



DISPUTE RESOLUTION ALERT

VOL. 7, NO. 1 • WINTER 2007

AN UPDATE ON WORLD DEVELOPMENTS IN MEDIATION AND ARBITRATION

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FEB. 21-24,
2007

for a
comprehensive
three-day
program on
Commercial
Arbitration

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Reflections on International School on Business Mediation

By **Bruce A.
Edwards, Esq.**



**Bruce A.
Edwards, Esq.**

We arrived in Admont, Austria on a beautiful Sunday afternoon, our home for the next week a 900-year-old Benedictine monastery set in the shadow

of the Austrian Alps. Rebecca Westerfield and I had been invited to join two other American trainers, Professor Len Riskin from the University of Missouri School of Law and Professor Erica Fox from Harvard Law School at the 2nd International



**Hon. Rebecca
Westerfield, Ret.**

Summer School on Business Mediation. Our assignment, along with half a dozen European professors/mediators, was to teach approximately 80 certified mediators from Austria, Germany and Switzerland

the best lessons learned from our collective experience as mediators. We are all experienced mediators, and we are very experienced teachers and trainers. Since we had arrived with the express

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A Real Socratic Dialogue – Philosophy and Mediation

By **Mike McCord**

Conflict is part of the human condition. People are, by nature, social beings, and in interactions with others, conflict is certain to occur. Conflict in and of itself is neither good nor bad. Rather, it is the individual response to conflict that determines whether the outcome will be positive or negative. The aggregate of individual conflicts also has a significant impact on society as a whole.

In this short article, I address some of the most deeply troubling philosophi-

cal issues implicated by the effects of individual responses to conflict. I offer no answers – but instead I describe the works of Plato and Socrates, philosophers who have shaped my view that mediation offers the best approach to just conflict resolution.

WHOSE JUSTICE IS IT?

When in conflict, people look inward towards their own sense of justice. In Plato's "The Republic," Socrates explained at great length how the percep-

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Reflections on International Mediation School *Continued from Page 1*

mission of imparting knowledge to the Europeans, we were not fully prepared for just how much we were to learn in the days ahead. We learned a great deal about mediation in German-speaking countries of Western Europe. And we learned quite a bit about ourselves.

The summer school program was the brainchild of two Austrian mediators and trained psychologists, Dr. Mario Patera and Ulrike Gamm, who developed this mediation training program as an extension of their mediation and training practice, "Konfliktkulture," based in Vienna. The goal of the program was to further the training and education of German speaking mediators and other professionals looking for ways to integrate mediation skills more fully in their chosen professions. While the faculty thought we represented a diverse set of trainers, workshop participants came from a substantially more diverse set of fields. They came from law, psychology, engineering, architecture and accounting – reflecting a wide range of interests and ideas in the burgeoning mediation profession of these countries. The school

was hosted by the Austrian Chancellor and European Union President, Dr. Wolfgang Schlusser and the Austrian ministers of Justice, Health, Economy and Labor.

The program was a boot-camp of day-long course instruction punctuated by European-style coffee breaks (read: long and strong). Movement between general sessions and breakout courses was choreographed by Mario and Ulrike with the precision of an Austrian corps de ballet, reflecting the months of preparation that preceded our adventure.

Our first hour in this quiet Austrian village found Rebecca and me immersed in conversations with our co-trainers, excited about the week ahead, but even more excited to learn from one another the diverse nature of

our respective career paths. My favorite conversation was with a certified mediator and professor of pantomime, who was present to entertain as well as teach an understanding of body language in mediation.

The week was to include a heavy dollop of inward reflection. The tone for the spiritual and reflective aspects of the training was set by a private tour of the world's largest monastic library; a single room almost 75 yards long lined with two-story high book shelves and filled with volumes of religious and historic literature. The setting was classically European baroque complete with frescoed ceilings, gilded book shelves, intricately carved statues and marbled floors. While I spend much of my life in a state of amazement at just how little I

know in this world (editor's note: this is a sure sign of intelligence. Wisdom is knowing you don't know!), but there are few things I've ever experienced as humbling as standing in the shadow of those monumental stacks of collected knowledge.

On the first day of summer school, the participants arrived

and were immersed in an ambiance of learning through self discovery. Clearly, this was a reflection of the psychology background of the program founders. Rebecca and I wondered aloud throughout the week how a focus on feelings and needs would be received at a JAMS training. We thought our American colleagues might be a little more results oriented and impatient than our European counterparts. The program soon shifted focus to a comparison of mediation styles as the American mediators were tasked with mediating two role plays for the group at large: a complicated construction project dispute and a family-owned business dispute. We found it interesting that both disputes were mediated pre-litigation and did not involve attorneys in the role plays. The role play exercises and all breakout



sessions focused on a wide variety of teaching points, were simultaneously translated into German and were videotaped for later distribution.

