A respondent’s perspective on mediation

By M. Brian O’Connor

In western Pennsylvania, mediation has become increasingly popular as a method of Alternative Dispute Resolution. Prior to the year 2000, mediation was relatively rare in western Pennsylvania and exceedingly rare in medical malpractice cases. However, in the last five years, mediation has gained momentum and is now almost the preferred method of resolving a lawsuit. In the last five years, I estimate that I have participated in at least 30 mediations.

From the respondent’s perspective, there are multiple advantages to mediation. Mediations are typically scheduled several weeks, if not months, prior to trial. If the mediation is successful, this allows the defense attorney to reallocate time to a more pressing legal matter. It is not unusual for me to be juggling multiple cases on a trial list. Eliminating one case from the trial list by mediation allows the busy defense lawyer to concentrate on the case in which settlement is not an option.

Mediation can also be an effective tool when there are disputes among the responding parties. Obviously, the defense lawyers do not want the plaintiff’s attorney to know about the potential for infighting at trial. At mediation, the responding parties and their insurance carriers can air their disputes in a

A claimant’s perspective on mediation

By John P. Gismondi

There is no question that mediation has become much more popular in recent years as a means of resolving civil litigation. From a plaintiff attorney’s perspective, here are some thoughts on the advantages to mediation, some “dos and don’ts” and one pet peeve about the process.

First, here is a short list of some advantages to mediation.

- **Focused attention** – Mediation forces all of the interested parties to gather at a particular place and time without the distraction of other work, i.e., everyone’s attention is focused on an attempt to resolve the case. Trying to negotiate a case over the telephone can be very protracted and drawn out. You not only have to get the other attorney on the telephone, but he/she has to be prepared to talk and frequently that’s not the case, either because he or she is not “up to speed” on the file or he or she needs to speak with his or her claims representatives. Hence, the conversations often end with “We’ll get back to you.” By contrast, at a mediation, everyone is on the premises and without the distraction of other duties and responsibilities. That is a huge advantage.

- **Quantity of Time** – In most jurisdictions, the parties will never get several hours or a full day of a judge’s attention to try to settle a case. Although the parties have to pay for a mediator’s time, whereas the judge comes at no cost, it is well worth the expense to get the necessary time to truly negotiate a case. Too often settlement “discussions”...
Message from the ADR Committee chair

By Stephen G. Yusem

210! As of Feb. 15, 2013, the membership of the PBA Alternative Dispute Resolution Committee has grown to 210. That’s an increase of 65 percent since May 2011. We’re on a roll thanks to the leadership of Membership Subcommittee Chair Herb Nurick and Vice Chair Laura Cooper, a dynamic duo, ably assisted by Andy Anderson and Tyler Christ, who are developing ways to recruit members through social media.

I cannot imagine why any PBA member involved in ADR as a neutral or advocate would not want to join our committee because the cost is zero and the benefits are significant: Resolution to keep current with ADR in the commonwealth, excellent networking opportunities, leadership positions in one or more of our dozen subcommittees and opportunities to move ADR onward and upward.

Speaking of networking opportunities, it’s tough to beat the networking that will be available at the Gettysburg Retreat set for April 5-7, 2013, at the Best Western Gettysburg Hotel. The retreat is sponsored by the PBA Civil Litigation Section and co-sponsored by our committee as well as the Federal Practice Committee and the Labor and Employment Law Section. Every attendee will be a potential referral source. The ADR segment of the retreat is scheduled for April 5, from 2:30 to 4:00 p.m. A panel moderated by CLE Subcommittee Vice Chair Judy Weintraub and including committee member Judy Meyer will address “When ADR is Appropriate and How to Make It More Effective.”

The retreat will be closely followed by our committee meeting at the Radisson Hotel Harrisburg, located in Camp Hill, on April 11, 2013, at 1:30 p.m. in conjunction with PBA Committee/Section Day. There will be a free buffet lunch at 12:30. This is an important committee meeting because it is one of only two in-person meetings held during the year. Our other two meetings are by telephone conference in Pittsburgh, Harrisburg and Philadelphia.

As you will note from the agenda which was emailed to committee members weeks ago, our committee meeting will include a report on the Gettysburg Retreat, our progress on the Revised Uniform Arbitration Act, a proposed revision of the Lawyer Dispute Resolution Program presented by LDRP Subcommittee Chair Mel Shralow and a proposed Pro Bono Mediation Program presented by Legal Services Subcommittee Chair Cheryl Cutrona. Copies of the proposed LDRP and PBMP will be posted on our website and also available at our meeting.

Ann Begler is scheduled to present a status report on the Joint State Government Commission Advisory Committee on Alternative Dispute Resolution, and David Miller is going to present on the progress of the new PBA Collaborative Law Committee. The meeting will be a good opportunity to introduce yourself to Clymer Bardsley, the new editor of Resolution. He would welcome your comments as well as your submissions for publication.

I look forward to greeting you at Camp Hill.

Best regards,

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

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Upcoming PBA events

- **PBA Committee/Section Day**
  - April 11, Radisson Hotel Harrisburg, Camp Hill
  - *ADR Committee meets at 1:30 p.m.*

- **PBA Board of Governors Meeting**
  - May 8, Wyndham Grand Pittsburgh Downtown, Pittsburgh

- **PBA Annual Meeting**
  - May 8-10, Wyndham Grand Pittsburgh Downtown, Pittsburgh

- **PBA House of Delegates Meeting**
  - May 10, Wyndham Grand Pittsburgh Downtown, Pittsburgh

- **PBA Family Law Section Summer Meeting**
  - July 11-14, Gaylord National Resort, National Harbor, Md.

- **PBA Young Lawyer Division Summer Meeting**
  - July 24-26, Toftrees Resort and Conference Center, State College
Message from the editor

By Clymer D. Bardsley
Resolution editor

It is an honor to take over the reins of Resolution from Mary Kate Coleman, who has made this a must-read newsletter. I only hope I can continue the tradition and keep providing the committee with timely updates and articles regarding ADR in Pennsylvania and in general. Thanks go to both Mary Kate and ADR Committee Chair Steve Yusem for tapping me to take on this responsibility. I look forward to meeting many committee members in Gettysburg in April during the ADR retreat and in May at the PBA Annual Meeting in Pittsburgh.

I consider it a privilege to be a mediator: to sit with people who are in the midst of conflict and help them have difficult conversations, deepen their understanding of one another, and hopefully, come to resolution. I work mainly with families and young people, and sometimes with employers and employees, I find the process to be exactly as advertised: empowering and gratifying for the parties. I also get to interact with advocates who are trying to help their clients find the best outcomes and who are working as problem-solvers themselves.

