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ARBITRATION & MEDIATION

A Newsletter of the PBA Alternative Dispute Resolution Committee

Doctor-Lawyer Project Tackles Malpractice

By Stacey Burling

Doctors and lawyers in Montgomery County are doing something unusual: working together.

Members of the county's bar association and medical society, along with Abington Memorial Hospital [...] are launching a pilot project they hope will keep more malpractice disputes out of court.

Lawyers and doctors will work in teams to mediate conflicts between patients and the hospital or doctors. The hope is that the new approach will resolve problems more quickly and humanely, without the demonization of both sides that can occur in malpractice battles.

Whether it will save money remains to be seen. Project leaders say that is not the primary goal.

John J. Kelly, Abington Memorial's chief of staff, said he wanted to avoid the "harshness" of litigation. "At the end of the day, I think everybody walks away feeling like it's a much more productive process, and it's a healing process," he said of mediation.

"I think litigation makes everything so much more painful for everyone, and I'm not sure healing ever occurs."

Planning for the project started three years ago after a nudge from the state Supreme Court. It encouraged counties to look at alternatives to traditional court battles as doctors threatened to leave Pennsylvania

because of skyrocketing malpractice-insurance rates. Not much has happened elsewhere in the state, but doctors and lawyers here pursued it because "there's got to be a better way to do things than the way we've been doing them," said Mark Lopatin, a rheumatologist, who led the medical society's part of the effort.

People on both sides say the current system is emotionally draining, even when you win.

People on both sides say the current system is emotionally draining, even when you win.

"Clients hate courtrooms," said Robert Morris, president of the Montgomery County Bar Association. "I haven't ever had a client that wanted to get in the witness stand."

The project deals with unhappy patients and their families through a

two-step process. In the first, doctors and nurses at Abington have been trained to listen to such patients and explain what happened in as much detail as possible. Project leaders say many people who sue do so primarily to find out what happened.

If that is not enough, patients can move to mediation, a process that helps them hammer out a settlement with their doctors. The mediator shuttles between the sides, bringing their positions together. Unlike a judge or arbitrator, the mediator does not decide the case. Instead, the patient and doctor — or more likely their attorneys — determine an acceptable outcome. Usually that involves money, but patients also often want an apology and assurance that steps will be taken to prevent future mistakes.

If the sides are still fighting, patients still have the option of going to court.

In this region, Drexel University College of Medicine's doctors have

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Doctor-Lawyer Project Tackles Malpractice

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the longest-running mediation program. Theirs often uses a team approach, pairing lawyers who typically represent patients with those who defend doctors. Abington's new program creates even more unusual teams. A lawyer with health experience will be the lead mediator, and a doctor will be his "medical partner."

"It's precedent-setting, this project," said Jane Ruddell, a former health-system lawyer who now runs a company devoted to alternative dispute resolution. "It's really trying to change a culture."

Ruddell ran a training session last week in the bar association's Norristown office to train about 30 doctors and lawyers to be mediators. Many of the lawyers had previous experience with mediation, but the daylong program was an eye-opener for the doctors, who understood for the first time how hard and time-consuming it was to sort through strong emotion and find common ground.

In a training exercise, the doctors and lawyers were split into groups for some role-playing. Abington Memorial obstetrician-gynecologist Robert Michaelson played the mediator for one. The bar association's Morris was an angry woman with cancer, and Mark Pyfer, president of the Montgomery County Medical Society, was her even angrier husband.

The patient in the case had had foot pain, which the doctor thought was caused by a pinched nerve. The patient decided not to have surgery the doctor recommended and later lost part of her leg after the cancer was discovered.

Michaelson got into trouble almost immediately, waiting too long to separate the warring parties. He ran out of time without getting close to a settlement, but Morris, who is a trained mediator, and Pyfer, a novice, proved a good team.

"I thought she was negligent because she never paid much attention to me," Morris said petulantly.

"Dr. Reynolds can say she's sorry, but I don't think she has any idea what it's like to go through life with one leg," Pyfer chimed in. Then he asked for \$10 million.

Doctors came away from the experience understanding why the lawyers will take the lead in mediations, at least in the beginning.