In addition to the larger demonstration mediations we conducted, Rebecca and I taught smaller break-out courses drawing on our American experience. Rebecca taught courses on "Breaking Impasse" and the "Role of Retired Judges in Mediation." I taught sessions on "Partnering in Construction Projects" and "Comparative ADR Business Models in the U.S." We lectured together on "Developing a Successful Mediation Practice." Each session was attended by engaged and eager audiences.

When the schedule allowed for time off from teaching, Rebecca and I took full advantage of the unique opportunity to learn from our fellow trainers. We enjoyed the rich and diverse curriculum as much as any of the Europeans. We joined fellow students in sampling a menu of courses in "Non-Violent Communication," "Mediating Within European Institutions" and "Mindfulness in Mediation." Participation in courses taught by our German speaking co-trainers was made possible because we had the luxury of being attended to by personal translators who were never far from our side throughout the week. This formal training was augmented by informal conversations with summer school participants. We chatted over meals, walking between classes and, like the young college students we all once were, by sitting on the lawn – although our college days were not spent in the shadow of an 18th Century cathedral.

Following each day of course work we were encouraged to attend an eclectic mix of social, recreational and team building activities. One afternoon we hiked several thousand feet into the Austrian Alps picking wild blueberries along the route. At the top we enjoyed a meal at a mountain chalet and an impromptu camp out. Another evening brought us back to the monastery library which served as the backdrop for a night of choral singing. The music was composed by one of our co-trainers specifically for our event. Perhaps the most memorable event of a week filled with vibrant and enduring memories was the week-ending rock concert featuring the head of the 8,000 monk Benedictine Order who played lead guitar and flute. The crowd was raucous and once again, we were reminded of college days, although the bands we saw then were not led by monks.

What lessons did we take away from an intense and fulfilling week of interaction with aspiring mediators from different cultures almost half a world away? Rebecca and I both observed that the enthusiasm for learning was palpable even though most mediators were struggling to develop a full-time mediation practice. The mediation community was generally well organized and highly committed to the value of training. As an example, Austria requires completion of over 250 hours of mediation training to become a registered mediator. Once registered, a mediator can market herself as certified and is entitled to some protection under Austrian law. Switzerland and Germany, although less formalized in their training requirements, are equally devoted to the importance of education and training.

From a business perspective, Rebecca and I came to the same conclusion; the business of mediation in Austria, Germany and Switzerland is relatively undeveloped, perhaps akin to the marketplace encountered by JAMS and its predecessor companies in the United States 15 or so years ago. The difference appears to be that now in Europe there exists a critical mass of mediators poised to develop this market in a much shorter time than was true in America in the late '80s. Austria alone has over 3,000 trained mediators in a country of just over seven million inhabitants. Switzerland and Germany are home to several of the world's largest insurance companies, companies routinely using mediation in the United States. The future of mediation in Europe appears promising and we expect the application of mediation to be broader than simply mediating legal disputes. On the final day of the summer school program Mario and Ulrike invited more than 60 high-level business and political leaders to join the conference and to hear the message of untapped business opportunity. Perhaps in some small way Rebecca and I, through the sharing of our American experiences, contributed to the incremental growth of the European market.

In the final analysis, we learned a lot from our European counterparts, and we made many new friends. Perhaps no lesson is more poignant than that captured by the words once spoken by a famous Austrian philosopher: "The things we have in common unite us; it is our diversity that should inspire us."

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A Socratic Dialogue – Philosophy and Mediation *Continued from Page 1*

tion of justice differs for each person. Socrates, in his dialectic conversation with Thrasymachus, described how justice in the purest sense dictates that both friends and enemies receive what is due them. The just man giving his due to an enemy, however is seen by many as weak. On the other hand, the unjust man would never give an enemy his due, except in those situations that accrue to his own benefit.

Ironically, the unjust man claims the “right” to have more than the just man has. Further, the unjust man will strive and struggle in order that he may have more than all men. An unjust individual will abuse the legal system by employing their self centered sense of justice to seek only his advantage, without consideration of others or society as a whole.

Socrates related that injustice creates division, hatred and fighting amongst people, while justice imparts harmony and friendship. Injustice fails to respect and value others and society. Injustice becomes its own enemy, and society bears the cost in both human and financial terms.

WHAT IS JUSTICE?

Socrates stated emphatically that justice is not something citizens usually receive from government and the courts, and these institutions certainly are not the only and most important places that dispense justice. Justice is a commitment to the common good of those involved in conflict, and ultimately to society as a whole.

