

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

MAIN CAPITOL BUILDING
ROOM 418
HARRISBURG, PENNSYLVANIA

TUESDAY, SEPTEMBER 9, 2008
10:00 A.M.

BEFORE :

HONORABLE THOMAS R. CALTAGIRONE, MAJORITY CHAIRMAN
HONORABLE DAN FRANKEL
HONORABLE HAROLD JAMES
HONORABLE KATHY MANDERINO
HONORABLE JOSEPH PETRARCA
HONORABLE SEAN RAMALEY
HONORABLE DON WALKO
HONORABLE JEWELL WILLIAMS
HONORABLE CHRIS SAINATO
HONORABLE MARK COHEN
HONORABLE GLEN GRELL
HONORABLE CARL MANTZ

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ALSO PRESENT:

DAVID MCGLAUGHLIN, SENIOR RESEARCH ANALYST (D)
KAREN COATES, CHIEF COUNSEL (R)
JETTA HARTMAN, COMMITTEE SECRETARY

TRACY L. MARKLE,
COURT REPORTER/NOTARY PUBLIC

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1 ---oOo---

2 CHAIRMAN CALTAGIRONE: This is the House
3 Judiciary Committee Hearing on House Bill 1625.
4 Representative Glen Grell will open up the testimony.
5 And before that, I'd like the panel members and staff,
6 if they'd introduce themselves from my left. Carl.

7 REPRESENTATIVE MANTZ: My name's Carl Mantz.
8 I represent the 187th Legislative District, Berks and
9 Lehigh Counties.

10 MS. COATES: Karen Coates, counsel for the
11 House Judiciary Committee.

12 MR. MCGLAUGHLIN: Good morning, ladies and
13 gentlemen; David McGlaughlin, Judiciary Committee staff.

14 CHAIRMAN CALTAGIRONE: Tom Caltagirone,
15 Chairman, House Judiciary, 127th District, Reading and
16 Berks County.

17 REPRESENTATIVE SAINATO: I'm Representative
18 Chris Sainato, the 9th Legislative District, which is
19 parts of Lawrence and a small section of Beaver County.

20 REPRESENTATIVE MANDERINO: Good morning.
21 Kathy Manderino, 194th District, parts of Philadelphia
22 and Montgomery Counties.

23 REPRESENTATIVE RAMALEY: Sean Ramaley, 16th
24 District, Beaver and Allegheny Counties.

25 REPRESENTATIVE FRANKEL: Dan Frankel, 23rd

1 District, Allegheny County.

2 REPRESENTATIVE GRELL: Good morning, Mr.
3 Chairman. For the record, Glen Grell, member of the
4 Committee as well; and I'm from the 87th Legislative
5 District, which is part of Cumberland County.

6 Good morning; and thank you, Mr. Chairman,
7 for conducting a hearing on House Bill 1625. I want to
8 thank my colleagues for attending and hopefully we will
9 give you the information that you need in order to
10 evaluate the merits of House Bill 1625. I also
11 appreciate the efforts of our staff in preparation for
12 this hearing and the witnesses that you'll hear from
13 shortly.

14 I don't purport to be an expert on
15 arbitration. Although, I am an attorney, I can probably
16 count the number of arbitrations on one hand that I've
17 personally been involved with. So if you have specific
18 questions about the process or the provisions of the
19 legislation, you would probably be better off waiting
20 for either of the testifiers; although, I will certainly
21 do my best to answer for my legislation.

22 Let me just give you a brief overview of
23 House Bill 1625, which is referred to as the Revised
24 Uniform Arbitration Act for Pennsylvania. For many
25 years, Pennsylvania law has allowed arbitrations as an

1 alternative to the court system in resolving primarily
2 commercial disputes. Arbitration is used primarily in
3 this context at least in contract claims and
4 particularly in construction claims.

5 It is an alternative and has proven to be a
6 very effective alternative to the costly and sometimes
7 very time-consuming burdens of a traditional court
8 proceeding, and it serves the purpose of reducing the
9 burden on our court systems by allowing these claims to
10 be resolved through these alternative means.

11 Arbitration has also served to enhance the
12 level of expertise that can be brought to considering
13 these types of claims. Rather than having a judge who
14 is learned in the law or a jury who is perhaps learned
15 in a lot of different things, arbitration panels are
16 typically chaired by or occupied by people who have a
17 particular expertise or knowledge base in the subject
18 matter that is at issue. So it allows the litigants to
19 have an enhanced level of expertise in resolving their
20 claims.

21 As I said, I'll leave the details of this
22 particular legislation to other testifiers; but you do
23 need the backdrop to understand what we're trying to do
24 here. Because from the look of it, it appears to be a
25 fairly voluminous and comprehensive piece of

1 legislation. But keep in mind that Pennsylvania already
2 has a Uniform Arbitration Act. This Act was the product
3 of the National Conference of Commissioners on Uniform
4 State Laws, which as many of you or all of you know, is
5 a group that is comprised of commissioners who are
6 appointed by their respective states to go and convene
7 and to consider uniform laws and to make recommendations
8 for enactment of those laws back to their respective
9 states. The Uniform Arbitration Act was developed
10 through the National Conference of Commissioners on
11 Uniform State Laws and has been adopted by 49 of the 50
12 states.

13 Pennsylvania adopted it in 1980, so we've
14 had 20-some years of experience with the Uniform
15 Arbitration Act here in Pennsylvania. Now, as the
16 commissioners get together annually at least to work on
17 either developing new Uniform Laws or revisions to
18 Uniform Laws that are in existence, they have for some
19 time, considered the possible need to revise the Uniform
20 Arbitration Act.

21 What we see embodied in House Bill 1625 is
22 the product of the work of the Commissioners, and
23 Commissioner Ray Pepe will testify in a little while.
24 He is a member of that Commission on behalf of the
25 Commonwealth of Pennsylvania and has been involved in

1 the development not just of revisions to this Act but
2 revisions in the development of other Uniform State
3 Laws.

4 Since the time of its adoption in 1980, the
5 experience has shown that there were some features of
6 the bill -- of the Act that need to be revised, either
7 because they were not clear enough or the circumstances
8 in the arbitration process have changed significantly
9 since that time.

10 The revisions that are embodied in House
11 Bill 1625 have been adopted either in whole or in major
12 part by 13 other states, and we're presenting House Bill
13 1625 to the General Assembly so that Pennsylvania might
14 become the 14th of those states to update its Uniform
15 Arbitration Act in line with the recommendation of the
16 Commissioners.

17 So with that, we are going to hear today
18 from two presenters who are practitioners and very
19 knowledgeable in this area. Lou Coffey has been
20 involved, and he will tell you his background. He's
21 been involved with arbitrations in Pennsylvania even
22 before we had a Uniform Arbitration Act, so he's very
23 experienced. And also, as I mentioned, Attorney Ray
24 Pepe, who is a member of the National Conference of
25 Commissioners of Uniform State Laws.

1 So without further ado, unless there are
2 specific questions for me about the legislation, I will
3 turn it over to our two witnesses to give you the
4 details of the Bill.

5 Thank you, Mr. Chairman.

6 CHAIRMAN CALTAGIRONE: Thank you,
7 Representative Grell. Are there any questions from the
8 other members?

9 If not, come on up.

10 REPRESENTATIVE GRELL: Thank you.

11 CHAIRMAN CALTAGIRONE: We'll next hear from
12 Louis Coffey, Esquire, Philadelphia WolfBlock and also
13 Michael David McDowell, Allegheny.

14 REPRESENTATIVE GRELL: It's not him. It's
15 just Mr. Coffey.

16 CHAIRMAN CALTAGIRONE: Coffey. Okay. Very
17 good, sir.

18 MR. COFFEY: Good morning, Mr. Chairman, and
19 honorable members of the Committee. My name is Lou
20 Coffey. And as the Chairman said, I am with the law
21 firm WolfBlock, formally known as WolfBlock, Schorr,
22 Solis-Cohen, based in Philadelphia and have practiced
23 for over 30 years and have been on panels of the
24 American Arbitration Association since 1972.

25

1 The types of cases that I arbitrate and
2 mediate tend to be complex business disputes, major
3 construction claims, things of that nature.

