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**PANEL ON “THE MYTHS OF ADR”**

**7 COMMON MYTHS  
&  
3 FALSE TRUTHS  
ABOUT ADR**

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**7 COMMON MYTHS:**

- 1. Arbitrators Split the Baby.**
- 2. You Can’t Mediate Until Discovery Is Completed.**
- 3. Asking to Mediate Is A Sign of Weakness.**
- 4. Mediation is Simply Free Discovery.**
- 5. Arbitrators Don’t Apply the Law.**
- 6. Mediation is Just a Waste of Time and Money.**
- 7. Mediation Just Delays the Ultimate Trial of the Case.**

**3 FALSE TRUTHS:**

- 1. Arbitration is Quick and Cheap. Yes, but...**
- 2. A Mediator is a Mediator is a Mediator.**
- 3. Arbitration Awards are Non-Appealable.**

## 1. Arbitrators Split the Baby.

I sat as wing chair in an arbitration between the defaulting purchasers of a \$2 million home and the builder. The defaulting purchasers argued that a 10% liquidated damages provision was both an unenforceable penalty and severed from the contract by the builder's breach. The builder argued that the default costs measured by interim-financing interest costs and lost opportunity was close to \$420,000. After two years of architectural revision, the buyers had walked away when they disliked the siting of the public utilities' junction box and having incidentally found a property they liked better. The panel unanimously awarded the liquidated damages to the builder. Upon receiving the award, an outraged buyer telephoned the panel chair and roared, "I thought we went to arbitration so everyone could win!" Popular myth has it that the buyer is right. In an article on "Why Arbitration Agreements Are No Panacea for Employers" its lawyer author summarizes: "Finally, and worst of all, there is a tendency among arbitrators to 'split-the-baby' – and their decisions can be virtually non-appealable.<sup>1</sup> If this myth has any truth, it may derive from the perception that arbitration awards are lower than those generally rendered on the same facts in court. If true, it also may arise from both the acute awareness of the arbitrator that, if even slightly wrong, s/he cannot be appealed and an unconscious unwillingness to offend any party too much for fear his/her services will never be sought after again. Of course the biblical tale from which this arbitration practice derives in fact resulted in no such diluted award.<sup>2</sup> King Solomon offered an equal award to each side only to force out an admission of the true mother who acted promptly to save the life of her child.

The attitude of professional arbitrators is that one is not rewarded for wimpiness. An award that gives half-a-loaf so as not to offend anyone, offends everyone. The half-a-loaf award is generally given without reasons because any reasoning would be weasel-worded and transparent. With the tendency of the better provider organizations to require reasoned awards, arbitrators must now justify any award they give. And it makes more sense to explain a winner than half-a-winner. If anyone is in doubt, the law firm of Liddle & Robinson is not shy about advertising its big wins in arbitration.<sup>3</sup> In June 2002 the New York State Supreme Court entered a judgment of almost \$29 million (\$25 million punitives) against Waddell & Reed, Inc. and its former CEO. The court noted that "the Panel's finding find support in the record." And that is only one example.

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<sup>1</sup> [http://www.womenof.com/Articles/le\\_6\\_16\\_03.asp](http://www.womenof.com/Articles/le_6_16_03.asp)

<sup>2</sup> *Kings*, 3:24-25.

<sup>3</sup> <http://adrr.com/smu/client.htm>

## **2. You Can't Mediate Until Discovery is Done.**

One of the main points favoring mediation is it saves time and money. Discovery on the other hand is probably the single largest budget item for a client in any lawsuit. Economists talk about the 80/20 rule which, when applied to litigation, fairly means that 20% of the effort produces 80% of everything important you need to know about the case. The additional 80% effort to fill in an additional 20% of information is the litigator's bane (or delight if you look at billable hours) and what is often referred to as leaving no stone unturned. You never know what you might find under a last rock. But rarely is it a smoking gun. Best practices in mediation dictate that you come to the table knowing the essentials of your case and the other side's case, but equally importantly, the knowledge of what your client hopes to gain in a resolution of the dispute. The reasoning that limits discovery in arbitration, time and cost savings, is even more compelling in mediation. And the beauty of mediation is that if a fact is critical, you take the time and discover it. And even more elegant is the possibility of bringing in people, by phone or in person, whose testimony is critical and posing them agreed questions – not under oath and not for use in impeachment at later deposition or trial. The answers are highly instructive and assist the parties in assessing risk and crafting settlement.

