



# DR Currents

A Publication of the Dispute Resolution Section of the State Bar of Georgia Winter 2011

## FROM THE CHAIR

During my time serving on the Executive Committee of the Dispute Resolution Section of the State Bar, I have been fortunate to have had two terrific chairs precede me, Larry Christensen and John Sherrill. Both devoted substantial amounts of their time on behalf of the section and in working closely with the Georgia Commission on Dispute Resolution and Georgia Office of Dispute Resolution during some challenging times. They deserve the thanks of all members of the Dispute Resolution Section. And they have made things much easier for this year in which I am serving as chair.

With the increase in both court ordered and private mediations throughout Georgia, the opportunities for the Dispute Resolution Section to serve the members of the Bench and Bar are significant. To that end, the officers and members of the Executive Committee invite your suggestions as to what you believe the Dispute Resolution Section can do to be of greater service not only to advocates, but also to those who serve as mediators, arbitrators and special masters. The names and e-mail contact information for this year's officers and members of the executive committee are provided in a box out. Feel free to contact any with whom you wish to share your thoughts and recommendations. And don't forget our very own Wayne Thorpe. This year he is serving as the chair of the American Bar Association Section of Dispute Resolution. He has also agreed to serve as an ex-officio member of the Section's Executive Committee. His e-mail contact is also provided.

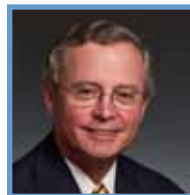
After practicing in litigation since 1977, and representing clients in mediations since 1989, I became a full time neutral in 2010. It is very rewarding to help folks make peace rather than make war.

When I began my new career I met with many lawyers to talk about what they liked and disliked about mediation. I will discuss what I learned in my next column. But for both neutrals and counsel representing parties, I want to throw out some of the questions I asked. You may want to think about and discuss some of them with others.

- What are your likes and dislikes about the mediation process?
- What are your thoughts on court ordered mandatory mediation?
- What percentage of your court ordered mediations settle? For those that don't settle, why don't they?
- What percentage of your voluntary mediations settle? For those that do, what are the things that contribute to success?
- For cases that don't settle at mediation, how many of those do settle because mediation has laid a ground work for that to occur?
- How do you go about selecting a mediator?
- What do you like a mediator to do?
- What don't you like a mediator to do?
- What suggestions do you have for mediators as to how they should conduct a mediation and assist in the negotiations?
- What do you recommend a mediator do when there is an apparent impasse?

Should any of you want to send me your thoughts on any of these questions I would welcome them.

I look forward to my year serving as the chair of the Dispute Resolution Section. It is an honor to have the opportunity to do so.



Ray Chadwick is the principal in Chadwick Mediation Services, LLC. Ray has represented both plaintiffs and defendants in many mediations in Georgia and South Carolina. He has also served as a mediator, arbitrator and special master in federal and state court cases. In 2009, Ray retired from Kilpatrick Stockton, LLP, to begin a full time practice as a mediator, arbitrator and special master throughout Georgia.

# FROM THE ABA ADR CHAIR

By Wayne Thorpe

As current Chair of the ABA Section of Dispute Resolution, I was asked to write a few paragraphs about what is going on in the ABA Section of Dispute Resolution, and I am grateful for the opportunity.

The Section is the largest organization in the world for dispute resolution professionals, with well over 18,000 members, and an extensive array of committees and other projects of interest to members. Literally hundreds of our members take active roles in committees, CLE programs and the like. I have identified the following themes for the Section to pursue in its activities this year: Promote Mediation and Arbitration, Improve Quality, Understand User Expectations. Many Section activities this year will follow those themes. Here is a summary of some of our most visible current activities.

