THE RESOLUTION EXPERTS®

DISPUTE RESOLUTION ALERT

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AN UPDATE ON WORLD DEVELOPMENTS IN MEDIATION AND ARBITRATION

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NEUTRAL FACT-FINDING AS A TOOL TO RESOLVE EMPLOYMENT DISPUTES

By Alexander S. Polsky, Esq.

Unresolved workplace conflict can divide a work group, drag down productivity, and destroy a professional environment. Direct negotiation between the employee and employer may be impossible if there are interpersonal issues, and in workplace conflict, there usually are. Mediation may be impractical or unripe. Arbitration may be unwelcome, as employees and employers may not feel comfortable giving up control over the resolution of the dispute. The use of an ombudsman may be regarded by the employee as a waste of time if the ombudsman is perceived to be a corporate shill. However, the rarely considered device known as neutral fact-finding may offer a way to bring feuding parties back to a working relationship and restore productivity to the workplace.

A Typical Workplace Problem:

Consider the problem of Susan. Susan is a 59-year-old corporate secretary who has worked at her job for 19 years. Susan's salary has reached the cap for the job classification. In addition, in one year her retirement benefits will increase more than 30% because she will have attained a retirement score of 75 (age plus years of service).

Susan is competing for a newly created position of Executive Secretary, a position that will increase her salary by 13 percent and provide an additional week of vacation. Her supervisor promised that she would be seriously considered for the position because of her length of service and her exemplary performance.

About a month after that promise, Susan's supervisor left the company. The new supervisor is a co-worker who Susan has always found to be difficult. Susan was told that she would have to work from 9:00 a.m. to 5:00 p.m. Susan had been on a 7:00 a.m. – 3:00 p.m. schedule so that she could pick her grandson up after school and take care of him until his parents came home from work. Susan was very upset when she was informed about the schedule change. She openly criticized the new supervisor and she filed a complaint with the Human Resources department alleging age discrimination and disparate treatment.

Susan's supervisor complained to the Human Resources department and Susan was given a written warning for disruptive behavior – the first blemish on an otherwise perfect work record.

Susan is now discussing an EEOC complaint. She has asserted in the lunchroom that the company has an agenda regarding older workers. She alleges her

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case is an example of the company's covert policy of forcing out workers just before their retirement vests. The Human Resource representative has scheduled interviews with Susan and her supervisor. This is the same HR representative that placed her on warning for disruptive behavior. She does not wish to participate in any interview unless accompanied by counsel. The HR policy permits the company to meet with the employee without counsel, and the company is enforcing that provision.

The Conflict in a Nutshell

Susan feels betrayed. She feels her supervisor has a vendetta and her company is deliberately trying to force her out to avoid payment of benefits. She is certain that the HR department supports this management goal. She is also certain that the likelihood of a beneficial outcome as a result of a human resource inquiry is nil. The company feels that Susan is pressing the "age button" in an effort to get the promotion and to cover up poor performance for the new supervisor. The Human Resources manager is now aware that HR placed Susan on warning without conducting an investigation. Therefore, the HR manager is of the opinion that a direct HR review will make problems worse.

The HR manager invited Susan to negotiate or mediate and Susan said she would sue first. The company considered arbitration but decided to explore other options first.

A Different Option: Neutral Fact-Finding

WHAT IS IT?

Neutral fact-finding is a process-oriented dispute resolution vehicle. It takes the resolution out of the company's hands and into the hands of a neutral third party. It works best when it is embedded in the corporate culture through the HR policy manual and is structured in an environment where it can be requested by the HR department, the manager or the employee. It may be optional or mandatory depending on corporate policy, but it works best when the parties can consent to the process rather than have it imposed upon them.

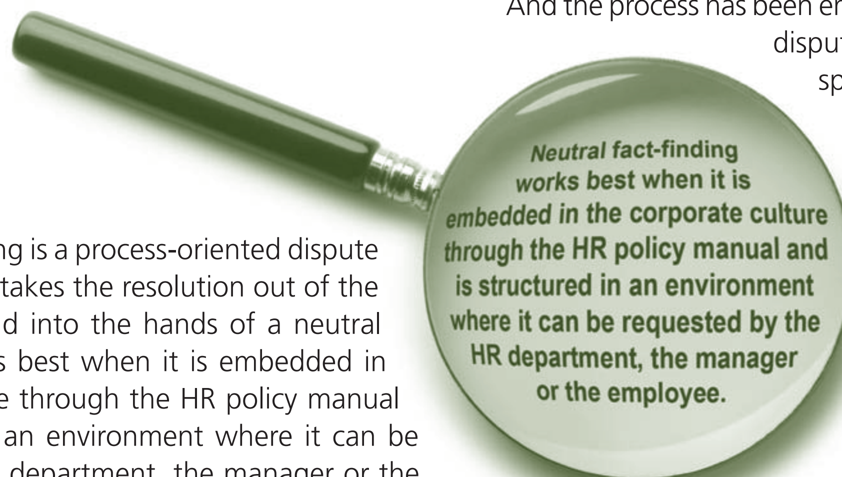
Norman Schultz defines the process as a "fact-finding endeavor in which those conducting the investigation are neutral with respect to the conflict at hand. Neutral fact-finding can be employed at many levels, from small (but heated) environmental or community conflicts to large-scale political or international conflicts." According to Schultz, "[t]he obvious advantage of employing neutral parties in an attempt to settle a factual dispute is that neutrals are much more likely to be objective, and in being objective they are more likely to discover the real facts."