In mediation, justice is created by those directly involved in the conflict. Only the participants can determine what is just in their own particular situation. Justice is something they give to one another, and even more importantly, give to themselves. Unfortunately, conflict is often accompanied by anger. In mediation, the anger

of broken relationships can be confronted and dealt with rather than avoided.

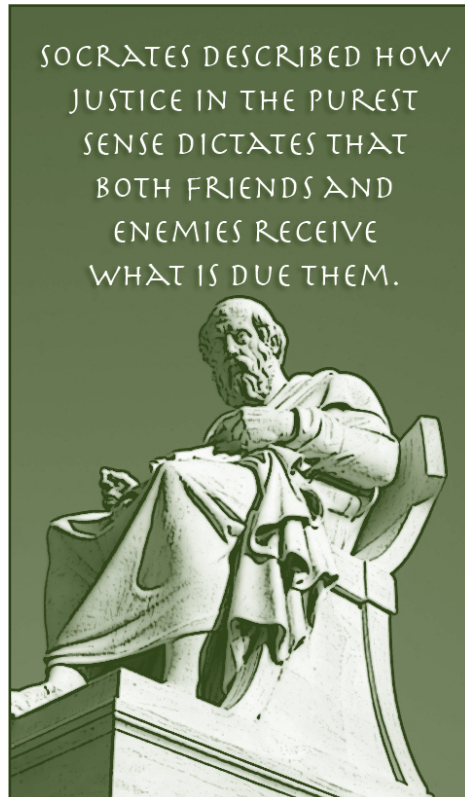
WHOSE RIGHTS?

Individuals who focus solely on their rights worry about losing their rights. This fear leads them to hold fast emotionally to what they have determined they deserve to receive. As long as a person in conflict is concentrating on their fear of loss, the focus of the conflict is on differences between people. A focus on differences pushes people apart and hinders their ability to find joint gains and resolve conflict. The focus is on fear of loss, rather than on the hope of a positive solution benefiting all parties.

In the practice of most good mediators, the focus is on common interests. A grudging agreement does not bring about unity between the parties. Nor does an edict handed down from a judge or arbitrator. Moreover, adversarial approaches to conflict resolution fail to take advantage of the power that a shared sense of purpose can bring. A good mediation creates a team of problem solving partners from a pair of polarized disputants. Unlike adjudication or arbitration, mediation asks those in conflict to explore their interconnections and shared interests.

WHITHER REVENGE?

Anger is a very powerful human emotion. It energizes and can lead to positive change. Individuals whose anger fuels a rights-based approach to justice, however, are likely to lose sight of their own self-interests. When revenge becomes the primary motivating factor, any objective view of self-interest becomes distorted. Revenge is elusive and its pursuit is costly to many other interests, including the resolution of the conflict.



All too often, people use the legal system to express their anger towards the other litigant. Such a focus becomes unhealthy when anger is so all-consuming that the someone loses sight of his own priorities and values. All-consuming anger diminishes the ability for self-introspection and positive change. Revenge is so destructive because it harms all involved in conflict. All are deleteriously affected and both the individual and society are diminished.

AND FORGIVENESS?

Anger hurts not only the people it is directed towards, but also those who wield it. By failing or refusing to forgive those who wronged us, we continue to inflict on ourselves the pain others created. Forgiveness is not only something one does for another; it is what one does to free oneself from the continuation of pain and anger. It is a gift to one's peace of mind, self-esteem, relationship with others and future.

Forgiveness is a choice that requires one to take responsibility for her actions, and more importantly her feelings. It requires the forgiver to be responsible for herself, even her pain and the choice to remain angry. The hoped-for goal of mediation is that people will be able to forgive others and themselves. With forgiveness, the individual can start anew, without any burdens encumbering one's peace of mind.

