On Oct. 2, 2000, the Pennsylvania Bar Association Young Lawyer’s Division held its 5th Annual “A Day on the Hill.” This occasion was highlighted by presentations on the featured topic “ADR: How Will it Effect Your Practice?” Senators Stewart Greenleaf and Allen G. Kukovich discussed current proposals for the establishment of a statewide agency to be known as the Commission on Dispute Resolution and Conflict Management. A Greenleaf initiative, which has been supported by the PBA and this committee, is S.B. 907. Enactment of this legislation would provide further impetus to the establishment throughout the commonwealth of Pennsylvania of programs for alternative dispute resolution. Consistent with the proposals of Sens. Greenleaf and Kukovich is a legislative proposal drafted by our committee vice-chair Tom Salzer. This draft proposes statewide standards for certification of mediators. Recognizing that this topic has, in the past, been controversial among our committee members, nevertheless, your co-chairs believe it is the business of our committee to assume the leadership role and to debate the merits of this initiative. A previous legislative initiative of our committee, the establishment of procedural rules for the conduct of international commercial arbitration in Pennsylvania, has been introduced into the House of Representatives by Rep. Lita Cohen, R-Montgomery, as House Bill 2438. This proposal was debated at public hearings in July 2000 and is scheduled to be submitted to the legislature during the current term.

In our last newsletter we highlighted the development throughout the commonwealth of court-related Alternative Dispute Resolution (ADR) programs and commented that the legislative impasse in Harrisburg was leaving the establishment of ADR to the judiciary at all levels. This trend continues and is even accelerating. However, as disparate jurisdictions enact their own rules and practices for ADR, the practice of law from jurisdiction to jurisdiction throughout the commonwealth is being made increasingly more difficult. The establishment of statewide regulations for court-annexed ADR would provide guidance and assistance to the various courts throughout Pennsylvania which seek to formalize and expand the role of ADR in the resolution of pending litigation.

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From the Editor

The days of this newsletter in a printed format may be limited if the promise of additional electronic means of communication, including threaded discussion groups, is fully realized throughout the Pennsylvania Bar Association. However, there is a place for a publication such as this newsletter, in some format, if its goal is to offer professionals a forum in which to share ideas concerning alternative dispute resolution.

As we get closer to the PBA having threaded discussion group capabilities — allowing for reliable instantaneous communications between the ADR committee members — I’m going to try to initiate some two-way communication through this newsletter instead of the usual one-way, writer-reader communication.

I recently attended an ADR training session in Harrisburg where Jack Nilon, among others, spoke and answered audience questions. (Jack addressed the pending international arbitration legislation.) The audience seemed to be a thorough mixture of legislators/attorneys and practitioners which may have been the reason that there was a wide spectrum of questions concerning ADR. Some of the questions, such as licensing of mediators, we’ve probably heard before while other questions, such as mediator confidentiality, were more novel.

All this goes to the issue that there are questions which you as readers could send to me in my role as newsletter editor, and then I could solicit replies from various sources. Also, there could be more commentary and interjection of opinion and insight as Mark Welge so admirably did in his article on Hozlock and arbitrator partisanship in the Spring 2000 newsletter.

While there is always an attorney with an opinion, comparable to an economist always having at least two hands (i.e. “on the other hand”), I find that certain very experienced arbitration professionals’ perspectives on a topic are exceptionally valuable.

All this may be concluded in summary: with your assistance, I will try to make this newsletter more responsive to issues and opinions.

Message From the Chairs
(Continued from page 1)

ADR in the context of consumer transactions has been the subject of recent criticism from various commentators, and is in fact now scheduled for presentation to the Supreme Court of the United States. In the case of Green Tree Financial Corp., - Alabama and Green Tree Financial Corporation, v. Larketta Randolph, United States Court of Appeals for the 11th Circuit, (98-6055), Petition for Writ of Certiorari, granted April 3, 2000, Oral Argument, Oct. 3, 2000, our highest court may decide if there are limitations or conditions under which a business enterprise may, in a contract of sale, lease, or other transaction, obligate a consumer to resolve disputes through ADR. This issue has become increasingly important in fields such as insurance, telecommunications, health care and other consumer transactions. Our committee members are urged to make known their views on this developing area of the law. This development is discussed in a separate article in this newsletter by co-chair Jack Nilon (see “ADR Backlash,” facing page) with a forward-looking perspective and also an article by Tom Salzer (see “Will High Arbitration Fees Defeat the Purpose?,” page 6) with a more retrospective viewpoint.

