

**ARBITRATION SUBCOMMITTEE REPORT
TO THE MISSOURI BAR ADR COMMITTEE
FALL 2006**

Per the request of the ADR Committee, as the Chair of the Arbitration Subcommittee, I submit the following report for consideration at the Fall 2006 Conference:

1. Recent Developments: Eighth Circuit and Missouri Appellate Courts

A. Introduction

Recent decisions from the Eighth Circuit Court of Appeals and Missouri's various appellate courts continue to examine on a frequent basis many aspects of mediation and arbitration and by doing offer expanded coverage over the rapidly growing volume of case law that exists on ADR. In the spring 2007, I will present again a detailed compilation of cases of significance and interest to this Committee for its consideration. At this fall 2006 meeting, I bring only a couple very recent cases to your attention, as follows:

B. Mediation

American Equity Mortgage, Inc. v. First Option Mortgage, LLC, 2006 W.L. 3032417 (E.D. Mo.), decided October 23, 2006. In this case, the Federal District Court for the Eastern District of Missouri decided that American Equity was not likely to succeed on the merits of its claim for tortious interference against a competitor, First Option, when various employees of American Equity who were under contract went to work for First Option. The Court concluded at a preliminary stage when considering whether injunctive relief should be granted, that American Equity was not likely to succeed on the merits of its case and that there was an insufficient threat of irreparable harm. The Court noted, however, that it kept open the possibility to change its mind once additional evidence was presented during the trial on the merits.

At the end of the decision, Judge Catherine Perry stated as follows:

By separate order I refer this case to mediation. The parties have conducted extensive discovery already, and they certainly know enough of the evidence to engage in meaningful settlement discussions. If the mediation fails I expect the case to be ready for trial on the merits relatively quickly, so I will set a scheduling conference to be held shortly after the deadline for completing mediation.

This case is of interest because it appeared to be contentious, involved allegations over numerous employees who left one place of work to go to another, and involved high profile parties; namely, American Equity Mortgage and First Option Mortgage. The Court set a tone, I believe, by its order that this matter would be sent to mediation and that if mediation failed, the Court was already applying immediate pressure that a trial would soon follow. Thus, this case seems to reinforce the continuing support that federal courts have for the mediation process and their willingness to use it as an effective tool to achieve dispute resolution short of the ultimate trial on the merits.

C. Arbitration

Power of Attorney

In *Tallmadge v. Beverly Enterprises-Missouri, Inc.*, 202 S.W.3d 47 (Mo. Ct. App. E.D.), decided September 26, the Eastern District of Missouri held that a patient who had been admitted to a health care facility and thereafter sustained personal injuries was not subject to arbitration when her attorney in fact signed admission papers on her behalf agreeing to arbitration of various disputes, including those involving the personal injury that she thereafter sustained. The appellate court, in reversing the trial court, focused on the fact that a few months later, after admission, the patient signed a durable power of attorney appointing the person in question as her attorney in fact with full power to carry out various acts. That was at a point in time, however, a few months after she had already been admitted and after this person who obtained her authority as her attorney in fact had executed an admission process form agreeing to arbitration. The Court concluded that: “The power of attorney executed by Carolyn [the patient] after the arbitration agreement fails to provide authority for the execution of the arbitration agreement on Carolyn’s behalf.”

Non-Signatory to Arbitration Agreement

In *Nichelson v. Soeder, III*, 2006 WL 3079109 (E.D. Mo.), decided October 27, the Eastern District of Missouri provided some extremely helpful analysis of when a non-signatory to an arbitration agreement can nevertheless be bound. It concluded that, consistent with prior authority from the Third Circuit Court of Appeals, an arbitration agreement can include those to be bound by the dispute who are agents of the signatory parties. It further found that a non-signatory can enforce an arbitration clause against a signatory to the agreement in several circumstances, including: (1) where there is a relationship sufficiently close between the non-signatory and the signatory and only by permitting the non-

signatory to invoke arbitration “evisceration of the underlying arbitration agreement between the signatories can be avoided”; and (2) when the signatory relies on the terms of the written agreement contained in the arbitration clause in asserting its claims against the non-signatory.

This case also involved allegations of waiver of the arbitration provision and the Court reinforced the continuing importance to show prejudice to advance successfully a claim of waiver of an arbitration provision. The Court concluded that prejudice was not shown and therefore the arbitration provision had not been waived. In addition, the Eastern District held that “courts find waiver only where the same legal and factual matters are at issue.”

