Message from the Chairs

By Andrew P. Goode, Esq., and John W. Nilon, Jr., Esq.

As our Committee continues the business of organizing its subcommittees and looks for fresh initiatives, it becomes increasingly apparent that the most rapidly changing area of Alternative Dispute Resolution practice is the initiation of ADR programs by the various Courts within the Commonwealth of Pennsylvania. In our last newsletter we outlined the establishment by the Pennsylvania Commonwealth Court of a Mediation Program. We are also seeing similar developments in various Common Pleas jurisdictions throughout the state. Closely related to the establishment of court related ADR programs is the issue of the certification of court appointed mediators and arbitrators. Currently in the Commonwealth of Pennsylvania there are no statewide or uniform standards with respect to the certification of dispute resolution professionals. We have established a subcommittee which will work actively to assemble a data base of certification procedures and educational requirements for dispute resolution professionals. This assembled information can be used as a basis to recommend a minimum standard for the certification of mediators and arbitrators.

Our initiative should recognize the certification procedures of private dispute resolution agencies, and also give proper recognition to the dispute resolution experience and education of our committee members.

We are pleased to report that the initiative of our committee urging the adoption by the Commonwealth of Pennsylvania of the UNCITRAL Model Law on Commercial Arbitration has moved forward in the legislative process and has been introduced as House Bill 2438, by Representative Lita Cohen, R-Montgomery. We have been advised that public hearings will be convened to take testimony of interested individuals. Those hearings will take place in the summer months of the year 2000. Any committee member who is interested in testifying in support of this legislation is asked to contact Co-Chair, Jack Nilon.

Our committee should now monitor closely the development of the Uniform Mediation Act as it moves toward adoption. A text of the Uniform Mediation Act will be provided to the committee members at our next meeting. Currently the draft of the Uniform Mediation Act is expected to be forwarded to the Uniform Law Commission and the American Bar Association, Section of Dispute Resolution, for final approval or redrafting guidance in July 2000. If the current draft is approved by the Conference and the Section, it will be forwarded to the ABA House of Delegates for consideration in February 2001. If approved by both organizations, the Uniform Mediation Act will then be forwarded to the individual states for consideration.

John Nilon, a Fellow with the Chartered Arbitrators Institute centered in London, has practiced international ADR in Paris and currently has a very established ADR and commercial law practice in Media, PA outside of Philadelphia. Andrew Goode is an attorney and a senior manager with the Better Business Bureau in Philadelphia and is an instructor and post-graduate student at Temple Law School.
Court Reviewing Arbitration Decisions

By Thomas Salzer, Esq.

When a party to an arbitration wants the decision to be reviewed by a court, the general axiom is that the requesting party must show that either: (1) the arbitrators acted in manifest disregard of the law (inter alia a showing the arbitrator knew the law and intentionally ignored the law) Wilko v. Swan 346 U.S. 427 (1953), Elijer Manufact. v. Kawin Development, 14 F.3d 1250, 1254 citing Mechanical Indus. v. Hughes, 975 F.2d 1253, 1267 (1992); United Paperworkers Int. Union v. Misco, Inc., 484 U.S. 29, 38 (1987), (2) the arbitrators exceeded their powers over authority, (3) the award was irrational, arbitrary or capricious, or (4) the award violated public policy and thereby undermined confidence in arbitration. [ four factors quoted from Tim Huey Corp. v. Global Boiler and Mechanical., 649 N.E.2d 1358, 1361 (1995)]

As this axiom is a distillation of various appellate court decisions and in some aspects by Supreme Court decisions, it is the author’s opinion that there is nothing about this axiom that might be viewed as extremist or divergent from the main body of jurisprudence and the theory of arbitration. It should be noted however that there are some nuances to the axiom. Also, a recent appellate court decision, Coltec Industries v. Elliott Turbocharger and General Electric, 1999 U.S. Dist. Lexis 13475 (E.D. Pa. 1999) now provides a ruling in the third circuit which supports this axiom.

