Uniform Mediation Act, UNCITRAL, State Bar Survey, Lawyer Dispute Resolution Program, Statewide Dispute Resolution Agency and credentialing. Committee members continue to participate in a number of notable state and national education programs, as well as collabo rating with other organizations, such as the Pennsylvania Council of Mediators, on ADR issues.

A subcommittee was appointed and -- led by co-chairs Louis Coffey of Philadelphia and Thomas Miller of Harrisburg -- has been studying the Revised Uniform Arbitration Act (RUAA) drafted by the National Conference of Commissioners on Uniform State Laws. The subcommittee was charged to study the proposed act and changes, and to report with recommendations to the full committee at the upcoming Nov. 29 meeting.

Bob Creo, co-vice chair of the ADR Committee, is heading up a sub-committee formed this summer to review the Uniform Mediation Act, which is also a product of the aforementioned National Conference. Bob will report at the upcoming committee meeting and will recommend that Pennsylvania should not modify existing Pennsylvania law in order to adopt the Uniform Mediation Act.

The Dispute Resolution Section of the ABA has circulated to all states a survey of state and local bar ADR programs and is compiling that survey. The committee has directed this material to the appropriate persons and organizations in Pennsylvania for completion.

Results of the credentialing survey prepared by Tom Salzer were published in the Spring 2001 ADR Committee newsletter and will be on the agenda for discussion at the upcoming meeting. In addition, as Tom continues his prodigious efforts to publish this newsletter, (which has received compliments) the committee has been seeking to expand its circulation to local bar associations, judges and other sections and committees of the PBA.

The committee continues to expand use of its listserv and urges all members to subscribe.

With respect to continuing education programs, the ADR Committee was well represented at the PBA annual meeting in Pittsburgh this year. Mark Welge, co-chair, moderated a debate between Judge Richard Klein and former Bar Chancellor Cliff Haines on ethical and professional obligations to discuss ADR alternatives with clients.

In addition, the Pennsylvania Bar Association ADR Committee (along with the Philadelphia Bar Association ADR Committee) will join with the ABA Section of Dispute Resolution and the Association of Family and Conciliation Courts to present a symposium on family, family-business and intergenerational disputes, titled “All In The Family,” on Feb. 1, 2002, at the Philadelphia Marriott Hotel, 1201 Market Street. For a full schedule of the program and registration form, call 1-800-285-2221 or go to http://www. abanet.org/dispute/ philabr.pdf.

Andy Goode, former co-chair of this committee, and Bob Creo will participate in an important program this winter in Cancun where the committee, in conjunction with the Judicial Administration Committee, will present perspectives on ADR and the courts.

The committee is sensitive to our responsibility to communicate with and to educate the public with respect to ADR and to be sensitive to our relationships with ADR practitioners who are not lawyers. The Pennsylvania Council of Mediators graciously invited your co-chairs to their board meeting in Carlisle on Sept. 21, after Kathe had re instituted a dialogue with them.

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Mediation Minus Good Faith Equals Zero

By Herb Nurick, Esq.

Good faith is a 
\textit{sine qua non} for a successful mediation. For this reason, the Mediation Unit of the Office of Administrative Law Judge of the Pennsylvania Public Utility Commission (“commission”) has prepared a document entitled “Good Faith Factors for Mediation Sessions” (“list”). The list reads as follows:

\textbf{GOOD FAITH FACTORS FOR MEDIATION SESSIONS}

\textbf{GOOD FAITH INCLUDES, AMONG OTHER THINGS:}

\begin{enumerate}
\item \textbf{GIVING THE PARTICIPANTS, PRIOR TO THE FIRST SESSION, ALL THE INFORMATION THEY NEED TO KNOW IN ORDER TO RESOLVE THE CASE.} (The commission believes “that formal discovery procedures are not appropriate in the informal [mediation] process.” \textit{Pa. Bul.}, Vol. 25, No. 20, May 20, 1995, p. 1996. Therefore, discoverable information should be discovered informally.)
\item \textbf{BEING FULLY PREPARED WITH FULL KNOWLEDGE OF THE CASE AND WITH POSSIBLE SOLUTIONS FOR RESOLVING THE CASE.}
\item \textbf{BEING WILLING TO CREATE OPTIONS TO RESOLVE A MATTER, CONSIDERING HOW THE SOLUTION MUST ADDRESS THE INTERESTS OF ALL THE PARTIES, AS OPPOSED TO TAKING AN UNYIELDING POSITION.}
\item \textbf{HAVING THE PERSON WITH THE AUTHORITY TO APPROVE THE TERMS FOR RESOLUTION ATTEND THE MEDIATION SESSION, OR, AT LEAST, BE AVAILABLE TO CONFER WITH THE PARTY’S REPRESENTATIVE DURING THE MEDIATION REGARDING APPROVAL OF TERMS.}
\item \textbf{DEMONSTRATING A WILLINGNESS TO LISTEN AND TO UNDERSTAND THE PERSPECTIVES OF THE OTHER PARTIES.}
\item \textbf{BEING WILLING TO SPEND THE ENTIRE DAY, IF NECESSARY, AT THE SESSION.}
\end{enumerate}

