



The Dispute Resolution Advocate

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Inside This Issue

From the Chair

Page 1

By Phillip Armstrong

Republican Senator Proposes Major Changes to FAA

Page 2

By Justin Kelly

ABA Task Force on Improving Mediation Quality is Busy Listening to Users

Page 2

Section Officers

Page 3

New Developments in Georgia Arbitration Law

Page 3

Tricks of the Trade

Page 3

By William S. Goodman

Upcoming Events

14th Annual ADR Institute and Neutral's Conference
State Bar of Georgia
Oct. 19, 2007

ABA Annual Meeting
San Francisco, Calif.
Aug. 10-14, 2007

ABA Dispute Resolution Section
Advanced Mediation and
Advocacy Skills Training
San Antonio, Texas
Oct. 11-13, 2007



From the Chair

By Phillip M. Armstrong
Georgia-Pacific Corporation

Greetings members! This is the first in what we hope will be periodic newsletters sent electronically to each of you, highlighting upcoming events, reporting on the Section's activities and focusing on developments in state, local and national dispute resolution. It is, in a very real sense, a work in progress. We welcome your suggestions, comments and any fresh ideas to make this a more informative, entertaining newsletter.

My year as chair, which ended June 30, went by quickly. Besides this newsletter, our Section was co-chair and a sponsor of the 2006 ADR Institute and Neutral's Conference held last October at the new State Bar of Georgia headquarters in Atlanta. (By the way, for those of you who have not seen the Bar Center, I strongly recommend you do so on your next trip to Atlanta. The facilities are absolutely first rate—a great place for a conference, as we found out.) Unlike previous years, the 2006 ADR Institute was a one-day affair, shortened from the usual two days because the previous April Atlanta hosted the ABA/Section of Dispute Resolution Annual Meeting, "Georgia on My Mind," which drew more than 800 attendees from all over the state and the country, and overseas as well. Our Section was also a contributor and sponsor of "Georgia on My Mind." We are now planning for the 2007 ADR Institute this fall. More information on that will follow, but a survey conducted at last year's Institute indicated that the membership overwhelmingly prefers the one-day format.

This May our Section was also a co-chair and sponsor of ICLE's Winning at Mediation Seminar, which drew approximately 85 attendees. Other activities during the year included weighing in on a proposed rule amendment for the Fulton County Superior Court Business Case Division and making a financial contribution to the Committee on Civil Justice of the Access to Justice Commission. Our Section sponsored the Opening Night Festival at the State Bar's Annual Meeting in Ponte Vedra Beach, Fla., in June. Finally, your Executive Committee recommended, and our Section passed a number of amendments to update the bylaws at our Annual Meeting, held in conjunction with the ADR Institute and Neutral's Conference.

As some may know, I was fortunate enough to be elected to the ABA Council, Section on Dispute Resolution, and became part of the ABA Task Force on Quality in Mediation. See the article on page 2 summarizing the goals of the Task Force, and the results of its work thus far.

All in all, it has been a gratifying year, one in which accomplishments were made, but with the recognition that much still needs to be done. ADR is no longer the wave of the future. It is here. Those of us in the ADR community know this—the rest of the legal community is beginning to realize it as well. However, the education process is a never-ending battle. The creative, problem-solving approach to conflict resolution remains elusive to many and for that reason alone we must persevere. Thanks for your support this year. Please do not hesitate to contact me. I welcome your comments. ★

Republican Senator Proposes Changes to FAA

By Justin Kelly
ADRworld.com

Sen. Jeff Sessions, R-Ala., has introduced legislation that would amend the Federal Arbitration Act (FAA) to establish certain minimum due process protections for parties, as well as an opt-out for small claims cases.

Sen. Sessions said in a press release on April 18 that the proposed Fair Arbitration Act of 2007, S. 1135, introduced April 17, “will ensure that those who can least afford to go to court can go to a less expensive arbitrator with confidence that the arbitration process will treat them justly. It will make the arbitration system fairer and more user-friendly for both sides of a dispute.”

The release said that despite abuses of the arbitration process over the past several years, “Sessions believes the process is a valid alternative to resolving disputes in court at the cost of skyrocketing legal fees.”

According to Sessions, it is the legislature’s role to address these abuses. “If flaws in the federal arbitration process appear, Congress has a duty to make improvements to the Federal Arbitration Act,” he said, adding “All Americans should be confident that they will be treated fairly if they agree to arbitration.” The proposed legislation is geared to making the arbitration process fairer for consumers, employees and small businesses.