4 I want to thank the Committee for taking up this Bill
5 and for hearing from us this morning. I also want to
6 thank Representative Glen Grell for being the primary
7 sponsor of this Bill and Representatives Cappelli,
8 Gingrich, Josephs, who is my representative, Keller,
9 Moul, Rapp, Sonney and Youngblood for co-sponsoring the
10 Bill.

11 I'm here to present the position of the
12 Pennsylvania Bar Association. On behalf of the Bar
13 Association, I thank the sponsors of the Bill for taking
14 the recommendations of the Bar Association to cause the
15 Revised Uniform Arbitration Act with minor modifications
16 to be adopted as the law of the Commonwealth of
17 Pennsylvania.

18 The sponsors of the Bill have agreed with
19 the recommendations of the Bar Association and we urge
20 adoption of House Bill 1625. Along with the Honorable
21 G. Thomas Miller, I co-chaired a Committee of the Bar
22 Association whose charge was to review the Bill, issue a
23 report with recommendations and copies of the report
24 have been made available to the Judiciary Committee.

25

1 Ray Pepe, who will follow me this morning,
2 will among other matters, give you some background on
3 the National Conference of Commissioners on Uniform
4 State Laws. As Representative Grell stated, Mr. Pepe is
5 one of the Commissioners from Pennsylvania. The Uniform
6 Arbitration Act was promulgated in 1955 by the National
7 Conference of Commissioners on Uniform State Laws.
8 Forty-nine jurisdictions have adopted the Uniform Act or
9 similar legislation, and Pennsylvania adopted the
10 Uniform Arbitration Act in 1980. So there's been over
11 50 years of experience with the Uniform Act and about 28
12 years of experience in Pennsylvania with the Uniform
13 Act.

14 The primary purpose of the Uniform Act was
15 to ensure the enforceability to bring this to
16 arbitrate. Since that time, arbitration has become a
17 widely accepted procedure for resolving disputes. Such
18 growth caused the Commissioners to appoint a drafting
19 committee to revise the Uniform Act in light of the
20 increased use of arbitration, the complexity of disputes
21 being resolved, and developments of the law and also to
22 take advantage of best practices that developed since
23 1955.

24 The Uniform Act did not address some very
25 important issues. It does not address who decides the

1 arbitrability of the dispute and by what criteria.
2 Section 7306 of this Bill addresses those issues. The
3 Uniform Act does not address whether a court or
4 arbitrators may issue provisional remedies. Section
5 7308 of this Bill addresses that issue. The Uniform Act
6 does not address how a party can initiate an arbitration
7 proceeding. Section 7309 of the Act addresses that
8 issue. The Uniform Act does not address whether
9 arbitration proceedings may be consolidated. Section
10 7310 of the Bill addresses that issue. The Uniform Act
11 does not address whether arbitrators are required to
12 disclose facts reasonably likely to affect impartiality.
13 Section 7312 of the Bill addresses that issue. The
14 Uniform Act does not address to what extent arbitrators
15 or an arbitration organization are immune from civil
16 action. Section 7314 of the Bill addresses that issue.
17 The Uniform Act does not address whether arbitrators or
18 representatives of arbitration organizations may be
19 required to testify in another proceeding, and Section
20 7314 of the Act addresses that issue.

21 And there are a number of other issues, very
22 important issues, that have come to light since 1955
23 which the Uniform Act does not address and are addressed
24 by this Bill. The drafting committee of the Uniform
25 Commissioners agreed on two guiding principles in

1 drafting the revised Act, first, that arbitration is a
2 consensual process in which autonomy of the parties
3 should be given primary consideration so long as their
4 agreements conform to notions of fundamental fairness.
5 The revised Act provides parties the opportunity, in
6 most instances, to shape the arbitration process to
7 their own choosing. They can design the process, again,
8 as long as it complies with fairness. And the second
9 guiding principle is that the underlying reason many
10 parties choose arbitration is the relative speed, the
11 lower cost, and greater efficiency of the process.

12 The revised Act does not expressly deal with
13 international arbitration, because according to the
14 drafting committee, few international cases are dealt
15 with in state courts. As Representative Grell stated,
16 the revised Act has been adopted in 13 jurisdictions and
17 it's currently being considered by four additional
18 jurisdictions in addition to the Commonwealth of
19 Pennsylvania.

20 The Act has been endorsed by the American
21 Arbitration Association, the National Arbitration Forum,
22 the predecessor of JAMS, then known as JAMS Dispute, The
23 National Academy of Arbitrators, The Dispute Resolution
24 Committee of the American College of Real Estate
25 Lawyers, and the Association of the Bar of the City of

1 New York, and by the following sections of the American
2 Bar Association, the Dispute Resolution Section, the
3 Litigation Section, the Business Law Section, the
4 Tourist and Insurance Practice Section, the Real
5 Property, Trust, and Probate Section, The Labor and
6 Employment Law Section and the Senior Lawyers, and it's
7 also been adopted by the Pennsylvania Bar Association.

8 The Subcommittee of the Pennsylvania Bar
9 Association that met to review and report on the revised
10 Act, met five times in addition to numerous discussions
11 through e-mails; and a list of the members of that
12 committee is attached to the report. The subcommittee
13 is comprised of experienced and full and part-time
14 arbitrators, law school professors, a former Common
15 Pleas Judge, the Chief Administrative Judge of the
16 Pennsylvania PUC, and a regional Vice President of the
17 American Arbitration Association, as well as a
18 Commissioner of the Uniform Commission.

19 In addition, the subcommittee sought and
20 received input from the Pennsylvania Trial Lawyers
21 Association and the Government Lawyers Committee of the
22 Pennsylvania Bar Association.

23 That concludes my formal remarks. I'd be
24 happy to answer any questions you may have. I'll do the
25 best I can at it.

1 CHAIRMAN CALTAGIRONE: Thank you. We've
2 been joined by Representative Joseph Petrarca from
3 Westmoreland County. Is that correct, Joe?

4 REPRESENTATIVE PETRARCA: Yes, sir.

5 CHAIRMAN CALTAGIRONE: One of the questions
6 that was brought to my attention, and I'd like to see if
7 you could answer this, does this run into trouble with
8 the Supreme Court Legislature superseding the right of
9 the Court to regulate the Court system? This has been
10 one of the concerns that has been raised, and I'd like
11 to hear your answer to that.

12 MR. COFFEY: The Uniform Arbitration Act
13 which was enacted in Pennsylvania in 1980 and has been
14 in existence for 28 years now, does contain some of the
15 same provisions that are contained in the Revised Act,
16 although there have been major revisions in amendments;
17 and I have not heard that there has been any issue with
18 the Supreme Court's authority to regulate the practice
19 of law in Pennsylvania. So I'm not aware of that being
20 an issue.

21 CHAIRMAN CALTAGIRONE: Well, I'm just
22 concerned about this piece of legislation. There's been
23 an issue raised, to be perfectly honest with you, that
24 came from the trial lawyers and this was one of the
25 issues that was being raised by them that this could

1 potentially pose some kind of a conflict with the
2 overarching verbiage in the legislation that's before
3 us.

4 MR. COFFEY: Well, Mr. Chairman, I'd be
5 happy to hear from the trial lawyers to talk with them
6 and get an understanding of exactly what their concern
7 is. Off the top of my head, I'm having difficulty
8 understanding where they see the issue; but I'm
9 certainly willing to talk to them and to report back to
10 you when I know something more.

11 CHAIRMAN CALTAGIRONE: Counsel.

12 MR. MCGLAUGHLIN: Thank you, Mr. Chairman.
13 Good morning, Mr. Coffey. I was privy to a copy of a
14 report that had your name on it from about 6 or 8 years
15 ago. You sat on -- you chaired a commission regarding
16 this matter, I believe; is that correct?

17 MR. COFFEY: I co-chaired that. Yes, sir.

18 MR. MCGLAUGHLIN: Or co-shared that.

19 MR. COFFEY: And did sign the report from
20 2002.

21 MR. MCGLAUGHLIN: Yeah. My question was
22 this, I noticed certain recommendations that were in
23 that report. Have you had a chance to review House Bill
24 1625 to determine whether or not those recommendations
25 in that report were actually now reflected in the

1 current version of 1625?

