Message from the Chairs

Annual report of the Alternative Dispute Resolution Committee to the PBA House of Delegates (edited to serve as a message from co-chairs Mark A. Welge and Kathleen L. Daerr-Bannon.)

1. Overview
The committee continues to be active in addressing the current ADR issues before legislatures, courts and the public. Co-chairs Mark Welge and Kathleen Daerr-Bannon have created subcommittees to carry on the ADR Committee’s work throughout the year. As a result, more members are active and involved, and more substantive work is accomplished.

The fundamental concern of the ADR Committee and its leadership is that, although there is substantial interest in ADR on the part of many individuals, in the commonwealth of Pennsylvania, unlike almost all neighboring states and many other jurisdictions, there has been no institutionalization of a culture of ADR. The major focus of the committee going forward is to examine this issue and work toward proposals for such institutionalization.

2. Revised Uniform Arbitration Act
A subcommittee, chaired by Louis Coffey, was very active in studying and proposing a comprehensive report on the Revised Uniform Arbitration Act. With the guidance of the subcommittee, the ADR Committee, as a whole, made its formal recommendation to the House of Delegates. On April 30, 2002, the PBA Board of Governors approved the committee’s recommendation, as presented by Bob Ackerman. The resolution was presented to the House of Delegates at the May 3, 2002 meeting by Louis Coffey, and was adopted.

3. Uniform Mediation Act
A subcommittee, chaired by Robert Creo of Pittsburgh, reviewed the Uniform Mediation Act (UMA) and reported to the ADR Committee at its Nov. 29, 2001 meeting. A resolution opposing the UMA passed unanimously and was thereafter presented to the PBA Board of Governors on Jan. 15, 2002. The resolution opposing the UMA was adopted unanimously and the matter was later debated before the American Bar Association’s House of Delegates. The ABA House approved the UMA in February 2002. The UMA was drafted for states with no mediation confidentiality statutes in place. The drafters, and the ADR Committee, do not expect Pennsylvania to adopt the UMA. The committee will monitor any related legislation in Pennsylvania.

4. Symposium with Pennsylvania Council of Mediators
A joint effort with the Pennsylvania Council of Mediators to plan and sponsor a symposium on the institutionalization of mediation practice in the commonwealth is underway. Ann Begler of Pittsburgh and Robert Ackerman of Carlisle lead that effort.

The subcommittee continues its efforts in conjunction with the Pennsylvania Council of Mediators. Toward this goal, a focus group of mediators, hosted by professor Robert Ackerman, was convened at Dickinson Law School. Co-chairs Kathleen L. Daerr-Bannon and Mark A. Welge, and additional ADR Committee members, attended. A second focus group was convened this month.

5. Joint Project with Unauthorized Practice of Law Committee
Herb Nurick and Ann Begler are leading a subcommittee to explore the issue of whether, and under what circumstances, mediation might be considered the unauthorized practice of law. They are working closely with the Unauthorized Practice of Law (UPL) Committee. A report and presentation were given at the ADR Committee’s May 2002 meeting.

The subcommittee met with the UPL Committee on May 8, 2002, following the ADR Committee meeting.

(Continued on Page 3)
Message from the Editor

By Thomas Salzer

There are potential pitfalls to arbitration being an effective means of conflict resolution, and as practitioners and professionals we should work to correct or to minimize these weaknesses rather than winking or ignoring them. Of course, some alleged problems are either only historical, or are red herrings for those people or institutions that just don’t want arbitration to succeed. Whether the newsletter cited below has any pre-meditated outlook, or whether it is sincere, is not known, but the following quote is clear in its outlook that arbitration is suspect on four different aspects.

“[we] generally refrain from including arbitration provisions in the employment agreements for a number of reasons, including (i) arbitrators are not bound by fact or law; (ii) no appeal of the arbitration decision can be made absent extraordinary circumstances; (iii) arbitrators are more likely to seek compromise; and (iv) oftentimes arbitrators are more sympathetic to an employee.” Herrick, Feinstein LLP Corporate Alert newsletter November 2002

While this committee’s newsletter has had a number of articles over the past couple of years to refute each of these criticisms with the caveat that, at least one of these items (“ii” regarding appeals) may be a benefit, I believe there is a valid criticism that is not listed above that is growing and serious: that of arbitrators not dedicating consecutive days in a timely manner for arbitration hearings. This problem is particularly an issue when three arbitrators comprise the panel as opposed to a single arbitrator. It is a disgrace when three arbitrators on a panel are willing to find no more than three non-consecutive days in an entire month that they are all free for a hearing.

