



ARBITRATION & MEDIATION

A Newsletter of the PBA Alternative Dispute Resolution Committee

ADR UPDATE: 2011 facts and figures, some historical data and some true stories

By John M. Noble

As the years come and go, many of us tend to look back and reflect upon the passing of the most recent calendar year, subjectively closing the book on “what was” — maybe in the hopes of learning from it all — or perhaps just searching for some comfortable closure. Regardless of the individual inspiration, the following is one mediator’s semi-lighthearted year in review. Certainly no cause for alarm — while the stories are all true, the names have been removed to protect the innocent.

BY THE NUMBERS

As I am often asked about the types of cases I see in Alternative Dispute Resolution (ADR), by far, motor vehicle claims dominate the numbers — nearly one-third of the total. This percentage was a little lighter than usual in 2011 where, historically, the number has been closer to 40 percent of the total. Twenty-two percent involved medical malpractice and/or nursing home/assisted living facility claims. While the motor vehicle cases have been mediated for quite some time now, it wasn’t too many years ago when the med-mal claim would not even have been considered for mediation. Times certainly have changed over the past five years as the number of medically-related mediations continued to increase — particularly the nursing home claims.

Regardless of the individual inspiration, the following is one mediator’s semi-lighthearted year in review.

Given the aging population, unless legislated out, there should be no downturn in these claims, and without question, more and more attorneys are venturing into this area of elder care liability.

Continuing, 10 percent of the cases involved premises liability — mostly slip, trip and fall incidents — with 9 percent the mandatory Federal Court mediations and/or Early Neutral Evaluations involving a wide variety of federal claims. Seven percent of the total included uninsured motorist/underinsured motorist (UM/UIM) arbitrations, while 5 percent of the cases

involved product liability claims with another 5 percent including construction-related injuries.

The following cases are typically seen less than five times a year including bad faith, fire loss subrogation/mold/real estate claims, electrical contact injuries, dog bites, recreational vehicle accidents, professional/legal malpractice, Federal Employers Liability Act (FELA) and Employee Retirement Income Security Act (ERISA) claims, labor and employment matters, age/gender discrimination claims and breach of contract. However, 2011 brought even more diverse claims from years past: a 20-year dispute over a fishing stream, a wrongful cemetery burial, two-decades-old coal royalty disputes, a fireworks injury claim, two

Continued on Page 8

Also inside this issue ...

Message from the ADR Committee chair	2
Notice of next meeting	2
Message from the editor	3
Case Summary: <i>Casaccio v. Curtiss</i> — Sanctions for Failure to Appear at Mediation	4
Scenes from PBA Committee/Section Day November 2011	5
Minutes of the ADR Committee Meeting	6
Welcome new committee members	10
Column: Ask the Dispute Resolution Professional	11
PBA ADR Subcommittee News	11-12
Membership nomination form	13
PBA ADR Committee Members in the News	14
Help with using your PBA listserv	15

Message from the ADR Committee chair

By Stephen G. Yusem

Our Revised Uniform Arbitration Act (RUAA) Action Subcommittee, chaired by Hon. Mason Avrigian (Ret.) and vice-chaired by Mike McDowell, has been working behind the scenes. On Jan. 23, 2012, the RUAA passed the Pennsylvania House of Representatives by a vote of 194-0. How's that for RUAA action? Now on to the Pennsylvania Senate. Your personal endorsement to your state senator would be invaluable in moving the Legislature to adopt the RUAA this year.

The 1925 Federal Arbitration Act is bare bones and has never been amended. The Pennsylvania Uniform Arbitration Act (UAA) fails to address many issues which generate petitions to vacate arbitration awards. The RUAA answers many of those questions and enables the UAA to "catch up" with the current sophisticated world of commercial arbitration. For example, the RUAA resolves the confusion over who decides arbitrability and by what criteria, grants immunity to arbitrators from being sued by arbitration parties, requires arbitrators to state in writing the basis for punitive damage awards, and covers the use of electronic documents.

As you presumably know, our next committee meeting will be held simultaneously in Pittsburgh, Harrisburg

and Philadelphia on Tuesday, March 13, at noon. The three locations will connect by conference call. The first item on the agenda will be the question of whether we should change the name of our committee from Alternative Dispute Resolution to Dispute Resolution. There is more to that question than the mere deletion of one word. The ABA DR Section deleted "Alternative" years ago, not only because the word is surplusage but also to counter the perception that ADR processes are second best alternatives rather than co-equal alternatives to litigation. Both Matthew J. Creme Jr. and Thomas G. Wilkinson Jr., as Pennsylvania Bar Association president and president-elect, respectively, have expressed confidence that the Board of Governors would be prepared to approve the change.

At our Nov. 17, 2011, meeting in conjunction with PBA Committee/Section Day in Harrisburg, Alan Trosky, director of PBA Management and Information Systems, reviewed the advantages offered to us by the PBA website at pba.org. The website is available for promotion (recruiting members, recognizing achievement, educating the field), research for both members and non-members, communication by listserv and networking (events, topics, news). The possibilities are endless: archives, photos, external links, articles, news releases, minutes, reports, events,

CLE, legislation, resolutions, and the list goes on.

Our Public Relations Subcommittee chair, Dave Doto, has regretfully resigned owing to his pursuit of a DR master's degree at Pepperdine. The primary focus of the PR Subcommittee this year is to work with Trosky and his staff to optimize the value of the PBA website for our committee. I encourage interested committee members to apply for this leadership role. PR Subcommittee Vice Chair Denise Pekelnicky is ready, willing and able to provide leadership assistance.

Please join us for our March 13 regional meeting.