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

by John W. Nilon, Jr., Esq.

The growing popularity of Alternative Dispute Resolution may be threatened by a growing backlash of consumer advocacy organizations which have challenged the right of private businesses to use ADR in certain types of consumer and employment agreements.

Arbitration has long been favored by businesses for its ability to resolve disputes, quickly and inexpensively. Arbitration, mediation and other methods of ADR, have been developed by businesses for the much discussed advantages of independent, efficient and timely dispute resolution. Businesses have promoted ADR because it saves time, costs, and also may avoid the unpredictability of juries. The utilization of ADR has, in recent years, been expanded by some businesses to impose the practice on consumer contracts.

The United States Supreme Court will hear argument during its current term in the case of Green Tree Financial Corp., - Alabama and Green Tree Financial Corporation, v. Larketta Randolph, United States Court of Appeals for the 11th Circuit, (98-6055), Petition for Writ of Certiorari, granted April 3, 2000, Oral Argument, Oct. 3, 2000. The plaintiff, Mrs. Randolph, bought a mobile home and financed the purchase through Green Tree Financial Corp. Some months after the purchase, on the advice of a friend, she showed the mortgage papers to an attorney who pointed out that she was required to pay an annual repossession insurance fee that had not been properly disclosed. Moreover, she had agreed to settle all disputes with Green Tree through binding arbitration. Mrs. Randolph became the lead in a would-be class action suit against Green Tree, which countered, questioning her right to sue individually, and as representative of a class, citing the provisions of the mandatory ADR clause.

The 8th Circuit Court of Appeals has held that the failure of Green Tree to explain, in the contract, how the arbitration process would be paid for, negated the mandatory provision. The Supreme Court has granted certiorari to review this determination.

Practices similar to those of Green Tree, have become increasingly popular in consumer contracts. For example, the American Arbitration Association (AAA) has established ADR rules for the resolution of consumer disputes within the telecommunications industry. (See American Arbitration Association - Wireless Industry Arbitration rules). The dissatisfied purchaser of telecommunications equipment or services is, under this standard arrangement, obligated to take any dispute into AAA, and not into a court of competent jurisdiction.

Similar practices are in force within the commonwealth of Pennsylvania in group health insurance contracts and in similar transactions.

The controversy before the Supreme Court of the United States involves, not only the mandatory use of the ADR provision in contracts, but its crossover implications to class action litigation. Among the groups opposing mandatory consumer ADR, is the American Trial Lawyers Association. Members of the Pennsylvania Bar Association Alternative Dispute Resolution Committee are urged to make their views known on the limitations, if any, to be imposed on the use of ADR in consumer transactions. The continuing use of ADR in consumer transactions could threaten the utility of ADR in other contexts.
Can You Keep A Secret?  
Mediation Confidentiality Under Judicial Attack

by Mark A. Welge, Esq.

As legal practitioners and as neutrals, we use mediation to help resolve disputes. A key component to the success of mediation is that communications with the mediator are confidential. What is said to and by the mediator is not to be revealed to others unless expressly authorized by the party to those communications. Trust in the process and in the mediator is dependent on the explicit belief that one’s candid conversations with the mediator won’t be used against that person or repeated to the world. Without that trust, mediation fails.

Notwithstanding the importance of confidentiality to the mediation process, recent court decisions have called into question whether communications with or by the mediator can be kept secret. This article briefly reviews those decisions and offers suggestions to counsel and neutrals to avoid breaches of confidentiality.

Twenty years ago, the Ninth Circuit became the first court to wrestle with mediator confidentiality in National Labor Relations Board v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980). The NLRB would not allow a mediator to testify “as to a crucial fact occurring in his presence.” Id. at 52. The Circuit Court affirmed. It is important to note, however, that Macaluso did not protect the confidentiality of a participant’s communications with the mediator or the confidentiality of the proceeding; rather, the decision was aimed at preserving mediator impartiality, which would have been compromised if the mediator was forced to testify in order to resolve a credibility dispute arising out of the mediation itself. The narrow focus of Macaluso never reached the larger issue of preserving confidentiality of the entire mediation proceeding.

