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THE BAR ASSOCIATION OF MONTGOMERY COUNTY, MD

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PRESIDENT'S MESSAGE

By Lauri E. Cleary

TECHNOLOGICALLY SAVVY IS THE NEW COMPETENT

Science fiction writer (and non-lawyer) Larry Niven said: "Ethics change with technology." Writer/activist Stewart Brand put it in more menacing terms: "Once a new technology rolls over you, if you're not part of the steamroller, you're part of the road." A new technology began to roll over us well over a decade ago, when email was fully embraced and the exchange of enormous volumes of email and other electronically stored information ("ESI") became commonplace in our world. Email dramatically changed the way we communicate with colleagues, clients, witnesses and the rest of the world outside our offices. It led to the discovery of ESI becoming the rule rather than the exception in commercial and other types of litigation, where courts began to face the difficult problem of addressing the significant, and occasionally prohibitive, costs incurred in the process.

Many of us who litigate were nudged — or dragged — into the electronic age by the advent of e-discovery, with its unique protocols and practicalities. But some litigators have managed to maintain "low tech" practices, remaining blissfully ignorant of *Zubulake* and its progeny. And a good number of lawyers who do not litigate still do not believe they need to keep up with the latest technological advances necessary not only to facilitate their practices but secure their data. Yet we all represent clients with whom we communicate — clients with secrets and confidences that we are ethically and legally bound to protect, and all of whom — like all of us, are vulnerable to hackers. Three years ago, then Attorney General Eric Holder quoted a private security expert who said there were only "two categories" of companies affected by trade secret theft: "those that know they've been compromised and those that don't know yet." This growing danger inspired Congress's nearly unanimous passage of the Defense of Trade Secrets Act earlier this year. And it has inspired material changes to legal ethics rules, as well. Every lawyer has a general duty to remain competent, and the question we all must answer is what constitutes competency in this digital age when safeguarding client information is more complicated than ever before?

The Comments to the Maryland Lawyers' Rule of Professional Conduct describe our duty to protect client information (Rule 1.6) tell us that we must "act competently ***to safeguard information*** relating to the representation of a client ***against inadvertent or unauthorized disclosure*** by the attorney or other persons who are participating in the representation of the client or

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Bar Luncheon Schedule

September 6, 2016
Speaker:
Diane Kilcoyne, Esq. of ESI Group, LLC will discuss MD attorneys' duty of competency with respect to e-discovery, data privacy, cybersecurity and other legal technology issues

October 4, 2016
November 1, 2016
December 6, 2016
February 7, 2017
March 7, 2017
April 4, 2017

Rockville United Methodist Church
112 W. Montgomery Ave.
Rockville, MD
12:15 p.m. - 1:00 p.m.

If you have a dietary restriction and require a special meal, please contact Cindy at Cindy@barmont.

24th Annual Golf, Tennis Charity Classic & Silent Auction

Monday, October 10, 2016
Manor Country Club

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Register Now ...
See Insert This Issue

BINDING MEDIATION?

Kenneth A. Vogel, Esquire

Binding Mediation? ADR comes in many flavors. The chocolate and vanilla of ADR are Mediation and Arbitration. In Mediation, the parties sit down with a trained mediator. The mediator engages the litigants in a conversation which, the parties hope, will result in a negotiated resolution of their dispute. In Arbitration, the arbitrator acts as a private judge. S/he hears evidence and decides for the parties how the dispute will end.

The Montgomery County Bar ADR section recently conducted a CLE on types of ADR in Maryland. I presented a program entitled Alternative ADR. There are new flavors of ADR. One flavor I discussed was Binding Mediation.

Binding Mediation means that the parties begin their session in a traditional mediation format. They meet. They discuss. They caucus. They negotiate. During the caucus sessions, the parties and the mediator discuss the merits and weaknesses of each parties' respective cases and their negotiation position. By definition, caucus discussions are *ex parte.* A party in a mediation may reveal things to the mediator that they do not want the other side to know. They tell the mediator things that they would not tell a judge. Even though the mediator acts as a neutral, the parties try to convince the mediator that their side has merits and that the other side's legal or factual positions are weak.

