DR Currents

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From the Chair

By Raymond G. Chadwick Jr.

In my From the Chair article in the previous edition of *DR Currents* I discussed meetings I had with numerous lawyers to get their views on what they liked and disliked about the mediation process. All but one liked mediation and believed in the value of it. He had not found it to be helpful in settling his cases (I don't know if this was because of the type cases he handled, the mediator or him). But most others ranged from a willingness to do it to enthusiastically embracing it. For the purpose of the discussion that follows I am excluding the one naysayer.

A common view expressed was that there was no downside to mediation, particularly for a plaintiff. Achieving a resolution more quickly was a benefit to all (except perhaps counsel being paid by the hour). Further, most were of the view that even if the mediation did not result in a settlement the day it was held it "set the table" for future discussions likely to result in a settlement.

In response to questions about court ordered versus voluntary mediations, there were mixed views. Some were not in favor of court ordered mediations because of experiences in which parties and counsel only showed up because they had to and were not in a position to settle the case at the time the mediation was required. They believed that the success rate for voluntary mediations was higher. But a majority of those I talked to did not object to court ordered mediations because they caused the parties to come to the table and could frequently be successful. (My personal experience as a mediator has been in line with that and there has been only a small percentage difference in the success rate of court ordered versus voluntary mediations.) There was also an observation by some that they liked court ordered mediations because they felt if they suggested mediating the case, it would be taken as a sign of weakness. This, however, tended to be a concern of those less experienced in mediations. Those who were more experienced did not feel that way because mediation had come to be the norm for most of their cases.

The views of those I spoke to about what they liked and disliked in the conduct of a mediation by the mediator were similar. I commonly heard the following:

- Be patient. Don't try to hurry it. Don't move too quickly.
- Be persistent. Keep everyone there.
- So long as it's truthful, despite the frustrations that develop in most mediations, express confidence that success is possible. This is very important for clients to hear as well as lawyers, particularly those not as experienced in the process.
- Several defense lawyers said don't be afraid to "put the pressure on" or "beat up" on their client in a diplomatic way (as long as you do the same thing to the other side when needed).

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- Most of the plaintiffs' lawyers said they wanted the mediator to assist in having their clients "overcome delusions of grandeur." They appreciated help in "bringing them down to earth." They wanted the mediator to let their client know they were not being realistic or reasonable.
- But it is important not to push too hard because it can make a client think you are taking the other party's side.
- Virtually all said they like an evaluation by the mediator, but not too soon. The timing of an evaluation is very important. Sometimes it can be effectively done indirectly by playing devil's advocate because that sends a message to counsel, if not a client. Being indirect, but clear, by talking about risks, and the reasons for such risks, can be effective. But sometimes they want a mediator to directly express opinions, either in a meeting outside of the presence of their client or in the client's presence if they (the lawyer) ask for that.
- A mediator should never express criticisms of the case or the lawyer in front of a client. (Walking around sense for a good mediator).
- Plaintiffs' lawyers stressed the importance of the mediator having a good "bedside manner," particularly in personal injury disputes or where individuals are involved in a personal business dispute. It results in clients liking and trusting the mediator.
- There was a universal dislike of mediators who were simply "note carriers." They wanted a mediator who was active in the discussions about the case and suggestions for how to move the negotiations to a successful conclusion.
- Lastly, where the case does not settle the day of mediation, they wanted a mediator to follow-up with telephone calls and suggestions that could lead to a settlement as a result of the mediation session.

Experienced mediators likely won't find any of these summarized views of attorneys surprising. Nor will attorneys who have represented clients in mediations.

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The Economy of Single-Neutral Med-Arb

By Herbert H. Gray III

Author's Note: This is the first of two articles to be published in this newsletter relating to single-neutral Med-Arb. While this article addresses the economy of Med-Arb, generally, the article to be published in the next edition will more particularly address how a Med-Arb process might be structured in practice.

A single-neutral Med-Arb process ideally does the following things: It permits the parties to retain control of their dispute by providing them the opportunity to resolve it themselves without the intervention of a third-party determiner, resolving the dispute. If the parties are unable to resolve the dispute in mediation, the same neutral who tried to facilitate the mediated settlement will then serve as the determiner of the case and at the end will issue his binding award. The legal costs of preparing for and conducting a second hearing are eliminated as is the expense of educating a second neutral on the merits of the case and the positions of the parties.

What cases are better served by Med-Arb? Are some more appropriate than others? As set forth above, one of, if not the, overriding argument in favor of Med-Arb is the cost savings to the parties. If the cost savings are measured against the amount in dispute, it would appear that the larger benefit would be obtained in smaller dollar cases. For example, assume a case in which there is $100,000 in dispute. The parties have agreed to one-day mediation and are prepared for a two-day arbitration or trial. Counsel fees are anticipated to be $4000 a day. A half-day's preparation is necessary for the mediation session and a day-and-a-half preparation for the arbitration hearing or trial, for a total of five days of total lawyer time or $20,000. To this add the cost of a mediator at $3000 a day and the cost of an arbitrator at $3000 a day. The total human cost of this traditional mediation then arbitration process is therefore $29,000 – almost 30 percent of the amount in dispute.

Under a Med-Arb process, these costs should be lower. The Med-Arb process will last one or perhaps two days in succession. Assuming attorney preparation will be more efficient since it will only be required one time, allocate one full day at $4000. If the Med-Arb process lasts two days, an addition $8000 in attorneys' fees will be incurred. Under this example, the single neutral's fees would be for two days at $3000 a day. The total human cost would therefore be $18,000 – less than 20 percent of the amount in controversy or a savings of $11,000, and almost a third of the cost of proceeding under the traditional two-step ADR process.

Considering the inherent opposition of lawyers to new ADR concepts, the unwillingness of lawyers to try new concepts in cases in which large amount of money are at stake, and the fact that significant percentage savings may occur in cases of lower dollar value, Med-Arb may well be employed more efficiently in disputes of the latter nature. When Med-Arb achieves wider acceptance in the dispute resolution community, this balance may shift and the more significant cost savings in larger dollar cases would more encourage its further acceptance as a mainstream ADR process.

