
THE ADR INSIDER

A Newsletter for ADR Professionals

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Welcome. Happy New Year! I am pleased to welcome you to the second issue of my newsletter. I have received many encouraging responses, for which I thank you, and a few contrary views, which are similarly appreciated. (Examples of both kinds follow in this issue.) Respondents include, *inter alia*, David M. Elderkin (Cedar Rapids), Tom Levis (Des Moines), Bob Wagoner (Grand Island), Todd Epp (Sioux Falls), Joe Fitzgibbons (Estherville), Hon. Nick Caporale (Omaha), Hon. Mary Alice Theiler (Seattle), Tom Stipanowich (NYC), Rod Confer (Lincoln), Joel Greer (Marshalltown), Alfredo Parrish (Des Moines) and Dick Montgomery (Spencer). Thanks much to all for your participation. This edition will be a bit longer because I have sought to include representative views from all of you. As before, I solicit your views and participation. Please note that this newsletter is free and open to all. Prior issues are available on my website, www.blairadr.com.

Editor's Page: Public vs. Private Justice. A good friend and distinguished lawyer takes me to task over the growth and popularity of ADR. Mediation and arbitration, he writes, are robbing the courts of precedent while escaping the watchful eyes of citizenry. He is kind and prudent in his remarks. The source commands respect. Thus, I seek to answer in the same tone, seeking the same prudence. I have always believed that there is a critical "fit," often misunderstood, between public and private justice. The "fit" is described in a phrase I used years'

ago while addressing a group of trial lawyers. It was early in the modern usage of ADR, and the group was hostile and suspicious. *The best ADR technique, I told them, is still a firm trial date. Stated better, I would say a “firm, early trial date.”* That’s the fit, and everyone in the room took the point. Properly understood, there is no conflict between ADR and a jury trial, between public and private justice. Nor does one succeed because the other fails. Each system is exactly what it is supposed to be. The availability of public justice, in addition to doing its own work, is the essential force which drives cases to ADR, which makes ADR vital, effective and popular. Call it an example of good cop/bad cop if you wish, but the fact remains that ADR caseload would vanish entirely without the sobering alternative and pressure of the public system. Indeed, it’s the looming presence of the courts, with all their warts and blemishes but with all their power and dignity and accountability and universality, which encourages the exploration of other approaches to dispute resolution in appropriate cases. And the “other approaches” (i.e., ADR) are much closer to the original model than would be confessed by the more strident proponents on either side. Consider this basic truth of dispute resolution: Your case *will* be negotiated; it’s just a question of *who* does the negotiating. Either the group of negotiators at a settlement conference or mediation (call them jury number one) will do the job, or the group at the courthouse (call them jury number two). The processes differ in how the negotiators are selected and informed, but it’s pure negotiation either way. Thus, you choose the negotiation protocol that fits the case. And there isn’t a wrong choice. So keep your chin up, public system. The ADR successes proclaimed loudly by some are a direct result of your good work and example. And that, my friend, is my answer to your important question.

Tom Stipanowich on Evaluating ADR. “Finally, there is the inherent difficulty that mediation and other forms of ADR – with the notable exception of binding arbitration – cannot and should not be evaluated primarily as trial substitutes. The best measure of effective “ADR” is not as a surrogate for public adjudication, but as an intervention strategy to promote the things that trial was not designed to accomplish: getting quicker and less costly resolution, tailoring creative solutions, serving business goals, improving relationships, enhancing the quality of human interaction, and “opening up” the dispute resolution process to the broader community. Indeed, one recent study of court-connected mediation concluded that “mediation and the judicial system are built on incompatible assumptions about human nature, human capacity, and the goals of conflict interaction.” (From his research paper entitled ADR and “The Vanishing Trial”: What We Know – What We Don’t. Footnotes omitted. Tom Stipanowich is President, The CPR Institute for Dispute Resolution, New York.)

Todd Epp on Federal ADR in Kansas: ADR is alive and well in the Federal District of Kansas. In my opinion, it is a model for those of us who practice here in the Upper Midwest. Besides being admitted in South Dakota, I am also admitted in Kansas. Over the past couple of years, I have filed several employment discrimination cases in the Wichita Division of the District of Kansas. While I have had positive and negative outcomes, it is my favorite jurisdiction in which to practice. The civility of lawyers is extremely high. Magistrate Judges play an ongoing and vital role in case scheduling, discovery and management. Perhaps most important is the District’s reliance on ADR. Many scheduling orders mandate a date by which ADR must occur. In their conferences with counsel, the Magistrate Judges push for ADR. The District keeps an accredited list of neutrals on its website (<http://www.ksd.uscourts.gov/>) . The listing has extensive information on the neutrals’ background, including percentage representation of plaintiffs and

