Message from the Chairs

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

The Pennsylvania Bar Association Alternative Dispute Resolution Committee continues to lead the way in promotion of and participation in programs to increase the use of ADR in the commonwealth.

Led by co-chairs Kathleen Daerr-Bannon and Mark Welge, and co-vice chairs Ann Begler, Bob Creo and Tom Salzer, the committee has expanded its membership roster and has been involved with a number of high-profile dispute resolution activities and initiatives.

The Pennsylvania Conflict Resolution Initiative (PACRI), a collaboration of this committee, the Pennsylvania Council of Mediators and the Allegheny and Philadelphia Bar Association ADR committees, was formed to develop statewide ADR programs through a cooperative working relationship with Gov. Ed Rendell’s administration and the Pennsylvania Supreme Court.

In response to Gov. Rendell’s plan for medical malpractice liability reform, Chief Justice Ralph Cappy appointed Justice William Lamb to co-chair a Medical Malpractice Mediation Task Force with an ADR Committee member and the governor’s general counsel, Leslie Anne Miller, as the other co-chair. The task force is charged with developing policies and practices for the mediation of medical malpractice cases in the commonwealth. A number of ADR Committee members have been appointed to serve on the task force, including Lou Coffey, Ann Begler, Judy Shopp and Mark Welge.

With regard to educational activities, on June 13, the committee, in cooperation with the ABA Dispute Resolution Section and the Philadelphia Bar Association ADR Committee, co-sponsored a six-hour CLE program, “Maximize Your Mediations!” Among the topics covered by the panels were tips on how to prepare the client for mediation, how mediators handle tough issues and how mediators use the “interests” of the parties to achieve resolution. The committee was well represented on the panels: Lou Coffey, Judge Richard Klein, Judy Shopp, Jim Rosenstein, Joe Skelly, Mark Welge, Andrew Barbin, Fred Hatt, Steve Yusem, Lawrence Coburn, Joe Torregrossa and Herb Nurick. Justice Lamb was the luncheon speaker.

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.

Mark A. Welge is co-chair of the Pennsylvania Bar Association ADR Committee. He is a recent appointee to the Pennsylvania Supreme Court’s Task Force on Medical Malpractice Mediation. He is a full-time neutral and president of Welge Dispute Solutions LLC in Newtown Square.

(From left) Justice William Lamb and ADR Committee member Lou Coffey at the June CLE program.
Meeting Minutes - June 6, Harrisburg

Budget Report
Like other committees, the ADR Committee is being subjected to budget cuts. One almost-universal cost-saving modification is to delete the printing allowance and use e-mail almost exclusively. Part of those savings has been shifted to the “institutionalization” of an ADR initiative budget line item.

Leadership Meeting
The chairs reviewed their notes from the Committee/Section Chair Roundtable. They discussed the possibility of having more frequent meetings via conference calls, with various locations set-up around the state.

A lengthy discussion was held regarding the listserv. The committee would like to have all of its members added to its listserv and then give them the opportunity to “opt out.” Judge Klein expressed concerns with the committee using the listserv as a means to disseminate information and expressed that an e-mail distribution list would be better. He felt that a listserv should be reserved for chat room purposes. It was explained that the PBA uses listservs as a way to disseminate information to committee/section members, but that an e-mail distribution list could be used as well. Louann Bell later reiterated the same information.

The chairs also discussed directives for a more “paperless” organization and noted that the ADR committee has no members on the nominating committee.

Listserv Procedures
The committee needs all members to enroll themselves on the listserv with their current e-mail addresses. The PBA provides a sign-up link on their home page at www.pabar.org.

Institutionalization of ADR
Ann Begler, Kathy Daerr-Bannon and Mark Welge met with members of the governor’s staff and the Supreme Court of Pennsylvania. There was a question of where funds would come from and how much would be expected for this institutionalization from the Pennsylvania government.

The committee is talking to Leslie Miller and Justice Cappy for their support. The office of general counsel probably will do a test case within the agencies to see how it goes. The committee would like to see Pennsylvania follow Maryland’s model, which uses mediation much of the time.

Unauthorized Practice of Law Subcommittee – Whether Mediation is the Practice of Law
There has been continuing dialogue with the subcommittee, but results have been difficult to define so far.

Two changes to the code of ethics were noted: specifically 2.1, comment instructing practitioners to inform clients of ADR possibilities; and 2.4, regarding mandatory disclosure of an attorney mediator that he/she is not representing any parties. Also noted was an ABA committee report furthering the concept that ADR professionals are not necessarily engaged in the practice of law.

