

ADR IN LABOR & EMPLOYMENT LAW COMMITTEE NEWSLETTER

Summer 2000

AMERICAN BAR ASSOCIATION

SECTION OF LABOR AND EMPLOYMENT LAW

ANNUAL MEETING UPDATE

Our committee's session at the annual meeting in New York this past July 10 featured JAMS Deputy Counsel, Vivien Shelanski and the Chair of the ADR Committee of the Association of the Bar of the City of New York, Roger Deitz, in a program entitled, "How Mediators Settle Difficult Cases: Breaking Impasse." These two respected mediators led a discussion on three hypothetical mediations, which resulted in a free-wheeling exchange of ideas on mediation techniques and

tactics between the speakers and attending committee members. Much of the discussion centered on how mediators can persuade parties to accept practical resolution of their dispute, and how advocates can most effectively utilize the process. Joe Garrison, Plaintiff Co-Chair of the Committee, moderated and organized this program.

Submitted by Larry Casazza

INTERVIEW WITH GEORGE NICOLAU: THE "COUNTRY BOY" FROM JACKSON, MICHIGAN WHO BECAME AN INTERNATIONALLY KNOWN ARBITRATOR

When I became the neutral editor of the Newsletter, I was asked to complete an interview of an arbitrator who I believe has made a significant contribution to the arbitration field. I must say that my immediate response was "George Nicolau". In my experience as both an advocate (14 years) as well as a neutral (2 plus years - I'm still "crawling"), a name that has kept surfacing over and over again as being on the cutting edge of arbitration is George Nicolau.

I would be remiss if I did not mention my first face to face encounter with George. When I first began going to the midwinter meeting of the ABA Labor and Employment Committee,

Subcommittee on ADR in Labor and Employment Law (formerly Arbitration and the Law of Collective Bargaining) in the early 1990's, one of the first people that I wanted to meet was George Nicolau. I had read his decisions and had read about him in the newspapers, primarily in the context of Major League Baseball arbitrations. However, in my youth, I was so intimidated by my perception of his stature, it took me a few years to have the guts to go up and introduce myself. Of course, at that point, I realized that my intimidation was completely misplaced. George is a wonderful, down to earth person who has a broad, full view of life.

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George was raised in Jackson, Michigan. As a youth, George enjoyed playing pool (I wonder if this ultimately influenced his decision to become an arbitrator). He went to Jackson High School and after graduating from high school, George volunteered for service during the 2nd World War and served as a navigator and a 2nd Lieutenant in the 8th Air Force between 1944 and 1945. During the war, he lost a leg as a result of an air combat injury in Germany.

After returning from the war, George went to the University of Michigan where he earned a bachelor's degree in political science (As a graduate of the University of Illinois which is annually trounced by Michigan in football, I will forgive him for that). From Michigan, George went to Law School at Columbia University and graduated in 1951.

When George first graduated from law school, he became a labor relations attorney on the union side and worked with two firms in New York City. However, the "humdrum" life of a practicing attorney was not satisfying to George. He went on to more lofty pursuits and served as the Deputy Director for Special Projects for the Peace Corps. George saw this as an "exciting opportunity to make a difference". After the Peace Corps, George continued working in the government theatre. He worked as a high-ranking official of the U.S. Office of Economic Opportunity. He then went on to be Commissioner of New York City's Community Development Agency.

George became intimately involved in the field of ADR when he was the Vice President and Executive Director of the Institute for Mediation and Conflict Resolution. George served in this capacity between 1970 and 1980. While working there, George began to arbitrate "on the side". I know that it is hard to think of George as being an arbitrator "on the side", but that's how he started out. Toward the end of his time at the institute, George decided that being a full time neutral on his own was the way to go.