Best regards,

*ADR Committee
Chair Stephen G.
Yusem is a full-time
mediator and
arbitrator in
Plymouth Meeting.*



Notice of next meeting

The next scheduled meeting of the Alternative Dispute Resolution Committee is Tuesday, March 13, from noon to 3 p.m. The meeting will be held in three sites (Philadelphia, Pittsburgh and Harrisburg) and connected by conference call. A meeting agenda will be distributed in the near future. Lunch will be provided. Please try to be prompt.

The Philadelphia site is the office of Jim Rosenstein (Fineman Kreckstein & Harris PC, 1735

Market St., Suite 600). The Pittsburgh site is the office of Sally Griffith Cimini (Leech Tishman Fuscaldo & Lampl LLC, 525 William Penn Place, 30th Floor). The Harrisburg site is PBA headquarters (100 South St.). The Philadelphia meeting will be chaired by Steve Yusem; the Pittsburgh meeting will be chaired by Sally Griffith Cimini; and the Harrisburg meeting will be chaired by Herb Nurick. ■

Message from the editor

By *Mary Kate Coleman*
Arbitration & Mediation editor

Our subcommittee is pleased to release our first newsletter of 2012. Many thanks to everyone who contributed content or otherwise assisted in its production. We hope you enjoy reading the newsletter!

As we look to the future, we ask that you please consider writing for our next issue. This is your newsletter and we would like to hear from you! During these cold winter months when we are stuck indoors is the perfect time to pen an article for your colleagues to

read. What better way to stay in touch than to drop us a line about your recent activities or accomplishments for the "Members in the News" column? If you have read an Alternative Dispute Resolution-related article that you have enjoyed and would like to share with others, please send it to me, and I will attempt to obtain permission to re-print it in our newsletter.

The deadline for submissions for the next newsletter is June 1. In addition to the above items, we would appreciate receiving book reviews, case summaries, subcommittee reports, photos, notices of upcoming events,

etc. You may send your newsletter items to me at mkcoleman@rhwrlaw.com.

Looking forward to seeing (or hearing) you at the March meeting! ■

Mary Kate Coleman is a civil litigation attorney, mediator and arbitrator with Riley, Hewitt, Witte & Romano P.C. in Pittsburgh.



PBA Alternative Dispute Resolution Committee

CHAIR:

Stephen G. Yusem

600 W. Germantown Pike, Suite 400
Plymouth Meeting, Pa. 19462
syusem@syusem.com
610-940-1750

VICE CHAIR:

James A. Rosenstein

Fineman Kreckstein & Harris P.C.
1735 Market St., Suite 600
Philadelphia, Pa. 19103
rosenstein@finemanlawfirm.com
215-893-8709

SECRETARY:

Lindsey Bierzonski

232 Glenn Road
Camp Hill, Pa. 17011
lbierz@live.com

NEWSLETTER EDITOR:

Mary Kate Coleman

Riley Hewitt Witte & Romano P.C.
650 Washington Road, Suite 300
Pittsburgh, Pa. 15228-2702
MKColeman@rhwrlaw.com
412-341-9300

NEWSLETTER SUBCOMMITTEE

MEMBERS:

Clymer D. Bardsley

Good Shepherd Mediation Program
5356 Chew Ave.
Philadelphia, Pa. 19138-2804
cbardsley@phillymediators.org
215-843-5413, ext. 32

Stephen A. Hall

Burns White LLC
Four Northshore Center
106 Isabella St.
Pittsburgh, Pa. 15212-5804
sahall@burnswhite.com

Charles W. Kenrick

Law Offices of Charles W. Kenrick
U. S. Steel Tower
600 Grant St., Suite 660
Pittsburgh, Pa. 15219
ck@kenricklaw.com
412-281-3417

Denise Pekelnicky

Hon. Michael E. Dunlavey
Erie County Court of Common Pleas
Erie County Courthouse
140 W. Sixth St.
Erie, Pa. 16501
dpekelnicky@eriecountygov.org
814-451-6371

John E. Toczydlowski

Strachan & Hatzell
1650 Market St., Suite 4100
Philadelphia, Pa. 19103
john.toczydlowski@chartisinsurance.com

PBA NEWSLETTER LIAISON:

Amy Kenn

800-932-0311, ext. 2217
amy.kenn@pabar.org

PBA STAFF LIAISON:

Louann Bell

800-932-0311, ext. 2276
louann.bell@pabar.org

Case Summary: *Casaccio v. Curtiss* – Sanctions for Failure to Appear at Mediation

By Charles W. Kenrick

Casaccio and National Indemnity Co. v. Curtiss, et al., No. 101527, Supreme Court of Appeals of West Virginia (Nov. 9, 2011).

The West Virginia Supreme Court recently held that a West Virginia trial judge had the ability to impose sanctions upon an insurance carrier when the carrier failed, without good cause, to appear at court-ordered mediation through the presence of a representative with full decision-making discretion to examine and resolve issues and make decisions, but lacked a sufficient basis to impose sanctions under the facts presented in this case.

The underlying case involved a wrongful death action arising from a trucking accident. The initial liability carrier, Converium Insurance, entered into an agreement to sell to a second carrier, National Indemnity, before the first court-ordered mediation date. Under the agreement to sell, Converium's settlement authority was expressly limited to amounts under \$500,000. A Converium insurance representative was present, but no representative of National Indemnity appeared at the first mediation.

Neither plaintiffs' counsel nor the mediator was aware of the \$500,000 limitation restricting the settlement authority of the Converium representative who attended the first mediation session until the session concluded. Notwithstanding the express limitation on authority, the Converium representative made an unqualified offer to settle of \$700,000 that was rejected by plaintiffs. Ultimately, the Converium representative agreed to recommend and seek approval for a settlement of \$900,000, which sum was acceptable to plaintiffs to settle all claims.

