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# Pennsylvania Bar News

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Promoting Professional Excellence in the Law: Serving Lawyers in Every Practice Area in Every Corner of Pennsylvania

## PBA's Alternative Dispute Resolution Committee Grows

**M**any lawsuits settle out of court, largely because of alternative dispute resolution (ADR).

Interest by attorneys in alternative dispute resolution methods continues to expand, according to the PBA ADR Committee.

The committee's mission is to address current issues of mediation, arbitration and other alternative dispute resolution processes, including mediation and arbitration of private and court-connected disputes. The committee conducts professional education programs in alternative dispute resolution and studies and recommends standards of practice for neutrals. The committee also proposes and monitors legislation regarding alternative dispute resolution.

"ADR is becoming more popular," said PBA ADR Committee Co-chair Mary Kate Coleman, Riley Hewitt Witte & Romano PC, Pittsburgh. "Everybody is using it more often. It's a quick, cost efficient and easy way to try to resolve your litigation. It's also confidential. People are attracted to that."

The committee has 255 members as of November 2023, she said. About 30 to 40 members attend regular meetings.

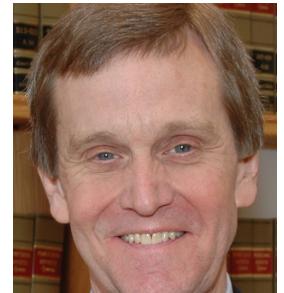
As attorneys and firm partners become more senior in their practice, Coleman noted, they want to learn more about how to become a "neutral," one who is impartial and not invested in any particular outcome of a dispute. With ADR, a mediator helps the parties resolve their dispute. An arbitrator determines the actual outcome of a dispute.



Mary Kate Coleman



David A. Fitzsimons



Daniel F. Cusick

### Tale of the Orange

To explain the difference between mediation and arbitration, a tale of a dispute over who owns an orange is a common analogy.

"Two people argue over one orange," Coleman said. "Both people want the orange. The arbitrator will hear evidence about why each party should get the orange. The arbitrator also will hear legal argument about why each person is entitled to the orange. Then, the arbitrator will decide who gets the orange based on the facts and the law. The arbitrator might decide, 'Party A gets the orange and Party B does not get the orange.' Or the arbitrator might decide, 'I'm going to cut the orange down the middle and give each of you half of it.' However, the mediator will dig a little deeper and ask each party, 'Why do you want the orange?' Party A will say, 'I want the orange because I'm making a cake, and the recipe calls for the peel of an orange.' Party B replies, 'I'm hungry, I want to eat the fruit.' So, the mediator says, 'Ah-hah, we have a way to resolve this dispute that will satisfy both of you. One party takes the peel, and the other party takes the fruit.' The result

of mediation is often more satisfactory to both parties because their needs are addressed, they have control over the outcome, they can be creative with possible resolutions, and they can obtain remedies outside of what the law provides."

More about the analogy can be seen at <https://bit.ly/OrangePeeAnalogy>.

However, not all cases can be mediated successfully. A court-determined outcome may be inevitable.

"There was a time when all mediators said mediation is the answer to everything," said PBA ADR Co-chair David A. Fitzsimons, ADRFitz LLC, Carlisle, a solo practice mediator and arbitrator. "There are some disputes that people just need to be heard and have somebody decide who's right and who's wrong. But what we tell people a lot of times in mediation is: rather than having the parties hand over their future and their outcome to a judge, a jury or even an arbitrator, how about we sit around this table and engage in some facilitated discussions and see if we can come up with your own solution? The parties who have been



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living this dispute for years, weeks or months know more about it than any factfinder (judge, jury or arbitrator) is going to learn at trial. Oftentimes, the solutions are there; you just need help peeling back the resistance."

## Both Sides Happy

Not everybody walks away from a mediated or arbitrated dispute unhappy, at least most of the time. The goal, Fitzsimons said, is to make both sides happy.

"One great fallacy is oftentimes we hear that mediation is a process where both sides walk away a little bit unhappy, and that's misleading," Fitzsimons said. "A properly conducted mediation provides the ability for both sides to walk away happy or satisfied. And that rarely, if ever, happens in the litigated lawsuit."

It sounds easy, but mediation is a very involved process, Fitzsimons said. It differs from standard tactics in litigation.

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### James C. Schwartzman, Esq.

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- Former Chairman, Supreme Court of PA Interest on Lawyers Trust Account Board
- Former Federal Prosecutor
- Selected by his peers as one of the top 100 Super Lawyers in Pennsylvania and the top 100 Super Lawyers in Philadelphia
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"As lawyers, we're educated, trained and practiced in 'select your champions,' look up the legal remedies and go fight over the remedies," he said. "Whereas, in a mediated resolution, we can come up with solutions that frankly the judge can't order, because they're not in the remedies class you took in law school."

Fitzsimons' mediations are commercial litigation, business disputes between companies, and individuals. He also mediated employment discrimination cases in the federal system, personal injury matters and construction litigation. In mediating a litigation case where lawyers are already engaged, a complaint may or may not have been filed.