George decided in 1979 that he would become a full time arbitrator. George warmly remembers that in his first year as an arbitrator, he received a total of 5 cases!! (Keep that in mind, you younger arbitrators!) and he was wondering whether this was the right way to go. However, 20 years later, reading George's C.V. is like looking at the arbitration hall of fame. There are so many panels that George is on that it they are too numerous to mention. I shall attempt to highlight some of George's work. George has worked with all of the major sports including Major League Baseball, the National Basketball association, the National Hockey League and the Major Indoor Soccer League. He has also arbitrated for major media outlets such as ABC, NBC and CBS and has arbitrated for such diverse groups ranging from the Screen Actors Guild to the International Longshoreman's Association. Finally, he has arbitrated with numerous transportation disputes including rail, sea and air. He now acts as the permanent mediator for American Airlines and Allied Pilots Association.

In 1999, he mediated an end to the Reno Air dispute, which had precipitated a system wide sick-out in February of that year. After being named mediator under the parties' newly crafted Dispute Resolution Protocol, he then mediated a contract extension agreement this year, which if approved by the membership, will return the larger regional jet aircraft to the mainline.

George is perhaps best known for his work as the Chairperson for the Arbitration Panel for Major League Baseball. George spent 9 years as the chairman of this group. Considering some of the labor problems that this industry has encountered, it is amazing that anyone could last 9 years in such a divisive atmosphere. Frankly, the author is a big baseball fan and anyone who could have had labor and management agree on anything for 9 years should have been named commissioner!

During his tenure, George wrote a number of famous (and somewhat controversial) decisions. Two of the more notable ones were the collusion cases, which ultimately ended in a \$280 million mediated settlement, and the reinstatement of New York Yankee Pitcher Steve Howe, in which he refused to approve a lifetime ban of the player that had been imposed by the commissioner.

Even before he was known as a baseball arbitrator, George began mediating and arbitrating sports cases in the late 70's when he was the arbitrator for the pre-Magic Johnson, pre-Larry Bird and pre-Michael Jordan National Basketball Association. While George indicated to me that the issues have not changed a great deal since that time, the amounts involved have increased astronomically. George also indicated that both the contracts, and the players, have a great deal more sophistication than they had in the late 70's. Issues which were unheard of 20 years ago, such as disability insurance and "escalator clauses" (where players salaries are automatically raised based on other player's increasing contracts" are now common.

As George begins the new century and his third decade as an arbitrator, I asked him about some of the trends that he has seen over the years. He agrees that parties to arbitration have grown more litigious, somewhat akin to society in general. Whereas cases used to be tried by non-lawyer representatives and were decided with a simple presentation and argument, cases today are tried by lawyers who demand transcripts and lengthy post-hearing briefs. George is concerned that the "formalization" of arbitration has turned it into another form of litigation,

rather than an inexpensive and speedy alternative, which was its original intent.

Even though he is perhaps best known as an arbitrator, George indicated that he also truly enjoys mediations. He feels that he is most effective when he can work with the parties and help them to reach agreement. He feels that he can accomplish a great deal in this context.

On a personal side (yes, believe it or not, George does have time for a personal side!), George and his wife, Sibohan, recently purchased a 250-year-old Georgian Home in Ireland, which includes horse stables and pastures, and which will soon include a billiard and pool table! But while some folks would be talking about retiring at George's age, George gets busier and busier. When asked in March when his next available date was, George replied that it probably would be sometime in December, 10 months in the future. When asked about the "R" word, George indicates that he doesn't have the time, though Sibohan has already purchased a book for that possibility: "Herb Gardening for Dummies". George adds that there is another reason not to retire: "There are too many cases out there to mediate and arbitrate". While some see him as a national celebrity, George would simply like to be seen as a "fair man whose decisions make

For those of us just entering the profession, George is a great example of the combination of intellectual curiosity and "street smarts" that make for a great arbitrator and mediator. Based on his success and considering that after his first year, he had only 5 cases, we can all aspire to George's success.

CALL FOR CONTRIBUTORS FOR THE 6TH EDITION OF *HOW ARBITRATION WORKS*

The Section has commissioned for publication in 2001 a 6th edition of the standard treatise "How Arbitration Works," originally authored by Frank and Edna Elkouri.