WHERE HAS IT BEEN USED?

Neutral fact-finding is a common tool in the resolution of international disputes over just about everything from commercial contracts to treaty violations. For example, the international investigation by the United Nations into Saddam Hussein's weapons arsenal was a recent example of neutral fact-finding.

The process is not just for international problems. Neutral fact-finding has been used in a great many public policy disputes, including those involving acid rain and other scientific environmental issues. Governmental agencies use neutral fact-finding to determine whether social service providers are complying with licensing agreements. The process has also been used to determine the cause of police shootings.

And the process has been employed effectively in civil disputes as well. In fact, many special masters have been appointed by courts to determine the root causes of discovery delay, reliability of evidence, and other similar sorts of problems.For an example of a dispute involving a public university that was resolved through neutral fact-finding, see http://www.universityofcalifornia.edu/news/2005/feb17.html.



HOW DOES IT WORK?

The first step is to identify the problem to be investigated. The second step is to find a neutral. The third step is to create a protocol which typically includes an agreement that all material collected by the neutral shall be kept confidential until the final report is released. Typically, the report is held confidential for a stated period of time while the parties attempt to negotiate a resolution consonant with the facts found.

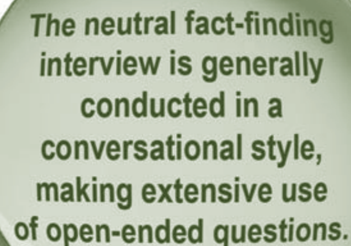
HOW DOES IT WORK IN THE WORKPLACE?

The Intake Form: A simple form initiates this process. It is made available to all department heads, employees, and to Human Resources. In a company with a collective bargaining agreement that allows union employees to use this process, the forms are available to union stewards and committee members. The form identifies the date, the party submitting the complaint, names of interested parties and a brief description of the issue. The form is submitted to the corporate designee or directly to an outside neutral service provider. After it is submitted, a neutral fact-finder is selected.

The first step: Once the neutral fact-finder is selected, either through a neutral provider list or a strike list, an initial caucus is scheduled. This is typically done as a joint caucus. The neutral fact-finder establishes the parameters, explains that the process is confidential, clearly defines the objective as the development of a win-win resolution, and requests each party to explain the situation in a non-adversarial (non-competitive) manner. After each side provides their overview, the neutral may ask some questions in joint session.

And then… the neutral fact-finder will have individual meetings with the disputing parties to flesh out the issues and underlying facts, and to decide who will be witnesses. The neutral fact-finder is not seeking to test realities or create a solution at this stage. He is simply deciding the investigation strategy.

These first sessions are adjourned with the understanding that the neutral fact-finder will prepare an investigation plan and interview the necessary parties. The parties to the dispute are requested not to discuss the dispute or the inquiry with any of the potential witnesses or their co-workers.



The Interviews: The interviews are scheduled through the HR department. This may be done in conjunction with the manager, unless the manager is the source of the complaint. It is important that parties to the disagreement be asked not to discuss the issues or the pending interview. Thereafter, the neutral fact-finder engages in confidential discussions with the witnesses and, if necessary, with other managers or individuals within the department. The interview is generally conducted in a conversational style, making extensive use of open-ended questions.

The introduction to the interview is important. The neutral fact-finder must gain the confidence of the witnesses through an assurance of confidentiality and an understanding that individual names will not be linked to any particular statements or conclusions. Therefore, the interview is not recorded.

After the interviews – the Report/Conclusions: Depending upon the circumstances, the neutral fact-finder will either draft a report or provide an oral debriefing. In either case, an overview of the issue, scope of investigation and conclusions are provided. The conclusions will typically include a recommendation for specific action that may be taken to address the issue. Sometimes the recommendation may be that no action be taken. Whatever the recommendation, it should be stated in neutral terms.