"The most striking thing about this was ... how difficult this is," said Lopatin, the rheumatologist.

Frank Murphy, a lawyer who attended the training, said it might be harder than the hospital anticipated to avoid malpractice filings and to persuade lawyers to be totally open with one another. Legal-filing deadlines, strategy, and payment agreements give lawyers an incentive to file in court and, sometimes, to stretch out the proceedings.

Advocates of mediation say it is often cheaper than court because there are fewer exhibits and medical experts to pay for.

Participants usually sign confidentiality agreements, a step that supporters say spares everyone embarrassment. The downside of the secrecy is that mediated cases create no legal precedent and leave no public record. Monetary settlements are reported to the National Practitioner Data Bank. But its information is available only to hospitals and professional groups, not consumers.

Some doctors also worry that mediation will be just one more step on the way to court. That has not been Drexel's experience. Of 40 cases that have gone to mediation, only three were unresolved.

Those involved in the Montgomery County experiment say it is more likely to give patients what they really want: early action, an apology, and information. "Patients want answers. That's what they want more

than anything," said Sheila Stieritz, a former director of patient safety at Abington Memorial, who consulted on the pilot project. "And if it's something really serious, most patients want it not to happen to anybody else." ■

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Cheryl Cutrona to Receive Annual PBA Sir Francis Bacon Award

The 5th Annual Pennsylvania Bar Association Sir Francis Bacon ADR Award will be presented to Cheryl Cutrona, executive director, Good Shepherd Mediation Program, during the PBA Annual Meeting Awards Luncheon on June 4 in Hershey.

Cutrona is an attorney, mediator, trainer, facilitator, writer and editor. In addition to her work at GSMP, she mediates for the Pa. Department of Education Office of Dispute Resolution, the U.S. Equal Employment Opportunity Commission, and the U.S. Postal Service. Cutrona sits on the Court Improvement Project Committee of the Philadelphia Family Court Dependency Unit, the board of directors of the Pennsylvania Council of Mediators, the board of directors of the Association for Conflict Resolution Greater Delaware Valley Chapter, and the editorial board of *Conflict Resolution Quarterly*.

Cutrona holds a B.A. from Michigan State University, a Masters in library science from Wayne State University, and a J.D. from Temple University Beasley School of Law. ■

Collaborative Law: Not Just Being Cooperative

By Debra Denison-Cantor

When most practitioners hear the term *collaborative law*, their first reaction is to believe they practice this way already. Practitioners, particularly family law practitioners, like to view themselves as cooperative in handling their cases. They believe that the informal exchange of information and the negotiation of a settlement makes the case collaborative. However, being cooperative, is not the same as being collaborative, for many different reasons.

In the collaborative process, each party retains his or her own trained collaborative law attorney to advise and assist in negotiating an agreement on all issues. The collaborative process involves a series of four-party settlement meetings which are attended by both clients and both lawyers. The clients establish the agenda and identify issues that are important to each of them in resolving their case. Collaborative negotiations are based on the needs and interests of the parties and are not positional. Attorneys are present throughout the process to assist their clients in both understanding the issues and to assist them in verbalizing their needs and interests. There are several aspects of the collaborative process which differ significantly from the court process.

The Participation Agreement

The hallmark of the collaborative case is the collaborative Participation Agreement. This agreement is signed by the parties at the start of the case and sets the groundwork for the process. The parties agree to full and open disclosure of all facts and information relevant to the case. The result is no requirement of formal discovery. The collaborative process begins with information gathering and occurs vol-

untarily and truthfully. In the event the parties need to retain outside assistance in the information gathering process, they will do so jointly. There will be no battling of the experts, no averaging of appraisals, no one-sided presentation of value. All experts will be joint experts who will be available to both parties and counsel and who will operate under the same full and open disclosure obligations as the parties. Should the collaborative process fail, neither party may call the joint expert to represent their individual interest.

The agreement not to give power to the courts in decision-making allows for more creative thinking by the parties and the lawyers.