While the list certainly is not complete, it does give basic principles to follow.

The commission has various methods of encouraging parties to use the mediation process. One is to send a notice to them (when it appears that a case may be appropriate for mediation) explaining the mediation process, giving its attributes, and inviting the parties to consent to mediate. This notice includes the following paragraph:

By consenting to mediate, the commission understands that you have made a commitment to act in good faith toward resolving the dispute in this matter (see “Good Faith Factors for Mediation Sessions” enclosed). If you cannot make this commitment, you should not consent to mediate. This notice is worded very carefully so as not to eliminate mediation if a party feels that he/she/it cannot, \textit{at the time}, comply with the good-faith factors. This could happen, for example, where a party wants to use the mediation process, but realizes that all the information required will not be available by the date agreed upon for the session. If the information will be available at a reasonable time in the future, it is better for the party to request a later mediation date than to have no mediation at all.

Looking at the specific factors in the list, you will observe that each simply makes good common sense for the mediation forum. Considering Factor 1, if all the facts are not available, you cannot move forward much because you are “playing without a full deck of cards.” This does not mean preclusion of a session for the purpose of facilitating the exchange of information in order to have a productive mediation. The exchange of

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last year by attending two of their functions and listening to their concerns. Professor Bob Ackerman serves on the board, as do other attorneys. Mark and Bob attended the meeting in Carlisle and report that one of PCM’s strategic objectives is to develop partnerships with other ADR organizations to work on a joint project that enhances the field of mediation in Pennsylvania. As a result of the meeting, PCM and the ADR Committee will co-plan and sponsor a symposium in 2002 concerning the institutionalization of mediation practice in the commonwealth.

In conclusion, as required, the co-chairs did submit timely and detailed committee reports to the PBA House of Delegates earlier this fall. The House of Delegates will meet on Nov. 30 at the Harrisburg Marriott. The committee is not recommending any actions to the Board of Governors at this time.

Committee members should continue to submit their thoughts, ideas and concerns to the co-chairs for consideration on future meeting agendas.

Mark Welge will look forward to seeing you on Thursday, Nov. 29, at 1:30 p.m. at Holiday Inn - Harrisburg East for Committee/Section Day and will chair the fall meeting in Kathe’s absence as she presents two ADR programs at the Business Lawyers’ Institute in Philadelphia. Mark, along with co-vice chairs Tom Salzer and Bob Creo, will have a full agenda for your input and discussion in Harrisburg. We hope that you can join us.

Mark Welge, a founder of Marta & Welge in Philadelphia, recently formed Welge Dispute Solutions, LLC, a new firm devoted to mediation and arbitration. He is a former chairman of the Philadelphia Bar ADR Committee.

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. She is also currently a co-chair of the Philadelphia Bar ADR Committee.

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information should be voluntary. Formal discovery not only increases cost to the parties, but also creates acrimony, both of which are detrimental to the mediation atmosphere.

Factors 2 and 3 are related. While the parties should give their respective perspectives of the case, they should not take positions. Positions stall, if not defeat, mediation. Instead, the parties must be willing to give creative options for resolving the problem at hand. In doing so, the parties should present options that will satisfy all interests, and not just their own individual interests. The result of the mediation should be a win for all.

With respect to Factor 4, if the party with authority to “sign off” on an agreement is not at the mediation, it may be a waste of time to proceed. The person with authority should be part of the discussions so that he/she understands why the parties have agreed to certain terms. Moreover, it is always best for the person with authority to be one of those “buying into” the terms. If that person is absent, it may also give his/her side reason to have a change of mind on what was accomplished, or to “agree” to terms, as a negative tactic, knowing that the person in command will not be satisfied. If these problems develop, they will undermine the mediation effort.