2 MR. COFFEY: Yes, sir, I have; and they are
3 reflected. There's perhaps one point, and that is the
4 effective date once this is enacted; and I think that's
5 something that's, you know -- can be determined. It may
6 be appropriate to give people a year or two notice that
7 the new statute has been enacted and a chance to find
8 out about it and become familiar with it, but I think
9 that House Bill 1625 does reflect the recommendations in
10 the report, yes, sir.

11 MR. MCGLAUGHLIN: Okay. Thank you, sir.
12 One other question I had, although I'm somewhat of an
13 old hand at the Bar myself and this came in after my
14 admission to the Bar, my practice was primarily
15 concerned with criminal cases; and I didn't do too many
16 arbitrations. My question though is this, and it
17 probably springs from some ignorance and I do apologize
18 for that, the situation we have in Pennsylvania with --
19 even under the present Act, are there situations where
20 arbitration is forced on parties or is this always an
21 elective option for parties or people that are in
22 disputes?

23 MR. COFFEY: I believe there may be some
24 situations where arbitration is mandated. Also, there's
25 been concern --

1 MR. MCGLAUGHLIN: Would that be in
2 connection with like an employment contract or something
3 along those lines?

4 MR. COFFEY: Possibly, yes.

5 MR. MCGLAUGHLIN: Okay.

6 MR. COFFEY: I was also going to say in
7 consumer transactions, more and more we're finding
8 arbitration provisions and contracts dealing with
9 consumer transactions and although the consumer
10 technically has a choice of signing that agreement and
11 accepting those provisions or not signing it, in many
12 instances as a practical matter there is no choice. And
13 in a number of those situations, the courts, when faced
14 with a challenge to enforceability of the arbitration
15 provision, have looked very closely at those provisions
16 to see whether or not they are fair to the consumer.
17 And in those situations where the courts have found that
18 they were unfair to the consumer, they've said that the
19 provision is unenforceable. In other situations,
20 they've found that the provisions, although forced on
21 the consumer, were fair.

22 MR. MCGLAUGHLIN: Okay. Thank you very
23 much, sir.

24 MR. COFFEY: Yes, sir.

25 CHAIRMAN CALTAGIRONE: Representative Grell.

1 REPRESENTATIVE GRELL: Thank you, Mr.
2 Chairman. Mr. Coffey, thank you very much for your
3 testimony and coming here today. You testified in large
4 part about, I believe, seven different areas that the
5 Uniform Arbitration Act as it currently exists does not
6 address but the revised Act would; and I wanted to ask
7 you about two of those --

8 MR. COFFEY: Actually, I think there are 14
9 areas; but I didn't want to bore the Committee with
10 going through each one of them.

11 REPRESENTATIVE GRELL: Well, we certainly
12 appreciate that. But of the seven that you mentioned, I
13 wanted to ask you about two of them.

14 MR. COFFEY: Sure.

15 REPRESENTATIVE GRELL: Could you explain
16 what the change is and the reason for the change in
17 terms of provisional remedies? I'm not certain that I
18 fully understand what types of provisional remedies an
19 arbitrator might issue during the proceeding. If you
20 could give us a little clarification on that one.

21 MR. COFFEY: Sure. Perhaps the best way I
22 can answer that is to illustrate it with a situation
23 that I dealt with as Chair of a three-member arbitration
24 panel in a complex business dispute. In that dispute,
25 some of the dollars that were payable by one party to

1 another were not in dispute and other dollars were, so
2 there was an amount, let's say it's ten, the amount was
3 ten, and three of the ten were not in dispute; and the
4 party making the claim was in great need.

5 I issued an order compelling the respondent
6 to pay over to the claimant the three. Under
7 circumstances where the claimant was required to post a
8 bond to cover not only the three that was paid over but
9 also to include interest on the three in the event that
10 the arbitration panel ultimately determined that they
11 were not entitled to it. But in the papers that were
12 submitted by the parties, the three was not in dispute.
13 So that was a situation where the arbitration panel was
14 able to give provisional relief to a party under
15 circumstances where the party having to make the payment
16 was still fully protected.

17 REPRESENTATIVE GRELL: And under the revised
18 Act, would those types of provisional remedies be easier
19 to impose for the arbitrator -- or is there some
20 question as to whether you were allowed to do what you
21 do in this case that's being addressed by this Bill?

22 MR. COFFEY: Most of the arbitrations and
23 mediations that I'm involved in come to me through the
24 American Arbitration Association or the International
25 Institute for Conflict Prevention and Resolution and

1 those two ADR provider organizations, along with a
2 number of others, have very sophisticated rules so that
3 when someone starts their arbitration through those
4 organizations, their rules are applicable; and the rules
5 of the American Arbitration Association, CPR, National
6 Arbitration Forum, JAMS, are very sophisticated rules
7 and are substantially similar to the provisions of your
8 House Bill 1625.

9 So in that situation, I was operating under
10 the rules of the American Arbitration Association which
11 provides for provisional remedies.

12 REPRESENTATIVE GRELL: The second area I
13 wanted to ask you about was, could you explain the
14 reasons for the language --

15 MR. COFFEY: I'm sorry. Let me just say
16 that there are, I'm sure, many situations where there
17 are arbitrations that don't go through organizations
18 like that, where their rules are not applicable. And in
19 that case, the statutory rules would cover those
20 situations.

21 REPRESENTATIVE GRELL: Yeah, in fact, that's
22 something I wanted to ask about. The backdrop of all of
23 this is, that with few notable exceptions, the parties
24 doing a business transaction are free to negotiate and
25 agree to pretty much whatever rules they would like if

1 the dispute goes to arbitration. A lot of what's in the
2 current law and the revised law is intended to address
3 those situations where the parties have not agreed to
4 some aspect of that proceeding; is that correct?

5 MR. COFFEY: That's absolutely correct.
6 They are, for the most part, default provisions where
7 something is not addressed by the rules that the parties
8 have selected or in some instances some parties really
9 create their own process from scratch. And so if there
10 are things that they haven't dealt with, the default
11 provisions are what apply and they would be provisions
12 in the Act.

13 REPRESENTATIVE GRELL: Okay. Thank you.
14 And could you --

15 MR. COFFEY: Now, there are some provisions
16 of the Act that are not waivable unless the parties --
17 unless common law arbitration is preserved, which our
18 recommendation is that it would be and the Bill provides
19 under those circumstances, you know, the common law
20 arbitration would apply.

21 But there are some provisions of the Bill
22 that are not waivable, and those are provisions that are
23 intended to protect the integrity and fairness so that
24 where you have a disparity in bargaining power, one
25 party can't take unreasonable advantage of the other.

1 REPRESENTATIVE GRELL: And those go to the
2 enforceability of the ultimate decision of the
3 arbitrator.

4 MR. COFFEY: Yes.

5 REPRESENTATIVE GRELL: So without that
6 fundamental fairness, the arbitration decision would not
7 be binding on the parties?

8 MR. COFFEY: There are a number of
9 provisions, the right to be -- to have a representative
10 be with you at the proceeding, the right to get proper
11 notice of the proceeding and procedural things that are
12 necessary to protect the fairness and integrity of the
13 process.

14 REPRESENTATIVE GRELL: Okay. I also wanted
15 to ask you just briefly on the background for the new
16 provision of providing for immunity of the arbitrators,
17 has that been a problem over the course of the 50 or so
18 years under the Uniform Arbitration Act?

19 MR. COFFEY: I have to admit that I haven't
20 heard of it being a problem. And, again, personally,
21 I'm usually functioning under the rules of an ADR
22 provider organization and that immunity is part of those
23 rules. It's similar -- being an arbitrator is like
24 being a judge for hire. And one of the important things
25 about protecting the integrity and impartiality of a

1 judge or an arbitrator is to know that they can call it
2 as they see it and not be subject to being sued as a
3 result of that, so it's a very important provision.

4 REPRESENTATIVE GRELL: Okay. Thank you very
5 much for your testimony. Thank you, Mr. Chairman.

6 CHAIRMAN CALTAGIRONE: Thank you. We've
7 been joined by Representatives Jewell Williams from
8 Philadelphia County and Don Walko from Allegheny County.
9 Kathy.