In our case, the recommendation may look something like this: *"Following an interview with the employee, representatives of management and numerous co-workers, as well as a comprehensive review of the employee handbook and job descriptions, it appears that issues within this department are the result of a personal dis-*

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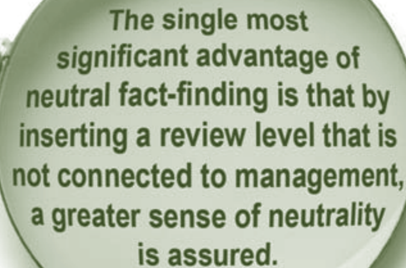
Neutral Fact-Finding in Employment Disputes *Continued from Page 3*



pute between the supervisor and the employee. This employee has been a highly regarded employee for her entire career at the company. The employee's reaction to her changed responsibilities under her new supervisor constituted disruptive behavior within the workplace. However, the supervisor should have alerted HR to a potential problem before she undertook management of this employee. The election by the employee to disrupt the workplace rather than make use of available human resource options is an issue that requires counseling. However, the decision of HR to place the employee on formal warning without interviewing her, coupled with general employee concerns regarding age-based discrimination, requires redress. Therefore, the employee should be transferred out of this department and promoted to executive secretary with no change in current pay pending her successful training. She must concurrently complete a period of informal warning as a consequence of her disruptive behavior. She should be reviewed in six months and if performance is satisfactory, given an out-of-sequence salary adjustment. Existing HR guidelines provide for a 5-7% pay increase due to the new grade level. In light of the employee's conduct, a 5% pay increase is recommended after six months. The supervisor should be given sensitivity and management training and should be counseled regarding her use of her position in situations where her actions may appear to constitute a vendetta.

The single most significant advantage of neutral fact-finding is that by inserting a review level that is not connected to management, a greater sense of neutrality is assured. Employees are more comfortable and more candid when they are assured that specific comments will not be attributed to them and that their personal opinions will not be communicated to co-workers or management. It is often believed that employees are fearful of being critical of management. Often, employees do not wish to be critical of the co-worker if the criticism might get back to the co-worker. Neutral fact-finding reduces these concerns.

Moreover, many jurisdictions require that the firing of an employee meet certain due process standards, including a "reasoned decision." The California Supreme Court stated in a fairly recent case that what is required is a "reasoned conclusion… supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." Neutral fact-finding meets this requirement.

After the report: When a report is completed, questions about the use of the report remain. Should the neutral report be binding? Whether or not binding, should the neutral report be admissible in a collateral proceeding such as a complaint before the EEOC or other administrative body, or in civil litigation?

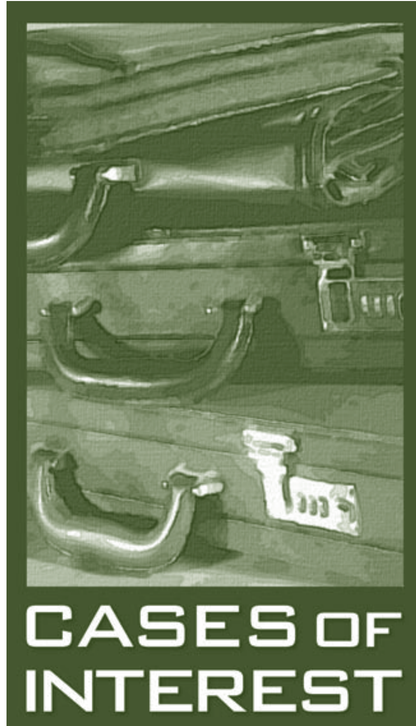
As a voluntary administrative remedy, neutral fact-finding should fall within the mediation privilege, and neither the results nor the investigation be subject to disclosure or discovery beyond the scope of the parties involved in the investigation. In those situations where the findings are not binding, the neutral fact-finder or a third party should be permitted to utilize the findings in an effort to obtain a voluntary agreement.

Conclusion:

A process that provides an outside review of employee grievances, that includes even handed fact finding and provides stated conclusions, is an effective and constructive method of resolving workplace disputes. The earlier it is undertaken; the sooner people get back to work.

Alexander S. Polsky, Esq. is a neutral with JAMS.

This issue of the *Alert* spans a period of time that overlaps that of the astrological sign Gemini – the twins – and so our cases of interest come this time in related pairs.



EVIDENTLY PARTIAL? #1: TRIVIAL BUSINESS RELATIONSHIP NOT EVIDENT PARTIALITY

***Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, WL 111343 (5th Cir. (Tex.), Jan. 18, 2007).**

Positive Software Solutions and New Century Mortgage submitted a contract dispute to arbitration. The arbitrator issued an award in favor of New Century. After losing, Positive conducted an investigation and learned that the arbitrator and one of the parties' attorneys worked for the same side of an (unrelated) litigation seven years prior. Neither the arbitrator nor the attorney disclosed their common history. Positive moved to have the decision vacated arguing that the arbitrator showed evident partiality in failing to bring up the past relationship and later ruling in favor of his former colleague. However, the evidence showed that the arbitrator and attorney were two of 34 attorneys for the one side and they never interacted, met or spoke while working on that unrelated litigation. The Court of Appeals for the Fifth Circuit found this previous relationship to be trivial and insubstantial and therefore refused to vacate the arbitration award.