Extended Arbitration and Complicated Arbitration Order

The world of arbitration has extended far from its original concept and roots of simplicity and speed. Like litigation, there are now various matters resolved through arbitration that have consumed considerable time and involved enormous complexity. Does this give rise to a truly parallel system of justice? If so, is this indeed consistent with the original mandate that ADR would be cost-effective and more timely than traditional litigation? A case in point is *DTV Network Systems, Inc. v. Skywalker Communications*, 2006 WL 2987040 (E.D. Mo.), decided October 17. In this case, the Eastern District considered an arbitration that lasted more than three years. It had a number of interesting findings, including:

- Reinforcement of the concept that under the Eighth Circuit law in addition to the mandate set out by the Federal Arbitration Act, the only two additional grounds upon which an arbitration award can be overturned are (1) completely irrational and (2) manifest disregard of the law;
- An arbitration award must be confirmed even if the court is convinced that the arbitrator committed a serious error, so “long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority”;
- The procedure at the arbitration is within the parlance and providence of the arbitrator;
- This parlance can include an arbitrator’s decision to elect during the proceeding to allow a “surprise rebuttal expert report” and to exclude “pivotal impeachment evidence”;

- The limitations set upon this Court—the Eighth Circuit—in reviewing an arbitrator’s award are strict. The parties should be aware that they get what they bargained for and that arbitration is far different from adjudication.

And finally, In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 2006 WL 3103677, decided September 14, the Eastern District discussed an arbitrator’s report that consisted of 2,075 pages. Yes, 2,075 pages. This alone speaks volumes as to how far arbitration has come and how close in some ways it seems to be to traditional litigation.

2. Recent Developments: United States Supreme Court

The United States Supreme Court in a recent case decided that a challenge to the validity of the contract as a whole, whether brought in state or federal court, must be referred to arbitration for decision. The case is *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006), decided February 21. The case involved Cardegna, who brought a class action claiming that Buckeye had charged usurious interest rates in connection with various check cashing loans, allegedly in violation of Illinois consumer fraud laws. Buckeye moved to compel arbitration and Cardegna responded that the contract as a whole was illegal and therefore void, which in turn would void the arbitration provision contained within it.

The Florida Supreme Court ruled in favor of Cardegna, finding that the contract as a whole not only was void, but also in fact might be criminal in nature.

The Supreme Court of the United States reversed the Florida Supreme Court’s decision and held that Cardegna’s attack on the contract “must go to the arbitrator” for decision. This underscores with emphasis the tremendous deference that the U.S. Supreme Court is giving to arbitrators to decide a wide range of issues involving the validity of the contract as a whole and all its contents.

In reaching this result, the Supreme Court reaffirmed principles previously established in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), including that an arbitration provision is distinct and separate from the rest of the contract, that it is for an arbitrator to consider a challenge to the validity of the contract as a whole, and finally that federal arbitration law on a substantive level applies in both state and federal courts.

The result also supports a continuation of a recent Supreme Court trend expanding and endorsing arbitrator authority in matters of contract interpretation and enforcement, with the notable recent previous case on this point being *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003). In this case, the Supreme Court in 2003 had held that arbitrators rather than courts had the power to determine and apply various contract damage clauses.

It also extends the previous decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), wherein the Court held that matters of contract interpretation are for arbitrators, not the federal courts, to decide.

In addition to this recent U.S. Supreme Court case, a compilation of other recent cases from the United States Supreme Court, the Eighth Circuit Court of Appeals, and the appellate courts in Missouri is attached to this report in an article entitled: *The Current Law on ADR*. This article appeared in the Winter 2006 edition of the *The St. Louis Bar Journal* and is being reprinted herein by its author, the undersigned Chair of this Arbitration Subcommittee.

3. Trends and Issues

Please refer to points in discussion in Items 1 and 2 above.

4. Recommended Resources

An excellent overview of arbitration, along with some in-depth chapters on various stages of arbitration, is the loose-leaf “The Alternative Dispute Resolution Practice Guide” by Roth, Wulf and Cooper (Thompson West, 2005). As a loose-leaf, updates appear annually.

