

## DISPUTE RESOLUTION

### The Newsletter for Conflict Resolution Neutrals and Attorneys

Published by the Dispute Resolution Section of the  
Tennessee Bar Association

August, 2001

#### LETTER FROM THE CHAIR

David Taylor has provided the following article for this month's Newsletter:

#### TENNESSEE REJECTS "MANIFEST DISREGARD OF LAW" STANDARD EVEN IF FAA APPLICABLE

In a case of first impression, both in Tennessee and nationally, a Tennessee Appeals Court has refused to adopt "manifest disregard of the Law" as a basis to vacate an arbitration award, even if the Federal Arbitration Act is applicable. Warbington Construction, Inc. vs Franklin Landmark, LLC, Middle Section Court of Appeals, 7/25/01, 2001 Tenn. App. Lexis 531.

When a Tennessee trial court is faced with a motion to vacate an arbitration award, the first issue is whether the review is under the Federal Arbitration Act ("FAA") or Tennessee's Uniform Arbitration Act ("TUAA"). Normally the FAA is applicable if "interstate commerce" is involved. Under the FAA and TUAA, the statutory grounds for vacating awards are very limited. However, all Federal Circuits have adopted so-called "nonstatutory grounds" for vacating awards. The primary non-statutory ground has been if the award was in "manifest disregard of the law," and is based upon the U.S. Supreme Court's opinion in Wilko v Swan, 346 U.S. 427 (1953). The burden to show manifest disregard is extremely high, and a reversal on these grounds is very rare. Under the TUAA, the Tennessee Supreme Court has limited review to the statutory grounds (which are virtually identical to the FAA), and has ruled that the award must stand even if the trial court believes the award is irrational. This dichotomy has caused smart lawyers, who want to vacate the award, to argue that the FAA, and not the TUAA, is applicable to a motion to vacate. Prior to this new case it was assumed that Tennessee courts, when applying the FAA, would follow the federal circuits and also adopt nonstatutory grounds.

In Warbington, the arbitration concerned disputes arising out of the construction of a hotel in Franklin, Tennessee. The owner argued in the arbitration that because the contractor violated the licensing laws, it was not entitled to an award. The arbitrator ruled in favor of the contractor, but the owner took the award to court and, because interstate commerce was involved, argued that the award should be vacated under the FAA because it was issued in manifest disregard of the licensing law and was also against public policy. The trial court agreed. The contractor argued on appeal that even if the FAA was applicable, the court should reject the federal case law and not apply nonstatutory grounds. The contractor also argued that recent Tennessee Supreme Court decisions showed that arbitration is a favored method of dispute resolution, and that arbitration should be final. The contractor also argued that allowing nonstatutory grounds would encourage losing parties to not accept the award and go to court. The Court of Appeals agreed with the contractor, and ruled that even if the FAA was applicable to a review of an arbitration award, "manifest disregard" and violation of public policy" could not be used by a trial court to vacate an arbitration award. It is expected that the owner will ask the Supreme Court to take up the case.

#### THE TENNESSEAN GETS IT MOSTLY RIGHT

In an editorial on July 24th, *The Tennessean* criticized the Tennessee General Assembly for failing to fund the Parenting Plan. Thank you. However, the editorial recounted how the Parenting Plan law provides for "arbitration" by "arbitrators."

#### Wright Medical Technology, Inc. v. OrthoMatrix, Inc., 2001 Tenn. App. LEXIS 354 (5/17/01)

*Wright and OrthoMatrix entered into an amendment to an Asset Purchase Agreement whereby OrthoMatrix was to pay a quarterly fee. The fee was in lieu of a lump sum payment at closing. Closing was delayed, and at that time the parties entered into a "Distribution Agreement." Wright filed a complaint alleging that the fees had not been paid for four quarters. OrthoMatrix claimed that the Distribution Agreement provided for mandatory arbitration. The trial court denied OrthoMatrix's motion to compel arbitration on the grounds that the fee sued for would still exist as a contractual obligation even if the Distribution Agreement had not been entered into. The Court of Appeals for the Western Section affirmed the decision of the trial court on the grounds that the terms of the Distribution Agreement made it subordinate to the Asset Purchase Agreement as amended, and that the references in the Distribution Agreement to arbitration were unambiguously limited in scope and not applicable to the fee dispute.*

Lesson Learned: If you want an alternative dispute resolution clause to cover all disputes under all the agreements related to a business combination, say so unambiguously.