No matter how experienced or learned these arbitrators think they are, to do justice to understanding a dispute and to synthesize a resolution, arbitrators should only take a case for which they are willing to dedicate meaningful time, particularly for the hearing phase. It is a matter of ego that arbitrators like to brag about how busy they are as an indicia of how much they see themselves as being in demand. Keep in mind that the result of this arrogance is disjointed hearings and — when three-arbitrator panels are used — very prolonged hearing phases, all of which make arbitration no longer quicker or cheaper than going to trial.

Thomas Salzer is an attorney with construction litigation experience and is the general counsel for APG-America, Inc., a curtain wall manufacturer and installer.
Message from the Chairs
(Continued from Page 1)

Joe Skelly, a member of both the UPL and the ADR committees, is actively involved in this issue. The primary issue is whether mediators are engaged in the practice of law, with family and custody law matters being a particular concern to the UPL Committee. Herb Nurick, Joe Skelly and Mark Welge reported to the ADR Committee at the Nov. 21, 2002 meeting that little progress toward a consensus had taken place over the summer and fall of 2002.

6. Cooperation with Philadelphia and Allegheny Bar Association ADR Committees

The PBA and Philadelphia ADR Committees have cooperated and coordinated in assisting the Philadelphia Court of Common Pleas to train judges pro tem. in mediation techniques. A program was presented to judges pro tem. and settlement masters on March 18, 2002.

The ADR Committee is kept advised as to Allegheny Bar Association matters generally by Ann Begler, who is chair of the Allegheny ADR Committee as well as an active member of the PBA ADR Committee.

7. PBA Meeting in Cancun, Mexico

Members Andy Goode and Robert Creo participated, with the Judicial Administration Committee, in presenting a program focusing on the perspectives of the courts and ADR providers and users in various ADR contexts. The program was held at the PBA meeting in Cancun, Mexico, this past winter and was well attended.

8. Lawyer Dispute Resolution Program

The committee continues its active involvement with the Lawyer Dispute Resolution Program. Committee member Graham McDonald of Philadelphia heads up that effort. He reported that a reconsideration of an arbitration decision was filed. There was some discussion on whether the rules need clarification since there is no option for correcting a mistake in a decision. McDonald 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.

9. ADR Committee Newsletter

The committee’s newsletter requires expanded funding, which has been requested for the greater dissemination of the publication to local bar associations, committee and section chairs, ADR committee members, Pennsylvania law schools and chambers of commerce offices.

10. Office of General Counsel

[Then-]Gov. Schweiker signed an executive order for use of ADR in governmental agencies and offices through the Office of General Counsel (OGC). ADR Committee stalwart Herb Nurick and others played an instrumental part in promoting this initiative. At the May meeting of the ADR Committee, Bob Creo reported that 20 OGC lawyers had been trained during a three-day training session at Dickinson in November 2001, and cases have been assigned.

11. Superior Court Mediation Program

Superior Court Judge Richard Klein, a long-time member of the ADR Committee, reported on a mediation program of the Superior Court at the May meeting. He advised that the case volume in the Superior Court is so substantial that it is difficult to identify cases early enough for mediation.

Mark A. Welge is co-chair of the Pennsylvania Bar Association ADR Committee and president of Welge Dispute Solutions LLC, Newtown Square. He was a litigator for 27 years before becoming a full-time neutral.

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.

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Resolution on Mediation & the Unauthorized Practice of Law
Adopted by the ABA Section of Dispute Resolution on Feb. 2, 2002

Resolution written by ABA ADR Committee, edited for this newsletter by Thomas Salzer.

The American Bar Association Section of Dispute Resolution has noted a wide range of views expressed by scholars, mediators, and regulators concerning the question of whether mediation constitutes the practice of law. The section believes that:

1. Such statutes and regulations should be interpreted and applied to permit all individuals, regardless of whether they are lawyers, to serve as mediators.

2. Mediation is a process in which an impartial individual assists but does not represent the parties in reaching a voluntary settlement. Thus, such assistance does not constitute the practice of law.