In addition, a number of publications are contained within the website for the American Arbitration Association at www.adr.org. Move to the attachment labeled “Publications” and within it you will see listings for a variety of publications, including

- ADR Informative Package
- Labor Publications Package
- Dispute Resolution Journal
- ADRWorld.com
- Employment Dispute Awards Online
- Arbitration of a Commercial Dispute (video)
- AAA Handbook on Commercial Arbitration
- ADR & the Law (latest editions)

- On and Off the Record: Colosi on Negotiation, Second Edition
- Collective Bargaining: How it Works and Why, Third Edition
- Labor Arbitration: What You Need to Know, Fifth Edition

Another reference of note is the *The Journal of Dispute Resolution*, a student-edited journal published on a semi-annual basis by the University of Missouri-Columbia School of Law in collaboration with the Center for Study of Dispute Resolution. A symposium issue of the Journal in Volume 2006, No. 1 contains a symposium on Marc Galanter's article, "A World Without Trials?" In addition, the *Journal of Dispute Resolution* plans to present a new publication initiative: The Legislative Update, which features updates on ADR legislation in all 50 states. This update is accessible through the webpage for the University of Missouri at www.law.missouri.edu/csdr/journal/.

We invite the Committee members to supplement this with additional information of which they are aware which will be posted in upcoming web productions.

5. Upcoming Trainings

The American Arbitration Association at the local level that covers Missouri, Iowa, Kansas and Nebraska, does not have any present plans for training sessions. The undersigned is not aware at this point of any other organizations on a local level that are planning in the near future arbitration training sessions. If anyone is aware of other programs, please advise so that this material can be updated.

Respectfully submitted,

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Chair of the Arbitration Subcommittee
Of the ADR Committee of The Missouri Bar

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The Current Law on ADR

by James R. Keller

This Article originally appeared in the Winter 2006 edition of *The St. Louis Bar Journal*.

Introduction

This Article presents the current law on arbitration and mediation based upon rulings from the courts that most directly affect mediators, arbitrators and trial attorneys who practice ADR in the State of Missouri. The focus is on recent opinions from the United States Supreme Court, the Eighth Circuit Court of Appeals and Missouri's appellate courts. Virtually all case law concerns arbitration rather than mediation.

The United States Supreme Court continues to support, even encourage arbitration. During one recent oral argument, the high court quizzed counsel on the parties' willingness to resolve their disputes through arbitration.¹ The Supreme Court then expressed "hope" in its written opinion that the parties would agree to binding arbitration for all remaining issues.

In Missouri, many of the state's premier courtroom trial attorneys recently turned to binding arbitration to resolve their disputes over their attorney fees to be paid for tobacco litigation.² The arbitrator award was

\$111,250,000, a result meriting attention from even the most skeptical as to whether “big awards” are possible in arbitration.

I. The Agreement to Arbitrate

It is axiomatic that binding arbitration requires a written agreement to arbitrate. Absent such an agreement, disputes are resolved in a court of law or equity. The courts liberally construe an arbitration agreement and resolve all doubts in favor of arbitration.³ A motion compelling arbitration will be granted unless it may be said with “positive assurance” that the arbitration provision is not susceptible of an interpretation that covers the asserted dispute.⁴

A letter from counsel responding to a request for arbitration that stated that arbitration was a “workable process for resolving this dispute” and then requested a discussion of the ground rules for arbitration was sufficiently binding to create an agreement to arbitrate.⁵ An arbitration provision survives an employee’s termination even after the other provisions in the employment agreement no longer apply.⁶

Typically, broadly worded arbitration provisions will cover all anticipated disputes and are enforced by the courts to address a myriad of claims. An example is an arbitration clause that applies to “all disputes, controversies or differences arising out of or in connection with this agreement or the making thereof.”⁷ Another broadly worded provision calls for arbitration of all disputes “arising hereunder.”⁸

If an arbitration provision is broad, the court analyzes whether the dispute relates to the subject matter of the agreement and if so, the court will send the case to arbitration.⁹ By contrast, courts will not compel arbitration where an arbitration provision is narrow and does not cover the claim in dispute. If the clause is narrow, the court determines “whether the dispute involves an agreement collateral to the agreement contained in the arbitration clause.”¹⁰ For example, a letter of understanding that is separate from the main contract and its arbitration provision does not bind the parties to arbitration absent incorporation by reference.¹¹

Similarly, if the dispute involves a narrow arbitration provision and the claims do not raise any issue requiring reference to or construction of the agreement containing the arbitration provision, then the dispute is not subject to binding arbitration.¹² The arbitration provision in a collective bargaining agreement that provided for arbitration of any matter that relates to an interpretation of the agreement did not cover a former employee’s allegations that a resignation was due to some irrational behavior caused by an unspecified illness.¹³ Tort claims often involve issues where the resolution does not require reference to or construction of the agreement containing the arbitration provision, and thus they generally are not covered under a narrow provision.¹⁴