### **NASD AWARDS AVAILABLE ONLINE: NO CHARGE TO PARTIES**

In a cooperative arrangement between NASD Dispute Resolution and the Securities Arbitration Commentator—SAC (in conjunction with SAC's project partner CCH, Inc.) you can now access awards issued by arbitrators at the NASD and at other forums via its Web Site. Parties to arbitrations at the NASD Dispute Resolution forum can directly obtain online the past awards of proposed arbitrators free of charge, seven days a week via the Internet. You can immediately connect to SAC's arbitration awards library <[javascript:document.AwardsRequest.submit\(\)](http://www.sacarbitration.com/javascript:document.AwardsRequest.submit()>)> , which enables parties to search the awards by arbitrator name, award date, or by using keywords. The awards – in pdf format – are exact replicas of the arbitrators' awards, without modifications of any kind. Parties who need more sophisticated tools – such as a summary and analysis of specific awards – may purchase additional, enhanced services from SAC. Visit SAC's Web Site at [www.sacarbitration.com](http://www.sacarbitration.com) <<http://www.sacarbitration.com>> for more information.

Parties can still obtain copies of awards directly from NASD Dispute Resolution. Continuing our current practice, parties in pending cases are entitled to obtain free of charge the last five awards (or all awards issued during the prior 12 months) of every proposed arbitrator. Review the instructions <[http://www.nasdadr.com/awards\\_request.asp](http://www.nasdadr.com/awards_request.asp)> and form <[http://www.nasdadr.com/pdf-text/arb\\_award\\_form.pdf](http://www.nasdadr.com/pdf-text/arb_award_form.pdf)> to request prior arbitration awards rendered by arbitrators selected to preside over your case.

### **CONSTRUCTION MEDIATION?**

According to an article by Gary Morgerman at

([www.mediate.com/articles/morgerman1.cfm](http://www.mediate.com/articles/morgerman1.cfm) <<http://www.mediate.com/articles/morgerman1.cfm>> ), *Construction Mediation Really Works*. He gives details of a specific case of alleged over-inspection where arbitration was not an option, the “cost to collect” was an important factor for both the prime and its affected sub, the parties had a good and continuing relationship, and the public agency acquiring the construction project had the good sense to acknowledge its error and a Contracting Officer with negotiating authority.

### **WILLAMETTE LAW SCHOOL**

One of the best sources for current arbitration and mediation case news can be found at [www.willamette.edu/law/wlo/dis-res/index.htm](http://www.willamette.edu/law/wlo/dis-res/index.htm) <<http://www.willamette.edu/law/wlo/dis-res/index.htm>> . You can subscribe free of charge to their case reports and links.

### **MUST ATTORNEYS ADVISE CLIENTS ABOUT ADR OPTIONS?**

The answer appears to be “Yes” in the Show Me state. Missouri Supreme Court Rule 17.02 (b) provides that “counsel shall advise their clients of the availability of alternative dispute resolution programs.” Other states have equivalent rules, but Tennessee attorneys don't. The question is whether we have duties under the present Code of Professional Responsibility that establish at least an implied duty.

As I read it, we have duties of competence and diligence in representing clients. Knowledge of ADR processes and techniques can serve clients in several ways, including preventing a bigger and more costly dispute. Paula Young has an article entitled “ADR—Ethically Speaking” available at [www.mediate.com/articles/young2.cfm](http://www.mediate.com/articles/young2.cfm) <<http://www.mediate.com/articles/young2.cfm>> that you might find useful in promoting ADR.

