



# ABRAMS LANDAU, LTD.

L a n d a u L a w S h o p

SUMMER 2002

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## ARBITRATION AND MEDIATION:

### Success with Alternative Dispute Resolution

"I'll see you in court!" is the familiar refrain when a case cannot be settled by the parties to a lawsuit. While more than 90 percent of all civil cases do settle, personal injury and Workers' Compensation claims increasingly are being set for trial because the parties cannot agree on all the issues.

At **Abrams Landau**, we have had success with both arbitration and mediation of personal injury cases and Workers' Compensation claims. These procedures, which are usually explored when settlement negotiations have run their course (or are not feasible), have a number of benefits for our clients. What are the benefits?

1. First, they can usually be conducted more quickly than trial.

2. Second, they are much less expensive than taking a case to a full jury trial, because the doctors and other necessary expert witnesses do not usually need to attend. The predominant cost item in most injury trials is the several thousands of dollars paid, in advance, to subpoena and secure the expert medical, engineering, and technical testimony.

3. Third, there is no appeal, thus no delay in the client's receipt of funds.

4. Fourth, they are private, confidential proceedings; no record, transcript, or outsiders are involved.

5. And finally, we are often able to bring a case before an arbitrator or mediator with little downside. With mediation, we can walk away with no prejudice to our case, and with arbitration, we have negotiated a "High-Low" agreement beforehand, meaning our client is guaranteed an acceptable minimum recovery regardless of the judge's decision!

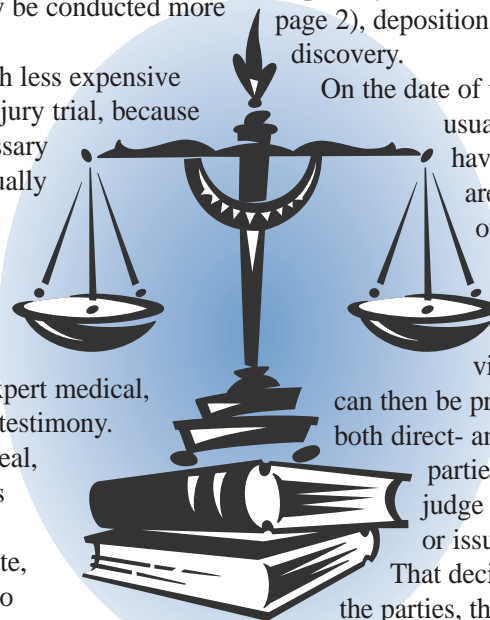
### What is ARBITRATION?

In an arbitration, the parties to a dispute submit their differences to the judgment of an impartial party appointed by mutual consent. Usually, a retired Circuit Court Judge is hired by the parties and the arbitration is held either at a local courtroom, one of the lawyers' offices, or some neutral site. Medical records, evidence of losses, photographs, x-rays, and other documentary evidence may be sent in advance of the date of the arbitration by both sides, and the plaintiff may have to undergo a medical examination (see Meredith, "The IME and the patient's right to privacy," Landau Law Shop, Spring 2002, page 2), depositions, and/or other pretrial discovery.

On the date of the arbitration, both sides usually tell the judge what issues have been agreed to, what issues are up for resolution, and then outline their cases. When there is a "High-Low" agreement, the judge is not told the amounts. Live and videotaped witness testimony can then be presented. There is usually both direct- and cross-examination of the parties and their witnesses. The judge can then rule from the bench or issue a written decision later.

That decision becomes binding upon the parties, the judgment is paid, and the court case, if filed, is dismissed. The process has generally taken several hours (a half day or less), and the costs for the arbitrator have been about a thousand dollars per side.

**EXAMPLE:** In the case of *Jackson vs. Payton*, Circuit Court of Fairfax #191798, our client was rear-ended while driving his company's painting truck. He had received



PERSONAL INJURY  
WORKERS' COMPENSATION  
SOCIAL SECURITY  
DISABILITY  
OCCUPATIONAL DISEASES

• Trial attorney  
• Free consultation  
• No recovery. No fee.  
We do not get paid unless you do.

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Our agenda is clear...justice for all.

## ARBITRATION AND MEDIATION:

### *Success with Alternative Dispute Resolution* (continued from front page)

some initial Workers' Compensation benefits and had missed intermittent days after returning to his regular job, but his time limit had expired prior to retaining **Abrams Landau, Ltd.** (see related article on the continuing two-year time limit in comp claims), and he was facing neck surgery three years after the December 1998 crash. The insurance company offered no more than \$22,500 when **Abrams Landau** took over the case. We filed suit to protect the statute of limitations and contemporaneously filed to reopen his time-barred comp claim by seeking permanency benefits. Because his case would require the testimony of three or four doctors and entail trial costs of almost \$10,000, we explored binding arbitration to avoid the uncertainty, costs, and delays of trial and appeals. We also knew that the defendant had limited insurance coverage and no significant assets with which to pay any judgment over his policy limits.

