



DR Currents

A Publication of the Dispute Resolution Section of the State Bar of Georgia Fall 2010

FROM THE CHAIR

It has been a great year to be Chair of your Dispute Resolution Section! Last year's ADR Institute and Neutrals' Conference on Dec. 11, which has been sponsored jointly by the section with ICLE for a number of years, was held at the Bar Center and drew over 250 attendees. This was the largest crowd in the history of the event. In addition to presenting panels of leading arbitrators and mediators from Georgia, we had several prominent national ADR speakers on the program. This year's Institute is scheduled for Dec. 10, also at the Bar Center, and I encourage you to attend because this program is shaping up to be another excellent opportunity to obtain ADR-related CLE credit (including ethics) and to learn from leading ADR practitioners in interactive sessions.

The 2009 ADR Institute was immediately preceded as usual by the annual meeting of the section, at which our officers and Executive Committee were elected. That slate included myself as chair; Ellen Malow as vice chair; Ray Chadwick as secretary/treasurer; and an Executive Committee composed of the officers, plus Phil Armstrong (past Chair); Larry Christensen (immediate past Chair); Jim Stewart; and John Hinchey. That Executive Committee has been actively involved in all of our activities, and I would like to thank and commend them for their time and participation in all of the section activities over the past year.

As pointed out in Edie Primm's article in this newsletter, our section was instrumental this year in working with the Committee on Dispute Resolution and the Office of Dispute Resolution to effectuate their reorganization which put them on sound financial footing, and in lobbying the Legislature to leave the funds in the budget to provide the necessary financial support to support the GODR during the transition period. In fact, as I will report at our annual meeting, the section approved spending approximately \$25,000 of our funds for the GODR accounting and lobbying effort. On the budget side, even after this contribution, the section remains very financially solvent with approximately \$30,000 in our account with the State Bar.

This summer, the section also co-sponsored our fourth annual Arbitration Institute at the State Bar on Aug. 20.

This event was chaired by Joan Grafstein of the Atlanta JAMS office, and her hard work paid off with an excellent arbitration program drawing over 60 attendees.

And now for this year's "innovations" by the section. Initially, obviously, we have started a Section newsletter in which this article appears. Many thanks to Ray Chadwick for all his hard work in obtaining and assembling the articles that appear herein, and to Derrick Stanley at the State Bar for working with us to get it in dissemination format consistent with State Bar standards.

Also, through the efforts of Hal Gray and, again, Derrick Stanley, we are launching a section web site with the help of Stephen Combs at Combs Ventures as our "web master." Although we have asked the State Bar to circulate the first edition of our newsletter by e-mail, it will also be on the web site, as will subsequent issues, along with other links that we think will be of interest to our members.

Some might suggest that it is somewhat ironic that all of this innovation took place during the term of possibly one of the least tech savvy members of the section, but it is amazing how much can be accomplished by effective delegation to the right people. I have certainly enjoyed my stint serving as chair, and I hope to see many of you at the ADR Institute in December.



John Sherrill is senior partner in the Litigation Department of the Atlanta Office of Seyfarth Shaw LLP and is the chair of the Firm's National ADR Group. Sherrill has more than 37 years of experience in resolving all types of civil and commercial disputes through negotiation, mediation, arbitration and litigation at the trial and appellate levels. A significant part of his practice has involved acting as a neutral and an advocate representing clients in all forms of alternative dispute resolution. He has served as mediator in more than 500 mediations and arbitrator in more than 200 arbitrations. He is a member of the Panel of Distinguished Neutrals of the CPR Institute, and an arbitrator and mediator on the Commercial, Construction and Large Complex Case Panels of the American Arbitration Association.

ADR A VALUABLE PROCESS FOR LAWYERS, CLIENTS, TAXPAYERS

By Lester Tate

On behalf of your 42,000 fellow members of the State Bar of Georgia, I would like to congratulate Chairman John Sherrill and everyone in the Dispute Resolution Section for a successful launch of your electronic newsletter. Thank you for offering me the opportunity to be a part of this first edition.

Because of significant growth in the use of alternative dispute resolution (ADR), it is increasingly important to communicate with lawyers who represent clients in all types of cases on issues and developments affecting the ADR process. Accordingly, preparing and distributing an e-newsletter on a regular and timely basis is a very efficient and effective means of providing this information.

Speaking of “efficient and effective,” it is no wonder that ADR has grown in popularity since the system was created in 1993 by the Supreme Court of Georgia and the State Bar. While each of us would certainly expend our last breath defending a citizen’s right to his day in court, a successful use of ADR can benefit everyone involved, including:

Bar members. As a trial lawyer, I have used mediation many times. These experiences have made me a strong supporter of the process, as I have seen first-hand how beneficial mediation can be for my clients. Here in Georgia, state budget cuts to our court system have made it much more difficult to take civil cases to trial in a timely manner. ADR is an attractive alternative for lawyers and helps judges clear their dockets so they can concentrate on the cases that absolutely require their services.

Litigants. Whether you are representing an individual

citizen or the largest corporation, in today’s economy, clients are increasingly concerned with the costs associated with litigation. The potential savings in time, money and energy from ADR make it a valuable tool in resolving their disputes.

Taxpayers. While it is our duty to exhaust any means necessary to exact justice on behalf of our clients, if we are able to do so through mediation, arbitration or case evaluation and thus avoid the public expenses involved with a costly trial, then that is a valuable service to the taxpayers. Public resources are then saved for the cases that simply cannot be resolved without a judge and jury.

I also would like to thank the members of the Dispute Resolution Section for what you are doing on behalf of the State Bar, the Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution (GODR). The efforts of the policy-making Commission and the staff at GODR have helped further the use of ADR in our state. Since 1997, some 178,000 cases have been resolved through the ADR system.

Again, congratulations on providing this new and innovative form of communication. I look forward to reading future editions to keep up with developments in the ADR field and help in continuing to use it effectively on behalf of my clients.



