

DISPUTE RESOLUTION

The Newsletter for Conflict Resolution Neutrals and Attorneys

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SO YOU DON'T WANT TO ARBITRATE? CAN YOU BEAT THE "POSITIVE ASSURANCE TEST"?

Where there is contractual agreement to arbitrate all differences, the Supreme Court has held that such a provision requires arbitration "unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582-583, 4 L. Ed. 1409, 80 S. Ct. (1960). The Sixth Circuit has applied the presumption of arbitrability where there is not a specific provision excluding a particular matter from arbitration. There has to be forceful evidence of a purpose to exclude it. *United Steelworkers v. Mead Corp.*, 21 F. 3d 128, 131 (6th Cir. 1994).

Tennessee's adoption of the Uniform Arbitration Act (29 TCA § 29-5-301 *et seq.*) makes an agreement to settle all claims under the contract by arbitration enforceable. TCA § 29-302 (a).

If you want to pre-empt the "positive assurance" test, our Chair, David Taylor, wrote an excellent article called "*Avoiding Unnecessary Punches: Skillful Crafting of Alternative Dispute Resolution Contract Clauses*" in the April 2000 TBA Journal. If you missed it, or don't have your copy, it's available at www.tba.org/Journal_tbArchives/tbj-apr00.html <http://www.tba.org/Journal_tbArchives/tbj-apr00.html> .

MEDIATION FOR A STRATEGIC ALLIANCE ???

In the 1980's and into the 90's, I was involved in creating "strategic alliances." For example, I developed a strategic alliance between a camera company and a specialized imaging firm to expand into foreign markets. Another case involved an alliance between an aerospace company and an airline. Yet another was with a foreign government-owned enterprise. One of the lessons I learned in those cases was the value of interest-based negotiations.

Strategic alliances were created by companies, even fierce competitors, to share resources to develop new products, realize economies of scale, compete with other combinations, enter into ventures they would not otherwise be qualified for, obtain financing in return for expertise, etc. The aim is to achieve more as a combination than one company could alone. In my view, the foremost consultant/researcher/writer in the field is Dr. Jordan D. Lewis. His books include *Partnerships for Profit: Structuring and Managing Strategic Alliances* (1990) and *Trusted Partners: How Companies Build Mutual Trust and Win Together* (2000).

As I was thinking about our Parenting Plan legislation and its implementation, and my role as mediator, it occurred to me that what we are trying to do is to help divorced parents – often fierce opponents -- create a strategic alliance for the benefit of their children (and their own peace of mind!). In a recent family mediation, I was struck by the need and desire of each party to start to rebuild the trust that had been lost – not for reconciliation, but simply for trusting each other with the children's nurture.

Likewise, some of my civil mediations have been centered on maintaining relationships in the face of disputes about particular transactions – a recurrent problem in even the best of strategic alliances. As Barbara Ashley Phillips points out "[T]he power of mediation may be seen through some contract dispute resolution mediations that turn(ed) into contract negotiations." Phillips, *The Mediation Field Guide*, pp. 237-243, 238.

It is safe to raise difficult issues in mediation, she says, and so the parties can take on problems that arise from unforeseen circumstances, frustrated expectations. In initial contract negotiations mediation can help to transform an emphasis on the points of conflict to an emphasis on creating an alliance. The mediator can allay the anger than can disrupt discussions between principals.

Some of the features of strategic alliances mentioned by Lewis include:

- The parties must first agree on what they want to achieve -- their common objective.
- They must surface their hopes, assumptions and presumptions –otherwise they are setting the stage for later conflict.
- They cooperate out of mutual need for mutual gain.
- They share the risks for a common objective.
- They recognize that they have to make compromises in their separate objectives for the values of their joint objective.
- Parties must recognize that there is a limit to foresight; indeed, trying to cover every possible contingency implies distrust in many cultures.
- Conflicts are a normal part of any relationship, and “the most fruitful arguments are those in which people feel free to raise issues with each other, listen well, make themselves understood, and come to a resolution involving creative solutions plus some degree of compromise.”
- Other measures of a good relationship include: promoting extensive communications, using active listening, consulting before making key decisions, adapting to differences, and increasing awareness of the other’s interests, needs, and abilities.

