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Big Changes in Washington ADR Law

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Earlier this year, the Washington State Legislature passed two uniform acts relating to alternate dispute resolution (ADR): The 2000 Revised Uniform Arbitration Act (RUAA), under RCW 7.04A, and the Uniform Mediation Act (UMA), under RCW 7.07. Both Acts have been signed into law, with effective dates of January 1, 2006. The RUAA, applies to all arbitration agreements entered into after 1/1/06. After July 1, 2006, the Act applies to arbitration agreements entered into before 1/1/06. Both Acts are "uniform" laws approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL). This article attempts to summarize some of the salient aspects of each Act, and to discuss in more detail the respective arbitrator and mediator disclosure requirements and the potential consequences of non-disclosure.

The RUAA expands upon the original Uniform Arbitration Act adopted in 1955. The Act addresses procedural issues not covered in the 1955 Act, e.g., allowing a court to order provisional remedies before the arbitrator is selected. The Act codifies much of the case law interpreting the 1955 Act. The RUAA also purports to be drafted to avoid federal preemption by the Federal Arbitration Act. The Act specifically provides for consolidation of separate arbitrations. Accordingly, complex litigation with multiple parties and multiple agreements is now governed by the RUAA. The Act makes clear that an arbitrator has the same powers as a judge in a court proceeding. And, the RUAA specifically provides arbitrators with immunity "from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity."

The Act gives the selected arbitrator the express power to order provisional remedies. In addition, the RUAA gives an arbitrator the express power to issue subpoenas; to permit a deposition of any witness; to issue a protective order; and "permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties…and the desirability of making the proceeding fair, expeditious, and cost-effective."

The RUAA differs from the UMA in one important respect. The UMA applies to all mediations (with some exceptions), while the RUAA expressly provides that it is a default act, i.e., most of its provisions may be varied and/or waived by contract "to the extent permitted by law." The RUAA, however, provides that a number of provisions may not be waived or varied, including the section on arbitrator disclosures (discussed below).

The Uniform Mediation Act, RCW 7.07, applies to mediations that are required by statute, court or administrative rule, as well as mediations referred by

"Careful consideration of these changes…particularly with respect to the disclosure requirements, is important to the integrity of alternative dispute resolution in Washington."

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Mediator Focus
Harry Goldman

Celebrating
20 Years of Excellence

Harry Goldman is our most veteran mediator. (Larry Levy also joined the panel in 1986.) He participated in WAMS first mediator training class in 1986. The following is an excerpt from an interview with him.

Why did you want to become a mediator?

I decided to pursue an interest in becoming a mediator in 1986. I was drawn to WAMS by Alan Alhadeff, who was the granddaddy of Seattle mediators. I had been practicing law for about a decade and had frankly become concerned that the profession had become unnecessarily contentious. It seemed we were more confrontational and litigious; the congeniality and collegial nature of lawyers had become strained. I felt that mediation offered a more civil method of resolving disputes without always litigating cases or at least avoiding trials in cases that could be amicably resolved.

What childhood event helped create the mediator in you?

I truly can't blame a childhood tragedy for working as a mediator for the last two decades. On the other hand, I am a child of the Sixties, which was a time of ferment and confrontation. In spite of this atmosphere in which I came of age, I was fortunate to have grown up in a home with two fairly special parents. They encouraged me and my siblings to openly discuss our passions and beliefs at the dinner table, even though they usually disagreed with what I expressed. I am convinced this willingness by them to agree to disagree without bitterness or holding a grudge played a role in my eventually pursuing a career as a lawyer and then as a mediator.

How do you avoid burn-out as a mediator?

I have mediated almost 4,000 cases since 1986. I avoid burn-out by constantly reminding myself that this case is the most important thing on the agenda for those involved. By taking that approach, I avoid falling victim to trivializing the smaller or common case. The parties are paying WAMS and me a lot of money to assist in the resolution of the dispute. They are entitled to my full attention and effort, regardless of what is involved.

What traits make you an effective mediator?

My technique has evolved over the years. After thousands of mediated cases, I now know many of the lawyers and claims people. This allows me to cut through much of the formality and get to the heart of the dispute. At the risk of sounding immodest, I think my reputation for candor and honesty as a mediator has allowed me to be a more effective mediator. Our reputation always precedes us, and it is really all we have to offer.

One of my favorite quotes is from a famous baseball player named Satchell Paige. In response to a question from a reporter about his true age, which was a subject of much conjecture, Satch said "...Never look back. Your past might be gaining on you." I've always extrapolated from that expression that we can't change whatever the past is so we should spend our time concentrating on the future. Applying that philosophy to mediations, the parties have to play with the cards they've been dealt so let's figure out how to resolve the dispute and make the best of the future.

People who know you understand that you have a passion for baseball. Why is that?

When you ask about baseball, you speak about an activity that had to be divinely inspired. Everything about the sport, until it was ruined with the designated hitter, artificial surfaces, and domed

(Goldman continued on page 4)

…WAMS Buzzz

The Tacoma WAMS office has expanded and moved to a new location. We are located at 2602 N. Proctor Street, Suite 201, directly above Starbucks. Our clients can enjoy the convenience and ambiance of the new location as well as more conference room space and free parking.