The Converium representative then revealed for the first time that the proposed settlement could not be finalized without approval from National

Indemnity. Following the first mediation session, National Indemnity refused to agree to a \$900,000 settlement, and, acting through its vice president and legal counsel, Joseph Casaccio, reduced its settlement offer to \$350,000. At that point the trial court ordered the parties to a further mediation session and instructed the mediator to inform the parties that certain individuals were to attend the second mediation, including Casaccio as designated representative of National Indemnity.

Casaccio did not appear at the second mediation, claiming he missed a connecting flight, but did participate by phone. He also participated in person at a third mediation session in the trial court's chambers, at which time the case settled for \$850,000. During a subsequent proceeding at which the trial court ratified the settlement and proposed distribution of proceeds, the judge informed the parties, *sua sponte*, that a later hearing would be scheduled to determine whether the conduct of Casaccio or National Indemnity warranted sanctions under a court rule or the inherent powers of the court. The trial judge received evidence and heard oral argument on the issue of sanctions at a subsequent hearing and issued orders as described below.

In his first order, the judge awarded plaintiffs \$50,000, representing the difference between the \$900,000 to which they initially agreed and the \$850,000 ultimately accepted, \$25,000 as compensatory damages, \$150,000 as punitive damages, and attorney's fees from the date of the first court-ordered mediation through the date of the entry of the order imposing sanctions. There was no indication how the compensatory and punitive damages were determined by the court. Plaintiffs were directed to submit their claim for attorney's fees and ultimately submitted a claim for over \$115,000 in fees.

Casaccio and National Indemnity opposed the fee request and requested

reconsideration of the initial sanctions order. After substantial delay, the court entered an award of attorney's fees and expenses in the sum of approximately \$49,000. Casaccio and National Indemnity then filed a Motion for Clarification of Rulings and Entry of Final Order, which was heard but never ruled upon. Instead, the trial court entered an order denying the objections of Casaccio and National Indemnity, and Casaccio and National Indemnity appealed.

The West Virginia Supreme Court reversed under an abuse of discretion standard, holding that while the lower court had authority to impose sanctions against the successor insurance company, the trial court lacked a sufficient basis to impose sanctions. As to the first issue, the West Virginia Supreme Court ruled that for purposes of West Virginia Trial Court Rule 25.10, the insurance carrier for an insured party is considered a party to court-ordered mediation and may be sanctioned by the lower court for an unauthorized failure to participate in a mediation through the presence of a representative with full decision-making discretion to examine and resolve issues and make decisions in connection with the mediation.

In determining whether a factual basis existed to impose sanctions, the West Virginia Supreme Court reviewed three grounds: (1) National Indemnity's failure to attend the first mediation session; (2) National Indemnity's direction to Converium to offer plaintiffs \$350,000 to settle after an earlier offer of \$700,000 had been rejected; and (3) National Indemnity's failure to attend the second mediation session.

The West Virginia Supreme Court excused National Indemnity as to ground one because uncontroverted evidence indicated the carrier received no notice of the mediation session. The West Virginia Supreme Court further excused National Indemnity as to

Continued on Page 7



**Scenes from PBA
Committee/Section Day
on Nov. 17, 2011,
in Harrisburg, Pa.**



Minutes of the ADR Committee Meeting

Nov. 17, 2011, Committee/Section Day, Harrisburg, Pa.

By Lindsey Bierzonski,
ADR Committee Secretary

The meeting was called to order at 1:30 p.m. The chair thanked everyone who came to Harrisburg for Committee/Section Day.

Pennsylvania Bar Association President-elect Thomas G. Wilkinson Jr. suggested that the Alternative Dispute Resolution (ADR) Committee consider converting from a committee to a section. He announced that the PBA approved a new committee for collaborative law practitioners. The Collaborative Law Committee has approximately 60 members. The president-elect also suggested that the ADR Committee recruit younger attorneys, and he encouraged the committee to work with the Young Lawyers Division.

Sandy Ballard, of Penn Legal Services, asked if our committee would provide pro bono mediation services to low-income and disadvantaged clients. To qualify for free mediation services, at least one party must be disadvantaged as determined by a county or other legal services group. Concerns were raised regarding conflicts with community mediation centers and issues involving insurance coverage were discussed. Ballard will interface with committee member Cheryl Cutrona to discuss these issues.

PBA Management Information Systems Director Alan Trosky discussed the ADR Web page. He demonstrated sample Web pages of other committees and provided a list of important items that should be on every committee's page, including a listserv to communicate with members and an "About" page with a list of subcommittees and how to join. He discussed how certain portions of the website could be restricted to members-only or available for general public access. The information on the Web page is uploaded by PBA's webmaster and must be provided by the committee to Louann Bell to

pass along. Redesigning our Web page will be handled primarily by our Public Relations Subcommittee.

John Gullare proposed the creation of an environmental and land use subcommittee. It was noted that the Environmental Law Section had rejected the idea of creating an ADR subcommittee; however, having such a subcommittee with an ADR focus on environmental issues would be beneficial because few people think of ADR for such issues. Most environmental issues involve strict liability standards, so the conflict involves how clean-up costs will be distributed, an area where ADR can greatly benefit parties. A subcommittee could focus on raising awareness about the availability of ADR and its benefits, including how, even if the ADR process seems to fail, it nevertheless lays the groundwork for future resolution. Member Edward Pereles made a motion to table further discussion regarding an environmental and land use subcommittee and other substantive subcommittees, and Melvin Shralow seconded the motion. The motion passed without dissent.

