

Notes from the Editor**Issue No. 44, June 15, 2003**

Mediation, as the preferred process to reach resolution, was in the business news headlines again late last month. This time it was the high profile Enron Corp. bankruptcy case with shareholders seeking billions and eleven banks and brokerage firms named in the complex lawsuit.

U.S. Bankruptcy Judge Arthur-Gonzalez named U.S. District Judge Kevin Duffy in New York to handle the mediation. U.S. District Judge Melinda Harmon in Houston, who proposed the court ordered mediation, also said other defendants in the lawsuits may be ordered to mediate at a later date. Those defendants include former Enron executive Chairman Kenneth Lay and former CEO Jeffrey Skilling.

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The second edition of an excellent book titled "Mediation Practice Guide – A Handbook for Resolving Business Disputes" arrived recently. It's author, **Bennett G. Picker** was featured last June 2002 (Issue No. 32) discussing how to break down barriers in negotiation through mediation. His article reappears as Chapter 5 in the book. The book is available for \$39.00 plus S.H. from ABA

Section of Dispute Resolution. Web: www.abanet.org/dispute, Tel: 202-662-1680.

Attorney Picker is a partner in the Philadelphia law firm, Stradley Ronon Stevens & Young, LLP, and chairs the firm's ADR Practice Group. I have previously given out his first book, published in 1998, to clients to help them understand the key mediation issues and make the most of the opportunity for resolution and settlement that the mediation process offers. Ben Picker can be contacted by email at bpicker@stradley.com.

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This month we present the second part of **George Strohfeldt's** two-part article titled "Managing Disputes with Contractors and Maintaining Performance." George's article was originally published in its entirety in the Institute of Arbitrators and Mediators, Australia Journal "The Arbitrator and Mediator". He can be contacted at cci@gil.com.au.

Joe Grynbaum, P.E.

**Mediation Practice Guide – Second Edition (Revised and Expanded)
A Book by Bennett G. Picker**

The first thing I noticed about the Second Edition is that the book had grown to 222 pages. The First edition came in at 159 pages. The second thing I noticed is that Appendices had increased with the addition of a practical Negotiation Plan for Dispute Resolution in Litigation by Carrie Menkel-Meadow, Professor of Law at Georgetown University Law Center, and a useful listing of internet resources' websites.

By revisiting the book I was able to recall why I had previously given copies to both parties who had selected me as mediator in their long running contractual construction dispute. The book's

strength is that it delivers what it promises to deliver, i.e. a practical narrative in ten easy to read groupings that answers many of the questions that parties and lawyers will have, as they consider how best to prepare for a mediation. It provides easy to follow checklists for preparation and participation, and highlights the opportunities for business-driven solutions that mediation encourages.

Mr. Picker's experience in mediation, which continues to increase in his own law practice, has highlighted the fact that even the most experienced litigators and transactional lawyers are not familiar with the mediation terrain. His stated

objective for his book is that "it serve as a practical guide – a primer – to assist lawyers and parties in navigating the landscape of mediation."

The expansion of the book beyond the first edition, which included "The Decision to Mediate", "The Stages of a Typical Mediation", "The Role of the Mediator" and several "Case Studies in Mediation" is the author's coverage of "Negotiation and Mediation – Overcoming Barriers to Resolution" and "The Future of Mediation – New Challenges and Opportunities for the Legal Profession."

Chapter 10, the final chapter of the book, speaks to Mr. Picker's own experience both in the U.S. and abroad where he lectures and sits on arbitration and mediation panels. Within his specialty of advising clients seeking to resolve business disputes he points out that the "universe has changed rapidly in recent years." He acknowledges that in most business disputes, solutions that take into consideration speed and cost are paramount. These solutions focus as much on underlying interests as upon truth and rights.

The book advises that there are new roles for the legal profession. Roles that place a premium on creative lawyering. Lawyers are now spending far more time with their clients discussing their interests and objectives. In business agreements,

lawyers are inserting dispute resolution clauses in early drafts where they can be given the full attention they deserve. In complex agreements a multi-tiered approach including neutral fact-finding, executive negotiations and mediation as a predicate to adversarial approaches such as arbitration or litigation, is becoming more prevalent.

Ben Picker has found a sense of personal accomplishment as a mediator after decades as a litigator. He points out that "the world of ADR unbounded by strict rules of litigation is limited only by one's imagination. Lawyers are designing new and imaginative approaches to dispute resolution every day."

I recommend this book because it not only focuses on the fundamental underpinnings of mediation and how mediation works, but also shares the author's best practices for how to prepare for the mediation, how to recognize whether a dispute is suitable for mediation and how to advocate in a mediation setting. The book also reaffirms a lawyer's commitment to doing what is best for his/her client. It should be kept on one's desk or readily at hand and reread before each mediation, to prepare oneself to explore the opportunities that the mediation process will certainly present. This is not a book that should rest untouched on the bookshelf.

