
THE ADR INSIDER

A Newsletter for ADR Professionals

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Welcome: "Never on Monday." Greetings to all. How long has it been since the last issue of this infrequent newsletter? About the right amount of time, methinks, for you to have recovered sufficiently from the last issue so that a new one can be foisted upon you. So here goes. We begin with a philosophical issue of great weight. I commend to you the philosophy of "Never on Monday." *This philosophy holds that nothing difficult or contentious should ever be undertaken on a Monday.* The rule of this philosophy precludes any kind of unwanted personal contact on Monday, most particularly nasty hearings, obnoxious client conferences and abrasive depositions. I have practiced this philosophy for years, to-wit: I prefer not to mediate on Monday, and I also try to avoid Monday arbitrations. The result is a happy one. I thus avoid many fractious people who would not be inclined towards dispute resolution anyway. And I stay happier myself because I don't have a nasty Monday engagement to worry about over the weekend. I try not to travel for business on Sunday; I save that for Monday. I'm serious about this. Of course, it doesn't work every Monday but it works most Mondays if you pay attention. Try it yourself. See if your Friday, Saturday and Sunday aren't better if you avoid the looming prospect of professional strife on Monday. See if you aren't happier at home on Sunday reading the sports section vs. traveling on Sunday for Monday depositions or working at the office on Sunday to prepare for something miserable on Monday. I'm not saying don't work on Monday; but give yourself an *office day* on Monday, with lots of unscheduled time for getting organized and getting centered. Read the

mail. Do some thinking. Peruse the paper with your feet on the desk. Plan for the week ahead. Make a few lists and phone calls. Take a long lunch hour; have a hot ham & cheese with a green salad, and do some shopping. Cruise through the afternoon and go home early. Try it, you'll like it! Let me know what you think. As always, I solicit your views and invite your participation. Please note that this newsletter is free and open to all. Prior issues are available on my website: www.blairadr.com. You may unsubscribe by sending an email to davidblair@blairadr.com.

Editor's Page: "Why Can't Arbitration Be More Like Litigation?" That's what many *lawyers* say to me, and they mean it! They miss the formal protocols of pleadings, liberal discovery, dispositive motions and the stringent rules of evidence in which they were schooled. They miss the comfort of an available appeal process. For the most part they don't like arbitration, and most have never tried it. Then I talk to *clients*, who say "Why has arbitration become so much like litigation?" And they mean it too! These are the clients who increasingly direct their business and commercial cases to arbitration through pre-dispute arbitration clauses and post-dispute submission agreements. These arbitration contracts may and often do ordain a fast, private resolution process with minimal pleadings, little discovery beyond document exchange, shortened hearing time – perhaps limited to a day or two, relaxed rules of evidence, page-limited briefing, and few if any appellate opportunities. So this is the curious day in which we live - where some of the smaller cases take months and years from petition to trial and several days or more to try; and some of the largest, most complex cases are processed from petition to hearing within a few months and arbitrated to finality in a few days or less. The times they are a changin'. It's food for thought.

Mediation Topic: "Ships Passing in the Night." I once wrote an article entitled "Deal Killers in Mediation," which chronicled the various negotiating tactics which, wittingly or unwittingly, kill a deal dead. (See website for article.) The point was to avoid these deal killers if you can, or at least understand their virulent effect if you can't. I now find there is a new kid on the block, which I call "Ships Passing in the Night." This is a scenario wherein two negotiators each entertain fundamentally different concepts of the value of a case, and each assumes that the other secretly shares his opinion. The phenomenon usually occurs because of the quite recent practice of very limited negotiation history prior to mediation. Negotiators no longer exchange five or ten pre-mediation offers and counters, preferring instead to save their ammunition for the mediation itself. Today we often see only one demand and one offer, or perhaps no numbers at all. The consequence is that it's easier today, without a settlement history of offers and counters, to misconstrue the opposing party's target numbers and ultimate valuation. Even seasoned evaluators may make assumptions about shared valuations which turn out to be dramatically wrong. This can lead to intense frustration, disappointment and failed mediations. Literally, it's a case of ships passing in the night. The only antidote for this malady, which occurs most frequently between negotiators with no prior history, is for each side to obtain a perceived "reasonable" opening number from the other prior to mediation. A reasonable opener provides some evidence of target numbers. A reasonable opener gives some assurance of shared valuations. A reasonable opener sends a strong signal of rationality. Two reasonable openers, one on each side, set the bookends for the negotiation at places where both sides feel comfortable (or close to comfortable; or equally uncomfortable). And it's harder to claim that the other side is goofy if that same party just gave you a reasonable opener. So, if your opposing colleague isn't a known quantity, get a perceived "reasonable number" in advance.

Arbitration Topic: “Let the Process Fit the Case.” The public justice system has some marvelous attributes, most notably the fairness of aggressive bilateral discovery, attention to procedural and substantive detail, strict evidentiary standards (i.e., probative quality), reviewability, and the public interest in open courtrooms and the development of legal precedent. In particular cases, however, some or all of these qualities may be unnecessary or downright unwelcome. Thus, it may be that the *client’s* interests do not turn upon the foregoing attributes, but rather upon *speed, economy, finality and privacy*. If so, you likely have a case for arbitration and not litigation. There’s no right or wrong here; it’s a balancing act. You need to know what interests and values you are balancing. Then clients should make the call.

ADR Journal: “Cormac McCarthy.” If you haven’t heard, I want to acquaint you with the works of American novelist Cormac McCarthy. Somehow I hadn’t heard of Mr. McCarthy until an ADR colleague from Dallas, architect Dave Braden (with whom I served recently on an arbitration panel), emailed his recommendation of McCarthy’s *No Country for Old Men* (2005) and *The Border Trilogy*, consisting of *All The Pretty Horses* (1992), *The Crossing* (1994) and *Cities Of The Plain* (1998). McCarthy’s prose style is challenging. It’s like overhearing a conversation involving snatches of dialogue between people who know lots but don’t talk much. The action is direct and very tough. Don’t look for conventionally happy endings, but do expect profound lessons and the reward of enigmatic dreamlike visions of Mexico and the Texas/New Mexico border country in the first half of the 1900’s. Here you will find unlikely, compelling tales that will frequent your contemplation for a long time. These are wonderful books. There’s more Cormac McCarthy information on the author’s website, www.cormacmccarthy.com.

Windshield Justice & Travel Notes: “The Cottage Inn.” “Terry Redlin.”
“The Alpine Inn.” “The Brenton Arboretum.”

*The late Judge Dick Cooper of Storm Lake
Referred 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.*

It’s not on my diet, but next time you’re in Indianola IA check out the great loosemeats at *The Cottage Inn*, 302 South Jefferson (Hys. 65/69 & 192), and the classic onion rings at *Crouse’s Café*, 115 East Salem Street. When in Watertown SD, Hy. 212 just off I-29, take a few minutes to tour the *Terry Redlin Art Center* for a visual feast of original wildlife paintings. *The Alpine Inn* on Historic Main Street at Hill City SD serves filet mignon exclusively (and deliciously) at the evening meal. *The Brenton Arboretum* (suggested by colleague Dwight James), 2629 Palo Circle,

Dallas Center IA, offers gardening classes and great kickback tours for the observation of birds, blooms and trees.

Stay safe. See you in ADR.

David J. Blair