We were able to get a "High-Low" format that guaranteed our client at least \$20,000, and protected the insurance company from paying its policy limit of \$100,000 and the defendant from an excess verdict. The defendant agreed not to fight liability, and the medical reports and bills were all admitted into evidence, as were our wage-loss documentation and medical illustration. The issues in controversy were: causal relation of the neck surgery three years postaccident and the nature and extent of the injuries and damages. After deliberating for a week, the judge awarded \$72,500—\$50,000 more than the highest offer! The claimant was able to repay the comp lien, keep his Workers' Compensation claim open, and can now pursue his state benefits without having to fight on two fronts, having received a significant net, tax-free tort recovery.

### WHAT IS MEDIATION ?

Mediation, on the other hand, attempts to bring about a peaceful settlement or compromise between disputing parties through the intervention of a neutral conciliator. Mediations, unlike Mr. Landau's father-in-law's cooking, are nonbinding and almost risk-free. If mediation does not resolve the issues presented, the parties merely pick up where they left off. The Virginia Workers' Compensation Commission has trained mediators that it has sent to **Abrams Landau** on a number of occasions to help resolve single- or multiple-issue claims. The Ombudsman's Office has trained specialists who have helped the parties avoid the "all or nothing" outcome of a full evidentiary hearing before a Deputy Commissioner. "There is no shortage of issues ripe for resolution by mediation...and there is [now] another means of decision-making at [our] disposal." (See "Mediating Workers' Comp Claims," quoting Doug Landau, in *Virginia Lawyers Weekly*, at B-1, [www.valawyersweekly.com](http://www.valawyersweekly.com), 10/18/99.)

Examples of mediations handled by Mr. Landau include

payment for newly developed knee cartilage injections for a claimant whose case was settled but who still had medical benefits available. The insurer in that claim argued that the procedures were too new to even appear on their reasonable and customary cost schedule or auditing programs. A conference call was set up by the Commission's Ombudsman's Office, with defense counsel, the adjuster, the treating doctor's office manager, the claimant, and Mr. Landau together. The result was that the treatment was approved to be paid for at a rate lower than what the doctor sought, but much higher than what the carrier had thought it would pay. And there was no delay in waiting for a written decision or appeals.

Another instructive example of the benefits of Alternate Dispute Resolution through the Ombudsman's Office is the Mullins claim. (See *Virginia Lawyers Weekly*, October 1, 2001, Verdicts and Settlements, 16 VLW 454; [www.valawyersweekly.com](http://www.valawyersweekly.com).) The client had a car crash on the job and sustained multiple fractures. The lawyer for his auto accident, Rick Shadyac, did an excellent job and settled the car crash case for the policy limits of \$100,000. However, the injuries were so serious, other action was needed. The client also had a related case pending against the nursing home where he fell out of the bed postoperatively, and so did not want to be fighting on multiple fronts and spending his limited net tort recovery on that claim, which might take years.

In addition to the state Workers' Compensation award, at **Abrams Landau**, "We were able to win Mr. Mullins' Social Security Disability Income case. Social Security was deducting what he was receiving each month in Workers' Comp benefits, so we set up mediation in Richmond in order to try to settle his comp claim in such a manner that he could maximize his federal disability benefits and provide a guaranteed income stream to his family. The Ombudsman's office arranged for several mediators to meet with our clients, the defense counsel from Georgia, an annuity expert, and the insurance company representatives. This mediation took all day but resulted in a unique settlement that combined

- (1) a lump sum of almost \$150,000
- (2) periodic payments of \$318.55/month, for the claimant's and his wife's lifetimes, with ten years guaranteed
- (3) \$120/month for life, with five years guaranteed (these combined payments had a present value of approximately \$215,000)
- (4) medical benefits to continue for a year or until the start of his third-party nursing home liability case, whichever was sooner
- (5) three months of continued TTD benefits
- (6) the insurance company's cooperation and assistance in the third-party litigation, with its lien intact for the pelvic injuries only and the right to take over such litigation if the plaintiff's third-party counsel does not advance the case.