The nuance noted above focuses on the principal that the arbitrator’s decision must emanate from the confines of their authority. This concept phrased by one court as: an award is valid if it “rationally can be derived from the agreement and the submissions of the parties/” has been coupled with a double negative, found invalid “only if the terms of the award are “completely irrational.” [quote from Mutual Fire as quoted in Coltec at page 11. (Mutual Fire, 868 F.2d at 56 [quoting Swift Ind. v. Botany Ind., 466 F.2d 1125, 1131 (3rd Cir. 1972)] ) It is cumbersome that the Swift decision uses the positive direction of an award is valid if “rationally...” and then uses the opposite perspective that the award is invalid if it is completely irrational.”

Ultimately in Coltec, the court found “[I]n short, the arbitrator interpreted the contract in a reasonable manner and in a way that duely regarded the contractual language and terms; that is sufficient for confirmation of the award, given the ‘singularly undemanding’ scope of this court’s review.” Coltec page 20.

The Mutual Fire court criteria appears to be a low hurdle to get over when the court says it “need only find a colorable justification” to confirm the award. Coltec at 20 quoting Quaker Securities v. Mid-Atlantic Securities, 1996 U.S. Dist. Lexis 13475 (E.D. Pa. 1966) (Giles, J.), aff’d mem., 116 F.3d 469 (1997). In spite of this easily attainable but vague criteria for upholding arbitration awards, it is worrisome how this criteria might be warped due to its vagueness into a real barrier. In the instance where an arbitrator’s decision shows he or she got the law wrong in its application but there is no manifest disregard because the arbitrator did not knowingly and intentionally misapply the law, then the award should not be subject to review by a court because of an alternative criteria of “irrationality” or lack of ‘colorable’ justification.

There is a constant tension between the courts and the arbitration system as to which path to resolving dispute is the right one for today’s society as the Supreme Court noted courts’ past refusal to enforce agreements to arbitrate. The Supreme Court suggested these refusals are attributed to jealousy on the part of the courts, an unwillingness to share any power. (Allied-Bruce Terminix, 513 U.S. 265, 130 L. Ed.2d at 762 (1995) quoted from Huey at 1365. It should be a constant concern to arbitrators and courts when they are asked to consider reviewing or ruling on the validity of an arbitration ruling that the review is limited to these four factors and manifest disregard of the law should not be reduced to a misapplication of the law under the cloak of irrationality so that courts are effortess overturning arbitration awards. □

Thomas 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, Salzer is associated with Foster Wheeler Constructors, Inc.
Mediation and Gender

No Bias Against Women. Couples Benefit.

By Joseph G. Skelly, Esq.

QUESTION: Use of mediation in divorce cases has been criticized by some as being biased against women, the contention being that women have less bargaining power than men during the mediation process. Is there any merit to this argument?

ANSWER: No. Not according to a study published in the latest issue of Mediation Quarterly, a publication sponsored by the Academy of Family Mediators.

DISCUSSION: The genesis of the argument appears to be a 1992 Wall Street Journal article headlined “Mediation Seen as Being Biased Against Women” and a 1994 article published in Family Law Quarterly which told of horror stories about women who had been strong-armed by mediators into accepting settlements that left them homeless and impoverished.

The study just published, entitled “To Mediate or Not to Mediate: Financial Outcomes in Mediated Versus Adversarial Divorces,” Mediation Quarterly, 1999 17 (2), 143-152, concludes that mediation is not biased against women, and in some cases, women fare better in mediation than in adversarial cases.

The authors of the research study analyzed a statistically significant sample of mediated and adversarial cases for differences in financial outcomes between the two formats. In all cases, the parties were represented by counsel.

THE FINDINGS:

No differences were found between mediated and adversarial cases:

- in family income received;
- in liabilities retained by women;
- in likelihood of periodic alimony received; or
- in amount of alimony received.

However women in mediated cases obtained:

- a significantly greater percentage of assets;
- periodic alimony for a significantly longer duration; and
- significantly more child support.

ALSO SIGNIFICANT:

- men who mediate were more likely than men using the adversarial process to obtain joint legal and joint physical custody;
- children’s college education was more likely to be included in the final settlement agreement when couples mediated;
- mediated cases had significantly less post judgment disputes and modifications than adversarial cases; and
- the time from complaint to judgment was significantly shorter in mediated cases than in adversarial cases.

CONCLUSIONS:

The authors conclude: “[r]esults of our study suggest that mediation is actually advantageous not only for women but also for couples...”. Even though women received higher amounts in some categories, no conclusions can be drawn that mediation is unfavorable for men in those categories.