In his latest work, Lewis shows how companies build, manage, and repair the *sine qua non* of alliances: trust. As mediators we can help the parties start to rebuild the trust that has been lost in their conflict. One way to do this is to employ constructive problem solving. First, says Lewis, increase the number of possible solutions. Probe to learn each party’s views, expand mutual understanding of context, build on each other’s logic, discuss assumptions when you don’t agree, and use this open, exploratory style. Focus on the issue, not the individual. Each of these techniques is mirrored in our mediation training and skills.

Lewis advises parties to avoid the temptation to resolve tough issues by splitting the difference, using *quid pro quo* tactics, or yielding for the sake of relations because they set a pattern of evading hard topics. In fact, if the issues are addressed, new opportunities may emerge when people think out of the box of old-fashioned negotiation.

Chapter 8 of *Trusted Partners* deals with ways to repair broken trust, which, Lewis says usually results from a lack of effort to build trust in the first place or from inattention. Sound familiar?

COGNITIVE THERAPY AND MEDIATION ???

One area I think would be fruitful for someone to research (or write up for us, if obvious to someone who already has the knowledge) is the techniques of cognitive therapy that would be instructive for improving the techniques of mediation. Obviously, I am not advocating that we act as therapists when we mediate, but I’m convinced that our practice is improved with techniques and paradigms from other fields.

I suspect that the techniques of cognitive therapy are helpful in mediation because self-help is a key to recovery from the trauma of conflict. Your cognitions (thoughts, perceptions) give you messages and they affect how you feel. Your feelings result from the messages you give yourself and they are more powerful than reality. You can learn to change the way you think about things, your basic values and beliefs.

In mediation, our interventions in expressions of strong emotions include:

- helping to manage the emotions
- venting
- caucus
- making suggestions about how to express things
- stopping aggression
- empowering
- focus thinking

What are your thoughts on this topic and on such interventions in general? Can you help us by crystallizing the issues and communicating information on the topic?

GILMER v. INTERSTATE/JOHNSON LANE CORP. REVISITED

In case you haven't seen it, 16 Ohio St. J. on Disp. Resol. 463 ff. is devoted to a symposium on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) ten years after. In a 7-2 decision the Supreme Court held that a "condition of employment" agreement to arbitrate future disputes between an at-will securities industry employee and his firm trumped a lawsuit under the Age Discrimination in Employment Act. This decision engendered concern about using an alternate process such as arbitration in this way, particularly in employment cases involving allegations of discrimination.

In March of this year, the Supreme Court in a 5-4 decision in *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001) decided that the Federal Arbitration Act, 9 U. S. C. §§ 1-14 (which pre-empts state anti-arbitration laws and applies in state courts*) precludes employment arbitration only in cases involving seamen and other *transportation* workers under the exception in Section 1 which reads: ". . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The * refers to *Southland Corp. v. Keating*, 465 U. S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984).

The articles in the Journal include discussions of the effect of *Gilmer* in collective bargaining settings; the procedural differences between litigating in court and arbitration (e.g., greater leniency in pleadings in arbitration) and who benefits at each stage; the relationship between employment arbitration and workplace dispute resolution procedures; the insufficient attention to the effective waiver of Seventh Amendment rights (right to jury trial) of such agreements to arbitrate; and the idea of providing different default rules for employee and consumer disputes to overcome the perceived "balance" deficiency in such cases.

I've subscribed to this Journal for some years now – it's very economical -- and I recommend it. You can visit its site at <http://www.osu.edu/units/law/JDR/JDRHOME.htm>.

One question I have is whether the enforcement of such arbitration agreements increases the likelihood of courts finding that the parties have created employment contracts. Any thoughts?

?HABLA ESPANˆOL? SPRECHEN SIE DIE DEUTSCH?

I'm interested in identifying neutrals who speak and understand Spanish sufficiently to serve as neutrals when one or more parties speak Spanish, but has little or no English. Ditto for other languages.

Also, I would be interested in reporting on your experiences as a neutral when you had a translator, particularly when you were not fluent in the other language.

ENVIRONMENTAL MEDIATION

The Summer 2001 issue of *Mediation Quarterly* includes two useful articles on environmental mediation. One deals with the benefits of joint fact-finding gathered in three case studies and experience gained over a ten-year period. The other reports on a waste management conflict in Germany.