10 REPRESENTATIVE MANDERINO: Thank you. Thank
11 you, Mr. Coffey. I have lots of questions, so bear with
12 me. If I may start not only for my own benefit, but for
13 the members of the panel and particularly those who are
14 not attorneys, I think a lot of times we kind of lump
15 arbitration and mediation together and not really
16 understand the difference. So is it fair to say that a
17 mediation is a totally voluntary process that folks can
18 choose to go through but regardless of the outcome of
19 that they still have all their remedies at the court to
20 come back to?

21 MR. COFFEY: The answer to that is, yes.
22 And the major difference between arbitration and
23 mediation is that arbitration is an adjudicative
24 process, parties present their case to an arbitrator or
25 an arbitration panel and the arbitrators decide the

1 outcome of the case. It's also a voluntary process most
2 of the time. There are some instances where people are
3 forced to --

4 REPRESENTATIVE MANDERINO: Yeah. I want to
5 get to some of those too again just to set the stage.

6 MR. COFFEY: Now, let me just say, in
7 mediation --

8 REPRESENTATIVE MANDERINO: Go ahead.

9 MR. COFFEY: -- however, the thing that --
10 the major distinction between arbitration and mediation
11 is the mediator is there to facilitate an outcome that's
12 crafted by the parties. A mediator has no authority to
13 impose an outcome, so -- and that's a big difference,
14 big difference, and totally different skill sets for the
15 neutral who's acting --

16 REPRESENTATIVE MANDERINO: Sure. So the Act
17 that we're talking about today is one that governs an
18 adjudicative process in which there is a determinative
19 outcome which may or may not, depending on what other
20 parameters or what context it came out have any
21 appealable rights or other ways to get that back into
22 the legal system?

23 MR. COFFEY: There are two types of
24 arbitration. There's binding arbitration and
25 nonbinding. What you say is a hundred percent true of

1 binding arbitration. There is no appeal. There are
2 grounds to have an arbitration award vacated; they are
3 very narrow, very limited and it doesn't happen very
4 often that a court agrees to vacate an arbitration
5 award. Non-binding arbitration, however, is non-binding
6 and parties can accept the decision of the arbitrators
7 or reject it.

8 REPRESENTATIVE MANDERINO: You're following
9 the script perfectly here. So binding versus
10 non-binding arbitration, that is usually something that
11 has been contractually determined or set up by some
12 other law or statute? Is that a correct assumption for
13 us to make? So either, you know, we have a collective
14 bargaining agreement that provides for this or, for
15 example, in the case of fire-fighters and police
16 officers, we may have a law on the books that says, this
17 is the way an arbitration and these kinds of public
18 safety, public disputes are to be contracted. So it's
19 usually -- you wouldn't have a situation where -- or
20 would you? Would you have a situation where something
21 would be a non-binding arbitration that wasn't an arm's
22 length agreement between the two parties? I'm not
23 articulating this right. I guess what I'm trying to say
24 is, help us understand, again, because the context is
25 going to become important when we get down to the

1 details. When do you have a binding arbitration is what
2 I'm really looking for versus a non-binding and then I
3 want to go into aspects of binding arbitration and the
4 power between the two parties.

5 MR. COFFEY: Arbitration is, generally, with
6 some exceptions, a contractual arrangement between the
7 parties to the arbitration. As we've noted, there are
8 some exceptions to that. And parties can choose in
9 their contractual agreement to go to non-binding
10 arbitration. This Act deals with binding arbitration.

11 REPRESENTATIVE MANDERINO: Okay. I think
12 when you hear the term as a layperson "binding
13 arbitration", the first thing that comes to mind is an
14 organized labor dispute where you have what I would call
15 two parties of equal power and sophistication, etc.,
16 kind of being represented. But you had intimated
17 earlier that there are lots of other kinds of contracts
18 that could have mandatory quote/unquote binding
19 arbitration clauses such as consumer contracts and not
20 just a contract of buying a product but a contract of
21 negotiating for services. We've seen in recent years
22 where you might go to your doctor and your doctor has
23 you sign a form that says, I agree if I'm going to be
24 treated by Dr. X that I won't sue Dr. X or if I have a
25 dispute with Dr. X, it will go to binding arbitration.

1 And if I'm sitting in the doctor's office
2 and I don't sign that I guess I don't get treated by
3 that doctor that day, so I sign that, getting to the
4 point that you made earlier. But that is binding
5 arbitration and the kind of thing that would be covered
6 by the Act that we're looking at today; is that correct?

7 MR. COFFEY: That's right.

8 REPRESENTATIVE MANDERINO: Okay.
9 Pennsylvania has been operating under --

10 MR. COFFEY: But I would say this, in terms
11 of giving the doctor a release in advance for any
12 malpractice that may occur, I'm not sure the Courts
13 would look favorably on enforcing that release.

14 REPRESENTATIVE MANDERINO: I'm going to get
15 to that. Of the -- Pennsylvania's been operating under
16 our version of this model Arbitration Act for at least
17 25 years, so I would assume in those 25 years we have a
18 whole jurisprudence of Pennsylvania case law that kind
19 of combines with that to either address some of these
20 not so sure if it should apply situations or some of the
21 silent situations which are coming to us to address
22 today, would that be a correct assumption?

23 MR. COFFEY: Correct.

24 REPRESENTATIVE MANDERINO: Okay. Of the
25 things you're coming to us today to say the new version

1 of the Uniform Arbitration Act is suggesting that these
2 14 things which the current Act was silent on ought to
3 be fixed or ought to be addressed directly. My question
4 is, and I don't know if this is in the PBA report. We
5 do not have a copy of that, and that may actually be a
6 good thing for us to have, Mr. Chairman. Do you -- did
7 the PBA look at all, here are the 14 things. Here is
8 Pennsylvania case law addressing those 14 things and
9 they all match up, they don't match up, here's where
10 they differ. That's what I'm looking for. Where are
11 the rubs? Where are the differences going to come in
12 terms of our current jurisprudence, based on 24 years of
13 applying the old law? And what if we institute this new
14 one? I want to understand what either I'm saying --
15 we're not going to do it that way anymore because we're
16 adopting this new law or this new law is consistent with
17 what we've been doing for the past 25 years.

18 MR. COFFEY: I'm going to do my best to
19 answer your question. It's a good question. It's a
20 very complex and difficult question. I think, and to
21 some extent I'm guessing at this, but I think that the
22 case law in Pennsylvania probably addresses only a
23 couple of these 14 different issues. Case law would, I
24 think, go primarily to whether or not there is an
25 agreement to arbitrate, whether or not an arbitration

1 clause in an agreement is enforceable, whether or not an
2 arbitration award should be vacated. And I think those
3 are the issues that primarily would be addressed by
4 cases decided by the Courts, so --

5 REPRESENTATIVE MANDERINO: And at least with
6 those that you mention that you're familiar with, the
7 proposed new provisions, are they consistent with what
8 our jurisprudence has been or are they different in some
9 respects? And if so, can you --

10 MR. COFFEY: I can't answer with a hundred
11 percent certainty, but I think the answer is yes.

12 REPRESENTATIVE MANDERINO: Okay. That is
13 something that I think would be very important for the
14 Committee, at least to understand, what are the choices
15 that we're being asked to make?

16 The other issue with regard to choices we're
17 being asked to make that I want to probe a little bit.
18 I remember a number of years ago actually, one of my
19 first years in the legislature in the mid-90's, went
20 through a whole process of trying, which never happened,
21 of trying to codify an evidence code. And during that
22 process, there were philosophical disputes about whether
23 we should just be codifying the current evidence code or
24 using this as an opportunity to tweak some things that
25 weren't quite working well and then even if you were

1 split on which philosophy you were going under, then the
2 language became problematic because different folks
3 interpreted the codification of the language as either
4 the status quo or the tweaking.

5 So my question comes to the language
6 proposed here. Let's put aside the provisions that are
7 new that weren't addressed in the first original. What,
8 if anything, are we changing, modifying, tweaking of
9 what people know and have been practicing under for the
10 last 25 years?

