

ADR*Report*

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Message from the Chair

It would be easy to rehash the successes we've had this year. In fact, I will, but at the end of this message. More importantly, I thought it would be a good time for some reflection, and some thank yous.

The work of a "Section Chair" begins years before you formally take the post, although I didn't know it at the time. Let me explain. Five years ago I expressed interest in being on the section council of the new ADR Section. The ADR Committee had been in existence for a number of years, but in 2000 it was converting to a full fledged MSBA Section. As one of four neophytes, I was given a one year term, with the possibility of seeking a full three year term thereafter. During that first year on the council, I had the good fortune to watch and learn from people who had been leaders in Maryland's ADR world for a number of years. To them, I owe a debt of gratitude. Maybe we all do.

Roger Wolf, Melanie Vaughn, Robert Park, and Trish Miller all preceded me as Section Chair, and all taught me something about how to continue the work of the Section. More importantly, they provided strong leadership and a great foundation from which to build this Section, now almost 400 strong.

They were joined in the early years by people like Charles Winner, Mary Louise Pries, Judges Joseph HH Kaplan and Steven Platt, Rachel Wohl, Louise Phipps Senft, and Mike McWilliams. All gave of

their time, experience, and wisdom to contribute to the growth and development of our Section.

And more recently, we have been fortunate to add people like Joyce Mitchell, Venetia Bell, Mark Scurti, Marc Baer, Judge Mimi Cooper, and many other practitioners who continue to bring new energy and ideas to our table. By design, the previous leaders of the Section Council wanted this new energy to transition onto the council and into roles of leadership. To that end, we have been very successful.

And to all of you, including those that space did not permit a full listing, I say thank you, again.

In addition to the many people who give of their time and energy to volunteer their service on the Council, we are very fortunate in Maryland to have a treasure trove of talented people at MSBA headquarters. From Paul Carlin down, the folks at MSBA do everything in their power to make sure membership has every resource possible at their disposal. In particular, I have had the great fortune over the past few years to work with Wanda Claiborne, Theresa Michael, Janet Eveleth, Pat Yevics, John Anderson, Tom Briehan, and Patrick Tandy. All were always willing to help, always there to help, always helping. Amazing. Thank you.

(continued on page 10)

The MSBA's Leadership Academy

Interested in becoming a leader in the Maryland State Bar Association?

Interested in becoming a leader in your Local or Specialty Bar Associations?

The MSBA's Leadership Academy is a 12 month venture into developing leadership enhancing experiences and learn more about the internal workings of the MSBA. Each term Fellows are selected from a pool of applicants. This term has 15 Fellows participating in the program.

During their term, each Fellow will spend time attending MSBA events, developing and implementing a public service project, as well as attending a special program on public speaking, media relations, interviewing skills, conducting effective meetings, budgeting, and many other related areas. Fellows establish a relationship with past Bar Presidents and current bar leaders to learn more about the MSBA and to enhance leadership skills.

Team building is a significant part of the Academy, wherein the Fellows develop relationships that will last long after the Academy. The things the Fellows learn will benefit the MSBA, the local or specialty bar associations and the public as a whole.

Each Fellow is assigned to a Mentor who has had prior experience with the Academy. The Mentor provides "one on one" direction and insight for the Fellow. The Mentors meet with their Fellow at least monthly during the term. Having a Mentor gives each Fellow a chance to ask questions in a relaxed setting and offers the Fellow a positive role model.

Most costs for the Fellows to participate in the Leadership Academy and the related events are paid by the MSBA. Membership in the MSBA is not a prerequisite to be a Fellow but it is encouraged.

All Fellows will be expected to participate actively with at least one MSBA committee during the course of their participation as well as upon graduation.

The Leadership Academy does not create the leader but certainly bolsters the skills necessary to be one.