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Arbitrator Authority to Impose Sanctions

By Taylor T. Daly

May arbitrators impose sanctions against parties? In one sense, an arbitrator's authority is limited because it is circumscribed by the agreement between the parties to a dispute. On the other hand, "arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good]."[1] In this sense, arbitrators have discretion to balance the equities between parties and may, in many instances, impose sanctions against parties for a variety of reasons.

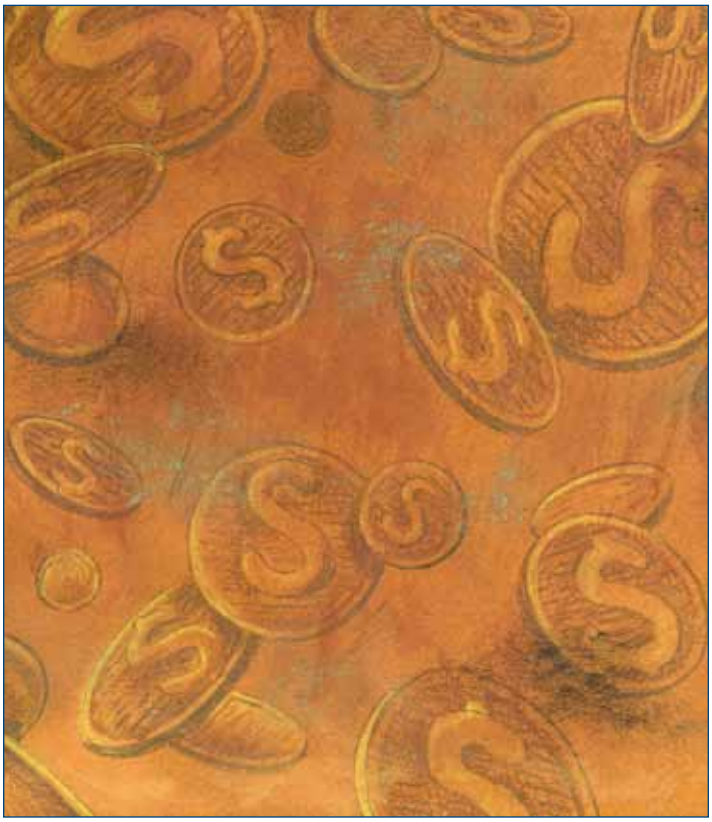
Where an arbitration agreement explicitly provides for sanctions, an arbitrator may certainly impose sanctions. In certain circumstances, however, an arbitrator may also impose sanctions where the arbitration agreement only implicitly provides for the authority to sanction. "Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate."[2] In *Reliastar Life Insurance Company of New York. v. EMC National Life Company*, the United States Court of Appeals for the Second Circuit upheld an award of sanctions of attorney's fees and arbitrator's fees despite the absence of an explicit grant of authority in the contract at issue allowing for sanctioning of a party. The court held that "a broad arbitration clause

> . . . confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees."[3] However, the court also indicated that such broad inherent authority has its own limit.[4]

Implicit authority to impose sanctions can also come from language in an arbitration agreement that incorporates other law. For instance, in *David v. Abergel*,[5] a California court of appeals upheld a monetary sanction for frivolity where the agreement "confer[red] upon the arbitrator the power to 'grant any remedy or relief to which a party is entitled under California law.'"[6] Referring to that language in the agreement, the court simply stated, "we presume they meant what they said."[7] However, to the extent that the incorporated law does not provide for sanctions, an arbitrator would seemingly not have that authority.[8]

Apart from authority deriving from language in the arbitration agreement, arbitrators can also draw upon their inherent authority in imposing sanctions. This authority is present where the arbitration is governed by or incorporates a body of arbitration rules, such as the American Arbitration Association (AAA) Rules or the Federal Arbitration Act (FAA). In *InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*,[9] for example, the parties' contract stated that "[a]ny controversy or claim arising out of or relating to the Contract shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association."[10] Both parties requested attorneys' fees, and the arbitrator awarded fees against a party and against an attorney personally.[11] The district court upheld the former award because an AAA Commercial Rule explicitly allows for such a sanction;[12] however, the court did not uphold the latter sanction against the attorney personally because "neither the Arbitration Agreement between the parties nor the AAA Commercial Rules provided for the awarding of [such] sanctions."[13]

In the context of the AAA, the rule frequently relied upon by arbitrators in imposing sanctions is Commercial Arbitration Rule 43, which provides, in pertinent part, that "[t]he arbitrator may grant any remedy or relief that the



arbitrator deems just and equitable and within the scope of the agreement of the parties." As the United States Court of Appeals for the Ninth Circuit has noted, "Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies, particularly when a dispute arises between parties to a commercial contract with an arbitration clause that incorporates AAA Commercial Rule 43, and which applies to every dispute arising under the agreement."[14] But while authority to impose sanctions under this rule is seemingly robust, it has its limits.[15]

Once possessing the authority to impose sanctions, an arbitrator can elect to impose a variety of different sanctions, depending on the circumstances at issue. An arbitrator may shift costs of the arbitration but should exercise restraint in the absence of explicit authority to do so. Additionally, an arbitrator may impose a monetary sanction. Normally monetary sanctions are imposed against a party; however, courts have been willing to uphold the imposition of sanctions against counsel for the parties in certain circumstances.[16]

Apart from these monetary measures, an arbitrator can utilize other measures that impact the course of the arbitration. For example, where a party improperly fails to produce documents to the opposing party, the arbitrator may apply a negative inference, thereby concluding, without viewing the documents at issue, that the documents say what the requesting party believes them to say. Additionally, an arbitrator may prevent a party from presenting evidence where that party has failed to produce rebuttal evidence. However, in considering the imposition of this particular sanction, arbitrators should be mindful that one statutory ground for vacatur of an award is where the arbitrator "refus[es] to hear evidence pertinent and material to the controversy."[17]

Accordingly, depending on the language in the parties' contract and the rules under which the arbitration proceeds, arbitrators may have explicit, implicit, or inherent authority to impose sanctions. However, the limited review of arbitration awards in courts of record highlights the relative finality of arbitration awards.[18] Therefore, arbitrators should be cautious in imposing sanctions.

Taylor Tapley Daly has more than thirty years of experience as a civil trial lawyer in state and federal courts in multi-claim and class action consumer matters, product liability, commercial matters and dispute resolution.