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# Compensation client's educational successes

One of the weaknesses of the Virginia Workers' Compensation Act is that while medical and wage-loss benefits can be ordered by the Workers' Compensation Commission, vocational rehabilitation, education, and job placement cannot. Penalties can be awarded when there has been illegal delay of weekly benefits, but not when retraining or educational opportunities are denied.

The Virginia Workers' Compensation statute states that these vocational rehabilitation benefits "MAY" be provided by the employer or insurance company, not "SHALL." What most insurers do, once a claimant has been released to light duty work, is hire a private vocational rehabilitation company to put the injured worker into a job as soon as possible in order to save the amount of money the company has to pay each month. If that job is inconvenient, a "dead end" with no opportunities for advancement or benefits, or results in termination, then the claimant's comp benefits can be cut off. That is why at **Abrams Landau** we encourage our clients to register with the state, local, and federal agencies that can assist with job placement, training, and education, such as the Virginia Department of Rehabilitative Services (DRS) and the Maryland Department of Education, both of which have offices all over the state.

By way of example, a Reston client sustained injuries to his neck and back, and was unable to return to the physically demanding work he performed for UPS. He found a part-time, light-duty job at Target in the electronics department, but the insurance company thought he was "under marketing" and threatened to obtain a "labor market survey" and "take immediate steps to reduce his temporary partial [disability payments] rate." When that did not cause this UPS driver to capitulate, the carrier hired a private "disability management" agent, who tried to place the client into a light-duty sales position. The position was in

cemetery sales! Talk about a "dead end job"!

At **Abrams Landau**, we were able to get this client registered with DRS, and he was able to complete the Information Technology Certification Training program. How could he afford this schooling? He was able to get this advanced computer training while still receiving his partial wage-loss benefits (because he was able to keep his 20-25-hour/week job at Target). Furthermore, we were able to arrange for DRS to pay \$4,897.50 towards his tuition, with Liberty Mutual Insurance paying an equal \$4,897.50. At the conclusion of his training, he was able to secure a job in his new field (with benefits, the potential for advances, and little risk of reinjury), and we were able to get his claim settled for about three years of total wage-loss benefits and medical care available for four additional years. We try to achieve a "win-win" situation whenever possible. Motivated clients, like this gentleman, are able to improve their situation, even in the face of permanent injury and disability, and get on with their lives.

Another client of ours, who fell from third-story scaffolding and suffered severe brain and facial injuries, never finished high school before he went to work at age 18. He was able to register with the North Carolina Department of Education and, with their help, complete the requirements

for his G.E.D. He also successfully found employment outside Virginia that enabled him to qualify for child care. It is our understanding that this 24-year-old man has now been accepted to the college curriculum at the local community college. Abandoned by his prior lawyer, we were able to get him permanency, medical, and other benefits as the result of a hearing in Alexandria. Mr. Landau has visited with the claimant and his mother in West Virginia and looks forward to this young man's continued success.

These are just two examples of clients who have successfully completed high school, technical or computer training, or college education while "out on comp." Far from suggesting that our clients sit back and do nothing while receiving their weekly disability payments, at **Abrams Landau, Ltd.**, we take a proactive approach, anticipating an eventual return to gainful employment and providing information so that clients from all over the United States can achieve success like the two individuals described above. Bottom line to the injured workers we are trying to help: **Make use of the time you are out**

**of work due to disability. Explore your options. Look out for yourself, your family, and your future. Try to improve your situation through education, training, and daily marketing efforts.**



*Judge Thomas Fortkort and attorney Douglas Landau outside the Herndon Courthouse. Judge Fortkort arbitrated a personal injury claim, bringing about a settlement for the claimant without going to trial.*



*Deputy Commissioner James Szablewicz and his bailiff heard the first Workers' Compensation hearings held in Herndon this summer. He has also presided over mediations and will be hearing additional cases in August and September in Herndon!*

# Safe children's car seating

Protect your children in your car. Between 1990 and 1999, nearly 17,000 children under age ten were killed in automobile crashes, and millions more were injured. Adult seat belts don't safely restrain the undeveloped bones and muscles of the small bodies of infants and young children.

## Safety restraints

Use child safety restraints, which come in several types.

**Infant seats**—Rear-facing safety seats for babies from birth to about 20 pounds.

**Convertible safety seats**—Change from rear-facing for infants to front-facing for tots weighing 20–40 pounds.

**Booster-with-shield seats**—For children 30–60 pounds who are too large for convertible seats, but too small for adult seat belts.

**Belt-positioning booster seats**—Designed for children weighing 30–60 pounds, these raise children to properly



position the vehicle's seat belt. Some boosters feature a five-point harness attachment.