EVIDENTLY PARTIAL? #2: "POWERFULLY SUGGESTIVE" EVIDENCE REQUIRED

***Southern N.J. Building Laborer's District Counsel v. Collective Concrete Corp./Collective Building Services*, WL 77331 (United States District Court, D. N.J., Jan. 8, 2007)**

Southern New Jersey Building Laborer's District Counsel entered into a collective bargaining agreement with Collective Concrete Corp./Collective Building Services. The union claimed that Collective neglected to subcontract bargaining unit work to a signatory contractor paying the contractual wages and benefits required by the CBA and the matter was sent to arbitration. The arbitrator ruled in favor of the union which moved to confirm the award in the United States District Court for the District of New Jersey. Collective moved to vacate the award for evident partiality of the arbitrator based on Collective's observation that Union's representatives "seemed to be very well-acquainted with the Arbitrator."

The Court confirmed the award, holding that a party requesting a court to vacate an arbitration award for evident partiality must present evidence of circumstances that are "powerfully suggestive of bias" so that a reasonable person would conclude that the arbitrator was biased. The Court held that Collective's allegation did not amount to a powerful suggestion of bias and therefore failed to demonstrate evident partiality.

FEE ISSUES #1: CALIFORNIA LAW TRUMPS PRIVATE AGREEMENTS

***Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, WL 49638 (Cal. App. 4th Dist., Jan. 9, 2007)**

Dr. Schatz retained attorney Allen Matkins to represent him in a dispute. The fee agreement contained an arbitration clause stating that all disputes arising out of their relationship would be arbitrated. There was, in fact, a fee dispute which was resolved in arbitration. Schatz later retained Matkins for a second unrelated dispute. Two months before trial, Schatz stopped making payments. Matkins completed the trial and then demanded payment. Schatz elected to invoke California's Mandatory Fee Arbitration Act, which requires a lawyer to arbitrate fee agreements in a nonbinding forum. Schatz

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lost the arbitration and filed for a trial. Matkins moved to compel arbitration under the original agreement. The lower court denied Matkins' motion. California's 4th District Court of Appeals affirmed, holding that the legislature enacted the law for public reasons and clients are not free to waive the rights that it affords.

FEE ISSUES #2: AND THE CALIFORNIA LAW IS STRICT

***Ervin, Cohen & Jessup, LLP. v. Kassel,* WL 466282 (Cal.App. 2 Dist., Feb. 14, 2007)**

The law firm of Ervin, Cohen & Jessup served Kassel notice of intent to file suit to recover unpaid legal fees and notified Kassel of his right to resolve the dispute under the Mandatory Fee Arbitration Act. Kassel did not respond to the notice within the MFAA's requisite time frame and EC & J filed suit. After filing suit, EC & J then filed a motion to compel arbitration pursuant to the parties' retainer agreement. The agreement stated that any and all disputes would be resolved through binding arbitration. The trial court found that this provision in the retainer agreement was unenforceable. The Court of Appeals later reversed, holding that the client failed to invoke his right to nonbinding arbitration under the MFAA and, therefore, must submit to arbitration pursuant to the agreement.

PUNISH MEDIATION NO-SHOWS #1: NO SHOW PAYS OTHER PARTY'S EXPENSES

***Scott v. K.W. Max Inv., Inc.,* WL 80851 (M.D. Fla., Jan. 8, 2007)**

Jeffrey Scott and Otis Jones sued K.W. Max Investments, Inc. alleging that Max had violated laws regarding unpaid overtime. The court ordered mediation. Scott appeared by telephone to the mediation claiming transportation problems. Jones was incarcerated at the time of mediation, but both sent their attorneys with full settlement authority. Local Rule provided that unless excused by the presiding judge in writing, all parties must be present at the mediation. Neither Scott nor Jones made a good faith effort to get permission from the court, or even notify opposing counsel or the mediator about their absences. The court found that the absences were not substantially justified, and awarded reasonable expenses, including attorney's fees and mediator's fees incurred by Max.

PUNISH MEDIATION NO-SHOWS #2: MEDIATION BINDING ON NO-SHOW LIFE TENANT

***Goodman v. Lothrop*, WL 14560 (Idaho, Jan. 4, 2007).**

Sallie Lothrop and her mother, Alta Hess, were involved in a property boundary dispute with a neighbor, John Goodman. Goodman filed a claim in district court and the dispute went to mandatory mediation. Hess was in the hospital at the time of the mediation and unable to attend, but Lothrop was able to attend. Lothrop's counsel represented that she had the authority to settle the case even though she did not have Hess' permission. Lothrop also believed that her mother had a life estate in the property at the time but neglected to inform the other parties. Lothrop and Goodman reached an agreement that made no reference to Hess' rights to the property. Goodman found out later about the life estate and appealed to the Idaho Supreme Court to uphold the mediation agreement. The Court held that because the life estate had not been recorded on the deed it was not enforceable, even though Lothrop believed it to be in existence at the time of the mediation.