defendants. Most of the neutrals have extensive trial experience. They were “evaluative”; in other words, they would offer opinions as to the worth of a case based on their experience. They knew the District Judges and their quirks and preferences. They were good humored, patient, persistent, good listeners and worked hard to obtain settlements. ADR is most effective when backed by the judiciary. In the District of Kansas, the judiciary backs ADR whole-heartedly. From my perspective as a plaintiff’s employment attorney, it’s an excellent system and litigation tool. It reduces time, costs and stress. The added benefit is that the client still gets an opportunity to “tell their story” to someone in a position of authority. I believe my clients were also satisfied with the process, thinking it fair, even when the mediators had to tell them (and me) that certain causes of action or facts or law might not be as useful as first thought. To any jurists reading this newsletter, I would encourage you to find out more about the “Kansas System” and think about its application in your court. (Todd D. Epp is a partner in the Abourezk & Epp Law Offices in Sioux Falls, SD. Email: todd@abourezkepp.com)

Judge Theiler, A Former Mediator, On Becoming A Judge: I knew it but I didn’t really know it. Twenty-six years of law practice, including practice as a court- or party-selected neutral, suggested that the role of a judge acting as a mediator is much different than that of a lawyer. In my civil litigation practice, I had often been “mediated upon” by judges as well as lawyers trained as mediators, and had an active ADR practice of my own. In my experience, very few active judges were effective mediators. Most had little or no training, and lacked the necessary patience or time to nudge the parties along to a settlement. As a result, they felt the most comfortable giving their opinion on valuation or lecturing the parties on the strengths and weaknesses of their case. In Seattle, as in many other areas of the country, many retired judges hang out their shingle as mediators. Some are more effective than others. The most successful are those who are willing to put in the preparation time and who is the best judge of character. The prestige of their former status as a judge may initially bring in the business, but the former judges with the best people skills are the ones who succeed. The reality, however, is that an active judge has many advantages in settling cases that are not available to the lawyer or retired judge mediators. It is unfortunate that the dockets of most courts are too crowded to allow their judges the luxury of time necessary to truly assist the parties in reaching settlement, because a case settled results in a tremendous savings of valuable court time and resources. In the federal court system, the Magistrate Judges are becoming settlement specialists. The Federal Judicial Center provides excellent training courses and materials, and the federal courts understand the advantage of investing judicial resources in assisting the process of settlement. Therefore, I looked forward to handling my first settlement conference as a judge. What I did not fully appreciate until then was the tremendous credibility that a sitting judge brings to the process of facilitating a settlement. Our settlement conferences are held in the courthouse, which brings the parties face to face with the reality of what will happen if the case doesn’t settle. The surroundings are more solemn, and somehow the parties take it more seriously. As a sitting judge, you bring more clout to the table. Everybody stands up when you come into the room, which is definitely not a courtesy given to the average mediator! Your comments about the strengths and weaknesses of the parties’ cases may be heard to be predictions rather than suggestions. The parties assume (or fear), no matter how emphatic you are to the contrary, that you have the ear of the trial judge and they will be “blamed” if the case does not settle. As a result, you must tread carefully and, well, judiciously. As a new judge (less than two years), I find that my many years of law practice serve me well in settling cases. I can walk in the shoes of the

lawyers, and am less likely to be blinded by their repeated assertions about the inflexibility of their positions. I know the value of listening. I have learned effective communication skills. I know that a case will either “ripen” or “rot” by the time it’s ready for trial, and that you can’t always predict when you take the case which one will happen. I know the business reality of law practice, and the pressure it puts on lawyers. And I know that the momentum toward settlement, once it starts, is your best friend. Now that I’m a judge, it’s nice to know that the fair resolution of cases in the courthouse isn’t limited to the courtroom. (Hon. Mary Alice Theiler was appointed on April 25, 2003 to the position of United States Magistrate Judge for the Western District of Washington.)

Mileposts: Death of Francis Fitzgibbons. Francis Fitzgibbons, 79, of Estherville, died on July 28, 2004. A 50-year member of the Iowa State Bar Association, Fran served his clients and colleagues as an accomplished trial lawyer and equally fine person. He lived a life of service and distinction. He is missed by family, friends and colleagues.