A registered Mediator/Arbitrator, she serves regularly as a neutral in complex commercial matters with substantial monetary damages at issue and in tort matters involving personal injury, slander/libel, and sexual misconduct. For her ADR work, she has been selected by The Best Lawyers in America and Georgia Super Lawyers.

(Endnotes)

1 *Advanced Micro Devices, Inc. v. Intel Corp., 885 P.2d 994, 1001 (Cal. 1994) (quoting Moncharsh v. Heily & Blase, 832 P.2d 899, 904 (Cal. 1992) (en banc)).*

2 *Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2009).*

3 *Id; see also Americredit Fin. Servs., Inc. v. Oxford Mgmt. Servs, 627 F. Supp. 2d 85 (E.D.N.Y. 2008) (permitting imposition of sanction for bad faith conduct where agreement permitted arbitrator to resolve any claim arising out of the agreement).*

4 *Reliastar Life Ins. Co. of N.Y., 564 F.3d at 87-88 ("While a broad arbitration clause affords arbitrators considerable discretion to award such remedies as they deem appropriate, they may not 'exceed the power granted to them by the contract itself.'"(quoting Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003)).*

5 *46 Cal. App. 4th 1281 (1996).*

6 *Id. at 1283.*

7 *Id.*

8 *See, e.g., Luster v. Collins, 15 Cal. App. 4th 1338, 1343, 1348 (1993) (not upholding economic sanctions where nothing in statutory scheme incorporated from California Code of Civil Procedures authorized an arbitrator to include economic sanctions).*

9 *373 F. Supp. 2d 340 (S.D.N.Y. 2005).*

10 *Id. at 343.*

11 *Id. at 354-56.*

12 *Id. at 354 (quoting AAA Commercial Rule 43(d)(2), which provides, in part, "an award of attorneys' fees [may be rendered] if all parties have requested such an award" (alteration in original)).*

13 *Id. at 356, but see contrary holding in Footnote 16.*

14 *Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1064 (9th Cir. 1991).*

15 *Cf. Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co., 264 F. Supp. 2d 926, 943-44 (N.D. Cal. 2003) (concluding that imposition of sanction that amounted to civil contempt was beyond the scope of an arbitrator's inherent authority provided under the FAA).*

16 *See, e.g., Polin v. Kellwood Co., 103 F. Supp. 2d 238, 248 (S.D.N.Y. 2000) (basing authority to impose sanction against attorney personally "on the agreement, the AAA rules, and the applicable law").*

17 *9 U.S.C. §10(a)(3).*

18 *See generally Americredit Fin Servs. Inc., 627 F. Supp. 2d at 92-93 (indicating that the "manifest disregard of law" standard has been replaced by 9 U.S.C. § 10(a), which now provides four exclusive grounds for vacating an arbitration award).*

"Show and Tell or Hide and Seek?"

A Plaintiff's Perspective on Mediation

By Harry D. Revell

In many ways mediation has now replaced the jury trial for resolution of civil disputes. Overcrowded criminal dockets make it more and more difficult for plaintiffs to have their "day in court" before a jury. As a result, lawyers for plaintiffs must anticipate and plan for mediation much like they have traditionally planned for a jury trial.

I. Understanding the Mediation Relationships.

Effective mediation starts with the recognition and leveraging of the different relationships attendant to the mediation setting. Those relationships include: lawyers/clients (both plaintiff and defendant); plaintiff and the mediator; defendant and the mediator; and counsel for plaintiff and counsel for defendant.

Information imparted to clients needs repetition and reinforcement. When you first address with your client the possibility of mediation their attitudes range from "What's a mediation – it must be just another tactic to delay this thing" to "They want a settlement conference – that means I must be getting all the money I want for my case." Usually reality is somewhere in between. Certain things should be on your checklist to prepare for any mediation. Here are a few:

- Explain the mediation process early and often and leave no room for doubt. Explain to your client that it is a settlement conference where a mediator acts as a facilitator only. The mediator will not render any decisions in the case.
- Consider who should - - and who should not - - come to the mediation with your client. Certain family members and close friends might add to your plaintiff's credibility, so consider someone who can help the decision-making with a better degree of objectivity.
- Take the client through the details of what the mediation day will be like. Explain exactly what will go on in the room: the mediator's opening remarks and the opportunity to make a statement, if advisable. Explain that the proceeding is not adversarial or confrontational. It's a time to extend courtesies rather than rattle sabers.
- Let the client know about the neutrality of the mediator. Everyone wants the mediator to be on his or her side, but typically the mediator is firm with both sides.
- Review how you want the client to conduct themselves at all times. Make them aware that their body language is important –no rolling of eyes, shaking of the head, or audible sighs. When greeting the opponents do so with courtesy and proper respect.
- Emphasize to the clients that even if the case does not settle at the mediation, their presentation and conduct will likely influence the defendant's ultimate opinions about the case.
- Explain to the client the defenses they will hear in the mediation setting, and explain they should be braced to listen respectfully without becoming upset during the defendant's presentation. Hearing these defenses is actually beneficial because they must eventually be overcome anyway.
- Long before the mediation consider and discuss the allocation of any money that might be offered. For example, that the widow splits the money with the children or that the minor's share is not for the parents to use as they wish. Review the attorney fee contract so there is no uncertainty about how the contingency fee operates. Make the client aware of the out of pocket costs advanced. Talk in terms of net to the client.
- Be aware of and inform the client about liens, subrogation and medical reimbursement claims.

Frequently, liens cannot be resolved until the outcome at mediation is known.

- If applicable, explain structured settlements, special needs trusts, conservatorships, etc. to the client. These concepts are complex and hard to understand. Clients will justifiably be upset and confused if they hear about structures, special needs trusts, etc. for the first time at the mediation.
- Patience, Patience, Patience. Prepare the client for the truly arduous grind of the mediation experience and for the obligatory "low ball" first offer, which often insults the client. Remember, the only offer that really matters is the last one, not the first one.

II. Educating the Mediator.

It is important to give the mediator adequate information about the client and the case. This can be done with a confidential memorandum to the mediator or a memorandum to share with the other side.

If you submitted a settlement letter or settlement package that alone might be enough. Most mediators do not want to be burdened with too much information. Good mediators are quick studies who are very experienced and able to pick up on the relevant issues quickly. It is also important to alert the mediator to anything unusual or remarkable about the case. If a unique statute or a rule of law exists, let the mediator know in advance. Inform the mediator in short version what law applies to the case. For example, explain how tort reform legislation affects your case.