11 MR. COFFEY: I would have to get back to you
12 on that. I couldn't --

13 REPRESENTATIVE MANDERINO: Okay. Again, I
14 think that's another kind of important thing to
15 understand. Again, it may be an appropriate choice; but
16 if we don't know we're making those choices, then we
17 don't know, Gee, should we be out checking the opinion
18 of some consumer advocate group to see if they think
19 there's a problem with this or should we be going out
20 and checking the opinion of folks who represent
21 organized labor to see if they think there's a problem
22 with this proposed change?

23 MR. COFFEY: Mr. Pepe may be able to answer
24 that question when he comes up to testify.

25 REPRESENTATIVE MANDERINO: Okay. Great.

1 And I guess my last question would be -- and you made
2 reference, Mr. Coffey, towards the end, I think, with
3 your responses to Representative Grell, you said
4 something like, The common law provisions are preserved
5 by something that's in this proposed Act. But I'm not
6 sure, maybe I was just distracted thinking of my own
7 questions. Just explain what it is you were referring
8 to and what that means and whether that addresses some
9 of these questions that I've been raising.

10 MR. COFFEY: Pennsylvania has common law
11 arbitration. I have to confess that I am not familiar
12 with how that works, because I've never been involved in
13 the common law arbitration; but it does exist in
14 Pennsylvania. The Uniform Act that is in existence now
15 continues to allow people to arbitrate under common law
16 arbitration, and the recommendation of the Bar
17 Association is that we've got to change that.

18 REPRESENTATIVE MANDERINO: Okay. I guess
19 I'll get a side explanation on that, because I'm not
20 quite sure -- can you just give us an example of -- I'm
21 involved in a personal injury action as either plaintiff
22 or defendant and both parties decide it's going to be
23 years before we get to court. I just want this thing
24 over with; let's go to arbitration. Does that come
25 under -- do we choose to follow these rules or some

1 common law rules or is that by its very nature since it
2 wasn't really a contracted kind of thing? Is that what
3 comes under common -- I don't understand what comes
4 under common law arbitration. I'm not getting --

5 MR. COFFEY: As I understand the Uniform Act
6 today, unless there's a written agreement to the
7 contrary or expressed agreement to the contrary, common
8 law arbitration applies; so you have to select the
9 Uniform Arbitration Act if you want it.

10 This (indicating) Bill, if adopted, would
11 change that, would turn it around and say that after a
12 certain period of time, unless there's an expressed
13 choice of common law arbitration, this Act would govern.

14 REPRESENTATIVE MANDERINO: Okay. So for the
15 past 25 years while we have had a Uniform Arbitration
16 Act, kind of common law has always been the default.

17 MR. COFFEY: Yes.

18 REPRESENTATIVE MANDERINO: So with this
19 Bill, we're being asked to consider not only changes to
20 our Uniform Act but shifting the default, so to speak?

21 MR. COFFEY: Yes.

22 REPRESENTATIVE MANDERINO: Okay. So who
23 would be affected by the shift in the default? For
24 example -- and maybe I'm not understanding how a common
25 law arbitration works. Is that something that's done by

1 third-party arbitrators or is that something that's done
2 by the judiciary?

3 MR. COFFEY: I don't know the answer, so I
4 hesitate to guess. As I said, I've never been involved
5 in a common law arbitration. My guess is that it's an
6 arbitrator; but, you know, sometimes judges act as
7 arbitrators.

8 REPRESENTATIVE MANDERINO: Okay. Another
9 question mark there, Mr. Chairman. Okay. Thank you
10 very much.

11 MR. COFFEY: Sure.

12 CHAIRMAN CALTAGIRONE: Just for the members'
13 benefit, we are getting a PBA report as we speak; so
14 I'll have copies before we leave for all of the members.
15 Just as a comment, I'm beginning to wonder if maybe --
16 and we don't have enough time left in this session, as
17 you all know. I think the agenda's pretty well set for
18 what's going to happen for the remaining few days that
19 we have in active voting session.

20 One of the things that I'd like to suggest
21 respectfully is that maybe the Joint State Government
22 Commission could undertake this task and report back in
23 a timely manner the next session, because there are a
24 lot of questions and issues that are being raised about
25 some of these concerns. It's just a thought, that maybe

1 somebody else should take a hard look at this and review
2 this and come up with some suggestions or changes. I
3 don't know if that would be --

4 REPRESENTATIVE MANDERINO: Yeah, I don't
5 know if that's the appropriate agency.

6 CHAIRMAN CALTAGIRONE: It may not be. But
7 maybe there is somebody else that we could designate
8 under state government to review this and come back,
9 because you're raising a lot of questions and I think
10 Don raised a lot of questions and there's a lot of areas
11 that I don't think anybody has the answers to, at least
12 -- unless Ray may have some answers to these questions.
13 But I think there's enough being raised here that maybe
14 we want to have somebody else take a look at it and
15 report back to us. What do you think?

16 REPRESENTATIVE MANDERINO: Well, Mr.
17 Chairman, I am -- I know I raised a lot of questions.
18 I'm sorry. It's kind of just in my nature. I'm not
19 sure that the answers wouldn't be fine if I had them.
20 Do you know what I'm saying?

21 CHAIRMAN CALTAGIRONE: Yeah.

22 REPRESENTATIVE MANDERINO: So I'm not sure
23 whether we have need to go that route or with a
24 transcript we might be able to just between the
25 Committee members and staff kind of distill down, these

1 are the things we need answers to and then put the
2 questions out there back to the Bar, back to the Court,
3 back to some of the practitioners and interested groups
4 and see maybe these are a lot of questions that are
5 easily answered and there aren't a lot of conflicts and
6 we can come back in January kind of ready to roll. I'm
7 not sure that I would think that the Joint State
8 Government Commission has any particular expertise. And
9 if I try to think of an alternative group, I'm not sure
10 I can think of an alternative group that can do that
11 analysis any better than we could with the kind of back
12 and forth.

13 CHAIRMAN CALTAGIRONE: We have our
14 Subcommittees, too, that possibly in the interim, let's
15 say in December, you know, that's always a down month,
16 that maybe a group of interested parties could get
17 together and come up with a recommendation.

18 REPRESENTATIVE GRELL: Yeah, I agree that we
19 need to get the answers to Kathy's questions and other
20 questions. But for the fact that we have a National
21 Conference of Commissioners that has already considered
22 this matter exhaustively, I would probably agree with
23 you but for the fact that they've done that. So I think
24 that resource is available to us and to our staff, and I
25 think these answers are pretty readily discernible

1 without referring it to another entity respectfully.

2 CHAIRMAN CALTAGIRONE: Okay. Are there any
3 other questions from the members of the Committee?
4 You've given us a lot to chew on.

5 MR. COFFEY: Sorry I didn't have answers to
6 your questions. They're all good questions.

7 CHAIRMAN CALTAGIRONE: Thank you. Thank you
8 very much for your testimony.

9 MR. COFFEY: Thank you.

10 CHAIRMAN CALTAGIRONE: We'll next hear from
11 Raymond Pepe, Esquire, K&L Gates, Member of the Uniform
12 Law Commission and maybe you'll have some of the
13 answers. We may be meeting with you between the end of
14 the session and the new session.

15 MR. PEPE: Thank you, Mr. Chairman. My name
16 is Raymond Pepe, and I am a Member of the Pennsylvania
17 Delegation to the National Conference of Commissioners
18 and Uniform State Laws, now more simply referred to as
19 the Uniform Law Commission; and I'd like to compliment
20 Representative Grell and Lou for their excellent
21 summaries of this Act. And I have submitted a statement
22 for the record, so I'll try to be relatively brief and
23 just hit on a few key points and then try to answer some
24 questions.

25 I'd like to comment a little bit on the role

1 of the Commission in general, talk a little bit about
2 how this particular revised Uniform Arbitration Act was
3 developed, offer a few comments about what the Act does
4 and then make some suggestions about how I would
5 recommend that the Committee might want to proceed.

6 To begin with, to talk about the Uniform Law
7 Commission, the Uniform Law Commission is a state
8 government created and funded organization that's been
9 in existence since 1892. There are approximately 40 to
10 50 acts on the books in Pennsylvania now that the
11 Commission has adopted over the years. The most
12 prominent work of the Commission is the Uniform
13 Commercial Code, which Pennsylvania was the first state
14 to adopt and which is in effect in all fifty states.