We are looking for a few additional volunteers to update and revise several of the topics contained in the 19 chapters. If you are interested in contributing to this premier labor law work, please contact Alan Miles Ruben at Cleveland-Marshall College of Law, Cleveland, Ohio 44108 - Phone: 216/687-2310; Fax: 216/687-6881.

2000 MIDWINTER MEETING IN PUERTO VALLARTA, MEXICO!

On February 13 through 16, 2000, 97 members and their guests attended the Midwinter Meeting at the Marriott CasaMagna Resort in Puerto Vallarta, Mexico. Not only were the presentations by the Committee's acclaimed members and guests thoroughly enjoyable, but the conference activities were a lot of fun, also. Thank you to the meeting chairs – Larry Cassazza, Patti Bittel, Lynn Hicks and Joseph Garrison – for putting together a current and informative program. The presentations demonstrated this Committee's leadership role in ADR's development and its sensitivity to the issues of today.

After Eugene Ginsberg's always entertaining Committee history report, the next presentation aptly addressed NAFTA – "Mexico: The Impact of NAFTA on Labor Relations." The panel consisted of Roy Henan, a management attorney from Canada, Carlos DeBuen, an attorney representing Mexican unions and employers, and Lewis Karesh from the Department of Labor to discuss NAFTA. Not surprisingly, the impact of NAFTA on labor relations generated a lively discussion in our group of both management and union attorneys. Basically, it appears NAFTA has been good for Mexico and there is a dispute as to its effect on the U.S. and Canada.

Mark Irvings, Kevin Conlon, Kevin McCarthy, and Randy Freking presented a panel on "Ethics in ADR." This panel highlighted how ethics considerations in ADR depend on the ever-increasing variations on the process. For example, ADR processes range from proceedings with one or more unrepresented parties to an arbitration with strict evidentiary standards. Although it goes without saying we must always be ethical, how that is properly done may depend on the setting.

The ethics topic served as a nice segue to the presentation from Jim Adler, Ted St. Antoine, Rick Seymour, and John Sands on "The *Pro Se* Claimant and Handbook Arbitration: Call for a New Protocol?" This topic highlights this Committee's leadership and dedication to maintaining a fair process for everyone.

Wayne Outten moderated a presentation by guest speakers Sarah and Stewart Rankin on the potential biases in ADR generated by conscious and unconscious race discrimination. Despite this sensitive topic, the Rankins skillfully facilitated a lot of interaction and good discussion.

Tim Bittel, Lynne Hicks, Randy Freking, John Kagel and moderator Susan Grody-Ruben presented "This May Be Arbitration but I Object!" Since the use of arbitration is beginning to substitute some more formal types of litigation, some arbitrations are beginning to look like trial litigation. For the traditional labor lawyer, this may mean a refresher course on evidence. Ugh!

Dan Campbell spoke about "ERISA Arbitration," which highlighted the fact that ADR is helpful in benefits cases, too. Matthew Fagnani discussed the new technologies in drug testing and issues related to their validity. This technology keeps changing and Fagnani helped us keep up!

Representatives from JAMS, a private adjudication center, AAA, FMCS, and CPR provided an insightful presentation on the features of each ADR service provider. This presentation was moderated by Deborah Neveu and provided advocates and neutrals alike with important information about these services.

Jon Rosen, Margery Gootnick, and John Billick dealt with the age-old issue of employee absences in "Absence in the Millennium: Policies for the New Age." This age-old problem is now further complicated by the ADA, FMLA, and Workers' Compensation Act. Be careful out there!

Ed Pereles explored issues related to the rights and responsibilities of legal and illegal aliens in the workforce and provided some clarity to an unclear area. Finally, during the business portion of the meeting, a resolution was passed regarding future sites of our meeting which reads, "The

Committee shall participate in only those locations as to which there is unanimity among each of its co-chairs at the time of the decision (labor, management, neutral, plaintiff)."

In addition to these timely and informative presentations, Sheri Mead organized a wonderful cocktail party and dinner with a traditional presentation of Mexican dances. Thanks to ABA's Sheri Mead, all of the members and guests had a wonderful time.

Hope to see you in Key West in 2001!