Prepare the mediator to deal with a client with special needs or a unique personality and let the mediator know that you are bringing someone to assist the client for some special reason. You also should let the mediator know if some party who appears to be essential is not going to be there and why they are absent. If any particular problems surfaced during the previous negotiations, let the mediator know. Most mediators can smooth over problems and minimize conflicts that previously existed. A mediator who understands your case can help with client management by reinforcing strengths and weaknesses of the case. This can also validate the lawyer's opinions previously expressed to the client.

Most mediators want to know beneficial information that might influence the case like a particular judge presiding, the venue, previous verdicts in the jurisdiction and whether a limits demand has been made.

III. Educating Your Opponent.

Naturally, the further along you are in the discovery process, the greater the chance for a successful mediation. The more information each side has about the other, the easier the decision-making process becomes. Sometimes cases are mediated when all that is left is the trial of the case and, therefore, education at or before the mediation process in not as important. The mediation process should then be used to emphasize the real strengths of the case.

If discovery has not been completed, you should provide the other side with the data you think is important in your case. Most people who have successful mediations are those who provided trustworthy information prior to the mediation. Surprises won't help at mediation. Insurance companies and manufacturers simply do not work that way.

Typically, senior claims people and/or a claims committee makes a decision about the ultimate payment they will commit to settling the case. It is unlikely that those decision makers will show up at the mediation. Usually the person at mediation is given a range or a maximum within which he or she is authorized to settle your case; and, yes, this is done regardless of the typical expectation that defendant will have "someone with full authority to settle" present at the mediation. The person who comes does have "full authority" but only the authority to pay up to the number authorized by higher management. The representative of the defendant can make telephone calls back to upper management to get more money, but it is usually not as a result of some surprise at the mediation process.

Sometimes even defense counsel does not know how much his own client has authorized to settle a case. This situation did not exist many years ago but is now more common as adjusters chose not to be as deferential to defense counsel.

Hard special damages carry the power of objectivity. Such damages should be underscored with charts or handouts at the mediation. As to the intangible damages, make your client's human damages real and palpable to the defendant. As to all claims for damages, it is good to use

the mediation process to emphasize those damages, even if in shorthand form, but remember the claims adjuster has many claims open at the time. You must get the adjuster focused on your client.

Liability should be addressed with the strongest possible evidence as quickly and succinctly as possible. The emphasis on third party's statements, impartial policemen, etc. is helpful. In a claim where your client might be partially at fault, a few words on comparative negligence might be in order to educate an adjuster who is not from Georgia. Be prepared to acknowledge and address what you know are the weaknesses in your case. All cases have some weakness and you are not going to minimize it by failing to address it.

As for opening statements, most lawyers believe they have minimal impact on a case in which the parties know a good deal about each other's case. Considerations as to whether or not a prolonged and detailed opening statement include client management, the degree to which the defendant knows the case, and the degree to which the mediator and adjuster need help in becoming more familiar with the facts.

IV. Exit Strategy.

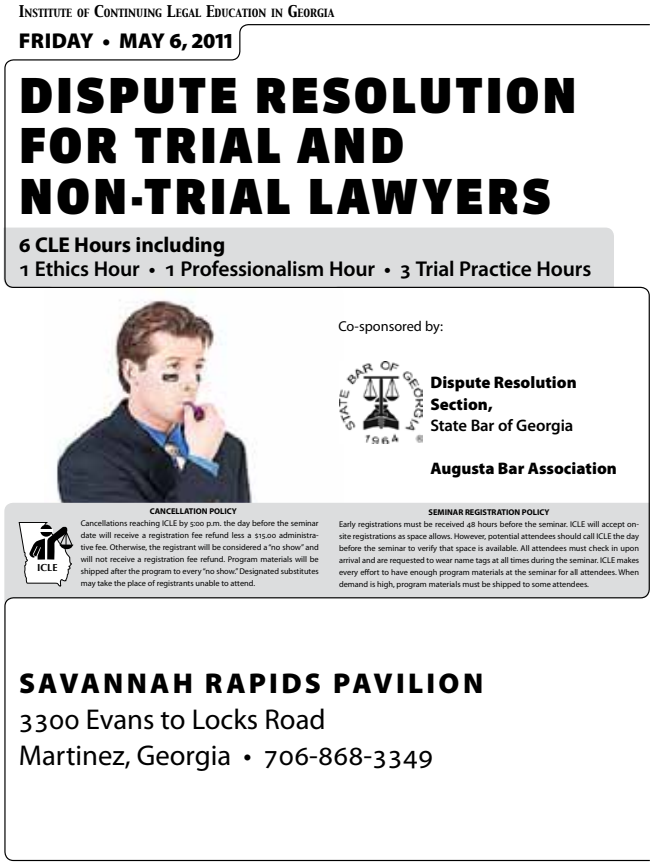
Many times mediation ends with acceptable if not perfect settlement terms established and appropriate memoranda prepared. Other times the formal mediation adjourns with an understanding that the mediator will continue to work with the parties, usually by phone, to attempt to close the deal. Sometimes they adjourn with a tentative settlement but with work to do, e.g., satisfaction of liens and subrogation interests. And there are, of course, times of true impasse when no future help will be needed by the mediator. Nevertheless, most mediations end with benefit derived. Narrowing the money gap, identifying new issues for resolution and simply learning more about both sides of the case will usually make the process worthwhile and beneficial.

So remember, to have a successful mediation experience get the client fully informed and come with patience, flexibility and resolve.

Harry D. Revell began his legal career 24 years ago and has earned a reputation for committing himself to the best interests of his clients. Although comfortable with all aspects of civil litigation, his particular expertise is in the areas of consumer class actions, serious and catastrophic injury cases and business and commercial litigation. He has achieved several multi-million dollar verdicts & settlements in class action cases that resulted in substantial cash payments and other benefits to millions of consumers throughout the country.

Don't forget the "Dispute Resolution for Trial and Non-Trial Lawyers" CLE will take place on Friday, May 6 in Martinez, Ga.

Register online at http://www.iclega.org/programs/7681.html or by completing the application on page 16 of this newsletter.



Mediation of a Civil Case From the Defense Lawyer's Perspective:

How to Make it Work.