And bottom line, if you do need more discovery to engage in meaningful settlement discussions, mediation will direct you to the discovery you do need and away from the wasteful “leave no stone unturned” type. What don't you know that is critical to understanding your interests? Mediation should answer that question. And then you can adjourn the mediation and seek that discovery and only that discovery. Mediation can be adjourned and reconvened with the new information. Mediation is not only a way of problem solving, but of defining the problem to be solved.

### 3. Asking to Mediate Is a Sign of Weakness.

Real men don't eat quiche. Real men don't cry. War is the metaphor of litigation: "Take no prisoners," "go for the jugular", "scorched earth." The litigation prep room is frequently called the "war room." Litigation is the ultimate competition. That makes sense since it is the stand-in replacement for medieval trial by battle or purgation. It is institutional warfare governed by institutionalized rules of battle and court-sponsored protocol. In a courtroom, it is unseemly and forbidden for counsel to address each other except through the medium of the judge. They are not trusted to be civil since there is nothing civil about a civil action. So how can you ask to mediate? Isn't that a signal that you have a truly weak case? Maybe. But if you do have a weak case, why mediate at all? You can always fold your cards early or sit the game though bluffing to the end. Mediation can be approached from strength – the strength of knowing what you want out of this dispute and the assurance that you can get it, or at least most of it. And as Fisher and Ury have repeatedly reminded us, if you don't like the deal offered, your Best Alternative to a Negotiated Agreement ("BATNA") is – fill in the blanks—walking away, trying the case, engaging in more discovery, moving for summary judgment, *et cetera*. You could look at it another way: only weak litigants avoid mediation. They are the ones who are afraid to engage in a meaningful dialogue in which they look not just at their strengths, but also at their weaknesses. And it is a grateful client who gets this opportunity in the 2<sup>nd</sup> hour rather than in the 11<sup>th</sup> hour when the judge in a pre-trial conference strikes the fear of possible loss into each side. Think of Peter Jovanovich, who in sitting down to negotiate the survival of his family-founded publishing house, Harcourt Brace Jovanovich, signaled his desire for sincere discussion by presenting his opposing presence, Dick Smith, CEO of General Cinema who was bidding to buy HBJ, with an engraved HBJ watch and the words: "My father always gave a watch like this to his partners at the beginning of a new business relationship. This is meant to signify my sincere belief that General Cinema is the right buyer for HBJ."<sup>4</sup> Remember, agreement is consensual. One does not have to settle a case or make a deal if the terms of settlement make no sense and serve no need. It is the strong who are unafraid to engage in talk; the weak who first resort to battle.

And if you are really shy about asking the other side to attend a mediation, ask the mediator to serve as your foil. S/he can contact each side and suggest that s/he thinks this is an excellent case for mediation and not suffer the reactive devaluation response that is almost knee-jerk were you to suggest the same thing to your opponent(s). And in a multi-party case, it need not even be disclosed where the interest in mediation is coming from.

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<sup>4</sup> Richard Shell, *Bargaining for Advantage*, p 4.

#### **4. Mediation is Simply Free Discovery.**

Why should mediation be free discovery? Because your client is there? Isn't it his case? Isn't he the one that will be most affected by the outcome? Are you afraid your client will show weakness? Display a personality side previously unrevealed? Is there anything really that you can hide that won't be discovered at trial or in settlement discussions with the judge the day before trial? Remember mediation is voluntary. Its rules are consensual. If defendant does not bring a representative, insurance claims specialist or CFO of the company, you do not need to bring your client. If defendant barrages your client with questions, your client does not need to respond. Might you get a sense of the demeanor of the people present and how they may appear at trial? But doesn't that work equally to the advantage of both sides?

Are you afraid your client will spill his guts? Sit down and talk to your client before the mediation. Decide what role he will play and what he will contribute. Make him an active participant in a comfortable negotiation; you will get all his new business and many referrals.

People talk in mediation. True it is far from the "talk" of interrogatories where questions are "asked" in writing and "answered" in writing under oath. Most of the time the questions are tortured and the answers ungrammatical and evasive. Clients sign the interrogatories as an act of faith in their lawyer. The questions and answers have nothing in common with a dialogue and they are designed to conceal not only interests but as much information as possible. Courts hate them and in the law practice they are delegated to the people furthest from the client – the youngest associates in the law firm.

Are you afraid of revealing a settlement position that makes you look soft? Don't reveal it. You don't have to reveal bottom lines. You really just want to know if you can get into the same ballpark. Lots of good things happen after that.