S. Lester Tate III is president of the State Bar of Georgia.

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DISPUTE RESOLUTION SECTION PROVIDES LIFELINE TO COURT ADR SYSTEM

The Dispute Resolution Section this past year played a decisive role in giving new life to the Georgia Commission on Dispute Resolution, to its executive arm, the Georgia Office of Dispute Resolution, and to the state's court-connected ADR system.

Amid major statewide budget cuts, GODR faced the grim prospect of receiving no more state money whatsoever to fund its operations starting in FY2010. Thanks to the leadership of the Section's 2009 Chair Larry Christensen, 2010 Chair John Sherril, and the executive committee, two key specialists were hired to work on behalf of GODR's fiscal future – a CPA to review GODR's financial status and recommend funding options, and a lobbyist to help us convince legislators not to cut the limited funds they had appropriated to GODR for FY2010 and FY2011.

Our CPA concluded that GODR could not survive state budget cuts and fulfill its service mandate without remaking itself into an organization funded entirely by membership fees. To make that transition, the Commission took several key steps: it significantly increased neutral registration fees; it instituted new fees trainers must pay to offer GODR-approved trainings; the registration period was reduced from two years to one year; and continuing education requirements were set at 3 hours a year. In return for the increased cost of their "membership," neutrals are now receiving new benefits from GODR registration, such as medical, dental and liability insurance at group rates, a monthly e-newsletter, and more continuing education opportunities.

Our lobbying efforts successfully protected the state appropriations to GODR for FY2010 and FY2011. Combined with the organizational makeover and expense reductions, these steps have permitted GODR to plan to be financially independent from the legislature by July 1,

2011. Cutting GODR's reliance on state funding limits disruption of its important regulatory work. Moreover the financial freedom lets GODR focus its resources fully on improving services to courts and to registered neutrals in Georgia and throughout the country.

Our state's thriving court-connected ADR system has long been a shared vision of the State Bar and the Supreme Court. Without the Section's financial resources to hire the experts we needed, the survival of the Commission, GODR and that ADR system would have been highly questionable at best. The Dispute Resolution Section's timely and decisive actions have helped us weather a tumultuous storm, and now we can chart a new, more sustainable and independent course for GODR in leading the state ADR system.

As a mediator for over 32 years and as Chair of the Commission, I extend to the Section the sincere gratitude of the Commission, of GODR, and of the thousands of registered neutrals whom we serve. We will do our best to be worthy of your generous investment in us.

Edith B. Primm, Chair
Georgia Commission on Dispute Resolution



Edith B. Primm has been a member of the State Bar of Georgia since 1981 and currently serves as the Executive Director of the Justice Center of Atlanta. There she has operational and professional responsibilities for caseloads, contract negotiation, training and administration. In 2009 she was appointed by the Supreme Court of Georgia as Chair of the Georgia Dispute Resolution Commission, the regulatory body which makes policy for ADR court-connected programs and mediators serving those programs statewide. She has extensive experience serving as a mediator and arbitrator in a wide range of disputes including civil rights and special education matters.

DISPUTE RESOLUTION EXECUTIVE COMMITTEE

John Sherril, chair

Ellen Malow, vice chair

Ray Chadwick, secretary/treasurer

Phil Armstrong, past chair

Larry Christensen, immediate past chair

Jim Stewart, member-at-large

John Hinchey, member-at-large

COUNSELING BUSINESS CLIENTS ON MEDIATION

By Raymond G. Chadwick Jr.

In 1993, the Supreme Court of Georgia issued an order amending Ethical Consideration 7-5 which provides:

“A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.”

To fulfill this duty, when counseling clients involved in business disputes, either prior to or after the commencement of litigation, what should be discussed to help them understand why mediating their dispute often makes business sense? Obviously, advising them on the disadvantages of going to court, and the advantages of not doing so is key. And taking them through a cost-benefit analysis can drive the point home.

What are the disadvantages of litigation, and advantages of mediation, to discuss? A number of the most significant ones are:

Cost

Business people are becoming increasingly concerned about how expensive litigation is. In some cases it may be possible to resolve a dispute for less than the ultimate legal

costs of going to trial, not to mention those of a possible appeal. Explaining that the vast majority of cases settle at some point without going to trial, and that mediating their dispute sooner rather than later can result in significant savings, will be important to them.

Disruption of Focus on Business

Litigation typically results in personnel spending unproductive amounts of time away from day-to-day business activities. This is particularly harmful in a significant dispute where management and other key personnel must devote time and attention to it. Resolving a dispute through mediation allows them to focus on what makes their business money, not on-going litigation.

Lack of Control Over a Final Result

Outcomes of lawsuits where jury trials are involved are unpredictable. Many experienced trial lawyers recognize that through a jury's verdict they have won cases they don't believe they should have won, and lost cases they don't believe they should have lost. And they may even be willing to admit that in neither case was it because of their brilliance or lack of skill. Mediation eliminates risk by allowing the client to control the outcome of their dispute, not a group of strangers.

Time

A matter in litigation often lasts for a substantial period of time, frequently a number of years. This increases cost and the potential disruption of business focus. And what if there is an appeal?

Lack of Confidentiality

A trial is a public proceeding. Having a business' "dirty laundry" exposed, or information it does not want competitors or those with whom it does business to know about, may occur. Mediation can result in protection of a business' reputation, confidential information, and trade secrets.

Damage to Important Business Relationships

Litigation with a company or individual that is important to a business may result in more harm than benefit, even if there is a victory at trial. Mediation can assist in the preservation of business relationships that will result in future monetary benefits.

Only One Winner

At a trial one side wins and the other side loses. The



parties give up the opportunity to reach a compromise that is in their mutual best interests. On the other hand, mediation provides flexibility. For example, an agreement to buy or sell future goods or services. Or, reformation of a contract. Solutions can be tailored beyond only paying or receiving money.