In February the ABA will hold its Mid-Year meeting in Atlanta, and our Section will hold a number of events that should interest readers. On Feb. 11 at the downtown Hyatt Regency, we will put on three interesting CLE programs: Analytical Mediation; Arbitration Agreements; and the College of Commercial Arbitration Protocols for Expedient, Cost-Effective Arbitration. Lawyers from around the country will present these programs. Go to <http://www.abanet.org/dispute/midyear2011.html> for a full description. That afternoon the section will hold a reception at the JAMS office at 1201 West Peachtree St., Suite 2650, beginning at 5:30 p.m. All members of the ABA, State Bar and Atlanta Bar sections of Dispute Resolution are invited. Many of the officers and Council members of the ABA section will be in attendance. RSVP at [https://abanet.qualtrics.com/SE/?SID=SV\\_5doXGbhFWqfy50w](https://abanet.qualtrics.com/SE/?SID=SV_5doXGbhFWqfy50w).

At our Council meeting on Saturday Feb. 12, we will explore some of the continuing activities of our Arbitration Committee, including a compilation of best practices guides, an annotation of the Code of Ethics for Commercial Arbitrators, and a draft report to inform the Consumer Financial Protection Bureau established under the Dodd Frank Act as to the various factors that should be considered in preparing its report on arbitration and consumers in the financial sector. We will also devote a substantial portion of our meeting to a discussion of how our section might contribute the skills and experiences of our members towards producing a more civil and rational dialogue in modern American politics and government. This entire meeting is open to the public. It will begin at 9 a.m. at the Hyatt and last until about 2 p.m. If you plan to attend please send an e-mail to our director, David Moora, at [david.moora@americanbar.org](mailto:david.moora@americanbar.org).

If you are interested in getting involved more in the ABA Section of Dispute Resolution, these Mid-Year events will provide a great opportunity to meet with section leaders and staff. About a dozen Georgia lawyers have taken on current leadership assignments in the ABA DR Section. They include Phil Armstrong, Budget Officer; John Sherrill, a Council member and co-chair of the CLE Committee; and Dr. Tim Hedeem, a Council member and Chair of our Associates Committee.

On Feb. 24-26, the ABA Section of Dispute Resolution will put on the Sixth Annual Arbitration Training Institute at the Biltmore in Los Angeles. Another Atlanta lawyer/arbitrator/mediator, John Hinchey will join me and several other arbitrators on the faculty for this two and a half day program. With a small faculty and breakout sessions the Institute provides a great opportunity for both arbitrators and counsel to learn a lot in a very short time about every aspect of arbitration law and practice. <http://www.abanet.org/dispute/arbinstitute/2011/home.html>.

The section also delivers monthly frequent telephone/web-based CLE programs, the next one scheduled for February 8, on the future of “mandatory” arbitration, including implications of Dodd-Frank and the Arbitration Fairness Act. [http://www.abanet.org/dispute/docs/tele\\_mandatory.pdf](http://www.abanet.org/dispute/docs/tele_mandatory.pdf).

Finally, I would like to invite each and every reader to the ABA DR Section’s biggest event of the year, the Thirteenth Annual Spring Conference in Denver, April 13-16. <http://www.abanet.org/dispute/conference/2011/home.html>. Joan Grafstein, Caleb Davies, and John Hinchey have served in important roles in organizing the conference. These conferences typically attract about 1000 ADR professionals from literally all over the world (including lawyers who represent parties in mediations and arbitration). With over 100 CLE programs, committee meetings, receptions, and so forth, the learning and networking opportunities are staggering. Please join us.

If you have questions or input about the ABA DR Section, please let me know; my e-mail address is [wthorpe@jamsadr.com](mailto:wthorpe@jamsadr.com).



R. Wayne Thorpe has mediated more than 1000 cases and arbitrated more than 400, including class, mass tort and other multi-party issues, in a practice areas including commercial, construction, employment, health care, IP, and significant tort cases including product and professional liability.

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# THE SPECIAL MASTER: AN UNDERUTILIZED DISPUTE RESOLUTION OPTION

By Cary Ichter

The modern commercial dispute is characterized by one overwhelming feature above all others: cost. As litigation — from discovery, to trials, to appeals — dissolves into a battle of time-consuming briefs and motions, legal fees correspondingly escalate. The deleterious effects of these outlays are compounded by the strained judiciary, which struggles to manage a frenetic caseload with scant resources. This risk is as worrisome as it is apparent: aggrieved plaintiffs, unable to afford a jury trial, will be compelled to settle in order to avoid the economic hardships wrought by tiresome pre-trial spats. There is, however, an emerging solution, which, by tempering costs and promoting efficiency, can benefit both litigants and the judiciary: the use of special masters.