Steven Loux, PBA legislative counsel, discussed various recent legislative concerns including RUAA, joint and several liability, venue rules and apology legislation. The Legislative Subcommittee discussed U.S. Senate Bill 987 (Arbitration Fairness Act) and PA Senate Bill 999 which would amend the Medical Care Availability and Reduction of Error Act, commonly known as the "apology bill."

The Conflict Resolution Day Subcommittee is planning an event for October 2012. Conflict Resolution Day will be held next year on October 18.

The Membership Subcommittee seeks additional ADR Committee members. It plans to encourage members of the Young Lawyers Division and the Minority Bar Committee to join. Future newsletters will include an easier way for new members to join the ADR Committee.

The Liaison Subcommittee is calling for ADR Committee members to serve as liaisons between the committee and other PBA sections and committees. A sign-up sheet was circulated for members to choose the PBA committees and sections for which they would like to serve as liaison.

The CLE Subcommittee is attempting to lessen the financial burden of ADR-related CLE events. Chair Ross Schmucki discussed the recent survey results of the CLE Subcommittee. Respondents strongly preferred live events over webinars, despite the extra travel time and cost. Therefore, "simulcasts" were suggested, providing one live event simulcast to multiple locations so that attorneys can network with other attorneys and be able to ask questions of the speakers. Concerns included the Pennsylvania Bar Institute's technology access, which the PBI has long-term plans to update. A suggestion was made to encourage more ADR-related programs be included with substantive law CLE events.

The Sir Francis Bacon ADR Award Subcommittee is seeking nominees for the next award. Recommendations must be made by Feb. 3, 2012.

The Lawyer Dispute Resolution Program Subcommittee is reviewing its entire program and will submit a report by the end of the year with a plan to increase interest in the program.

The Newsletter Subcommittee's next newsletter deadline is Feb. 1, 2012. Any articles or notes for publication should be submitted before that date. Future newsletters will be provided to judges and to waiting rooms where attorneys routinely visit. Also, a link to the ADR newsletter should be included in future PBA e-Briefs.

The Superior Court plans to discontinue its mediation program. ADR members expressed concerns and plan to make a proposal to the Superior

Continued on Page 7



PBA Annual Meeting

May 9-11, 2012
Lancaster, Pa.

Lancaster Marriott
at Penn Square



Your Other Partner

www.pabar.org

Casaccio v. Curtiss

Continued from Page 4

ground two because uncontradicted evidence was presented at the sanctions hearing, which showed that the National Indemnity representative had no knowledge that a prior offer of \$700,000 had been made, or even that an initial mediation had been held, at the time it suggested a \$350,000 offer be made. Lastly, as to ground three, the West Virginia Supreme Court refused to impose sanctions on the carrier for its failure to attend the second mediation session because the carrier's representative was not furnished "reasonable notice" under the circumstances. Essentially, the West Virginia Supreme Court determined that National Indemnity only received three days' actual notice and concluded that three days' notice was not "reasonable." The West Virginia Supreme Court did not indicate what period of time it would find to be reasonable under the trial rule in question. It should also be noted that the West Virginia Supreme Court did not address the issue of whether the trial court had the inherent authority to impose sanctions in the case.

What is significant in this case for mediators, counsel, parties and insurance carriers who are involved in mediations in West Virginia cases?

For starters, insurance carriers in West Virginia are on clear notice that a court-ordered mediation requires the physical presence of an appropriately authorized representative who can in-

telligently participate and that serious consequences can follow from failure to comply. Second, insurance carriers, and all parties to a court-ordered mediation where participants need to be physically present, are entitled to reasonable notice, which means at least something more than a few days. Third, and most obvious, counsel and the parties should not test the patience of a judge when a court-ordered mediation is scheduled by not following the rules.

Unfortunately, *Casaccio* offers little guidance on the range of sanctions that are likely to be entered and upheld against an insurance carrier party in West Virginia when its trial rule covering mediations is clearly violated and after reasonable notice of the mediation to the carrier. In this case, it appears that opportunities to produce contrary evidence may have been missed by plaintiffs. It further appears that plaintiffs' counsel was overreaching in their attempt to recover compensable fees and related damages. ■

Chuck Kenrick provides ADR services primarily in western Pennsylvania and may be reached at ck@kenricklaw.com.



Minutes of the ADR Committee Meeting

Continued from Page 6

Court on the topic.

Discussion regarding changing the name of the committee from ADR to simply "DR" was tabled until the next meeting.

The meeting adjourned at 4 P.M. The next PBA Committee/Section Day is scheduled for Thursday, May 10,

2012, at the Lancaster Marriott at Penn Square in Lancaster, Pa. ■

Lindsey Bierzonski is a contract specialist for the National Institute of Health in Rockville, Md.



ADR UPDATE

Continued from Page 1

will contests (one which involved alleged “undue influence” by the “other woman” of a dying husband), two bar shootings, a real estate deal gone bad between a brother and sister, and a negligent adoption case (involving a sexual predator).

Having mediated/arbitrated over 1,600 matters at this point, I can make this observation — while the majority of cases placed into ADR continue to involve motor vehicle/personal injury and medically-related claims, the mediations I see continue to move further and further from the traditional claim. Plainly, just about any type of dispute is heading to ADR these days (e.g. Recent headline “Judge orders mediation for WVU-Big East”).