ADR Journal: Arbitration Basics, In One Minute Or Less. Here is what I would say to attorneys about arbitration in a nutshell: “First of all, draft an arbitration agreement and have it signed by the clients. Pick a hearing date and arbitrator. Pleadings, discovery and motions will be as you may agree. If you can’t agree talk to me. I would appreciate receiving written statements of position from each of you prior to the hearing. The hearing itself will be conducted informally. Witnesses will be sworn and presented for direct and cross. Evidentiary standards will be limited to relevance and materiality. Foundation and hearsay objections will be waived. You should advise each other prior to hearing if you intend to (a) offer written hearsay on an important issue, or (b) use a court reporter. Exhibits should be marked and exchanged prior to hearing. The probative effect of all evidence, including hearsay, will be determined by the undersigned. We will have post-hearing briefs if requested by you or required by me. I will rule by memorandum order within 30 days following the close of the evidence or submission of the last brief, whichever last occurs. The foregoing process may be modified by you, with my approval, if a different approach is desired.”

Readers Respond to The ADR Insider. *From Tom Levis:* “I loved reading the first issue of The ADR Insider. Please keep me on your “send” list. For years, Judge Bill Stuart, a retired Iowa Supreme Court Justice and Federal District Judge, commuted 60 miles each morning and each evening to work in Des Moines. Judge Stuart enjoyed the drive. He claimed it gave him an opportunity to collect his thoughts on the way to work, and an opportunity to relax before meeting his family on the way home. Like you, Judge Stuart claimed to discover interesting things in his daily travel. I don’t know. I still like my 10 minute commute.” *And from Bob Wagoner:* “Nice Newsletter, especially the Hiways and Byways sections. As a travelling Lawyer/Mediator, I, too, appreciate the “nooks and crannys” of the US, especially our all too often overlooked areas of the Upper Midwest. I also can certainly identify with the practice of Mediation and the Spirit and Attitude under which it is undertaken...or more correctly, intended to be Practiced! Suddenly, I find the food shows on Cable TV hold my attention more these days,.. not because I delusionally aspire to be a great cook, but rather, I can focus on those omnipresent intangibles of Spirit and Attitude which surround each recipe and each preparer... “Presentation is not the only ingredient,” seems to be the Mantra there. Your Newsletter is likewise food for thought, rather than a product for consumption.” *And from Alfredo Parrish:* “Thanks so much for sending me your Newsletter. I enjoyed it. I loved the article about driving since it hits so close to home. I am on

the highways and byways of Iowa and the rest of the Midwest so much. You are so correct. It is great thinking time."

Windshield Justice & Travel Notes: A Visit to Woodburn.

The late Judge Dick Cooper of Storm Lake used to refer to "windshield justice" as the phenomenon of two judges passing each other on the highway, going in opposite directions, each bound for the home of the other to hold court. It was not a complimentary term. However, as used here, "windshield justice" refers to the itinerant life we lead and the particular moments of surprise, instruction and inspiration we encounter along the way.

The Iowa hamlet of Woodburn (pop. 244) is just down the road from lots of places. It is 35 miles south of Des Moines on Hy. 65, then west about 6 miles on Hy. 34, then south 2 miles on Hy. 204, past farms with pole fences, to town. Woodburn is also 6 miles west of Lucas on Hy. 34. Lucas was the birthplace in 1880 of American labor leader John L. Lewis, who served as President of the UMW during the turbulent years from 1920 to 1960.

Woodburn looks from a distance like a Vermont postcard, but it isn't. It's tougher than that, and it's a lot closer to Lucas than Des Moines.

On a brilliant Fall day we drove to Woodburn to visit the graves of family buried there. The Ottawa Cemetery is north of town, but we kept going through town, to the other town cemetery just to the south. This is hill country, wooded and rugged. The cemetery sits on a high ridge running east and west. The ground falls away rapidly to the north and south, running down in rivulets to densely wooded valleys. In the burial ground there were a few fresh graves, but mostly old and some very old, going back to Civil War vets from Michigan and New York, and to graves of the very young and very old who were born before 1850. It feels like a place out of time. Leaving the cemetery we drove through town. There was no apparent gas station or grocery store, but we found three active churches - Methodist, Catholic and Christian. There was a city park, bar & grill, legion hall and volunteer fire department. A large schoolhouse was boarded up. We drove around and saw vehicles pulled into yards, in various stages of disrepair, being worked on by lean shirtless men. We drove slowly past, but they did not turn or wave. Driving later to Chariton and a visit to Piper's for homemade candy, we talked about what we had seen. There is beauty in the hills and woods of Woodburn, but it's a hard beauty with history and tough pride wrapped up inside. Woodburn, we wish you well.

Stay Safe. See you in ADR!

David J. Blair