3. In disputes where the parties’ legal rights or obligations are at issue, the mediator’s discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

4. When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

Comments

1. Mediation and the practice of law

There is a growing consensus in the ethical opinions addressing this issue that mediation is not the practice of law. See, e.g., Maine Bar Rule 3.4(h)(4) (The role of mediator does not create a lawyer-client relationship with any of the parties and does not constitute representation of them.); Kentucky Bar Association Ethics Opinion 377 (1995) (Mediation is not the practice of law.); Indiana Ethics Opinion 5 (1992) (same); Washington State Bar Association, Committee to Define the Practice of Law, Final Report (July 1999), adopted by Washington State Bar Association Board of Governors, September 1999 (same). But see New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 676 (1994) (holding that when a lawyer serves as a third party neutral, he or she “is acting as a lawyer”).

2. Guidelines on legal advice

The Virginia Guidelines on Mediation and the Unauthorized Practice of Law, drafted by the Department of Dispute Resolution Services of the Supreme Court of Virginia, and the North Carolina Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law, adopted by the North Carolina Bar in 1999, articulate a UPL standard for mediators that differs from the standard articulated in this resolution. According to those guidelines, a mediator may provide the parties with legal information but may not give legal advice. The guidelines define legal advice as applying the law to the facts of the case in such a way as to (a) predict the outcome of the case or an issue in the case, or (b) recommend a course of action based on the mediator’s analysis. The section believes that adoption of the Virginia and North Carolina standards in other jurisdictions would be harmful to the growth and development of mediation.

Even though mediators who engage in these discussions do sometimes aid the parties by discussing possible outcomes of the dispute if a settlement is not reached and providing evaluative feedback about the parties’ positions, this conduct is not the practice of law because the parties have no reasonable basis for believing that the mediator will provide advice solely on behalf of any individual party. This is the important distinction between the mediator’s role and the role of an attorney. Parties expect their attorney to represent solely their interests and to provide advice and counsel only for them. On the other hand, a mediator is a neutral, with no duty of loyalty to the individual parties. (Thus, for example, when a judge conducts a settlement conference, acting in a manner analogous to that of a mediator and providing evaluation to the parties about their case, no one suggests that the judge is practicing law.)

3. Discussion of legal issues

This resolution seeks to avoid the problem of a mediator determining, in the midst of a discussion of rele-
vantage legal issues, which particular phrasings would constitute legal advice and which would not. In their article, “A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law,” (6 Dispute Resolution Magazine 20 (Winter 2000)), authors David A. Hoffman and Natasha A. Affolder illustrate this problem across a broader mediation context, setting out numerous alternative ways a mediator might phrase a point. They note that there would likely be very little professional consensus about which phrasings would constitute the practice of law and which would not. Even if mediators could agree as to where the line would be drawn among suggested phrasings, the intended meaning and impact of any particular statement might vary with the context and how the statement was delivered.

4. Settlement agreements

The Virginia and North Carolina Guidelines approach to the drafting of settlement agreements by a mediator is similar to the approach outlined in this resolution. See “Guidelines on Mediation and the Unauthorized Practice of Law,” Department of Dispute Resolution Services of the Supreme Court of Virginia, at 27-28 (Mediators who prepare written agreements for disputing parties should strive to use the parties’ own words whenever possible and in all cases should write agreements in a manner that comports with the wishes of the disputants. Unless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.

Ethics opinions in some states have approved the drafting of formal settlement agreements by mediators who are lawyers, even where the mediator incorporates language that goes beyond the words specified by the parties, provided that the mediator has encouraged the parties to seek independent legal advice. See, e.g., Massachusetts Bar Association Opinion 85-3 (Attorney acting as mediator may draft a marital settlement agreement, but must advise the parties of the advantages of having independent legal counsel review any such agreement, and must obtain the informed consent of the parties to such joint representation.).

5. Resources

A number of articles addressing the question of whether mediation is the practice of law have been published in recent years. In addition to the articles cited above, see generally, Symposium, “Is Mediation the Practice of Law?,” Forum, Number 33 (NIDR, June 1997); Carrie Menkel-Meadow, “Is Mediation the Practice of Law?,” Alternatives, May 1996, at 60; Bruce E. Meyerson, “Mediation Should Not Be Considered the Practice of Law?,” 18 Alternatives 122-123 (CPR Institute for Dispute Resolution, June 1996); Andrew S. Morrison, “Is Divorce Mediation the Practice of Law?,” A Matter of Perspective, 75 California Law Review 1093 (1987).