AND NOW, FROM BEHIND THE ADR DOOR:

TOP TEN THINGS HEARD FROM PLAINTIFF’S COUNSEL AT MEDIATION

10. “We don’t want to bore you with the facts of our case.”
 9. “Liability should not be an issue.”
 8. “We believe our demand is most reasonable.”
 7. “Hah!” (after hearing the offer)
 6. “Tell them they’re going to have to get *a lot* more reasonable.”
 5. “A jury should believe our economic report.”
 4. “This case could really anger a jury.”
 3. “Why don’t they just tell us what they’ll pay?”
 2. “Tell them were getting ready to leave.”
- And the No. 1 thing heard from plaintiff’s counsel at mediation is . . .
1. “Just tell them our demand is \$800,000 and see what happens!”

TOP TEN THINGS HEARD FROM DEFENSE COUNSEL AT MEDIATION

10. “We don’t want to bore you with the facts of our defense.”
 9. “This is a very defensible case.”
 8. “We believe our offer is most reasonable.”
 7. “Hah!” (after hearing the demand)
 6. “Tell plaintiff they’re going to have to get *a lot* more reasonable.”
 5. “The jury will never believe their economic report.”
 4. “This case would never anger a jury.”
 3. “Why don’t they just tell us what they’ll take?”
 2. “Tell them my adjuster is getting ready to leave.”
- And the No. 1 thing heard from defense counsel at mediation is . . .
1. “Just tell them the offer is \$5,000 and see what happens!”

MORE FACTS AND FIGURES

In tracking the arbitration statistics over the past five years, the UM/UIM numbers continue to fall given the removal of the arbitration provisions in automobile liability policies not so many years ago. Not surprisingly, many of these cases are getting resolved in mediation and, on lesser occasions, by way of binding mediation where, if the case does not settle during the mediation, the mediator is authorized to make a binding decision. It remains to be seen whether or not the UM/UIM claims will continue to find resolution via ADR or if more cases will be tried in the courtroom.

On the mediation front, while the total number of cases mediated is no longer settling at the 75 – 85 percent range of a few years ago, it remains my perception that more difficult cases are being presented at mediation, “bringing down” the number of cases settled at the mediation. More cases with significantly disputed liability issues are being mediated — always the tough-

est cases to settle at the first mediation. Nonetheless, the overall 2011 “dollars” remain consistent with the past five years in “gross numbers” negotiated where more than \$100,000,000.00 was again in play with just under \$80,000,000.00 comprising settlement offers accepted in 2011, with another \$25,000,000.00 remaining unaccepted by year’s end. Even I find it hard to believe when doing the math, but these are the dollar figures that were generated by 235 cases in 2011.

I have also seen two distinct trends on the defense side of the non-medical claims where I observe all too often that the superiors of the defense lawyers are “keeping them out of the loop” and/or otherwise are not accepting their recommendations regarding settlement or negotiation strategy. It is also clear that the non-medical defense decision makers continue to get further and further away from the mediation “trenches,” where the attending adjuster or representative more often than not has to call “upstream” to obtain the “real” authority (if not calling two or three streams upward). As a result, it has become more difficult (or it just takes longer) to get many of these cases settled, however, more often than not we ultimately reach a settlement but with a whole lot more effort than in past years. I personally relate the line of demarcation dating back to the second half of 2008 with the decline in the economy topped off by the last presidential election — stay tuned in 2012.

QUOTABLE QUOTES

From the I-can’t-believe-they-just-said-that department.

By a plaintiff - “The injury doesn’t bother me anymore, and I don’t even think about the scar!”

By a defendant - “We have no defense - what our client did was indefensible!”

Continued on Page 9

ADR UPDATE

Continued from Page 8

Out of the mouths of babes department.

A 14-year-old high school plaintiff interrupting defense counsel's incredible mediation presentation that there "should be no liability whatsoever" on the part of his client.

"How are you ever going to prove that at trial?"

Never saw this one coming department.

Following the settlement, plaintiff advised she "was not keeping the money." "I'm giving it all (\$100,000) to the Honduran Orphan Fund!"

Never saw this one coming department - Part II.

"I was having so many problems, I started eating my own teeth!"

JUST A FEW MORE FACTS AND FIGURES FROM WESTMORELAND AND BEYOND

Wading through the caseload statistics provided from the Administrative Office of Pennsylvania Courts (AOPC), the following are some more facts and figures demonstrating our changing profession over the past decade.

For example, in the year 2000, there were 9,147 Westmoreland County juror days pertaining to 112 jury trials started at a cost of \$1,597 per trial. Ten years later, the Westmoreland County juror days fell to 5,117 with 52 jury trials started at a cost of \$1,724 per trial. (These totals include both civil and criminal jury trials.) Although the number of trials dropped significantly, civil filings significantly increased from 2,564 in 2000 up to 4,010 cases filed one decade later. Similar to the jury trials, compulsory arbitrations fell from 280

in the year 2000 to approximately one-half 10 years later.

For you domestic lawyers out there, divorce filings were actually down from the year 2000 (1,273) compared to 2010 (1,089); however, significantly more cases remained unresolved at year's end in 2010 (3,433) as compared with cases remaining open at the end of calendar year 2000 (2,386).

For those of you interested in the med-mal statistics, defense verdicts statewide ranged between 80.3 and 85.1 percent over the past six years with overall filings down from 191 cases filed statewide five years ago to an average of 132 cases filed statewide between 2008 and 2010. To see all of the numbers, refer to The Unified Judicial System of Pennsylvania website for county/state-wide statistics dating back to 1993.

MORE FROM THE ADR VAULT

TOP TEN WAYS DEFENDANTS HAVE SAID "I'M RUNNING OUT OF MONEY."

10. "Tell them we're running out of room."
9. "Tell them I have a flight to catch."
8. "Tell them we're running out of gas."
7. "Tell them the train is heading into the station."
6. "Tell them we're running out of juice."
5. "Tell them we're about to hit the wall."
4. "Tell them my supervisor is leaving in 15 minutes."
3. "Tell them the train is *leaving* the station."
2. "Tell them I'm starting to hit sand."