See **E2K, UMA, and PMRPC** below.

### **PARENTING PLAN WEBSITE**

Don't miss checking out this website referred to in the ADR Commission's Summer 2001 issue of *Tennessee ADR News*:

[www.tsc.state.tn.us/geninfo/Programs/Parenting/Parentingintro.htm](http://www.tsc.state.tn.us/geninfo/Programs/Parenting/Parentingintro.htm) <<http://www.tsc.state.tn.us/geninfo/Programs/Parenting/Parentingintro.htm>> . It has a good compendium of questions and answers for parents, attorneys, clerks, judges, mediators; forms; and other materials.

Whatever your views on the Parenting Plan, I think it helps to create a future-oriented atmosphere which is key to client-centered mediation. The parties don't have to argue about the past – although they will – and the mediator can ask: "What future parenting plan can you agree to so you both can have a constructive parenting relationship **that best meets your childrens' needs** even though you'll be living apart?" [Emphasis supplied.] See Erikson and McKnight, *The Practitioner's Guide to Mediation: A Client-Centered Approach*, p. 25.

## DOES THIS CASE NEED A JUDGE?

TBA President Charles Gearhiser wrote in his "President's Perspective" column in the July *Tennessee Bar Journal* about his inaugural remarks defending the advocacy system, the judicial system and our system of justice. He expressed his concern about eroding the time-tested means in which disputes are resolved in our system and "sidetracking dispute resolution to means other than our traditional means." He quickly added that he is "not against alternative dispute resolution . . . so long as such is achieved without doing violence to our system of justice." Whatever we read in this disclaimer, it is not a ringing endorsement of ADR.

I think most of us recognize the limitations of ADR, but we're also first-hand witnesses to the limitations of traditional litigation. What we should all be struggling for are ways and means to help folks handle and resolve conflicts appropriately. Sometimes that will be full-bore litigation, and other times transformative mediation and most of the time somewhere in between.

John Wade, a Professor of Law at Bond University in Gold Coast, Queensland, Australia, gives us a provocative article in the Spring 2001 *Mediation Quarterly*, *Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge*. His examples include:

Need to shift responsibility. A manager needs to keep on the litigation track for fear of being held responsible for settlement figures.

Need to demonstrate effort, show yourself or others you won't give in without a fight.

Uncertainty of precedent may lead one person to play the judicial lottery, another to settle for fear of setting a precedent.

Settlement offers are too divergent.

Preservation of tough reputation, forcing the complainant to commit significant resources.

False expectations of disputants uncorrected by attorneys.

Benefits of delay.

He also provides a list of indicators that filing a formal claim probably will be necessary, e.g., avoidance of loss of a claim due to death or the passage of time, obtaining the benefits of consent orders, getting publicity, access to lower cost processes (e.g., getting mediation services under Rule 38).

But the kicker of the article, I think, is found in Appendix A where he attacks the statement, "My client needs a day in court" or "This case needs a judge." We hear these reasonably often and he provides a long list of reasons why it may be misleading, unhelpful, and imprecise, including:

Reinforces fantasies that truth, justice and finality are available at an adjudication.

Is false in most cases.

Fails to distinguish which part of court procedure the person actually needs.

Too readily serves the self-interest of the attorney-speaker.

## E2K, UMA, and PMRPC

OK, so like Dutch still life paintings, there are too many acronyms in the world. These are important for neutrals and there should be some interesting developments this month. E2K, of course, refers to the ABA's Ethics 2000 Commission, which is working on some revisions to the Model Rules. These will be considered at the upcoming annual meeting. Also in August, the National Commission on Uniform State Laws will be meeting in August to consider the last

draft of the UMA (Uniform Mediation Act) before sending it to the ABA's mid-year meeting in February 2002. Finally, the Tennessee Supreme Court is working on the TBA's proposal for Tennessee to adopt a version of the Model Rules to replace our Code of Professional Responsibility.