"In those cases, parties are often looking for what we call 'subject matter expertise,'" Fitzsimons said. "Oftentimes, the belief of the litigators is that we need someone who's an expert in that area of law to get this case mediated."

"What I found after 20 years of training and practice as a mediator is that's only true to a point. Sometimes, one more person with an opinion isn't very helpful, and what I focus on as the mediator is delivering effective process," he said.

Fitzsimons focuses on "process-centered mediation," he said. "Instead of me coming into the mediation with an opinion as to each side's case and where they need to go, I come in there and work on helping them work together to get where they need to be. It's a subtle difference. Oftentimes, when I was representing a litigant, the mediator, a very good mediator, would come into the mediation with a lot of experience in law and they'd have a number in their heads. That mediator might be shepherding or pressing the parties toward their preferred solution. What I found in mediation is when the mediator did not do that and, instead, applied process, giving the parties time and the atmosphere for my client sitting with me to reflect upon what got us here and what they most want to do going forward, resolutions that were not specifically anticipated in preparation, but much more satisfactory to my client, were often reached."

## Educate PBA

The PBA ADR Committee stays busy, creating CLEs and other programs to educate lawyers.

"We try to educate the bar about alternate dispute resolution, which would include arbitration and mediation," Coleman said. "Those are the two major types of ADR that people think about. We educate our committee members as well. We have different types of committee members. Some are friends of mediation, meaning they want to know more about mediation, or they have an interest in it for whatever reason. Others are practicing neutrals, either arbitrators or mediators. We do educational programs for the bar in general, and we have educational programs for our committee. We often do a short program during our meetings for committee members on various topics."

Coleman said, "the committee's

meeting agenda contains a 'local news' section where committee members can tell other members about developments regarding ADR in their county or court system. In Pennsylvania, there is no dispute resolution office overseeing the development of ADR in the state, so coming to committee meetings is a good way to share information and learn about what's going on. It's another way we educate our members."

In Pennsylvania, unlike many other state jurisdictions, there are no mandated uniform qualifications for training mediators," Fitzsimons said. "In Pennsylvania, except for narrowly defined subject matters, such as custody and specific aspects of family law, anybody can call himself or herself a mediator. In Maryland, for instance, you must have 75 hours of training and engage in ongoing continuing education to maintain a practice as a mediator. We don't have that in Pennsylvania. The PBA

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ADR committee is focusing on growing our membership base, the

use of ADR and mediation. Other forms of alternate dispute resolution

are growing exponentially in various specialized focused areas of the

practice of law and are being used more and more."

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## 5 Questions for Daniel F. Cusick, Chair of the PBA ADR Lawyer Dispute Resolution Program

*Editor's note: Daniel F. Cusick, Pittsburgh, a retired Social Security Administration hearing office chief administrative law judge, is chair of the PBA ADR Lawyer Dispute Resolution Program (LDRP). He was vice-chair of the PBA ADR committee at the time of the initial development of the LDRP. The LDRP uses mediation and arbitration to resolve disputes between lawyers.*

### What is the Lawyer Dispute Resolution Program (LDRP)?

The Lawyer Dispute Resolution Program is a fee-based service provided by the PBA, which provides a means for the confidential resolution of a dispute within the legal community without the need to resort to litigation. The program provides opportunities, through alternative dispute resolution procedures, for resolution of disputes between and among lawyers, among law firms and among lawyers and law firms with each other. It also provides opportunities for the resolution of disputes among lawyers and/or law firms and their clients under limited circumstances.

### How did the LDRP start, and why?

In the 1980s, there were several disputes among lawyers that resulted in litigation. The media covered these disputes, and some thought the publicity did not reflect well on the legal profession. Some judges wanted to refer these cases to a more private means of resolution as did the leadership of the PBA. The result was the Alternative Dispute Resolution Committee which developed the LDRP, and the PBA approved the program.

### What is your role with the LDRP?

I serve as chair of the LDRP subcommittee of the Alternative Dispute Resolution

Committee of the PBA. The subcommittee administers the LDRP with the generous support of the PBA staff. We receive information about the dispute and forward a list of neutrals and biographical information for the parties to select their neutral. If questions arise, we do our best to provide an answer consistent with the LDRP rules and procedures. We also consider changes to our rules and procedures and look for feedback on how well our program works.

### What major changes have been made to the LDRP, and why?

There has been an expansion in the types of cases we will consider and some tweaking

of the rules and procedures, but nothing I consider major.

### Why are attorneys more interested in learning about mediation?

There has been an increased interest in arbitration and a larger increase in the interest in mediation. It may be that the interest in mediation is due to the control that the parties and their attorneys have over the process and outcome of the mediation. Also, some may view mediation and arbitration as less stressful than litigation and something that they can do longer and in a part-time capacity.