**Integrated seats**—Manufacturer options in which the child seat is physically a part of the vehicle's seat.

**Safety belts**—Traditional lap/shoulder belts fit securely

across the hips and chest for larger children and adults.

## Suggestions

■ Always restrain every child in a vehicle, preferably in the back seat.

■ Visit the National Highway Traffic Safety Administration's Web site—[www.nhtsa.dot.gov/](http://www.nhtsa.dot.gov/)—for good information on child restraints. Click to the "Child Passenger Safety," "Child Safety Seats—Selecting, Installing, and Using," and "Selecting The 'Best' Child Safety Seat For Your Child" for comprehensive guidance on manufacturers, models, vehicles, and lots more.

■ Do your homework and purchase the best seat(s) you can. Do not select products that may have hard parts, clips that can break, or other design problems that can make your child more prone to injuries.

■ Be sure that the safety seat you purchase for yourself or as a gift for another is designed to be compatible with the vehicle in which it will be used. Read all instructions and install it properly.

■ Drive carefully. Avoid speeding, talking on a cell phone, or doing other things that may be unsafe.



*What can you do if you feel your family has suffered an injury because of a child restraint device? Talk with an attorney who can help you understand your rights.*

# You always need a witness

If a tree falls in a forest and there's no one there to hear it, does it make any sound? Do you remember this old conundrum?

When it comes to personal injuries, such as a slip and fall or an auto accident, it's always best if there is an observer to affirm that the event took place and to bear witness to its details.

If you're upset or in discomfort following an injury, the last thing you're probably interested in is finding someone who will say they saw or heard what happened. But think of this: Should you need to sue to receive compensation for medical bills and pain and suffering, a witness's testimony may be the most important single verification of the injury that you have going for you. When a case is before a jury, the other side's lawyer will look for witnesses to say the accident happened in a way that differs from your recollection. The

opposing lawyer may look for details that may even suggest you were at fault for what happened. Talk about blaming the victim!

So here's what to do. Try your best to get the names, addresses, and telephone numbers of any witnesses to any accident in which you are involved.

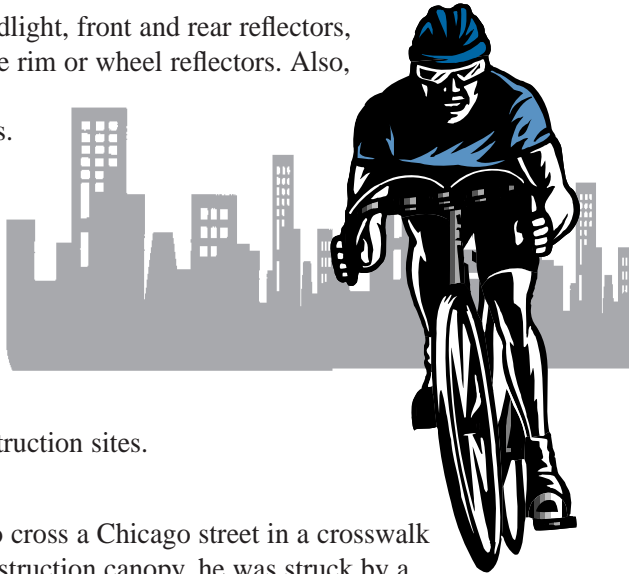
You always need a witness.



## Urban bicycling safety

Urban bicycling requires special riding and safety skills knowledge. Here are some suggestions to help you enjoy touring any city's streets.

- ✱ Keep your bicycle in top mechanical order.
- ✱ Protect your head. Wear a Consumer Product Safety Commission-approved safety helmet.
- ✱ Be visible. Use a headlight, front and rear reflectors, pedal reflectors, and side rim or wheel reflectors. Also, wear reflective clothing.
- ✱ Use rear-view mirrors.
- ✱ Obey traffic signals.
- ✱ Hand-signal stops and turns, and don't weave between vehicles.
- ✱ Stay off sidewalks.
- ✱ Walk your bike across busy streets.
- ✱ Exercise care at construction sites.



### A serious injury

As a bicyclist tried to cross a Chicago street in a crosswalk next to a pedestrian construction canopy, he was struck by a taxi. A law student, the rider suffered paraplegia and must use a wheelchair. The bicyclist's attorney earned a significant settlement for his client by demonstrating that although the city encouraged urban bicycle use, its construction site obstructed visibility and created a hazardous environment for riders.