And the No. 1 way to say "I'm running out of money" . . .

1. "Tell them I'm in my car, it's heading toward the river, but I'm not going in the river." (?? via Philadelphia)

As co-defense counsel, the quickest way to get voted off the mediation island department.

"I have no authority, I'm not paying (for the mediation), and I'm only here as an observer."

Laugh of the year department.

One female plaintiff's dreamy-eyed response to this mediator's presentation of the "mediation process":

"Mr. Noble, you must have a *wonderful marriage!*" (Fill in your own punch line here. . .)

True Black and Gold negotiations - during a recent Steeler playoff run:

Plaintiff demand: Lynn Swann (you do the math)

Defense offer: Mike Webster

Plaintiff demand: John Stallworth

Defense offer: Jack Ham

Plaintiff demand: Max Starks

Defense offer: Ernie Holmes

Plaintiff demand: Moon Mullins

Defense offer: Tom Beasley (this was a tough one)

Settlement amount: L.C. Greenwood! (\$68,000.00)

FROM THE "WHAT ROOM AM I IN?" DEPARTMENT.

TOP TEN THINGS FROM BOTH PLAINTIFF AND DEFENSE AT MEDIATION

10. "You've got your work cut out for you today."
9. "We feel this is a case that should settle."
8. "Tell them we came here in good *faith*."
7. "We're bidding against ourselves at this point"/"go work your magic." (tie)

Continued on Page 10

Welcome new committee members

The Pennsylvania Bar Association Alternative Dispute Resolution Committee extends a warm welcome to the following new committee members:

Maria Spina Altobelli, Mears Smith Houser & Boyle PC, Greensburg
 Jean Maria Biesecker, Bala Cynwyd
 Aviv Sarah Bliwas, Pennsylvania Treasury Department, Harrisburg
 Kathy Jean Bloom, Bloom Law, Blue Bell
 C. Grainger Bowman, K&L Gates LLP, Harrisburg
 Dan Michael Brookhart, Atlee Hall & Brookhart LLP, Lancaster
 Maureen Margaret Carr, Unionville
 Tyler Benjamin Christ, Liberty Law Group LLC, Reading
 James R. Demmel, Smigel Anderson & Sacks LLP, Harrisburg
 Dianne Elaine Dusman, Office of Attorney General, Consumer Advocates Office,
 Harrisburg
 Lisa Mary-Frances Hopkins, Hopkins Law Office, Harrisburg
 Marylou Matas, Saidis Sullivan & Rogers, Carlisle
 MaryBeth McCabe, Law Office of Marybeth McCabe, Doylestown
 Kelly A. Mroz, The Family Law Group, Erie
 Ellen C. Schurdak, King Spry Herman Freund & Faul LLC, Bethlehem
 Chris Alexander Stachtiaris, Frank Gale Bails Murcko & Procrass PC, Pittsburgh
 Susan Topper Travis, Slatington
 John J. Zagari, Pittsburgh

The committee hopes that these new committee members enjoy their committee membership and experience the many benefits of serving on the Alternative Dispute Resolution Committee.

ADR UPDATE

Continued from Page 9

6. "It doesn't look like this case will ever settle."
5. "We really want to try this case to a jury."
4. "It's not me, it's my client."
3. "They're the ones who wanted this mediation."
2. "I can't believe this case settled."

And the No. 1 thing heard from both rooms at mediation . . .

1. (After the case settled) "Don't say anything, but we never could have put our client on the stand!"

IN CLOSING

From this vantage point, it was another year of mostly "win/win" scenarios for those utilizing the mediation process. It certainly was another year of incredible loss — both large and small — with almost daily unexpected turns along the conciliation highway with many an emotional high and low. One thing is for sure — it's not getting any easier out there for either side of the fence with truth again often stranger than fiction — along with some trends that remain to be played out in 2012. In the end, however, there was a lot of really great lawyering going on out there locally and throughout the commonwealth.

Best wishes to you all in 2012 — may the force be with you. ■

John M. Noble is a full-time neutral from Westmoreland County. He can be contacted at 724-396-2543 or john@noblemediation.com. Editor's note: The editor is grateful for the assistance of Richard P. Kidwell in obtaining this article for publication.



Column: Ask the Dispute Resolution Professional

The goal of this column is to share advice on how to handle situations that stump dispute resolution professionals. One or two questions will be selected for each newsletter and will be posed to the Alternative Dispute Resolution Committee membership for comment by committee members.

The following is a situation that occurred to a mediator:

A mediator was assigned a case through a court-annexed mediation program. The case was a personal injury action involving a slip and fall. The plaintiff, her attorney, the defendant homeowner, the defendant's insurance defense counsel and the insurance adjuster for the insurance company participated in the mediation. No settlement was reached during the mediation. The mediator suggested that both parties give some more thought as to their positions/offers and volunteered to be available for an additional mediation session should both sides decide they wish to engage in further discussions.

The parties, their counsel and the insurance adjuster went their separate ways. The mediator was on his way to return the court file to the clerk of court's office when he was stopped by the judge's tip staff. The tip staff advised that the judge would like to speak to the mediator to see how things went. What should the mediator do and/or say?

The following suggestions for dealing with this situation have been submitted:

Chuck Kenrick: "Assuming the court-annexed mediation program is that of the U.S. District Court for the Western District of Pennsylvania, the mediator should tell the tipstaff that he/she cannot speak to the judge without authorization of all case counsel because of confidentiality and the policies of the court-annexed program itself. Both the letter and spirit of the Western District's ADR program and written policies are clear on this point. The policies provide the only authorized communication with the court should be by means of

the electronic report of the result of the mediation and nothing further. To provide anything more without proper authorization compromises absolute confidentiality.