By Benjamin H. Brewton

Mediation condenses in both time and effort the whirlwind of activity surrounding the litigation of a civil claim. It allows the parties to see clearly one of two things:

- Their difference in opinion as to the value of their claim is not so vast as to warrant the time, effort and expense of continued litigation or;
- The parties' sharply differing ideas of value make it clear the case can't be settled so all involved can proceed with litigation up to and including a trial.

This article highlights the timing of, preparation for and conduct at mediation that, in the author's experience, will "make or make" the mediation of a civil lawsuit.

Timing: Mediation Following "Early Limited Discovery."

Conducting mediation after "early limited discovery" represents an ideal compromise between a pre-suit mediation and mediation following the close of discovery. It is typically difficult, if not impossible, for either party to evaluate a legal claim without the benefit of some discovery. Plaintiffs generally need access to information under the control of the defendant while the defendant needs to gather core information concerning the plaintiff and the plaintiff's damages.

Initial discovery allows a defendant to gather information necessary to establish defenses and, additionally, to depose the plaintiff. The plaintiff's deposition also will generally illustrate to the plaintiff that litigation will not be an easy road and that her background is likely to become an issue in the case. This is particularly true when a plaintiff becomes aware that many aspects of her background are already known to defense counsel. This can be somewhat sobering. Likewise, plaintiff's counsel often recognizes the desirability of deposing at least one key witness or corporate representative together with requests to produce. This sends the signal the plaintiff is actively and thoroughly pursuing evidence to support the claim and nails down potentially damaging testimony.

Conducting mediation after clearly defined early limited discovery avoids either party making decisions in the "blind". It allows counsel to discuss mediation as an option without the concern opposing counsel will see such willingness as an expression of weakness. Moreover, if mediation fails it will fail only after the parties have clearly defined the economic gap in their expectations concerning the value of the case.

Preparation: Reach Agreement Concerning Special Damages.

There is no excuse for any "information gap" regarding special damages and yet, remarkably, research shows a significant percentage of mediations break down because the parties have not exchanged key information concerning damages. Not only should plaintiffs insure they have produced all information and documentation concerning medical bills and lost wages but, also, they should explore with defense counsel whether there is any disagreement concerning the documents produced. The special damages should be well-organized and summarized. Why make it

difficult for the person with the checkbook to understand what your economic damages are?

Information concerning special damages should be turned over well in advance of the mediation. Significant claims involve not only defense counsel but multiple levels at the defendant's insurance company or at the office of the self-insured corporate defendant. Several persons will need to review the package and meet to discuss it. Plaintiff should allow at least three weeks for this process.

Lastly, any liens or outstanding claims by third parties concerning the settlement proceeds should be documented and made part and parcel of the settlement/mediation package. All parties should be in agreement, prior to the mediation, what liens exist and the mechanism for resolving those liens. Liens often cannot be resolved until the case is settled. Nonetheless, the parties can agree a lien exists and can come to terms about how it will be resolved.

Preparation: Reach Agreement Concerning Value Parameters for the Case.

Prior to the mediation opposing counsel should get on the telephone and acknowledge both that mediation is necessary and will be conducted in good faith. The next step of this conversation concerning value parameters is delicate and requires a great deal of "reading between the lines." The lawyers should be able to signal or clue each other that the money likely to be offered or demanded is in a possible range of payment or acceptance. This process will avoid people traveling from all parts of the country to conduct a mediation only to have it end in 45 minutes. Aborted mediations do nothing but create further hostility between parties and make it even less likely the case will be settled later.

Preparation: Identify and Understand the Decision Makers.

A lawyer must understand the decision making process on both sides of the case or the mediation will not succeed. These dynamics are often either not recognized or are underappreciated leading parties to negotiate in the blind and posture to their detriment.

Plaintiffs must recognize the representative of the defendant present has often derived his settlement authority from a higher source. Consequently, despite the admonition the defendant must have a representative with "full settlement authority" present, the representative has only the authority extended to him by someone higher up the chain. Typically, the settlement authority for a significant case is handed out weeks in advance of the mediation. Any compelling evidence the plaintiff has impacting the value of the case including "day in the life" videos, liability admissions and proof of damages should be transmitted to the defense weeks in advance so the person in charge of the authority can take it into consideration.

Defendants, likewise, need to have an understanding as to who is "driving the bus" on the plaintiff's side. In some cases, the plaintiff is more complacent and willing to settle his or her case while the plaintiff's lawyer is difficult. In other cases, however, the lawyer wants to get the case resolved and it is the plaintiff who is difficult. A wise defense lawyer will recognize this early in the game and tailor his arguments and settlement strategies accordingly.

Preparation: Prepare Opposing Counsel for Your Mediation Posture.

A lawyer must understand the decision making process on both sides of the case or the mediation will not succeed. These dynamics are often either not recognized or are underappreciated leading parties to negotiate in the blind and posture to their detriment.

Historically, mediation is not the time for antagonism and accusation. Both sides are better served if the histrionics are kept to a minimum and a simple, straightforward statement of the case is made.

It is always advisable for a lawyer to contact his opposing counsel prior to the mediation and advise as to the presentation and posture the lawyer anticipates taking at mediation. For example, if a plaintiff's attorney believes he will have a complete "dog and pony" show at the outset of a mediation including film footage, PowerPoint presentations, emotional statements by family members, etc. then it is definitely advisable to contact opposing counsel and outline what is forthcoming.

There is absolutely nothing to be gained by surprising opposing counsel at mediation. Surprise can, however, lead to an extreme amount of ill will being generated across the table. No lawyer likes to be surprised, embarrassed or, more importantly, made to look unprepared relative to his opposing counsel. If a defense lawyer, for example, is advised plaintiff's counsel intends to have a complete run through of the case then the defense lawyer can prepare his own version which will often serve the purpose of making the plaintiffs more reasonable. Alternatively, she will be given an opportunity to advise her clients what they will be seeing and will also have an opportunity to explain to

her clients why she is not, on their behalf, going to put on a similar presentation. A defense lawyer surprised and embarrassed by an unequal presentation at a mediation will often, either consciously or subconsciously, decide the best way to prove her ability is simply have the case not settle and let her "time to shine" be in the courtroom during the trial of the case.

At Mediation: Don't Showboat or Antagonize Your Opposition.