FIVE PATTERNS OF CONFLICT OVER MONEY AND SUGGESTED INTERVENTIONS

Another article in the current issue of *Mediation Quarterly* that is worth your attention is *Money and Mediation: Patterns of Conflict in Family Mediation of Financial Matters* by Michael Benjamin and Howard Irving. After pointing out the scarcity of treatment of the subject in the literature, the authors report on their experiences in a way that should be helpful to all family mediators. (And, I would add, to anyone dealing with money issues.) Their point is that the mediation of financial issues in family matters is "as much concerned with relational dynamics as it is with money per se." They present the following patterns of money conflict, qualifying their report by pointing out that there may well be other patterns and noting that they work from a therapeutic family mediation practice model. They also note that some families present with a combination of patterns. The patterns are more about power and control, they say, than gender *per se*. My experience tends to confirm that point.

Pattern One: Money as Power. Level the playing field.

Pattern Two: Money as Security. Role reversal.

Pattern Three: Money as Painkiller or Revenge. Controlling and educating the participants in the handling of conflict, role reversal, talking out feelings.

Pattern Four: Money as Compensation. Reframing the conflict, refocusing to the future, improving negotiation communication skills.

Pattern Five: Money as Closure. Provide structured process, emotional support.

ADR TRAINING -

-Nashville Bar Association presents - The Realities of Alternative Dispute Resolution on September 6th. Call the Nashville Bar Association (615-242-9272) or me (615-244-1713) for more information.

-Nashville's Conflict Resolution Center will be providing training for volunteer mediators on two weekends in September (15-16 and 22-23). Contact De'An Bass at 242-9272 or de_anbass@hotmail.com for more information.

MUSINGS

At least this mediator is guilty of "thoughting," Peter Garrett's word for how we replay old tapes rather than doing some real thinking. By taking our Rule 31 from existing templates we may have imported some problems that we need to revisit after five years experience with the Rule. It's time for us to get away from "thoughting."

For example, we encounter rationalizations for avoiding or putting off mediation from judges, attorneys, and parties. For example, we hear:

- The matter won't settle.

- I can negotiate a settlement.
- We've got a winner and don't need to settle.
- I don't trust the other side.
- We need to teach them a lesson.

We mediators in turn employ rationalizations about how mediation excels at dealing with those rationalizations. For example, we argue with the "we've got a winner" person that he may be wrong, that he may lose or get less than he hopes in court. We're put in the position of a pessimist when, in fact, we're sometimes overly optimistic about the improved processes of mediation – less time, cost and stress.

I'm more convinced with every mediation that it all boils down to a question of who makes your decisions. You and the other side? A judge or jury who don't know you? Sometimes you don't have a choice, as when the other side refuses to negotiate. There are times when an attorney, and, more unusually, a mediator unduly influence a decision. And there are other times when you just don't want to deal with the problem, or you want to test or penalize the other party by putting him to the time and expense of a trial.

DISPUTE RESOLUTION EXECUTIVE COUNCIL MEETING

The Section's Executive Council met at its bi-monthly telephone conference meeting on August 21st. On the line were David Taylor, Susan Lee, Judy Johnson, Hayden Lait, Lisa Givonetti, Lynn Pointer and Ken Jackson. David told of our CLE plans: The Art of Arbitration (December 2001), and the next annual Dispute Resolution Forum (tentatively March 2002). He has written the other Section leaders, offering help with ADR segments in their future CLE programs.

We discussed the values of Section membership and increasing membership. Lynn will provide us with a Section directory; it is being updated as TBA and section membership renewals come in.

We discussed increasing our outreach activities, not only to local bar associations (David is going to write to them) but also to non-attorney

Neutrals (Rule 31 or others such as VORP, CASA, BBB, NJC who might not be Rule 31 listed).

Lynn reported that we had received some positive feedback on the Newsletter. Obviously, it's only as good as it appears to you, the reader, and the acid test is always the latest issue. So I need your comments, suggestions, and actual contributions to its content. What happened in your last arbitration or mediation that was of concern to you? How did you handle a specific situation? In this issue, I've included some information on a couple of paradigms (strategic alliances and cognitive therapy) that might or might not be helpful in thinking about our field. My e-mail is kjackson@nealharwell.com. My snail mail is Ken Jackson, Neal & Harwell PLC, 150 Fourth Avenue, North, Suite 2000, Nashville TN 37219, Tel. 615-244-1713, Fax 615-726-0573.