Message from the Chair

Losing an Original

By Connell Mullins

Since our last issue was published, the Virginia ADR community lost one of its original voices and proponents. On September 6, 2019, Lawrence Harold Hoover passed away. Aside from a distinguished career as an attorney and State Department legal adviser, Hoover also became known as “the father of mediation in Virginia.” A tribute to Hoover, and his many accomplishments, is highlighted in this issue. Virginia’s ADR community, and this committee, has Hoover to thank for ADR’s continued growth and success in the Commonwealth.

Aside from a reflection on Hoover and his contributions to ADR in the Commonwealth, this issue also contains an article by E. Stanley Murphy entitled “Keeping Neighbors Neighborly.” Murphy’s article addresses the use of ADR by property owners’ associations to address issues such as payment of assessments, management of funds and corporate governance.

Another topic addressed in the current issue is restorative justice. Brenda Waugh, a pioneer in the concept and use of restorative justice, has provided a wonderful article on the history of restorative justice, its practical applications and compelling reasons why mediators should be interested in adding this approach to their repertoire. As Waugh notes, “the power of an apology and an attempt to repair harm cannot be lost.”

Our hope as a committee is that these, and other articles, will inform, inspire and occasionally entertain those who are involved in ADR and those who might yet come to appreciate all that ADR has to offer. As always, please feel free to contact me or any member of the committee with questions, comments or suggestions for future newsletters.
Larry Hoover, the “father of mediation” in Virginia, died on September 6 at age 85. For decades, Larry inspired Virginia practitioners to explore alternatives to litigation and worked tirelessly to transform the legal landscape of the Commonwealth.

Practicing trusts and estates law in Harrisonburg, Larry became interested in the new field of mediation in the 1980s and helped found the state’s first community mediation center there in 1982.

Larry spread the word about collaborative problem-solving throughout the state, motivating the formation of other community mediation centers, such as those in Fredericksburg and Warrenton. He helped to build bridges between community mediation centers and the ADR work of judges and lawyers, according to Geetha Ravindra, who worked with Larry while she was director of the Department of Dispute Resolution Services at the Supreme Court of Virginia.

Larry was one of the founding members of, and regular trainers at The McCammon Group. John McCammon described his first meeting with Larry: his vision “was deep, captivating – different from my world” as a litigator.

Larry’s greatest contribution was in his work with the Virginia State Bar. The VBA and VSB decided to form Joint ADR Committee in 1986. He was chair of the Joint ADR Committee from 1989 to 1992, during which a statewide ADR office was established at the Supreme Court of Virginia and legislation authorizing court referrals to mediation was developed.

As a member of the Special Committee revising the Bar ethics rules, Larry took the lead in introducing and drafting critical provisions relating to ADR, including Rules of Professional Conduct on the lawyer as Third Party Neutral (Rule 2.10) and as Mediator (Rule 2.11). A joint committee colleague on this project, Carl Hahn, noted that “Larry’s quiet authority and humility, coupled with his intellectual depth, helped us work so well as a team” developing these rules.

Larry’s vision is distinctly captured in the following official comment to the Rule on Diligence (Rule 1.3):

“Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client’s needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous

Continued on page 3
Lawrence H. Hoover, Jr.
Continued from page 2

pursuit of the client’s interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.”

“It’s always been so obvious to me that you’ve got to work stuff out, and seeing lawyers bang up against each other without trying to work it out was very real,” Larry reflected in a Harrisonburg Daily News Record article in 2016. “It’s different now. It’s much more acceptable to work things out.”

In addition to mediation, Larry became an early proponent of the Collaborative Law process, where attorneys and parties commit to resolve their disputes at the bargaining table rather than through litigation. He also worked to support the passage of a statute addressing the inadmissibility of expressions of sympathy in malpractice cases.