I believe everyone who reads Resolution needs to take it upon himself or herself to advance the cause of ADR within and without the legal community, here in Pennsylvania and across the United States. We need to spread the word that ADR concepts are, in fact, what advance the interests of us all. Zero-sum litigation leaves half of us losers and the other half of us something less than winners. Wherever possible, people need to be encouraged to sit across from their adversary and express their concerns, consider different ideas of fairness and justice, and collaborate to find compromise or even mutual gain.

That means that we neutrals and advocates must encourage our clients. We must advocate for reforms in the courts which make access to ADR processes more available. We must let our Legislature know that to really help the people of this commonwealth, we must encourage them to try to resolve their differences whenever possible.

Advancing the cause of ADR may threaten the way some lawyers do business, those who see their case load as inventory or who have to eat what they kill. But to those folks, I respond by asking whether they are pleased with what a zero-sum practice gets them. Does it lead to happier clients? Does it lead to happier lawyers? Does it lead to a more productive commonwealth? I believe the answer to each of these questions is trending negative.

Would that we had a champion to advance the cause of ADR in Pennsylvania. Until then, it is incumbent upon all of us in this section and using ADR processes, to do our part to spread the word.

Clymer D. Bardsley, Good Shepherd Mediation Program’s Training and Consulting manager, is a mediator in Philadelphia who focuses on family, school-based, and workplace dispute resolution.

Free Section Membership for One Year

PBA members who have considered joining one of the association’s 18 sections can test-drive one at no cost. The offer is open to all PBA members who have not belonged to the section they are choosing for five years or longer or who have just been admitted to practice and are PBA members.

All 18 sections are participating in the one-year, free membership offer:

Administrative Law Section
Aeronautical and Space Law Section
Business Law Section
Civil Litigation Section
Criminal Justice Section
Education Law Section
Elder Law Section
Environmental & Energy Law Section
Family Law Section
Intellectual Property Law Section
International and Comparative Law Section
Labor and Employment Law Section
Municipal Law Section
Public Utility Law Section
Real Property, Probate and Trust Law Section
Solo and Small Firm Practice Section
Tax Law Section
Workers’ Compensation Law Section

Members who wish to take advantage of the free section membership offer may register here or call PBA Member Services at 1-800-932-0311. In order to join a PBA section, you must be a member of the PBA.

For more information about individual sections, go to www.pabar.org/public/sections.
Victim Offender Conferencing: A restorative approach

By Michelle Rosenberg

Kelsey is 12 years old, a good student and has never been in trouble with the law, until now. Kelsey began acting out in class and would not listen to her teacher’s instructions to be seated. From Kelsey’s perspective, even though all of the students were behaving poorly that morning, the teacher was ignoring the other students and only seemed to be disciplining Kelsey. In a moment of frustration and anger, Kelsey threw a book at her teacher and walked out of the classroom. Not only did Kelsey’s actions disrupt the class, her teacher felt disrespected, vulnerable and threatened. Kelsey was immediately brought to the principal’s office, and when the school police arrived she was handcuffed in front of her peers and taken to jail. She was charged with aggravated assault, a second-degree felony in Pennsylvania, punishable by up to 10 years in prison if committed by an adult. She spent the entire day in a holding cell where she was left to think about what had happened and await the series of life-changing events that would lead from her bad decision. At 11 o’clock that night her grandmother was finally allowed to take her home. The following morning Kelsey had to appear at the Youth Study Center, a short-term residential detention center where youths attend an informal interview, at which time her case would either be diverted or referred to the court.

The System

How the criminal justice system deals with Kelsey will have a huge impact on Kelsey’s life, her family and the community. Having a record will have damaging consequences for Kelsey. For example, it may limit her likelihood of getting into a good college or finding a summer job when she must reveal to a prospective school or employer that she was adjudicated to be delinquent. Additionally, aggravated assault is a serious offense. Although police officers initially have discretion in determining a charge, and since a schoolteacher is a protected class, Kelsey’s charge is not unfounded. But Kelsey gets lucky: The diversion coordinator at the Youth Study Center has recommended that her case be diverted. Kelsey will not be required to appear before a judge, as long as she successfully completes the recommendations of the coordinator, including participating in Victim Offender Conferencing (VOC) at Good Shepherd Mediation Program (GSMP).

By having her case diverted, Kelsey has the opportunity to benefit from restorative justice, a community-based approach to dealing with crime. While retributive justice focuses on punishing actors for committing crimes against the state, a restorative justice system allows Kelsey to assume responsibility for her offense and take action to repair the harm caused to the victim and the community. Restorative justice programs for youth offenders, like VOC, are rooted in the Pennsylvania Juvenile Act. The act states: “Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.”

Victim Offender Conferencing offers youth offenders and those they have harmed an opportunity to meet face-to-face in a safe environment, with a trained neutral third party setting up and facilitating the conversations. With this goal in mind, Victim Offender Conferencing offers youth offenders and those they have harmed an opportunity to meet face-to-face in a safe environment, with a trained neutral third party setting up and facilitating the conversations. VOC provides the opportunity for these parties to engage in a dialogue that promotes understanding, allows for offender accountability and fosters victim healing, all with the aim of seeking to repair the harm caused by the offense.

The VOC Process

There are four stages of VOC: referral and intake, individual participant pre-conferences, victim offender conference and follow up. Referrals to VOC come from various points within the juvenile justice system, including the Philadelphia Youth Study Center, Juvenile Court Judges, Victim and Community Services, the Philadelphia Youth Aid Panel and the Philadelphia School District. During the referral and intake, the referring agency determines whether a case is appropriate for diversion. To qualify, the youth must take responsibility for her actions, at least acknowledging her involvement in the offense.

To be eligible for the program, the youth must be at least 11 years old and demonstrate the necessary cognitive ability to participate in dialogue of this sort. During the youth pre-conference, the facilitator will also ensure that the youth is able to take accountability for the action and is appropriate for VOC. At this time Kelsey will be able to share her side of the story and explain the circumstances and reasoning for her actions. The facilitator will also begin to assist Kelsey in thinking about the harm and what she could have done differently.

During the victim pre-conference the victim and facilitator will assess whether the victim is willing and

Continued on Page XX
Minutes of the ADR Committee Meeting
Nov. 15, 2012

By Louann Bell
PBA Staff Liaison/Acting Secretary

Legislative Report – Legislative Counsel Steve Loux reported on the status of RUAA.