Managing Disputes with Contractors and Maintaining Performance – Part 2 of 2 by George Strohfeldt

How to avoid disputes

The best way to manage disputes is to avoid them. Whilst this is not always possible the following guidelines are offered:

1. Select contractors / subcontractors on the basis of a series of criteria including proven ability to perform without undue disputation and not

on the basis of price alone. A very low bid price should be treated with suspicion.

2. Many disputes are the result of, or are exacerbated by, a lack of communication between the parties. Always seek to maintain open, honest and clear communications. If necessary, compensate for the other party's lack of communications skills by taking the initiative with communication.

3. *Don't forget to talk! - All-important communication should be in writing - most administrators are aware of this. However, written correspondence should not be used as a substitute for face-to-face communication. Explaining your motives and position face-to-face can often lead to much better mutual understanding where a dispute would have arisen if left to the written word alone. In general, the better the understanding each party has of the other party's rights and obligations, the better it is for both parties.*
4. *Maintain comprehensive accurate historical records of events and agreements.*
5. *Try to get the other party to cooperate willingly in the first instance before using contractual or commercial "muscle".*
6. *Be both firm and consistent in dealings with the other party.*
7. *Be alert for problem "early-warning signs" during the Contract. Do not let "issues" turn into problems - resolve them before they develop into disputes.*
8. *Keep the emotion out of administration. It is common (and natural) for persons who have invested much time and effort in a project to become emotionally involved in the project. Such emotion can become an impediment to rational and constructive discussion aimed at resolution. Be aware of the "emotional trap" and be prepared to involve a more objective person if you think your judgement may be emotionally clouded.*
9. *A common source of potential disputes on a project are subcontractors who are engaged by the Contractor under subcontract arrangements which are not "back-to-back" with the Prime Contract. If possible, make sure the Subcontract terms are matched to the Prime Contract terms.*

10. *Where possible consider each issue from the other party's viewpoint. This will give a better understanding of the forces that are causing the problem and will lead to more appropriate problem solving strategy.*

Conclusions

1. *Disputes can have a disastrous effect on a contractor's performance; especially when the contract works are still on foot.*
2. *Dispute management begins at the time of contract formation and needs to be considered when deciding upon the project delivery system, contract conditions and dispute resolution provisions.*
3. *Hence those persons involved in the contract formation process need to have an understanding of the range and workings of the dispute resolution procedures that are available, and ideally the terms of the dispute provision should be negotiated by the parties "up-front".*
4. *Standard-form contract should not be blindly adopted and if used at all, should be amended to align with the agreement of the parties.*
5. *Standard-form contracts are generally not suitable in unabridged format for use on partnered or alliance contracts.*
6. *The best way to manage disputes is to avoid them altogether; whilst this is not always possible, some general guidance in this regard is provided in this paper.*
7. *It is important that disputes be properly managed and not ignored or left to resolve themselves as this rarely happens, i.e. things usually only get worse.*
8. *To do this one needs to have an understanding of the dispute resolution procedures available,*

the commercial influences involved, how the contracting game is played, a knowledge of the relevant issues, an understanding of human behavior, patience and a measure of commonsense.

9. *If any of these skills are lacking in the project manager charged with the responsibility of managing the dispute, then assistance should be sought from a suitably experienced person inside the organization (failing this, such assistance can be outsourced).*
10. *Taking legal advice or seeking a legal opinion can be useful to test the merits of one's case and to provide leverage for a commercial resolution, and also in respect of protecting without prejudice discussions and documents and maintaining legal privilege.*
11. *Ideally issues should be resolved early and progressively to prevent minor issues "fester" and growing into major disputes.*
12. *A critical decision that needs to be made early on, is whether a commercially based or rights-based resolution is required.*
13. *Any goals that are set need to be commercially realistic and achievable.*
14. *A sound and logical strategy should be developed to achieve the above goals; this is best done from an analysis of both sides' positions and interests.*
15. *Once the strategy is developed it should be implemented with confidence through various tactical measures, but should be monitored and corrected if and when necessary.*
16. *By far and away most disputes are resolved by negotiation; hence an understanding of the principles underpinning this process is critical to those involved in dispute management.*
17. *Developed negotiation skills (including the use of proven methodologies) combined with adequate preparation is often the key to success in resolving disputes. These skills need to be practiced to be effective.*
18. *Sometimes it may be necessary to initiate formal dispute action (such as arbitration or litigation) as a backdrop to parallel negotiations in order to secure a negotiated resolution. This often acts to focus the parties' thoughts and deeds, and sets a timeframe (or deadline) for resolution (i.e. it creates a set of "tram tracks").*
19. *ADR procedures are not a panacea, and it may be in certain cases that litigation is the best option, (e.g.. where a rights-based resolution is required and where this approach best matches an organization's overall commercial objectives).*
20. *By properly managing a dispute one can often earn the respect of the other party and maintain, or even enhance, the business relationship.*