The agreement also establishes that neither party nor their counsel will utilize, or threaten to utilize, the court process without consent of the other party. There is no threat to just let the judge decide, but instead a commitment to resolve the case in a manner best suited for the family involved. These decisions may follow the general guidelines set forth in the law, but will oftentimes involve creative solutions generated by the parties themselves. The agreement *not* to give power to the courts in decision-making allows for more creative thinking by the parties and the lawyers. Importantly, it places the responsibility for the outcome of the case on the parties themselves and not a faceless legal system. While the law is involved in every collaborative case, it is not the only factor used in making decisions. However, if the parties reach impasse or one party is acting in bad faith, the client(s) may

terminate the collaborative process and turn to the courts for assistance.

The participation agreement also requires that counsel withdraw should the collaborative process fail. It further strengthens the parties' commitment to stay true to the process even when it becomes difficult. Removing the traditional court system in a large way from the collaborative law process opens up the doors to more creative resolutions

The Four-Party Conference

Family lawyers will often use the four-party conference as a means to facilitate settlement. In a court process case, the lawyers come prepared with their respective positions, their posturing and a well laid-out plan to get the best deal possible within the parameters of the law. Whole subjects will be excluded from discussion, as either outside the scope of the law or outside the consideration of one or the other parties. The discussion is heavily, or almost exclusively, lead by the attorneys.

In collaborative law, the agenda and discussions are not lead by the attorneys, nor are clients expected to place the agenda and the decisions in the hands of the lawyers.

In collaborative law, the agenda and discussions are not lead by the attorneys, nor are clients expected to place the agenda and the decisions in the hands of the lawyers. Instead, each agenda is established by the parties based on their respective needs and interests and those of the family. The attorneys facilitate discussion

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among the parties, not among each other. Many four-party conferences in the court process serve only as an opportunity for the attorneys to argue, grandstand and negotiate on behalf of their clients. In those situations, attorneys are not utilized to foster communication between the parties. In contrast, the four-party conference in a collaborative case is the means by which all information is openly exchanged, where *all* needs and interests are discussed and where all options, including the guidance the law may provide are discussed. When resolution is reached, it is after the parties have exhausted all possible remedies and have chosen the option best suited for them as a family. While the lawyers' presence cannot be discounted, their role is very different from that of a court process attorney.

The Paradigm Shift

As a practitioner engaged in both the collaborative process and the court process, the shift in approach and mindset is dramatic and incredibly difficult. When involved in the court process, we are trained to aggressively represent our client by articulating the legal interpretation of their case in the manner best suited to their success. Success is defined by percentages of the estate, by minimizing support obligations or by maximizing cash flow for the dependent spouse. Success is also defined by getting the exact custody schedule your client desires. If this success requires repeated visits to the court in the form of emergency petitions, petitions for special relief and appeals, so be it. Our job in the court process is not to protect the family, but to see to it that our client's interests, as defined by the law, are met.

The collaborative process requires a dramatic shift in this thinking. It is

this shift, oftentimes called the paradigm shift, that truly makes a case collaborative and that makes a practitioner a collaborative attorney. While the approach and process may be easy for the client to understand and to undertake, it can take years for a practitioner to truly make the change.

The shift requires us, as attorneys, not to measure success as a "win" defined by law.

The shift requires us, as attorneys, not to measure success as a "win" defined by law. It requires us to actually listen to our clients, and their spouses, to learn how they measure success. Oftentimes, our clients want to leave the process, not with the most money, the most support, or the most time with the children, but with the ability to co-parent, and the knowledge that they divorced in the most respectful fashion possible. Success may be defined by paying for a college education, or by allowing a parent to remain at home with the children for a period of time. Divorce, while dissolving the marriage, does not have to change what the family thinks is best for their children, even if it is outside the scope of the law.

Our task is not to lecture on the support guidelines, or dismiss an idea because it is beyond the scope of what a court would order. Our task is not to lead the agenda, the conference or the outcome based on our predisposed notions. The task is to empower our clients to take control of their lives and their case. Collaborative law allows the clients to resolve the conflict in a manner that will produce mutual gains that could not be achieved by either party working alone or by attorneys working in the traditional positional state. Attorneys work with clients to clearly state their needs and interests and to listen to

those of their spouse. Attorneys foster the process through which collaborative discussions occur, but do not control the outcome. This shift is the true measure of a collaborative case.