One place where you really may worry about free discovery is if a third-party to the dispute shows up at the mediation who, while "averring that he has no liability in the case", just wants to sit in. You might strongly suspect that in this situation that party is simply looking to gather evidence that he can assert if he is sued. But that kind of free discovery is easy to deal with; if he is unprepared to tell you his take on the story and factually why he should not be a party, ask him to leave. Mediation is consensual. Only the people who want to be there are there with others of the same mind.

## 5. Arbitrators Don't Apply the Law.

That is correct. They don't have to apply the law. However, it is a rare or an untrained arbitrator who is not grateful to counsel for supplying a cogent legal analysis and application of statutory and case law to the facts of a case before him.

Remember, arbitration has proud historical foundation in the efforts of merchants and businessmen to retain control over their disagreements by submitting them for determination to an arbiter in their particular trade who had no stake in the outcome and who's wisdom, experience and impartiality everyone respected. Commerce required quick resolution; the legal system was the long arm of the state which knew nothing about the ins and outs of daily commerce in a particular trade.<sup>5</sup> The problem was less in determining who was right and who was wrong, but in achieving a solution that let everyone get on with their business. Rough justice was quick justice, which if not academically analytical, served America's capitalist future.

Today, lawyers view arbitration as an alternative to court, but one that still applies legal precedent and procedure. It is particularly attractive in international disputes where at least one party is not the hometown team and fears submission of its dispute to a legal system that is, by definition, foreign. But what guides arbitrators today? Outside of the agreement of the parties, on which not enough emphasis can ever be placed, arbitrators are ruled by fear of *vacatur*. Under the FAA §10, courts can vacate an award where it was procured by corruption, fraud or undue means; where there was evident partiality or corruption in one or more arbitrators; where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence; or where the arbitrators exceeded their powers. And there are "non-statutory" standards for *vacatur* that courts recognize with no predictable reliability: where the award was rendered in manifest disregard of the law; where it was arbitrary and capricious; where it was completely irrational; where it violates public policy.<sup>6</sup>

But most importantly, remember, if you want an arbitrator to apply the law, say so in your agreement to arbitrate. Your agreement to arbitrate defines the scope of your arbitrator's authority. If you want the case law of New York applied say so. But be sure then that you supply all the case law, with copies of the cases that you want your arbitrator to rely upon. Your arbitrator generally does not come with a research clerk, which is just as well, because the research clerk would have to disclose any conflicts he may have. And you want to make sure that it is the arbitrator who is doing the reading and thinking. Just give him the law; ask him to apply it; and he will.

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<sup>5</sup> For an excellent discussion of the history of ADR in the U.S. see *Justice Without Law?*, Jerald S. Auerbach (1983).

<sup>6</sup> For an excellent discussion of the finality of arbitration awards see §7, *Commercial Arbitration at Its Best*, Thomas J. Stipanowich, editor (2001).

## **6. Mediation is Just a Waste of Time and Money If the Case Doesn't Settle.**

Mediators like to say there is no such thing as a failed mediation. But lawyers tend to think in binary fashion. A case settles or it is tried. Mediation is meant to settle cases, therefore, if the case does not settle in mediation, the mediation is a failure. Mediators think along a spectrum and ask the following kinds of questions: what are the issues in the case? Are the parties able to dialogue about the issues? Are the lawyers and/or the clients too adversarial to communicate effectively? Can the lawyers talk to each other? Can the clients talk to each other? Does the client trust his lawyer? Does the lawyer believe his client?

Lawyers view settlement as an apocalyptic and sudden event; usually induced by a heavy-handed judge and a trial the next day. Mediators view settlement as a process, and a gradual one at that. Adversaries settle in court because the risk of loss is too great to contemplate. Adversaries settle in mediation because they begin to understand each other's perspective. The same set of facts can bear totally differing interpretations. Much like the picture shown in introductory psychology classes of the woman who appears as either a beautiful young woman or a witchy old hag, the untrained eye can only discern one image. But identical pictures do yield different stories. A trained mediator can look at the picture and see both women simultaneously.

So if a case does not settle at the mediation is that a failure? What if the parties came in a million dollars apart and leave \$45,000 apart? Is there an increased likelihood that the case will settle? What if three smaller issues resolve, but a larger one remains? Is the goodwill generated by the solution of some, but not all, issues enough to allow the parties to continue to dialogue? What if, if nothing else, the parties leave understanding exactly what stands in the way of settlement and can focus more narrowly on overcoming a better-defined, and therefore more manageable, obstacle? What if, two weeks later, the lawyers renew the conversation through the mediator and two weeks after that, the case settles? What if the mediation teaches the parties how to communicate about a shared problem?