The challenge ballooning costs pose to litigants is no secret; discovery provides an apt example. In the era of electronically-stored information, lawyers routinely request millions of pages of information for a single case, effectively bringing the dispute to a halt as parties and their attorneys attempt to manage an insuperable mountain of information. Plaintiffs routinely put forward a “\$150,000 case and someone makes a discovery request (that costs) \$300,000.”<sup>1</sup> In such cases, costs become more than a factor in managing the dispute: they become dispositive, changing each side’s tactics and incentives by distorting the cost-benefit analysis between trying and settling a case, or between paying and appealing a judgment.

Costs also have the effect of distorting returns. In the protracted asbestos litigation, for example, barely a third of the money recovered went to the victims; the rest was lost to legal fees and other transaction costs.<sup>2</sup> This is compounded by the protracted duration of contemporary civil litigation, where litigants are forced to absorb skyrocketing expenses as their cases drag on for years in a state of perpetual limbo.<sup>3</sup>

The dangers created by the costs and delays attendant to the civil litigation process are real and widespread. The president of the American College of Trial Lawyers recently expressed concern that people will be forced to “look [ ]

for alternative means for resolving their disputes or [to] walk away completely.”<sup>4</sup> This outcome, however, is entirely unacceptable. Parties petition courts because they need an impartial arbiter for their claim. When the costs and time involved become so onerous as to make a court-solution anything but, litigants are forced to abandon their hope of a judicial remedy and seek settlement where they can.

Among the scanty solutions proffered to address exploding costs and expanding delays are programs at the trial-court level to curb the amount of discovery allowed in each case.<sup>5</sup> Such programs threaten to create as many problems as they alleviate, however. While they recognize the difficulty of modern trial practice, they respond by circumscribing tools designed

to ensure relief for plaintiffs.

It should also be noted that the costs of trial are not limited to discovery — indeed, ballooning discovery costs seem to be but a symptom of a larger problem. Pre-trial litigation has become a motions arms race with each side moving and opposing at virtually every conceivable opportunity. Legal costs can easily eclipse the amount in dispute well in advance of opening statements, and even the most conservative litigant may be forced to expend copious resources simply *responding* to pre-trial actions by their opponent. Given the fundamental role that the adversarial process plays in the American legal system, however, solutions to this action-reaction dynamic are either truly meager or wholly radical.

There may, however, be a solution simpler than cutting off discovery or attempting bottom-up reforms of our legal system: the increased use of special masters. Special masters, judges or attorneys sitting by designation and assigned discrete tasks, can increase efficiency, reduce costs, and ensure aggrieved parties get their deserved day in court. Special masters, for example, can successfully undertake many of the more onerous time-intensive tasks foisted upon trial courts, including managing discovery disputes, performing detailed fact-specific calculations of costs and damages, and reviewing documents for claims of privilege.<sup>6</sup> Consequently, masters are increasingly common

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in high-stakes and complex cases in federal court and have a growing track record of success.<sup>7</sup> State courts, however, are only recently beginning to embrace the use of masters.<sup>8</sup>

Special masters can and should play a central role in state court litigation, where courts can task them with complicated and detail-oriented endeavors that would otherwise overburden the court.<sup>9</sup> The use of masters is a solution that, rather than usurping the function of the courts, compliments their role as arbiters of disputes. Instead of being tied down in the minutiae of a technical dispute between the litigants (or, more frequently, their attorneys), the court is left to perform its most sacred function: judging the dispute at the heart of the case. Masters provide considered, reasoned answers to complex questions from the outset of litigation, thus allowing courts to decide disputes without exerting unnecessary time or energy. Despite a string of successes using masters in federal court, many state court proceedings amble to a dissatisfactory close without the aid of masters. This perplexing pattern of behavior owes to a few causes, including local rules that often constrain the court's ability to delegate tasks to masters.<sup>10</sup> Likewise, litigants or counsel may harbor lingering concerns that the use of a special master — particularly a private attorney sitting by designation — will be prohibitively expensive when billed at normal rates. This argument ultimately misses the forest for the trees. Any increase in direct costs from the use of masters is offset twofold: first, by gains in efficiency; second, by value added as a result of the master's expertise.<sup>11</sup>

