ARIZONA ADR FORUM

WINTER 2016

CONTENTS

STATE BAR OF ARIZONA

EDITOR | THOM COPE

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Thom Cope at tcope@mcrazlaw.com

from the chair

Renee Gerstman

So long as people have disputes that require resolution, business and legal communities will continue to study the nature of conflict and explore different methods for resolving disputes in a fair and expeditious manner. This newsletter and the programming presented by the Alternative Dispute Resolution Section of the State Bar provides ADR practitioners and lawyers utilizing dispute resolution methodologies with the current insight and thoughts about managing conflict and resolving disputes. Over the next couple of months our programming will address **Mediation Skills and Practice Areas** [February 14], **Healthcare Mediation** [March 14] and **Virtual Mediation** [April 11]. Please save these dates and attend any of the programs that are of interest to you. For the convention, we have arranged for **Tom Stipanowich** from Pepperdine University to present on **Mediation in Evolution**. The afternoon session will be devoted to different aspects of the arbitration process and will presented by a variety of Arizona ADR practitioners as short "Talks."

If there are aspects of dispute resolution or specific practice areas that you would like to see addressed by the ADR section or are aware of new methods and practices not widely known or utilized in Arizona, please let us know so that we can plan an event and share this information with the community.

— Renee Gerstman
ADR Section Chair

Mediation — Country Style

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by Jason Houston

Deep in the outback of the farthest corners of California's vast Kern County are tiny mountain hamlets that haven't noticed the 20th century has been here and gone.

One such place is Onyx, where people still live an earthy existence that went out with the last Hank Williams records and hula hoops. Few residents here know what smog is. Telephone outages are as common today as when phone service first arrived. The local news is swapped each morning at the post office. In wintertime drivers of ranch trucks gather for coffee and to warm themselves by the huge fireplace inside the only gas station.

Wafting gently through this lost pocket of time drift occasional signs of the modern world. Old-fashioned dial-up is worshipped by those lucky enough to have an Internet connection. But with the nearest courts more than an hour away, it's not surprising issues with human interaction often endure without resolution.

Several years ago a neighbor was telling me he was losing his home. I suggested he and the lady from whom he bought the place *on a handshake* get together and try to restructure the agreement through mediation.

I then contacted the seller who was enthusiastic about the prospect of keeping the buyer in the house.

On the appointed date, the seller showed up but the buyer didn't. While waiting for the buyer, the seller asked me to review the documents she had drawn up on this very informal agreement to sell her property.

The deal turned out to be violating any number of California's strict residential property transfer statutes. Had it not involved real people, it would have been a skit from *The Honeymooner's*.

Without benefit of escrow, the property – an aging singlewide with a market value of perhaps $40,000 in sunnier times – was sold on a 30-year contract for $90,000. The property was sold *as is* with the buyer waiving all rights to any appraisal or inspection. The buyer's down payment consisted of a lump sum insurance settlement, followed by a stratospheric monthly obligation he could never hope to meet. Finally, the contract called for the seller's *gardener* to arbitrate the matter, should a dispute arise. Nothing was notarized, no transfer of ownership was recorded and it was the buyer's dilemma to figure out where to come up with the delinquent taxes.

Several days later the buyer called me from Carson City, Nevada, to advise he wasn't coming back. He and his 7-year-old daughter had become destitute while he looked for work. He just wanted my help transferring the property back to the seller, so he would be free of any debt.

Maintaining my status as a neutral, I suggested both sides consult a real estate attorney because it appeared there were some elements of this contract which might not be enforceable, should it come to the attention of the courts through a foreclosure action. Apparently, neither party felt this option was worth pursuing.

Shortly after, the *seller* moved to *Reno Nevada*, where she enrolled in college.

Neither side was aware the other had moved to northern Nevada, much less to within 30 miles of each other. But both parties – despite a lack of any hostility between them – eventually called back anxious to explore the possibility of modifying the terms.