Two years ago, Folb v. Motion Picture Ind. Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), carved out a federal mediation privilege. Folb declared that the privilege applies to “all communications made in conjunction with a formal mediation.” Id. at 1180. Significantly, the privilege was adopted under Federal Rule of Evidence 501, wherein federal courts are authorized to define new privileges based on interpretation of common law principles in the light of reason and experience. Consequently, in federal and pendent state law claims in federal question cases, communication with the mediator and communications between parties during mediation are protected. Id. Moreover, communications in preparation for and during a mediation with a neutral mediator are subject to the privilege, but subsequent negotiations between parties, even if they include information disclosed in the mediation, are not protected. Id.

Folb does not appear to apply the privilege to mediations of claims governed by state law. Nor does it address confidentiality issues arising from mediations conducted in connection with cases pending in the state courts. Indeed, several recent decisions strongly suggest that mediation confidentiality is subsumed by other factors.

In Idaho v. Trejo, 979 P.2d 1230 (Ct. App. Idaho 1999), an Idaho statute provided mediation participants with a privilege to prevent a mediator from testifying about communications at mediation proceedings. The Idaho Court of Appeals held that the statutory privilege did not apply in a criminal trial where the defendant’s wife testified against her husband and, in order to impeach her testimony, the defendant sought to introduce the testimony of a mediator who had mediated an earlier divorce dispute between defendant and his wife. Defendant wanted the mediator to testify about statements the wife had made during mediation. According to the Court of Appeals, the wife could

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Apology: Does it Have a Place in Mediation?

By Joseph G. Skelly, Esq.

Does apology have a place in mediation? What constitutes a real or meaningful apology? When and where should an apology be made? Will an apology be construed as an admission of liability? What role does the mediator play in an apology? These are just a few of the questions that arise in discussing the role of apology in conflict resolution, especially in mediation.

Apology Can Be A Powerful Tool in Mediation

Although there are critics, especially critics of mediation as a means of dispute resolution, who would argue against a proper role for apology in mediation, many prominent players in the dispute resolution field would respond with a resounding “yes” to the question of whether apology has a proper role in mediation. While this brief newsletter article cannot review, or even cite to, all of the literature on the subject, two scholarly articles that do review the literature in detail and provide persuasive discussion on the efficacy of apology in mediation, are worthy of note. The first is a 1997 New York University Law Review article by Deborah L. Levi, a litigator in the Boston firm of Ropes & Gray, titled “The Role Of Apology in Mediation” and the second is a recent article by nationally prominent mediator/mediator-trainer, Carl D. Schneider, Ph.D., published in Mediation Quarterly, titled “What It Means to Be Sorry: The Power of Apology in Mediation”.

A third article of interest is one by Steven Keeva, senior editor of the ABA Journal, entitled “Does Law Mean Never Having to Say You’re Sorry?”, which discusses the role of apology in lawsuits generally.

According to these authors, and the authorities to which they cite, apology is clearly appropriate in mediation, especially in cases where a personal relationship exists — or existed — and where there has been emotional harm to one of the parties. When one party feels injured, this feeling of injury can be a block to reaching an agreement. The party simply cannot get beyond the hurt. Where this intangible injury exists, it has to be dissolved, minimized, or at the very least, addressed, before the tangible issues of the case can be dealt with in a meaningful fashion.

Apology, both Levi and Schneider contend, can be a powerful tool to move the parties closer to settlement. An apology can eliminate, or at least reduce, the fiction of translating emotional pain to dollars. While in most civil cases, the main issue remains money or some form of compensation, addressing and bringing a degree of healing to the underlying conflict can do a lot towards achieving a prompt and realistic settlement.