The answer to this question might be different if another court mediation program is involved."

Rick Kidwell: "I think the mediator should simply tell the judge that the case did not settle without going into any detail about the specific discussions. The mediator should also let the judge know that he/she (the mediator) offered to stay in touch with the parties to continue discussions."

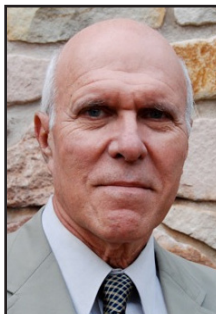
If you have had a situation as a dispute resolution professional that has perplexed you, please e-mail the details to Mary Kate Coleman (mkcoleman@rhwrlaw.com) for inclusion in the next "Ask the Dispute Resolution Professional" column. We look forward to hearing from you and learning from your experience! ■

Report of the ADR Lawyer Dispute Resolution Program Subcommittee

By M. Melvin Shralow

Members of our subcommittee have been reviewing the current program. We hope to have a report soon summarizing the results of that review and preliminary suggestions for change. ■

M. Melvin "Mel" Shralow, principal of Shralow ADR LLC of Bryn Mawr, mediates and arbitrates commercial disputes, as well as serves as a judge pro tem in the Commercial Case program and in major civil cases in the Court of Common Pleas of Philadelphia County.



Report of the ADR Legislative Subcommittee

By Richard P. Kidwell

There is little to report from Harrisburg, and the budget will be the focus of attention there in the coming weeks. The governor did sign HB 1052 on Dec. 22, 2011, to go into effect 120 days from then, which establishes an informal dispute resolution process for long-term care nursing facilities to contest Department of Health survey deficiencies. The Apology Bill, HB 459, passed by the House on March 2, 2011, languishes in the Senate Judiciary Committee. The Fair Health Care Provider Contracting Act, HB 1763, provides for an external review process in billing disputes between physicians and health insurers but does not provide specifics on the mechanism of such a review. This bill sits in the House Insurance Committee since its referral there on June 29, 2011, so its prospects for passing appear dim. ■

Richard P. Kidwell is chair of the Legislative Subcommittee and senior associate counsel and vice president of risk management at University of Pittsburgh Medical Center (UPMC).



PBA ADR Subcommittee News

Recent activities of the ADR Liaison Subcommittee

James A. Rosenstein, chair, and Charles Kenrick, vice chair

By James A. Rosenstein

Our subcommittee is charged with recruiting and placing liaisons between the ADR Committee and other committees and sections of the Pennsylvania Bar Association. The role of these liaisons is to:

- Identify any matters being considered by either the ADR Committee or the other Committee or Section that are likely to be of interest or concern to that committee or section or to the ADR Committee, as the case may be; share this information with the leadership of each body; and assist both of them in addressing the matter in question to their mutual satisfaction; and
- Initiate and help implement any proposals for ways that the ADR Committee and the other Committee or Section can work together to advance their respective goals and objectives.

To date the following liaison placements have been made:

- Civil Litigation Section: Charles Kenrick
- Elder Law Section: Ross Schmucki
- Family Law Section: David Miller
- Real Property, Probate & Trust Law Section: James Rosenstein
- Appellate Advisory Committee: Richard Klein
- Civil & Equal Rights Committee: Victoria Madden
- Collaborative Law Committee: David Miller
- Corrections System Committee: Thomas Gould
- Federal Practice Committee: James Kozuch
- Government Lawyers Committee: Victoria Madden
- Health Care Committee: Richard Kidwell
- Judicial Advisory Committee: Ross Schmucki

Efforts to engage other sections and committees for this purpose are ongoing. ■

Jim Rosenstein divides his time between his commercial mediation and public policy facilitation practice and his real estate law practice with the Philadelphia firm of Fineman Krekstein & Harris, P.C. Charles W. Kenrick offers ADR services as part of his civil litigation practice. He may be reached at ck@kenricklaw.com.

Membership update/Request for help

By Herb Nurick

We obtained 17 new members since our last membership list (dated Oct. 13, 2011), which included 136 members. Chairman Yusem established a goal of 300 members for 2012.

In our "Plea" published in the Fall issue of the *Arbitration & Mediation* newsletter, we asked every current member of our committee to recruit at least one new member to help us reach our goal. We have a long way to go.

While we cannot offer you a tangible prize for recruiting new members, such as the Pennsylvania Bar Association and the American Bar Association are doing, we feel that there is a reward. It is knowing that you did something to benefit the committee and the new member.

To make it easy, here is the information that you can give a PBA member (you must be a PBA member to be on the committee) to join through the internet:

Go to PBA website home page:

www.pabar.org

Click "Committees/Commissions"

Click "Join a Committee"

Complete the form, check "Alternative Dispute Resolution" and submit.

OR

Go to PBA website home page:

www.pabar.org

Click "Committees/Commissions"

Click "Alternative Dispute Resolution Committee"

Click "How to Join"

Complete the form, check "Alternative Dispute Resolution" and submit.

In the alternative, you can give your prospect's name to me (hnurick@pa.gov) or Subcommittee Vice Chair Laura Cooper (lcooper@libertylawgroup.us) for us to contact.

Whatever method you choose, LET'S SEE THE NUMBERS RISE!

We shall be most grateful for your cooperation. ■

Herb Nurick, chair of the ADR Committee's Membership Subcommittee, is the mediation coordinator for the Pennsylvania Public Utility Commission and a past co-chair of the PBA ADR Committee.