While Factors 5 and 6 are self-explanatory, Factor 6 requires an anecdote. In the early stages of mediation at the commission, some parties said that they could only stay until a certain time. Setting conditions like this interrupts the rhythm of the mediation and may also result in more sessions than necessary. Generally, if a party cannot stay for whatever the outer reasonable limits to finish a session may be, that party should alert the mediator of this in advance, so that another day can be set.

Giving the list to the parties at the earliest possible time will result in a smoother mediation process from the start. If a problem with a participant develops thereafter, the mediator can refer to the list and remind the person that he/she agreed to abide by each factor in the list. Ordinarily, this will bring a change of tune for that person.

Having all parties aware of — and agreeing to act in accordance with — the good-faith factors should go a long way in ensuring a successful mediation.

Herb Nurick is the mediation coordinator in the Office of Administrative Law Judge of the Pennsylvania Public Utility Commission.
Potential Conflicts – Rights to a Jury Trial and Arbitration

by Thomas Salzer, Esq.

In July 2001, the Second Circuit Court of Appeals addressed the question of whether a state statute (Minnesota Sales Representative Act - Minn. Stat. 325E.37) mandating arbitration violates the U.S. Constitution’s 7th Amendment which guarantees almost unconditionally the right to a jury trial. The court found no violation of the Constitution because: (1) the 14th Amendment did not convey the 7th Amendment right to disputes with state jurisdiction, and (2) following the Erie doctrine, disputes in federal court due to citizenship diversity should follow state procedural law, including arbitration clauses as procedural law. Eric Railroad v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust of New York v. York, 326 U.S. 99, 101, 109, 110 (1945); Gasperini v. Center for Humanities, 518 U.S. 415, 418 (1996).

While this decision may not strike anyone as radical, other federal decisions elaborate this decision. In the realm of employee-employer labor disputes, there is a more layered view of the rights of employees to a trial, and, by deduction, a right to a jury trial. In a dispute focusing on the proper law to apply to an employee who is terminated with virtually no likelihood of returning to that position, in a dissent, Justice Black wrote that he was very concerned about “whether his [respondent-Charlie Maddox] case is settled by a professional arbitrator or tried by a jury can make a crucial difference.” Republic Steel v. Maddox, 379 U.S. 650, 664 (1965). Justice Black continued, “Forcing Charlie Maddox, who is out of a job, to submit his claim to arbitration is not going to promote industrial peace.” “Such an expansion [of the Labor Management Relations Act Sec. 301] would run counter to this court’s long established policy of preserving the ancient, treasured right to judicial trials in independent courts according to the due process of law.” 379 U.S. at 665.

In 1974, the Supreme Court found “an employee’s statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.” Alexander v. Gardner-Denver, 415 U.S. 36, 37 (1974). In 1979, the Supreme Court was faced with the constitutionality of the Arizona Agricultural Employment Relations Act within several areas. Inter alia, the Court “disapproved a provision construed as mandating compulsory arbitration, Sec. 23-1393(B), on the ground that it denied employees due process and the right to a jury trial, which the District Court found guaranteed by the 7th Amendment.” Babbit v. United Farm Workers National Union, 442 U.S. 289, 296 (1979).

In a not very profound conclusion, there are limited areas such as employment where statutory rights place a premium on a trial before one’s peers and limit the application of arbitration. □

Tom Salzer is an attorney with a civil engineering background and has held positions as an associate with a construction litigation firm in Philadelphia, the Federal Energy Regulatory Commission and a construction claims firm. Currently, he is associated with Foster Wheeler Constructors, Inc.
Transformative Mediation: Is It a Realistic Approach?

By Joseph G. Skelly, Esq.

Models of Mediation: The Settlement or Satisfaction Model

There are different paradigms, or models, of mediation. One model that is common to a large majority of mediators today, and familiar to lawyer/advocates who refer cases to mediation, is known as the problem-solving, or more aptly, the settlement or satisfaction model. The premise of this model is that the most important goal of the mediation is to get a speedy resolution, or settlement, of the issues at hand. The success of the mediation turns on whether a settlement is reached. If the parties reach an agreement, the mediation has been a success; if no agreement is reached, the mediation has failed. Discussions leading to settlement tend to focus solely on legal issues.

A danger inherent in this settlement or satisfaction model is that mediators, wanting their mediation to be “successful,” can develop a vested interest in the outcome of the mediation. Accordingly, they may be willing to take strong measures to influence the outcome, based on their own sense of what would be a good solution, even if that means challenging and redirecting the parties’ own views. Based on this premise, the mediation can easily become directive mediation. A party may walk away having agreed reluctantly to something with which he or she was not fully in accord.