In addition to discussing the disadvantages of litigation, and the advantages of mediation, assisting a business client in performing a cost-benefit analysis is frequently very helpful. This will involve a number of topics. Typically they include:

- What is the problem that caused the dispute?
- What is the history of the business relationship?
- How does the problem that caused the dispute affect the business?
- Have there been any discussions with representatives of the adverse party of possible ways to resolve the dispute?
- What are the advantages of settling?
- What are the possible adverse consequences of not settling?
- What is the financial risk involved?
- For a plaintiff: How much are you likely to recover after fees and expenses?
- For a defendant: How much are you likely to spend in fees and expenses and how does that relate to a likely settlement amount?
- Based on the advantages of settling and risks faced, what are acceptable outcomes in reaching an out-of-court resolution?

The goal is to assist the client in making a decision as to what is in its best interests with respect to seeking a resolution at mediation rather than through a trial. (Mediators will want to discuss many of the same points in a private caucus.)

Counseling a business client on mediation is important for all disputes likely to lead to, or actually in, litigation. Should the client choose it, the benefits of mediating a dispute can be great as the client controls costs, its own destiny and eliminates risk.



Raymond G. Chadwick received his undergraduate degree from Emory University in 1969 and law degree from the University of Virginia in 1972. He began his practice in Augusta, focusing on medical malpractice, product liability and other complex litigation. He has represented clients in many

mediations and also served as a mediator, arbitrator and Special Master. Additionally, he has been a program chair and speaker on mediation for the Georgia Institute of Continuing Legal Education. At the end of 2009 he retired from Kilpatrick Stockton LLP to begin a full time practice as a mediator and arbitrator with his firm, Chadwick Mediation Services, LLC.

OBSERVATIONS ON LITIGATION

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often a real loser, in fees, expenses, and waste of time. As a peace maker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln
Noted Trial Lawyer
U.S. President

Why would they want twelve strangers or six strangers, as the case might be, deciding these big complex disputes? And why would they think they'd be better served than in a settlement? I've always preached that settlement is the best form of justice.

Anthony A. Alaimo
U.S. District Court Judge,
Southern District of Georgia

I have never met a litigator who did not think he was winning the case right up to the moment when the guillotine came down.

William F. Baxter
Assistant U.S. Attorney General

Only two things can happen at a trial and one of them is bad.

A. Rowland Dye
Noted Trial Lawyer

When you go into court you are putting your fate into the hands of twelve people who weren't smart enough to get out of jury duty.

Norm Crosby
Noted Comedian

THOUGHTS FOR ARBITRATORS AND ADVOCATES FOR EFFECTIVELY CONDUCTING THE EVIDENTIARY ARBITRATION HEARING

By John A. Sherrill

Although the hearing itself will certainly proceed very much like a trial, with direct examination and cross-examination of witnesses, one of arbitration's advantages is that arbitrators are generally not bound by the strict rules of evidence and can accept hearsay testimony, affidavit testimony, and other less formal means of presentation of evidence than in court – the theory, of course, being that the arbitrators are capable of weighing the evidence presented, disregarding any evidence that they do not feel should be properly relied upon. I will generally err on the side of admissibility, often crafting a way to hear the evidence so as to minimize prejudice, but accepting most evidence offered by the parties and refusing to admit only that evidence that is clearly irrelevant or otherwise improper.

Because of the flexibility inherent in arbitration, many innovative and more efficient means of presenting the evidence can be employed and should be encouraged (and even required) by arbitrators to save time and expedite the hearing. These techniques can include:

1. The presentation of direct testimony of witnesses in writing, with the witness being subject only to live cross examination.
2. Using “panels” of witnesses from each side to simultaneously testify regarding broad issues, rather than putting each witness on the stand separately.
3. Direct confrontations between opposing experts, with each expert given the opportunity to question the opposing expert, and allowing the arbitrators to ask questions as appropriate.
4. Encouraging or requiring counsel to agree to specified time limitations for presentation of their portion of the case.
5. Submission of the testimony of secondary witnesses by deposition or affidavit.
6. Submission of jointly compiled binders of exhibits wherever possible, with admissibility of the exhibits being stipulated between the parties.
7. Extensive use of computer graphics and other high tech evidence presentations.
8. Bifurcation of the proceedings to hear only the portion of the case dealing with



liability before accepting any evidence concerning damages. Of course, a preliminary finding of no liability would obviate the need for any evidence of damages, sometimes saving significant hearing time. However, this procedure would only be more efficient if the proof of damages can be completely separated from evidence concerning liability, which is often not the case.

From my perspective as an arbitrator and an advocate, attorneys who are most successful representing clients in arbitrations are litigators who know the rules intimately, but who are also able to utilize the informality and flexibility of arbitration to their client's advantage. At the hearing, arbitrators do not want to hear repetitive or irrelevant evidence, so counsel should keep witnesses on issue and on task so that their knowledge of the evidence can be presented as efficiently as possible and not delay the hearing. Counsel should be advised that it is appropriate to alert the arbitrators when proceeding to another issue with a witness, with statements to the effect of, "Now let's move on to the issue of..." The arbitrators appreciate this use of the flexibility of the process to keep the hearing moving so that they can follow the presentation of the evidence more effectively.

It is important that counsel warn the client representatives and witnesses that their overall demeanor, knowledge, credibility, and other attributes will be closely evaluated by the arbitrators throughout the arbitration process, and that they will actually be much more visible because of the informality of arbitration, rather than being simply "on alert" when a jury is in the room and

not sequestered. Of course, credibility of witnesses is just as important in arbitration and can be just as big an issue as in litigation, and the members of the arbitration panel will be weighing the knowledge and credibility of all the witnesses, as well as their demeanor, throughout. It is also important to encourage counsel and their clients to avoid the histrionics and unnecessary confrontation that is too often present in litigation today. Arbitrators do not appreciate the distractions from their evaluation process that are created by constant belligerence or bickering between counsel or the parties themselves.