More often than not, a lawsuit is not the basis of the conflict; it is a symptom — a symptom of the underlying conflict that has resulted in an insult of one form or another, an emotional wound. What frequently happens is that the party feeling the wound becomes angry and frustrated and wants redress, or even revenge, against the perceived perpetrator of the hurt. When redress or acknowledgement is not forthcoming and worse yet, compounded by being ignored or dismissed, the injured party goes to a lawyer who does what lawyers have been trained to do. The lawyer frames the dispute so that it falls within some recognizable general principle of law, reduces it to a monetary demand, and starts a lawsuit. Thereafter, the parties become enmeshed in considerations of the substantive law, procedural rules, posturing and tactical maneuvering, thereby completely losing sight of the original hurt that gave rise to the dispute. “The legalization of disputes,” says Levi, “shifts the parties’ focus away from private moral concerns to strategic maneuvers and legal consequences.”

The Ritual of Apology

For an apology to be effective, it must be made in a meaningful way, and must be sincere and genuine. A simple “sorry about that” rarely will do. Schneider says there is a ritual of apology, its core

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by Thomas Salzer, Esq.

There are a multitude of issues that may arise when the reality and nuances of everyday disputes meet the stark language of statutes and regulations. In one instance noted here the statutes in question are the Federal Arbitration Act (FAA) and the Truth in Lending Act (TILA), and the reality is whether an agreement calling for arbitration should be upheld or stricken because one party may be burdened with high arbitration fees and costs. This issue was one of several sub-parts addressed in Randolph v. Green Tree Financial Corp., 178 F.3d 1149 (11th Cir., 1999).

In essence, Randolph brought suit alleging that Green Tree violated the TILA by way of a flawed disclosure. The court noted, in part, that “[a]s an initial matter, we recognize that arbitration ordinarily brings hardships for litigants along with potential efficiency ... In light of a strong federal policy favoring arbitration,” some “inherent weaknesses” in the procedural apparatus of an arbitration “should not make an arbitration clause unenforceable.” Paladino v. Avnet Computer Technologies, Inc., 134 F. 3d 1054, 1062 (11 Cir. 1998). “So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

Some barriers of access to an arbitration forum may render an arbitration clause unenforceable. Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230, 1234, note 3 (10 Cir. 1999). The Randolph court found for the plaintiff by voiding the arbitration clause, and did this by relying on Paladino in that forcing a plaintiff to bear the brunt of “hefty” arbitration costs and “steep filing fees” constitutes “a legitimate basis for a conclusion that the [arbitration] clause does not comport with statutory policy.” Paladino, 134 F.3d at 1062.

The Randolph court distinguished its finding from cases in which other circuits had held that arbitration agreements were enforceable in spite of substantial arbitration costs. For instance, in Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 15-16 (1 Cir. 1999), the Court rejected an argument that the New York Stock Exchange’s arbitration procedures were unenforceable to arbitrate a Title VII claim merely because plaintiffs could be charged high forum fees. However, the court in Rosenberg had before it a record suggesting that most successful arbitration claimants were awarded fees and costs. In Randolph, there is no similar information about how claimants fare under Green Tree’s arbitration clause because the clause in the Green Tree agreement was silent on the subject of arbitration fees and costs. So in this instance, Randolph might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim.

Other courts have raised similar concerns. The Shankle court concluded that a “fee-splitting” provision of an arbitration agreement substantially limited an employee’s use of the arbitral forum and therefore rendered the arbitration agreement unenforceable. 163 F.2d 1230, 1234-35. At the other end of the spectrum, in Cole v. Burns International Sec. Services, Inc., 105 F.3d 1465 (D.C. Cir. 1997) the court required an employer to bear the sole costs of an arbitrator’s fees where the arbitration was imposed by the employer, and noted, but declined to answer the question whether an arbitrator’s refusal to waive filing and other administrative fees could preclude enforcement of an arbitration agreement. Id. at 1484-85 & note 12.

The Second Circuit held that in Doctor’s Associates, Inc. v. Stuart, 85 F.3d 975, 980-81 (2d Cir. 1996) an arbitration agreement and process may be laden with high fees and costs, but the arbitration agreement was still determined to be valid. Id. at 980-81; Paladino v. Avnet Computer Technologies, Inc.,

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elements being (1) acknowledgement, (2) affect and (3) vulnerability. “[T]here must be an acknowledgement, or recognition, of an injury that damaged the bonds between the offending and offended parties. The offense has to qualify as a genuine injury, one that involves some transgression of a moral or relational norm that both damages the offender’s social bonds and calls into question his or her membership in some community. Tavuchis calls this injury ‘an act that cannot be undone, but cannot go unnoticed.’”