For more information and an application, go the MSBA Website at http://www.msba.org/sec_comm/committees/leadership/index.htm

Medical Malpractice Law has ADR Implications

By Jonathan S. Rosenthal

During a special session of the Maryland General Assembly in December, 2004, the legislature crafted and passed the new Maryland Patients' Access to Quality Health Care Act of 2004 ("the Act"). The Act, which survived a gubernatorial veto, creates new opportunities for alternative dispute resolution (ADR) usage in claims against a health care providers for medical injury.

The applicable portions of the Act, found in Courts and Judicial Proceedings, 3-2A-06C, track with the current rules of civil procedure regarding ADR, found in Title 17 of the Maryland Rules of Civil Procedure. For example, 3-2A-06C (A) accepts the definitions of mediation, neutral case evaluation, neutral fact-finding, and settlement conference found in 17-102.

Under the new statute, cases involving medical malpractice shall engage in ADR at the earliest possible date. The parties may not have to engage in ADR if they all agree not to use it AND the court finds that ADR would not be productive in that case. It is not clear what threshold the court will use to determine if ADR would not be productive in a particular case. The Act also leaves open to the parties which ADR process they want to use. It is unclear what process will be used if the parties fail to specify which one they want to use. If the court is going to assign the neutral, there will have to be a way for the court to match a provider with the process selected for that case.

Because each of the processes is different, attorneys will have to be clear on the differences and benefits of each ADR process so they can decide which process suits their case, and advise their client(s) accordingly. It seems clear that some cases will be more appropriate for mediation, while others may benefit more from the techniques permitted during a skillfully facilitated settlement conference.

From the ADR practitioner standpoint, it makes sense to be very clear at the beginning of the process to explain to the participants (attorneys and litigants) which process they are using and exactly what that means within the definitions in Title 17 of the Rules. ADR practitioners may also want to review the Standards of Conduct for ADR Practitioners to make sure they will be in compliance.

Similar to current court rules, the parties may use the ADR provider selected by the court, (subject to objection by a party), or they may choose their own by agreement. The Act also authorizes the Court of Appeals to adopt rules that will meet the requirements of the Act. For example, the Court of Appeals will likely have to add a section to Title 17 detailing additional requirements for neutrals chosen to participate in these kinds of cases, at least from the court roster perspective. A committee of circuit court judges is already at work trying to make sure the Rules meet the needs and requirements of the Act.

The Act tracks with the current rules in keeping mediation communications confidential, but it seems to extend the confidentiality provision to settlement conferences, neutral case evaluation, and neutral fact finding as well. It also requires defendants AND claims representatives to attend all ADR sessions, unless excused by the neutral, and courts will have to determine how such policies will work. If someone fails to appear at the ADR Session without proper permission, the ACT permits sanctions as provided for in Rule 2-433.

This is only a brief summary of the ADR components of the Act. The ADR Section of the MSBA will continue to keep its membership up to date on how the Act is applied, and any modification to the court's rules and ADR provider application forms as they become available.

Our Section's Annual Spring Dinner was held at the Furnace Inn in Elkridge Maryland on April 21, 2005. As all of those who attended know, the event was a rousing success, despite (or maybe because of) the variety of obstacles overcome. As Section Chair, Jonathan Rosenthal, wrote in his post-dinner thank you to planners and participants: "getting moved into a different room.... no problem! Squeezing in a few more seats..... forget about it! Rearranging tables while the guests are arriving.... Just part of the job!"

The pre dinner reception was a chance for networking and reaffirming our ties in the ever growing pool of our section. The dinner was delicious and worthy of the Inn's fine reputation. The program was, arguably, the best part of the evening though, and by all accounts too short.

The program, Sex Money and Marriage - Ending It Through Mediation, was thought-provoking, and animated. Designed to attract practitioners who may not traditionally embrace ADR techniques, the program gave all a chance to hear from domestic attorneys J. Michael Lawlor, Susan Land and Stacy Siegal, as well as from Baltimore City Circuit Court Judge Audrey Carrion and psychologist Dr. Alice Glossman. In considering that Family Law filings account for approximately sixty percent of the of all civil filings, the panel discussed the need for both paid and volunteer efforts to channel more of these case into ADR and settlement opportunities and for more respect to be accorded both the process and its' practitioners.



