ADR Humor or Horror Stories?

By Linda A. Michler and Daniel Yamshon

The earlier articles in this issue deal with novel approaches to ADR where the parties chose a novel solution. But what happens when an arbitration or mediation becomes "novel" unexpectedly? Who would think Secretary Rumsfeld's observation about known unknowns and unknown unknowns would be applicable to dispute resolution? The late Professor William L. Prosser's *The Judicial Humorist* was reputed to be one of the thinnest law books on record. In reality, ADR is serious stuff. Neutrals, especially arbitrators, hold parties' futures in their hands. While it is crucial to take the issues seriously, it is important for neutrals not to take ourselves too seriously, lest we become pedantic curmudgeons. In this article we take a stab at finding humor and novelty in ADR, winding up with an even thinner tome than Professor Prosser.

1. You Can't Be Too Careful, or Can You?

In one arbitration, extreme care in drafting backfired on a party. The case was arbitration under a submission agreement. The agreement read "The only issue before the Arbitrator (sic) is whether rent commenced on [date A] or [date B]." The case required the arbitrator to determine the completion date of a shopping center. The relatively short time differential in the date the center was suitable for occupancy had a significant impact on both the developer's and tenants' cash flows. The parties, or at least the draftsperson, did not want the arbitrator to get sidetracked with any extraneous issues. Thus, the submission agreement was drafted with extreme precision.

Shortly after the award determining the completion date was served, the prevailing party submitted a request to correct it. Counsel argued the arbitration clause in the underlying contract called for attorneys' fees and costs of arbitration to be awarded the prevailing party. Indeed, it did. Counsel did not understand that the arbitrator's jurisdiction was determined by the submission agreement, not the contract's arbitration clause. The arbitrator denied the request to correct the award as the arbitrator's only jurisdiction was to determine the date rent was due. Lesson: Be very careful when you're being careful.

2. *It's Not About the Dog - Or Is It?*

It is axiomatic in community mediation that a barking dog case is not about the dog but about the relationship between neighbors. One state requires a day-of-trial settlement conference for large cases. In reality, this postpones the commencement of trial by a day if the case does not settle and a courtroom is available the next day. The settlement conferences have some similarities to mediation and neutrals can be a bit facilitative, but the goal is not to integrate the interests of the parties, achieve process satisfaction, or provide any of the fine attributes of mediation. The goal is to settle the case and free up a courtroom.

A neutral was asked to settle a case in which it was alleged there was either an oral or implied contract granting certain specific privately held access rights to approximately fourteen thousand acres of land, almost twenty-two square miles, in one of the western states. The neutral was trying to determine what evidence the alleged grantee had to prove such a contract. At one point, out of the blue the alleged grantee said, "Have you heard about [name] the dog?" I roared with laughter and immediately had to apologize. It turned out that the alleged grantor had given the alleged grantee a prize-winning hunting dog, which was held out as proof of the intent of the alleged grantor to give the alleged grantee access rights to the land. The alleged grantor was in the room at the point in which the dog was mentioned and much to my amazement, although no or little prior progress had been made, the case settled immediately. **This time it *was* about the dog.**

3. *Active Whatening?*

A family mediator was handling a case in which one spouse became more and more frustrated as the day wore on. The individual just could not understand what the other spouse wanted, finally blowing up in anger and shouting "For God's sake, what the hell do you want?" The other spouse replied, "I want you to listen to me like the mediator does."

4. A Novel Approach to Arbitration: Creative Incompetence

This is a true story although it happened in trial rather than arbitration. There may be a valuable lesson for arbitrators, however. A law student worked at a firm for a senior partner who had a trial before an out-of-county visiting judge who was filling in for a local judge on vacation. At the outset, before opening arguments, the judge moved the pleadings into evidence. The law firm partner and opposing counsel looked at each other, asked for a recess, stepped into the hallway and settled the case right then and there. Now think about how an arbitrator showing extreme incompetence would encourage parties to settle.

5. Respect is What I Want[*]

For reasons irrelevant here, everyone at the arbitration knew one of the lawyers was a male to female transgender woman. Opposing counsel kept referring to her with male pronouns. Although the referred-to lawyer ignored the mis-gendered references, when she was called "he" about the fifth time, the arbitrator said "She. Her name is [Jane Doe.]" It never happened again during that hearing. It is important to keep civility and respect integral to the process.

6. I Get Around,[***] *or The Well-Connected Arbitrator*

A real arbitration horror story came to light during a three arbitrator tribunal in a large, complex case. At the preliminary hearing, all three arbitrators were questioned by counsel as to whether they had made all appropriate disclosures. The arbitrators confirmed they had nothing further to disclose. At that point, one of the lawyers commenced what amounted to a cross examination of one of the arbitrators regarding their acquaintance with opposing counsel's firm: "Do you know anyone at the [Acme Law Firm]?" The arbitrator admitted s/he did. "And do you have a friendly relationship with anyone at [Acme]?" Again, the arbitrator admitted to having such a relationship. "And isn't it a fact that you have a social relationship with [name]?" The arbitrator admitted that as well, resulting in an immediate motion to recuse the arbitrator. As horrifying as that was, the same arbitrator was caught, almost *in flagrante delicto,* for failing to make similar disclosures in two subsequent arbitrations regarding two other relationships with counsel in firms representing parties at the arbitrations. There are times when being popular is too popular.

8. *Stormy Weather*[****] *or Maybe You Do Need A Weatherman To Know Which Way the Wind Blows*[*****] *or What's That Draft?*

So much has been written about what has become the world's most famous arbitration clause, it is difficult to come up with something new and timely. But there is always another lesson! Ask yourself about the time you ventured into an area of law you know very little or nothing about. Did you have resources and a mentor or two? How long did it take your eyes to be able to focus again after all those hours of research to bring yourself up to speed?

The ABA *Model Code of Professional Responsibility* EC 2-30 states, *inter alia*: "Employment should not be accepted by a lawyer when he is unable to render competent service…" which, for all intents and purposes, is identical to the ABA's *Model Rule 1.1.*

So, let's set up a hypothetical: Let's say a lawyer has developed a reputation as a "fixer," one, through payoffs and threats gets his client out of jams. One day, the fixer perceives a need to keep a potential scandal under wraps but is afraid a standard contract might not do the trick. Having heard ADR is private, the lawyer includes an arbitration clause, thinking s/he would get the client out of a jam. Although the lawyer/fixer has been involved in a multiplicity of suits thanks to the litigious client, the fixer has little experience drafting ADR clauses and may be unaware of some subtleties such as arbitrators generally only having jurisdiction over signatories. The hush contract seems to have been drafted in haste, compounding the problem if counsel did not have time to become competent in the area.

Thus, the parties are faced with the opposite of the too carefully drafted clause in Example 1. ABA Rule 1.1 is a more civilized statement of one of the sagest pieces of advice one of the authors read while in college: **If you don't know, don't mess with it.**

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* Otis Redding, Volt Records
*** The Beach Boys, Capital Records
**** Harold Arlen & Ted Koehler
***** Apologies to Bob Dylan, *Highway 61 Revisited*