Courts are reluctant to enforce an arbitration provision that provides that one side can invoke arbitration but the other side does not

have that option.¹⁵ Lack of mutuality can expose the clause to a finding of unconscionability. Courts also will deny a motion to compel arbitration where the amount in dispute is below the threshold amount specified to arbitrate.¹⁶

A frequent challenge is that the arbitration provision does not allow the arbitrator the authority to award all relief that could be available in a court of law. Issues relating to any potential limitation on recovery go to the merits of the dispute rather than whether the arbitration provision is enforceable. Decisions on the merits are for the arbitrator, not the court.¹⁷

An arbitration clause only produces binding arbitration if it so states.¹⁸ Parties also need to specifically incorporate (rather than merely reference) another contract containing an arbitration clause if they intend the arbitration clause to apply to their contract.¹⁹

A. Court Jurisdiction

The courts routinely exercise their jurisdiction to decide the “gateway question” of arbitrability; namely, whether the parties have entered into a valid and binding agreement to arbitrate.²⁰ The court’s role in deciding this issue is limited, however.²¹ If the court decides in favor of arbitration, the matter then proceeds in arbitration without further court involvement.

Consequently, an arbitrator (not the court) will decide the legality and enforceability of an arbitration agreement that prohibits punitive and

exemplary damages in a case where claimant has requested treble damages under RICO.²² The Supreme Court defers to the expertise of arbitrators even over its own federal judges to resolve issues on statute of limitations, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate.²³ Also, questions regarding the unconscionability of an arbitration provision typically rest with the arbitrator, not the court.²⁴ There are times, however—see II. A. Venue, for example—when the court will rule on whether an arbitration provision is unconscionable.

Challenges to the jurisdiction of an arbitrator are either (1) procedural, (2) substantive jurisdictional or (3) relate to the merits of the arbitrator’s decision.²⁵ Courts decline to address issues regarding procedural arbitrability. Substantive jurisdictional challenges involve the gateway question whether the parties agreed to arbitrate. The courts have jurisdiction to decide this issue. By contrast, the courts “refuse” to exercise jurisdiction to review and reconsider on the merits an arbitrator’s award.²⁶

A dispute whether an employee complied with pre-arbitration provisions in a grievance procedure as a prerequisite to pursuing arbitration is a matter of procedure for the arbitrator, not the court, to decide.²⁷ The courts repose great confidence in an arbitrator to decide a wide range of issues, including federal statutory claims.²⁸ While an occasional judge may still bristle at the concept that arbitrators have broad decision-making authority, the appellate courts have cast those

judges as reflecting “an outmoded judicial hostility to arbitration that the Supreme Court has consistently rejected.”²⁹

Missouri’s courts are not available to review a dispute on a matter that is being arbitrated outside the State of Missouri, provided the arbitration agreement specifies arbitration in a state other than Missouri.³⁰ This requires parties to be careful in considering the location for the arbitration hearing for only those hearings that take place within the State of Missouri will allow enforcement or redress in Missouri.³¹

B. Non-Signators to the Arbitration Agreement

Generally, a non-signator to a contract containing an arbitration provision is not bound to arbitrate. There are exceptions, however, as noted recently by both Missouri’s appellate courts and the Eighth Circuit Court of Appeals. For example, a non-signatory party to an arbitration agreement can be bound to the arbitration provision if he or she is an agent of one of the signing parties or is a third-party beneficiary of the contract.³² A third-party beneficiary to a contract is someone who did not expressly execute the agreement but benefits from one or more of its terms.³³

A non-signatory can enforce an arbitration clause against a signatory when (1) the relationship between them is sufficiently close that only by permitting the non-signatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided, or (2) the signatory to a written agreement

containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory.³⁴ The test for determining whether a non-signator can enforce a signator into arbitration is different from the test for determining whether a signator can force a non-signator into arbitration.³⁵

C. Waiver of Arbitration

One or more parties to an arbitration agreement can waive the right to arbitrate. Waiver occurs when the party (1) knew of an existing right to arbitrate; (2) acted inconsistently with that right; and (3) prejudiced the other party by his or her inconsistent acts.³⁶ The courts often focus on the prejudice component in determining whether a waiver exists.³⁷ Seven-³⁸ and nine-month periods³⁹ between filing a lawsuit and then filing a motion to compel arbitration are not necessarily of sufficient duration, absent other factors, to constitute a waiver.