New Maryland Rules of Professional Conduct Take Effect July 1, 2005

By Meg Attanasio, Esquire

The debate in Maryland about whether attorneys have an ethical obligation to discuss alternative dispute resolution (ADR) options with their clients has quietly continued in Maryland. Revised Rules of Professional Conduct (“the Rules”) will take effect July 1, 2005, and there are some changes that may affect the way attorneys discuss ADR options with their clients.

The Rules are recognizing the impact on the legal profession of increased use of ADR options and the roles lawyers play in serving as arbitrators and mediators in addition to their traditional representational functions. For example, the Preamble now includes language that eliminates the phrase “intermediary between clients,” and specifically lists the “third-party neutral, . . . non-representational role helping the parties to resolve a dispute. . . .”

While some states have taken the step of declaring a requirement that attorneys discuss ADR options with their clients, there is no rule in Maryland that definitively creates this obligation, but there is, I believe, stronger language creating this implied duty. For example, Rule 1.2(a) provides “[a] lawyer shall abide by a client’s decisions concerning the objectives of the representation, and, when appropriate, shall consult with the client as to the means by which they are to be pursued. . . .” The comment to this Rule states that “a lawyer is not required to . . . employ means simply because a client may wish the lawyer to do so.” Whatever the decisions made, one thing that seems to be clear is that attorneys should communicate with their clients about these means, even if not chosen to be pursued.

Following the theme of communication, Rule 1.4(b) states “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” This Rule has not been changed significantly, and it follows that part of the discussions between attorney and client

may be about the means by which to pursue the objectives of the representation. Does this include a discussion about ADR options?

Rule 1.12 has been modified to add mediators to the list of third-party neutrals that must disclose conflicts and take precautions when representing parties after having served for them in a neutral capacity. This is important in its recognition that attorneys are increasingly assuming the role of mediator in their practices.

Rule 2.1 directs “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Although the Rule itself has not changed, the Comments have added “...when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” This may be the clearest indication that lawyers do have a responsibility to discuss ADR options with their clients in some cases.

Rule 2.2, lawyer as intermediary, has been deleted in its entirety.

And finally, Rule 3.2, which has not changed, still requires an attorney to resolve the dispute in the client’s interests as expeditiously as possible.

Taken as a whole, the Rules of Professional conduct have embraced the role ADR plays in the legal world and the roles attorneys have taken as mediators. As attorneys continue to learn about and distinguish the benefits of the various forms of ADR, they will better be able to discuss them and advise their clients accordingly.

Nominating Committee Recommends New Council Members

The Nominating Committee of the ADR Section has released its slate of nominees for election to the Section Council. The Nominating Committee consisted of Roger Wolf, Erica Calhoun, Venetia Bell, Section Secretary Marc Baer, and Section Vice-Chair Joyce A. Mitchell, who served as the Committee's Chair.

The Committee's recommendations for Officers and Council members for 2005-2006 are:

1. Officers: Under the ADR Section By-Laws, as Chair and Vice-Chair this year, respectively, Jonathan S. Rosenthal will become the Immediate Past Chair and Joyce A. Mitchell will become the Chair for the coming year. In addition, the Committee is nominating Marc Baer (our current Secretary) for Vice-Chair and Mimi Cooper (a current Section Council member) for Secretary for the coming year.

2. Council Members: For the coming year, there are 4 seats on the Council to be filled by election, a fifth seat because of a shift to Council Leadership by a current Council member, and a sixth seat due to a resignation. The four vacant seats are becoming vacant due to the regular staggered rotation for three year terms. Those seats are being

vacated by Venetia Bell, Danny O'Connor, Mark Scurti, and Elizabeth Yarema. The vacancy from the resignation is creating a two year term opening, and the other vacancy that may be created if Judge Mimi Cooper is elected Secretary will create a one year term.