As a passionate defender of ADR, Larry lent his substantial credibility and intellect to address concerns raised by the Bar over the years. In the late 1990s, he was a key voice on the Supreme Court-sponsored committee that helped resolve the tension between mediation and the unauthorized practice of law. He later contributed to the revisions of the Standards of Ethics for Virginia mediators. He and other colleagues also met with Bar Ethics counsel to allay concerns about the propriety of the disqualification provisions in the Collaborative Law process.

Larry received numerous awards, including the Lifetime Achievement Award from Chief Justice Harry Carrico in 2001 and the Virginia Alternative Dispute Resolution Founder Award in 2004.

He taught negotiation and mediation at Washington and Lee (W&L) University’s law school for over 25 years. By 2007, over 60% of the graduating students at the law school had taken one of his courses. Along with Frank Morrison, he developed an intensive practicum taken by all W&L law students.

His intellectual curiosity and enthusiasm naturally led him to explore other facets of how practitioners can collaborate more effectively to help their clients. Larry became a certified Enneagram Teacher (to assess personality traits to enhance collaboration). He became intrigued with the concept of mindfulness, even offering a course on the subject at W&L School of Law.

And, on one occasion, he participated in a retreat where he had to steadfastly remain silent for days. Although it was typical of his quest for new insight, some of his colleagues found the idea of Larry adhering to a vow of silence amusing. “How could he be quiet?” Dillina W. Stickley, one of his law partners, wondered. “Whenever he was enthused about something, he had to tell everyone about it.”

His voice, vision and passion for ADR will be greatly missed.

Sam Jackson, who chaired the Joint ADR Committee from 2010 to 2012, had the pleasure of working with Larry Hoover on many committees and bar projects. He now lives in Chapel Hill, North Carolina, teaches at UNC Law School and continues to work as a mediator.

Frank Morrison offers a glimpse of Larry Hoover’s personal manner in the following anecdote, which Frank shared at a celebration honoring Larry’s career in April 2016:

After three sessions of a collaborative case, I asked Larry what I should do and how I should handle the situation. In his wonderful mediator style, Larry said “tell me about it.” I told him that in these three collaborations the same pattern happened each time. The parties would come in initially and deal with the issue at hand, and then there was a period of time in the middle of each of these sessions where they would yell at each other and use profanity and then after a break would come back and get matters resolved and that this just didn’t seem very collaborative to me. And Larry asked me: “Are either of the parties harmed or do they feel unsafe during those periods of high-conflict exchanges?” No, I answered,
Lawrence H. Hoover, Jr.

Continued from page 3

in fact, they appeared to enjoy them and Larry said, “Well, why do you think you are bothered by this?” Well, I guess somehow, I felt like “being nice” to each other was an essential of a collaborative case and that there could not or should not be any rudeness or insults allowed in the collaborative process.

I then realized for the first time that their different conflict resolution style was working for them and that I should not impose my judgment on what an appropriate conflict resolution style should be on them and told Larry so. Larry said that he agreed with my analysis, which of course had been Larry’s insightful read on this situation from the beginning. Larry, however, rather than initially stating his opinion, helped me analyze the situation and come up with my own conclusion, which he then supported and helped me with an important self-awareness that I really needed.

If you have a point of view or ADR story that you would like to share in an upcoming newsletter, please email Bill Culbreth at william.culbreth@workcomp.virginia.gov with your ideas.

Where great mediations happen

The right environment can make a difference. A well-designed, flexible and comfortable meeting space can serve as the backdrop for a successful mediation session.

VBA on Main offers multiple light-filled rooms, both large and small, providing you and your clients a relaxing and cheerful environment, in which to solve complicated legal situations. These facilities are free, as a VBA member benefit.

Reserve easily at vba.org/reserve
MARK YOUR CALENDARS

Date: March 20, 2020
Time: 10:00 a.m. - 5:00 p.m.
Networking Reception: 5:00-6:00 p.m.
Place: University of Richmond
Jepson Alumni Center

Please join us, along with a wide range of stakeholders and our co-sponsors Resolution Virginia and Virginia Mediation Network, to assess where we are now and how we can best meet the dispute resolution needs of the future.