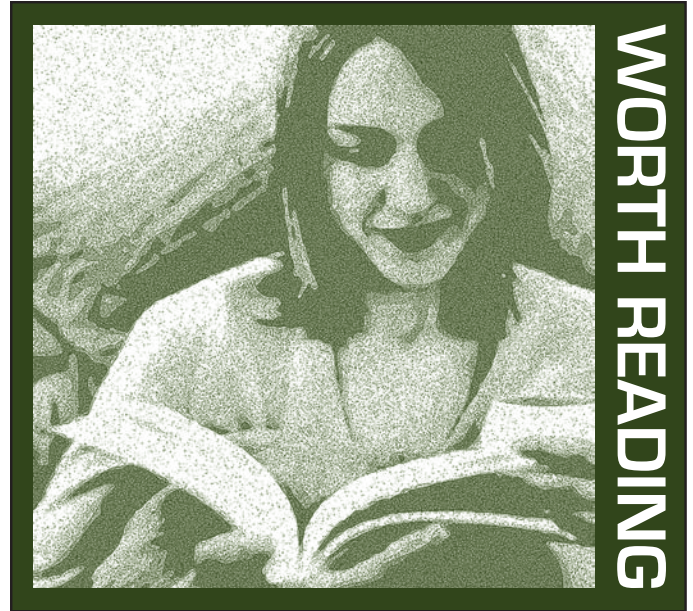
CONCLUSION: THE HOPE OF MEDIATION

Mediation is optimistic in its nature. It respects the ability of the individuals in conflict to create their own justice. Such a justice, Socrates proclaimed, is best of all because it is created and molded by those involved in the conflict. Justice is a gift they give to each other and to themselves. Mediation aspires to the type of justice, which Socrates enunciated; a justice created by individuals, which benefits all.

**"If I am not for myself, then who will be for me?
If I am for myself alone, what am I? And if not
now, when?"**

- From Sayings of the Fathers

Mike McCord is an attorney, mediator and educator.



Worth Reading: The Best Articles of 2006

Reviewed by Richard Birke

2006 was a year of changes. Congress changed hands. The strategy for the war in Iraq is changing, but it's anyone's guess as to what the changes will be or mean. The Middle East continues to be a hotbed of change – every season sees new parties in power, new leaders, new alliances, new violence, new worries. And the same is true of many African nations. Iran and North Korea are changing from non-nuclear to nuclear. China and India have changed from "getting ready" mode to "we're emerging" mode. Global warming has changed from a theory into a challenge. YouTube was the invention of the year, as the internet and technology continue to change the way business and media work. We're only six years into the new century, and the 1990's are already a very distant past.

Thankfully, the year was far less turbulent in the world of dispute resolution literature. There were no new breakthroughs in case management, decision theory, economics or psychology. There were no sweeping legislative changes, no epiphanies or trends or events to be presented, debated, adopted, discussed, rejected, critiqued or suffered through. Instead, the year was

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Worth Reading: The Best of 2006 *Continued from Page 5*

characterized by thoughtful reflection and comment on our ever-more mature field.

This year, the best articles represent three comments on the current state of arbitration, a compendium of lawsuits involving mediation, a symposium about the state of health care dispute resolution, a musing on the “vanishing trial,” and a refreshing piece about how a year in Nepal changed one mediator’s perspective on her practice in America.

Long annual standard disclaimer here: “Best” means I read and liked them, and “article” means “law review article.” As a law professor, I have to read all – or at least most – of the law review articles in the dispute resolution field, and that you, prefer not to sort through the many articles that are “not the best.” Non-law review articles – mainstream media – are too numerous to keep track of, and you are in as good a position as I to review these. Finally, I don’t pretend to read every last article that gets written, so I may have missed some good ones, and there are many excellent ones that didn’t make my highly subjective cut.

Disclaimers and introductions complete, let us now proceed to the – cue fanfare – Best of 06!

Class Actions After the Class Action Fairness Act of 2005 by Edward Sherman; 80 Tulane Law Review, page 1593 (2006).

The last time class actions saw major reform was in the 1960’s. Those changes gave rise to the civil rights lawsuits of the ‘60’s and the mass tort lawsuits that continue to this day. These were not entirely predictable outcomes. Now the next major set of changes to the class actions rules – the Class Action Fairness Act (CAFA) – have occurred and are starting to make their way into the legal arena. Will the changes be as dramatic? What might happen next?

Not too much, observes Tulane law professor (and former Dean) Ed Sherman. We are seeing a modest expansion in the jurisdiction of the federal courts over class actions – that is, there will be more federal law applied and less state law applied in class actions filed in federal court. There remain exceptions to federal

jurisdiction – if the controversy is primarily a state court matter with state court plaintiffs as a dominant percentage of the class, a federal judge may be more likely to use state law rules, but all things equal, federal courts will apply federal laws.

What else? Plaintiffs can aggregate losses to meet federal court “amount-in-controversy” requirements, and federal courts will apply a “minimum diversity” test, not a strict diversity test, to determine whether a class action can be filed in federal court. There is a tiny bit of expanded appellate review of the decision of a federal judge not to remand a case to a state court. There’s also a short lived timing problem about the effective date of CAFA.

CAFA matters to anyone who is involved in a class action matter, especially if they wish to remain in a state court and their opponent wants the case to go to federal court. And for these litigants and lawyers, Dean Sherman’s article provides a great starting point for your practice. He points practitioners to exact numerical proportions of classes that allow state law to control, and he directs the reader to all the small but relevant changes in the law. For the rest of us – not part of a class action lawsuit – Sherman offers some forecasts – he foresees an increase in the number of intrastate classes and a decrease in the national class action, and he foresees that the changes of CAFA won’t come close to the changes induced by the 1966 changes to the nature of class action practice.