15 In the last ten years, some of the other
16 acts that the General Assembly has adopted that have
17 been recommended by the Commission include the Athletic
18 Agents Act, the Child Custody and Enforcement Act, the
19 Condominium Code, the Conservation Easements Act, the
20 Uniform Determination of Death Act, the Transfer of
21 Death of Secu rites Registration Act, the Trade Secrets
22 Act, and most recently the Trust Code.

23 The way the Commission does its work is, the
24 Commission consists of -- well, for example, the
25 Pennsylvania delegation has one appointee from each of

1 the four legislative caucuses, three gubernatorial
2 appointees, the Attorney General, and then a
3 representative of the Legislative Reference Bureau and
4 the Joint State Government Commission that are in
5 Pennsylvania's delegation.

6 Pennsylvania's delegation is typical of the
7 delegation for most states, so you have approximately
8 350 commissioners that constitute the Commission.
9 Almost all of them have some substantial state
10 government experience. There are approximately 40
11 legislators on the Commission, including, interestingly,
12 a couple of presiding officers of legislatures, such as
13 the Speaker of the House from Utah. There are
14 approximately 25 to 30 federal and state court judges, a
15 fair number of academics, and a lot of private
16 practitioners who have prior government service.

17 The way the Commission develops its Acts is
18 it appoints a drafting committee from among its members.
19 The drafting committees will then invite observers and
20 advisors from affected groups and organizations to work
21 with them and then they will then work to develop an act
22 through weekend meetings; so we would all have 3, 4, 5,
23 6 of these weekend meetings to develop a draft and then
24 the act has to be read section by section and debated at
25 an annual meeting of the conference before all 350

1 commissioners. The general rule is twice before it's
2 finally adopted. So, in general, that's what the
3 Commission is and how it does its work.

4 With respect to this Act, the original
5 Uniform Arbitration Act was promulgated by the
6 Commission way back in 1955; and it's obviously been on
7 the books for, you know, over 50 years now. The
8 recommendation to revise this Act was first made in
9 1997, and the Act was not finalized until 2000. Between
10 1997 and 2000, there were five three-day meetings of the
11 drafting committee to work on the Act; and the Act was
12 considered at two annual meetings of the conference.
13 Following the final vote to approve the Act, the Act was
14 then taken before the House of Delegates of the American
15 Bar Association for review where it was endorsed. So,
16 in general, that's the process that was used to develop
17 this Act.

18 Let me comment a little bit on what the Act
19 does and does not do. The original 1955 Act follows
20 very closely the terms and provisions of the Federal
21 Arbitration Act which has been in effect since 1925 and
22 did little more than take the provisions of the Federal
23 Arbitration Act and make them state law. What the new
24 revised Uniform Arbitration Act does is fill in a lot of
25 the blank spaces in terms of rules of procedure for how

1 arbitrations are to be conducted, and almost all of
2 these rules are default rules that apply unless the
3 parties agree otherwise. So, basically, this is a rule
4 book for how to conduct an arbitration unless the
5 parties agree upon different rules. Very few of these
6 provisions in this Act are not waivable by law. Most of
7 them can be waived by the agreement of the parties.

8 Let me comment a little bit on some of the
9 questions that were asked by members of the Committee.
10 David McGlaughlin has asked, What affect does this law
11 have on the rules of the Court? Under the Judicial
12 Article of the Pennsylvania Constitution, it's the role
13 of the General Assembly to determine the jurisdiction of
14 Courts. All this Act really does is determine when
15 disputes with respect to arbitration fall within the
16 jurisdiction of the Courts. And in that regard, there's
17 really no difference in the 1955 Act that's been on the
18 books in Pennsylvania since 1980.

19 Representative Manderino and others asked
20 about, Well, does this Act apply to binding arbitration?
21 And let me draw this distinction, to the extent
22 arbitration is mandated by law, if there is a statute
23 that says you must arbitrate, then this Act does not
24 apply. This Act only applies when there is a genuine
25 agreement among the parties to arbitrate and then the

1 Act does apply. There was also a long discussion about,
2 Well, how does this Act differ from so-called common law
3 arbitration? In abundance of caution, when Pennsylvania
4 adopted the original Uniform Arbitration Act in 1980,
5 Pennsylvania decided to preserve what we call the old
6 common law rules of arbitration, subject to certain core
7 provisions of the new Act and say that that would be the
8 law in Pennsylvania unless parties chose to go under the
9 Uniform Act. And there's probably not a great deal of
10 difference between common law arbitration and
11 arbitration under the Uniform Act, with one glaring
12 exception, and that is the extent to which an
13 arbitration award may be modified or set aside by the
14 Courts.

15 If you go under common law arbitration,
16 it's, in most circumstances, final; and there is very
17 little guidance as to when a court may reverse an
18 arbitration award. If you go under the Uniform Act, and
19 in this respect the old Act, the 1955 Act is very
20 similar to this Act, an award may be set aside for
21 fraud, may be set aside for evident impartiality, it may
22 be set aside for corruption, it may be set aside for
23 misconduct by an arbitrator, it may be set aside by the
24 refusal of an arbitrator to consider material evidence
25 which results in substantial prejudice to the parties,

1 it may be set aside if an arbitrator refused to delay a
2 proceeding and it resulted in substantial prejudice to
3 the parties, it can be set aside if an arbitrator
4 clearly exceeded his authority, and it can be set aside
5 for lack of notice that materially prejudices the
6 parties.

7 So there is substantial benefit to parties
8 to an arbitration to go under the Uniform Act versus
9 going under common law arbitration. However, in
10 recognition that in some contexts some parties may
11 indeed want common law arbitration, the recommendation
12 of the Pennsylvania Bar, which I take no position
13 because it wasn't something that has anything to do with
14 the Uniform Act, was to preserve the option of going
15 under common law arbitration, if that's what the parties
16 really want.

17 Now, the Bar also made a recommendation
18 which I think is a very good one, which is that if and
19 when this Act is adopted, it ought to have a two-year
20 effective date to give people plenty of time to
21 determine whether they want to be under the new Act or
22 whether they want to continue to be under common law
23 arbitration, because the Act would provide the default
24 rules that would apply unless the parties elect
25 otherwise; but it would allow the parties to say, no, we

1 would prefer to be under common law arbitration and
2 preserve prior law.

3 Let me also comment on the materials that I
4 did submit to the Committee together with my written
5 statement. My written statement really repeats the
6 comments that Mr. Coffey made about the substance of the
7 Act, so I won't comment about that much. But I also
8 presented the Committee the detailed version of the Act
9 that was developed by the Uniform Law Commission which
10 has a very detailed section by section analysis of each
11 portion of the Act and compares the Act with existing
12 law. And what it will generally show you is that this
13 is really an effort in codification based on the
14 prevailing standards with respect to how arbitrations
15 are conducted around the country.

16 Finally, let me make a recommendation about
17 how I would recommend that the Committee proceed.
18 Clearly, the Conference worked on this Act for several
19 years, The Pennsylvania Bar worked on it for several
20 years. You know, the law's been around since 1955;
21 there's no need to hurry.

22 The Conference worked very hard on this Act
23 in trying to, you know, identify things that may be of
24 potential controversy, tried to involve a very broad
25 group of organizations in the drafting, but may not have

1 found all of the issues. I would recommend that you
2 report a bill this session just to give it a little more
3 publicity, and then get answers to some of the questions
4 you have asked and then reintroduce it next year and
5 come back and see how it all shakes out and see which
6 issues we need to address at that point in time.

7 At this point, I'd be happy to answer any
8 questions.

9 CHAIRMAN CALTAGIRONE: Oh, I'm sure you're
10 going to get them. We've been joined by Chairman Harold
11 James from Philadelphia County and Mark Cohen, Chairman
12 of the Caucus and also from Philadelphia County.

13 There have been some issues that have been
14 raised by the trial lawyers, and I'm sure you're aware
15 of those. I was looking over this one section -- they
16 say as an example, and maybe you could answer this, The
17 arbitrator's given breathtaking and sweeping new powers
18 under Section 7308(b), including the right to issue
19 orders for provisional remedies, including rewards or
20 other orders necessary to protect the effectiveness of
21 the arbitration proceedings.