Civil Litigation Section Retreat – Amy Groff, chair, Civil Litigation Section, reported that plans were set for a section retreat in Gettysburg the weekend of April 5-7, 2013. The section is co-sponsoring the retreat with the ADR Committee and the Labor and Employment Law Section. The ADR Committee will present a CLE panel on Friday, April 5, at 2:30. Members were encouraged to attend.

Conflict Resolution Day – Subcommittee Chair Charles Shaffer advised that the subcommittee was able to get proclamations from both the governor and the Senate declaring Oct. 18, 2012, as Conflict Resolution Day. The county bars were notified and given information on how they could recognize Conflict Resolution Day. This is something that can be done annually.

CLE – ADR Committee Chair Steve Yusem reported that PBI had set up an arbitration CLE without notifying the ADR Committee. He sent a letter of complaint to the PBI executive director advising that the ADR Committee had to abandon its plans for an arbitration CLE due to the PBI program. In a follow-up letter, the chair again requested that PBI work with the ADR Committee before planning any other ADR program. CLE Subcommittee Chair Ross Schmucki reported that Carolyn Weper is now the PBI liaison to the ADR Committee. A CLE on consumer arbitration is being planned for July 31, 2013, in Philadelphia.

RUAA Action – Subcommittee Chair Mason Avrigian advised that the RUAA bill was introduced in June 2007. It passed the House unanimously and is now before the Senate Judiciary Committee. Steve Yusem and Judge Avrigian have met with the chair of the Senate Judiciary Committee. A letter from a member of PATLA raised many objections. Judge Avrigian plans to meet with the author of the letter and to try work through the issues. Ray Pepe responded to the PATLA objections raised with an 18-page letter, which is on the ADR Committee’s website. Judge Avrigian stated that the RUAA would be a beneficial to the justice system.

Lawyer Dispute Resolution Program – The outline submitted by Subcommittee Chair Mel Shralow for suggested changes to the LDRP was discussed. Concerns include the collection of fees, the process for the selection of mediators and arbitrators, the appointment of mediators and arbitrators to the LDRP panel, and general administration of the program. It was suggested that if the changes could be finalized in time, the program could be promoted at the July Conference of State Trial Judges. Mel Shralow offered to re-work the outline to add more details and bring it back to the committee for consideration at its April 11, 2013, meeting. It was suggested that he convene a meeting of the LDRP Subcommittee to work through the issues with him.

Ad Hoc Legal Services – Subcommittee Chair Cheryl Cutrona reported that she is working with Sandy Ballard. Plans for a two-track program are in progress. She will have the final draft ready for submission to the Committee at the April 11, 2013, meeting. Judge Avrigian stated that the RUAA appeared in the PBA Bar News. The nomination form can be found on the committee’s website. The award will be presented at the PBA Annual Meeting in Pittsburgh on May 8, 2013.

Liaison – Subcommittee Chair (and ADR Committee Vice Chair) Jim Rosenstein stated that he will have an official list of all the Liaison Subcommittee members to the various PBA committees and sections by the April 11, 2013, meeting. The need to have a liaison member for PBI was discussed.

Membership – Subcommittee Chair Herb Nurick advised that the committee membership has risen from 127 members 18 months ago to 180 members today. The article on ADR membership which appeared in the PBA Bar News did result in new members. Mr. Nurick continues to encourage members to recruit at least one new member. Andy Anderson and Tyler Christ discussed the advantages of forming a group on LinkedIn. They reported that each member’s contacts in LinkedIn could be used to recruit new members. They offered to send the address/link to committee members and ask that they join LinkedIn to use it as a recruiting tool for the committee.

ADR Newsletter – The new name of the ADR Newsletter is Resolution. Chair Steve Yusem announced that Mary Kate Coleman is retiring as the editor. Committee members extended a hearty expression of appreciation for all her very effective efforts. She received a standing ovation. Members were encouraged to consider applying for the position of newsletter editor.

Next Meeting Date – PBA Committee/Section Day April 11, 2013, at 1:30 p.m. at the Radisson Hotel, Camp Hill, Pa.
A correct frame of mind

Editor’s note: This article was originally written for and published in the February 2012 Cumberland County Bar Association newsletter and is reprinted by permission.

By David A. Fitzsimons

Did you ever receive a timely reminder of a “good practices” point in an area seemingly unrelated to the day job? Developing studies in neuroscience using active CAT scans and EEGs appear to provide insights into brain activity in people under varying degrees of stress. With emerging understanding of how certain areas of the brain “map” for certain activities, scientific observation is aiding in conflict resolution.

A high point of the New Year’s holidays is the increased frequency of English Premier League soccer games on TV. Watching with my then 16-year-old son as his favorite team, Arsenal, unable to hold a 2-1 lead — a constant worry for Arsenal fans — loses 3-2 to their London rivals, Fulham, I observed with clinical detachment the failure of the Gunners’ midfield to protect the wavering Arsenal back four. James and I discussed this fact in clipped tones as the Cottagers players mobbed the winning goal scorer in the closing seconds of injury time.

I was at first surprised when James, generally a calm young man — he gets that from his mother’s side — reacted rather negatively to a suggestion by his mother:

“Now that the game is over, could you put this laundry away please?” she asked.

His reaction was, let’s say, somewhat disproportionate to the reasonable proposal.

As the thunder of unhappy size 12’s receded to the back of the house (cue SLAM of door), I mentioned that the collapse of what looked like a comfortable win MIGHT have been all that his mind could process at that moment.

“But I waited until the game was over” was the perfectly reasonable response of Mom.

So here’s the thing, and thank you if you have stuck with my tenuous thread thus far. In the properly structured process of mediation — pre-mediation conference, mediation statements, meaningful inquiry and observation by mediator — we often enjoy the advantage of forewarning of issues and questions that are likely to fire the emotional, non-rational areas of the brain.

And those CAT scans indicate that when the emotional centers go red hot, the analytical centers go stone cold and remain that way for quite some time AFTER the hot spot of the initial outburst has calmed down. Is science confirming the effectiveness of what we often have done via intuition? Change the subject, redirect, reframe, acknowledge a person’s reaction by reflecting his pain at the failure of the wing midfielders to track back, exposing the centre backs to overlapping attacks and crosses … and WAIT a few minutes before asking him to pair socks.

Further discussion of the intricacies of effective defense in depth and its application to real life is happily discussed over a Pint at the requestor’s pleasure.

For more information regarding this subject, please take a look at the following link: http://www.americanbar.org/publications/gp_solo/2012/may_june/dispute_resolution_neuroscience_negotiation.html.