II. Factors Affecting Arbitration

Both arbitrators and the courts face a number of unique issues presented by virtue of arbitration. Among other items in recent years, the courts have considered:

A. Venue

Arbitration provisions frequently specify where the arbitration will occur. The court may strike a venue provision if the location places an undue burden on a party, particularly if the agreement is between a business and a consumer.⁴⁰ A Missouri appellate court struck down the

venue portion of an arbitration provision requiring the purchaser of an automobile in Missouri to arbitrate the dispute in Arkansas, finding it to be a contract of adhesion and unconscionable.⁴¹

B. Punitive Damages

Arbitrators decide issues concerning punitive damages including whether an agreement prohibiting the award of punitive damages is unenforceable.⁴² The Eighth Circuit affirmed an arbitrator's award of \$6,000,000 in punitive damages even though the actual damages were only \$1,000 in statutory damages, \$1,000 in actual damages, \$22,780 in attorney fees, and \$9,300 for the cost of the arbitration.⁴³ Missouri's Western District upheld an arbitrator's award of punitive damages of \$50,000 in addition to \$50,000 in actual damages relative to a construction dispute over a house.⁴⁴

C. Attorney Fees

The Eighth Circuit recently upheld an arbitrator's award of attorney fees based upon breach of contract in the amount of \$215,480.82 for fees paid to a major law firm for services prior to the breach and an additional \$359,861.55 for fees paid to that same firm for services after the breach.⁴⁵ As the Eighth Circuit noted, "the district court erred in substituting its remedial judgment for that of the arbitrator."⁴⁶

The Eighth Circuit also upheld a district court's decision to confirm an arbitrator's award denying attorney fees. The arbitrator

found the dealership agreement to be a contract of adhesion and unconscionable as regards the provision that provided that the prevailing party could recover all costs and attorneys' fees.⁴⁷ Kawasaki, even though victorious in arbitration, could not recover costs and attorney fees of \$1.7 million.

In the only reported decision from the Eighth Circuit overturning an arbitrator's award based upon manifest disregard of the law,⁴⁸ the Eighth Circuit affirmed a district court's decision to vacate an arbitrator award of attorney fees because the panel expressly recognized that the law did not support such a recovery but awarded the attorney fees anyway. Manifest disregard of the law does exist where an arbitration panel cites relevant law, but then proceeds to ignore it.⁴⁹ This rarely happens.

An arbitrator's award of attorney fees also may be vacated when the fees related to litigation previously decided by a Missouri court rather than to attorney fees generated in the arbitration itself.⁵⁰

D. Arbitrator Fees

The courts examine carefully how an arbitration provision addresses the payment of an arbitrator's fees and on occasion courts will strike such a provision. Recently, the Eighth Circuit decided that a pension plan that required that arbitrator fees be split equally between the parties was not in accord with ERISA's statutory framework and

discouraged the pursuit of many legitimate claims by those who cannot afford such costs.⁵¹

E. Class Action

The United States Supreme Court recently decided that an arbitrator can decide whether to certify a proceeding for class arbitration.⁵² This affords an arbitrator considerable authority and responsibility in determining what previously was thought to be within the exclusive parlance of the courts.

F. Replacing an Arbitrator

On occasion, an arbitrator must be replaced due to illness, conflict or other unavailability. The Eighth Circuit, departing from several other federal circuits, has concluded that where the arbitration provision is silent about what to do in this instance, the court shall designate a replacement arbitrator.⁵³ Some other federal circuit courts have taken a different approach and concluded that if an arbitrator needs to be replaced, the entire panel must be replaced and the arbitration start anew.⁵⁴

G. Delegation of an Arbitrator's Authority

While the parties may agree to arbitrate virtually any dispute, there are certain matters that cannot be delegated to an arbitrator. One example is a labor agreement involving a public entity. Per Missouri law, wages and hours for public employment in Missouri must be established

by statute or ordinance and cannot be the subject of bargaining or arbitration.⁵⁵

H. No Private Cause of Action Against Arbitration Tribunal

Disputes in arbitration occasionally prompt a party to file a collateral lawsuit naming the arbitration tribunal as a defendant. Consistently, courts around the country have taken the position that arbitration tribunals are immune from such lawsuits, at least to the extent covered by the administrative actions that they perform.⁵⁶ Missouri's appellate courts have not yet expressly ruled on this issue.

