

DISPUTE RESOLUTION

The Newsletter for Conflict Resolution Neutrals and Attorneys

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NOTE: Next month is the third anniversary of this Newsletter. The ADR Committee and Newsletter Editor, Ken Jackson, would like to have your feedback. Please send comments to lpainter@tnbar.org. Thank you.

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Arbitration Law Reporter

For \$1,200 per year, the new *Arbitration Law Reporter* publishes decisions, articles and briefs. Each monthly issue contains 150 to 200 pages. For further information, go to www.lawreporters.com, and send an e-mail, as this particular law reporter is not on the website as of May 30th.

ACResolution Issue on Health Care

The Spring 2003 issue of *ACResolution* includes a number of articles on conflict resolution in health care settings. For more information, go to www.acresolution.org.

TBA Dispute Resolution Section Executive Council Meeting 7/3/03

Attending were: Allan Blair, Chair; Hayden Lait; Valerie Epstein; Ken Jackson; and Lynn Pointer, TBA

- Hayden Lait informs group that the ADR Commission is doing an “Advanced Mediation Training” in October (date to be determined). He proposes that the TBA DR Section may want to do their CLE program in conjunction with this program. The ADR program will bring faculty from Pepperdine –

possibly to be held at Vanderbilt Law School on a Friday in October. TBA DR Section could still do their "Mediation A – Z" on Thursday before the Friday ADR Commission program. *Hayden and TBA CLE Director Heather Caldwell will connect and discuss the possibility of doing this. Heather says October 2 and October 16 are already booked for TBA.*

- Valerie proposed the 3-day cross-over training (general, civil mediators who want to become family mediators) with Robert Benjamin. Hayden says Benjamin may be used by the Pepperdine folks rather than TBA.
- Lynn to follow up with Jan Walden to tell her what is being proposed for CLE. Jan emailed Lynn prior to the meeting to say the NBA is having a domestic violence training for family mediators and she did not want to compete with other organizations.
- Hayden also says that the ADR Commission is going to do a three month survey of all Rule 31 mediators – starting in September or as late as December. Mediators are required to give the survey to everyone involved in mediations. Howard Vogel suggested that TBA could put the survey on their web site. Valerie says she sees no benefit in TBA putting the same survey on their web site if the ADR Commission is putting it on theirs – we could possibly help in publicizing the survey. *Lynn will email this information to Allan Ramsaur, copy Hayden Lait, Howard Vogel and Valerie Epstein. Contact person for the ADR Commission is Rebecca Reeder (resigning this month) or Dottie Pounders in Memphis.*
- Ken Jackson asks for contributions to the newsletter.
- Lynn to send Section Bylaws and DR Executive Council roster to Valerie.
- The Section will meet at TBA Convention on Thursday, June 12, 2003 at 2:00 p.m. @ the Peabody Hotel (room to be determined). Ken will include notice of this meeting in the section newsletter.

NASD Notice to Parties in California Arbitration Matters

For the latest information on securities arbitration in California, http://www.nasdadr.com/ca_arb_notice.asp#fogel, has information for parties. Also, there is a link to the Order Denying Plaintiff's Motion to Vacate Order Compelling Arbitration in the case of Mayo v. Dean Witter Reynolds, C-01-20336 JF (PVT). The basis for the motion was that the NYSE refused to appoint an arbitration panel that was compliant with the new California ethics standards for arbitrators. The basis for the Order is that the California standards are preempted by the SEC Act of 1934 and by the Arbitration Act.

Louisiana Appeals Court Nixes Securities Arbitration Clause

In James D. Simpson v. Robert D. Grimes, No. 02-0869, the Louisiana Third Circuit Court of Appeal found the pre-dispute arbitration clause unconscionable and unenforceable. Full text at: <http://www.la3circuit.org/opinions/0521/02-0869opi.pdf>.

To Arbitrate or Not to Arbitrate

Hrhero.com includes an article from the Tennessee Employment Law Letter by Miller & Martin on whether or not to arbitrate employment disputes. To see the article go to <http://www.HRhero.com/q&a/q&a.shtml>.

Unilateral Mistake of Failing to Realize Extent of Injuries Insufficient Grounds to Rescind Agreement to Arbitrate

The case is Leonard v. McDowell, Rhode Island Supreme Court, No. 2002-57, March 22, 2003, available at: <http://caselaw.findlaw.com/data2/rhodeislandstatecases/2003/02-57.pdf>.

Actual Consent Required for Consent Judgment

I'm not sure if this is a "Well, duh . . ." opinion from the 3rd Circuit (Virgin Islands), but if you're interested you can read *Kean v. Adler* at:

<http://www.ca3.uscourts.gov/indexsearch/ooop/qfullhit.htw?CiWebHitsFile=%2Fopinarch%2F031301u%2Epdf&CiRestriction=Adler&CiBeginHilite=%3Cstrong+class%3DHit%3E&CiEndHilite=%3C%2Fstrong%3E&CiUserParam3=/indexsearch/archives.asp&CiHiliteType=Full>.

Mediation Under Christian Principles

The ABA e-report, abajournalereport@ABANET.ORG, has an article by Margaret Graham Tebo, regarding the use of conciliation agreements based on Christian principles. For information on the Peacemaker Ministries program, go to:

<http://www.hispeace.org/index.htm>.

California Second Appellate District Has Its Own Idea on Preemption of State Procedure by FAA: No Dice.

Cronus Investments, Inc. V. Concierge Servs., No B159591 (Cal. 2d App.Dist. April 21, 2003). To read the full text of this opinion, go to:

<http://caselaw.lp.findlaw.com/data2/californiastatecases/b159591.pdf>.

Much Ado About Settlement Agreements

Check out *National Union Fire Insurance Company and AIG Aviation Insurance Services v. Price*, Colorado Court of Appeals, No. 02CA0736, dated May 8, 2003. Full text at:

<http://www.courts.state.co.us/coa/opinion/2003q2/02CA0736.doc>. Price asserted tort claims against the insurers for a death in a private plane crash. The insurers claimed that Price orally accepted a settlement agreement. Price argued that the Colorado Dispute Resolution Act requires a signed, written agreement for enforceability. Price also objected that oral testimony from the mediator, the insurers and Price about the oral settlement agreement violated the provisions of the Act regarding confidentiality of mediation communications. The District Court concluded that an agreement had been reached and was enforceable. It read the Act as saying that reducing an agreement to writing and presenting it for court approval was just one way to obtain court enforcement. The appellate court disagreed. It also disagreed with the idea that the confidentiality provisions did not prevent proof of settlement, but only, in the case of a failed settlement, statements or admissions made during the course of the mediation.

This case led to a lot of commentary by mediators around the country on their practices in reducing full or partial settlement agreements to writing. A key issue, of course, is whether the mediator participates in the actual drafting of the document. A mediator cannot be both a mediator and an attorney in dealing with the document. Can the mediator serve as the secretary for the agreement? A Texas mediator does the first draft and it is then given to the attorneys for review and approval. An Illinois mediator always documents the deal points, but acknowledges that he would act differently if lawyers for the parties were not present. Minnesota requires that the settlement agreement must be in writing, state that it is binding, and include a reference to several statutory requirements. The Minnesota lawyer-mediator responding to the discussion says that he insists, and includes in his mediation agreement, that the lawyers draft it, and that he serve as the "arbitrator" or court of last resort for post-mediation disputes.

What are your thoughts on this question?