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## ADR

# Keys To Effective Mediation Programs

In our August issue, **Stuart Alderoty**, Chief Litigation Counsel, American Express Company; **Marc Gary**, Vice President and Associate General Counsel, BellSouth Corporation; **Joe Murillo**, Associate General Counsel – Litigation, Philip Morris USA; **Laura Schumacher**, Vice President, Secretary, Deputy General Counsel, Abbott Laboratories; **Jim Snyder**, Vice President – Litigation, Home Depot, Inc.; **Taysen Van Itallie**, Associate General Counsel, Johnson & Johnson; and **Bruce Whitney**, Assistant General Counsel, Air Products and Chemicals, Inc. talked with Deputy Editor **Kristi L. Vaiden** and Associate Editor **George Miller** about what makes a good mediator. To read their discussion, visit [www.metrocorpccounsel.com](http://www.metrocorpccounsel.com). Both the August and the following discussion took place in connection with a meeting of the Chief Litigation Counsel Association hosted by **Martha E. Solinger**, Managing Director and Co-Head of Global Litigation, Lehman Brothers Inc.

### Editor: What contributes to the effectiveness of your mediation programs?

**Whitney:** Air Products is very high on mediation. Even if mediation does not immediately settle a matter, the process often narrows the issues – making it an excellent tool to help control litigation expenses. Its flexibility and adaptability help us to preserve long-term and other valued business relationships while untangling any dispute that might arise.

The business focus contributes to mediation's effectiveness. The absence of formalized discovery rules and pre-trial procedures allows business owners to "own" how a matter will be resolved.

**Alderoty:** We are able to resolve a wide gamut of cases using mediation. The gamut runs from "mom and pop" disputes to major corporate matters. For nationwide class action suits, we enlist the aid of JAMS or other experienced mediation professionals.

Starting early contributes to the effectiveness of mediation.

**Van Itallie:** Johnson & Johnson is a passionate believer in mediation for all kinds of disputes, including mandatory mediation for all employment-related disputes. A new trend we are supporting is bringing the mediation process to matters in Eastern Europe and the Pacific Rim, where we hope the process will be as effective as in settling matters in North America and Western Europe.

Training is an important element in designing an effective mediation program. We provide training not only for our in-house litigators, but also for our outside litigation counsel involved in the mediation process on our behalf.

**Murillo:** Philip Morris uses mediation to solve as many consumer issues and

disputes as possible. Rather than always using mediation, however, we use it selectively. The type of case, dollar amount in dispute and the other side's receptiveness to the process are among the factors contributing to the likelihood of a matter being settled by mediation.

**Schumacher:** Abbott is firmly committed to solving disputes short of litigation. We have found that the success of mediation is directly tied to the desire of the parties for a resolution. Like Joe, we have found that mediation is not effective if the relationship between the parties has totally fallen apart or where the parties' positions are entrenched because of what is at stake or the size of the potential recovery.

**Gary:** BellSouth has used, and likes to use, the mediation process. Like Philip Morris, we like to use mediation as strategically as possible. We tend to focus our mediation efforts on general liability cases, personal injury and property damage cases. We also do a lot of mediation in the labor/employment area as well, particularly on single plaintiff labor cases. Occasionally we will use mediation in more complex matters.

Within 60 days of the opening of a matter, all our lawyers are encouraged to propose a defense plan that includes an ADR or mediation component. We get excellent results when the "stars are aligned."

Mediation can be particularly helpful when perceptions of the facts or the law are out of synch. A well credentialed neutral can bring reality to the table.

**Snyder:** Home Depot is very fond of mediation, depending on the type of dispute – ranging from commercial, general liability and installed sales disputes. Successful use of mediation is dependent on the parties, timing and the mediator involved. Early case assessment is also a key aspect of successful mediation. In some cases, the early case assessment may conclude that mediation is either not feasible or not advisable.

### Editor: Where does preparation for mediation begin?

**Snyder:** We begin before a dispute arises. Many of our agreements require early mediation as the first step in a dispute process, and we are looking to apply the process more broadly in the future.

**Schumacher:** We have had phenomenal success with what we call our standard ADR clause, which has been a part of all our contracts for many years. We have a wide range of contractual arrangements associated with many businesses. The clause provides that if any dispute arises, it will be resolved by binding ADR.

Implementing the clause, we have successfully used early dispute resolution techniques where there have been significant financial implications.