ARTISTS BATTLING ARTISTS #1: CHOICE OF LAW NOT VIOLATIVE OF PUBLIC POLICY

***Twin Cities Galleries v. Media Arts Group,* WL 429551 (8th Cir. (Minn.), Feb. 9, 2007).**

Twin Cities Galleries of Minnesota and Media Arts Group of California entered into a dealership agreement which contained an arbitration clause but no choice of

law provision. Twin Cities alleged that Media Arts violated its rights under the Minnesota Franchise Act and the matter was submitted to arbitration. The arbitration panel ruled that California law applied to the parties' relationship and therefore dismissed the Minnesota claims and made an award in favor of Media Arts.

Twin Cities appealed to the district court to have the award vacated, and their motion was granted on the ground that the arbitrator's ruling violated Minnesota's public policy of protecting franchisees. The case was appealed to the Eighth Circuit, which held that the public policy exception would only apply if the application of California law undermined an asserted fundamental Minnesota public policy. Because California and Minnesota's statutes protecting franchisees were virtually identical the public policy exception did not apply.

ARTISTS BATTLING ARTISTS #2: WHO DECIDES WHO DECIDES WHO DECIDES? ABITRABILITY IS FOR THE JUDGE

***Vivid Video, Inc. v. Playboy Entertainment Group, Inc.,* WL 274366 (Cal.App. 2 Dist.) Feb. 1, 2007)**

Plaintiffs Vivid Video, Inc. filed an action in district court for breach of contract to which Defendants Playboy Entertainment Group, Inc. filed a motion to compel arbitration in which they made only one argument – that according to the contract governing the dispute, arbitrability was a question for the arbitrators, not the courts, to decide. (This is known as the doctrine of "kompetenz-kompetenz," meaning that the arbitrator has the competence to determine the limits of the scope of his authority.)

Basing its ruling on the language in the agreement, the trial court denied the motion to compel arbitration of arbitrability. Playboy appealed to the California Court of Appeal in Los Angeles. The Court held that a trial court's ruling as to who decides arbitrability is a final determination that does not give rise to an appeal and therefore dismissed Playboy's appeal.

WAIVE IT GOODBYE #1: PAY YOUR FILING FEE OR HOLD YOUR PIECE

***Susan Stowell v. Toll Brothers,* WL 30316 (United States District Court, E.D. Pa., Jan. 4, 2007)**

As a condition of employment, Susan Stowell signed an agreement to arbitrate any disputes that might arise between her and her employer, Toll Brothers. Stowell later filed a complaint against Toll Brothers alleging gender discrimination and sexual harassment and the dispute was submitted to the American Arbitration Association. Toll Brothers failed to respond to AAA's request for a $750 filing fee and the AAA refused to arbitrate the dispute.

Subsequently, Stowell filed the suit in the United States District Court for the Eastern District of Pennsylvania. Toll Brothers responded by filing a motion with the Court to compel arbitration pursuant to Section 4 of the Federal Arbitration Act. The Court held that Toll Brothers surrendered its right to arbitration when it defaulted on the pending arbitration by refusing to pay the filing fee. The Court held that because Toll Brothers' default would prevent the Court from staying proceedings under Section 3 of the FAA, Section 4 of the FAA did not require the Court to compel arbitration.

WAIVE IT GOODBYE #2: LITIGATING MAY ACT AS IMPLIED WAIVER

***Alexander v. Easy Finance of New Albany, Inc.,* WL 188579 (N.D. Miss. Jan 23, 2007)**

Alexander and five other plaintiffs had binding arbitration agreements with Easy Finance of New Albany. They joined forty-eight other people in a class action against Easy Finance alleging that Easy Finance was charging excessive fees on loans. After a 19-month-long discovery period, Easy Finance moved to compel arbitration. Plaintiffs claimed Easy Finance's extensive participation in litigation amounted to a waiver of arbitration. The Court held that a party waives its right to arbitration when its participation in the litigation prejudices the non-moving party in terms of delay, expense, or damage to a party's legal position. The Court found

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no prejudice and compelled arbitration based on its findings that Easy Finance raised its arbitration defense in response to Plaintiffs multiple amended complaints, Easy Finance filed the motion to compel arbitration immediately following discovery, and Plaintiffs contributed significantly to the delay of the case.