A mediation was begun which lasted several weeks. The seller agreed to return a substantial sum of money in exchange for a quitclaim to the property. A cashier's check payable to the buyer was obtained in Ridgecrest. The buyer's quitclaim documents were prepared, executed and notarized in Lake Tahoe. All documents were delivered to my office via certified mail and then redistributed to their respective Nevada addresses via more certified mail. It took a lot of negotiation, telephone calls, envelopes, postage, mailing of documents and trips to the post office. It also took most of a month to finalize and a ton of patience. The buyer covered my fee with an old 1962 Ford he left behind and which the seller didn't want.

The buyer placed the bulk of his proceeds in a trust account for his daughter when she turned 18. The seller was relieved to be out from under what could have been a financial bloodbath under California's toothy predatory lender laws. Above all, both agreed they could have lost any combination of time, money and aggravation had mediation not happened.

My satisfaction came from seeing both of these well-meaning folks come out ahead instead of losing.

That's a mediation done *country style*.

A SYNOPSIS OF ARIZONA'S MEDICAL MARIJUANA LAW

by Thom K. Cope, Attorney at Law

Thom Cope has practiced employment and labor law for over 44 years. He is a partner in the Tucson AZ law firm of Mesch Clark & Rothschild. He may be reached at tcope@mcrazlaw.com.

The latest statistics from the Arizona Department of Health show as of May 1, 2016 (latest numbers) 99,938 Arizonans have medical marijuana cards.

Cardholders range in age from under 18 to over 80 years old. (Arizona Department of Health website: http://www.azdhs.gov/documents/licensing/medical-marijuana/reports/2016/2016-apr-monthly-report.pdf). However, the majority of cardholders are working in business today. Chances are that one many employees have cards. What rights does an employer have when a cardholder tests positive for marijuana in the workplace?

Arizona law is very clear on this point. Except in very specific circumstances, an employer may not terminate or discriminate against an employee because that person has a card. In fact, without evidence of impairment, employers may not terminate an employee for testing positive for marijuana except in limited situations.

Medical marijuana cards are issued if an individual has an illness or condition listed in the law: cancer, AIDS, HIV, glaucoma, Hepatitis C, ALS, Crohn's Disease or a "chronic or debilitating medical condition…" Chronic pain is the number one reason listed by cardholders. (79,030 http://www.azdhs.gov/documents/licensing/medical-marijuana/reports/2016/2016-apr-monthly-report.pdf)

Further, an employer may not ask job applicants if they have a card because that is like asking them if they have a serious medical condition, which is clearly illegal to ask under the Americans with Disabilities Act.

The law does give an employer certain protections if they act in good faith. First, if the employer would lose a federal monetary benefit (i.e. federal contract, federal grant money, etc.) the employee's medical marijuana protections do not apply.

Second, an employee may not smoke, ingest or possess marijuana in the workplace or that of a client or customer. And finally, a cardholder may not be impaired while working.

The big problem for employers is determining whether or not the employee is impaired. It is common knowledge that .08 is the standard for legal intoxication with alcohol. There is no similar standard for marijuana.

The law helps employers with identifying subjective factors. So if the employer can in good faith observe and document one or more of the following factors, it can conclude the person is impaired:

- Speech
- Standing
- Agility
- Demeanor
- Walking
- Physical dexterity
- Coordination
- Irrational or unusual behavior

Further, the employer may take into account: appearance; clothing; odor; negligently operating machinery or equipment; involvement in a serious accident resulting in serious damage or injury; any symptoms or actions by an employee that causes reasonable suspicion of the use of drugs or alcohol. (ARS §23-493)

Another extremely successful strategy is to designate certain jobs as safety sensitive. Safety sensitive positions include those employees whose jobs entail the handling of food or medicine; operating motor vehicles, equipment or machinery; repairing or monitoring machinery or equipment; performing service in the premises of a residential or commercial customer. Therefore, if an employer wants to eliminate the card protection, they must revise the job descriptions as safety sensitive. Generally clerical staff persons are not in safety sensitive jobs. It is important that employers do not over designate positions as safety sensitive when they are not. It is advised to follow the four requirements described above.

The law protects an employer if it: acts in good faith pursuant to a legal drug test, even if they fail to test for a specific drug; and have a good-faith belief the employee used or possessed drugs on work premises; and have a good-faith belief the employee was impaired during work or on the premises.