David A. Fitzsimons is a shareholder at Martson Law Offices, Carlisle. He has been practicing law in central Pennsylvania since 1984. His practice touches all aspects of dispute resolution, representing individuals and companies in contract and business disputes, with emphasis on construction, business operation/succession, employment, land use and estate-related litigation. Over the past 10 years, he has served as a court-appointed and privately retained mediator for the successful resolution of numerous disputes in the areas of commercial contract, construction, employment law, business succession and personal injury. Fitzsimons also serves as an arbitrator, both on court-appointed panels and as a privately retained neutral.
Request to Members of PBA ADR Committee from Membership Subcommittee

By Herb Nurick

The membership subcommittee has set a goal of having 300 members on the ADR Committee by May 2013. As of Dec. 31, 2012, we had 192 members.

We ask that each member of the ADR Committee, who has not already done so, recruit at least one new member within 30 days of the receipt of this request. This would be an easy way of making a contribution to the committee and would also put us over the 300 mark.

Some advantages of having a larger membership, to both the recruit and the recruiter whether or not one is an ADR practitioner, are that the committee will be able to have more influence, engage in more brainstorming and idea generation, have more networking opportunities and, hopefully, have more diversity. To boot, membership is free and the only requirement is that the person be a member of the PBA.

To make adding a member as easy as possible, the following is all that is required. If a person agrees to join our committee, just give me his/her name and place of practice (such as Susan Jones, Harrisburg). I will forward this to PBA staff and the person will be notified that she/he is a member of the committee. You can provide the information to me at: hnurick@pa.gov or 717-783-5428

Our subcommittee will be very grateful for your cooperation.

Herb Nurick is chair of the PBA ADR Committee’s Membership Subcommittee

Welcome new committee members

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

Alfred Abel, Law Offices of Alfred M. Abel, Abington
Dylan Alper, Cozen O’Connor, Philadelphia
June Dozier Scarborough Appell
Niles S. Benn, Benn Law Firm, York
Victoria Bentley, Bentley Law Offices PC, Wyomissing
Austin Brunson, Law Student
James D. Cameron
Daniel Ely
Annette Ferrara, Harad Gittleman Greenberg Brunner & Love, Philadelphia
Eboni Frempong
Andrew C. Lehman, Pennsylvania State System of Higher Education, Harrisburg
David Lehman, Lehman Mediation Service LLC, Harrisburg
S. Beville May, Prevent Claims LLC, Exton
John J. Mulholland
Michael Perehinec, Holmberg Galbraith & Miller
William Peters, Peters & Wasilefski, Harrisburg
Manny Pokotilow, Caesar Rivise Bernstein Cohen & Pokotilow Ltd., Philadelphia
Victoria Schneider, Law Student
Vicki Shoemaker, Whiteford Taylor & Preston LLC, Wilmington, Del.
Charles Wasilefski, Peters & Wasilefski, Harrisburg

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.
PENNSYLVANIA BAR ASSOCIATION

ALTERNATE DISPUTE RESOLUTION COMMITTEE

MEMBERSHIP SUBCOMMITTEE

Please help us reach our membership goal of 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.

All of us 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, hnnurick@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:

<table>
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<tr>
<th>Nominees</th>
<th>Contact Data</th>
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<tr>
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<td>5. _____________________________________</td>
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I have contacted the above nominee numbers __________________. I would like our Membership Subcommittee to contact nominee numbers __________________.

Nominator:

Name: ____________________________________________

Contact data: ____________________________________________

________________________________________________________________________
PBA ADR Subcommittee News

Mid-year (Feb. 1, 2013) Report of the Liaison Subcommittee

By James A. Rosenstein

Our subcommittee is charged with strengthening the relationships between the ADR Committee and other components of the PBA, with a particular emphasis on promoting the use of all forms of ADR by the members of other PBA sections and committees. Currently this work is carried out principally by the following team of liaisons:

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<thead>
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<th>Section or Committee</th>
<th>ADR Committee Liaison</th>
<th>Status of Liaison Subcommittee’s Request*</th>
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<tr>
<td>Business Law Section</td>
<td>Louis Coffey</td>
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<td>Civil Litigation Section</td>
<td>Charles Kenrick</td>
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<td>Environmental &amp; Energy Law Section</td>
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<td>David Miller</td>
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<td>Intellectual Property Law Section</td>
<td>James Kozuch</td>
<td>Accepted</td>
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<tr>
<td>Labor &amp; Employment Law Section</td>
<td>Lindsey Bierzonski</td>
<td>Accepted</td>
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<tr>
<td>Real Property, Probate &amp; Trust Law Section</td>
<td>James Rosenstein</td>
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<tr>
<td>Appellate Advisory Committee</td>
<td>Richard Klein</td>
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<tr>
<td>Civil &amp; Equal Rights Committee</td>
<td>Victoria Madden</td>
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<td>Collaborative Law Committee</td>
<td>David Miller</td>
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<tr>
<td>Corrections System Committee</td>
<td>Thomas Gould</td>
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<td>Federal Practice Committee</td>
<td>James Kozuch</td>
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<td>Government Lawyers Committee</td>
<td>Victoria Madden</td>
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<td>Richard Kidwell</td>
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<td>Mel Shralow</td>
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<td>Cheryl Cutrona</td>
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<td>Professional Liability Committee</td>
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<tr>
<td>Senior Lawyers Committee</td>
<td>Charles Kenrick</td>
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*“No response” reflects liaison relationships with other PBA sections and committees that we have requested, but without success so far.

The reported status of liaison activity and specific accomplishments to date during the current program year follows:

• Civil Litigation Section: The ADR Committee is a co-sponsor of this section’s retreat on April 5-7 in Gettysburg, and Ross Schmucki has arranged for the inclusion of a 90-minute session titled “Avoiding a Battle – When ADR Is Appropriate and How to Make It More Effective,” with a panel including Judith Meyer and moderated by Judy Weintraub. This is a great example of the kind of collaboration that our liaisons can foster.

• Environmental & Energy Law Section: It has been suggested that a liaison’s mere attendance at meetings of both the ADR Committee and the other group is likely to be insufficient for effective action. The most propitious time to work together might be when a situation arises in which members of the other section/committee are engaged that could be used as an example of how ADR can be helpful.

• Family Law Section: Our liaison has reported to the section’s council at its January meeting about a half-dozen ADR-related items thought to be of interest to family law practitioners.