This does not suggest that the shift requires an attorney not to represent a client zealously, or that the client is not fully informed about the law and its application to the case. It does, however, require counsel to listen to the needs and interest of the other party as well as their client. It requires counsel to guide the parties through the process and to allow them to openly discuss all of the issues. It requires counsel to help lead the discussion by asking open-ended questions to allow the other side to articulate his/her concerns. In essence, it requires counsel to facilitate the process rather than direct it.

This is not an easy task for a practitioner, particularly one trained and operating in the court process. It is very hard for a lawyer to sit back and allow his/her client to run the show. It requires that success be measured by the parties and, most importantly, requires the outcome be the result the parties wanted and not the lawyer. Collaborative law is not the process for every client, just as it is not a process for every attorney. However, it is an option to the tremendous strife caused by the traditional legal process. There are many types of families and collaborative law provides them with an option that incorporates the strength of legal representation with the interest-based negotiation of mediation to create an atmosphere for creative problem-solving. ■

Debra Denison Cantor is an attorney in the Harrisburg office of McNees, Wallace and Nurick L.L.C.

How to Institute an Arbitration Program at a Business and Have a Lot of Credibility Problems

A suit was brought before the civil court in Massachusetts because a dispute had arisen regarding whether there was a waiver of class-action rights when a company initiated an intra-company arbitration program for employment matters. See *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007).

A court in Massachusetts found the “timing, the language and the format of the presentation of the [Arbitration] Program obscured, whether intentional or not,” *Id.* at 60.

[T]he court did find problematic that significant aspects of the new arbitration program were contained not in the e-mail itself but in three attachments to the e-mail ...

While the court had no problem with the arbitration program being presented to the labor force using e-mail, the court did find problematic that significant aspects of the new arbitration program were contained not in the e-mail itself but in three attachments to the e-mail, which themselves had a number of appendices. The court noted that it was more likely than not that an employee reading the attachments would have become confused. For instance, the first attachment stated this new program enhanced, without changing or limiting, employee rights under the existing arbitration program. However, a second attachment did have two different/inconsistent waivers of a class action under this new program without addressing the use of one form over the other. To further cloud the introduction of this new arbitration

program, three monthly newsletters aimed at employee matters issued soon after the new arbitration program was launched did not mention any waiver matters.

[T]hree monthly newsletters aimed at employee matters issued soon after the new arbitration program was launched did not mention any waiver matters.

In another aspect, this new arbitration program was poorly presented to employees because there was nothing in the body of the e-mail concerning an express acceptance by each employee to his or her participation in this new arbitration program. The final page of the first appendix to the second attachment to the e-mail stated that “a return to work the Monday after Thanksgiving constituted consent by both the employee and the employer to be bound by the [Arbitration] Program.” There was a separate e-mail sent only to company managers highlighting the fact that the management considered this new arbitration program to be mandatory.

Furthermore, this new arbitration program was, as noted above, introduced merely through a single e-mail with attachments, followed up by less-than-comprehensive newsletter articles. This was *not* the standard course this company had taken in the past when introducing new programs to its employees. Previously, the company used a combination of: (a) distinct orientation sessions, (b) multiple e-mails, (c) personalized letters sent to each person’s home address, (d) company paid training programs, (e) ded-

icated announcements at regular employee meetings, and (f) annual printed acknowledgment forms for other programs asking for signatures by each employee confirming the person’s awareness and participation in a program. None of these events [marked above as (a) – (f)] happened for this new arbitration program.

[T]he company seems to have done nothing to further worker confidence in using ADR in the workplace.

Beyond the narrow legal issues the Massachusetts court was faced with, it is clear that the company did a number of steps poorly in even bringing the new arbitration program forward to its employees, and the company seems to have done nothing to further worker confidence in using ADR in the workplace. ■

In Memoriam

As a continuing advocate for mediation in neighborhoods, I need to memorialize the deep loss to our community mediation efforts with the death this April of Dorothy Davis of Philadelphia. She will be missed by all who ever met her as she had a terrifically kind personality in addition to being a dedicated mediator with outstanding skills and instincts.