Mediations don't fail. A good mediation smoothes the way to settlement by creating ways in which parties can understand each other, the mediator serving as a conduit to explain each party's sense of the case to the other. A good mediation enables parties to focus on the issues that truly impede settlement and to talk to each other about removing that impediment. Mediation generates options and opportunities. Mediation enhances the likelihood that the case will settle before trial in ways that are more satisfying than apocalyptic settlement on the eve of trial. And that is what mediation in great measure is all about.

## **7. Mediation Just Delays Ultimate Trial of the Case. It is Just Another Delaying Tactic.**

“Sometimes parties may try to use the mediation process to stall or buy time, not only dragging out mediation with no intent to settle, but by agreeing to a settlement they have no intention of carrying out. By the time the other party can take them to court, to get an outcome no different than the settlement, they will have gained weeks or months.”<sup>7</sup> And if they are really mean-spirited, perhaps filed bankruptcy?

But ask yourself: why should mediation delay **any** legal remedy? Just because you agree to go to mediation does not mean that the clock should stop on court-sponsored remedies. One reason that cases settle is because they face trial tomorrow, hence the adage that “all cases settle on the eve of trial.” Keeping a trial date set offers every encouragement for people to pay attention in mediation and use it for purposeful ends. And even if an agreement is reached, a trial date need not be dismissed until performance of the agreement’s terms is completed. Some ADR clauses are drafted to require direct negotiation and then mediation before a lawsuit may be filed; while this may be conducive to early resolution, the time frames for negotiation and mediation should be kept relatively short. There is no better way to focus people’s attentions than by creating a trial date which may be everyone’s “WATNA” or Worst Alternative to a Negotiated Agreement.

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<sup>7</sup> Dwight Golann *Mediating Legal Disputes*, Aspen Publishers 1996, §14.3.8(d).

## FALSE TRUTHS:

### 1. Arbitration is Quick and Cheap.

As the use of arbitration grows in the resolving of commercial disputes, lawyers complain that the process increasingly resembles litigation.<sup>8</sup> Is this good or bad? Is it the fault of the arbitrator or the lawyer? What is the fuss all about?

Everyone will tell you arbitration is quick and efficient and saves the headache and costs of long and expensive court trials. Yet I have sat on a 40 day case that took 2 and ½ years to try because only 5 days were initially scheduled, 3 panel members and 2 lawyers could not coordinate their schedules, and one panel member spent 4 months of every year in France. In the course of the 2 and ½ years I lost my father and I became a grandmother, events, of course, wholly unrelated to the arbitration, but life events or *rites de passage* that underscore the unnecessary passage of time just to get one case resolved. I have also sat on a 72-day arbitration which took place over the course of almost 2 years where the panel chair established a 9:45 a.m. to 3:45 p.m. hearing day with morning and afternoon breaks and an hour-plus for lunch, and where counsel elicited deposition-length testimony from witnesses. Not to mention the cross-examination which was exponentially longer than the direct.

When Gerry Phillips interviewed 85 busy commercial arbitrators, asking them whether they “believe[d] that arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-effective means of resolving commercial disputes?”, 72% responded “yes.” Most said they perceived a trend toward “creeping legalism” and the “judicializing” of arbitration. Supporting his finding, a short surf of the web produced this dismaying remark: “Moreover, arbitration hearings often end up being longer than a court trial. Unlike trial courts and judges, arbitrators have little incentive to streamline the hearing (either through controlling discovery, thoughtfully considering dispositive motions or controlling the evidence of the hearing), so that an arbitration hearing can take much longer than even a jury trial. This is particularly true given that, unlike court hearings, arbitration hearings can be heard in bits and pieces over the course of several months...Further, the rules of evidence only loosely apply, so that hordes of unnecessary or inflammatory (but irrelevant) information may be allowed into the hearing.”<sup>9</sup>

But **remember**: Arbitration is created by contract. Litigation is the default provision in the absence of an ADR agreement. If you arbitrate, you can shape the process to your liking, i.e., “this arbitration must be completed within 3 months”; “no more than 5, 10, 25, 50 hearing days may be allotted”; “the rules of evidence [will] [will not] be strictly applied”; “we will choose one arbitrator”; “we will choose a panel of 3

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<sup>8</sup> See Gerald Phillips article on “Is Creeping Legalism Infecting Arbitration?” in *Dispute Resolution Journal*, February/April 2003.