Abbott has developed the clause because so much time and money was spent and wasted on discovery. At the end of the day, only a subset of testimony, documents and other exhibits are really relevant. Rather than engaging in extensive discovery, our clause calls for a very truncated "mini-trial."

**Whitney:** We have a unique process where we have the mediation focused on the discovery before the suits are filed. We had an experience where we knew both sides were angry, but instead of rushing to litigation, we agreed to mediate early. We retained two mediators, one who is an expert on the subject matter, and the other who understands the process. Afterwards, I thought that if I could capture this process in a contract clause, it would forestall all of the expenses of discovery and immediately go to mediation.

**Gary:** Selection of a mediator is always a challenge. To minimize the inconvenience, delays and expenses associated with protracted discussions about who should be the mediator, we have found it helpful to have the selection process spelled out in all our contracts. Sometimes the contractual details for the selection process can be quite lengthy, particularly for complex contractual arrangements extending 20 years or longer.

**Alderoty:** Preparation for AmEx begins with the selection of a mediator. The mediator must have the confidence of both sides. Otherwise the mediation will fail. The psychological impact of a well chosen "neutral" helping the parties to put a number to the claimed damages is very positive. A mediator is trained to be focused on neutrality regardless of who is right or wrong.

**Murillo:** For mediation to be effective in consumer cases, we are sensitive to the fact that the consumer must have faith in the fairness of the process. Elements include reassuring the consumer that the mediation will be non-binding and conducted where the consumer is located. We also make sure that the consumer knows that our company will absorb the expense and that there will be a mediator they can trust.

**Snyder:** At Home Depot, our preparation for mediation begins with policies such as written agreements with suppliers and contractors that call for early dispute resolution. Our preparation also follows the axiom that selection of the mediator is crucial to the success of the mediation. Other preparation steps include early disposition assessment and helping to set a tone with the parties themselves in terms of following a process that enhances their desire to settle the dispute.

**Van Itallie:** Preparation begins with the selection of quality advocates who can drive the concept and the outcome of early dispute resolution. These are

## Corporate Counsel Organization Highlights

### Arthur H. Saiewitz Installed As NJCCA President

Arthur H. Saiewitz, corporate counsel at Lucent Technologies Inc., was installed last month as the 2005 president of the New Jersey Corporate Counsel Association (NJCCA).



**Arthur H.  
Saiewitz**

The installation took place at the NJCCA Annual Meeting and Wine Tasting on November 18 at the Highlawn Pavilion in West Orange, NJ.

Other members of the NJCCA Executive Committee who will serve during 2005 will be: President-Elect Kristi L. Vaiden, senior vice president and deputy general counsel, *The Metropolitan Corporate Counsel*; Vice President/Secretary Valerie J. Camara, counsel, Merck & Co.; Vice President/Treasurer Lee A. Braem, corporate counsel, Quest Diagnostics Inc.; Vice President/Committee Liaison Lucinda P. Long, senior vice president and general counsel, Valley National Bank; Vice President/Program Chair Barry Pulver, senior counsel and vice president HO, SYSCO Food Services of Metro New York; Immediate Past President Bruce J. Hector, associate general counsel, Becton Dickinson & Co., and Executive Director Barbara A. Walder.

Members of the NJCCA Board of

Directors who will serve during 2005 include: Joseph M. Aronds, assistant general counsel, Hartz Mountain Industries; Sylvia A. Ayler, assistant counsel, Merck & Co.; Martin Carrara, senior counsel, Pfizer Inc.; Philip P. Crowley, assistant general counsel, Johnson & Johnson; Amrita Master Dalal, employment and labor counsel, GAF Materials Corporation; Steven Garfinkel, pharmaceuticals counsel and director, Novartis Pharmaceuticals Corporation; Janice Meola Sokol, general counsel and secretary, Suburban Propane L.P.; Ilene P. Karpf, counsel, American Standard, Inc.; Deborah A. Keller, associate general counsel, KPMG, LLP; Edward R. Leyden, director-international law, Schering-Plough Corporation; Michaela O'Brien, senior counsel, BASF Corporation; John L. Sander, staff vice president and associate general counsel, Schering-Plough, and Barbara Ann Sellinger, associate general counsel and chief litigation officer, American Standard, Inc.

Sponsors for the November 18 event were AV Search Consultants; Fragomen, Del Rey, Bersen & Loewy; Kelley Drye & Warren LLP; Kirkpatrick & Lockhart LLP; Lowenstein Sandler PC; McCarter & English, LLP; McGuireWoods LLP; Morgan, Lewis & Bockius LLP and Sills Cummis Epstein & Gross P.C.