Tom Salzer, Editor

Alternative Dispute Resolution Committee Meeting Summary – March 26, 2008

ADR Institute

The co-chairs extended congratulations to the planners and PBI for a great program. The evaluations received were very positive. In the near future thoughts will need to be directed to the 5th Annual Institute, which will be held in 2009.

Members discussed the pros and cons of holding the Institute every year versus every other year. Some other thoughts expressed concerning future Institutes include:

- The Institute should be directed to neutrals and “want-to-be” neutrals.
- Something different should be offered each time to entice those who have already been to an ADR Institute.
- The title is important and should be an attention grabber.
- Emerging issues should be offered.

Formalized Effort Toward ADR Education Among the Bar

The Subcommittee volunteers are Jim Rosenstein, Tom Salzer and Dan Cusick. Issues to be addressed by this subcommittee are:

- Amendment to Rules of Professional Conduct to require ADR information.
- ADR as CLE requirement.
- ADR on bar examination.

Abington Mediation Program

The Montgomery County Medical Society and Montgomery Bar Association created a joint mediation task force. The program addresses the formulation of funding, as well as fields complaints. The purpose is to promote communication and resolution of the alleged problem. So far, 30 people have been trained as facilitators.

Initially the participants are offered to have counsel. Secondly, the participants are introduced to the classic mediation program, which typically uses one or two mediators. Both attorneys and doctors are trained to serve as mediators. At this point, doctors serve only as “shadow” mediators. Currently, funding is in the works to pay the mediators. This is a pilot project and it is hoped its success will entice others to follow suit.

Lawyer Dispute Resolution Program

The co-chairs announced that the newly revised LDRP rules were approved by the PBA Board of Governors in November and are now in effect. Thoughts are now turning to a training program for new mediators and arbitrators which would be geared toward issues that come up in law firms and how to mediate or arbitrate these issues.

Update on 160 Advisory Group

Ann Begler reported that the 160 Advisory Group met in October 2007 and the coordinating meeting is scheduled for June 2008. Tom Salzer’s survey was sent to the 160 Group for their input on the questions. Ann gave Tom the four additional questions received and the survey should be ready to go soon. It is hoped that the survey will be together and out to the members so responses can be received and ready for discussion by the June 4 meeting.

Subcommittee Reports

Award Subcommittee – John Salla advised the members that the 5th Annual Sir Francis Bacon ADR Award would be presented to Cheryl Cutrona, Executive Director, Good Shepherd Mediation Program, during

the Annual Meeting Awards Luncheon on June 4 in Hershey. Louann Bell will work with Jeff Gingerich of the PBA Communications Department to make sure a press release is done. [NOTE: Following the meeting it was decided to also present an ADR Special Recognition Award to Judge Donetta Ambrose.]

Collaborative Law Subcommittee

– It was reported that the goal of the subcommittee is to educate the public as well as the profession in regards to collaborative law. The Committee approved a letter to be sent to the presidents and executive directors of the county bars. A template has been prepared to provide a consistent message and presentation. Discussion ensued as to the possibility of including collaborative law issues in the PBA brochure on ADR. Linda Pellish will look into this further. The subcommittee will meet again by conference call on April 8.

Agency Programs – Judy Shopp reported that some agencies have their own ADR programs or need help. The OGC is working on a Web page, but the new technology is coming slowly. The real activity will take place in about six months. She stated that sometimes facilitation may be better than mediation. Confidentiality is also an issue being discussed.

Credentialing/Certification – The issues of this subcommittee have been rolled into the 160 Group.

Newsletter – An article on collaborative law will be submitted as well as an article on the Abington Mediation Program. Tom Salzer is preparing additional articles.

Pro Bono – This subcommittee needs additional members. One of the

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Arbitration a Growing Trend in Health Care:

Doctors say it will hold down medical costs, but patients say they fear giving up the right to sue.

By Stacey Burling

Within the space of two weeks late last year, Michael and Hedy Cohen, who happen to be experts on medical errors, each encountered what they saw as a disturbing development in the modern doctor-patient relationship.