Consistent with a commitment to involve a variety of members of the Section on the Section Council, the Committee is nominating Craig Distelhorst, Richard Alper, Steven Shapiro, and Craig Little for the 4 seats, which will be for three year terms each under our By-Laws (2005-2006 to 2007-2008). Additionally, the Committee is nominating Paul Dorf to complete the remaining two years of for the Council member who resigned. Paul Dorf's term will be from 2005-2006 to 2006-2007.

The additional vacancy created if Judge Mimi Cooper is elected to be Secretary will be filled by Robert McFarland, which will be a one year term. Robert McFarland will be eligible for nomination to a complete three year term after next year.

Respectfully submitted,
Joyce A. Mitchell, Esquire,
Chair, Nominating Committee

The ADR Section will hold its business meeting on Thursday, June 16, 2004 at 8:00 a.m. at the MSBA's annual meeting in Ocean City. The election will take place prior to our Section's presentation mediation and the National Association of Securities Dealers.

Just One Man's Thoughts...

By Ward Morrow, Esquire

(Editor's note: This past winter, Mr. Morrow posted his musings on the ABAnet listserv: what follows is an updated excerpt of his post)

I would like to put out a general comment on mediator and arbitrator training and make a modest proposal for universally recognized certification program. The current barriers in this field are a detriment to this practice maturing properly.

Without going into excruciating detail of my trial and tribulations, I will just say that for close to twenty years, I have attempted multiple times and in multiple ways to carve out either a part-time or full-time career in mediation and/or arbitration.

It seems that everyone now offers a certification program. They tend to be expensive, although often held in exciting venues. None have a guarantee of employment. Many do not even meet the basic qualifications to be listed on any panels, which might provide work. When pushed these "course" marketers will shower you with volunteer opportunities. Office supplies, support staff, and my mortgage payment, let alone student loans, have never been paid with only low bono opportunities. Yes, my term, low bono, but feel free to use it.

So we now have a cottage industry in certification, lots of volunteer opportunities, and many great folks who are willing to lecture about how we can use it/them in our practice. What we really need is to focus on agreement by AAA, FMCS, ABA, law schools, and the multitude of academies of mediation and arbitration on one program with follow

up classes teaching the specifics of the various subject areas.

Clearly the med/arb practitioner will set their own rates and the parties will select or request those they prefer ultimately, but the manner in which one gets into this field is confusing and costly. Many potentially good practitioners (myself included-assuming humbly that I might be a good one) find other paths instead. For my part, after 10 years living in the courtroom, I have now practiced labor law for 5 years. I have met some fine arbitrators in my practice, but many are elderly and can afford the up and down of the practice, as they are semiretired.

In addition to taking lots of costly certification classes, in order to add another certificate to the wall (and where members of the bar can "role play" at hotel, near a beach or casino) it might benefit us to examine the process of expanding paid opportunities to those who might be interested in paying the bills as a dispute resolution practitioner.

Of course if you would like to pay my way to a beach resort, I will be happy to offer my services, in a low bono capacity, as a facilitator of role plays. I will even give you a certificate!

PS...Two months after posting this, Ward Morrow was sent, by his employer as part of his legal duties serving as Assistant General Counsel for the American Federation of Government Employees, to Venice Beach, California where he taught a one day Introduction to Arbitration class to 30 labor union officials. Of course he also worked on his tan.

Two, Two, Two Programs for the Price of None!

By Jonathan S. Rosenthal, Esquire

In our continued efforts to assist our Section members increase their skills and expand their horizons, the ADR Section has planned two, (that's right, not one, but TWO), new and exciting programs for the MSBA's Annual Meeting in Ocean City. The Conference, which this year will be June 15-18, 2005, will once again be in Ocean City at the Clarion Hotel and Conference Center. The ADR Section will present two very different educational programs with a common theme. MONEY! (OK, money isn't the focus, but it is a common thread.) Both programs will be on Thursday, June 16, 2005.