Assume that the parties are unable to settle their dispute. The mediation ends. The parties continue down the litigation track to trial or arbitration. However, the mediation does not have to end. Might the parties, perhaps suffering from litigation fatigue, develop trust and confidence in the mediator? They can decide to let the mediator resolve their case. Presumably the mediator has developed a rapport with the litigants. The mediator has become familiar with some of the facts of the dispute and perhaps even with the governing law. When the parties make the decision to switch to binding mediation, the mediator becomes the decision maker. S/he resolves the dispute. It's a one way street. Once a mediator becomes a decision maker, s/he should never go back to a peacemaker role.

A benefit of private ADR is that the parties can dream up their own flavors. They can make up their own rules. Whatever they want to do to resolve their dispute is fair game as long as they all agree.

The California Fourth District Court of Appeal considered an appeal of a $5 million decision entered in a binding mediation. In *Bowers v. Raymond J. Lucia,* 12 C.D.O.S. 5876 (2012), the parties set up their own process. They referred to it using phrases such as "mediation/binding baseball arbitration"; "mediation with a binding arbitration component" and "binding baseball arbitration." The mediator himself described it as a "Med/Arb, baseball high-low atmosphere." While the names used by the parties varied, the parties were clear as to the process. They agreed to first spend a full day in mediation attempting to resolve their dispute. If they could not reach an agreement, they would submit their bottom line figures to the mediator. Each side would put forth a single number - a demand or an offer. Liability was not in dispute. The parties each picked a number ranging from a low of $100,000 to a high of $5 million. This is called bracketing. The mediator would then make the decision. The mediator had to pick one of the two figures which he felt closest reflected the plaintiff's damages. The binding mediation decision would then become a legally enforceable judgement in San Diego County California Superior Court. In theory, the parties' numbers would be tempered by reasonableness. If, hypothetically, one side put forth a $200,000 offer and the other side put forth a $2 million demand, and if the arbitrator felt that it was a $1 million case, the $200,000 offer would prevail because $200,000 is closer to $1 million than is the $2 million figure. On the other hand, had the demand been $1.2 million, the party tendering that figure would have received $1.2 million as it is closer to the arbitrator's $1 million valuation. In baseball arbitration, the arbitrator calls balls and strikes. There is no such thing as a compromise award. One side or the other gets exactly the amount that they proposed.

In *Bowers,* both parties took extreme positions in the binding mediation. One offered $100,000. The other $5 million. The mediator-turned-decision maker selected the $5 million figure and issued his binding decision in that amount. The party against whom the $5 million award was entered appealed to the courts. There were multiple attacks on the process in the appeal, but the process was upheld. The mediator's decision became a final court judgment.

In another binding mediation case, cited in *Bowers,* CA Fourth District Justice David Sills opined about *Lindsay v. Lewandowski,* 139 Cal.App.4th 1618 (2006) that he could "think of nothing more self-contradictory than 'binding mediation.'" A concern is that the parties will not exhibit openness and candor if the mediator will at the end of a failed mediation determine the winner and the loser.

The parties in *Bowers,* so said the losing side, did not fully map out how they wanted the process to unfold. There was no evidentiary hearing. The mediator was instructed in the ADR agreement to decide the case at the conclusion of the mediation. Therefore, the mediator only had the information about the underlying dispute that the parties told him about during their caucuses. He did not hear any evidence. He saw no documents. He heard no witnesses. None of the formalities of a traditional arbitration hearing were afforded the parties. The mediator's knowledge of the case was limited to what the parties told him or withheld from him.

The *Bowers* trial court served up a victory to the winner of the baseball arbitration. The appellate court affirmed. The courts found that the parties were fully cognizant of what they were agreeing upon. There was mutual consent. The parties were clear and unambiguous in their written agreement creating the recipe for their ADR process. The parties had only themselves to blame if they did not provide for an arbitration hearing with evidence and testimony at the conclusion of the mediation. The decision was binding and enforceable.

When litigants select their own flavor of ADR, they need to know the ingredients. Otherwise, the taste of the outcome might not be to their liking.

Kenneth A. Vogel is co-chair of the Montgomery County Bar ADR Section. He is a principal in Bar-Adon & Vogel, PLLC. He is also the Maryland/DC State Director for Construction Dispute Resolution Services, an international company exclusively providing ADR services to the construction industry.