Mediations are not the time for preaching and finger pointing. Plaintiffs are often uncomfortable because they are the only persons in the room with no experience in this particular process and, additionally, after spending months with their own lawyer they are now exposed to multiple new faces. A defense lawyer should not be confrontational to the plaintiff or become overly hostile. A calm, matter-of-fact tone and opening is best. Less is always more.

A defense lawyer should generally point out there are two sides to the story and his job will simply be to make certain the jury understands the other side of the story. Limit specific case discussion to three or four key, unassailable components of the defense. This should be brief and addressed to the plaintiff all while making direct eye contact.

Defense lawyers should never enter mediation without knowing how long it will take to get a check if the case settles. This specific fact should be referenced in the opening statement. The plaintiff will often have encountered several years of delay between the date of their injury and the mediation. The prospect of money in hand in ten days is extremely compelling. At the end of a seven hour mediation this, when coupled with a reasonable offer, can be an almost irresistible lure for the plaintiff.

Defense lawyers should, likewise, explain to the plaintiff no one can undo what has happened and no one can take them back in time. The only purpose for the mediation is to place a monetary value on a legal claim. This is particularly critical in wrongful death cases where plaintiffs are extremely sensitive to a monetary value being placed on the life of a loved one.

The defense lawyer and the corporate or claim representative should tell the plaintiff they are sorry for what has occurred. There are very few significant lawsuits that do not involve something genuinely bad happening to the plaintiff. Whether it is the defendant's fault is a different issue but, nonetheless, there is usually a problem or the parties would not be sitting in a room talking about money. A straightforward apology goes a long way. This brings closure and emotional closure is often as significant a factor in the resolution of lawsuits as financial compensation.

At Mediation: Be Realistic in Initial Demands and Offers.

Only counsel inexperienced in the mediation process will encourage his client to make a "lowball" initial offer. The better practice is to make a fair offer that is obviously less than the final offer will be but which still represents a significant sum of money relative to the value of the case. This initial offer should be sent, however, with an explicit message via the mediator acknowledging a lowball offer was not sent but the plaintiff should not consider the initial good faith offer to be a mere fraction of what will be forthcoming.

Plaintiffs, likewise, should not start in the stratosphere hoping this will somehow, magically, induce a defense lawyer and the defendant's representatives to pay more than they intended to pay originally. Perhaps more than any other single factor mediations fail because the plaintiff's lawyer starts at some elevated demand that has no connection to the true value of the case. The plaintiff/client then sits throughout the course of the mediation watching as their $4,000,000 case is whittled down to what it really is which is a $400,000 case. The plaintiff feels like they have "given up too much."

It is absolutely imperative the plaintiff's lawyer not, under any circumstances, come to the mediation and increase his demand from the amount made known prior to the mediation without forewarning. If the demand increases for some valid reason then the plaintiff's lawyer should not only provide advance warning but also an explanation. Failure to do this will create an immediate defeatist attitude among the defendants.

Lastly, plaintiff's lawyers should make an attempt to be likeable. This sounds obvious and perhaps trite but, nonetheless, is real. It is axiomatic that the defense lawyer should not antagonize the plaintiff. It is often overlooked, however, that a plaintiff's lawyer can irritate a corporate representative or defense representative who holds the checkbook. While the claims professional is infinitely more experienced in the process than the plaintiff they are, nonetheless, human. If they decide they do not like the plaintiff's lawyer they are more inclined to believe he or she should get their money the "old-fashioned way" via 12 tried and true jurors.

At Mediation: Allow Time for the Process to Work.

The parties should not be in a hurry and neither should the mediator. Plaintiffs in particular have built up expectations over months, if not years, about the value of their case. Inevitably, the economic value of the claim in the plaintiff's mind is more than what is being offered at the mediation and, consequently, the plaintiff is watching as the value of his or her case declines. If this declining process takes place too rapidly it is upsetting to the plaintiff. It is vastly better to let the process unfold over multiple hours so the plaintiff feels like the process was difficult and they worked to get to the final dollar figure. It is an unfortunate but true fact that physical and mental exhaustion are necessary components for everyone involved in the mediation process.

At Mediation: Conclude Mediation with a Concrete Agreement.

Mediations are typically lengthy and can be exhausting. At the end of a ten hour session when a settlement is reached there is a tendency to simply reach agreement as to some broad terms and a dollar figure. This can cause heartache later. At a minimum, the parties should write out and sign the settlement terms. Generally, these terms should include, in addition to the payment, who will be on the check and the amount of time it will take to provide the check. Additionally, the parties should agree on the terms of the release including confidentiality, the nature of the dismissal and, if it is a multi-party case, the mechanism by which the settling party will be dismissed from the case which requires a court order pursuant to O.C.G.A. §9-11-21. Lastly, there should be concrete agreement as to how the mediator will be paid.

Virtually all of these items can be agreed to prior to the mediation including how long it will take to get a check, how the mediator will be paid, who will be on the check if the case is settled and the terms of the release. In a significant case the best practice is to take a full release document and exchange it well in advance of the mediation so no one can claim surprise as to the terms.

If the case does not settle there is still the need for agreement. It is always advisable to have the parties jot down the actual, concrete dollar figures representing the last demand and offer. Mediations, particularly those will multiple parties, can become confusing. It is beneficial at the conclusion to know precisely where everyone involved stands. This also may serve as a jumping off point for continued settlement discussions.

Mediation is no different from every other aspect of law practice. Successful lawyers do not simply blunder into a mediation hoping a big offer will be forthcoming or the case will magically settle. Pre-mediation communication and preparation are necessary to avoid unanticipated obstacles at the mediation. Likewise, the actual mediation should be conducted in a fashion that optimizes the chance of resolving the case. The thoughtful lawyer that prepares and thinks through the mediation process will typically enjoy a more successful mediation.

Ben Brewton is a partner in the Augusta law firm of Tucker, Everitt, Long, Brewton & Lanier who represents both plaintiffs and defendants in personal injury and death cases. He is a Fellow in the American College of Trial Lawyers and has extensive practical experience with the mediation process. He can be reached at bbrewton@thefirm453.com or 706-722-0771.

INVITATION TO SUBMIT ARTICLES

You are invited to submit articles for future issues of *DR Currents*. Please e-mail them to Ray Chadwick at rchadwick@chadwickmediation.com.