E2K in Commentary (5) to Rule 2.1 states: ". . . when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." (Rule 1.4 deals with communication with the client, including the means by which the client's objectives are to be accomplished.) Tennessee's PMRPC (Proposed Model Rules of Professional Conduct) does not have such a provision as Commentary (5), and its Rule 1.4 does not include communication about the means for accomplishing the client's objectives.

Another important difference is the scope of ABA Rule 2.4 "Lawyer Serving as Third-Party Neutral" and Tennessee's Rule 2.4 "Lawyer as Dispute Resolution Neutral." The thrust of the Tennessee Rule is to apply to lawyers who serve as neutrals in other than Rule 31 proceedings the same standards as apply to Rule 31 neutrals when handling a court-ordered proceeding. It also creates standards for lawyer neutrals over-and-above those required of non-lawyer neutrals under Rule 31.

Tennessee tackles the question of drafting of settlement agreements – it's permitted with the consent of all the parties -- whereas the ABA avoided that minefield. See July issue of this Newsletter for a discussion of that topic.

**CONFIDENTIALITY.** Proposed ABA Rule 1.6 expands the grounds for discretionary disclosure of information relating to the representation of a client. In Tennessee's proposed version, a lawyer "*shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes is necessary: (1) to comply with an order of a tribunal requiring disclosure but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege *or other applicable law*. [Emphasis supplied.] and (2) to comply with Rules 3.3, 4.1 or other law." The ABA's version simply says that a lawyer "*may* reveal . . . to comply with other law or court order. [Emphasis supplied.] Commentary (13) calls for the attorney to assert the protections as in Tennessee's version.

Tennessee Proposed 2.4 (c) (4) and (5) treat all information related to the dispute as if it were information protected by Rules 1.6, 1.8(b) and 1.9(b), and as to information obtained in caucus as if it were information related to the representation of a client under those rules.

Throw into this mix Rule 31's open-ended confidentiality standard ("unless otherwise provided by law"); the Uniform Mediation Act's coverage of the topic; mixed decisions in various jurisdictions; and some very practical concerns and you have, in my opinion, a minefield. In the case of the UMA, think of confidentiality as a Swiss cheese.

There are some bright spots in protecting confidentiality of mediation communications, e.g., the *Foxgate* decision, reported in the July Newsletter, but on the whole it is an area for significant concern.

## **WHAT DISPUTANTS WANT FROM MEDIATORS AND ARBITRATORS**

There is a lot of commonality, I think, in what parties expect from their mediators and arbitrators – once they understand the processes and have some practical familiarity with them. There are differences. In mediation, the parties want help in getting their needs met. In arbitration, the parties want someone who will make a decision with an open mind. Here are some common expectancies:

Neutrality, impartiality

Patience

Listening and communication skills

Good judgment and common sense

Imagination

Attorneys representing parties in a mediation may have different expectancies, e.g.,

Commitment to settlement

Help in advocating their client's interests

Help in dissuading clients from having unrealistic expectations

What do you as a neutral expect from the mediation or arbitration? What have parties and attorneys told you they expect? Do you address this issue in discussing the potential engagement? At the outset of the proceeding?

As one attorney expressed it, "Lawyers are smart enough to communicate each other's position back and forth. We are looking for an active ingredient, who can give us more than we already have." Bernard Mayer, *The Dynamics of Conflict Resolution* at p. 194. See also his discussion of an interesting case of a partnership break-up where one group wanted to talk finances first and the other group wanted to discuss the relationship, hurt feelings, etc., at pages 197-198. The point of the example is that "delving deeper and helping parties look more broadly at the conflict" is not "fluff", but, in that case, they needed to do so in order to get at the financial resolution of the dispute.

**UNCLE SAM WANTS YOU!**

**AND SO DOES UNCLE KEN ! I'm looking for articles, suggestions for topics, reports, essays, letters to the idiotor, whatever for the next issue.**