Universes Colliding: The Constitutional Implications of Arbitral Class Actions by Maureen Weston; William and Mary Law Review, March 2006.

There is a rich and interesting intersection between arbitration and class actions. If some or all of the members of a putative class have signed an arbitration agreement, there are strong arguments that the class action should be arbitrated. However, class actions exist not just for private justice. They exist for public purposes as well, and some of the hallmarks of arbitration – including the potential for confidentiality and the relative informality of the procedure – are not designed to promote a

primarily public purpose. This entanglement of public purpose and private actors has led to a variety of court decisions on such matters as whether the arbitrator or the judge must preside over class certification and concerns about how much process is due in an arbitral class action.

Professor Weston does an admirable job summarizing cases, statutes and other commentator's works, and she organizes them into a clear, orderly article. I found the contrast between approaches to the arbitrability issues particularly informative. In some jurisdictions, the arbitrator shares authority with the judge over many class decisions. In others, the judge confirms the work of the arbitrator, and in others, the arbitrator does it all. Which is best? Professor Weston says the best one is the one that balances public interest and constitutional requirements with the freedom to contract for an arbitration clause that is appropriate to the transaction it covers.

The second part of Weston's article is a thorough analysis of notice, hearing, evidence, appeal, selection and other matters. I won't try to summarize it all here, so let me give away the punch line. Professor Weston says that if you are careful in the drafting of your arbitration clause and in the administration of your arbitration, that you can avoid any constitutional problems. But if you aren't careful, what you don't know about class action arbitration could lead to a problem of constitutional magnitude.

The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees by Stephen Ware; Journal of American Arbitration, Volume 5, 2006

This is a fun and funny article. Professor Ware takes on the favorite tool of judges who like to let parties out of arbitration agreements – the unconscionable contract of adhesion – and tells the judges who use it to back off. Why? Because the judges tend to look at the so-called "unfair" clause at the time that an unfair situation has arisen. Instead, they should look at the clause at the time it was bargained for. When I enter into a contract with you to insure me for every possible event that might befall me and we include getting hit by lightning, but you offer me a discount if I waive benefits if I am hit by

two simultaneous bolts of lightning. I accept. Then I get hit by two bolts of lightning and I sue you arguing that "I had so much coverage, how could I not be covered for this?" There's a hindsight bias, and Ware argues that if the remoteness of the possible negative impact were weighed appropriately against the aggregate benefit to the consumer of having an arbitration clause that the clauses would rarely be struck down as unconscionable. Why is it fun and funny? This is a nice little skewer of some judge's sacred cows, and it's done with a certain boldness that puts about as much swagger in an article as one is likely to find in an arbitration journal.

ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes by Julia Ann Gold; Journal of Dispute Resolution, Volume 2 (2005 – distributed in 2006).

Professor Gold goes to Nepal for a year. I'm jealous.

She discovers many things about how different Americans are from Nepalis. The ones pertinent to conflict resolution are – in very short fashion:

We are individualist. They are collectivist.

We universalize. They particularize. (We like social rules. They like to treat each instance of interaction as unique.)

Our communication is direct – words mean what they mean. Their communication is indirect – nuances mean a lot, as does what is not said. Moreover, we place less meaning on context than they do.

Our sense of time is that of a commodity that we waste or use. Their sense of time is that everything has its time.

We are a low power distance culture – subordinates are expected to strive to achieve and are rewarded for it. Innovation is welcome. They have a high power distance culture. One knows one's place and the good of all requires that one observe the hierarchy.

We are comfortable with some social uncertainty. There is room for people at the fringes. They like rules to impact everyone equally and they like people to fall in line.

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Worth Reading: The Best of 2006 *Continued from Page 7*

We believe we are the locus of our control. They believe the universe is the locus of control.

Professor Gold then maps our predilections onto processes used to deal with disputes. Small wonder that we map pretty well onto arbitration, litigation and mediation, and the Nepalis tend to be less litigation oriented. The article closes with advice to a mediator dealing with a Nepali-American dispute and a Nepali-Nepali dispute.

The article is a nice piece of comparative styles and it makes Nepal seem like a wonderful place to be. But it also makes me realize that the US is a wonderful place to be as well. If you are direct, low power distance, individualist....

Shifting the Focus from the Myth of the Vanishing Trial to Complex Management Systems, or I Learned Almost Everything I Need to Know about Conflict Resolution from Marc Galanter, by John Lande; Cardozo Journal of Conflict Resolution, Volume 6 (2005, released 2006).