Newsletter
The newsletter will only be published in electronic format from now on. In order to receive it electronically, members need to furnish their current e-mail addresses to the PBA as soon as possible. To do so, follow the same instructions as for the PBA E-News on Page 4 of this newsletter.

Dispute Program Between Law Firm Members
Graham McDonald reported the following: two arbitrations scheduled, one mediation ongoing, one selection of arbitrator in-progress, one proceeding on-hold, one arbitration recently completed, one proceeding awaiting receipt of the mediation fee.

Other Business
Mark Welge noted that Ohio’s and Oregon’s offices of dispute resolution received no dollars in their current budget, due to financial hardships in these states. Parenthetically, Berks County (Pa.) does get some funds for dispute resolutions from existing fees.

Members of the ADR Committee met with the Medical-Legal Interdisciplinary Committee on June 6. The meeting concluded with both groups enthusiastically viewing future collaborative efforts including, but not limited to, ADR-oriented educational efforts aimed at physicians, insurers and hospital professionals. The ADR Committee and the PBA Medical and Health-Related Issues Interdisciplinary Committee each voted to agree to work together.

The Quality of Life Task Force and the Civil Litigation Section have agreed to partner with the ADR Committee on undefined topics. The Civil Litigation Section asked the ADR Committee for articles to publish in its newsletter. The ADR Committee agreed.

The committee voted to create a Dispute Resolution Award that would be given during the PBA Committee/Section Day luncheon. The members would like the first award to be presented in November 2003. John Salla agreed to serve on the Award Subcommittee with Mark Welge.

All committee members would like to receive a committee roster that includes mailing addresses and e-mail addresses.
Medical Malpractice Meeting Held with Pew Study Group

By Thomas Salzer

On June 20, 2003, a meeting was held to acquaint Philadelphia ADR professionals with the work done — and the work to be done — under the Pew Trust grant for pilot ADR programs focused on medical malpractice disputes and medical professional disputes.

In addition to members of the Pennsylvania Bar Association ADR Committee, other attendees included Cheryl Cutrona, ADR program director at Good Shepherd; Doug Frenkel, ADR professor at the University of Pennsylvania Law School; Bud Herman, who specializes in medical insurance issues as they relate to commercial and economic factors; Chris Stern Hyman of Medical Mediation Group LLC and former chief counsel of the Bureau of Professional Medical Conduct for the New York State Department of Health; Jane Ruddell, former Jefferson Hospital general counsel and principal of resolution consulting firm Health Care Resolutions; Carol Liebman, professor of ADR at Columbia University and the Pew Trust health ADR pilot program manager.

Some general topics discussed in the meeting included how to have a conversation among interested/affected parties if a problem arises (disclosure conversation). Historically disclosure conversations have not occurred.

There is no singular model training program for hospital staff, although Liebman and Hyman have visited four Philadelphia-area hospitals — CHOP, Abington, Lehigh and Jefferson — where they trained some physicians of varying years of practice in clinical/hospital settings in many sub-specialties. Typically at the beginning of the physician training, role-playing showed some limited problem-solving techniques that were able to be expanded over the course of two 1.5-hour sessions. The follow-up goal is to train some hospital administrators more extensively as mediators. Administrators also wanted “outsiders” for mediators as they perceived “outsiders”/ADR professionals as having a high degree of credibility.

Some hospital administrators indicated they do not believe they have the time to be mediators.

Some attendees who are familiar with the Rush Hospital Model ADR Program in Chicago said it is, by design, a program for a very limited type of malpractice dispute. The Rush Program has mediation so close to trial [late in the discovery stages] that little is saved from the costly litigation track and little time is saved.

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Mark Your Calendar for these Upcoming Events:

PBA Committee/Section Day
November 20, 2003
Holiday Inn East, Harrisburg

PBA Midyear Meeting
January 21-25, 2004
The Breakers, Palm Beach, Florida
Brochure and registration forms available at www.pabar.org.
Secrecy in Arbitrations?

By Thomas Salzer

In a 2002 study, the Global Center for Dispute Resolution Research in New York surveyed more than 120 attorneys and businesspeople who had been engaged in international arbitration. The poll participants were asked to rank eight arbitral virtues and ranked secrecy seventh, below the attributes of fairness, cost, speed, enforceability, expertise and finality. Only eight percent of participants listed secrecy as one of their top three. See article “Private Practices” by Michael Goldhaber in Focus Europe, Summer 2003, p. 16-19.