Joseph Skelly is an attorney and principal member of the SKELEY DISPUTE RESOLUTION CENTER at 2080 Linglestown Road—Suite 202, Harrisburg, PA 17110 which handles mediation/ADR processes concerning a number of legal areas.

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Hozlock Crosses the Boundary Between Arbitrator Partisanship and Fiduciary Relationship

By Mark A. Welge

Pennsylvania law permits parties to select “friendly” arbitrators so long as they disclose past or present relationships with the selected arbitrator and the selected arbitrator does not have a fiduciary relationship with the appointing party. See, e.g., Donegal Ins. Co. v. Longo, 415 Pa. Super. 628, 610 A.2d 466 (1992).


In Hozlock, an insurance policy provided that in the event the insurer and insured failed to agree on the amount of a fire loss, either could demand an appraisal of the loss. In that event, each could choose a “competent” appraiser. The two appraisers would then choose an umpire. Thereafter the appraisers would separately calculate the loss and, if they failed to agree on the amount, they would submit their appraisals to the umpire. A decision by one of the appraisers and umpire would set the amount of the loss.

When the parties in Hozlock were unable to agree on the amount of a loss, the insured appointed, as its appraiser/arbitrator, a public adjuster with whom the insured had a contingency fee agreement. The adjuster’s fee was based on a percentage of the amount paid on the loss by the insurer. Claiming that the adjuster/appraiser had an interest in the outcome of the appraisal, the insurer petitioned to disqualify him. The trial court denied the petition.

When the parties’ appraisers could not agree on the amount of the loss, an umpire was appointed and agreed with the insured’s appraiser. The insurer then moved to vacate the appraisal. That motion was also denied.

On appeal, the insured argued that the adjuster/appraiser should have been disqualified because of his financial interest in the claim; i.e., bias due to his fee being based on a percentage of the amount eventually recovered by the insured. The Superior Court declared that “appraisal” is analogous to common law arbitration, “for purposes of judicial review.” Boulevard Associates v. Seltzer Partnership, 664 A.2d 983, 987 (Pa. Super. 1995), and framed the issue for decision as follows: [W]hether the mere existence of a contingency fee agreement between a party and his appointed appraiser renders the appraiser per se unfit when the applicable appraisal clause requires only that party-appointed appraisers be “competent.”

The insurer relied on Donegal Ins. Co. v. Longo, 610 A.2d 466 (Pa. Super. 1992), to support its bias argument. In Longo, the insured’s arbitrator was also the insured’s lawyer in an unrelated matter. The court held that an arbitrator is unfit to serve on a panel where there is an attorney/client relationship between the appointing party and his arbitrator. The arbitrator was disqualified not merely because he was partial to the appointing party, but also because he owed it a fiduciary duty of loyalty. Id. at 468-69. This result was reached even though the arbitration clause in Longo did not specify “competent and disinterested arbitrators.”

The Hozlock court distinguished Longo from the instant facts. The adjuster/appraiser’s partiality did not render him incapable of fair judgment. Moreover, he did not owe his appointor “a fiduciary duty of loyalty.” Hozlock defined the fiduciary duty as raising “an inherent conflict between his [the arbitrators’] duty to act in his appointor’s best interests and his duty to render a fair judgment.” Hozlock limited Longo to the situation where the appointor (arbitrator) owes his appointor a duty of loyalty as a result of a separate fiduciary relationship. Hozlock declared that there was no confidential relationship between the appointer and his appointor, unlike the attorney/client relationship in Longo. Moreover, the insurer’s allegations of partiality were based only on the manner in which the fee was to be paid. Accordingly, the trial court’s orders were affirmed.

While one could certainly argue that the adjuster in Hozlock owed the insured a duty of loyalty to maximize appraisal of the loss, both for his own and the insured’s benefit, the Hozlock court approached the issue from a contract drafting perspective. Noting that the insurer could have contracted for neutral appraisers, the insurer chose contract language calling only for “competent” appraisers. The Superior Court found that the words “competent” and “neutral” (or disinterested) have different meanings. An appraiser/arbitrator may be “competent” (capable of rendering a fair judgment) but also partial to one party. Hozlock declared that there is often some partisanship in three-arbitrator arbitrations, such as the one at issue.