NO REASONING #1: FINDINGS OF FACT AND REASONING UNNECESSARY

***Electronic Data Systems v. Donelson,* 2007 WL 108280 (Fed. App. (6th Cir.), Jan. 18, 2007)**

Milton Donelson and Cortez Lotts, two African American employees of Electronic Data Systems Corporation, sued EDSC for firing them based on their race. Both parties agreed to arbitration. EDSC asked for several extensions before the hearing, which eventually occurred on September 28 and 29 of 2004. On January 3, 2005, EDSC wrote a letter to the arbitration panel objecting to any decision that might be reached because of the length of time that had elapsed. Two days later, the panel issued its decision in favor of Donelson and Lotts, awarding putative damages and attorney's fees. The decision included no findings of fact or reasoning. EDSC appealed the award, claiming that the arbitrators had exceeded their powers. The district court denied EDSC's opinion and the Court of Appeals affirmed, entering into a long discussion that reiterates the propositions that you get what you contract for, and it's hard for a court to review a case when there's virtually no record.

NO REASONING #2: FLAWED INTERPRETATION MAY BE UPHELD

***Michigan Family Resources, Inc. v. Service Employees Int'l Union Local 517M,* WL 188099 (6th Cir. (Mich.) Jan. 26, 2007).**

Service Employees International Union initiated arbitration against Michigan Family Resources, Inc. after MFR gave non-union employees a significantly higher cost-of-living increase than it gave union employees. The arbitrator agreed that all employees should receive the same cost-of-living increase and found in favor of SEIU. MFR filed a motion in the Federal District Court in Michigan to vacate the award arguing that the arbitrator's award did not draw its essence from the agreement because he considered extrinsic evidence to clarify an ambiguity in the agreement. The district court granted the motion and SEIU appealed to the Sixth Circuit Court of Appeal, which reversed, holding that as long as the arbitrator was arguably construing or applying the contract and acting within the scope of his authority, the Court would not overturn his award – even if it went so far as to find that the arbitrator had committed a serious error.

OLD CONTRACT + NEW INJURY = ARBITRATION #1: OLD CONTRACT BINDS NEW DISPUTE

***Reigelsperger v. Siller,* WL 415154 (Cal. Feb. 8, 2007).**

Chiropractic patient Reigelsperger and his wife sued Dr. Siller for medical malpractice and loss of consortium. Siller filed a motion to compel arbitration pursuant to the contract between the parties made two years prior, for chiropractic treatment unrelated to the treatment at issue. The Superior Court denied the motion and the court of Appeals affirmed; however, the Supreme Court of California reversed. The Court held that the arbitration agreement was enforceable because the agreement contained language intended to bind the patient and doctor "who now and in the future treats the patient." The back of the agreement also contained an informed consent clause that reiterated the intention to bind the parties for future treatments.

OLD CONTRACT NEW INJURY #2

***Terrebonne v. K-Sea Transport Corporation,* 2007 WL 196532 (5th Cir. (La.) Jan. 26, 2007)**

Dextel Terrebonne was a seamen on a ship owned and operated by K-Sea Transport Corporation. On November 3, 2000, Terrebonne was injured while working. The company settled with him for the cost of the medi-

cal expenses that he had accrued to date. Both parties agreed that future related claims would be settled by arbitration. Terrebonne was later re-injured and attempted to file suit. K-Sea moved to compel arbitration. Terrebonne argued that the new injury was distinct from the old injury and that the arbitration agreement was unenforceable. The district court disagreed and compelled arbitration. At arbitration, Terrebonne lost, but was awarded arbitration fees. K-Sea reopened the case to enter judgment from the arbitration. Again, Terrebonne objected. The district court affirmed the award and the appellate court affirmed the district court.

[Editorial note: Apparently new injuries must be radically different from old injuries not to be considered re-injuries.]

OUTSIDE THE AGREEMENT #1: SIDE PROVISIONS OF CBA PART OF CONTRACT

United Steel Workers of America v. Cooper Tire & Rubber Company, WL 101990 (6th Cir. (Ohio) Jan. 17, 2007)

Cooper Tire & Rubber Company and United Steelworkers of America Local 207L entered into a collective bargaining agreement containing an arbitration clause. The parties concomitantly implemented a "side agreement" limiting Cooper's contributions to retiree healthcare benefits. The side letter did not contain a separate arbitration clause. A dispute developed concerning interpretation of the side agreement and the union filed a motion in federal district court to compel arbitration of the grievance. The district court held the grievance arbitrable under the scope of the CBA's arbitration clause.

Cooper appealed to the Sixth Circuit Court of Appeals and the Court affirmed. The Court applied the "scope" test which holds that unless parties indicate otherwise, disputes over a side agreement are arbitrable if the subject matter falls within the scope of the CBA's arbitration clause. The parties' arbitration clause covered all disputes concerning interpretation of the CBA. The Court held that the subject matter of the side letter pertained to the CBA's healthcare benefits provisions and therefore fell within the scope of the arbitration clause.