Even in the absence of an express confidentiality agreement, parties and lawyers have traditionally assumed that they have a duty to maintain complete silence about an arbitration. Though English and French courts honor this presumption, it was rejected by the Supreme Court of Australia in 1995 and the Supreme Court of Sweden in 2000. Arbitration is a private matter and not a branch of government. Any decision from an arbitration panel has no stare decisis value. Accordingly, ADR practitioners do not need to know what past panels have decided in fashioning their own arguments. An Australian ADR practitioner commented, “Here in Australia, arbitration is not confidential anymore,” he said. “But I don’t think anyone is concerned. I’ve never had a general counsel ask me to insert a confidentiality provision in an arbitration clause. And I’ve never seen one either.” Supra, p. 18.

The main argument in favor of secrecy is the sanctity of the contract. While no one questions that express confidentiality agreements in purely private cases must be honored, many lawyers favor greater openness in cases involving a public entity. The range of options for going public includes discussing it with the press, accepting amicus briefs and arbitration hearings open to the public. “As arbitral panels become substitutes for national courts in dealing with major international disputes, parties expect them to be more courtlike,” said Charles Brower, of White and Case, “…that includes the transparency of the proceedings.”

Society needs to know what judges and lawyers are doing. Otherwise, important decisions affecting the common good are taken without public knowledge. “Transparency promotes accountability,” according to Hans Smit of Columbia University Law School. Moreover, Oliver Wendell Holmes Jr. wrote, “It is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” Supra, p. 18.

While the topic of secrecy of arbitrations is of interest to this editor, I come out in favor of enforcing whatever course the parties in the arbitration desire. While some have argued that if the SEC demands public disclosures and has meetings in the open, so too should commercial arbitrations be open. The fallacy of this argument is that the SEC is trying to assist the public in having access to information reasonably necessary to make investment decisions, and from this goal emanates the need for open meetings. No such public education and protection goals exist within the context of arbitrating commercial agreements. ■
By Mark Welge

Preparation for mediation is as important as the facilitated negotiations at the mediation table. Indeed, success at the table depends on thorough and thoughtful preparation by the advocate. Part Two of this article continues with the checklist of things advocates should consider doing to ensure a good result for the client. Part One appeared in the Winter 2003 edition of the newsletter (available at www.pabar.org; click on “Members Only,” then “Committees Info”).

Part II of a two-part article providing a checklist of the things advocates should do before mediation ever begins.

Mediation Agreements - Should You Have One?

Before going to the mediation, the advocate should think about whether the parties need to reduce “shape of the table” issues to writing. The “shape of the table” includes questions about when, where and how the mediation will be conducted. Should the parties have a signed agreement? Some of the considerations are: is the dispute complicated factually or legally; are there multiple parties; do the parties trust each other with a “handshake” agreement; is the mediation taking place during ongoing litigation? If the answers to these questions lead one to conclude that a written agreement is necessary, then what should go into it? The following are some of the things that can form part of a mediation agreement.

Selection of the Mediator. If the parties have not already agreed on a mediator, then they should reduce to writing a mutually acceptable process for selecting one. Otherwise, the parties might find themselves in a dilemma: they want to go to mediation, but cannot because they have failed to find a method for choosing a facilitator.

Mediator Cannot be Called as Witness or Serve as Counsel. The parties need to agree that the mediator cannot be called by either side as a witness in any subsequent actions between them. One of the advantages of mediation is that the process and result are confidential. However, confidentiality can be compromised if the mediator voluntarily discloses or is compelled to testify about party/counsel communications and conduct during the mediation process. Existing law may not provide adequate protection against such disclosures so it is wise to agree, in writing, that the mediator, parties or counsel cannot voluntarily disclose or be compelled to disclose mediation confidences.

The parties should likewise protect against the mediator serving as counsel for any participant in later, or pending, lawsuits or negotiations between or among the litigants. Although such a prospect may seem unlikely, it is surprising how often one party or another tries to retain the mediator after a failed mediation.

Purposes of Mediation. It is helpful for the parties to reduce to writing the reasons why they are mediating their dispute. It focuses the parties’ attention on the objectives of their facilitated negotiations.

Mediator Not Liable. The parties should protect the mediator from liability that arises from the conduct of the mediation. If the parties do not provide such protection, the mediator will likely require it in his or her retention agreement.