• Intellectual Property Law Section: No opportunity for raising ADR matters has occurred yet in this section’s conference calls. Our liaison welcomes suggestions about what might be done to change this situation.

• Labor & Employment Law Section: Our liaison has been in contact with this section’s leadership, who are receptive to working with us, but nothing specific has materialized yet.

• Real Property, Probate & Trust Law Section: There have been ongoing discussions about including ADR sessions in the
PBA ADR Subcommittee News

Legislative Subcommittee Update

By Richard P. Kidwell

With new sessions of the commonwealth and federal Legislatures just commencing in January, there is not much to report.

In Harrisburg, Sen. Michael Stack is set to introduce legislation to create mandatory arbitration panels to resolve medical malpractice claims. Any medical malpractice complaint filed in a Court of Common Pleas would be referred to a three-person panel consisting of an attorney, a medical professional and a senior judge from the county where the case is filed. Either party could appeal the arbitration award and seek a jury trial.

The panel’s recommendations may be introduced as evidence during the jury trial. This proposed legislation, not yet introduced, would sunset in five years. The act’s effectiveness would then be studied to determine whether it would be renewed. Maryland had a similar system but abandoned it a few decades ago when it turned out that it added only another layer to litigation and did nothing to more efficiently or effectively impact medical malpractice cases. Thus, the prospects of passage are dim.

State Rep. Bob Godshall and state Sen. John Rafferty plan to reintroduce their legislation to establish specialty health courts, which may or may not incorporate some pre-trial ADR process. This did not get any traction last session and will probably meet a similar fate this time around.

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

Liaison Subcommittee

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Real Estate and Probate & Trust Law Institutes sponsored by this section and conducted by PBI, but nothing has come of them in the last two years. It would probably help our ability to include more ADR sessions in PBI programs if we had an ADR champion among the members of PBI’s board.

- Collaborative Law Committee: Our liaison is a leader of this committee, which substantially aides in the liaison process. However, nothing specific has happened recently, except for coordinating the times of the meetings of the two committees so that someone can attend both committees’ meetings.

- Corrections System Committee: Our liaison has repeatedly pointed out to the members of this committee the availability and benefits of using ADR to help clarify issues and develop options for addressing them in the criminal arena as well as in the civil one, and for getting stakeholders together to explore their concerns. However, nothing specific has materialized yet.

- Government Lawyers Committee: There has been no opportunity yet to interject ADR into the matters discussed by this committee.

- Health Law Committee: There is shared interest in issues around apologies and the applicability of the Uniform Arbitration Act in the health law context. However, so far this interest hasn’t been translated into any joint action.

- In-House Counsel Committee: One-half (one hour) of the CLE program sponsored by this Committee on Feb. 28 in Harrisburg is being devoted to a panel discussion of “ADR and Mediation,” in which the perspectives of advocate, mediator and in-house client will be addressed with respect to “case selection, mediator choice, timing, preparation and case presentation.”

- Minority Bar Committee: The principal thrust with respect to this committee has been to recruit minority attorneys to join the ADR Committee.

As noted above, although we have made overtures to the leadership of the following sections and committees, we have not yet succeeded in obtaining their agreement to the appointment of liaisons with us: Business Law Section and Insurance Staff Attorney, Law-related Education, Legal Services to the Public, Professional Liability and Senior Lawyers committees. As suggested by one subcommittee member, it is entirely possible that we will have greater success if the chairs of the other sections or committees are approached by someone who is an active member of their section or committee as well as ours. If you would like to serve as our liaison with one or more of these sections or committees, please contact Liaison Subcommittee chair Jim Rosenstein at 215-893-8709 or jrosenstein@finemanlawfirm.com or vice chair Charles Kenrick at ckanicklaw.com or 412-281-3417.

Many thanks to our liaisons for what they have accomplished to date and in anticipation of what they will be able to do in the future.

Submitted by James A. Rosenstein, chair, on behalf of the Liaison Subcommittee, composed of: Charles Kenrick, vice chair; David J. Evenhuis; Stephen Hall; M. David Halpern; Hon. Richard Klein; James Kozuch; Victoria Madden and Sarah Silver.
Resolution Subcommittees

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

Richard Kidwell  
UPMC  
200 Lothrop St., Ste. 7015-A  
Pittsburgh, Pa. 15213  
kidwellrp@upmc.edu  
412-647-7398

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

We invite readers to submit letters to the editor via regular mail or email to Resolution editor Clymer D. Bardsley.

LEGISLATIVE ACTION CENTER

Legislative contact from individual constituents is an invaluable way to impact the legislative process. The PBA Legislative Department has created a new Legislative Action Center to enable PBA members to contact their legislators quickly and easily.

The Action Center allows members to send emails to their senators or representatives on important legislative issues facing the legal profession. Members also can create a message and download it to send via postal mail. Talking points on legislative topics and sample letters also are available. Visit the Legislative Action Center today at www.pabar.org/public/legislative/legismain.asp or email the Legislative Department with questions at legislative@pabar.org.
A respondent’s perspective on mediation

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confidential session with the mediator, thus preserving the appearance of a united front at trial.

Since what occurs at mediation is not admissible at trial, a physician-respondent has the option of apologizing directly to the injured party without concern that it might be held against him or her at a later trial. On occasion, a physician-respondent’s apology, and perhaps a statement that the conduct resulting in the injury will not occur in the future, can entice a claimant to settle the case for a lesser amount of money.

In federal court, early mediation or arbitration is often compelled. If the mediation occurs prior to depositions, the respondent’s attorney has the opportunity to better understand the claimant’s attorney theory of the case. This will allow the defense attorney to better prepare his clients for an upcoming deposition. Frequently in federal court, the parties are required to submit to a second mediation. The second mediation occurs after the close of discovery and exchange of expert reports. The second mediation is oftentimes far more successful in resolving a difficult case.

In state court, mediation is generally voluntary. However, in some counties like Washington and Blair counties, civil cases are often subject to compulsory mediation or ADR.

The selection of the mediator is of vital importance in the decision to mediate. In my practice, the defense of medical malpractice cases, I find it useful to have a mediator who has been a former judge and has experience presiding over medical malpractice cases.

Alternately, I prefer to use an experienced litigator who has tried malpractice cases for either the plaintiff or defense. If the resolution of the case requires contribution from the Medical Care Availability and Reduction of Error Fund (MCARE Fund), it is necessary for the defense lawyer to obtain the input from the MCARE Fund as to their choice of mediator. The MCARE Fund will only agree to mediate if the mediator has experience with medical malpractice cases and has a track record of successfully settling cases.