They were asked by two groups of suburban doctors to sign away their right to a jury trial in the interest of reducing malpractice costs.

Legal experts say such attempts to channel potentially unhappy patients away from the court system and into arbitration are becoming increasingly common in health care. Agreements to settle future disputes with binding arbitration, in which an appointed individual or small panel decides the case instead of a judge or jury, are now pervasive in contracts involving many other things we buy, including credit cards, cell phones and cars.

Proponents say arbitration is faster, cheaper and fairer than trials, but critics say the secretive system can be weighted against consumers and makes it harder to track complaints or build legal precedents.

Eugene Rosov, who runs two malpractice-insurance companies that advise doctors to use arbitration agreements, said he thought they ultimately would reduce the cost of insurance and defensive medicine — tests ordered primarily to protect against lawsuits. “This agreement is better for doctors and for patients,” said Rosov, whose companies have 35 subscribers in New Jersey and Pennsylvania. “The only person it’s bad for is the plaintiffs attorneys.”

But Temple University law professor Bill Woodward thinks the growth of a private judicial system “is a pretty nasty legal development,

I think, and it’s just crying out for correction from Congress.”

A bill introduced last year by Sen. Russ Feingold (D., Wis.) aims to do that. It would prohibit pre-dispute arbitration clauses involving employment, consumer, franchise and civil rights disputes.

Michael Cohen was handed an arbitration agreement when he visited his longtime primary-care doctor in Bucks County. Cohen said he was not the suing kind, but the thought of being asked to give up his right to sue “stopped me in my tracks.”

He said no, and his doctor saw him anyway.

Then Hedy Cohen, who has had a kidney transplant, was mailed a similar form by a group of kidney specialists she planned to see for the first time. The form from Hypertension-Nephrology Associates in Willow Grove insisted on binding arbitration and said she would have to pay the doctors’ legal fees if she filed a complaint and lost.

Hedy Cohen said no and was told to find another nephrologist.

That was fine with Cohen, a nurse with a master’s degree in health care administration. “I couldn’t have a relationship with this person because they had already set the tone,” she said. “We’re adversaries before we even know each other.”

Jerry Dolchin, the nephrologists’ attorney, said the doctors began using the forms at the height of Pennsylvania’s malpractice crisis in 2003, when doctors, he said, were being “hit pretty hard by overzealous plaintiffs’ lawyers.” Since then, he said, “hundreds and hundreds and hundreds” of patients have signed the form.

Ruth Schulze, a North Jersey gynecologist, started asking patients to sign an arbitration agreement last

year after she bought malpractice protection from Obstetricians & Gynecologists Risk Retention Group of America Inc., one of Rosov’s companies. She gave up obstetrics two years ago after she was told she would have to pay more than \$120,000 for insurance.

Schulze said she won each of the three times she was sued, but left the trials disenchanted. “It is not really a trial of your peers,” she said. “It’s theater.”

Her patients have largely embraced the new approach, she said. She will not do surgery on anyone who refuses to sign the form, which limits pain and suffering payments.

For her, the arbitration agreement sets the groundwork for a more trusting doctor-patient relationship. Patients need to understand that bad things happen in spite of doctors’ best efforts. “Medicine is not guaranteed perfection,” she said.

Steven Barrer, a Montgomery County neurosurgeon, says he thinks he was the first in his area to start using an arbitration agreement around 2003. Barrer wanted to “somehow create malpractice reform for myself since it wasn’t coming from the courts and it wasn’t coming from the legislature.”

He got the idea for an arbitration agreement from his cell phone contract. “I figured if they can do it, why can’t I?,” he said.

Out of thousands of new patients, only about 10 have refused to sign the form. He does not ask patients with emergencies.

No one knows how many doctors here use such agreements, but the practice does not appear widespread. It is common on the West Coast, and legal experts say it is spreading

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Arbitration a Growing Trend in Health Care

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nationally. Many nursing homes ask residents to sign arbitration agreements, experts said. Golden Living, a national chain that operates 40 nursing homes in Pennsylvania, says about half of its residents agree to arbitration.