John M. Townsend, chair of the Arbitration and ADR Group at Hughes Hubbard & Reed in Washington D.C., said, “I appreciate that he [Sen. Sessions] is trying to address some concerns that have been expressed about arbitration, but I believe that many of those concerns have been exaggerated. It seems to me that the courts are dealing well with the rare situation where a party drafts an unfair arbitration clause,” by refusing to enforce such clauses, he added. “My preference would be to leave the FAA alone, because it is working well for the vast majority of users,” Townsend said. He opined that “arbitration provides an inexpensive and simple means of pursuing a claim for many people who would otherwise be unable to make one, because the litigation system does not provide an economical way to address small- to medium-sized claims.”

“One of the most important things about the FAA is that it respects the ability of parties to craft their own process,” he said, “I would not want to see unnecessary limits imposed on that ability.” ★

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ABA Task Force on Improving Mediation Quality is Busy Listening to Users

Last year, the Section of Dispute Resolution established a Task Force on Improving Mediation Quality. In the first phase of its work, the Task Force is investigating concerns about the quality of mediation services in commercial and other civil cases and developing realistic proposals to improve the quality.

The Task Force began by conducting focus groups to listen to experienced mediation users. While it recognizes that “what users want” is not necessarily synonymous with “high quality practice,” the Task Force agreed that understanding the market for commercial mediation was a good place to start. (The Task Force, in this initial effort, is concentrating on commercial mediation, including tort, employment and other civil cases.) In the 12 months beginning in April 2006, the Task Force conducted focus groups in 10 major cities: Atlanta, Chicago, Denver, Houston, Los Angeles, Miami, New York City, San Francisco, Toronto and Washington D.C.

The participants in the focus groups have attended numerous mediations. Background data from 70 participants in the first sets of focus groups indicate that 66 percent have attended more than 30 mediations and an additional 27 percent attended 11-30 mediations. Ninety percent of the participants are lawyers, who have been in practice a median of 28 years.

In the focus groups, participants were asked about the quality of their mediation experiences. Questions covered topics such as the characteristics of a good mediator, the structure of the mediation process and preparation for the mediation.

Responses in the first five focus groups indicated that many users believe that mediators should handle each mediation as a unique process and not follow a predetermined pattern; that mediators should actively prepare for mediations including possible conversations and meetings with parties and/or counsel before the mediation session; that mediators should give careful consideration and possibly consult with users before deciding whether to use a traditional opening session with statements from all sides; and that mediators should be actively engaged in assisting the parties and counsel in analyzing issues and in suggesting options for consideration. There have been a variety of opinions about whether, when how and with what permission a mediator should recommend the terms of settlement solutions. ★

We will keep you posted as the Task Force continues in its efforts.

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New Developments in Georgia Arbitration Law

On Nov. 30, 2006, the Court of Appeals of Georgia held that parties asserting arbitration rights in Georgia courts do not have a right to an immediate interlocutory appeal from a trial court's denial of a motion to compel arbitration—even if that arbitration falls under the Federal Arbitration Act (FAA). *American Gen. Fin. Servs. v. Vereen*, 206 WL 3437812 (Ga. Ct. App. 2006) (Blackburn, J.).

Under the FAA, the denial of a motion to compel arbitration is immediately appealable, at least in federal court. 9 U.S.C. § 16(a)(1)(B). The court rejected an argument that the FAA preempted Georgia's prohibition of such interlocutory appeals, reasoning that it did not undermine the purposes of the FAA. The case is currently pending before the Supreme Court of Georgia on writ of certiorari. ★

Thanks to Tom Byrne of Sutherland, Asbill & Brennan LLP

"Tricks of the Trade" Practice Tips From Members

When it looks like a case is about to go into the tank, convene the lawyers for some "lawyer talk." More often than I want to admit, when the case has been "cussed and discussed" for several hours, the lawyers seem to drop their posturing and start talking about what can really be done to settle the case. (Parenthetically, professionalism is the key at this stage of a mediation. I've long said that the number one indication for the success of a mediation is when the lawyers are getting along.) I love the moment when, near the end of a mediation that looks like it might fail, they come in the room together and start kidding around with each other. Quite often, they start creatively talking about the numbers that will settle the case for each of their clients, which often is much, much closer than the numbers on my offer sheet, so that the logjam is broken. Of course, I would prefer that the case be settled through my "creative genius," but here the lawyers really deserve the credit. ★

William S. Goodman, Henning Mediation