Innovation in the effective and efficient presentation of the case as set forth above will be appreciated by the arbitrators so that the maximum advantages of the process can be realized. I have become convinced that arbitration requires a different way of thinking about dispute resolution by everyone involved, including, importantly, counsel and the parties, if it is to fulfill its role as an effective, quicker and lower cost alternative to litigation.



John Sherrill is senior partner in the Litigation Department of the Atlanta Office of Seyfarth Shaw LLP and is the chair of the Firm's National ADR Group. Sherrill has more than 37 years of experience in resolving all types of civil and commercial disputes through negotiation, mediation, arbitration and litigation at the trial and appellate levels. A significant part of his practice has involved acting as a neutral and an advocate representing clients in all forms of alternative dispute resolution. He has served as mediator in more than 500 mediations and arbitrator in more than 200 arbitrations. He is a member of the Panel of Distinguished Neutrals of the CPR Institute, and an arbitrator and mediator on the Commercial, Construction and Large Complex Case Panels of the American Arbitration Association.

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HEADQUARTERS
104 Marietta St. NW
Suite 100
Atlanta, GA 30303
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800-334-6865
Fax 404-527-8717



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OFFICE**
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800-330-0446
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Savannah, GA 31401-1225
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877-239-9910,
Fax 912-239-9970

MEDIATION, DISPUTE RESOLUTION, CONFLICT RESOLUTION...THE NAMES CONTINUE:

CHANGES AND CHALLENGES TO CONSIDER IN DOMESTIC CASES.

By Melissa C. Heard, MSSW

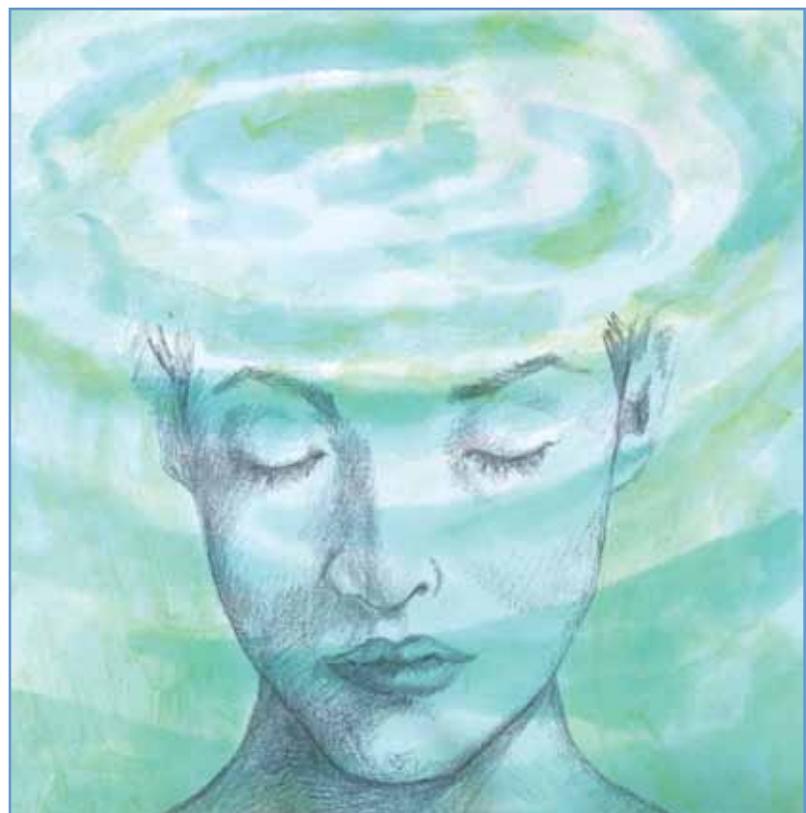
Divorce Mediation has changed over the last couple of decades and requires that mediators evolve, grow and develop skills to handle the changes and challenges. For those of us 'old timers', who can remember when the courts were not mandating mediation and the parties were seeking the services of a mediator outside of the court, the process to mediate a case seemed much simpler. In those days the rate of divorce was at an all time high and the request for mediation services was on an upswing with the private demand for mediation increasing. Mediators worked hard to distinguish themselves from therapists, who helped to fix the parties' situation and from attorneys, who resolve the situation. Mediators were trying to be seen as professionals who facilitate a process for parties and assist in the resolution of specific issues in a dispute. An additional change, and one many mediators find humorous, is the distinction between mediation and meditation. If you are unclear of the ongoing humor in that...ask an old timer!

During the early challenges of building a practice many mediators discovered that the selling points for mediation were not the selling points of therapists or attorneys. In order to build a practice, mediators had to market the art of conflict resolution with a very specific and much needed skill set. As the notion of mediating disputes became more common in the areas of law and counseling the mediator began to be seen as an asset. When the asset of mediation services was realized in the legal field there became an increased utilization of mediation in court cases. This quickly, and appropriately, led certain courts to a requirement of mediation before or during the legal process. It is understood that mediation is not restricted to domestic situations, but for the sake of this article the focus is on domestic cases.

Several questions have surfaced in the area of domestic mediation, and those questions can lead to a very lively discussion regarding the field of mediation past, present and future. Some of those questions are: *What have we seen in the state of Georgia over the last few years regarding domestic cases? How is this impacting the mediation profession? How is it impacting the mediation process? What should we do as practitioners in the field to prepare for the changes and challenges?* The questions not only stem from the mediation process perspective, but in marketing and growing your mediation practice as well. To talk about this in a brief article poses a challenge, so the first thing to do is

to network with other professionals who are asking some of the same questions and experiencing some of the same challenges. Consider the questions to get a better perspective and possibly generate conversation and discussion among your network of peer professionals.