Managing the Arbitration to Reduce Time and Costs

By John W. Hinchey

I. The Complaints

In recent years the business community has complained that arbitration of commercial disputes is becoming just as time consuming and costly as litigation. In 2009-10, two international surveys of corporate counsel in the United States and United Kingdom[1] produced the following findings:

- In disputes that are not international in character, and, when given a choice, 58 percent of all responders would opt for litigation; only 38 percent would choose arbitration; and approximately 10 percent say, "it depends";
- More than 40 percent of corporations plan to increase their budget for electronic discovery in coming years; they firmly believe that applicable discovery rules should be stricter in limiting the scope of electronic discovery.
- Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay; and
- Parties contribute most to the length of the proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly.

Consequently, companies and their in-house counsel are looking for other options to settling disputes; or they have determined that being in court is probably the best option--where, at least there is an appeal if things go badly In response to mounting complaints that commercial arbitration has become as slow and costly as litigation, the College of Commercial Arbitrators[2] decided in 2008 to convene the following year a National Summit on Business-to-Business Arbitration. The goals were to identify the chief causes of the complaints and explore concrete, practical steps that can be taken now to remedy them. The concept of a National Summit arose from two key insights: (1) each of the "stakeholders" in arbitrations, including business users, in-house counsel, outside counsel, arbitrators and arbitration providers must be involved; and (2) all of these "stakeholders" must collaborate in identifying the causes and cures of cost and delay in arbitration.

II. National Summit on Reducing Time and Cost

The National Summit was convened in Washington, D.C. at the end of October, 2009. Reflecting the importance of the Summit was the fact that five of the principal organizations involved in commercial arbitration, namely, the American Bar Association Section of Dispute Resolution, the American Arbitration Association, JAMS, the International Institute for Conflict Prevention and Resolution (CPR), The Chartered Institute of Arbitrators, the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two CCA Fellows joined the College as co-sponsors of the Summit.

III. The Summit Protocols

The Summit discussions revealed that promoting efficiency and economy in arbitration must be a mutual effort among the four constituencies: (a) business users and in-house counsel; (b) institutional arbitration providers; (c) outside counsel; and (d) arbitrators, because each have significant control over the arbitration process. Based on discussions among representatives of these four constituencies, the College developed and published in the fall of 2010 a significant document entitled, "*Protocols for Expeditious, Cost-Effective Commercial Arbitration - Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration-Provider Institutions*".[3]

IV. The Lessons of the Protocols

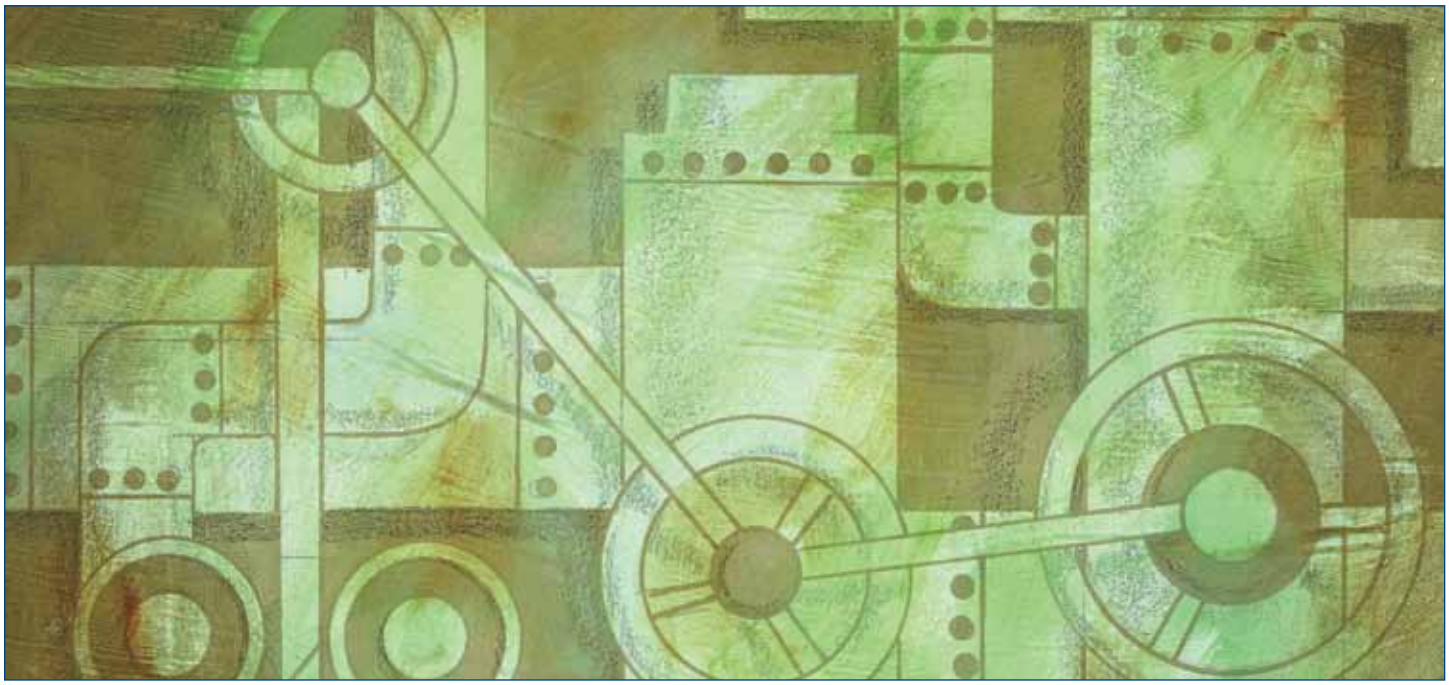
The lessons of the *Protocols* are premised on the National Summit consensus that the time and costs of commercial arbitrations are driven by specific actions that each constituency can take to reduce the time and expense of business-to-business arbitration. For example, if the arbitration provider whose rules control a case provides no option for accelerated time frames or limited discovery, and, if the parties and their counsel are battling every issue, the arbitrator's ability to contain discovery costs is seriously constricted. The overarching principles for each constituency in the *Protocols* are the following:

Be deliberate and proactive. Promoting economy and efficiency in arbitration depends, first and foremost, on deliberate, aggressive action by the stakeholders, starting with choices made by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process.

Control discovery. U.S. style discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful and limited alternative discovery routes that the parties might take. Also, the parties and their counsel should work to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement a discovery plan.