<sup>9</sup> [Http://www.womenof.com/Articles/le\\_6\\_16\\_03.asp](http://www.womenof.com/Articles/le_6_16_03.asp)

arbitrators and they must be available to sit 4 days a week over a period of 2 months”; “each side will be allotted one deposition that will last one day, unless the parties agree otherwise or good cause is shown”; “all discovery disputes will be the subject of a conference call to the arbitrator and will not be briefed”; “there will (or won’t be) pre-arbitration briefs”; and on and on. And do discuss your preferences with your arbitrator to make sure that s/he will accommodate you. In arbitration, you choose the decision maker. You choose the forum and the law to be applied. Arbitration is like wearing a bespoke suit. You custom-tailor all the details. Increasingly, counsel submit complex claims to arbitration. They cannot be heard in a day or perhaps a week. Counsel are not looking for “quick and cheap.” You still may prefer 40 days of more relaxed arbitral hearing before a neutral whose acumen and judgment you trust. Arbitration is your opportunity to create a hearing environment conducive to your liking and your needs; not a lottery ticket to board a runaway train.

## **2. A Mediator is a Mediator is a Mediator.<sup>10</sup>**

Okay, so you are going to be very brave and trendy and will send your case to mediation. You have a great mediator in mind. S/he just stepped down from the federal bench after 18 years of distinguished service.

Your problem looks like this: you have a major mattress manufacturer sued by its dealerships nationwide in anti-trust for unfair business practices and franchise law violations. The dispute is contentious and disrupts the manufacturer’s daily dealings with its franchisees. The nationwide franchisee association newsletter, *America Sleeps*, is running editorial jeremiads and letters-to-the editors excoriating management. A lot of the editorial language is inflammatory. Franchisee association attendees at the last association meeting greeted the CEO’s state-of-the-company address with open hostility. The manufacturer’s most recent dealership agreement has a state-of-the-art mediation clause, and you cannot think of anyone more eminent than the newly retired federal judge. In the mediation you expect the following:

- To tell the mediator about your side’s best evidence against the other, have the mediator measure up the evidence against the applicable law and engage in risk analysis that will allow both sides to come to a settlement position that makes sense;
- To talk directly to the other side about the wedge issues and market conditions that have driven the manufacturer and its franchisees apart and to work out a plan for changing the structure of the ways the parties work together;

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<sup>10</sup> *Rose is a rose is a rose*, this Zen-like phrase was coined by Gertrude Stein in 1913 in a poem called *Sacred Emily*, included in *Geography and Plays*. Boston: Four Seas Co., 1922 (pgs. 178-188).

- To empower the manufacturer and its franchisee association to talk forthrightly and not defensively so that future frictions can be quickly identified and easily resolved;
- All of the above.

Query: Are both sides in agreement about what they want to accomplish through mediation? Is your mediator aware of your expectations? Is your chosen mediator capable of meeting your expectations? How directive do you want your mediator to be? Are you looking for evaluation? Are you looking for communication? Are you looking for empowerment? In all likelihood, parties going into mediation agree only that they believe (read *hope*) mediation is the tool that will settle their case. The rest, like the incurious patient going to the paternalistic doctor, is in the realm of expertise of the mediator. The mediator, like the doctor, knows best.

What many litigators do not know is that mediators cover a spectrum of practice. Mediators may, themselves, not be aware of the spectrum, but only know that whatever it is they do has worked in the past, and “if it ain’t broken, don’t fix it.” There are, however, broadly put, evaluative mediators, facilitative mediators and transformative mediators. If you are looking to continue a relationship, evaluative mediators will hand you a potential winner and a potential loser; you may have put one dispute behind you, but you are in no way ready to prevent the next. A facilitative mediator will, in Socratic fashion, cause you to see your dispute through the prism of multiple lenses – each view astonishingly fresh and generative of new options. A transformative mediator, in the words of Robert Bush and Joseph Folger<sup>11</sup> will “consciously avoid shaping disputes into readily solvable problems” but, instead “help parties change and experience new modes of behavior and interaction; and these changes and new behaviors can occur and continue whether or not an agreement is reached.”