According to Divorce.com, Georgia has seen a decrease in the number of total divorces, but factor that with the greater decrease in the number of marriages, and things may not be what they appear. During the years of 2004-09 divorces dropped 33 percent, but marriages dropped by 42 percent in the same period. In having a conversation with a court dispute resolution program, you may be informed that there is not a significant decrease in the number of cases, but a change in the issues mediated. One way to interpret what that means for Georgia is that there are cases to be mediated, but the issues are not solely divorcing couples. Instead there are an increasing number of modifications, legitimating and issues specific to never married parents. Another possibility is that the parties are in the midst of a financial hardship requiring creativity of issues related to assets and liabilities. Financial hardships may be caused by the change in market or the instability of employment and can add to the challenges of the mediation process. One final interpretation



may be the children and their related issues, both financially and fiscally. At times, parents may need additional time to work on their adult needs before introducing a life changing adult decision, such as divorce, to the children.

Dispute resolution professionals can prepare for the changes and challenges of domestic cases through continued learning and exposure to a multitude of issues. The economy has changed the situation for many parents who pay support under a current order, so knowing the language and the application of the most current child support worksheet is a must. The era of having a 'salary from your job' is passing and there are many individuals who have businesses that require the mediator to understand how self employment works and the impact of fringe benefits on a person's income. Understanding a commission based income, the application of social security payments or the usage of the deviations when calculating child support can make the difference in mediation. A mediator who is comfortable and knowledgeable in the calculation of the worksheet and the ability to work through the information with parties is an asset to the process. Taking advantage of the networks you have in the field to ponder such situations is invaluable. So again, make use of your network, peer professionals and any continual training opportunities.

There are also the changes in the time spent with the child, which can involve the issue of custody. The mere definition of custody has not changed greatly. What

mediators have expressed as challenging is the scheduled arrangement of time with the child for the parents, as it requires more and more creativity. It was considered an easy arrangement to have one parent identified as the primary custodial parent and then designate what many have termed "standard visitation" for the non custodial parent. Standard visitation is typically defined as alternating weekends, sharing of the major holidays and the allocation of a specified amount of time in the summer for the non-custodial parent. We are also seeing a change in the definition of "family" and of what labels a family. There is a difference in the issues in cases that involve never married parents as they may have no previous parenting understanding or parental relationship. The considerations for the child in this situation are complex and often times overlooked.

It is expected of the mediator to think outside of the normal arrangement and to be aware of the complexities of the case that is presented. Make sure that you are equipped with the information to ask the correct questions regarding parenting and time that is needed for the child when working with parents from a never married relationship. How do you manage the conversation between parents who have never discussed a relationship or the raising of a child? What about the possibility in a case where the child may have no previous relationship with the non-custodial parent? What are the expectations of the primary parent versus the decision that may come from the court in the litigation process? The road to knowledge is to be traveled, but never to become a destination. To ensure the mediator is prepared one must continue to learn, make professional connections and develop networks to enhance their practice and skill base.

The field of dispute resolution is a constant work in progress and the nature of the field is to continue to evolve and change. Mediators should be prepared to ask the tough questions and allow the parties to consider the options. Issues related to domestic cases are varied and complex, but given the right process can be resolved. As a professional in a field of challenging parties and varying situations you must be prepared to allow the parties to be self determined and to adjust the process to meet the parties' needs. To maintain the mediation profession mediators are wise to utilize their networks and professional peer relationships in an effort to face the challenges and changes in the field.



Melissa Heard is a master conflict resolution specialist, mediating since 1992. She is skilled at family, deprivation, juvenile, probate, divorce, custody, education, employment disputes, adoption issues and insurance cases. She is an advanced practitioner member of the Association for Conflict Resolution, and the Association of Family and Conciliation

Courts. Melissa helps people through many mediums, including: radio, television, direct service and training.



WORKERS' COMPENSATION CASE MEDIATION

By Laurence L. Christensen

Mediation of workers' compensation cases is not for the faint of heart. Workers' compensation cases are statute specific in their component values. In addition they often present with the emotional overburden of injuries which have occurred in the course of the personal relationship of employer and employee who have worked together for years.

Case One

The adjuster had markedly undervalued the case. She had not ordered a Medicare Set-Aside (MSA). Her lawyer had scheduled the mediation two months earlier in an attempt to get her to take the case seriously. The hearing was on its third setting for next week and the mediation was tomorrow. The claimant and his lawyer had prepared and were ready. The mediation would have to be rescheduled because, as the adjuster obtusely observed, this was just the first setting for the mediation. Everyone was frustrated. Eventually the case would settle, but not tomorrow.

In real life injured workers and their families are seriously disadvantaged when those in charge of the case are not prepared for the mediation. What is the role of the mediator in this process? Is it within the zone of responsibility for the mediator to see to it that the parties are ready for the mediation when scheduled? Indeed the mediator has a role, perhaps an obligation,¹ to see to it that the process can go forward.

The mediator has a role to insure that the mediation is carried out in a fair manner. A check list should be completed before the mediation is scheduled.

- Is a MSA necessary?
- Has the MSA been completed?
- Has it been shared with the opposing counsel?
- Is the mediation current or must it be updated?
- Has the claimant sent a demand letter?
- Is the demand within the adjuster's authority level?
- If not, has the case been reviewed by those at the level necessary to set proper settlement authority?

If any of these steps has not been completed the mediation should not be scheduled. Sometimes a lawyer may schedule a mediation as leverage to require his client to review the claim file. If the mediator suspects this, he or she might require a cancellation pre-payment which would be credited toward the cost of the mediation if the

mediation goes forward as scheduled. It is important for both sides to be invested in the mediation process.