## ARBITRATION AND MEDIATION...

(continued from page 2)

The parties also agreed to match each other in their investment in the nursing home litigation, thus getting the client the benefit of all of this national comp carrier's resources, while eliminating the risk of having his compensation ending or his family having no income if he should pass away in the near future. Plus, his net recovery in the state comp claim, like the tort recovery, was free of taxes and able to be invested now, without the specter of delay or appeals that could have dragged on for years. You may be asking what the cost was of this mediation in Richmond. Less than \$300 for the exhibits, document duplication, and travel costs.

Mediation and arbitration are often cost-effective, efficient, and fair methods by which to have your case heard and resolved, without inordinate costs, uncertainties, or delays.

At **Abrams Landau**, we encourage our clients to look beyond the (jury) box.

## Hazardous medical products

The following medications and products initially offered relief to people suffering from medical conditions and diseases. However, their side effects may seriously harm users' health.

**Accutane**® (*Roche U.S. Pharmaceuticals*) Acne medication that may cause birth defects.

**Baycol**® (*Bayer Corporation*) Cholesterol-lowering medication that may attack skeletal muscle tissue.

**Benzene** Fuel additive linked to leukemia.

**Celebrex**® (*Pfizer Inc.*) Painkiller that may cause blood clots and stroke.

**Ephedra** Botanical dietary supplement that may lead to stroke.

**Fen-Phen** (*American Home Products Corporation*) Diet drugs that can harm heart valves.

**OxyContin**® (*Purdue Pharma L.P.*) Painkiller as addictive as heroin.

**PPA** (Phenylpropanolamine) Ingredient in over-the-counter diet and cold medications that may lead to stroke.

**Propulsid**® (*Janssen Pharmaceutica*) Gastric reflux medication that may cause irregular heartbeat.

**Protegen Vaginal Slings** (*Boston Scientific Group*) Bladder leakage-stopping implant that may harm adjacent tissue.

**Rezulin**® (*Warner Lambert*) Diabetes medication that may cause a myriad of bad side effects.

**St. Jude Heart Valves** (*Saint Jude Medical*) Heart-valve implant with leak history.

**Sulzer Hip Implants** (*Sulzer Medica*) Replacement hardware that may be contaminated with machine oil.

If you or anyone in your family suffered injuries from these medical products, contact your physician immediately. You may also want to talk to an attorney to help you protect your rights.

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## The Hidden Killer of Workers' Compensation *by Dianna Meredith*

The time limits in Workers' Compensation claims **cannot** be ignored if the claim is to be kept alive. Most individuals know that a claim must be filed within two years from the date of accident or date of diagnosis. Fatal to a Virginia Workers' Compensation claim is the two-year time limit to file a **Change in Condition Application**.

Once an award for benefits has been entered, the claimant's medical benefits are protected for treatment that is reasonable, related, and by referral regarding the injury received in their on-the-job accident. However, wage-loss claims may be terminated when the claimant returns to work at the rate of pay which they were paid at the time of the accident. If this happens, the claimant has **two years** in which he can file for further wage-loss claims for time missed from work or reduced earnings as a result of his work-related injury. The Change in Condition Application must be in writing, accompanied by documentation that supports the claim (pay stubs, off-work slips, etc.), and within two years of the date comp was last due under an award—not when it was received, not when it was ordered, but 24 months from when the weekly payment was due. Plus, a Change in Condition can only go back 90 days prior to the application. So wage loss claimed that is more than 90 days before the Change in Condition Application was filed is time-barred as set forth in Rule 1.2 of the Virginia Workers' Compensation Act. It is also important to follow up on the application to make sure it has been received and is being processed. It is not enough to notify the comp carrier. Prompt notice and filing with the Virginia Workers' Compensation Commission is essential.

The claimant must not be lulled into thinking that his responsibility to file the claim is satisfied by reporting it to his employer. An employer may pay all medical bills and compensation during a two-year period for a claimant's injury, but unless the claimant receives notification from the Virginia Workers' Compensation Commission that an award has been entered on his behalf, she cannot assume her benefits are protected. The employer's voluntary payment of bills and wage loss is not sufficient conduct upon which the employee can rely to excuse her failure to properly file a claim.

If no wage-loss claim has been made within that two-year period, the claimant is barred by the statute of limitations from any further wage-loss claim. If you do not stay on top of these time frames, your Workers' Comp claim can be terminated, leaving you and your family unprotected for any future claims.

### REFERRALS

We want you to think of us as your law firm.

If you have legal matters that need attention, please let us know. If we cannot handle the matter, we will refer you to a competent firm that can.

Please feel free to refer us to your family, friends, and neighbors for their legal needs. We welcome the opportunity to help.



**CALL US. YOU'RE GOING TO  
FEEL A WHOLE LOT BETTER  
ABOUT THINGS.**