Two consequences can flow from this. First of all, if a party agrees to something in mediation simply for the sake of reaching an agreement, the agreement is likely not to hold. This can give rise to post-mediation litigation. Secondly, although a resolution of the dispute at hand — i.e., the lawsuit, may have been reached, the underlying factors or conflict giving rise to the lawsuit may still persist. In essence, the symptom of the conflict, the lawsuit, has been resolved; the underlying cause of the conflict has not. If that underlying conflict is not addressed, the parties, if in a continuing or reoccurring relationship with one another, are likely to find themselves in further or ongoing disputes. In other words, the conflict remains, only the facts of the continuing disputes change. Typical examples of these continuing relationships are employer and employee, divorced husband and wife raising minor children, and busines or professional partners. Even if a party to a dispute is not in a continuing relationship with the other party, it is still important to have addressed the underlying conflict; otherwise, the party may carry those same elements of the conflict into disputes with other persons with whom he or she will relate.

The Transformative Model

A different paradigm or model of mediation designed to address the underlying conflict between parties in disputes, called transformative mediation, has been articulated by two nationally prominent leaders in the conflict resolution field who have practiced, taught and published extensively: Robert A. Baruch Bush, Rains distinguished professor of alternative dispute resolution at Hofstra University School of Law and Joseph P. Folger, professor of communications and associate dean for research and graduate studies at the School of Communications and Theater, Temple University. In their landmark work on this subject, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition, Jossey-Bass Publishers, 1994, (ISBN 0-7879-0027-3), they describe and discuss the transformative model. The basic premise of this model is that mediation’s greatest value lies in its potential not only to find solutions to people’s problems but also to change people themselves for the better, in the very midst of conflict.

Conflict: An Opportunity for Growth

Bush and Folger state that conflict makes people fearful, confused, unsure of themselves and suspicious of others involved in the dispute. They feel vulnerable, out of control, threatened, victimized and are likely incapable of looking beyond their own needs. They become hostile. They thus succumb to conflict’s most destructive pressures: to act from weakness rather than strength and to dehumanize or demean, rather than acknowledge, each other.

Conflict, say Bush and Folger, need not be viewed as a problem in itself, but rather as an opportunity for moral growth and transformation. Conflict can be a potential occasion for growth in two critical and interrelated dimensions of human behavior: the first dimension being the strengthening of self, the second being the reaching beyond self to others. This first dimension is called “empowerment”; the second dimension is called “recognition.”

The basic thrust of Bush and Folger’s hypothesis is that the mediation process contains a unique potential for transforming people by helping them grapple with difficult circumstances.
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and bridge human differences even while ensnared in the bowels of controversy. This potential for transformation arises from mediation’s capacity to generate two important effects: empowerment and recognition.

Empowerment

Empowerment, say Bush and Folger, is restoring to individuals a sense of their own value and strength, and their own capacity to handle life’s problems. In essence, it helps people realize they don’t have to be victims. If parties can become calmer, clearer, more confident, more organized and more decisive, they can regain a sense of their strength and take control of their situation. A mediator can foster opportunities for a party to gain this sense of strength by helping the party find clarity in goals, become aware that options or choices exist, increase communication skills during the mediation process, become aware of resources available and reflect on decisions to be made.

Two classic examples of empowerment illustrate the positive effect it can have not only in resolving the dispute at hand, but also for future life decisions. The first is the mid-life employee who has spent his entire career with one company doing one particular job. Because of advances in technology as well as downsizing in the company, he suddenly finds himself out of work. Panicked and demoralized, he files an age discrimination suit. If the case goes to trial, there is one issue: was age the basis for his termination? Regardless of the outcome, he is still left with his feeling of low self-worth and confusion about the direction of his career. If the case goes to mediation, a mediator can help the employee focus on his skills and how he might redirect them to his advantage. The mediator can also help him become aware of alternatives or options that might be available to him and what he might need from his employer to pursue a fresh start. He thus becomes empowered to work through his problems and to take control of the direction of his career. His anger and fears lessen, enabling him to work towards a meaningful settlement of his lawsuit against the company.

The second example of empowerment is the divorce action involving the wife who gave up a promising career to be a stay-at-home mom and homemaker. If the mediator can foster an opportunity for her to understand that she has options, such as going back to school, and to realize that financial resources are available for tuition and daycare, she becomes empowered to take charge of the direction of her life. Her fears of a life of near poverty diminish and she, too, becomes enabled to work toward a meaningful settlement in the divorce action.