Case Two

The claimant has sustained a routine low back injury. He has worked for the employer for eight years and has given, in his opinion, the best years of his life to the company. He was injured due to the clear, longstanding failure of the company to keep the delivery fleet in good repair. The brakes went out again and the claimant was seriously injured in a roll-over crash. He may be unable to return to meaningful employment. The claimant's demand is \$1.5M and his lawyer has little, if any, control over the evaluation process. The lawyer has worked on the case for four years; has been to a hearing, two rehabilitation conferences; and has done numerous depositions. This is not the point in time when he wants to risk getting fired. He has alerted the mediator to his problem and has frankly asked for help with his client.

In this delicate situation the mediator may view his role as that of an active settlement facilitator. Assuming the mediator has sufficient subject matter expertise a pre-mediation discussion (caucus) with the claimant and his lawyer may be a productive opportunity to discuss how workers' compensation cases are evaluated and settled on a day by day basis. Such a caucus could be used as an opportunity to diffuse a potentially negative result at a mediation based on unreasonable expectations. It can be an opportunity to listen to the claimant and to educate him about the structure and process of workers' compensation settlements.

The claimant wants everyone to know that he is angry about why the accident happened; that he resents the imposition of employer selected medical providers; that his family finances and fiber have been ripped apart. He sees the possibility (mirage) of revenge looming on the horizon. Effective handling of such strong emotions may not be possible within the few hours normally allotted for a workers' compensation mediation.

Workers' compensation cases are made up of discrete value components which can be identified and discussed. Punitive damages, pain and suffering and loss of consortium are simply not in the equation. Removal of these elements from the evaluation process must occur prior to the commencement of settlement talks if the case is to settle. It may take time, perhaps several days, for this concept to register in the mind of one not disposed to hear such propositions.

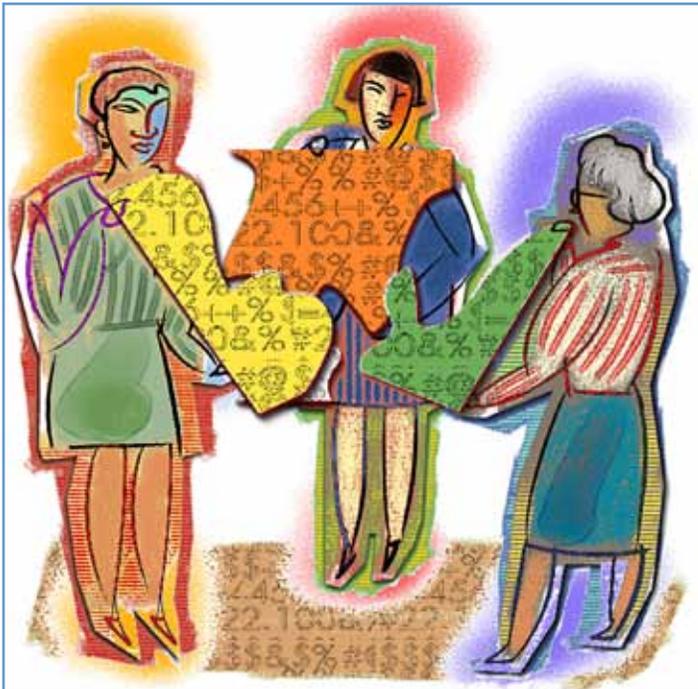
These rudimentary guidelines in workers' compensation cases will only be accepted by an injured worker once he feels that he has been fully heard. No injured worker wants to settle a case for too little money. No injured worker wants to leave money on the table. No doubt he has been assured by his brother-in-law's fishing buddy that all the lawyers are in cahoots to see to it that he is the one who comes out with the least money at the end of the process. His lawyer is not the one best positioned to reassure the client that he will not be sold out. The pre-mediation caucus can be an effective tool to give the claimant his opportunity to be fully heard, and then be introduced to the foreign concepts of workers' compensation law.

The claimant's histrionics may be his way of emphasizing to the mediator that his case is to be taken seriously. The mediator should take copious and conspicuous notes while actively listening to the claimant. What the worker says should be repeated back to him so he knows he has been heard. The injured worker must be assured that his concerns are being heard and understood. Only then will the mediator be able to explain some of the well established guidelines of the workers' compensation system with any hope that his message will be heard and accepted.

It is a delicate process which requires some skill and experience so that the mediator does not look like just another one of the squadron of people out to divest the claimant of what he perceives to be rightfully his.

Case Three

The cross cultural mediation is perhaps one of the most difficult settings in which to establish the trust needed to bring about a successful mediation. Trust, in this context, may come have to from the introduction of a trusted individual into the process. A cleric or a knowledgeable



community leader can prove to be an invaluable contributor to the success of the otherwise impossible mediation process.

The mediator must secure the permission of the claimant and the claimant's lawyer to introduce such a person into the process in advance of the mediation. This will give the mediator a chance to establish a working relationship with the individual selected by the claimant. Obviously one wishes for an intelligent, knowledgeable or educable individual who will be able to introduce reason and trust into the process. The mediator is unknown to the claimant, that is, not trusted by the claimant. Relationships of trust seldom develop in a matter of minutes. The mediator and claimant's lawyer must work closely together to identify if possible such an individual to participate in the mediation process.

Case Four

The claimant has suffered a compensible back injury when he slipped on some ice build-up on his truck. The injury occurred on a bitterly cold January day in 2006 when he was instructed to deliver the load. He protested to his boss that the situation was dangerous. The boss offered him the option of being fired if he preferred.

The claimant is a smoker, 57 years of age, significantly overweight with a limited education and work experience limited to the more menial jobs in the construction industry. He has no office skills. His second back surgery, an instrumented fusion, was not described as successful.

The claimant's lawyer has evaluated the case within the catastrophic guidelines although the social security claim is still two years from a hearing. The present value of life time benefits is \$295,000. The value of medical expenses not covered by Medicare is \$45,000, and the MSA will cost about \$75,000. The total settlement demand is \$400,00 plus the MSA.