While it is the preference of all parties to have insurance claims adjusters physically present at the time of mediation, it is not always possible. National insurance carriers typically have claims adjusters in one state managing lawsuits pending in another state.

When a case is filed in a remote Pennsylvania county, it can be difficult for a claims adjuster to be present at every mediation. Therefore, on occasion, I have told plaintiff’s counsel that I cannot agree to mediation unless the claims adjuster can participate by telephone. If the mediation is scheduled far enough in advance of trial, most claimant’s attorneys will not object to having the claims adjuster participate by telephone.

Several days to a week prior to a scheduled mediation, it is necessary to provide the mediator with a confidential mediation statement. The mediation statement should include a summary of the facts, the theory of the defense and the defense expert reports. If the defense is weak on the liability issues, then the mediation statement should emphasize the causation issues. If the credentials of the defense experts are more impressive than those of the plaintiff’s experts, then I often point out this disparity in the mediation statement.

Ideally, the preparation for mediation should be similar to the preparation for trial. If the mediation is to be successful from the respondent’s point of view, i.e. settlement at a defense number, a defense lawyer needs to have a thorough understanding of the strengths and weaknesses of his case. Inevitably, the mediator, at the prompting of the claimant’s lawyer, will point out the weaknesses in the respondent’s case. Therefore, it is necessary to be able to provide the mediator with a good explanation as to how you intend to overcome those weaknesses if the case proceeds to trial.

Court rules will dictate whether or not it is necessary for a physician-respondent to attend the mediation. Most often, physician-respondents do not attend the mediation, and in fact, mediation is often proposed to the physician-respondent as a method of avoiding additional time away from the medical practice. If a physician-respondent wishes to participate in a mediation, his presence can have a positive impact on the success of the mediation, if he is able to make a sincere statement acknowledging the claimant’s loss. If the claims adjuster is present, then an introduction is necessary, and, if properly coached, the claims adjuster can make a short statement explaining his role in the mediation.

At the beginning of the mediation, most mediators will hold a joint session which includes the parties and the attorneys. The mediator will often invite both the claimant’s attorney and respondent’s attorney to make an opening statement. This is an opportunity for the respondent’s lawyer to speak directly to the claimant about the strengths of the respondent’s case and perhaps sow the seeds of doubt in the claimant’s mind. In giving the opening statement, it is necessary for the respondent’s attorney to recognize the claimant’s loss in a sincere and respectful manner.

Typically, within the first hour or two, the mediator will be able to make a determination as to whether or not he or she is likely to be successful in resolving the case.

It is not unusual to make three or four settlement offers before the case is resolved. If resolution of the case is achieved, the mediator will typically bring the parties together for a final joint session. This final session is typically quite friendly in direct contrast to the tension of the opening session. In my experience, claimants are always relieved to have the litigation concluded. If the respondent is present,
A claimant’s perspective on mediation

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in front of the court consist of “What’s the demand?” followed by “What’s the offer?” and concluding with, “It seems like you’re too far apart.” Virtually every mediation starts with the parties similarly “too far apart,” but more often than not, the gap is closed because the parties have time to truly negotiate. The more perfunctory negotiations in front of the judge may not reflect lack of interest so much as a belief that the court has a limited role to play in the resolution of a case. With the mediator, however, his sole and exclusive role is to try to facilitate a settlement.

• Collecting Your Thoughts – Mediation forces counsel to thoroughly review the file and collect one’s thoughts, i.e. to “take stock” of the case. I always find that I am much better prepared to try a case after having prepared to present it at mediation.

• Savings of Cost and Time – I am not talking about the time and cost of trial because any settlement, even one achieved on the courthouse steps, will achieve those types of savings. I am talking about the time and cost of trial preparation. Mediations generally take place at least weeks, and often months, prior to a scheduled trial date. If a case is going to settle, far better for it to happen early in the run-up to trial rather than at the last minute. Clearly, there are certain cases that cannot be settled without a trial date literally hanging over a party’s head, but in those cases where the parties do not require such outside forces to compel them to reach a compromise, there are clear advantages to reaching a settlement earlier rather than later. In the end, time is money for all of the parties involved. The longer settlement is delayed, the more cost the carrier is absorbing and the less time plaintiff’s counsel has to work on the next contingent fee case.

Here are some of the “dos and don’ts” for mediation.

• Do by all means send a mediation statement to the defendant well in advance of the session so that they have sufficient time to “go through channels” to get the necessary authority to settle the case. This should provide a comprehensive overview of the case along with supporting expert reports. Also, give a copy to the mediator so he/she has an understanding of your position before the gathering.

• Do provide photographs or a video of your client ahead of time to the claims representatives if they have never met him/her. The “likeability” of your client always influences value in the courtroom, and it is no different in mediation. The smart defense attorney wants to be able to gauge how your client will be perceived by a jury, and if the defendant has never met him/her before, a pre-mediation submission of photographs and/or a video is something he/she can use in his/her evaluation process.

• Do prepare your client. Let him/her know what is going to happen at the mediation so that there are no surprises. Tell him/her there is going to be a lot of “back and forth” and also a considerable amount of “down time” when it appears as if nothing is happening. You do not want the client to get frustrated and disengage from the process.

• Don’t make your first demand at the mediation. Give the defendant a settlement figure well in advance of the session so he or she can discuss it with other persons involved in the evaluation process. There is absolutely no advantage to withholding a demand until the morning of the mediation.

• Don’t give up on the process. On more than one occasion I have seen cases settle in mediation after it appeared that the parties were simply too far apart to ever reach a middle ground.

• Don’t be obnoxious or offensive. It is often said that you can disagree without being disagreeable, and that should certainly be the approach at mediation. There is nothing to be gained by offending the opposing side or the mediator. You can vigorously represent your client but still be respectful of your opponent particularly in the close quarters of a mediation session. Bad behavior can quickly derail the process.

My pet peeve about mediation? This is an easy one: A defense attorney who shows up without the claims representatives who have authority to settle the case. There is nothing more frustrating than being in a mediation and not having the “right people” involved in the session. Regardless of assurances from defense counsel that the person holding the purse strings is “available by phone,” it is just not the same when you have to conduct a long-distance negotiation. Mediation works best when everyone is engaged with the mediator and is part of the dynamic of the process.

Last, and perhaps most important,
Victim Offender Conferencing:
A restorative approach

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able to participate in the conference. The role of the facilitator is to ensure that the youth will comply with the program criteria so as to create a safe environment for the victim in order to avoid re-victimization, a real concern for a victim, and something that would indicate a failure of the program. The process must not re-victimize, but rather it should help the victim move beyond the experience through emotional healing and restoration.