WAMS is pleased to welcome Catlin O'Halloran to our staff. Catlin will join WAMS January 3rd as a full-time case administrator. She is currently attending Seattle University Law School. In other news, Penny Humphrey retired from WAMS after over 20 years of service, 10 of those years as co-owner. Valerie Little retired from WAMS in December after 10 wonderful years with the company. Penny and Val will both be missed. Riveka Crooms has moved to a full-time position as the assistant case administrator. Nancy Taylor is no longer with WAMS.

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a court, administrative agency, or arbitrator. The UMA also applies to mediations where the parties and the mediator "agree to mediate in a record that demonstrates … that mediation communications will be privileged against disclosure". The Act also governs mediations where the parties use an individual who holds him/herself out as a mediator, or where the mediation is provided by an entity (such as WAMS) that holds itself out as providing mediation. The UMA does not apply to mediations conducted by a judge; school mediations where all the parties are students; and youth correctional institution mediations where all the parties are institutional residents.

The UMA confirms existing Washington law on the privilege against disclosure with respect to mediation communications. RCW 7.07.030 A mediation communication, with some exceptions, "is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by RCW 7.07.040." This privilege extends to parties, the mediator, and nonparty participants, and includes the right to refuse to disclose a mediation communication and prevent any other person from disclosing the same. RCW 7.07.040 allows waiver of the privilege if it is expressly waived by all the parties, and, in the case of the mediator's privilege, it is expressly waived by the mediator. The privilege is precluded where a party uses the mediation in connection with criminal activity. There are also exceptions to the privilege under the Act, including mediations open to the public and mediation communications "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice" filed against a mediation party, nonparty participant, representative of a party, or a mediator. There is also an exception to the privilege where the communication is sought or offered in a proceeding involving a child or adult protective services agency where abuse, neglect, etc. is alleged. A mediator, however, "may not be compelled to provide evidence of a mediation communication" in connection with misconduct or malpractice claims against others or in a claim attempting to "rescind or reform or a defense to avoid liability on a contract arising out of the mediation."

The final preclusion of the privilege pertains to the mediator. A mediator who violates the Act's disclosure requirements "is precluded by the violation from asserting a privilege under RCW 7.07.030." The Act requires ("shall") a mediator, before accepting to serve, to make a "reasonable" inquiry whether there are facts, which would affect the mediator's impartiality, including a financial interest in the outcome, "and an existing or past relationship with a mediation party or foreseeable participant in the mediation". The mediator must disclose any such known fact before accepting or after learning of the same during the mediation. Failure to do either results in loss of the privilege against disclosure. →

The RUAA contains disclosure requirements for arbitrators similar to those under the UMA. The requirements apply before accepting appointment and are "a continuing obligation". In addition to disclosing a financial interest, the arbitrator must disclose an "existing or past relationship with any of the parties,...their counsel or representatives, witnesses, or the other arbitrators." If the arbitrator discloses or does not disclose such "known facts" a party's timely objection "may be a ground to vacate the award". Further, an arbitrator who does not disclose a "known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under RCW 7.04A.230(1)(b)." The statute states that a court "shall vacate an award if: ... there was: Evident partiality by an arbitrator appointed as a neutral." RCW 7.04A.230(1)(b).

Whether the changes in Washington ADR law wrought by the RUAA and UMA are "big" may be a matter of perspective. Careful consideration of these changes by mediators, arbitrators and attorneys, particularly with respect to the disclosure requirements, is important to the integrity of alternate dispute resolution in Washington. Avoiding loss of privilege against disclosure in mediation and avoiding vacation of arbitration awards (and the litigation attendant thereto) would seem to be in everyone's best interests.

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stadiums, is as close to perfection as a sport can be. The dimensions of the diamond and the field are perfectly constructed to give the hitter and the defense an equal chance. It's played out on a beautiful field of dreams without a clock. Neither side can manipulate the time in order to win; the winning team must get the final run or out, as the case may be, to prevail. The game evolves at a leisurely pace over several hours, and the moves on the field by the managers are akin to grandmasters moving their chess pieces. A player who is the goat early in the game can become the hero in the later stages. The game is officiated by human umpires who cannot be overruled by an instant replay machine and command respect and obedience through unwritten rules of accepted behavior by the participants. Each generation can argue with the prior generations about players as the statistics are inviolate, at least until they were corrupted by the steroid epidemic of the past decade. In essence, baseball is a parable of life itself and a picture into the American soul.

Congratulations to Harry Goldman and Larry Levy for 20 great years at WAMS

WAMS Holiday Open House December 16, 2005




Thank you to all who attended...

WAMS MEDIATORS

Crane Bergdahl
Paul Chemnick
John Cooper
Pat Duffy
Cliff Freed
Judit Gebhardt
Harry Goldman
Scott Holte
Don Horowitz
Bill Joyce
Margo Keller
Don Kelley
Stan Kempner
Larry Levy
Judy Massong
Bill Rush
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Susan Keers Serko
David "Mac" Shelton
Richard Sindell
Hal Vhugen
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