Other than having an unwieldy title, this is a fine piece. Professor Lande takes on nationally-acclaimed professor Marc Galanter's assertion that trials are vanishing. Galanter did a massive study and concluded that the trial rate in the U.S. has dwindled to 1.8%. Professor Lande says, in short order that we never had many dramatic Perry Mason-like trials, that we are about where we need to be in terms of numbers of trials and trial rates, and that the real story about litigation is a story about arbitration, administrative hearings, and other forms of disputing than mediation and conciliation. Lande argues that Galanter over-emphasizes the disappearance of this chimera known as "trial" and loses the bigger picture. What is that picture? It's not one that is all roses and love and peace. It's a complex system in which people still, frequently enough, dig in their heels and argue for a binary win-lose verdict. It just isn't something that manifests in trials, per se.

The title is about 10% of the length of the piece. Short, brave, and well worth reading.

Disputing Irony: A Systematic Look at Litigation about Mediation by James R. Coben and Peter N. Thompson; Harvard Negotiation Law Review, Spring 2006.

The title says it all. Here's what's inside this comprehensive piece. Lots of data. Discussion of confidentiality and cases upholding and overcoming confidentiality. A section on enforcement of agreements, with some enforced and others not. A section on cases about conduct of participants – attorney misconduct, malpractice, mediator misconduct and malpractice, judicial ethics, and the particular challenges posed by hybrid processes. There are sections on fees, duty to mediate, costs, sanctions, and acts and omissions.

The authors summarize this 100-page work with two-and-a-half pages of lessons learned. I'll use one sentence. Disclose conflicts, don't over promise, look out for the rights of third parties, be a good practitioner or an informed consumer and don't be so hot and heavy to get a case settled that you force a reluctant person to accept a deal that gives them immediate remorse.

It's a good 100-page read – in part because it lets you know how much litigation this field has spawned.... and how little.

Georgia State University Law Review Symposium on Approaches to Conflict Resolution in Health Care Settings; Volume 21, 2005 (published/distributed in 2006).

I can't even begin to summarize all of the 11 articles in this wonderful symposium issue. There are articles on the next generation of medical malpractice ADR, on professional associations and their role in ADR, participatory approaches to conflict, and more. If you care at all about the aging of America and are curious about the shape of the future ADR landscape in the health care arena, find and read this issue of the *GSU Law Review*.

So – another year over, a new one just beginning. We wish you glad tidings and happy reading!

STATE LAW TRUMPS FEDERAL LAW REGARDING MODIFICATION OF DISPUTE RESOLUTION PROCEDURE

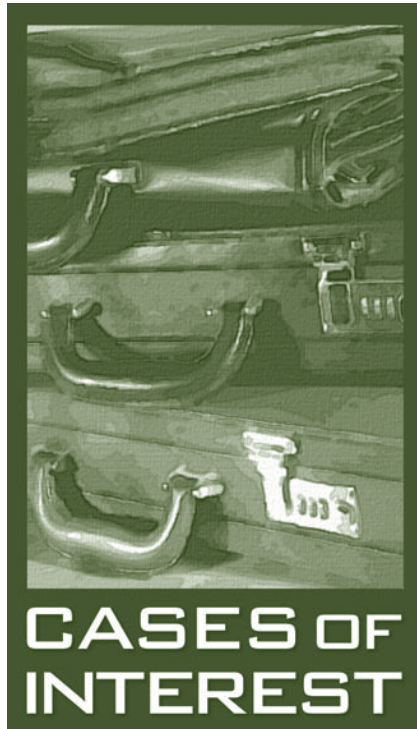
Martin v. Comcast of California/Colorado/Florida/Oregon, Inc.,
(Oregon Court of Appeals, Nov. 1, 2006)

Subscribers entered into cable television contracts with regional Comcast providers. Comcast mailed notices that existing cable contracts would now include an arbitration clause. The subscribers later filed a class action lawsuit in Oregon State Court alleging unlawful billing practices. The suit was unrelated to the notice about the arbitration. Comcast moved to compel arbitration. The trial court denied the motion, finding that the arbitration clause was invalid under Oregon law. Comcast appealed to the Oregon Court of Appeals arguing that Oregon law was preempted by the federal Cable Act. The Court of Appeals found the federal Cable Act does not preempt state law governing consumer acceptance of proposed modification to dispute resolution procedures. The Court ruled that the trial court correctly applied Oregon law, affirmed the trial court's finding that no meeting of the minds existed regarding the modification of the service contracts, and remanded the case for trial.

ARBITRABILITY DEPENDS ON RELATIONSHIP BETWEEN THE CLAIM AND THE CONTRACT THAT COMPELS ARBITRATION

Coventry First LLC v. Marmorstein, WL 3077682
(Fla.App. 4 Dist., Nov. 01, 2006).