ADR is sometimes called “appropriate dispute resolution.” So, if mediation is your choice and your issue is coverage under a reinsurance agreement or liquidated damages for non-conforming goods, an evaluative mediator may be a best choice. If communicating with a supplier or a customer fosters misunderstanding leading to litigation, a facilitative/transformative mediator will problem-solve in a different way. In the first example, communication with a reinsurer with whom you never have and never will communicate directly is not a goal. In the second example, while sound legal analysis may suggest the supplier is right and the customer wrong, the supplier may solve this problem in this mediation. But next time, the customer will find a new supplier.

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<sup>11</sup> *The Promise of Mediation*, pp. 199-201.

### 3. Arbitration Awards are Non-Appealable

The Federal Arbitration Act governs the vast majority of arbitrations conducted in the United States. Federal courts may vacate an arbitration award where there is “evident partiality” in the arbitrators. 9 UCSA §10(a)(2). Evident partiality is in the eyes’ of the beholder, and although all arbitrators are required to disclose relationships with parties and counsel for the parties, it is up for grabs and under judicial scrutiny what degree of disclosure is required. Disgruntled parties in arbitration – the ones who lose – do their own due diligence after the fact to uncover tenuous links and relationships which, in a petition to set aside an award, they assert should have been disclosed. It is worth a try. At best, it can set aside an award; at worst, it buys time for a party who does not want to pay an award or is sliding (or bolting) into bankruptcy.

In 2002 in Atlanta, the Eleventh Circuit confirmed the setting aside of an arbitration award where one of the arbitrators, an experienced construction lawyer in Birmingham, Alabama, verbally disclosed at the start of the arbitration hearings that “he knew and had worked with and against the attorneys and law firms who represented both sides in the arbitration.” The arbitrator, an experienced construction litigator, did not specifically disclose his representation of a co-defendant in a litigation with one of the firms in arbitration. The appeals court returned the case to the district court to determine if there was an ongoing business relationship between the arbitrator and the law firm and whether representation of a codefendant demonstrated evident partiality. And if that were not enough, an expert witness showed up during the arbitration who was not only known to the arbitrator, but whom the arbitrator had asked in the past to handle future matters. Although the arbitrator disclosed this at the time, still the aggrieved loser beseeched the court that this constituted evident partiality. *Universal Constructors Inc., Reliance Insurance Company v. University Commons-Urbana et al.*, 304 F.3d 1331 (11<sup>th</sup> Cir 2002). *Sphere Drake Ins. Co. Ltd. v. All American Life Ins.Co.*, 307 F. 3d 617 (7<sup>th</sup> Cir. 2002).

And of course, there is always the murky ground, which seduces some courts, called “manifest disregard of the law.” Although nowhere found in the FAA, although loosely applied under the FAA’s §10(d) where the arbitrators have “exceeded their powers”, this ground is court-created for courts that just cannot abide the fact that arbitrators are neither bound to know nor to follow the law. Most courts deciding the issue have decided that an arbitration award which is governed by the FAA can be vacated if the arbitrator acted “in manifest disregard of the law”.<sup>12</sup> Many arbitrators to avoid this peril -- and a past revered policy of the AAA -- simply rendered an award without reasons.

And, finally, with reference to our “truth” that arbitrations are quick and cheap, one appealable ground of an award is failure to allow a party to put on his evidence. So, the arbitrator may find himself between a rock and a hard place, wanting to streamline the

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<sup>12</sup> “What to Tell a Client About Arbitration”, <http://adrr.com.smu/client.htm>. But compare *Siegel v. The Prudential Insurance Co (Calif Ct App 11/20/98)* holding manifest disregard of law by arbitrators is not ground for reversal.

hearing, but fearing an appeal if s/he fails to allow the party to make the record of his choice.

Some parties have written in appeal rights into their decision to arbitrate. Courts frown upon these as expanding their jurisdiction by private contract and are disdainful of parties who attempt this private legislation. Trying to cut off these problems at the pass, some provider organizations such as CPR and JAMS have created optional appeal procedures allowing an appeal panel to appropriately affirm, reverse or modify an award. Because in major cases a party might be concerned about the possibility of an aberrant award and would like to be able to appeal from such an award to a tribunal of outstanding appellate arbitrators, CPR has adopted the CPR Arbitration Appeal Procedure which may be invoked whether or not the original arbitration was conducted under CPR Rules. The three member Appeal Tribunal hears the appeal and must make best efforts to assure the Appeal concludes within six months of its commencement. And the only grounds on which the Tribunal may modify or set aside an Award are: if the Award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis; or if it is based upon factual findings clearly unsupported by the record; or if the Award is subject to one or more of the grounds set forth in Section 10 of the FAA for vacating an award. The Tribunal has no power to remand the Award.