CONGRATULATIONS & THANK YOU TO . . .

Congratulations to **Bill Earnest** as the new Management Committee Co-Chair for the ADR and Labor and Employment Law Subcommittee. We look forward to your valuable input in the future.

A big thank you to **Larry Casazza**. Thank you, Larry, for your participation as Management Committee Co-Chair from 1997 through 2000. Your superb coordination of the Midwinter and Annual Meetings and participation in ABA activities on behalf of our Committees are appreciated by our members! Although you will remain a vital part of this Committee, your particular dedication and hard work for the past three years will not be forgotten. Thank you for contributing to keeping our Committee strong and growing!

Thank you to newsletter editor **Susan Grody-Ruben**! Susan Grody-Ruben, an arbitrator and mediator from Cleveland, served as an excellent newsletter editor for this Committee newsletter. She encouraged all contributions and invoked enthusiasm in all those who participated in the process. Her infectious enthusiasm has caught on within the Committee and she has now been chosen to serve as neutral co-chair of the ADR Advocacy Subcommittee. Good luck in your new position, Susan. It is well deserved and you will be missed as the newsletter editor!

PLAN NOW FOR KEY WEST

The 2001 Midwinter Meeting of the Committee will take place on February 18 through 21, 2001 at the Wyndham CasaMarina Resort in Key West, Florida. This meeting should continue our tradition of a thoroughly enjoyable midwinter break, including current and interesting presentations and lots of socializing.

Program, hotel and general registration information will be mailed to you in October. In the meantime, you may plan your air travel to Key West. As in the past, our meeting will kick off with a welcome reception on Sunday, February 18 with meetings on Monday, Tuesday and Wednesday. The meeting will adjourn on Wednesday, February 21 around 1:00 p.m. Flights connect through Miami to Key West or, if you choose to drive, it will take approximately a 3-hours to drive from the Miami Airport.

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**COMMITTEE ADOPTS SCHOLARSHIP PROGRAM
FOR MIDWINTER MEETINGS**

At the midwinter meeting this past February, upon motion of Charles Werner, the Committee voted unanimously to offer scholarships to promote attendance of new members at the midwinter meetings of the ADR Committee. The scholarship program will be in effect for four (4) years, with the maximum cost to the Committee of \$1,000 per year. One or more persons may be selected to share in the \$1,000 annual scholarship. The next midwinter meeting will be February 18-21, 2001 at the Wyndham CasaMarina in Key West, Florida.

The annual scholarship or scholarships will be applied to registration, hotel and travel costs up to \$1,000 for the successful applicant(s). A new

member of the Committee wishing to apply, should forward to Bill Earnest at Elarbee, Thompson & Trapnell at 229 Peachtree Street, NE, Suite 800, Atlanta, Georgia 30303, a letter setting forth: (1) his/her name, address, telephone, fax, and email; (2) a brief description of the applicant's formal education and work experience; and (3) a statement of his/her particular interests in the Committee's work and how he/she would be active in the Committee's work. The Committee's four co-chairs (management, neutral, plaintiff and union) will choose the successful applicant. Application letters must be postmarked on or before October 1, 2000.

EDITORS' NOTE:

Many thanks to neutral Newsletter Subcommittee Co-Chair Steve Bierig for his wonderful article on George Nicolau. His article demonstrates this Committee's strength in its unique and outstanding members!

As always, we welcome contributions to the newsletter including case developments, training opportunities, member news, and publication updates. You may forward any items you would like to be considered for inclusion in future issues of the *Committee Newsletter* to us at the addresses listed in this issue.

Also, please take a moment to complete the subcommittee sign-up form of the reverse side. These subcommittees offer the perfect opportunity to get involved!

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ADR in Labor & Employment Law SUBCOMMITTEE SIGN-UP

I would like to be a member of the following subcommittee(s):

- ADR Advocacy and Development and Training of Neutrals
- Book Publication
- Professional Responsibility
- Publication of Arbitration Awards
- Newsletter

I primarily represent ____ management ____ unions ____ individuals or ____ I am primarily a neutral.

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