OUTSIDE THE AGREEMENT #2: AWARD MAY BE VACATED IF ARBITRATOR GOES OUTSIDE CONTRACT

City of Westlake v. Corrigan, 2007 WL 284324 (Ohio, Feb. 14, 2007).

Charles Shimola owned property in the City of Westlake, Ohio that was the subject of litigation between him and the City. In 1993, the City and Shimola came to an agreement regarding Shimola's property that settled the litigation between them. Further disputes arose and three cases were filed. The Court of Common Pleas consolidated the cases and, following a jury trial, Shimola was awarded $2.5 million. The trial court reduced the award to attorney's fees, claiming that Shimola had shown no legally cognizable damages.

Shimola appealed to the local trial court, and on appeal, the court held that while there were clearly some damages, that the previous award had been excessive and, so it ordered a new trial. Shimola and Westlake agreed to arbitrate instead. The arbitrators awarded Shimola $560,000. Westlake moved to confirm the award and Shimola moved both to vacate the arbitration agreement and to set a trial date. The trial judge, Judge Corrigan, declined to dismiss Shimola's case and he vacated the arbitration award. Westlake filed a petition with the Ohio Court of Appeals to prevent Corrigan from taking further action in the case for lack of jurisdiction. Corrigan filed to dismiss the motion. The court held that Corrigan had jurisdiction and dismissed Westlake's petition.

On appeal to the Ohio Supreme Court, Westlake argued that the arbitration award should have been enforced, and that Corrigan was thereby stripped of jurisdiction. The Court held that the arbitrators had considered the issue of proximate cause, which was specifically outside the scope of the contract for arbitration. As such, Corrigan retained jurisdiction and vacating the arbitration award was appropriate.

Stumbling on Happiness

By Daniel Gilbert, Knopf Press 2006

Reviewed by Richard Birke

This book has been on the New York Times bestseller list for months. The author of the smash hit *Freakonomics* has written a glowing recommendation on the front cover. Malcolm Gladwell, author of bestsellers *Blink* and *The Tipping Point* and one of the most popular public intellectuals of his generation, offers a must-read endorsement on a special sticker affixed to the book. There's no question that it's worth reading. But will it make you happy? Hard to say. And that's the precise point.

Daniel Gilbert is a psychologist on the Harvard faculty. His particular interest is in the psychology of happiness, and he's written a wonderful book that offers some insights into our ability and inability to be happy and to know what will make us happy. The book is well written and researched, and Professor Gilbert is a very witty guy.

The book is divided into six sections: **Prospectivity, Subjectivity, Realism, Presentism, Rationalization and Corrigibility.** I'll spend just a moment on each.

The chapter on **Prospectivity** is subtitled the Journey to Elsewhen. It describes the human propensity to create mental images of the future. We spend a lot of time envisioning tonight, tomorrow and years from now. We try to imagine how to create our happiness and avoid unhappiness in the future. Why do we do this? Because we are, at base, all control freaks – at least with respect to our own lives. The problem associated with this tendency is that we have many roadblocks that stand between us and an accurate vision of what will make us happy.

Subjectivity defends the enterprise of studying happiness. Gilbert makes a case for the skeptics, who, like his dad (described in the book) says "if you can't measure it, you can't study it, so there's nothing valid you can say about it." And with happiness, there's reason to doubt the studies. It's hard to say that your report matches my report of the equivalent levels of happiness. Perhaps when I am experiencing peak happiness, I am only experiencing half of the happiness that you experience when you're at your peak. We often hear statements like "he only thinks he's happy – but if he knew…he'd see how limited his happiness is." So we don't know if a subject's reported happiness levels have anything to do with ours. Or do we?

Gilbert defends the study of happiness using the law of large numbers. He uses a wonderful example. Imagine a factory that makes faulty rulers. Some are huge and some are small. Perhaps one person will measure a tennis ball with a small ruler and think the ball is huge. And then he measures a tree with a large ruler and thinks the tree is small. The person might say that the tennis ball is smaller than the tree. However, the likelihood that a lot of people will get the same sort of distorted rulers and measure the tree small and the ball big is vanishingly small. Thus, subjective reports can, in the aggregate, say scientifically verifiable things.

Realism describes the behavior of babies, for whom reality is universal. If I hide a cookie in a drawer in the presence of a baby, then when you enter the room, the baby assumes that you know the cookie is in the drawer. Why? Because he knows it to be true, so of course you must also know. We are so overwhelmed with the images of what we see, we make estimates that are based on inaccurately complete visions of the future. We fail to adequately consider the things we don't see. How happy will you be if you lose your job?