Costs in litigation follow from any number of sources, including discovery disputes and motion practice at the trial court level. Costs may also arise, however, from long and tiresome appeals of the trial court's determination. One way that masters can alleviate much of this burden is by providing a clear and reviewable basis of decision for the appellate court. Masters' expertise makes it more likely that they will reach a reasoned result that will survive appeal with minimal expenditure by each side. Masters can also distill the most contentious — and complicated — parts of a case into a single report, well-organized and supported by evidence, which saves the parties and judges from having to pour through or even re-create the record. Masters thus are not only more efficient at the beginning of a dispute, but their substantive and procedural proficiency makes it more likely that the trial court's decision will survive appeal with minimal expenditure by each side, effectively circumscribing the arduous process that bookends most cases.

Special masters, of course, are not an all-purpose tool, but they are an important tool in the litigation toolkit. They can enhance each step of the process between a claim and relief, by seating an expert between the parties to remedy contentious and complicated issues that a trial judge, for lack of time, experience, or both, may be unable to fully consider. Furthermore, by alleviating many of the most

complicated aspects of a case before trial, masters can ensure that dispositions are not only reasonable and fair — but affordable. This, then, is ultimately the essential benefit special masters offer: helping to make the venerable right to trial a realistic option for litigants rather than simply a hollow guarantee.



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Cary is a regular contributor to the Georgia Bar Journal and Fulton County Daily Report. He has been recognized in Best Lawyers in America, Georgia Super Lawyers and Georgia Trends Legal Elite. He has successfully represented both plaintiffs and defendants in significant cases in state, federal and appellate courts, as well as, arbitrations.

#### *(Endnotes)*

- 1 Lisa van der Pool, *Biz Court Program Takes on Discovery Costs*, Boston Bus. J., Dec. 25, 2009, <http://boston.bizjournals.com/boston/stories/2009/12/28/story10.html>.
- 2 Michael D. Johnston, *Comment, The Litigation Explosion, Proposed Reforms, and their Consequences*, 21 *BYU J. Pub. L.* 179, 180 (2007).
- 3 *Id.*
- 4 Van der Pool, *supra* note 1 (quoting Joan Lukey).
- 5 *See id.*
- 6 Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 *Wm. Mitchell L. Rev.* 1270, 1270, 1277, 1297-97 (2005).
- 7 Thomas E. Willging et al., *Fed. Judicial Ctr., Special Masters' Incident and Activity* 3, 8-9, 12 (2000), available at [http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/\\$file/specmast.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/$file/specmast.pdf).
- 8 Lynn Jokela & David F. Herr, *The Role of Special Masters in the Judicial System: Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 *Wm. Mitchell L. Rev.* 1299, 1299 (2005).
- 9 *Id.* at 1308-09.
- 10 *See Academy of Court Appointed Masters, State Court Authorities Governing Special Masters, Referees, Commissioners, and Similar Judicial Adjuncts and Comparison State Rules to Federal Rule of Civil Procedure Rule 53* (undated), <http://www.courtappointedmasters.org/ACAM%20State%20Rules.pdf>.
- 11 Jokela & Herr, *supra* note 8, at 1311-12.

# HOW TO INNOVATE ARBITRATION

By Linda Beyea

Arbitration has received criticism of late for having become too much like litigation. The promise of a faster, less expensive alternative to court has not always been realized. Users of arbitration expect the benefits they bargained for, and the stakeholders in the process have an obligation to ensure arbitration remains a viable alternative to litigation.

Over the years experienced arbitrators have shared their ideas and suggested best practices for arbitration, and participants can benefit from these valuable suggestions. Nevertheless, in order to continue to improve arbitration's efficiency and effectiveness, stakeholders are faced with the challenge to innovate the process.