The defense has filed its WC 104 and has hired a vocational expert who identified six entry-level, unskilled positions in which an individual with the claimant's work restrictions could work. The present value of the temporary partial disability benefits is \$38,765. The insurer's lawyer has \$40,000 in authority² and is authorized to leave medical care open in order to avoid paying a MSA. Both evaluations are perfectly reasonable but each makes sense only to one side.

The mediator who allows himself or herself to be the mere carrier of messages, arguments and analyses from one side to the other is guaranteed to preside over a failed effort.

This situation should not come as a surprise to the mediator. He or she should have requested position papers by each side prior to the mediation and the situation should be clear at the outset. The mediation should begin with

a private caucus with each side to test out the strength and resolve of the respective positions. Only then should a joint session be held. It is common for the claimant's counsel to set forth a point by point evaluation of the case and for defense counsel to thank everyone for coming to the mediation and pledge a desire to settle the case amicably.

In the first caucus after the joint session it will become clear that each side wishes to use the mediator to shove the opposing side into the zone of reasonableness - as defined by that side. Neither side is disposed to change its position. The mediation cannot succeed as it is currently postured.

The parties should be reconvened in joint session and each side should be afforded ten to fifteen minutes to make its best argument for its position. Both sides will have to put forth their best arguments in Court. They can do it at mediation. The mediator can ask pointed questions to each side as a reality check. The mediator's questions will undoubtedly be the same question which each side would like to pose to the other side. The value of a group session is magnified at this point in the mediation by the fact that each side is exposed to the hard questions and to the impact of the answers. Will they like the process? Probably not, but they will be in the same position in the court room with no control over the outcome.

We mediators instinctively try to avoid saying things which either side may find offensive so we can maintain trust and keep the process going. Reality, however, can be offensive. The mediator can warn the parties at the outset that, if they are only willing to argue the strengths of their own case without a willingness to compromise or acknowledge merit in the opposing view, they may count on a reality check as part of the process. Is the mediator taking away the self-determinism of mediation? No, because people can settle or not even after a reality check. Mediation is not for the faint of heart. As a mediator, if you want to hit a home run, you have to be willing to strike out.

(Endnotes)

- 1 *Appendix C, Ethical Standards for Mediators, IV Fairness.*
- 2 *Defense lawyer requested higher authority in his settlement analysis but was not given the extra authority.*



Laurence L. Christensen received his undergraduate degree in philosophy from the Athenaeum of Ohio and graduated from Emory University School of Law in 1976. He began his law practice in Atlanta in 1976. He limits his practice to social security disability, workers' compensation claims, LTD, and personal injury cases. He

has published numerous articles relating to these fields for *The Verdict* and other Georgia and national legal publications.



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MEDIATION 101

By Cynthia McElmurray

Over the past several years, significant changes have occurred in the way attorneys approach conflict. There have been efforts to develop strategies aimed at more efficient, less costly and more satisfying resolution of conflict, including more extensive and appropriate use of mediation. Court-annexed ADR (alternative dispute resolution) programs have grown and there is clear, positive evidence of cost and time savings and numerous other benefits.

Litigants who go through any alternative process have gained information, be it a determination on the merits, an appraisal of settlement or a creative settlement package that was not available under traditional procedures. This information should enable litigants to better predict the outcome of their cases and ensure that both sides are operating on the same information. This, in turn, may narrow controversial issues and spur further negotiation, thereby leading to more settlements or to shorter, more focused trials.

The Augusta Circuit ADR Program was formed in 2007, initially in conjunction with the Tenth District ADR program. Since its inception, the program's mediators have made comments/suggestions with reference to what steps attorneys can take in order to make court-ordered mediation successful. As a result of those suggestions, we have compiled "Recommendations for a Successful Mediation", which I will share with you, in the hope that these will be useful to you as well.

Recommendations For A Successful Mediation

Virtually all civil cases settle prior to trial. The parties should come to mediation prepared to settle rather than waiting to do so the day before or the morning of the trial.

Surprises at mediation on liability or damages significantly reduce the likelihood of success.

PLAINTIFF (S): Provide all information on damages claimed in advance of the mediation. Insurance carriers customarily review claims, and decide on a range of what they are willing to pay, based upon available information prior to the day of the mediation. The more substantial the case, the further in advance of the mediation date such information needs to be supplied.

DEFENDANT(S): At the time a mediation date is selected, ask counsel for the plaintiff(s) if there is additional information on damages claimed or liability which plaintiff's counsel wishes to have considered. Explain that the decision on what the defendant will be willing to pay to settle the case will be based upon information obtained prior to the mediation.

PLAINTIFF(S) AND DEFENDANT(S): Complete sufficient fact and damages discovery prior to the mediation. It is important that the significant facts pertinent to liability and damages be known. (Unfortunately, it is far too common for a mediation to begin and, not long into



it, for counsel to realize additional deposition testimony is necessary before the case can be settled.)

PLAINTIFF(S): Make a pre-mediation demand.

DEFENDANT(S): Make a pre-mediation counter-offer.

PLAINTIFF(S): Don't increase your last demand at mediation unless there is truly something significantly new that justifies it. If there is such new information, make this known to counsel for the defendant prior to the mediation.

DEFENDANT(S): Don't decrease your last counter-offer at mediation unless there is truly something significantly new that justifies it. If there is such new information, make this known to counsel for the plaintiff prior to the mediation.

PLAINTIFF(S) AND DEFENDANT(S): Explain the mediation process and discuss the strengths and weaknesses of their case with your client prior to the mediation.

REMEMBER: There is an important difference in the manner of presentations at mediation. Your purpose should be to discuss the strengths of your case and the weaknesses of the other side in a calm, rational manner. Confrontational and unnecessarily hostile presentations will make it much more difficult to reach a settlement.

REMEMBER: Compromise is required. Neither side is likely to get everything it would like. Focus on what is in

your client's best interests in ending the litigation.