22 Is that so?

23 MR. PEPE: Well, what I think the Act does
24 is to codify existing law. And for a period of time,
25 there was a lot of controversy about whether or not

1 arbitrators had the power to issue interim orders.
2 There have been a variety of court decisions, including
3 decisions by the Supreme Court, which basically says
4 that arbitrators, unless an agreement provides
5 otherwise, have the same power as judges with respect to
6 the issuance of interim orders. And, in particular, one
7 thing that this Act does, again, unless the parties
8 agree otherwise, is to provide that once an arbitration
9 proceeding has begun, it's the job of the arbitrator to
10 determine whether or not to grant a provisional remedy
11 subject to appeal by the court rather than running to
12 the court first and then have the process reviewed.

13 But I think in terms of the provisional
14 remedies, again, that's a provision that only applies if
15 the parties elect it and you can weigh it if you don't
16 want it; but this would be the default rule that would
17 apply if the parties say nothing and that the provisions
18 in this Act are, I believe, broadly consistent with the
19 rules of the American Arbitration Association and the
20 rules that apply in most other arbitrations when people
21 choose to conduct arbitration using an arbitration forum
22 that has preexisting established rules.

23 CHAIRMAN CALTAGIRONE: The legislation
24 creates a procedure whereby arbitration can be enforced
25 by summary proceeding apparently not subject to the

1 requirements to file a complaint to use rules of
2 criminal procedure and civil procedure. Is that also a
3 concern that needs to be addressed? It's being
4 addressed by the trial lawyers, and I'm wondering what
5 your response to that concern is.

6 MR. PEPE: Well, what the Act says is that
7 it's the job of the Court to determine whether there is
8 an arbitration agreement among the parties and whether
9 or not a dispute is properly subject to arbitration.
10 And upon motion by a party to a Court to determine that
11 issue, the Court will summarily determine the issue.
12 Since it is a procedure for determining whether or not
13 the parties have an agreement, I don't believe that what
14 is in this Act would modify the existing rules of
15 procedure or modify significantly the rules that apply
16 under the existing 1955 version of the Uniform
17 Arbitration Act. But, you know, again, certainly it's a
18 topic which we'd be happy to meet with and discuss with
19 members of the Trial Bar.

20 CHAIRMAN CALTAGIRONE: You had mentioned
21 earlier in your testimony about this would provide for
22 rules of procedure; is that correct?

23 MR. PEPE: Well, by and large what is in
24 this Act are procedural rules that govern how an
25 arbitration is conducted and they are the default rules

1 generally will apply unless the parties have agreed to
2 use a different set of rules. Yes, that's correct.

3 CHAIRMAN CALTAGIRONE: Now I'll come back to
4 what I had previously asked the former testifier. Does
5 this, in fact, encroach on the powers of the Supreme
6 Court with regulating the court system with what you're
7 attempting to do with this Act? I'm getting this for
8 the record. That's why I'm asking you these questions.

9 MR. PEPE: No, I don't believe it does;
10 because the procedures that it is establishing are the
11 procedures to conduct the arbitration before the
12 arbitrator. The only thing it does with respect to the
13 role of the Court is to determine when Courts have
14 jurisdiction to review disputes that arise in the
15 context of arbitration.

16 CHAIRMAN CALTAGIRONE: Members? Kathy.

17 REPRESENTATIVE MANDERINO: Thank you. Thank
18 you, Mr. Pepe. On the issue of -- let me preface this
19 by saying, I'm looking for the points of potential rubs,
20 so to speak. And so the two broad areas that I see are
21 shifting of the default from common law to Uniform Act,
22 which again may be a moot point I just don't understand
23 yet and then where any of the proposed changes in the
24 Uniform Act are going to be deviating from our current
25 combination of the current law and our current court

1 jurisdiction and jurisprudence; and I'm just seeing
2 whose ox is going to be gored if anybody's and whether
3 the change is going to be perceived as good or bad. So
4 that's kind of where I'm going with these questions.

5 On the issue of kind of common law versus
6 Uniform Act, and I understand now a little bit better
7 your explanation as to what Pennsylvania did when we
8 first adopted the Uniform Act. But from a practical
9 practice point area, point of view, are there areas of
10 practice where kind of the common law process is
11 regularly used versus the Uniform Arbitration Act is
12 regularly used? Do business and transactional practice
13 areas tend to always use the Uniform Act where other
14 areas have traditionally used the common law way of
15 doing things and so, therefore, for that area of
16 practice, for that area of subject matter of the law,
17 this would be a more significant change?

18 MR. PEPE: I don't think it is a significant
19 change for this reason, I don't think that most people
20 understand under current Pennsylvania law that you're
21 not under the Uniform Act unless you elect it. So
22 that's not a widely understood distinction. Secondly,
23 in practice, I'm not sure it's a distinction that makes
24 that much difference. As I said, the big difference is
25 whether or not Section 24, which really repeats prior

1 law, is or is not applicable. But as the courts have
2 interpreted and reviewed arbitration awards, I believe
3 they pretty much adopted the rules in this new Act
4 anyway.

5 Having said that, the PA Bar's
6 recommendation was to preserve common law arbitration as
7 an option because many people believe, I'm not sure I
8 agree, but many people believe that if you elect common
9 law arbitration there's a much greater degree of
10 finality and far fewer opportunities to challenge
11 modifier vacated arbitration award.

12 REPRESENTATIVE MANDERINO: Okay. So if I
13 was concerned, for example, with what I'll call consumer
14 contract arbitration clauses which often can, depending
15 on the varying power of the parties, be considered
16 voluntarily entered into versus adhesion contracts where
17 you kind of didn't have much of a choice, should I be
18 comforted by the fact that we're putting everything
19 under the Uniform Arbitration Act and so therefore the
20 remedies for the consumer who may have been at a
21 disadvantaged bargaining power in that contract are
22 greater? Is that what I'm hearing you say?

23 MR. PEPE: I believe that's a fair
24 assessment. I believe that under the Uniform Act the
25 situations in which an arbitration award can be

1 modified, vacated, or set side are much more clearly
2 established and in instances in which someone has agreed
3 to arbitration but the rules are silent, it provides a
4 much clearer road map as to how the procedure will be
5 conducted and that would be to the benefit of consumers.

6 Having said that, there is an important
7 backdrop which is discussed in the comments which you
8 may want to review; and that is that the fundamental
9 question of whether or not a question may or may not be
10 submitted to arbitration is largely a question that's
11 preempted by federal law. Because under the Federal
12 Arbitration Act anything that affects interstate
13 commerce is, as a minimum, subject to the Federal
14 Arbitration Act and the Supreme Court has basically said
15 that once parties agree to arbitrate, that's a binding
16 election. And state law cannot, for example, prohibit
17 arbitration of particular types of disputes. That would
18 conflict with the Federal Arbitration Act to the extent
19 that there is any component of interstate commerce
20 involved, and of course it's hard to imagine anything of
21 any significance these days that doesn't have some
22 component of interstate commerce involved in it.

23 REPRESENTATIVE MANDERINO: This next
24 question might be difficult to answer. It's kind of
25 difficult to figure out how to word it. But what I'm

1 looking at is, in areas where we are making changes that
2 affect the rights of one party or another, obviously,
3 from my point of view, and this is probably subjective,
4 which is why it's hard, I'm looking at it and saying,
5 are these changes going to be perceived by the person
6 whose rights are being affected as a good and positive
7 change or a negative change that's going to further
8 limit my rights or legal remedies? And I'm hearing you
9 say, and Mr. Coffey saying, that most of the changes
10 that we're making weren't really ever addressed
11 specifically. But now that we're addressing them
12 specifically, are they all neutral? Are there ones that
13 are going to be perceived as limiting a party's rights?
14 Are there ones that are going to be perceived as
15 expanding a party's rights? And if so, can you make any
16 comments on those?