JADRC members have a lot to share with this statewide initiative - your insight and participation are needed! For more on the Summit and registration, click here.

Sponsorship & Exhibitor Opportunities

Can You, Your Law Firm or ADR Practice Contribute?

The Dispute Resolution Summit is made possible in part by a grant from the Virginia Law Foundation. Additional sponsorship dollars are needed to help support a broad range of necessary functions and enable the participation of many dispute resolution stakeholders.

Sponsorship opportunities include the following, and can be made by check, credit card, or PayPal.

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There is also an opportunity to sponsor specific parts of the meeting such as the Continental Breakfast ($1,000) and the Networking Reception ($2,000). A limited number of exhibitor tables will be available for $500. To reserve an exhibitor table or to sponsor the breakfast or reception, please contact Christine Poulson, Executive Director of Resolution Virginia, at 540-294-0732 or email info@resolutionvirginia.org.

Sponsors are asked to make their contribution as early as possible to help pay event preparation costs and to give the Summit planners some idea as to the number of fee waivers and amount of travel/lodging assistance that will be available. Thanks in advance for your support!

Keynote Speaker:
Toby Guerin, J.D., Managing Director, Center for Dispute Resolution, Maryland Carey School of Law; Convener, 2017 International Mediation Institute’s Global Pound Conference in Baltimore, MD
On a late summer afternoon in 1999, I sat at counsel table, among stacks of brown accordion files stuffed with manila folders. Two 20-year-old men, looking like a couple of students wearing dress shirts and pants, walked in and sat at opposite tables arranged parallel to the oversized judicial bench at the front of the courtroom. The hearing proceeded like hundreds of other plea hearings. The judge called the case. “State versus Jones. Ms. Waugh, present for the state, and Mr. Miles, for the defendant.”

I stood and spoke. Defense counsel stood and spoke. We continued, taking turns as though our dialogue was scripted: the judge, the probation officer, the judge again, the defense counsel. The defendant, Will Jones, stood behind the counsel table, beside his counsel. He began his allocution, required before the judge could accept the guilty plea. Will described how the two young men spent the afternoon together playing video games at the victim’s house. They argued. Alex, the other young man, took off running. Will picked up a gun and shot toward him. A bullet ricocheted, hitting Alex in the calf. Will understood that Alex had a long recovery requiring surgery and physical therapy.

Next, the defendant did something that surprised me, although I knew it was coming. He walked over to the table, where I sat with Alex and his grandfather. They stood. Will looked at Alex, extending his hand and apologized. Alex shook it, and Will turned to the grandfather and said that he was sorry, promising to pay restitution for outstanding medical bills. Will returned to his seat. The judge accepted the plea and, consistent with the recommendations of probation and the victim, placed him on probation.

I had never witnessed such a genuine, heart-felt public apology during a court proceeding. That day, the defendant’s words of regret and accountability to the victim and grandfather addressed one of the needs often articulated during my tenure as an assistant prosecutor. When I assured victims that the judge would order a lengthy court sentence or payment of restitution, many complained, telling me that they really wanted an explanation and an apology.

About the same time, copies of a VORP (Victim-Offender Reconciliation Program) newsletter began arriving in my office mail slot, describing a program:

The VORP model brings offenders and victims together for a face-to-face meeting to discuss the personal nature of the offense and to negotiate compensation for the victim. Participation is voluntary. Trained volunteers from the community conduct the mediation after intake sessions with everyone involved. Their role is to facilitate communication, not to impose a settlement.

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Brenda Waugh is a lawyer and mediator with offices in Berryville, Virginia; Charles Town, West Virginia; and Washington, D.C. Her early work as an assistant prosecutor in West Virginia created an interest in finding ways to address harm experienced by victims, and to the growing field of restorative justice. She has been an active proponent of restorative justice approaches in the law ever since.