The first program, called "Mediating for the NASD "If You Can't Beat 'Em, Join 'Em," will feature a presentation about the mediation program and other ADR opportunities utilized by the National Association of Securities Dealers (NASD). By attending this session, you will learn about those opportunities and how you can get involved. Session attendees will be taking the first step toward learning about the way the NASD uses ADR, and how you can mediate in their program. The program will begin at approximately 8:30 a.m., immediately following the ADR Section business meeting.

The second program reaches out to our members who are arbitrators or who want to be arbitrators, and it is an extended training program.

Titled "Arbitrating for the New York Stock Exchange "Like an Afternoon at the Beach," this program will be a three hour program that will train attendees to arbitrate cases for the New York Stock Exchange. Attendees MUST pre-register for this session as seating is limited. Attendees must also commit to attending the entire three hour session in order to receive their complete arbitration training. The registration form is available on the ADR Section website at www.msba.org/sec_comm/sections/adr. (note the "underscore between "sec" and "comm" in the web address). Once completed, the form should be faxed to Jonathan Rosenthal at 410-841-2261. This program is also limited (at least initially) to ADR Section members. If room permits, we will accommodate others.

Bonus, Bonus, Bonus!!!! Rumor has it that attendees at one of these sessions may receive a free memento just for attending. No promises just yet!

For more information about either program, please contact Alan Carmel at 410-486-1400, or Jonathan S. Rosenthal at 410-841-2260.

The Section would like to specially thank Section Council member Alan Carmel, Esquire, for his ideas and efforts toward planning both of these programs.

Is There a Case for Online Dispute Resolution?

By Nick Sloan

“Technology happens.” - Andrew Grove

“ODR is happening.” - Nick Sloan

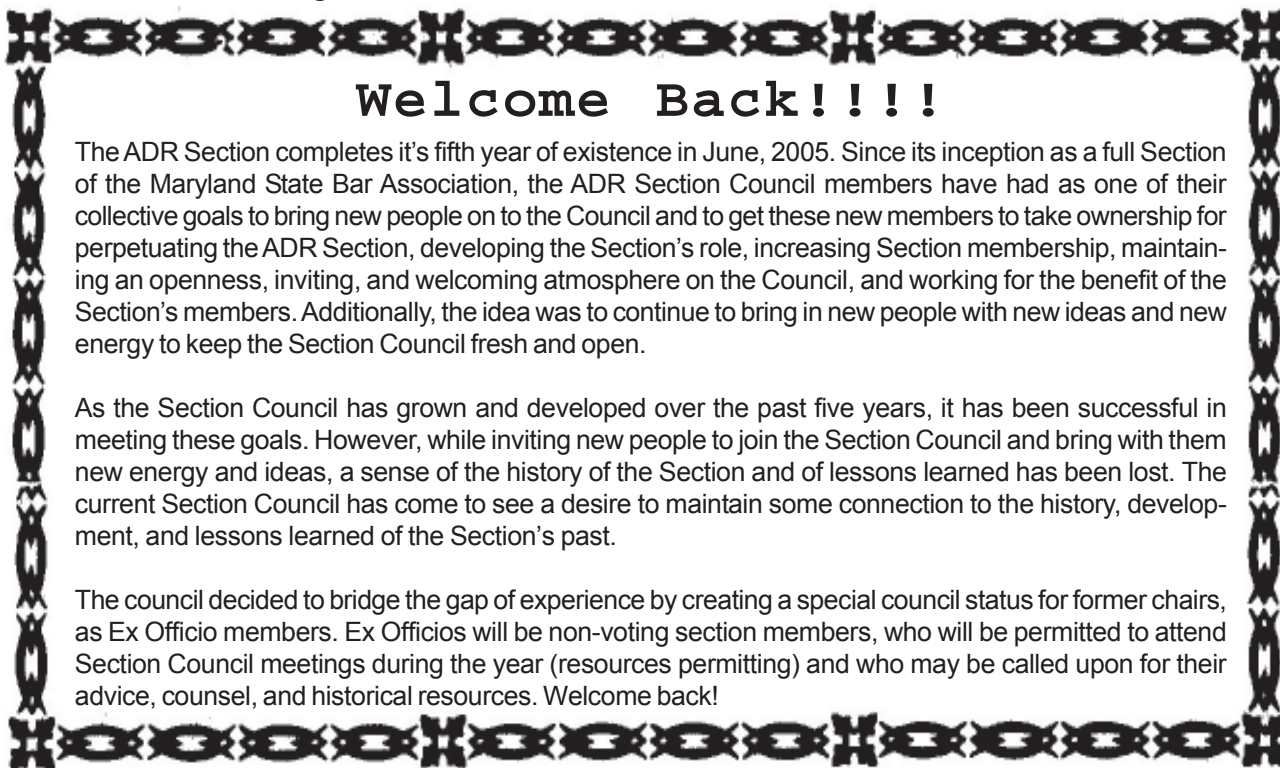
Many people consider ODR (Online Dispute Resolution) to be Online ADR for disputes that arise online. A growing number though, believe that ODR is more than just solving problems that arise online and feel that any disputes that are resolved online, regardless of where the dispute arose, are also examples of ODR. Some go so far as to characterize any ADR that employs communications technology (including Interactive TV (ITV), a telephone conference call, FAX, and even using a computer such as PC teleconferencing) as yet more example of ODR.