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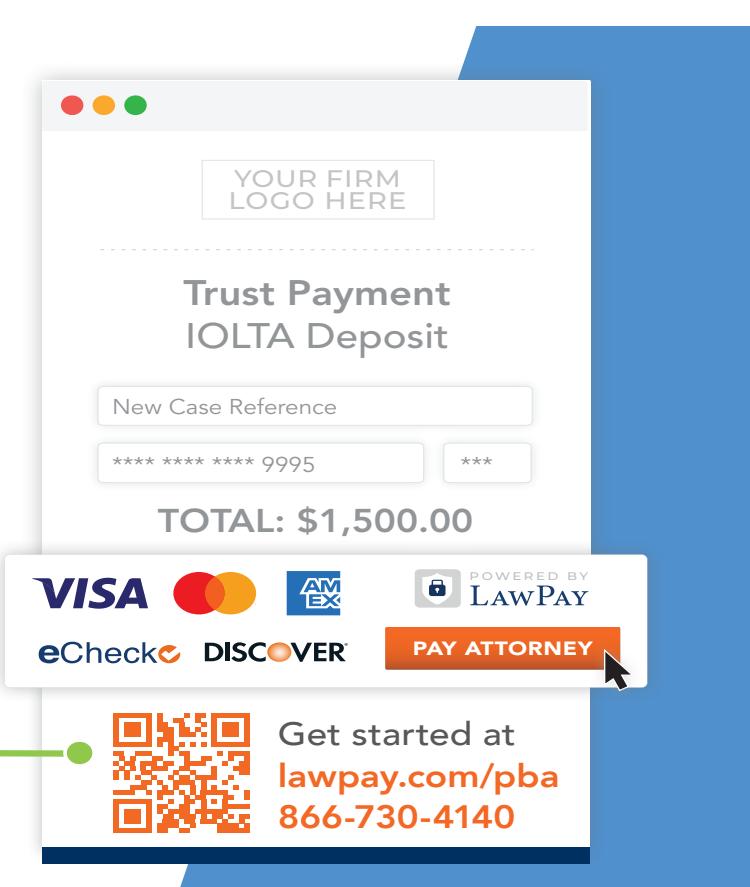
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# PBA's Alternative Dispute Resolution Committee Grows

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## Dispute Resolution

The PBA ADR Committee manages the Lawyer Dispute Resolution Program (LDRP), which uses mediation and arbitration to resolve disputes between lawyers.

"The program provides opportunities, through alternative dispute resolution procedures, for resolution of disputes between and among lawyers, among law firms and among lawyers and law firms with each

other," said LDRP Chair Daniel F. Cusick, a retired Social Security Administration Hearing Office chief administrative law judge, Pittsburgh. "It also provides opportunities for the resolution of disputes among lawyers and/or law firms and their clients under limited circumstances."

Cusick explains how the LDRP came into existence on Page 10.

All lawyers, PBA and non-PBA members, may use this program. A lawyer engaged in a law firm dispute, dissolution or withdrawal or in a fee dispute with another lawyer should

call the Pennsylvania Bar Association at 800-932-0311, ext. 2253. The parties involved then choose one of three procedures to resolve their dispute: mediation, arbitration or mediation followed by binding arbitration.

Learn more at <https://bit.ly/47LjKgK>.

"I'm interested in hearing from members who want to be active in the committee," Coleman said. "I'm interested in members who wanted to do things, such as speaking, taking on a role as a subcommittee chair or writing for our newsletter. We're trying to get

young people, newer lawyers involved in ADR, because younger lawyers have an interest in ADR, often from taking an ADR class in law school. However, it's sometimes difficult for them to get actual experience because they have not been out of law school for any length of time."

To join the PBA ADR Committee, visit <https://www.pabar.org/site/For-Lawyers/Committees-Commissions/Alternative-Dispute-Resolution>.

Share your reactions or comments about this feature with Andy Andrews, editor, at [Andy.Andrews@pabar.org](mailto:Andy.Andrews@pabar.org). 

## PBA Minority Bar Committee Requests Nominations

The Rising Stars Program is an opportunity for the PBA Minority Bar Committee to recognize the outstanding achievements and accomplishments of our members on the rise.

Individuals will have an opportunity to share their experience and volunteer activities on their biography, which is posted on the com-

mittee webpage. To be considered or to nominate someone for the program, complete the nomination form. For more information and the nomination form, visit <https://bit.ly/4beam0H>. 

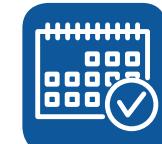


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## Upcoming Events

Find more information in the PBA Events Calendar at [www.pabar.org](http://www.pabar.org) or call the PBA Member Services Center at 800-932-0311.

**Feb. 29-March 2**

**58th Annual Conference of County Bar Leaders**

**March 7**

**PBA Commission on Women in the Profession Virtual Spring Conference**

**March 21-23**

**PBA Statewide High School Mock Trial Competition**

**April 10-11**

**PBA Environmental Law Forum**

**April 12-14**

**PBA Civil Litigation Section Retreat**

**May 8-10**

**PBA Annual Meeting**

**May 28**

**PBA Utility Law Bench/Bar Conference**

Please check the PBA website ([www.pabar.org](http://www.pabar.org)) and PBI website ([www.pbi.org](http://www.pbi.org)) frequently for updates.