Brenda has presented on the topic of restorative justice at conferences throughout the United States and Canada, and has published related articles for journals at Yale Law School, Washington University and the Association of American Law Schools. She has served as adjunct faculty at the West Virginia University College of Law and Eastern Mennonite University, and is a member of the District of Columbia and Northern Virginia Collaborative Law Practice Groups.
Restorative Justice

VORP was the first restorative justice program implemented in the United States, creating a process that provided the victim and offender with the opportunity to participate in a facilitated dialog. Over time, the structure of Victim Offender Dialogs (VOD) changed. Today, criminal judicial processes and juvenile proceedings in several states incorporate the method in pre- and post-conviction legal proceedings. In Virginia’s program, as part of the Department of Corrections’ Victim-Centered Programs, a victim may request a VOD and the program provides the support services to prepare and facilitate the meeting.\(^3\)

Other restorative justice-based processes that address wrongdoing in Virginia include the Family Group Conference (FGC) (a specialized meeting convened to include victims, offenders and supportive persons in matters involving juvenile offenders), Family Group Decision-Making (FGDM) (stakeholders and support persons assembled to work in a collective facilitated meeting to address harm and create a remedial plan in child dependency matters), sentencing circles (a facilitated dialogue structured in a circle restricting conversation sequentially to one speaker at a time), and circles of account and supportability (a community-based program where stakeholders and/or volunteers form a small group to provide resources and hold offenders accountable, often at the end of a period of incarceration). Many Virginia school systems – such as those in Fairfax County, Loudoun County, Chesterfield County, Harrisonburg, and Roanoke – include restorative justice in their school discipline processes.

As I read the VORP newsletters some 20 years ago, I wasn’t sure how to answer the question: “What is restorative justice?” Looking for answers, I enrolled in the master’s program at Eastern Mennonite University’s Center for Justice and Peace (CJP). I remember Professor Howard Zehr’s explanation in my first restorative justice class beginning, “It’s just common sense.” The Little Book of Restorative Justice provides a concise definition: “Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, to heal and put things as right as possible.”\(^4\)

Professor Zehr often reminded us that most conflict resolution practices are not 100% restorative, but often fall onto a continuum. During my studies at CJP, I continued to work in my law practice, daily reconsidering my strategy in working with each client. I’d imagine how, on that day, in that setting, I could increase the restorative response to harm or conflict. I continue in that work today as a mediator, and as a “restorative lawyer.” As a result, I have expanded ADR methods in my practice, including collaborative practice, transformative mediation, and structured negotiation. I find my clients are more satisfied and I am confident that I am meeting my ethical obligations under Rule 1.4 of the Virginia Rules of Professional Conduct to educate clients on their options to resolve their legal conflicts.

Just as I have incorporated restorative justice into my legal practice, the same principles often inform my mediation practice. Mediators should be informed about restorative justice and appropriately incorporate it into a mediation practice, for several reasons:

- Mediators have an ethical duty to understand multiple methods of ADR and to inform clients as to the options available to them. If a case involves wrongdoing, a referral to a restorative justice process may be the best action a mediator can take.
- Restorative practices, such as a talking circle, may be incorporated into a mediation when many parties are involved to help assure equal participation of all parties.
- Restorative justice requires that we look beyond the law – the legal rights and legal duties – and identify the needs and obligations of the parties impacted by harm. A similar examination provides a mediator, and the parties, with another lens to examine the conflict giving rise to the mediation.
- Understanding “wrongdoing” and harm may be necessary for some mediations. Restorative justice provides a non-adversarial practice to explore the wrongdoing and seek ways to make it right, for all of the parties impacted.
- The power of an apology and an attempt to repair harm cannot be lost. These elements may be more critical in mediation than we realize. Restorative justice helps us to be open to this possibility.

\(^3\) In Virginia’s program, as part of the Department of Corrections’ Victim-Centered Programs, a victim may request a VOD and the program provides the support services to prepare and facilitate the meeting.