Innovation is one of those ubiquitous buzzwords, but what does it really mean? Innovative ideas are new and different; they may range from small, incremental improvements to significant, game-changing ideas. The good news for many of us: innovation is less about personal creativity than it is about gaining new insights. It entails leveraging new insights to increase the value of a product or service to customers.

The following techniques can help you gain new insights and find innovative ways to manage arbitration:

- Connect and converse with a diverse group of people. We tend to spend most of our time talking with people like ourselves: lawyers talk to lawyers; financial professionals talk to financial professionals, etc. This limits our ability to see things from different perspectives. To gain fresh insights into how we might improve arbitration, spend time connecting and conversing with people from different industries, functional roles, educational backgrounds, ethnic groups, etc.
- Get out of the office and into the field. New insights are gained through observation, immersing oneself in the customer's environment. If possible, observe an arbitration to identify, what are the inconveniences, frustrations, and absurdities from the customer's point of view? How can we make their lives easier, even in small ways?
- Challenge arbitration orthodoxies. What are the widely held beliefs about the right way to do

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arbitration? Innovation will not happen if no one challenges beliefs about such aspects as how the arbitrator conducts a preliminary hearing; how evidence is presented; how a panel of arbitrators works together. You may be concerned that challenging the orthodoxies could compromise the core values of neutrality, fairness, or confidentiality. You need not worry; it is possible to innovate and still adhere to core values. When innovating, ask "Does the innovation work?" and "Does it conflict with our core values?" If an innovation violates a core value, reject that idea.

- Examine the trends. Identify the trends inside and outside of the industry. For example, examine trends in technology, lifestyle, regulation, and geopolitics that have the potential to change industry structure. Analyze where the trends intersect to find opportunities to innovate.
  - Borrow from other industries. Look at other industries to identify if there are ideas that can be borrowed and adapted to improve arbitration. For example, can we get new ideas by examining how business is done in the financial services, entertainment or healthcare industries?

Product and service providers in any industry can leverage innovation to increase value to customers. Those who use arbitration expect those who deliver arbitration services to offer the greatest value for the cost. Let's connect and converse about how we can improve the value proposition of arbitration.

Linda invites your comments or questions. You can e-mail her at [beyeal@adr.org](mailto:beyeal@adr.org).



Linda L. Beyea is the vice president of the Construction Division for the Atlanta regional office of the American Arbitration Association. She joined the Association in 2001 as a Case Manager administering commercial and construction cases in AAA's Northeast Case Management Center. She relocated to Atlanta in 2005 to become assistant vice president overseeing operations of the Southeast Case Management Center. Prior to joining AAA, she worked in the public schools of Rhode Island and in human services. She has an MBA from the University of Georgia.

# ARBITRATION AND EQUITABLE ESTOPPEL

Georgia court enforcement of arbitration agreements involving non-signatories.

By John Allgood

One of the challenges for parties in arbitration is the situation where the dispute seeks to include in the forum a party who is not a signatory to the arbitration agreement. In a recent Court of Appeals decision authored by Senior Appellate Judge Blackburn, the court provided guidance on enforcement of arbitration agreements under the Georgia Arbitration Code (GAC) where a contract containing an arbitration clause has been signed by some of the parties but not all. In *Helms v. Franklin Builders, Inc.*, AI OAI 162 (08/19/10) a sales agreement had been signed by a builder and the husband/purchaser. The wife, however, had not signed the agreement which contained an arbitration provision and she later brought an action against the builder. The wife was a joint tenant on the deed. The husband and wife sued for builder defects and the trial court enforced the arbitration agreement to include the wife holding that she was estopped from avoiding arbitration even though she was not a signatory to the sales agreement.

The court of appeals affirmed.

The court noted that the question of arbitrability was an issue for judicial determination. Further the court quoted from the agreement provisions requiring arbitration of disputes and setting forth applicable provisions of the GAC.



The Court of Appeals discussed the fact that arbitration is a matter of contract and normally parties who have not consented cannot be required to arbitrate a dispute when they have not agreed to do so. Noting this, however, the Court in this instance applied the theory of equitable estoppel which has been recognized in state and federal court cases and compelled arbitration of the disputed claims and including the wife as a party to the arbitration.