### Commercial Litigation Treatise Authors To Be Honored At NYCLA Reception

The 121 authors of the Second Edition of *Commercial Litigation in New York State Courts* will be honored on Tuesday, January 19 at a special reception being presented by the New York County Lawyers' Association (NYCLA).

*Commercial Litigation in New York State Courts* is a multi-volume, strategy-oriented treatise which resulted from a highly successful joint venture between NYCLA and West. The First Edition was published in 1995. Since that time, the treatise has become a source of pride as well as revenue for NYCLA. All royalties from the sale of this publication and the Pocket Parts go to NYCLA.

The team of 121 authors includes Judges from the Court of Appeals, Appellate Division, and Supreme Court, and many litigators in New York State. Robert L. Haig of Kelley Drye & Warren LLP serves as the editor-in-chief of both the First and Second Editions.

The First Edition received an enthusiastic reception from the legal press, reflected in more than 40 book reviews in bar journals and legal newspapers throughout the State of New York.

West began work on a Second Edition of the treatise during the fall of 2003. The Second Edition will be published this month. It is a step-by-step practice guide that gives the litigator coverage of every aspect of a commer-

cial case, from the assessment that takes place at the inception through pleadings, discovery, motions, trial and appeal. Emphasis is placed on strategic considerations specific to commercial cases. The treatise also contains 29 substantive law chapters on banking litigation, insurance, sale of goods, contracts, and other commercial law topics. In addition, there are hundreds of pages of essential litigation forms and jury charges in print and on a CD-ROM that comes with the set.

Twenty-one new chapters have been added in the Second Edition to the 68 chapters in the First Edition. As a result, the Second Edition is four volumes (there were three volumes in the First Edition) and contains approximately 5,000 pages (1,400 more pages than the First Edition). The Second Edition also contains an appendix with the rules, guidelines, procedures, forms, and other documents of the Commercial Division of the New York State Supreme Court in each of the eight counties in which the Commercial Division operates.

The reception will take place from 5:30 to 7:30 p.m. at NYCLA, 14 Vesey street, in downtown Manhattan. All subscribers to *The Metropolitan Corporate Counsel* are invited to attend. For reservations, call (212) 267-6646, ext. 231.

For information on ordering the Second Edition, call (800) 344-5009.

## Mediation Programs

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usually settlement lawyers that believe in the mediation concept and process.

### Editor: What helps to bring settlement negotiations to closure?

**Murillo:** Our approach is to call upon people at certain firms who have a track record of settling complex cases. While other counsel manage the litigation, all the settlement counsel does for us is to come in to close the settlement negotiations.

Often, selection of the settlement counsel comes from our short list of national trial counsel. When they're not trying another case for us, we call them in on a situational basis. This can be a valuable experience for them when they go on to the next case for us because they will have learned our approach and how we try to value and resolve our disputes.

**Whitney:** It is also part of our Air Products approach to mediation to have an in-house settlement team operating simultaneously with our outside trial team. We encourage our litigation team to set the stage for mediation, but we do not stop our trial process while we pursue mediation.

We have gone so far as having mediation with no lawyers, just the business people. This does not mean

that we have not prepared our business team or have not spent significant time communicating with them. With extensive experience in resolving disputes, they feel that they can focus settlement negotiations on the right issues with the right tone for coming to a quick closure. In such situations, they prefer to seek advice and counsel behind the scenes to avoid the appearance of a litigious approach that would impede the settlement process.

**Gary:** Business input is critical to bringing settlement negotiations to a successful conclusion. Anytime we engage in settlement negotiations (whether it is during an informal conference or a multi-day mediation process) we insist that someone from the client (whether it is on my staff or someone from the business side) be there at all times with authority to resolve the case. Having settlement authority available on the spot is critical at the time we have the momentum from both sides to reach closure.

**Van Itallie:** We find that timing can be critical. Often the best time to schedule settlement negotiations is as soon as we have gathered critical facts. For example, when the plaintiff is going to be deposed on one day, the deposition could be followed the next day with a mediation session. Freshly discovered evidence could be determinative of a settlement outcome, and the timing of the mediation session is one way to help get a quick resolution.

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**Tara Schwake**  
CRR, RPR, Illinois CSR  
and Missouri CCR

*Tara Schwake has been a court reporter for fourteen years - all but nine months with Midwest Litigation Services, Spherion's agent in St. Louis, Missouri.*

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