What to Mediate. There is no obligation to mediate all the issues between the parties; however, the participants ought to list those they will try to resolve. The list can be expanded or contracted as circumstances dictate. Such a list focuses the parties’ attention on the goals of the mediation.

Privilege and Confidentiality. Protection against inadvertent or deliberate disclosures and preservation of various privileges should be memorialized in the mediation agreement. Recently, a number of courts have eroded mediation confidentiality. See footnoted cases. The parties can take measures to protect the confidentiality of the process through a signed agreement. Likewise, privileges such as attorney-client, attorney work product and insurers’ joint defense should be listed as preserved in the agreement.

Disclosure not a Waiver. The agreement should provide that disclosures during the mediation shall not be construed as a waiver of any privilege.

Disclosure by Mediator. An agreement between or among parties not to disclose mediation communications does not bind the mediator. The parties’ mediation agreement should provide that the mediator shall not make disclosures to non-partici-
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pants. The mediator should be a signatory to the agreement.

No Record or Transcript. The mediation agreement should contain a provision that no record or transcript will be made of the proceedings.

Destruction of Mediator Notes. The mediator should agree to destroy his or her notes at the conclusion of the mediation and return or destroy any documents provided during the process.

No Mediator Subpoena. Not only must the parties agree that they will issue no subpoenas to the mediator to testify about mediation communications or conduct, but they should also agree to protect and defend the mediator against efforts by third parties to compel his or her testimony.

Mediation Schedule. It is wise to spell out when and where the mediation will take place. A time limit should be placed on the proceedings, particularly if there is a pressing statute of limitation or on-going litigation.

Good Faith Participation. This element is a given, but it ought to be put into the agreement anyway to remind the parties of its importance to the success of mediation.

Mediator Compensation. The mediator will include rates and timing of compensation in his or her retention letter. Nonetheless, the parties’ agreement should also provide for mediator compensation, including a provision for the amount or percentage to be paid by each party. The last thing parties want to have happen is an argument during the mediation about mediator compensation.

Integration with Litigation. If the mediation is being conducted during an ongoing lawsuit, any agreement to stay litigation must have court approval. A strict time limit on the mediation may be required by the court and, if that is the case, such a limit should be memorialized in the agreement. Likewise, there should be a provision for the resumption of discovery if the mediation does not successfully resolve the dispute. Generally, parties provide for a few days of “discovery truce” after the mediation terminates.

Attendance by Party Representatives. People with settlement authority must attend, or at least be readily available, in order for the mediation to succeed. In their agreement, the parties may identify those representatives by name and require them to be present as a condition for the mediation going forward.

Counsel must explore the client’s interests, not just his or her negotiation position. The difference between positions and interests is the difference between getting what one wants and wanting what one gets.

Preparing the Client for Mediation

The advocate is not the only one who should be preparing for mediation. The advocate should also help the client prepare for mediation. Some of the things that ought to be accomplished are:

Talk to the Decision-Makers. The people who make settlement decisions should be included early and often in the process.

Find out What the Client’s Needs Are. This means counsel must explore the client’s interests, not just his or her negotiation position. The difference between positions and interests is the difference between getting what one wants and wanting what one gets. The client’s needs should form the basis for the client’s negotiation strategy.

Prepare the Client for the Mediator’s Questions. During the caucuses, the mediator will address questions directly to the client. The questions will probe the client’s interests, the reasons the client is advancing certain positions, the underlying support for various assertions and assumptions. The mediator will also pose questions offered by the opposition, which may have been raised during the caucuses with that party and which are aimed at exposing weaknesses in the client’s case. The advocate should anticipate these questions and prepare the client to answer them before the mediation ever begins.

Explain the Mediation Process. The advocate should explain, step-by-step, each part of the mediation process, from openings, to caucuses, to closure. The client needs to know how the process works, when things happen and why they occur. There should be no procedural surprises.

Discuss Liability and Damage Issues. An objective assessment of all liability and damage issues should occur before the caucuses. This is not a time for “rose-colored glasses.”

Find out the Client’s Bottom Line. Before starting negotiations, the advocate should discuss “the bottom line” with the client; i.e., the least-favorable terms acceptable to the client beyond which the party will walk away from the mediation table without a settlement. The advocate should not learn “the bottom line” during negotiations because it is a vital component of a settlement strategy. The settlement strategy is formed before negotiations begin. Of course, “the bottom line” can change during negotiation if changed circumstances and the client’s best interests dictate that result.