Chances are that when you think about that, it's an unremittingly negative event. However, if you were to lose your job, there would likely be hundreds of other relevant factors that would determine your happiness – your family, your other job prospects, your health, and more. The tendency to think that what we see in our minds is true leads us down a garden path.

Presentism describes our tendency to intertwine our present with our images of the future. Gilbert describes images from the 1950s of what the future (our present) would look like. And the images are nothing like today. We have cellphones, laptops, and small cars that run on gas. We are multicultural. And we don't have holes in the wall that synthesize our food from air or silent jet cars. In fact, the images of the future from the '50s look oddly like images from the '50s.

So it follows that when we try to think of our own future, we evaluate it as if we were in the present. We fail to account for change, so we fail to estimate our future happiness correctly. When we are in current pain, we don't think happy events will make us happy. In fact, we think that because when we think of the event and we sense our unhappiness, that the thought of the event (instead of our current mental state) is the source of our unhappiness.

Rationalization describes how well people get over disasters. We aren't nearly as broken up by bad events as we think we will be. However, small annoyances really weigh us down. A person who was berated badly by a stranger quickly found ways to dismiss the stranger's opinion. However, observers were more bothered – because their defense mechanisms didn't get enough stimulus to kick in. Maybe this chapter could be called "don't sweat the big stuff."

Corrigibility means changeability. Gilbert shows the reader that we have a hard time learning from experience and from the experience of others. An example? Endings matter too much. If you like the whole movie but not the ending, you are likely to give it a bad review. And the opposite is true as well. Another example? People who make no money are less happy, on average, than people making $50,000. However, people making $5 million are not more happy than people making $50,000. Yet we struggle for more and more – thinking

When we try to think of our own future, we evaluate it as if it were in the present.

that the next thing – a new bathroom, a vacation, a car – will make us happy. And it doesn't, but no matter how many times we learn this, we continue to work harder and harder. There are more examples, but they all lead to the same bottom line – it's hard to improve our ability to predict what will make us happy.

Gilbert's humor might be a little cloying and persistent for some readers, and the lightness of his tone might obscure the weight of his message for some, but he does assemble an impressive array of important empirical work in a very entertaining manner, so perhaps his latent desire to be a satirist can be forgiven.

The message he does deliver is critically important for anyone in the dispute resolution business. When we are crafting deals and asking people to think about what sort of deal is most likely to provide the most happiness, we have learned that the disputants have little reason to have confidence in their ability to know whether they will be happy or not. They are likely to be able to take a big loss without a big problem, but they fear big losses. They are likely to envision too many details of the deal to be able to have a realistic assessment of what it will feel like to accept it. We can guide people to resolution, but we can't be sure they'll be happy in the morning. It's a terrible admission, but a liberating one as well.

Professor Gilbert's work tells you that you can't know whether you'll be happy, but I can tell you that reading the book made me smile and think, and I'll go so far as to predict that the same will be true for you. I add my voice to Gladwell's and Levitt; *Stumbling on Happiness* is well Worth Reading.

JAMS and HKIAC Form an International ADR Alliance

A reception was held in San Francisco on March 21, 2007, to announce a strategic alliance between JAMS, The Resolution Experts and Hong Kong International Arbitration Centre (HKIAC), two of the world's leading providers of arbitration and mediation services. Officials attending the reception included, from left, Jay Welsh, JAMS Executive Vice President and General Counsel; Sally Harpole, HKIAC Council Member; Steve Price, JAMS President and CEO; Michael Moser, HKIAC Chairman; Robert Davidson, Executive Director of JAMS Arbitration Practice; and Richard Chernick, Managing Director of JAMS Arbitration Practice.

The mission of the alliance is to promote more effective resolution of international business disputes through arbitration and mediation in the U.S. and Asia. JAMS and HKIAC will coordinate on the administration of arbitration and mediation cases. In addition, both organizations will jointly promote ADR in Asia and the United States and conduct seminars, conferences, and other events geared to the legal and business communities in each region.

UPCOMING EVENTS

- May 10-12, 2007 in Washington DC: ***Advanced Mediation Techniques*** with JAMS neutrals Linda R. Singer, Esq., Michael K. Lewis, Esq. and Edna A. Povich.
- May 20-22, 2007 in London, United Kingdom: JAMS neutral Katherine Hope Gurun, Esq. Co-Chairs the ***International Construction SuperConference.***
- May 22, 2007 in Los Angeles, CA: ***JAMS and USC Law Co-Host a Reception*** to celebrate Judge Dickran Tevrizian's affiliation with JAMS and his contribution to USC Law.
- June 24, 2007 in Chicago, IL: ***One-Day Arbitration Training on Arbitrating a Healthcare Dispute*** featuring JAMS neutral Jerry P. Roscoe, Esq.

For more information on all events, visit www.jamsadr.com.

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