The offending party must be affected personally by what he or she did, with a genuine showing of sorrow or remorse. As to vulnerability, the apology must be offered without defense or qualification. The offending party is placed in a potentially vulnerable state by offering the apology while knowing that it could be refused.

Levi describes four types of apologies that might occur in mediation. The first is the “tactical apology,” a scant acknowledgement of a party’s pain, made solely to gain credibility during negotiations and as a posturing effort to influence the opponent’s behavior. It is frequently of the “I’m sorry but I did nothing wrong” variety. The second is the “explanation apology” where one employs mock regret to rebuff an accusation, and then generates an account to defend past behavior. This, too, conveys “I’m sorry but not at fault.” The third apology described by Levi is the “formalistic apology,” made by the offending party who utters the requisite words because of a demand by an authority figure, (i.e., teacher, employer) or a demand by the offended party. The fourth apology is the “happy ending apology” which, in essence, contains all of the elements of the genuine apology discussed by Schneider.

Only the happy ending apology is a meaningful apology. The first three: the tactical, the explanation and the formalistic apologies, are insincere and thus meaningless in repairing the intangible emotional damage.

The Role of the Mediator

The role of the mediator can be vital in the apology ritual. Bush and Folger, in their landmark work on transformative mediation, admonish mediators to be vigilant for opportunities for empowerment and recognition. Apology, of course, is the ultimate form of recognition.

Schneider notes that many parties in mediation need assistance in both making and receiving apologies. Apology can be awkward and something foreign to many disputants. The caucus can be fertile ground when it comes to apology. The mediator can raise questions about sorrow and remorse and can explore whether opportunities for apology exist. The mediator can also explore with the offended party whether any apology might be fruitful. The mediator can then help the offending party frame the apology in such a way that it will be meaningful, i.e., that it will truly convey all the elements of a sincere and genuine expression of regret and remorse, and can help the offended party receive, and respond to, the apology.

Levi states “[a]pologies are speech-acts, and their effectiveness in reconciliation depends not only on the speaker but also on the participation of an injured party.” Moreover, timing is critical, says Levi. For an apology to be effective, the offended party must first have an opportunity to tell his or her story so that the apology reflects the understanding of the injured party’s loss.

One caveat is vital to the role of the mediator in apology. An apology can never be forced or imposed. To force or impose an apology is antithetical to its very concept.

Apology and Confidentiality. Mediation: A Safe Harbor

While apologies can be made at anytime and place during the course of a dispute, as noted, timing can be critical. Not only is timing critical to the dynamics of the parties relating to one another, other factors give rise to consideration of the time and place for an

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apology, especially concerns of confidentiality. This is especially true if a party or his or her lawyer fears that an apology might be tantamount to an admission of liability. By virtue of our Pennsylvania statute on confidentiality in mediation, 42 Pa. C.S.A. §5949, all communications, with certain exceptions, made in mediation are confidential and cannot be introduced into evidence. This applies to apologies.

Moreover, the recent amendment to Pa. Rule of Evidence 408, effective July 1, 2000, bringing our Pennsylvania rule into conformity with Federal Rule of Evidence 408, provides that all conduct in the course of compromise negotiations is not admissible. This, too, would apply to apologies. Clearly, mediations are settlement or compromise negotiations. Thus, mediation is an ideal and safe place for apology work. According to Keeva, “[I]t is a good idea to limit full-dressed apologies — the kind in which responsibility is acknowledged — to settlement talks or mediation.”

As to whether an apology could be construed as an admission of liability, Levi states that the “[a]dmissibility of apologies, however, hardly renders either liability or exacerbated damages a foregone conclusion.” She cites to a law review article discussing the legal consequences of apology that discusses two Vermont cases, one in which a gynecologist’s apology was not sufficient to establish negligence and another in which a urologist’s apology was not sufficient to even raise negligence before the jury.