California’s New Ethics Rules

By Thomas Salzer

There is a concern that arbitrators who preside over arbitrations involving the same party(s) may cause that party to have an advantage, although the exact advantage is nebulous. Companies that have contracts with arbitration clauses should be aware of California’s new ethics and disclosure rules, which are in response to legislation that took effect July 1, 2002. The legislation was prompted by reports that arbitrators and provider organizations were seen as injecting a bias by providing ADR services to certain parties over and over. The concern was that these repeat users of specific arbitrators may have had an advantage in knowing more about proposed arbitrators than the other side.

Users of the arbitration process should note that the rules apply to arbitrations conducted in California and also in cases in which one of the parties is a consumer who resides in California. Companies and their outside counsel especially need to be aware of the disclosure requirements of proposed Standard 7. Among other things, a disclosure must be made to all of the parties before the arbitration can proceed, providing the other parties with a listing of the other matters handled by a proposed arbitrator over a five-year period and also a listing of these proceedings’ participating lawyers (including, in specified situations, all attorneys in the law firms). The disclosures must also show the outcome in each prior arbitration.

The drafts were subject to public hearings and numerous written comments. The proposed standards and commentary are at www.courtinfo.ca.gov/invitationstocomment/documents/sp02-02.pdf.
Does It Matter That If It’s Tuesday, We Must Be In Belgium?

By Thomas Salzer

The following anecdotal excerpts are from an article by James Peterson and Steve Balmer in the June 2002 “ACCA Docket.” The purpose of these stories is to show how intangible factors are inherent in all dispute resolution processes and present a facet of ADR that simply cannot be learned in law school or fully appreciated after reading a hornbook. The exact settings and personalities will likely never be duplicated as they occurred in these anecdotes but there are some subtle issues illustrated.

Success in ADR often depends on understanding and managing different expectations.

In the U.S., if an expert and a judge both attended Yale and broke out in the “Whippen Poof” song, or both were Aggies from Texas A&M and gave the hook’em horns sign, we’d expect that when the process got down to serious, substantive decisions, everyone would be professionals and would leave these common events to history. The authors of the ACCA article, Peterson and Balmer, found that it was highly significant when a judge in Geneva found out that the criminal law expert before him was a graduate of the same school that the judge attended. Peterson and Balmer go on to recognize that this aspect of personalities in Geneva is a function of geography and is a generalization. They then go on to say that this generality does not hold for all of Europe and they speculate that such favoritism would never occur in Frankfurt.

Failure to appreciate Middle-eastern expectations very nearly upset the resolution of a $50 million disagreement involving an American company and its Saudi-based minority shareholder group. Going into face-to-face meetings, the U.S. firm had optimistic expectations as the opposition had signaled a willingness to talk, and moreover, had even offered to act as hosts at an upscale hotel on the French Riviera. All parties arrived at the conference site with a full team of substantive involvement with the strategy and handling of central issues and often see Americans as over-delegating such authority to their lawyers.

For instance, a litigant in Zurich who accepts a court call to confer on a settlement has signaled more than a slight willingness to reach an agreement. Consequently, if you do not want to enter into a settlement, you need to graciously decline the invitation by stating, for instance, the facts are not sufficiently developed at the time of the invitation.

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Relief came from the American CEO who interrupted his own counsel to declare a mid-morning break and invited the patriarch of the Saudi group for a stroll through the hotel gardens. An hour later, they returned to announce a handshake resolution to the entire matter and to charge the lawyers with the task of reducing the handshake to a written document while the two newly-reconciled principals went off to plan their evening dinner together. Back at home, the offending American lawyer would have been acting by the book, but in foreign territory and lacking appreciation of the more complex multicultural environment, he had arrived at the brink of a misguided disaster.

At home, the offending American lawyer would have been acting by the book, but in foreign territory and lacking appreciation of the more complex multi-cultural environment, he had arrived at the brink of a misguided disaster.

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Does It Matter That If It’s Tuesday, We Must Be In Belgium?

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In Belgium?

Local issues of reputation and community standing are among the most subtle to define and evaluate. It takes real patience and outreach to read the risks and construct an optimal strategy. For example, a French client had a subsidiary in equatorial Africa that found itself in a dispute with a local competing business. The French company was seen as the intruding group and its subsidiary had an undisputed uphill battle just because it had a huge parent with a foreign heritage, with the usual assumption that the foreign parent had deep pockets. The African locale of the dispute, however, had a very high regard for rules and regulations, and the subsidiary with the French connection shifted the attention away from its foreign taint by exploiting this sensitivity to rules when it was discovered that the opposition was operating without a critical license.