Warren Marmorstein entered into a contract with Coventry First insurance, according to which Marmorstein would sell insurance policies as an independent contractor to third-party clients who would then be insured by Coventry First. When Coventry directly contacted one of Marmorstein's prospective clients and



then cut Marmorstein out of the sale of the insurance policy, Marmorstein brought an action for tortious interference with a contractual relationship against Coventry. Coventry moved to compel arbitration pursuant to a contract clause which provided for arbitration of "all disputes." Marmorstein objected, arguing that his tort claim was unrelated to the contract. The trial court denied the motion and the circuit court affirmed. Coventry appealed, and the District Court of Appeal of Florida reversed, holding that a relationship existed between the tort and the contract with the arbitration clause. The Court reasoned that where the arbitration provision includes "all disputes," the existence of any nexus at all between the dispute

and the contract containing the arbitration clause gives rise to arbitrability. Where damages were for the type of compensation Marmorstein would normally earn through his contractual relationship with Coventry, the nexus was more than sufficient.

MISTAKE ABOUT AWARD OF ATTORNEY FEES AND ARBITRATION COSTS NOT MANIFEST DISREGARD, DESPITE CONFLICT WITH CONTRACT AND LAW

OneBeacon American Insurance v. Turner, WL 3102578 (5th Cir., Oct. 30, 2006)

Thomas Turner's yacht was stolen. When it was recovered, it had damage from flooding and vandalism. Turner's insurer, OneBeacon alleged contributory negligence and offered \$9,000 against the \$95,000 claim. The arbitration provision in the contract between OneBeacon and Turner stated that all costs and expenses would be borne by the parties. A panel of three arbitrators awarded Turner the full value of the yacht, administrative expenses related to the arbitration, and attorney's fees. OneBeacon appealed to the Fifth Circuit Court of Appeals, arguing that the arbitration award was contrary to public policy and that the arbitrators

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acted with manifest disregard for the law by acting in a manner inconsistent with both maritime law and the contract, which require bearing one's own costs. The Court held that while neither law nor the contract would allow Turner to recover attorney's fees, OneBeacon did not meet its burden in proving the arbitrators demonstrated manifest disregard for the law.

ARBITRAL "CEASE AND DESIST" ORDER FAILS IN LIGHT OF CHANGES IN FACTS

Massachusetts Nurses Association v. North Adams Regional Hospital
(First Circuit Court of Appeals, Oct. 26, 2006)

In 2002, North Adams Regional Hospital and Massachusetts Nurses Association brought to arbitration a dispute alleging that the hospital had exceeded an agreed nurse-to-patient ratio. The arbitrator found the hospital had violated the staffing provision in the collective bargaining agreement and ordered the hospital to cease and desist from further violations. In 2005, the nurses brought another similar staffing grievance and filed an action to enforce the cease and desist order. The parties agreed to submit the matter to a magistrate judge who granted the hospital's motion for judgment as a matter of law. The nurses appealed to the 1st U.S. Circuit Court of Appeals, which held that the changes in the complex work schedule created a material dissimilarity between the current and prior dispute, and that the new matter would have to be arbitrated.

INTERMEDIATE APPELLATE COURTS STILL SOMETIMES "GET IT WRONG" ABOUT DEFERENCE DUE ARBITRATORS

In re General Motors
(N.Y.A.D. 3 Dept. Oct. 26, 2006)

Brenda Gurau brought a Lemon Law claim against General Motors when her new Cadillac made loud noises and six attempts to remedy the problem had failed. The arbitrator awarded her a little more than \$27,000. GM moved to vacate and the Supreme Court of New York vacated the award on the ground that the arbitra-

tor applied an incorrect legal standard about whether a "proven" defect existed at the time of the hearing. The Supreme Court, Appellate Division, of New York reversed and held that the Lemon Law does not require a consumer to prove that a defect exists at the time of an arbitration hearing in order to recover under the statute. Additionally, General Motors merely attacked the merits of the award, claiming that the arbitrator should have resolved certain factual disputes in its favor. General Motors failed to establish that the arbitrator's decision was irrational, arbitrary or without adequate evidentiary support, and thus did not establish any ground for vacating the award.