The facilitator prepares the parties separately for the joint conference. Once the parties are together at the victim offender conference most of the healing and repair occurs. During the conference each party has uninterrupted time to describe and explain his/her perspective and to share how he/she was impacted by the event. Each party is able to ask questions, and the facilitator will help the parties engage in a thoughtful dialogue. During the meeting Kelsey has the opportunity to speak openly with her teacher in a non-punitive environment and apologize, something that may not be possible outside the conference. Ultimately the parties can create a Restorative Agreement, which is a written document that outlines in detail the actions, agreed upon by both parties, that the offending youth must complete in order to repair the harm to the greatest extent possible.

If the victim chooses not to participate, the offender can still proceed with VOC. Instead of meeting with the victim, the offender will participate in a Parent-Youth Meeting. At this time the family will discuss the incident and its impact, and they will consider ways to repair the harm to the greatest extent possible and to prevent future conflict. Kelsey will still have the opportunity to share her perspective, and the facilitator will assist the family in addressing the current concern and ensure Kelsey’s competency development.

The final stage is follow-up, during which the facilitator is responsible for making contact with all participants, providing final paperwork and closing the case for the office. During this process, participants who require additional conferencing, mediation or referrals to outside agencies, are provided those services. The facilitator will certify that the youth has successfully completed her obligation and will send a compliance report to the Youth Study Center.

The Facilitator

To be effective, facilitators must understand their role. Facilitators are third-party neutrals who utilize several skills to assess and promote restorative dialogue. They are willing to understand the parties, can empathize with them and aim to work with the parties to meet their needs. A facilitator is required to go through 40 hours of basic mediation training, 24 hours of restorative justice training specifically geared toward the VOC process and complete an apprenticeship at GSMP where the facilitator will observe and co-facilitate before taking a case alone. The facilitator is not required to be a trained psychologist, social worker or other healthcare or behavioral specialist. This means the facilitator is likely not equipped to deal with possible underlying issues that may have played a role in the child’s offense, including abuse or trauma. The facilitator must, however, find a balance so as to learn about the circumstances surrounding the offense and the youth’s background without getting too far immersed in issues more suitable for a trained clinician.

Part of the role of the facilitator is to gain insight into the offense and the parties whose lives have been impacted by it. By learning about the parties, the facilitator can help address the harm in a way specifically appropriate for them. The facilitator should ask questions about the parties’ schooling, family situation, prior juvenile record and the neighborhood in which the parties are living. This information will help the facilitator better understand Kelsey and help guide the parties in reaching an agreement that suits their needs and effectively repairs the harm caused to her teacher and the community.

The Benefit of Restorative Justice

Restorative justice programs like VOC benefit victims, offenders and the community. A 2011 study conducted at GSMP revealed that 13 percent of youths who participated in VOC later re-offended, as compared with a 44 percent recidivism rate for youths who went through the court system and did not participate in a diversion program. These numbers reveal the potential of restorative justice programs, and VOC in particular, in ensuring the safety of members of the community and at-risk youths. Shutting the proverbial revolving door into prisons will prevent further victimization, ensure effective spending of taxpayers’ money and foster stronger communities.

Additionally, the conference can help victims who currently have unanswered questions about the incident and may feel unsafe due to the harm they have suffered. While a retributive justice approach looks at the crime as an offense against the state and the victim remains in the periphery, in the restorative process the victim is central in deciding the outcome, and this can be empowering for a victim. Although not all victims choose to participate, and perhaps not all would benefit from the process, according to post-conferencing surveys filled out by participants of GSMP’s program, victim participants were satisfied with the process and felt they personally benefited. After speaking with Kelsey, her teacher began to understand Kelsey’s perspective and that the harm was not a personal attack on her, but was truly misplaced anger. Kelsey’s teacher was also able to impart to Kelsey the full impact of her actions in a non-judgmental environment where the two of them could speak more comfortably with one another. Another benefit of the process is that
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A restorative approach

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the teacher has the ability to take an active role in deciding how Kelsey can repair the harm; for example she can request Kelsey write a short essay about violence or have Kelsey assist the teacher in handing out materials in class. The victim also gains a sense of closure and can reintegrate into the community in cases where the harm had alienated the victim or made the victim feel unsafe.

This event, from arrest to completing the diversion program, will inevitably change Kelsey’s life. If Kelsey completes all of the requirements, she will not need to appear before a judge and her record can be expunged.

Through the diversion program, it is possible for Kelsey to repair the harm she caused, reintegrate into her community and return to worrying about things more fitting for a child who is only 12 years old. Kelsey is still developing, learning about her role in the community and discovering her likes and dislikes. She is old enough to make mistakes, but young enough to learn from those mistakes, and she deserves the time and ability to grow. Restorative justice views Kelsey’s offense as an opportunity: a chance for Kelsey, her teacher and the community to collaborate and ensure this does not happen again.

1 Kelsey is a fictional character who represents a “typical” youth that is arrested and subsequently participates in Victim Offender Conferencing.


3 These are the requirements at Good Shepherd Mediation. These are typical requirements, although they may vary at different training locations.


Good Shepherd Mediation Program: Court & Community Services “in-house JODP recidivism tracking”

Michelle Rosenberg is a second-year law student at Villanova School of Law and a graduate of Rutgers University. The author is currently interning at Good Shepherd Mediation Program.

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both parties can obtain closure from years of litigation stress.

Even if mediation is unsuccessful, it often lays the ground work for resolution at a later time. The parties always leave mediation with a better understanding of their opposition’s case, and if the lines of communication remain open, they may soon come to an amicable resolution.

M. Brian O’Connor is a shareholder in the Pittsburgh law firm Matis Baum O’Connor. His practice is concentrated in the defense of physicians and hospitals.

A claimant’s perspective on mediation

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both sides have to come to a mediation with an open mind, i.e., allowing for the possibility that their pre-mediation evaluation may change based on what happens during the session. If both parties just show up with a pre-determined “number” that they will not drop below or will not pay above, there is little to be gained in the mediation. Part of the process is having your eyes open to opposing arguments and the possibility that you may need to re-think things. Likewise, if you present some persuasive points not previously considered, your opponent has to be prepared to acknowledge that he/she may have undervalued the case.

On balance, the rise in popularity of mediation has been a very positive development on the litigation landscape. It has given parties the opportunity to have serious, person-to-person settlement negotiation far earlier in the process, and for a longer period of uninterrupted time, than is traditionally available on the court’s calendar. It is not a surprise, therefore, that the success rate for good mediators is usually well above 80 percent.