Likewise, in Eastern Europe there was a business involved in a large privatization. For reasons having to do with baroque local politics, the deal went south, and fees went unpaid. The business’s local management, supported by counsel, insisted that litigation be filed against the government agency to send a signal. The action was channeled into arbitration and then languished in inactivity, maybe because one party was a government bureau. However from a business perspective, the government division did not ignore the dispute, it retaliated. The government agency shut down a source of funding for a whole range of other projects, severely constraining this business’s operations in the Eastern European locale. Therefore, awareness to cultural differences in alternative dispute resolution settings may be useful.

ADR News from the Dickinson School of Law of the Pennsylvania State University

by Alex Miller

The Dickinson School of Law of the Pennsylvania State University established the Alternative Dispute Resolution Society in the 2000-01 academic year. The goal was to educate the law school community on the many alternatives to litigation and to serve as a catalyst for learning more about the importance of this growing practice area. Members discuss ADR practice, work with faculty to host ADR events and learn more about new and interesting topics in the ADR field.

We developed several programs and initiatives for our members, including hosting speakers, offering mediation training, volunteer mediation services, ADR simulations at meetings and developing our newsletter, Beyond Litigation.

This academic year, the ADR Society, in conjunction with Dickinson’s Center for Dispute Resolution, hosted two speakers: Jeffrey Senger, from the U.S. Department of Justice, who discussed current ADR issues in the DOJ, and Justina Wasikec, from the Pennsylvania Office of General Counsel, who addressed current ADR issues in state government.

In addition, we are developing a program at local middle and high schools where we would train students to be peer mediators. Finally, the third volume of Beyond Litigation is currently in production.

The student-run ADR Society is a manifestation of interest in ADR generated by the school’s Center for Dispute Resolution (CDR), established in late 2000. During its first year, the CDR engaged in a number of projects. In the spring of 2001, the faculty adopted a program of study through which students could obtain a certificate in Dispute Resolution and Advocacy. In January 2002, the CDR sponsored the first annual Dispute Resolution Symposium, “Resolving Disputes Arising Out of the Changing Face of Agriculture: Challenges Presented by Law, Science and Public Perceptions.” The symposium sponsored nationally prominent speakers in the fields of dispute resolution, agriculture and environmental protection, as well as academics, officials from local, state and federal government agencies, farmers, environmentalists and community activists from a wide geographic area, and was very well-received. The symposium papers were published by the Penn State Environmental Law Review in its summer 2002 issue.

The following is a list of recent faculty publications, additions to our faculty and events:

• Publication of professor Robert M. Ackerman’s article, “Disputing Together: Conflict Resolution and Communitarianism,” in a forthcoming issue of Ohio State Journal on Dispute Resolution, Vol. 18, (2002);

• Publication of professor Nancy A. Welsh’s article in Missouri Journal of Dispute Resolution (2002);

• Second annual Dispute Resolution Symposium, working title “Dispute Resolution and Capitulation to the Routine: Is There a Way Out?,” to be held on the Dickinson campus, April 10-12, 2003;

• Addition to our faculty of professor Thomas Carbonneau, internationally recognized expert on arbitration, who joins our new dean, Phillip McConaghay, expert on international arbitration.

Mr. Miller is a student at the Dickinson School of Law of the Pennsylvania State University.
Editor’s Note: The following is a report on the committee’s meeting on Nov. 21, 2002, as recorded on that day by PBA Committee Liaison Louann Bell.

Lawyer Dispute Resolution Program Program Administrator Graham McDonald summarized the cases received and worked on over the past year. There are still two outstanding cases with $1,000 each in their escrow accounts. Graham will call the arbitrators to determine the status of each. There is one case that took a long time to get to arbitration, as the court order was not clear as to what was to be arbitrated. A panel of three arbitrators has now been scheduled for that case. In addition, there is a closed case where one party has not made the final payment for the arbitrator. Discussion then ensued as to the pros and cons of expanding the list of arbitrators and mediators, possibility without going through another training session. It was decided to have a subcommittee look into this issue.

It was reported that Ray Pepe, Peter Pokorny and Bob Ackerman met with Steve McNett in an effort to try to get the ball moving in the legislature’s adoption of the Uniform Arbitration Act. Hopefully it will be considered the beginning of the next legislative session. At this point, no obstacles have been spotted. It was noted that Gov. Schweiker is looking to introduce the Uniform Mediation Act (UMA) with the Revised Uniform Arbitration Act, but it is expected that he will pass it on to the next administration. The UMA will be viewed in a state-by-state specific way.