17 MR. PEPE: I believe I would characterize
18 them as predominantly neutral in their impact, but being
19 beneficial in the extent that they eliminate
20 uncertainty. For example, take the question of
21 provisional remedies, there's been a ton of case law
22 that evolved over the years about whether or not an
23 arbitrator could or could not impose provisional
24 remedies and whether or not you needed to get the
25 decision of the arbitrator before you went to court to

1 enforce a provisional remedy. All of that uncertainty
2 has had transactional costs associated with it. To the
3 extent you establish a clear set of rules that says that
4 unless the parties agree otherwise, arbitrators can
5 impose provisional remedies and it's the job of the
6 arbitrator to impose the remedy or not impose the remedy
7 subject to review by a court. You've now clearly
8 established what the rules are.

9 I suppose if you were a party that didn't
10 want to be in arbitration and were resisting a
11 complaint, you might find that undesirable. But I think
12 in the longer view of the context since, you know,
13 depending on what dispute is involved, any given party
14 may or may not want to be in arbitration. I would
15 review the greater certainty as neutral.

16 REPRESENTATIVE MANDERINO: Thank you. Thank
17 you, Mr. Chairman.

18 CHAIRMAN CALTAGIRONE: Counsel.

19 MS. COATES: Thank you for your testimony
20 today. Are you aware of any provisions in the proposed
21 legislation which conflict with the case law that's
22 currently been determined under the existing UAA?

23 MR. PEPE: No, I'm not. Although, again, as
24 I said, the Act is really accompanied by an
25 extraordinary set of comments that review the case law

1 state by state and point out the extent to which each
2 individual provision is implementing prevailing state
3 laws. And since all interpretations are not the same,
4 as you go through these comments in detail, you'll
5 undoubtedly find some circumstances where some things
6 are clarifying a rule that some courts someplace,
7 sometime, may have determined a little bit differently.
8 But, no, I have not done a comprehensive review of the
9 Pennsylvania case law; and I can't tell with certainty
10 that we might not be modifying some precedent that was
11 established sometime. There's not a lot of case law
12 though, because arbitration is very final and it's very
13 difficult to review.

14 MS. COATES: Right. That's what I'm saying.
15 The purpose of it is to have finality for the parties,
16 so the case law is somewhat limited in interpreting
17 procedural aspects of what the arbitrator may do; is
18 that correct?

19 MR. PEPE: That's correct.

20 MS. COATES: Am I also correct that with
21 respect to common law arbitration, the common law
22 arbitration incorporates a number of the existing
23 provisions of the UAA?

24 MR. PEPE: That is correct. And, in fact,
25 one area in which we feel certainly would be a technical

1 amendment is to the extent you preserve common law
2 arbitration and that may be, you know, a question that
3 deserves some consideration, but to the extent you
4 preserve it, you probably also want to make sure that
5 you pick up the appropriate cross-references to the new
6 Act.

7 MS. COATES: That's what I'm looking at
8 specifically, the procedures under the Common Law
9 Arbitration, Section 7342, how it links those provisions
10 of the UAA that apply in the context of Common Law
11 Arbitration currently. So there is a technical
12 amendment that would be necessary there?

13 MR. PEPE: Yes. And then, of course,
14 there's another area that I think probably deserves some
15 clarification. And this whole Act is only intended to
16 apply when parties agree to arbitrate. It's not
17 intended to apply when state law mandates arbitration.

18 The rule that makes it clear that there is a
19 different standard of judicial review for when state law
20 mandates arbitration was buried in current Pennsylvania
21 law under the current Pennsylvania Uniform Arbitration
22 Act. That's no longer in the new law, so you probably
23 ought to put it someplace else. And what I've suggested
24 is just moving it someplace else in the Judicial Code to
25 make it clear that when law mandates arbitration there's

1 a greater review of standard review by courts.

2 MS. COATES: That was my question. I was
3 looking at your attachment and recommended amendment,
4 and it appears in the second section you've added to the
5 compulsory arbitration rules?

6 MR. PEPE: That's correct.

7 MS. COATES: And that appears to say now
8 that the rather -- or what was the intent there with
9 respect to putting that provision under the compulsory
10 arbitration?

11 MR. PEPE: Well, this takes language that
12 was previously in, I think it was Section 7303 of the
13 current law, and which is not carried over into the new
14 Act and preserves it by moving it back into the
15 compulsory arbitration section and it makes it clear
16 that when there is a law that mandates arbitration,
17 unless that law provides otherwise, a court would have
18 the same ability to review the arbitration award that it
19 would have to review the arbitration of a lower court --
20 I mean to review the judgment of a lower court.

21 So, in other words, if there was an error of
22 law or if there was an arbitrary and capricious ruling
23 or if there was a ruling clearly contrary to the
24 evidence, an appeals court could set it aside. That
25 rule does not ordinarily apply in arbitrations. So if

1 the arbitrator gets the law wrong, you know, that's not
2 ordinarily reviewable by an appellate court.

3 MS. COATES: But in the context of the
4 compulsory arbitration, they still have to go through a
5 trial de novo or obtain a judgment from the Common Pleas
6 Court. That's not saying the Common Pleas Court can
7 review the arbitrator award for errors of law, if it
8 calls for arbitration?

9 MR. PEPE: No. No, this language does --
10 this is not, you know, trial de novo language. If you
11 want a trial de novo in terms of arbitration required by
12 law, you'd need to use trial de novo language. This is
13 the language that is in the existing law.

14 MS. COATES: But the appeal for trial de
15 novo is also in existing law under the compulsory
16 arbitration. You have it cited there. It's --

17 MR. PEPE: This is true of trial de novo
18 when arbitration is mandated by rule of court as opposed
19 to by law.

20 MS. COATES: Okay. Thank you. Thank you.

21 CHAIRMAN CALTAGIRONE: Any other questions?
22 You've given us a lot.

23 MR. PEPE: Just one final quick comment.
24 The reporter who worked on this project, a guy by the
25 name of Timothy Heinz from Missouri, who's a

1 commissioner, and really did a wonderful job. If there
2 are a lot of issues that arise and you would like to
3 consider this again, you know, perhaps next session, I
4 suspect we could prevail on him or the Chairman of the
5 Committee to make a little trip to Pennsylvania and
6 answer many of your questions, if you would so desire.

7 CHAIRMAN CALTAGIRONE: Do you have a copy?
8 Is that the report that you have on the bottom pile
9 there that you might want -- do we have that? If not,
10 could we -- if you could give us one, if possible.

11 MR. PEPE: Yeah, this was transmitted to the
12 Committee staff.

13 MS. HARTMAN: Yes.

14 CHAIRMAN CALTAGIRONE: Do we have copies of
15 that there?

16 MS. HARTMAN: Yes, you have it.

17 CHAIRMAN CALTAGIRONE: We don't have that
18 (indicating).

19 MS. COATES: We don't have that one.

20 CHAIRMAN CALTAGIRONE: What I'd like to do,
21 if we could borrow that from you, Ray, if it's okay, I'd
22 like to make a copy for the entire Committee. This is a
23 pretty thick report, I think, that you have there on the
24 comment section, correct?

25 MR. PEPE: Yes. I believe you have it, but

1 you can certainly have my copy.

2 MS. HARTMAN: You have copies of everything.
3 It's attached to his --

4 MR. PEPE: It may look smaller, because it
5 may be printed double-sided in your version.

6 MS. HARTMAN: I made it double-sided.

7 CHAIRMAN CALTAGIRONE: No, we don't have it.

8 MS. HARTMAN: You don't?

9 CHAIRMAN CALTAGIRONE: No, none of the
10 members have that. That's why I was -- it's not here.
11 I think that's important that we have that. If you want
12 to share that with him, Ray, I would appreciate that,
13 because I think that --

14 MR. PEPE: Okay. I did electronically
15 transmit it to the Committee. And if anybody would like
16 me to send them an electronic copy, I certainly can; and
17 I'll leave this copy behind for now.

18 CHAIRMAN CALTAGIRONE: Okay. Jetta, if you
19 would pick up that copy now and we will make sure that
20 members of the Committee -- we'll get it back to you,
21 Ray.

22 MR. PEPE: Oh, there's no problem. I don't
23 need it back.

24 CHAIRMAN CALTAGIRONE: Okay. Thank you
25 very, very much. The meeting is now adjourned.

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(The hearing concluded at 11:34 a.m.)

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CERTIFICATE

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings and that this is a correct transcript of the same.

Tracy L. Markle,
Court Reporter/Notary