I. Discovery in Arbitration

The courts allow arbitrators sole discretion to interpret an arbitration provision and determine what discovery will be permitted in advance of the arbitration hearing.⁵⁷ Thus, an arbitrator will decide discovery issues such as whether and the number of depositions that parties may take and such decision will not be reviewed by a court.⁵⁸ Discovery requests within an arbitration proceeding can supersede an individual employee's privacy interests and require that information contained on his computer be part of the documents to be produced to the opposing party.⁵⁹

III. Litigating the Award

A. Applicable Law (Federal or State)

The Federal Arbitration Act (FAA) controls all arbitrations that involve interstate commerce, which the courts have broadly construed to

include a wide range of activities.⁶⁰ When both the FAA and Missouri's Arbitration Act are applicable, the courts will apply the FAA. A court is not bound, however, by the procedural provisions of the FAA and can apply Missouri's procedures to the extent they do not defeat the rights granted by Congress through the FAA.⁶¹ The FAA, while expansively applied, does not provide an independent jurisdictional basis for filing a suit in federal court.⁶²

B. Enforcing and Upholding the Award

Both the FAA and Missouri's Arbitration Act set forth the precise and limited grounds when an arbitrator's award can be challenged in court and vacated.⁶³ In addition to the statutorily prescribed reasons, the federal courts have engrafted by case law two additional grounds when an award can be vacated. The grounds are an award that is "completely irrational" or "evidences a manifest disregard for the law."⁶⁴ Otherwise, the courts will confirm an arbitrator's award even when the arbitrator committed serious error provided the arbitrator arguably construed or applied the contract or acted within the scope of his or her authority.⁶⁵ Given the limited grounds to challenge an award, a court's scope of review is "among the narrowest known to the law."⁶⁶

Consequently, the courts have considered in the past several years vast challenges to an arbitrator's award.⁶⁷ Yet, an arbitrator's award virtually never is overturned.⁶⁸ The courts' enormous deference to an

arbitrator's decision is part of the process and "exactly what" the parties agreed to by electing to arbitrate.⁶⁹

C. Standard of Review for the Appellate Court

An appellate court's review of a matter of arbitrability is *de novo*.⁷⁰ The courts apply the usual rules of contract interpretation. But, given an arbitrator's expertise and the process of arbitration itself, the courts extend "an extraordinary level of deference" to an arbitrator's decision.⁷¹

D. *Res Judicata*

An arbitrator's findings can provide the defense of *res judicata* in a subsequent lawsuit.⁷² This requires a careful and somewhat unusual preservation of the record at the arbitration stage. Arbitrations typically are informal, do not include a court reporter, embrace relaxed rules of evidence and a limited record on exhibits and other evidentiary matters, none of which bodes well for making the kind of record necessary to establish a defense of *res judicata*.

E. Collateral Estoppel

An arbitration award also serves as a final judgment for collateral estoppel purposes.⁷³ This can prevent a party from later advancing related allegations and causes of action in a court of law. For example, a former employee may be collaterally estopped from litigating claims against a union for alleged breach of the duty of fair representation by failing to take his termination grievance to arbitration, where that employee's underlying claim against his employer was barred by *res*

judicata.⁷⁴ An arbitrator may also be required to give a related “judgment” collateral estoppel effect.⁷⁵ And, findings in an arbitration proceeding may be presented to a jury in a subsequent lawsuit and collaterally estop a party from disputing those findings.⁷⁶

IV. Mediation

Everyone involved in lawsuits in federal court now knows that court-ordered mediation sessions must be conducted in good faith involving counsel and representatives who have serious and real authority to settle.⁷⁷ Recently, a lawyer’s misconduct in a state-court mediation session contributed to a three-year suspension from the practice of law for that attorney.⁷⁸ He had directed profanities at opposing counsel and the party during mediation.

The courts continue to encourage the use of mediation to settle cases. In one recent case, the final settlement agreement proposed additional provisions not in the handwritten agreement that was executed at the end of the mediation. The additional items included a provision on confidentiality, release of liability, disclaimer of fault, non-disparagement, and reinstatement or reemployment. While one of the parties balked at these new terms, the court upheld the final version of the settlement agreement, finding that it was not materially different from the one agreed to during mediation.⁷⁹

The assessment and payment of the mediator’s fees and his or her related costs often fuel heated disputes about who will pay for them,

particularly in domestic relations cases. Missouri statutory law provides that the court may assess mediation costs against any party as part of the court costs.⁸⁰

Mediation is not a license for attorneys to marshal whatever manpower they desire and then expect to be reimbursed once they become the prevailing party. Attorney fees can be recovered for the time spent in mediation. However, a court will review carefully a prevailing party's attorney fees and related costs, including those expended in a mediation.⁸¹ One court recently found the use of three attorneys by one party at a mediation to be unreasonable and thus disallowed part of the attorney fees, even though that party prevailed in the lawsuit.⁸²

¹ *Kansas v. Colorado*, 543 U.S. 86 (2004).