Herb Nurick advised that the Unauthorized Practice of Law (UPL) subcommittee met on May 8 with the co-chairs of the UPL Committee. At that point, the UPL Committee was to meet and draft a list of their concerns for submission to the ADR UPL subcommittee. To date, nothing has been received. Louann Bell reported that the UPL Committee has extended an invitation to Herb Nurick to attend their Jan. 8 meeting and make a presentation. However, it is not clear what the presentation is to be on. Herb will be in touch with Bill Hoffmeyer to discuss that. A suggestion was made to have the Legal Ethics Committee author an opinion on the subject of mediation and the unauthorized practice of law. After some discussion, it was decided to not take that step right now but continue to try and work directly with the UPL Committee.

Judge Klein stated that a major obstacle in trying to establish a Superior Court mediation program is the need for someone to see the cases early enough to determine which ones could be mediated. Judge Klein is seeking input from other appellate courts as to what they have done in this regard. He will talk to Joseph Torregrossa, manager/chief mediation program of the Third Circuit. A major problem is that the public and their lawyers are unaware of ADR and the types of processes that exist. It was suggested that the PBA brochures on ADR be sent out to members again.

The legislative report included the notice that an executive order integrating mediation into state government became effective on Feb. 14, 2002.

Committee Co-chair Kathleen Daerr-Bannon reported that the American Bar Association (ABA) is looking for local advertising and marketing co-sponsorships of its “Maximize Your Mediation” Workshop. Local mediators will be given the opportunity to be a part of this program. The ABA will provide the finances and a keynote speaker and will authorize eight CLE credits. The ADR Committee of the Philadelphia Bar Association has already voted to co-sponsor the program. Discussion ensued as to what part the Pennsylvania Bar Institute (PBI) would play in such programs. Dick McCoy advised that PBI has worked with ABA sections on other programs so he thought something could be worked out.

Ann Begler advised that focus group meetings with the Pa. Council of Mediators were held in June and September. Jurisdictions that succeed with ADR programs have the cooperation of the Supreme Court and the legislature. A meeting was set for June 6, 2003, as part of PBA Committee/Section Day in Harrisburg.

Committee/Section Day Report

Upcoming Meetings

Wednesday, April 23
2:30 p.m. - 4 p.m. (meeting)
4 p.m. - 5 p.m. (reception)

and

Thursday, April 24
9:30 a.m. - 11:30 a.m.
“ADR in the Workplace” CLE
PBA Annual Meeting,
Wyndham Philadelphia at
Franklin Plaza

Friday, June 6
PBA Committee/Section Day
Holiday Inn, East
Harrisburg

See you there!
Preparation: The Advocate’s Key to Maximizing Success at Mediation — Part 1 of 2

By Mark Welge

Long before the advocate enters the conference room to mediate a case for his or her client, preparation is the key to a successful result. Because most cases settle before trial, the decision to mediate may well result in the client’s only “day in court.” In other words, the day with the mediator may be the only opportunity for the client to get what he or she truly needs. Preparation for that day should be as thorough and thoughtful as preparation for trial. This two-part article is a checklist of the things advocates should do before the mediation ever begins.

What Does the Client Want?

The first step for the advocate is to consult with the client to find out what the client wants — mediation or litigation, facilitated resolution or a trial and verdict. It might just be that the client does not want to go to trial. The client surely wants legal redress, but may not be prepared to spend the time, money and emotional cost necessary to see the matter through a long discovery process, followed by an expensive trial. Another concern may be that the client is focusing on preserving an ongoing business or personal relationship, which could be damaged by litigation. If the client is not committed to litigation, and many are not, then the advocate needs to offer an alternative. Mediation may be that option. After all, the last thing the advocate wants to hear is the client saying, on the courthouse steps, “When I hired you, I told you I didn’t want to go to trial!”

Should this Case be Mediated?

Preparation should include a thorough analysis of whether the case is appropriate for mediation. Not all cases are suited to it. Among the questions to be answered are: Do the parties have an ongoing relationship they wish to save? Does the client want prompt, cost-effective resolution? Will the litigation cost more than can be realistically recovered or paid in an early settlement? Is there a need for confidentiality? Are there multiple parties and/or complex issues that drive up litigation time and cost? Is there an alternative to addressing them in a way that is fair and efficient? If these questions are answered affirmatively, then mediation should be seriously considered.