Recognition

Recognition, say Bush and Folger, is bringing out in an individual the acknowledgement and empathy for the situation, problems and needs of the other party. Recognition occurs when a party voluntarily chooses to become more aware, sympathetic and responsive to the situation of the other. A mediator can guide each party to understand the needs of the other party and to take those needs into consideration when making decisions. That can set the stage for compromise and help the parties to come to a win-win resolution to the extent possible. A mediator can also lead a party to recognition by helping the party to become aware of his or her own role in the dispute, and acknowledging that role to the other party.

All too often in disputes involving interpersonal relationships, there is the feeling “You never appreciated me or all the things I did.” Frequently, giving recognition to the other party by a simple, but genuine, acknowledgement to that party can dissolve a major block in reaching a settlement. The ultimate form of recognition is an apology when it is indicated. See “Apology: Does it Have a Place in Mediation?,” Arbitration & Mediation, A Newsletter of the PBA Alternative Dispute Resolution Committee, 5 (Fall 2000), 5.

An example of recognition can be as simple as the employer acknowledging (sincerely) to the employee, “You have been an excellent employee and have made valuable contributions to the company, and we are grateful for your services over the years, but circumstances, not your performance, have changed.” Or the husband acknowledging to the wife that she has been a good partner, homemaker and mother over the years, and that there were many good times in the marriage.

The Critics and Proponents

Transformative mediation is not without its critics. There are commentators and practitioners alike in the field who eschew this model of mediation, contending that parties come to mediation to get their dispute or lawsuit settled, not to get “transformed.” Moreover, many mediators are intimidated by it and do not feel comfortable with it. Others dismiss it as so much “touchy-feely balderdash.” In spite of the critics, there are many proponents of this model, contending that it strikes at the heart of the human relationship of the disputants rather than simply a weighing and siting of legal rights and obligations. Some proponents believe that all mediations lend themselves to this transformative model. Other proponents believe that

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Transformative mediation can achieve excellent results where it is appropriate, but that some cases simply do not lend themselves to this model.

Transformative Mediation Is Not Therapy
The words and phrases used to describe this model, i.e., “empowerment,” “recognition,” “changing the direction of one’s life,” “resolving underlying conflict,” “transformation,” even the descriptive word “transformative,” give it a therapeutic ring. It is important to point out that transformative mediation, as described by Bush and Folger, is not therapy as that term is commonly understood in the mental and emotional health field. Indeed, as Bush and Folger point out, in leading into a discussion of this issue: “[b]oth empowerment and recognition, as objectives of transformative mediation, should be distinguished from the objectives of different forms of therapy.” The Promise of Mediation, 97.

Transformative mediation is not about engaging in the practice of therapy. It is about removing the blocks that stand in the way of parties’ coming to terms in the resolution of their disputes.

Conclusion
Empowerment and recognition generally do not occur as dramatic moments in mediation. On the contrary, they generally emerge in a more subtle fashion. Their effects, however, on the dispute, and on the lives of the parties, can be very dramatic.

Joseph G. Skelly is an attorney and mediator/arbitrator in Harrisburg with a number of years’ experience as a practicing civil lawyer. In 1999, he opened the Skelly Dispute Resolution Center where he provides mediation and arbitration services in business and commercial matters, divorce and family law matters, and disputes generally in the civil law area. He is an adjunct professor of law in alternative dispute resolution at the Harrisburg campus of Widener University School of Law.

The author wishes to acknowledge and express appreciation to Lacy Hayes Jr., Esq., mediator and counselor at law, of Harrisburg, and proponent of transformative mediation, for his constructive critique of this article.

The Latest News Regarding Your PBA Listserv

The following updated instructions should assist in your effective use of the committee’s listserv.

To subscribe to the listserv, complete the the form on 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.

To 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.

IMPORTANT: When you reply to the message, make sure that the listserv name is included either in the “to” or “cc” fields. If you see the listserv name with “bounce” included in the name, remove that address. The “bounce” address is a black hole. You may have to manually add the listserv address to one of the address fields in order for your reply to make it to the members of that list.

To reply only to the sender, hit “Reply,” and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can use the message header to manually add other recipients outside of the sender or the membership.

To reply to the entire listserv membership, hit “Reply to All,” and type your response in the message body. This response will go to the sender and also to the entire listserv membership.

For customer service, contact Traci Klinger, PBA internet coordinator, (800) 932-0311, ext. 2255.
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All in the Family: A Symposium on Family, Family Business and Intergenerational Disputes

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