Doctors who join Medical Justice, another group trying to reduce malpractice expenses, do not require patients to agree to arbitration, but do ask them to sign contracts saying they will not file "frivolous" lawsuits and will use only board-certified specialists as medical experts in court.

In a project set to start next month in Montgomery County, the local medical society, bar association and Abington Memorial are working together to solve medical disputes with mediation. While an arbitrator decides a case, a mediator shuttles between the two sides to help them reach an agreement. If they fail, the patient can still file a lawsuit.

The Rothman Institute, one of the largest and best-known surgical practices in the region, is currently mulling whether to ask patients to sign statements saying they will try arbitration or mediation.

Trial lawyers say mediation raises far fewer ethical concerns than binding arbitration, but critics of mediation say it often fails, becoming just another step to a lawsuit.

Legal experts say courts have been mixed on upholding the agreements. Barrer said two patients had tested his contract. It was upheld in one case and shot down in the other. Lawyers said requirements hidden in fine print, particularly arbitration systems that require consumers to travel long distances, are legally shaky.

John O'Donnell, senior counsel for Temple Health System, said Temple considered asking patients to sign agreements but feared most would not read them and worried

that those who did would be upset. They also thought the agreements were likely to be unenforceable. The system decided instead to work harder to avoid mistakes and do a better job of dealing with mistakes that still occurred.

John O'Brien, a health-care defense lawyer, said he thought the agreements should give patients time to think and should clearly say that patients were giving up their constitutional right to a jury trial.

Critics of arbitration say it tends to benefit companies that frequently need arbitrators. It makes sense, they argue, that arbitrators would be more interested in pleasing "repeat users" than a consumer involved in one dispute.

"There are certainly companies that have their favorite arbitrators ... and they use them and use them and use them," said William Callahan, a Sacramento lawyer who is president of the American Board of Trial Advocates, a group seeking to protect jury trials. "Let's face it. They use them because they get the results they want."

Doctors have far fewer disputes than cell phone companies, but Alan Schwartz, a plaintiffs' lawyer, still thinks malpractice victims do better in court. The arbitration system rules, he said, work against him.

"I have to play my game in their stadium with their refs." ■

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Alternative Dispute Resolution Committee Meeting Summary – March 26, 2008

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areas that this subcommittee could focus on is landlord-tenant disputes. The co-chairs will discuss this further with David Trevaskis.

Supreme Court Custody Ad Hoc

- We are waiting for Justice Baer to move on this. It could be a gold standard for custody. It is necessary to determine just where the Supreme Court is in regards to mediation right now.

Committee/Section Liaisons

Solo/Small Firm wants to do a resolution requesting fewer Committee/Section Days (go back to the original two a year vs. three a year).

UPL could use some feedback from the ADR Committee regarding non-lawyer neutrals. The question of "is mediation the practice of law?" still looms. The Supreme Court has said it is not the practice of law.

Legislation

Members were reminded that the PBA Day on the Hill was scheduled for May 5-6 and were encouraged to participate.

Act III – the Right to Know Act – Open Records – provides for an informal mediation program under this Act.

Next Meeting Date: Wednesday, June 4 – immediately following the PBA Awards Luncheon, Hershey Lodge. ■

*Submitted by Louann Bell,
PBA Staff Liaison*



Help With Using Your PBA Listserv

To subscribe, login on the PBA Web site with your PBA member username and password, select the "Committees/Sections" tab, then the "Committees" tab, then the "Alternative Dispute Resolution Committee" tab, then the "Listserv Sign-Up" tab. The subscription form can also be accessed directly at www.pabar.org/public/listserv-form.asp.

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

"File sent due to actions of administrator traci.raho@pabar.org."

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

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

add other recipients outside of the sender or the membership.

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

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

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

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

Mark Your Calendars!



Check the PBA Events Calendar at www.pabar.org for more information, or call the PBA at (800) 932-0311.

May 17 — PBA Bike Tour
"Lawyers Riding for Children"
Carlisle

June 4, 2-4 p.m. — ADR COMMITTEE MEETING
June 4 - 6 — PBA Annual Meeting
also, RPPT Section Annual Meeting
Women in the Profession Annual Conference
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