² *Neel v. Strong*, 114 S.W.3d 272 (Mo. Ct. App. 2003).

³ *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001).

⁴ *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960).

⁵ *Asia Pacific Indust. Corp. v. Rainforest Café, Inc.*, 380 F.3d 383, 386 (8th Cir. 2004).

⁶ *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001).

⁷ *Medcam, Inc. v. MCNC*, 414 F.3d 972 (8th Cir. 2005).

⁸ *CD Partners, LLC v. Grizzle*, 424 F.3d 795 (8th Cir. 2005).

⁹ *United Steel Workers of America AFL-CIO-CLC v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005).

¹⁰ *Fleet Tire Service of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997).

¹¹ *Id.*

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- ¹² *Northwest Chrysler-Plymouth, Inc. v. Damler Chrysler Corp.*, 168 S.W.3d 693 (Mo. Ct. App. 2005).
- ¹³ *Bakery, Confectionary, Tobacco Workers and Grain Millers, Local 100G v. Penford Products Co.*, 2004 W.L. 1811898 (8th Cir.).
- ¹⁴ *Id.*
- ¹⁵ *Wiser v. Wayne Farms*, 411 F.3d 923 (8th Cir. 2005).
- ¹⁶ *G&S Masonry, Inc. v. MJC Constructors, Inc.*, 167 S.W.3d 813 (Mo. Ct. App. 2005).
- ¹⁷ *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002).
- ¹⁸ *In re Arbitration Between Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003).
- ¹⁹ *Dunn Indus. Group, Inc. v. City of Sugar Creek and Lafarge Corp.*, 112 S.W.3d 421 (Mo. 2003).
- ²⁰ *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003).
- ²¹ *Id.*
- ²² *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79 (2002).
- ²³ *Id.*
- ²⁴ *Madol v. Dan Nelson Automotive Group*, 372 F.3d 997 (8th Cir. 2004).
- ²⁵ *International Brotherhood of Elec. Workers, Local Union No. 454 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004).
- ²⁶ *Id.*
- ²⁷ *International Assoc. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Shopman's Local 493 v. EFCO Corp. and Construction Products, Inc.*, 359 F.3d 954 (8th Cir. 2004).
- ²⁸ *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821 (8th Cir. 2003).
- ²⁹ *Id.*
- ³⁰ *Government e-Management Solutions, Inc. v. American Arbitration Assoc., Inc.*, 142 S.W.3d 857 (Mo. Ct. App. 2004).
- ³¹ *See Teltech, Inc. v. Teltech Communications, Inc.*, 115 S.W.3d 441 (Mo. Ct. App. 2003).
- ³² *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868 (Mo. Ct. App. 2004).
- ³³ *Azbill v. UMB Scout Brokerage Services, Inc.*, 129 S.W.3d 480 (Mo. Ct. App. 2004).
- ³⁴ *CD Partners, LLC v. Grizzle*, 424 F.3d 795 (8th Cir. 2005).
- ³⁵ *Id.*
- ³⁶ *Kelly v. Golden*, 352 F.3d 344 (8th Cir. 2003).
- ³⁷ *Triarch Industries, Inc. v. Crabtree d/b/a Crabtree Painting, Inc.*, 2004 WL 941218 (Mo. Ct. App.).
- ³⁸ *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182 (Mo. Ct. App. 1999).
- ³⁹ *Nettleton v. Edward D. Jones & Co.*, 904 S.W.2d 409, 410-11 (Mo. Ct. App. 1995).
- ⁴⁰ *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. Ct. App. 2003).
- ⁴¹ *Id.*
- ⁴² *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003).
- ⁴³ *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004).
- ⁴⁴ *Groceman v. Pulte Homes Corp.*, 53 S.W.2d 599 (Mo. Ct. App. 2001).
- ⁴⁵ *St. John's Mercy Medical Center v. Delfino, M.D.*, 414 F.3d 882 (8th Cir. 2005).