COURT OVERTURNS ARBITRATOR'S AWARD ON PUBLIC POLICY GROUNDS

In re Arbitration between Binghamton City School District and Peacock,
WL2971766 (N.Y.A.D. 3 Dept. Oct. 19, 2006)

Binghamton City School District filed charges against Brian Peacock, a 32-year-old tenured teacher, stemming from his relationship with a 16-year-old female student. The parties submitted the dispute to arbitration, and the arbitrator found Peacock guilty of insubordination, neglect of duty and conduct unbecoming a teacher. The arbitrator also found that Peacock showed no remorse for his conduct. The arbitrator suspended Peacock without pay for one year, and Peacock appealed. The Supreme Court of New York found the penalty to be "shockingly lenient," vacated the award and remitted the matter for imposition of a new penalty. Peacock appealed again. The Supreme Court, Appellate Division of New York upheld the lower court's findings. The Court held that the authority to vacate an award is limited to acts which exceed the arbitrator's power. An arbitrator exceeds his or her power "where the arbitrator's award violates a strong public policy." Here, while the penalty was within statutory parameters, the award was so lenient that it violated a policy of protecting children from the harmful conduct of adults, particularly in the education system.

CONTRACT CAN DEFEAT FEDERAL LAW OF ARBITRABILITY

***Sadler v. Green Tree Servicing* (8th Cir., Oct. 17, 2006)**

Elsie Sadler purchased a mobile home with a loan from BankAmerica Housing Services. The loan was later transferred to Green Tree Servicing. The contract between Sadler and Green Tree stated that an arbitrator would determine questions of arbitrability, and also enumerated several self-help remedies available to Green Tree prior to arbitration, including foreclosure. Green Tree sent Sadler a foreclosure notice, and proceeded to remove Sadler from the home. Sadler filed a lawsuit in federal district court alleging unlawful conversion and other charges. She alleged that she never defaulted on a payment, and she asked for a jury trial and punitive damages. Green Tree moved to compel arbitration. The trial court denied the motion, holding that it would be unconscionable for Green Tree to exercise self-help instead of going to arbitration, and then to use arbitration as a shield against subsequent litigation. Green Tree appealed to the Court of Appeals for the 8th Circuit, arguing that the initial question of arbitrability should be decided by an arbitrator, as per the contract. The Court re-affirmed the general rule that absent explicit and unmistakable evidence to the contrary, that arbitrability questions were to be decided by a court. In this case, the evidence was clear and unmistakable, so the district court was reversed and the question of arbitrability was sent to an arbitrator.

STATE LAW LIMITS ARBITRATION REMEDIES ABSENT INTENTIONAL FRAUD OR GROSS NEGLIGENCE

***Moore v. Landes* (Ky.App., Oct. 13, 2006)**

John Moore purchased a horse from William Landes at an auction in Maryland. Purchasers and sellers at the auction assented to an agreement requiring disclosure of any invasive joint surgery and providing for rescission as the exclusive remedy for breach. The agreement contained an arbitration clause that specified arbitration would take place in Fayette County, Ky. After the auction, Moore discovered the horse had undergone

surgery. Landes offered to refund the purchase price. Moore instead ratified the sale and brought an action for fraud, negligence, and breach of warranty in Maryland state court. Landes removed the action to the Maryland District Court, where he filed a motion to dismiss on grounds that the parties had agreed to arbitrate in Kentucky. The Maryland District Court ordered the matter to arbitration in Kentucky and dismissed the case. The arbitrator concluded that under Maryland law, to collect damages outside of a remedy provision in a contract, a party must prove intentional fraud or gross negligence. Subsequently, the arbitrator found that Moore failed to establish fraud and awarded no damages. The Fayette Circuit Court affirmed the arbitrator's award. Moore appealed on two grounds: (1) that the arbitrator's award was in manifest disregard of the law, and (2) that the award jeopardizes the integrity of the thoroughbred industry and was thus against public policy. The Court of Appeals of Kentucky affirmed the arbitrator's award holding Maryland law enforces limitation of remedy provisions unless a party can prove intentional fraud or gross negligence.

DOCTOR MAY NOT REVOKE CONSENT AFTER INSURER HAS SETTLED THE CLAIM

***Simmons v. Ghaderi* (Cal.App. 2 Dist., Sept. 27, 2006)**

Michelle Simmons filed a medical malpractice claim alleging that Dr. Lida Ghaderi caused the death of her daughter. The parties agreed to mediate. Ghaderi was present at the mediation and consented to having her insurer, Cooperative American Physicians/Mutual Protection Trust, settle her claim. While Ghaderi waited in a separate room, Simmons and Cooperative reached a settlement agreement. After learning of the agreement, Ghaderi revoked her consent and brought an action to vacate the settlement. The trial court held Ghaderi's consent was sufficient to authorize Cooperative to settle the dispute on Ghaderi's behalf. Ghaderi appealed to the Court of Appeals of the Second District of California. The Court of Appeals held the settlement agreement was enforceable as Cooperative entered into the settlement agreement with Ghaderi's consent and as her authorized agent.

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