Control motion practice. Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that might be disposed of at the outset are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. The key is recognizing whether in a particular case a substantive motion would advance or reduce the goal of lower cost and greater efficiency in the particular case.

Control the schedule. Since work expands to fill the time allowed, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations.



Use the Protocols as tools, not a straitjacket. While there are certain categories of cases that are alike except for the identity of the parties and other participants, most commercial arbitrations with a substantial amount at stake are distinct in at least some way, be it the twist of circumstance that sparked a dispute or the array of legal issues presented. These *Protocols* offer actions that might apply to the broad range of cases, and yet embedded in them is recognition that parties' needs vary with circumstances and that a well-run arbitration will at some level be custom-tailored for the particular case

Remember that arbitration is a consensual process. Arbitration is rooted most often in an arbitration agreement made when the parties were in a constructive, "let's get the deal done" mode. If and when a dispute arises, reactions will vary. Some parties, looking to do business again in the future or accepting of the occurrence of a dispute, will be able to cooperate productively towards a common goal of cost containment. Other parties, by the point of a dispute, are entrenched in their respective perspectives of what occurred and why the other side is to blame. Parties in this mind-set face a daunting challenge to look beyond grievances in order to find cost savings that might benefit each side. The *Protocols* aim to meet the diverse settings in which cases arise, recognizing that the prescribed behavior ultimately cannot be imposed but can only be encouraged, in a context where the constituencies' efforts permit formulation of the best plan for the particular case.

The central lesson. In the final analysis, the central lesson of the National Summit is that the core value of arbitration is *choice.* The business users and in-house counsel who draft the deal start with the greatest range of choice in what procedures and limitations they place in the arbitration agreement - because arbitration is a creature of contract. Of course, the business users and in-house counsel can be greatly aided by arbitration providers and institutions who offer a range of draft agreement clauses, rules and guidelines. The outside counsel who play a key role as expert advisors to the users should be certain that they are fully aware of and advise their clients of the costs, benefits and potential risks of all of the procedural options available to them, so that fully informed choices can be made. Finally, the arbitrators must be good arbitration process managers, and fully committed to an optimal balancing of efficiency, economy and fairness.

Court litigation, by contrast, does not offer this range of choice. The unique and inherent value of the *Protocols* is that they are perhaps, to date, the most succinct and comprehensive analysis of the causes, cures and remedies for cost and delay in commercial arbitration.

The use of these *Protocols* by all stakeholders in the arbitration process, including business users, arbitration providers, arbitrators, inside and outside counsel, whether in U.S. domestic or international cases, will dramatically reduce process costs and delay, and restore arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes.

John Hinchey is recognized as a national and international leader in the practice of construction law with extensive experience in resolving significant construction disputes as a mediator and arbitrator with the JAMS Global Engineering and Construction Panel. For the past 18 years, he has led the construction disputes practice at King & Spalding. He focuses his practice on international and domestic construction arbitration and dispute resolution. He can be reached at jhinchey@jamsadr.com.

(Endnotes)

1 *See Fulbright & Jaworski Survey*http://www.litigationtrends@fulbright.com*; and White & Case/ Queen Mary School of International Arbitration, University of London Report.* http://www.arbitrationonline.org/research/2010/index.html.

2 *The College of Commercial Arbitrators (CCA) was established as a U.S. non-profit corporation in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop "best practices" guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately two hundred leading commercial arbitrators in the United States and abroad. For a current listing of the College members, see, CCA Website:* http://thecca.net/bio.aspx?id=browse

3 *The Protocols were chiefly drafted and edited by Thomas J. Stipanowich, CCA Fellow, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute of Dispute Resolution; The Hon. Curtis E. von Kann, CCA Fellow and former District of Columbia Superior Court Judge, and Deborah Rothman, CCA Fellow and full-time arbitrator and mediator. The complete Protocols may be found and downloaded from the College of Commercial Arbitrators website:* http://www.thecca.net/CCA_Protocols.pdf.

AGENDA

Presiding: ***Raymond G. Chadwick, Jr.,*** Program Chair, Chadwick Mediation Services, LLC, Augusta

8:15 **REGISTRATION AND CONTINENTAL** (All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:55 **WELCOME AND PROGRAM OVERVIEW**
Raymond G. Chadwick, Jr.

9:00 **THE ROLE OF THE GEORGIA COMMISSION ON DISPUTE RESOLUTION AND ETHICAL ISSUES FOR ATTORNEYS AND MEDIATORS**
Hon. Charles E. Auslander, III, Judge, Magistrate Court of Athens-Clarke County, Athens; Member, Georgia Commission on Dispute Resolution, Atlanta

9:45 **FREQUENT ROADBLOCKS TO RESOLUTION**
N. Staten Bitting, Fulcher Hagler LLP, Augusta

10:30 **BREAK**

10:45 **WHAT PLAINTIFFS AND DEFENSE LAWYERS LIKE AND DON'T LIKE ABOUT MEDIATION AND MEDIATORS**
Thomas R. Burnside, III, Burnside Wall LLP, Augusta
Randolph Frails, Randolph Frails, P.C., Augusta
Richard R. Mehrhof, Jr., Allgood & Mehrhof, P.C., Augusta
F. Michael Taylor, Hull Barrett, P.C., Augusta

11:30 **MEDIATING WORKERS' COMPENSATION CASES**
Laurence L. Christensen, Attorney at Law, Marietta

12:15 **LUNCH** (Included in registration fee)

1:00 **WHY BUSINESS CLIENTS LIKE ADR – AN IN-HOUSE COUNSEL'S VIEW**
Phillip M. Armstrong, Georgia-Pacific Corporation, Atlanta

1:45 **CLIENT-BASED DEVELOPMENTS AND TRENDS IN ARBITRATION AND MEDIATION PRACTICE**
R. Wayne Thorpe, JAMS, Atlanta

2:30 **BREAK**

2:45 **MISTAKES PLAINTIFF'S LAWYERS MAKE AT MEDIATION**
Susan W. Cox, Edenfield, Cox, Bruce & Classens, P.C., Statesboro

3:30 **WHAT MEDIATORS DO AND WHY THEY DO IT**
Percy J. Blount, Glover & Blount, Augusta

4:15 A**DJOURN**

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