John P. Gismondi is a personal injury trial attorney with a private practice in Pittsburgh. For more than 30 years he has handled all types of injury claims, including medical malpractice, automobile and airplane accidents, consumer products, on-the-job incidents and a variety of other circumstances. In addition to his full-time practice of law, Gismondi has served as an adjunct professor of law since 1985 at the University of Pittsburgh School of Law, where he teaches a “Trial Advocacy” course.

April 11
PBA Committee/Section Day
Radisson Hotel Harrisburg, Camp Hill
ADR Committee meets at 1:30 p.m.
2012-2013 ADR COMMITTEE EXECUTIVE COUNCIL

Stephen G. Yusem, Chair
600 W. Germantown Pike, Suite 100
Plymouth Meeting, Pa. 19462
syusem@syusem.com
610-828-2800

James A. Rosenstein, Vice Chair
Chair, Liaison Subcommittee
Fineman Krekstein & Harris PC
1735 Market St., Suite 600
Philadelphia, Pa. 19103
Phone: 215-893-8709
jrosenstein@finemanlawfirm.com

Lindsey A. Bierzonski, Secretary
Bierz Law LLC
P. O. Box 61644
Harrisburg, Pa. 17106-1644
Phone: 717-364-2625
lindsey@bierzlaw.com

Hon. (Ret.) Mason Avrigian Sr., Chair, RUAA Action Subcommittee
Wisler Pearlstine LLP
460 Norristown Road, Suite 110
Blue Bell, Pa. 19422-2323
Phone: 610-825-8400
Fax: 610-828-4887
mason@wispearl.com

Sandra A. Ballard, Co-Chair, Ad Hoc Legal Services Subcommittee
Dauphin County Bar Association
213 N. Front St.
Harrisburg, Pa. 17101-1406
Phone: 717-232-7536
Fax: 717-234-4582
sandy@dcba-pa.org

Edward Blumstein, Vice Chair, Sir Francis Bacon ADR Award Subcommittee
Edward Blumstein PC
1528 Walnut St., Suite 1100
Philadelphia, Pa. 19102-3621
Phone: 215-790-9666
edmediates@hotmail.com

Clymer D. Bardsley, Editor, Newsletter Subcommittee
Good Shepherd Mediation Program
5356 Chew Ave.
Philadelphia, Pa. 19138-2804
chardsley@phillymediators.org
215-843-5413, ext. 32

Laura E. Cooper, Vice Chair, Membership Subcommittee
Liberty Law Group LLC
505 Penn St., Floor 4
Reading, Pa. 19601
Phone: 610-685-1800
Fax: 610-685-5151
lcooper@libertylawgroup.us

Cheryl F. Cutrona, Co-Chair, Ad Hoc Legal Services Subcommittee
Chair, Sir Francis Bacon ADR Award Subcommittee
600 W. Germantown Pike, Suite 400
Plymouth Meeting, Pa. 19462-1046
Phone: 610-940-1640
david@feldheimlaw.com

Neil Hendershot, Co-Chair, Fiduciary ADR Subcommittee
Serratelli Schiffman & Brown PC
2080 Linglestown Road, Suite 201
Harrisburg, Pa. 17110
Phone: 717-540-9170
nhendershot@ssbc-law.com

Charles W. Kenrick, Vice Chair, Liaison Subcommittee
Law Offices of Charles W. Kenrick
U.S. Steel Tower
600 Grant St., Suite 660
Pittsburgh, Pa. 15219-2801
Phone: 412-281-3417
ck@kenricklaw.com

Richard P. Kidwell, Chair, Legislative Subcommittee
UPMC
200 Lothrop St., Suite 7015-A
Pittsburgh, Pa. 15213
Phone: 412-647-7398
Fax: 412-647-1081
kidwellr@upmc.edu

Hon. (Ret.) Richard B. Klein, Co-Chair, Fiduciary ADR Subcommittee
Two Logan Square, Suite 660
Philadelphia, Pa. 19103-2765
Phone: 215-656-4374
Fax: 215-656-4089
richardklein61@yahoo.com

James J. Kozuch, Vice Chair, Conflict Resolution Day Subcommittee
Caesar Rivise Bernstein Cohen & Pokotilow Ltd
Seven Penn Center
1635 Market St., Floor 11
Philadelphia, Pa. 19103-2212
Phone: 215-567-2010, ext. 133
Fax: 215-751-1142
jkozuch@crbcp.com

M. David Halpern, Vice Chair of Lawyer Dispute Resolution Program Subcommittee
8 Sheraton Drive,
Altoona, Pa. 16601
Phone: 814-940-8322
Fax: 814-940-8323
mdhalpern@halpernmediation.com

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2012-2013 ADR COMMITTEE EXECUTIVE COUNCIL (CONT.)

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Michael David McDowell, Vice Chair, RUAA Action Subcommittee
McDowell & Associates
P.O. Box 15054
Pittsburgh, Pa. 15237-0054
Phone: 412-260-5151
mmcdowell@arbitrationsandmediations.com

Herbert R. Nurick, Chair, Membership Subcommittee
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pa. 17105-3265
Phone: 717-783-5428
Fax: 717-787-0481
hnurick@pa.gov

Ross F. Schmucki, Chair, Continuing Legal Education Subcommittee
218 Rutgers Ave.
Swarthmore, Pa. 19081
Phone: 610-420-3430
rschmucki@verizon.net

Charles A. Shaffer, Chair, Conflict Resolution Day Subcommittee
Pugliese Finnegan & Shaffer LLC
575 Pierce St., Suite 500
Kingston, Pa. 18704-5732
Phone: 570-283-1800
Fax: 570-283-1840
shaffer@pfslawyer.com

M. Melvin Shralow, Chair, Lawyer Dispute Resolution Program Subcommittee
Shralow ADR LLC
930 Montgomery Ave., Apt. 101
Bryn Mawr, Pa. 19010-3037
Phone: 215-603-0076
melshralow@shralowadr.com

John E. Toczydlowski, Vice Chair, Legislative Subcommittee
Strachan & Hatzell
1650 Market St., Suite 4100
Philadelphia, Pa. 19103
Phone: 215-255-6396
john.toczydlowski@chartisinsurance.com

Judith W. Weintraub, Vice Chair, Continuing Legal Education Subcommittee
P.O. Box 352
Valley Forge, Pa. 19481-0352
Phone: 610-783-4519
Fax: 610-783-7131
judy@weintraublegal.com

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