Discuss the “Tough Stuff” with the Client. The “tough stuff” is an honest, candid assessment of the weaknesses in the case and the strengths of the opponent’s case. Every litigated matter has them. They includes a review of the monetary and emotional costs of continuing the litigation and taking the
Preparation: The Advocate’s Key to Maximizing Success at Mediation — Part 2 of 2

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Pre-Mediation Statements

Pre-mediation statements are written submissions made to the mediator within a few days to a week before the mediation begins. It is not necessary to submit these statements in every case, but in many types of matters, the mediator will request them. They are frequently used in multi-party cases, highly technical matters and in “big money” litigation. These statements can assist the mediator by providing basic information about the case. Moreover, they can help make the mediation more efficient by focusing attention on what is important or by offering insights into possible resolution scenarios.

A helpful pre-mediation statement should be brief, but contain the following: a summary of the procedural history and status of the case, a list of the important legal and factual issues, identification of any “below the line” issues which could help the mediator probe the parties’ interests, and a history of settlement negotiations, if any. In multi-party or complex issue cases, the advocate can offer suggestions to the mediator about how to structure the process or warn the facilitator of possible stumbling blocks to resolution. Pertinent pleadings and documents can be attached to the pre-mediation statement provided the advocate does not “empty his file” on the mediator.

One question that should be addressed is whether these statements should be exchanged with opposing parties. This is a tactical issue. The answer depends on the circumstances of the case and, particularly, the sensitivity of the information included in the statement. Some parties submit two statements, one for the opposition and the other for just the mediator’s eyes. If the parties want their statements kept confidential, then they should inform the mediator so that he or she does not inadvertently reveal information contained in the submissions to other parties.

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*(Continued from Page 7)*

**Conclusion**

Success at the mediation table depends on thorough and thoughtful preparation. The mediation process is a unique opportunity for the client to get what he or she needs through facilitated negotiation. Because most cases settle before trial, mediation might just be the client’s “day in court” in terms of obtaining the relief he or she seeks. Therefore, counsel should regard the process as seriously as any other matter undertaken on the client’s behalf and prepare for it accordingly.

*Rule 408 of the Federal Rules of Evidence provides that “evidence of conduct or statements made in compromise negotiations is … not admissible.” But Rule 408 has exceptions and a party could seek disclosure of mediation confidences by showing that the conduct or statements were not made in the course of compromise negotiations; rather, they were made during “informal dealings.” Furthermore, the subject statements or conduct could be admitted into evidence for reasons other than proof of liability or amounts of offers and demands. Moreover, mediation statements can always be obtained through discovery if they are contained in otherwise discoverable contexts. This important exception exists because Rule 408 is a rule of evidence, not discovery.*

A Pennsylvania statute, 42 Pa.C.S.A. Section 5949, protects mediation communications from disclosure during discovery or at trial. However, the statute cannot guarantee confidentiality even though its language is apparently unambiguous. There has been little judicial interpretation of the recently-enacted Pennsylvania statute. In the future, however, the courts may interpret the statute in ways we cannot predict. In contrast is California’s confidentiality statute, which is considerably older than Section 5949, and which has had exceptions carved from it by the California courts. See, e.g., Foxgate Homeowners’ Association, Inc. v. Brancale California, Inc., 78 Cal.App.4th 653, reh’g granted 999P.2nd 666 (Cal. 2000); Olam v. Congress Mortgage Co., 68 F.Supp. 2nd 1110 (N.D. Cal. 1999); Rinaker v. Superior Court, 62 Cal. App.4th 155 (Cal.Ct.App. 1998). But see Eisendrath v. Superior Court, 2003 DJDAR 5849 (Cal.Ct.App. May 30, 2003).

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**Getting to the Goal Line May Not Mean Much for International Arbitration**

*By Thomas Salzer*

*from an article called “Arbitral Terrorism” by Michael Goldhaber in Focus Europe, Summer 2003*

In December 2000, Jonathan Schiller, of Boies, Schiller & Flexner, won a high-stakes arbitration against an Indonesian company. Presently, his client is still waiting to collect anything from the opposing party and is fighting rear-guard actions against a defiant Indonesian court. Such scenarios are on the rise as parties from poor nations increasingly obtain domestic court orders that aim to undermine arbitral proceedings or awards. Investors call such moves “arbitral terrorism.”

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