LASTLY: Don't be discouraged if the case doesn't settle the day of mediation. Many cases settle after the mediation session because it sets the stage for further settlement discussions. Consider having follow-up telephone discussions with your mediator that continue the settlement negotiations which occurred. Your mediator should want to continue to work with the parties so that a settlement can be reached.

In closing, remember that information is power. Counsel and clients should come to mediation with as much preparation and strategic planning as they would for a trial. Counsel should know the details of the case as if it were their own dispute. The client should be prepared in advance, letting them know what to expect and what will be expected of them. This will allow them to make a better showing, and clients who are better prepared have the negotiating edge. After all, in most cases, mediation is their day in court.



Cynthia McElmurray is the Director of the Augusta Judicial Circuit Alternative Dispute Resolution Program, assuming that position in 2007. Prior to that she served as the assistant to the Chief Judge of the Augusta Judicial Circuit for 29 years.

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17TH ANNUAL ADR INSTITUTE

The Dispute Resolution Section of the State Bar of Georgia is presenting its 17th Annual ADR Institute and Neutral's Conference on Friday, Dec. 10, 2010, at the Bar Center in Atlanta. Please see the agenda below. For registration information contact the Institute of Continuing Legal Education in Georgia at icle@iclega.org or 706-369-5664 (Athens area), 770-466-0886 (Atlanta area) or toll free 1-800-422-0893

17th Annual ADR Institute and the 2010 Neutrals' Conference Friday, Dec. 10, 2010

Start	End	Track I	Track II
8:15 AM	8:55 AM	ADR PROGRAM DIRECTORS' MEETING , Shinji Morokuma, Director, Georgia Office of Dispute Resolution, Atlanta	
		STATE BAR OF GEORGIA DISPUTE RESOLUTION SECTION MEETING , John A. Sherrill, Seyfarth Shaw LLP, Chairperson, Dispute Resolution Section, State Bar of Georgia, Atlanta	
8:15 AM	8:55 AM	REGISTRATION	
8:55 AM	9:00 AM	WELCOME AND PROGRAM OVERVIEW , John A. Sherrill, Shinji Morokuma	
9:00 AM	10:00 AM	HIGH CONFLICT PEOPLE IN MEDIATION Bill Eddy, High Conflict Institute LLC, Scottsdale, AZ	
10:00 AM	10:10 AM	BREAK	
10:10 AM	11:10 AM	MEDIATING HIGH CONFLICT PARENTING DISPUTES: CHILD ABUSE, ALIENATION AND DOMESTIC VIOLENCE Moderator: Nicky Davenport Panelists: Bill Eddy; Marti Kitchens, mediator, LMFT, Douglasville, GA; Georgia Geiger, mediator, LPC, Marietta, GA	PLANES, TRAINS & AUTOMOBILES: LITIGATION v. MEDIATION v. COLLABORATIVE LAW IN DIVORCE Robert D. Bordett, CFP, CDFP, Atlanta; Amy Waggoner, Waggoner Hastings LLC, Alpharetta, GA; Marsha Schechtman, LCSW, Roswell, GA
11:10 AM	12:10 PM	MARKETING YOUR MEDIATION PRACTICE Moderator: Terrence Croft, King & Croft LLP, Atlanta Panelists: Michele Gibson, Digital Smart Tools, Atlanta; Ellen Malow, Malow Mediation & Arbitration Inc., Atlanta	
12:10 PM	12:55 PM	NETWORKING LUNCH	
12:55 PM	1:55 PM	REPRESENTING YOUR CLIENT EFFECTIVELY IN INTERNATIONAL ARBITRATION Moderator: Philip W. "Whit" Engle, Prenova, Inc., Atlanta Panelists: Steve Clay, Kilpatrick Stockton LLP, Atlanta; Richard Sheinis, Hall Booth Smith & Slover, Atlanta; Josepha Sicard-Mirabal, International Court of Arbitration, New York, NY	
1:55 PM	2:05 PM	BREAK	
2:05 PM	3:00 PM	DELINQUENCY AND DEPRIVATION: MEDIATING IN JUVENILE COURT Moderator: Shinji Morokuma Panelists: Lynn Goldman, Fulton County Juvenile Court; Melissa C. Heard, mediator, mediation trainer; Judge Robert L. Waller III, Gwinnett County Juvenile Court	A USERS GUIDE TO MEDIATION – PERSPECTIVES FROM A PLAINTIFF'S, DEFENDANT'S AND IN-HOUSE COUNSEL Moderator: Raymond G. Chadwick, Jr., Chadwick Mediation Services, LLC, Augusta, GA Panelists: Benjamin Brewton, Tucker, Everitt, Long, Brewton & Lanier, Augusta, GA; Lamar "Mickey" Mixson, Bondurant Mixson & Elmore, LLP, Atlanta; Phillip M. Armstrong, Georgia-Pacific Corporation, Atlanta
3:00 PM	4:00 PM	ETHICS AND OTHER SOURCES OF PROFESSIONAL EMBARRASSMENT AND ANXIETY FOR MEDIATORS AND COUNSEL IN MEDIATION Moderator: R. Wayne Thorpe, JAMS, Atlanta Panelists: Bill Goodman, Goodman McGuffey Lindsey & Johnson LLP; Edith B. Primm, Justice Center of Atlanta; John A. Sherrill	

8TH ANNUAL ADVANCED MEDIATION AND ADVOCACY SKILLS INSTITUTE

The Dispute Resolution Section of the State Bar of Georgia is a co-sponsor of the American Bar Association Section of Dispute Resolution's 8th Annual Advanced Mediation and Advocacy Skills Institute. Please see the following information on the program.

8TH ANNUAL ADVANCED MEDIATION AND ADVOCACY SKILLS INSTITUTE

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- Common Ethical Issues Faced by Mediators and Advocates
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Check out the Section website for updates. www.abanet.org/dispute