Many attorney's would advise that the employer should have at least two managers confirm the fact that the employee is impaired and have each clearly document what they saw, heard, smelled, etc. It is important to clearly document these factors.

Over the next few years it is expect there will be much more litigation in this area. Therefore, it is important to follow the law and have a medical marijuana policy in the employee handbook or procedures, and to document everything.

DO ARBITRATORS NEED TO KNOW ABOUT CHANGES IN THE RULES OF CIVIL PROCEDURE?

At a recent presentation on discovery issues in arbitration, I discussed the recent changes to the Federal Rules of Civil Procedure and the new proportionality standard. My colleagues immediately questioned the relevance of my comments, because after all, the rules of civil procedure are not applicable in arbitration and one reason many parties choose arbitration is to avoid the complex and lengthy discovery that is common in the court system. While arbitrators generally do not follow the rules of civil procedure, including those relating to discovery, I contend that Arbitrators should keep apprised of rule changes and shifting paradigms in the court systems and that in doing so, will result in enhanced communication with counsel and more efficiently managed process.

Litigators bring to arbitration the paradigms and experiences learned and developed over years litigating in the court system. Understanding the frame of reference of the attorneys appearing before you will help arbitrators in all stages of the arbitration. Lawyers like to stick with what they know and are familiar with. To many litigators, arbitration, specifically discovery is a bit like walking into the unknown. Unlike discovery under the rules of civil procedure, there are no set time lines and procedures and it is not self-executing. As a result, litigators will try to run an arbitration case as if it is was in the court system; fall back on the rules and process they are comfortable with. Being aware of these rules and systems will, in the initial stages, help arbitrators lay the groundwork for establishing the arbitration process to be followed and explaining how it will differ from that in the court system. If you don't know the current court system procedures and local rules you will be unable to do so. Knowledge of the current rules also provides the arbitrator with information needed to analyze the parties' positions and arguments. While arbitrators are not bound to the outcome that would have resulted in the court system under the applicable set of rules, knowledge of those rules (and why they don't apply in the arbitration process) is important to the arbitrator's analysis and the presentation of his/her decision.

Consider the recent change in the standard for discovery from "likely to lead to the discovery of admissible evidence" to proportionality. In the arbitration world the proportionality standard is old news and one that has been in effect for quite some time as it balances the competing interests of having a fair opportunity to present claims and defenses with the interests of cost efficiency and timeliness. If in a discovery dispute a party argues that the discovery is necessary because it might lead to admissible evidence, an arbitrator aware of the rule change, will have the tools to question counsel about the applicability of that standard both in the arbitration and in the court room.

Arbitrators may not, depending on the arbitration provision, be required to strictly follow the law in rendering their decision. Yet no one would contend that the arbitrator should not be aware of recent changes to substantive law. Similarly, arbitrators should not ignore changes to the rules of civil procedure simply because they are not strictly applied in the arbitration process. ADR

January 10, 2017
Arbitration Costs, Fees and Clauses
Format: Webinar

February 14, 2017
Mediation Skills Across Practice Areas
Location: Boardroom

March 14, 2017
Health Care Mediation
Format: Webinar

April 11, 2017
Virtual Mediation
Format: Webinar

Members will have a discount. The schedule will be as follows: 8:30AM – 9:00AM breakfast and registration, 9:00AM – 10:00AM program, and 10:00AM – 10:30AM networking.

ADR Section Executive Council 2016/17

Soliciting Articles and Comments

for a Pro/Con discussion of "*whether or not you need to be subject matter expert in the area in which you have been hired to mediate*" i.e. if you are hired to mediate a construction case, should you know something about construction law? Family law; employment law, etc.

from the editor

by Thom Cope

As always, this edition could not have been possible without the sterling efforts of section members responding to my call for articles. Thanks to all of you who contributed to the success of this newsletter. Again I encourage everyone with an idea for an article to contact me at any time. Or if you have published somewhere else, we can re-publish it for the benefit of our section members.

Also, there would be not be a newsletter without the assistance of the State Bar staff. Thanks to them as well.

I hope everyone has a hope everyone has a Happy and Safe Holiday. Be Well.

Thom Cope