On the other hand, if constitutional issues are involved, injunctive relief or a restraining order is necessary, or the objective is to punish the other side, then litigation is more likely the appropriate option. If a verdict by a judge or jury, or an order of court, or judicial precedent is absolutely needed, then the case should not be mediated. The vast majority of cases, however, are likely candidates for mediation.

Which Issues Should be Mediated?

Part of the flexibility and creativity of the mediation process is the fact that not all issues need to be brought to the table for judicial resolution. Disputes can be partially resolved by mediating those issues having the best chance for success. Mediation of key issues can result in resolution of the entire dispute. For example, a particular liability issue may be standing in the way of settlement. Successful mediation of that issue may compel the parties to close out the rest of the case.

Mediation of discrete issues can also be helpful to resolving complex, multi-party disputes. Suppose the defendants want to make a collective offer of settlement to the plaintiff, but are unable to do so because of indemnity and contribution claims that prevent them from allocating their respective shares. Mediation of those claims by the defendants only (plaintiff need not be at the table) can open the way for an offer to be made. Complex construction and environmental matters are particularly suitable to this kind of mediation. Therefore, the advocate can select all, some or just one issue to mediate, thereby resulting in a complete settlement, or at least in a narrowing of issues so that the parties can focus on what is still in conflict. Mediation of key issues can streamline the litigation process and save the client time and money.

How Does the Advocate Persuade the Other Side to Mediate?

How does the litigation warrior persuade the other side to mediate without sounding like he or she has a weak case? Pragmatic, common sense reasons work best. Mediation is faster and less expensive than litigation. It is party-controlled, flexible, simple and expedient. There is small downside risk. If the mediation fails, the parties can always go the litigation route, but with the added advantage of knowing

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their own and their opponents’ cases far better as a result of the facilitated negotiation process. The parties can even double track — litigate and mediate at the same time so there are no delays in getting the case to trial if the mediation fails. These are all factors that should appeal to clients and their counsel. Moreover, these reasons have nothing to do with the relative merits of the parties’ respective cases. They are not signs of weakness. Moreover, if the advocate has a strong case, all the more reason to display that strength in a mediation setting where the other side’s decision-maker can be directly addressed and persuaded.

Selection of the Client Representative

One of the most important jobs in preparing for mediation is selection of the client representative. In small cases, that job will be relatively simple. There may be just one person to select. In more complex cases, however, there may be several people who are appropriate.

First, the selection should not be made on the basis of job title alone. The representative should be selected on the basis of that person’s ability to make a meaningful contribution to the mediation process. Second, there are three phases of mediation during which the client representative can make a contribution; the preparation phase, openings and caucuses, and decision making.

During the preparation phase, the advocate wants the representative to be an information provider and give the advocate the facts on which to make his or her presentation, strategize and plan. That information function should continue throughout the mediation. The advocate should want a representative there during openings and the caucuses. In fact, the client should be given a role or part in the opening. Let the client tell at least part of the story to the other side. Last, the advocate needs a decision-maker, someone who ultimately decides on settlement terms.

If more than one client representative is involved: make sure the team is coordinated and in communication with each other; make sure the advocate is in sync with the client representative, particularly the one attending the mediation, and that each knows his or her role. If the client is a business entity, bring someone who best reflects who the company is, and one who can tell the company’s story and accurately report back what the other side is saying.

Selection of the Mediator

The most important job in planning for mediation is selection of the right mediator. Before choosing one, however, the advocate must know what the mediator does at mediation.

The Mediator’s Role

The mediator’s role is to serve as the facilitator of the negotiation process. The mediator accomplishes this by motivating the parties to conduct their settlement efforts in good faith and by promoting the participation of all the parties in the process. The mediator ensures that all of the parties have the capacity to negotiate a settlement and will seek a balance of power among them. An important part of the mediator’s role is to create a candid atmosphere in which the parties feel comfortable disclosing the strengths and weaknesses of their cases. These frank disclosures are made in the caucus room where the mediator assures confidentiality. The mediator maintains a level of tension during the negotiations that drives the parties toward closure, and directs the discussions in such a way as to move the parties through the negotiation process to resolution.

The mediator fulfills this role by maintaining a measure of control over the proceedings. He or she sets time limits and deadlines, uses the caucuses to structure the negotiations, sets the agenda, referees disputes and acts as a communication conduit between and among the parties.