\(^4\) The Little Book of Restorative Justice provides a concise definition: “Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, to heal and put things as right as possible.”
The heart of my practice as a restorative lawyer and mediator requires that I minimize (at least suspend) a focus on precedent and sentencing guidelines. The first step requires getting to know the people seated before me and working to understand how they have been impacted by harm and conflict. Then, we may collaborate to look for a healing outcome, one that addresses the unmet needs and increases the restorative potential of my mediation or legal services. It really is just common sense!

1. The names of the parties and defense counsel have been changed for this article.

2. While I no longer have copies of those early newsletters, I suspect that it may have been from this organization: San Luis Valley Victim Offender Reconciliation Program, http://restorativeprograms.org/wp-content/uploads/2012/04/Summer-Fall-2003.pdf (last visited October 22, 2019).


Keeping Neighbors Neighborly

ADR Opportunities for Property Owners’ Associations

by E. Stanley Murphy

Property Owners’ Associations are an increasingly important aspect of real estate ownership. Particularly in rural areas where governmental services can be scarce, owners depend upon this type of common-interest association to supply everything from roads to recreational facilities.1

These amenities are managed as common elements through an owners’ association, which is usually a nonstock corporation.2 Maintenance, upkeep and replacement of the common elements usually are funded through assessments issued by an association board of directors under a document known as a “declaration.”3 The association’s work is governed by Virginia statute4 and by regulations of the Virginia Department of Professional and Occupational Regulation.5

Disputes regarding the operation of associations and the meaning of governing documents are not uncommon, frequently involving the payment of assessments, the propriety of assessments, the management of funds intended to replace capital assets and the regularity of corporate governance.

Consequences of litigation can be significant for common-interest associations and owners alike because of statutory provisions awarding attorneys’ fees to the prevailing party.6 As a result, there can be a chilling effect on some suits, while litigious or contentious owners can be encouraged to maintain suits for spite and personal vindication rather than seeking redress. Small arguments sometimes result in large legal bills.7

Fortunately, Virginia common-interest law provides an alternative to litigation. Virginia Code § 55.1-1828 (C) provides:

A declaration may provide for arbitration of disputes or other means of alternative dispute resolution. Any such arbitration held in accordance with this subsection shall be consistent with the provisions of this chapter and [with Virginia arbitration and award laws8]. The place of any such arbitration or alternative dispute resolution shall be the county or city in which the development is located, or as mutually agreed to by the parties.

Although the section appears to express a preference for arbitration, its language is broad enough to include mediation (“or other means of alternative dispute resolution.”)

Declarations typically are filed by developers with owners’ associations organized at the time of the declaration. To promote alternative dispute resolution as a way to avoid litigation, developers should be encouraged to include a provision such as the following model language for the resolution of disputes:

Disputes under this agreement. In accordance with Virginia Code § 55.1-1828 (C), disputes concerning the interpretation of this Declaration, its enforcement or rights arising under the declaration shall not be litigated. All such disputes shall be submitted to binding arbitration and conducted in

Continued on page 10

E. Stanley Murphy is a partner with the White Stone, Virginia, firm of Dunton, Simmons & Dunton, LLP. Primarily a litigator, he also frequently advises property owners’ associations regarding community interest law. He is an alumnus of the College of William & Mary and graduated With Distinction from the George Mason University School of Law.

Mr. Murphy, who has served as both a mediator and arbitrator, frequently encourages resolution of complicated litigation through alternative dispute resolution. In 2018, he settled more than $1 million in claims through arbitration.
Keeping Neighbors
Continued from page 9

accordance with Virginia Code § 8.01-577 et seq. and the requirements of this section of the Declaration.

The arbitrator shall be an attorney or a retired judge, whose power shall be limited to interpretation and enforcement of the Virginia Property Owners’ Association Act (VPOAA) and granting the relief that a Virginia circuit court is authorized to grant under that Act.