Conclusion

A meaningful apology can do much towards addressing the underlying hostility in a dispute and help the parties move to a reasonable settlement. The mediator can do much to recognize opportunities for apology and help the parties express and receive an apology. A mediator should never force an apology. Neither should a mediator be intimidated by apology or worried about following “the right rules.” As Levi states, “… there are no formulas for either timing an apology or suggesting one. Only attentive listening will signal how and when an apologetic gesture is appropriate.”

As summarized by Schneider, “[a]n apology may be just a brief moment in mediation, yet it is often the margin of difference, however slight, that allows parties to settle. At heart, many mediations are dealing with damaged relationships. When offered with integrity and timing, an apology can indeed be a critically important moment in mediation. Trust has been broken. An apology, if acknowledged, can restore trust. The past is not erased, but the present is changed (citation omitted).”

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not invoke the privilege to preclude the testimony because the statute only applied where the person invoking it was a party to the instant case. As the wife was only a witness, not a party to the criminal action, she could not preclude the mediator from testifying about confidential mediation communications.

The power of the courts to police and control compliance with their orders overcame mediation confidentiality in Foxgate Homeowners’ Association, Inc. v. Bramalea California, Inc., 78 Cal. App. 4th 653, reh’g granted 999 P.2d 666 (Cal. 2000). Decided in February 2000, Foxgate held that a mediator’s “neutral” report to the court, concerning sanctionable conduct of one of the parties during mediation, could be considered by the court as a basis for imposing sanctions. Consequently, in court-ordered mediations, parties who commit sanctionable acts during the mediation, cannot shield their conduct from review by the court by claiming that the mediation is confidential.

Similarly, in Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999), the court allowed a mediator to testify at a hearing in order to resolve a claim by plaintiff that she was pressured to settle during a mediation and that her signature on a settlement document was obtained through “undue influence.” The court used its power to control the conduct of persons involved in the mediation even though it is not clear that the mediation was court-ordered. Nonetheless, mediation confidentiality took a backseat to judicial oversight. Constitutional due process considerations trumped mediation confidentiality in Rinaker v. Superior Court, 62 Cal. App. 4th 155 (Cal. Ct. App. 1998). The court ordered a mediator to testify at a hearing about admissions made at a mediation involving a juvenile delinquent and his victim. The victim’s admissions apparently would have aided the juvenile delinquent in his criminal trial, so the mediator’s corroborating testimony was needed. Mediation confidentiality was again subordinated to other concerns.

These decisions cast great uncertainty on whether the confidences shared with mediators, the conduct of parties in mediation and the mediator’s communications will be protected from scrutiny by tribunals in other settings. Practitioners and mediators must be proactive if they intend to successfully ward off efforts to reveal confidential communications in open court. The following should be considered:

1. A carefully drafted mediation agreement containing a confidentiality clause should be signed by all parties and the mediator, before mediation. The clause must bind all the participants to keep mediation communications and conduct confidential.

2. If the court orders mediation, the parties should consider entry of an order memorializing confidentiality and precluding the mediator from reporting mediation statements or conduct to the court, except to advise that mediation has concluded.

3. If fewer than all the parties agree to participate in mediation, the non-participants should be precluded from attending. If non-participating parties attend as spectators (which is a mistake in any event), they must be signatories to the confidentiality agreement.

4. Participating parties must agree to defend and indemnify the mediator in the event a non-participant attempts to compel the mediator to testify about mediation communications.

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134 F.3d 1054, 1062 (11 Cir. 1998); Doctor’s Assoc., Inc. v. Hamilton, 150 F.3d 157, 163 (2 Cir. 1998). It may be helpful to note the factual differences in each of these cases to determine how a court will find whether to uphold an arbitration agreement. The Hamilton court found an arbitration agreement enforceable where the plaintiff’s estimated total costs of arbitration were between $28,000 and $32,000. Note that the arbitration clause in Stuart arose in the context of a commercial franchise agreement, Id. at 977-78, and not a small consumer transaction as in Randolph or an employment agreement as in Paladino.