However it is defined, ODR seems inevitable to some. The growth of the Internet and the use of intranets and extranets are all technologies that support ADR. Other technologies such as Microsoft’s

“Live Meeting” and technologies such as teleconferencing are already being used to support e-commerce. Video Depositions are fairly commonplace. Similarly, the prediction is that ODR will soon be an everyday way of practicing ADR. Two organizations that already use ODR extensively to resolve conflicts, which are rooted in online transactions, are: The Internet Corporation For Assigned Names and Numbers (ICANN) and SquareTrade, which handles the disputes that arise from eBay transaction.

The Internet Corporation for Assigned Names and Numbers (ICANN) is an internationally organized, nonprofit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions.

(continued on page 11)



Welcome Back!!!

The ADR Section completes its fifth year of existence in June, 2005. Since its inception as a full Section of the Maryland State Bar Association, the ADR Section Council members have had as one of their collective goals to bring new people on to the Council and to get these new members to take ownership for perpetuating the ADR Section, developing the Section’s role, increasing Section membership, maintaining an openness, inviting, and welcoming atmosphere on the Council, and working for the benefit of the Section’s members. Additionally, the idea was to continue to bring in new people with new ideas and new energy to keep the Section Council fresh and open.

As the Section Council has grown and developed over the past five years, it has been successful in meeting these goals. However, while inviting new people to join the Section Council and bring with them new energy and ideas, a sense of the history of the Section and of lessons learned has been lost. The current Section Council has come to see a desire to maintain some connection to the history, development, and lessons learned of the Section’s past.

The council decided to bridge the gap of experience by creating a special council status for former chairs, as Ex Officio members. Ex Officios will be non-voting section members, who will be permitted to attend Section Council meetings during the year (resources permitting) and who may be called upon for their advice, counsel, and historical resources. Welcome back!

Message from the Chair

(continued from page 1)

Like many volunteer organizations, you get out of it what you put into it. Our young section continues to grow stronger, and with participation from our section membership, will continue to grow, develop, and play a role in the ADR world of Maryland, which extends beyond our “legal” world.

We continue to work on our mentoring initiative started by Trish Miller, and our business initiative, begun by Joyce Mitchell. We have expanded our view to deliberately reach other fields of ADR, including arbitration and collaborative law, and that will continue in the future. As an example, our section is very proud to provide a free arbitration training opportunity this year at the MSBA Annual Meeting in Ocean City, and providing information on a mediation program as well. (NYSE and NASD respectively.) Our goal of giving section membership the opportunity to grow professionally also included our cosponsorship of the 2nd Maryland Mediators Convention, MICPEL’s Mediators Networking Night, our annual Spring dinner program (this year highlighting family mediation), and the expansion of our web page and listserv. Our Section has been given the opportunity to help create an edition of The Maryland Bar Journal focused on ADR, which will be published this September. We have also given input on the debate over the new med/mal statute and its ADR component and for the sec-

ond year, we lent our support to the Uniform Arbitration Act.