Nothing in this section shall prevent the parties from agreeing to mediation or other forms of alternative dispute resolution.

Alternative dispute resolution under this section shall be the exclusive means of resolving disputes and enforcing rights under this declaration except that liens for unpaid assessments may be filed against an owner’s property as provided for in VPOAA. Nevertheless, actions to enforce any such lien, and amounts claimed to be owing for assessments, shall be subject to this section.

The award resulting from any arbitration may, at the option of the prevailing party, be reduced to judgment, as provided in Virginia Code § 8.01-581.012.

Arbitration shall be initiated by written demand served by the party desiring to enforce rights under the declaration. Any such demand shall include a detailed statement of that party’s claim and the legal basis for the claim under the Declaration, the Association’s bylaws, and/or Virginia statutory law. Within 30 days of receipt of the demand for arbitration, the responding party shall fully set forth its reasons, if any, for opposing claims contained in the arbitration demand. Such response also shall include a complete statement of legal support for that party’s position, citing relevant sections of the declaration, bylaws and/or Virginia law.

Unless otherwise agreed to by the parties, the arbitrator shall not consider any other claims or defenses. Absent written agreement of the parties, any such arbitration shall be conducted within 90 days of the written demand for arbitration.

The costs of arbitration shall be paid by the nonprevailing party. The arbitrator’s award shall specify the prevailing party. If the arbitrator does not fully accept the claims of either party, the award shall specify, by percentage, the extent to which each party has prevailed and arbitration costs shall be paid by each party according to the such assigned percentages.

No written discovery shall be allowed, except for that permitted under Virginia Code § 8.01-581.06.

Small arguments sometimes result in large legal bills.

Although a declaration is typically written by a project developer, owners in a common-interest association may, with a sufficient number of votes, amend the declaration to include arbitration or another alternative dispute resolution.9

An award of attorneys’ fees for the prevailing party probably cannot be written out of an ADR provision in the declaration, but the amount of attorneys’ fees resulting from an ADR-based resolution likely will be significantly less than attorneys’ fees actually incurred in a litigated claim. Additionally, the model language proposed by this article assigns pro rata responsibility for arbitration costs. Attorneys’ fees, if allowed, certainly will follow such an apportionment.

ADR certainly will reduce the expense of maintaining claims in at least one other important way. Discovery, which would be available in a litigated claim, is severely limited by the Virginia Uniform Arbitration Act, which is a part of the arbitration title. No written discovery is available and the only permitted deposition is for a witness who cannot be subpoenaed or who is unable to attend a hearing.

Because issues arising under a declaration and related Virginia law can be complicated, the model ADR clause suggested above includes a provision for development of the issues as part of the demand and response.

Mediation or other alternative dispute resolution is an ideal way to resolve disputes involving property owners’ associations, whose

Continued on page 11
resources usually are limited, and whose assessments are best spent maintaining and improving community amenities. ADR also is an effective way to avoid special assessments or increased annual assessments, which frequently are required to defend protracted litigation against or by the association.

Common-interest disputes always pit neighbor against neighbor. The less formal, less expensive and more expeditious resolution provided by alternative dispute resolution promotes community harmony while saving money.

Endnotes

1. This article deals specifically with property owners’ associations but the principles discussed are generally applicable to condominium associations and cooperatives. See generally Code of Virginia, Title 55.1, Subtitle IV, Chapters 18-21.
5. 18 VAC 48-70-10 et seq.
7. See Farran v. Olde Belhaven Towne Owners’ Ass’n, 83 Va. Cir. 286, 293 (Fairfax Circuit Court 2011) (rejecting argument that plaintiff “should not be allowed to essentially bankrupt the HOA with a lawsuit every time they feel the HOA has wronged them in some fashion because this unfairly burdens the rest of the property owners”).
8. Va Code §§ 8.01-577 et seq.
9. Check the declaration first. If there is no provision for amendment or no specified number of votes required for amendment, Virginia Code § 55.1-1829 controls.