Finally, in Young v. Walter Homes, the Alabama District Court noted the plaintiff’s reliance on Randolph but upheld the arbitration clause because Young was not trying to enforce a statutory right whereas in Randolph the plaintiff did try to do so. It has been speculated that to cross this hurdle of high fees and make a dispute resolution process available to satisfy statutory requirements, an arbitration agreement might incorporate standard and widely-known guidelines such as the Commercial Arbitration Rules of the American Arbitration Association (AAA) which contain safeguards protecting plaintiffs from inordinate arbitration costs. See AAA rules 45, 51-53. Moreover, the AAA rules provide that filing and administrative fees may be reduced in cases of extreme hardship and are subject to final apportionment by the arbitrator who may assess such expenses against any specified party and, for cases with small claims the arbitrator may serve without compensation for the first day of service. See AAA Rules 52 & 53. Also, under the NYSE and NASD arbitration rules, it is standard practice in the securities industry for employers to pay all of the arbitrator’s costs and for filing and administrative fees to be waived because of hardship. See Thompson, 2000 WL 45493, at *5, and Dorsey, 46 F.Supp.2d at 807-08 rejected the finding of the Randolph court; also Arakawa v. Japan Network Group, 56 F.Supp. 349, 354-55 (S.D.N.Y. 1999) (ordering arbitration of Title VII claim where arbitration agreement incorporated the Employment Dispute Resolution Rules of the AAA which provide similar protections against potentially high costs of arbitration).

Finding Federal Jurisdiction Down Surprising Avenues

by Thomas Salzer, Esq.

Federal courts can hear motions to vacate arbitration awards, absent diversity, admiralty, or any other basis for federal jurisdiction, if the primary ground for challenging the award is manifest disregard of federal law according to Greenberg v. Bear, Stearns, & Co., 2000 WL 1092135 (2d Cir. Aug. 7, 2000). The court in Greenberg noted the well-established principle that the Federal Arbitration Act (FAA) does not confer subject matter jurisdiction on the federal courts. Therefore, the fact that Greenberg filed a petition to vacate under section 10 of the FAA was not sufficient.

However, the court also said that federal courts have jurisdiction to entertain a petition to vacate an arbitration award if “the petitioner complains principally and in good faith that the award was rendered in manifest disregard of federal law.” Greenberg, 20000 WL 1092135 at *4. When the arbitration “process so immerses the federal court in questions of federal law and their proper application that federal question subject matter jurisdiction is present.” Id.
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References:

1 See generally Edward Brunet, Questioning the Quality of Alternative Dispute Resolution, 62 Tul. L. Rev. 1,15-27 (1987).


7 Schneider, supra note 4, at 266.

8 Schneider, supra note 4, at 266-267.

9 Levi, supra note 3, at 1172-1175 under the subsection entitled “A Typology of Apology”.

10 See generally Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (1994); and in particular, Chapter 6, Capturing Opportunities for Empowerment and Recognition (Id. at 139).

11 Schneider, supra note 4, at 269-273.

12 Levi, supra note 3, at 1178.


14 See Levi, supra note 3, at 1193. See also Bush and Folger, supra note 10, at 217.

15 See Order of Court adopting amendment, with comment, 3 Pa.B. 1642.

16 See Steven Keeva, supra note 5, at 95.


18 Levi, supra note 3, at 1195.

19 Schneider, supra note 4, at 277.

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5. The mediator should agree to destroy all notes of mediation proceedings and return, or destroy, all documents received during mediation when the proceedings are concluded.

6. Caution should be exercised at mediation where a participant has been ordered to attend against his or her will. Such participants are more likely to initiate motions to compel mediator testimony in underlying court proceedings, particularly criminal actions where that party is a defendant.

Mark Welge is a principal member of Manta & Welge in Philadelphia with a practice concentrating on commercial business and construction disputes on a national basis. He was recently chairman of the Philadelphia Bar ADR Committee.
PBA Listserv Update

A growing number of PBA members are keeping up on the latest committee/section news through PBA listservs.

Here are answers to some commonly asked questions about listservs:

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

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

Can I subscribe to any PBA listserv I wish?
No. Only members of the committee/section can subscribe to the committee/section’s listserv.

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

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

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