Traits of the Successful Mediator

In order to maximize the chances for success at mediation, one must select a competent, experienced mediator whose style of facilitation is appropriate to the client and the dispute at hand.

In no particular order of importance, the most successful mediators possess the following traits: Patience. The negotiation process, known as “the dance,” cannot be rushed or short-circuited. Good mediators know that difficult negotiations take time and that there will be impasses along the way. A competent mediator will not “throw in the towel” when the parties dig in their heels at the bargaining table, but will persevere and be patient enough to keep the parties talking. Helpfulness. The good mediator helps the parties to identify issues and see the weaknesses in their respective positions. In doing so, the mediator acts as an “agent of reality” to help the parties bargain more realistically from interests rather than litigation-based positions. Integrity and trustworthiness. The parties must trust and believe in the mediator’s neutrality. Without it, mediation fails. Intelligence. Complex disputes and negotiations require thoughtful and creative facilitation. Bright mediators are able to “think outside the box” and possess the ability to see through to the heart of a conflict while brushing aside the obfuscation of the parties’ positional bargaining. Experience. It helps, but what kind does the advocate want? Is experience sought in the
Preparation: The Advocate’s Key to Maximizing Success at Mediation — Part 1 of 2

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subject matter of the dispute or in the art of facilitation? Both is best, but an experienced facilitator can learn subject matter expertise during the mediation (or in preparing for it) because he or she is a quick study.

The best mediators are empathetic and scrupulously fair. They are savvy negotiators in their own right. They are good listeners. The really good mediators are persuasive people with strong personalities.

Mediation Style

Mediation style is just as important to the mediation process as competency and experience. The advocate must consider whether to engage a mediator who is evaluative, facilitative and/or transformative. Some mediators prefer one style over another. Other mediators use more than one approach, depending on the situation. Evaluative mediators are more “in your face” and express their opinions more readily on issues, positions and case valuation. Facilitative mediators are more subtle, but no less effective during the bargaining process. Transformative mediation is frequently used in employment disputes, but is also taking hold in commercial disputes as well. The advocate needs to question the prospective mediator about his or her mediation style.

By Harris Ominsky

Years ago, I settled the split-up of a small real estate empire by a coin toss. Yes, a coin toss! No appraisers, no mediators, no depositions, no litigation — no big fees. I did it on just a call of “heads” or “tails.” I could have done it by drawing straws, but straws were not easy to come by on the eleventh floor of Four Penn Center.

You won’t find this in the literature as one of the recommended methods of Alternative Dispute Resolution, but take my word for it, it can work. However, experts pitch more traditional methods to resolve disputes without litigation, principally arbitration and mediation.

The problem that some feuding parties have with arbitration is that they’re afraid that somebody will undermine them with the “Solomon Solution.” They may each have strong feelings that they are right, and don’t want some third party to simply split the last offers down the middle. They figure that even though Solomon got away with it in the Bible, it doesn’t work in real life. Despite that reservation, those people-of-little-faith are not correct about the way most arbitrators resolve issues. A special study of the American Arbitration Association showed that only 12 percent of arbitrators compromised at 40 – 50 percent of the competing offers. On the other hand, 21 percent completely denied the claim and 33 percent awarded between 80 – 100 percent of the claim.

When someone is requesting a monetary award, such as the amount of damages or a disputed salary, some suggest “baseball arbitration.” It has been described by academics a couple of different ways: (1) each side selects an arbitrator and then those two select a third with each then coming up with an award number, the two closest numbers are averaged and the third one discarded, or more often (2) each side must submit a figure and then the arbitrator must choose one of the figures. One commentator quoted from Article VI.F(5) of the Basic Labor Agreement Between Professional Baseball and the Players’ Association which provides, “...the arbitrator or arbitration panel shall be limited to awarding only one or the other of the two figures submitted.”

Either of these systems will encourage realistic figures and discourage splitting the baby. If you intend to gain leverage by tossing out a completely unrealistic figure, you stand to have your submitted figure completely discarded.


ADR: Baseball Arbitration and Coin Tosses

In the next issue of the newsletter, the author will conclude the review of preparation for mediation with a discussion of mediation agreements, client preparation, and decisions on who should attend mediation and pre-mediation statements.
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.raho@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 Raho, PBA internet coordinator, (800) 932-0311, ext. 2255.