More ADR Subcommittee News on Page 11.

PENNSYLVANIA BAR ASSOCIATION
ALTERNATIVE DISPUTE RESOLUTION COMMITTEE
MEMBERSHIP SUBCOMMITTEE

Let's double our membership from 150 to 300. More members will provide more value in terms of influence, idea generation, diversity and networking. And it's free! Any PBA member can join our ADR Committee at no cost.

We all know lawyers who would be well advised to join us. Please nominate them for membership and, if you wish, contact them to suggest that they join either online or by simply calling our staff liaison, Louann Bell, at 800-932-0311, ext. 2276.

Please email or fax this form to Herb Nurick, chair, Membership Subcommittee, hnurick@pa.gov, fax 717-787-0481, or to Laura Cooper, vice chair, lcooper@libertylawgroup.us, fax 610-685-5151.

I nominate the following PBA members:

	<u>Nominees</u>	<u>Contact Data</u>
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____

I have contacted the above nominee numbers _____. I would like our Membership Subcommittee to contact nominee numbers _____.

Nominator:

Name: _____

Contact Data: _____

PBA ADR Committee Members in the News

Attorney **Tyler Benjamin Christ** recently joined Liberty Law Group LLC, a general practice and litigation boutique located at 505 Penn St. in Reading, Pa. The firm handles a variety of civil matters including: personal injury, entertainment, corporate/business, contracts, litigation defense, Social Security, immigration and family matters. Christ graduated magna cum laude from Widener University School of Law in Harrisburg, where he was a member of the *Widener Law Journal*, the Moot Court Honor Society and the Veterans Law Clinic. A native of the Reading area, he is a graduate of Holy Name High School in Wyomissing. He is now a member of the PBA Alternative Dispute Resolution Committee.

Judge Richard B. Klein (Ret.) has been named co-chair of the Philadelphia Bar Association's ADR Committee, along with Peter Dunn. Judge Klein spent 28 years on Philadelphia's Common Pleas Court and eight on the Superior Court and is now doing mediation, arbitration and appellate advising with the Dispute Resolution Institute. The Philadelphia ADR committee is now part of the Civil Litigation Section, and Judge Klein hopes to use this new association to inform other sections of the bar on the value of ADR in their practices.

James Kozuch, a shareholder at Caesar, Rivise, Bernstein, Cohen and Pokotilow Ltd., recently was a panelist at the Midyear Meeting of the International Association of Defense Counsel

(IADC) for a program titled "Protecting Intellectual Capital - Trade Secrets, Non-Competes, Non-Disclosures and Employment Agreements." Kozuch is vice-chair of the IP Subcommittee of the Business Litigation Committee of IADC.

Michael D. McDowell is the course planner and program moderator of the "Labor Arbitration Discussion Series," consisting of five luncheon programs for which a total of 20 experienced labor arbitrators and advocates, four for each program, act as faculty and make presentations focusing on various labor arbitration matters. The series is sponsored by the Labor and Employment Law Section of the Allegheny County Bar Association with the support of the National Academy of Arbitrators. The individual luncheon programs are presented on the third Thursday of every month from January through May, 2012, in Pittsburgh, Pa.

Herb Nurick will receive the Pennsylvania Council of Mediators Most Valuable Peacemaker Award on April 27. With this award, PCM pays tribute to Nurick's effectiveness and generous spirit in promoting the understanding and use of mediation in both the public and private sector. During the evening, Nurick, the first mediation coordinator for the Pennsylvania Public Utility Commission, will share his observations on "Nuances of Government Mediation."

Jim Rosenstein reports that on March 23, he will be a panelist in a workshop titled "Everything You Ever Wanted to Know About Becoming a Mediator (and More)," conducted by the Good Shepherd Mediation Program in Philadelphia. **Cheryl Cutrona** will be the lead trainer, and the other panelists are **Ed Blumstein** and Phil Cottone. On April 28, during the annual conference of the Pennsylvania Council of Mediators in Harrisburg, Cutrona and Rosenstein will be presenting a workshop titled, "Strengthening Your Community Mediation Center or Other Nonprofit by Building a Better Board."

M. Melvin Shralow, principal of Shralow ADR LLC, and chair of our subcommittee on the Lawyer Dispute Resolution Program, has been elected president of the Greater Delaware Valley chapter of the Association for Conflict Resolution.

Steve Yusem presented "Fiduciary ADR: Obstacles and Opportunities" to the College of Commercial Arbitrators in Denver, at its annual meeting in October, and at the PBA Estate Law Institute in Philadelphia in November. Yusem commented that will and trust disputes are particularly appropriate areas for ADR.

Yusem also reports that he is now a full-time neutral, having established an independent ADR practice at 600 West Germantown Pike, Suite 400, Plymouth Meeting, Pa. He can be reached at 610-940-1750 or syusem@syusem.com. ■



Help with using your PBA listserv

To **subscribe**, log in on the PBA website with your PBA member username and password, select the “Committees/Sections” tab, then the “Committees” tab, then the “Alternative Dispute Resolution Committee” tab, then the “Listserv Sign-Up” tab. The subscription form can also be accessed directly at www.pabar.org/public/listservform.asp.

Once subscribed to the listserv, you will get the following confirmation message:

*“File sent due to actions of
administrator traci.raho@pabar.org.”*

To **send a message** to members of the listserv, address your e-mail to adr@list.pabar.org.

To **reply only to the sender**, hit “Reply,” and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can manually add other

recipients outside of the sender or the membership.

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

To **unsubscribe**, send a message to listserv@list.pabar.org with “unsubscribe adr” in the body.

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

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



www.pabar.org

**For all the information you need about
the Pennsylvania Bar Association**