(Continued on page 5)
Hozlock Crosses the Boundary (Continued from page 4)

In three-arbitrator panels, the parties frequently each appoint one arbitrator and then the two party-appointed arbitrators select the third or “neutral” arbitrator who acts as chairperson for the panel. See, e.g., Rule 15 of AAA Commercial Arbitration Rules. This selection process is followed because the parties believe that their arbitral selections will each act as an advocate during panel deliberations for the party who chose him or her. These “arbitral advocates” attempt to persuade the neutral, who casts the deciding vote, to rule for one party or the other.

According to Hozlock, because a party-appointed appraiser will have at least some bias in favor of his appointing party, the fact that the appraiser is paid with a contingency fee does not create any greater partiality than one paid on a flat fee basis. Consequently, the court held that in the absence of a contractual provision calling for impartiality, the mere existence of a contingency fee arrangement does not per se render the appraiser unfit. The insurer would have had to prove that the appraiser’s partiality clouded his judgment and caused an unjust result in order to disqualify him. The insurer failed to do that.

Hozlock could be simply read to stand for the proposition that arbitration clauses should be carefully drafted to include a neutrality requirement in order to eliminate biased party-arbitrators. However, Hozlock skates dangerously close to the line over which arbitrator partisanship becomes a “fiduciary relationship” with the appointing party. It is submitted that contingency fee arrangements invariably create a conflict between the arbitrator’s duty to act in the appointor’s best interest and the duty to render a fair judgment. The contingency fee ties the financial fortunes of the arbitrator to the award rendered in favor of the party appointing him. The greater the award, the higher the fee. The appraiser has an implicit (if not explicit) duty to work to maximize the recovery for the appointor. That duty could be exercised at the expense of a fair judgment. In the real world, the contingency fee makes the appraiser’s bias greater than that encountered in the so-called “friendly” appointment. Hozlock fails to appreciate the difference.

Even in the absence of contractual language requiring impartiality, the mere existence of a contingency agreement ought to warrant disqualification. To hold otherwise is to invite a relationship between arbitrator and appointing party that is inappropriate in an arbitration proceeding.

Mark A. Welge is a principal member of Manta & Welge in Philadelphia with a practice concentrating on commercial business and construction disputes on a national basis. Mark has just stepped down as the chairman of the Philadelphia Bar ADR Committee.

PBA Web Site Named ‘Best Legal Site of the Week’

The Pennsylvania Bar Association Web site recently captured Best Legal Site of the Week honors from OurSpot.com, an independent Web site self-billed as “Your Spot for Legal News, Information, Ideas and Resources.” Visitors to the OurSpot site — www.ourspot.com — were informed of the award, with a click on the award logo providing a direct link to the PBA Web site.

If you are still unfamiliar with the PBA site and what it offers, check out the article titled “What’s on the Web” in the March/April 2000 issue of the The Pennsylvania Lawyer magazine or visit the site at www.pabar.org. Have your member ID number handy for access to the Members Only area of the site.
A growing number of PBA committee/section members are keeping on top of the latest news through committee/section listservs.

Are you confused about what a listserv is, or how to subscribe to one? Here are answers to the most commonly asked questions about listservs:

**What is a listserv?**
A listserv is an electronic mailing list that allows subscribers to exchange information with the entire list of subscribers. Joining a listserv is like having a continuous conversation with a group of people, only all comments and responses are sent through e-mail. When you subscribe to a listserv, you are able to e-mail all listserv members via one e-mail address.

**How does it work?**
Any subscriber may post a question or share some information, simply by sending it to the listserv address. All subscribers will then receive the first subscriber’s e-mail, and they may answer the question, or comment on the information by replying to the first subscriber’s e-mail. Any responses will also be received by all the listserv subscribers.

**I’m a PBA member. Can I subscribe to any listserv I want?**
No. Only members of the committee/section can subscribe to the committee/section’s listserv.

**How do I subscribe to my committee/section’s listserv?**
Send an e-mail to the listserv address with “-subscribe” inserted before the “@.” Do not type anything in the subject line or the message body — they should both remain blank. For example, members of the Alternative Dispute Resolution Committee would send an e-mail to Adr-subscribe@list.pabar.org.

For more information, contact PBA Internet Coordinator Traci Klinger at (800) 932-0311 ext. 2255.

**Alternative Dispute Resolution Committee Listserv:** Adr@list.pabar.org.