We have also initiated a deliberate strategy of teaming up with other MSBA Sections to connect content with ADR. For example, we made presentations highlighting ADR within areas such as commercial real estate, trusts and estates, and the previously mentioned family law. It is my sincere hope that we can continue to reach out to and partner with the other members of MSBA Sections to help them understand and utilize the benefits and power of appropriate dispute resolution.

Finally, within this edition of the newsletter, and over our section’s listserv, we are again reaching out to our membership to find out why they joined the section, and what they hope to get out of that membership. Please, take the three minutes or so to complete the two questions and send it back to us.

I could be creative and tell you everything went just as I anticipated. There were bumps. If I could do it again, I’d like to do some things differently. What I wouldn’t trade, however, was the opportunity to serve on the Council, to learn from those who served before me and those who served with me, and to know that our work will continue. For all of that, once again, I say Thank You!

Online Dispute Resolution

(continued from page 9)

As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes.

Squaretrade.com, (supporting eBay), is approaching a million cases per annum. SquareTrade is a commercial operation, which evolved from the seminal work done at UMass on ODR. In an article by Ethan Katsh of UMass the Katsh says, "The need for dispute resolution at a place like eBay is relatively easy to understand. eBay has huge numbers of items offered for sale (currently over six million), huge numbers of transactions (currently over two million per week), and eBay assumes little or no responsibility for the transaction. eBay is not really a party to the transaction and the actual sellers, many of whom are small businesses or individuals, are often without customer service departments. eBay does not wish to participate in the transaction but it does wish users to feel comfortable making bids and purchases. The array of "safe harbor" resources along with the use of credit card chargebacks has made eBay into an online marketplace where buyers are able to find almost anything they are interested in purchasing, and are also willing to make bids and purchases without a high degree of risk."

Those who support ODR point to distinct advantages. Negotiations can be asynchronous, permitting the participants time to contemplate an offer and to research a topic before counter offering. A record of the proceedings is created electronically as the negotiations proceed. The emotions of the parties can be masked by the physical separation. The cost can be significantly less than the cost of travel and lodging.

Those more skeptical of ODR point out that there are flip sides to these so called advantages: The very

fact that communications may be asynchronous, can lead to a chicken and egg problem. E.g., one party will not pay until the other party signs a document and the other party will not sign the document until the first party pays. A phenomenon known as online rage is emerging. Similar to having road rage, those with online rage may act in ways they never would consider acting in a face to face meeting. Though emotionless, emails and intentions can be easily misunderstood. Finally, the cost to set ODR up should be factored well in advance. Though ODR may be cheaper than a face to face meeting, the equipment and technology needed may still be costly.

Despite the potential drawbacks, more and more practitioners believe that ODR is the future of ADR. There are a growing number of ODR sites that are open to the ADR practitioner. Generally, these sites are fee for service sites. In essence, they are webservices employing the latest in computer science to varying degrees. Here in Maryland, Prince Georges County Retired Judge Monty Ahalt, who is an enthusiastic advocate of using technology in the law, established the VirtualCourthouse website.

As technology grows, so too do the possibilities of and need for ODR. Voice and video communications, ITV, videophones and teleconferencing, electronic Data communications, Net meetings, email, Live Meetings, Chat rooms, PDA's, Cell Phones, email and Tablet PCs are all part of the ever expanding technology, which provides both avenues and opportunities for the ADR practitioner to utilize ODR.

The question is whether the legal profession, which has readily accepted ADR, needs to move rapidly to employ ODR. Remember it is only a little over twenty years since the IBM introduced their PC and it is only a little over ten years since Netscape started the broad use of the internet. Technology not only happens; it happens quickly and leaves many behind.

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