Citing earlier decisions the court set out the situation appropriate for the application of equitable estoppel: (1) a nonsignatory asserts a claim that presumes the existence of a contract containing an arbitration provision and (2) or the claims are so intertwined with the signatory's claim that the nonsignatory is estopped for avoiding arbitration. The court found that all of the claims against the builder by the wife were the same as the husband's. Accordingly the claims of breach of warranty and negligent construction "presume the existence of the purchase-and-sale agreement and are so intertwined with her husband's claims that she is estopped from avoiding arbitration."

Finally the court stated a third consideration. That being that because the husband and wife had asserted the same claims against the builder that requiring the wife to appear in the same forum as the husband for a resolution "eliminates the potential for 'varying decisions, discreditable to the administration of justice'".

The Helms decision provides clear guidance to arbitrators on standards they should apply under the GAC to similar situations involving nonsignatory parties and the claim of equitable estoppel. Where parties by contract have designated the arbitrator to determine gateway issues like arbitrability or where by reference to applicable provider rules raise have included authority for the arbitrator to make this determination then Helms clearly sets the tests to be applied by the arbitrator for the application of equitable estoppel.



John Allgood is of counsel with Ford & Harrison, LLP, in Atlanta. A graduate of the University of Georgia School of Law, he has served for more than 20 years as an independent neutral arbitrating cases in commercial, employment, construction and securities law areas. His practice includes mediation in the same areas, as well as, real estate and anti-trust matters. Allgood has been selected for The Best Lawyers in America in the area of Alternative Dispute Resolution.

# WHY ALL LAWYERS SHOULD BE FAMILIAR WITH ALTERNATIVE DISPUTE RESOLUTION

By Raymond G. Chadwick Jr.

**W**hy should lawyers who don't litigate know anything about alternative dispute resolution (ADR)? Isn't ADR something only litigators need to know about? In today's world the answer is no for lawyers of all types: business, wills and estates, employment, bankruptcy, real estate, construction and virtually every other area of the law.

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."

Note that with the "is likely to involve litigation" language, this duty exists even prior to a suit being filed. Additionally, it does not say "trial lawyer" or "litigator" but simply "lawyer." So this applies to all lawyers, no matter their area of practice. The odds are great that non-litigators are going to advise clients in matters that appear likely to lead to litigation.

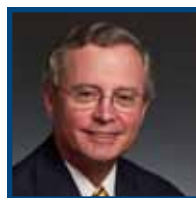
For the non-trial lawyer, showing knowledge of cost-saving ways to deal with disputes, and assisting with a cost-benefit analysis of possible litigation, will impress clients and increase confidence that their lawyer is looking out for their best interests. To properly counsel clients, the non-litigator needs to be familiar with the various forms of ADR that may be appropriate for a particular dispute.



Additionally, in certain matters it may be helpful for the non-litigator to assist the litigator at a mediation or arbitration because of his or her specialized or historical knowledge pertinent to the dispute. Where this occurs it will be important for the non-litigator to understand ADR alternatives and the procedure for each.

Further, the most common form of alternative dispute resolution, mediation, is at its heart "assisted negotiation." Non-litigators routinely negotiate on behalf of their clients in all types of legal matters. They may find themselves participating in the mediation negotiating process.

Therefore, with the very widespread use of ADR, it is important for non-trial lawyers to be familiar with the forms of alternative dispute resolution, how each works and the advantages of each. By having this knowledge, and counseling clients on ADR, the non-trial lawyer has the opportunity to help clients save time and money. Appreciative clients lead to more business, either from that client or others to whom they recommend their lawyer.



Ray Chadwick is the principal in Chadwick Mediation Services, LLC. Ray has represented both plaintiffs and defendants in many mediations in Georgia and South Carolina. He has also served as a mediator, arbitrator and special master in federal and state court cases. In 2009, Ray retired from Kilpatrick Stockton, LLP, to begin a full time practice as a mediator, arbitrator and special master throughout Georgia.