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- ⁴⁶ *Id.* at 885.
- ⁴⁷ *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721 (8th Cir 2003).
- ⁴⁸ *Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060 (8th Cir. 2003).
- ⁴⁹ *St. John's Mercy Medical Center v. Delfino, M.D.*, 414 F.3d 882 (8th Cir. 2005).
- ⁵⁰ *Strain-Japan R-16 Sch. Dist. v. Landmark Systems*, 51 S.W.3d 916 (Mo. Ct. App. 2001).
- ⁵¹ *Bond v. Twin Cities Carpenters Pension Fund*, 307 F.3d 704 (8th Cir. 2002).
- ⁵² *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 90-92 (2000).
- ⁵³ *National American Insurance Co. v. Transamerica Occidental Life Ins.*, 328 F.3d 462 (8th Cir. 2003).
- ⁵⁴ *Id.*
- ⁵⁵ *International Brotherhood of Elec. Workers, Local Union Number 545 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004).
- ⁵⁶ *MM & S Financial, Inc. v. National Assoc. of Securities Dealers, Inc.*, 364 F.3d 908 (8th Cir. 2004).
- ⁵⁷ *United Paperworkers Inter., Inc., Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).
- ⁵⁸ *CPI/Kupper Parker Communications, Inc. v. HGL/L*, 51 S.W.3d 881 (Mo. Ct. App. 2001).
- ⁵⁹ *Biby v. Board of Regents of the University of Nebraska at Lincoln*, 419 F.3d 845 (8th Cir. 2005).
- ⁶⁰ *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).
- ⁶¹ *Clayco Const. Co., Inc. v. THF Carondelet Dev., L.L.C.*, 105 S.W.3d 518 (Mo. Ct. App. 2003).
- ⁶² *Pinnavaia v. National Arbitration Forum, Inc.*, 122 Fed. Appx. 862 (8th Cir. 2004). See *Whitney v. Alltel Communications, Inc.*, 2005 WL 1544777 (Mo. Ct. App.) and *Netco, Inc. v. Dunn*, 2005 WL 858031 (Mo. Ct. App.).
- ⁶³ Title 9, U.S. Code §§1-15; Chapter 435, Mo. Rev. Stat. (2000).
- ⁶⁴ *McGrann v. First Albany Corp.*, 424 F.3d 743 (8th Cir. 2005).
- ⁶⁵ *Id.*
- ⁶⁶ *Finley Lines Joint Protective Bd. Unit 200, Brotherhood of Railway Carmen Division, Transportation Communications International Union v. Norfolk Southern Railway Company*, 312 F.3d 943 (8th Cir. 2002).
- ⁶⁷ See *McGrann v. First Albany Corp.*, 424 F.3d 743 (8th Cir. 2005); *The Electrolux Home Products v. The United Automobile Aerospace and Agricultural Implement Workers of America*, 416 F.3d 848 (8th Cir. 2005); *Manion v. Nagin*, 392 F.3d 294, 298 (8th Cir. 2004); *Lincoln National Life Ins. Co. v. Payne*, 374 F.3d 672 (8th Cir. 2004); *United Steelworkers of America, AFL-CIO, Local 9452 v. MacSteel, Arkansas Div. of Quanex Corp.*, 68 Fed. Appx. 750 (8th Cir. 2003); *MidAmerican Energy Co. v. International Brotherhood of Elec. Workers Local 499*, 345 F.3d 616 (8th Cir. 2003); *In re Arbitration Between Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003); *Finley Lines Joint Protective Bd. Unit 200, Brotherhood of Railway Carmen Division, Transportation Communications International Union v. Norfolk Southern Railway Co.*, 312 F.3d 943 (8th Cir. 2002); *Brotherhood of Maintenance of Way Employees and Wabash Federation v. Terminal Railroad Assoc. of St. Louis*, 307 F.3d 737 (8th Cir. 2002); *Maxwell-Gabel Contracting Co., Inc. v. City of Milan*, 147 S.W.3d 93 (Mo. Ct. App. 2004); and *Decker v. Kamil*, 100 S.W.3d 115 (Mo. Ct. App. 2003).
- ⁶⁸ *Id.*
- ⁶⁹ *The Electrolux Home Products v. The United Auto. Aerospace and Agricultural Implement Workers of America*, 416 F.3d 848 (8th Cir. 2005).
- ⁷⁰ *Dunn Indus. Group, Inc. v. City of Sugar Creek and Lafarge Corp.*, 112 S.W.3d 421 (Mo. 2003).

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- ⁷¹ *The Electrolux Home Products v. The United Auto. Aerospace and Agricultural Implement Workers of America*, 416 F.3d 848 (8th Cir. 2005).
- ⁷² *Kitsmiller Const. Co., Inc. v. Wynn Const., Inc.*, 126 S.W.3d 795 (Mo. Ct. App. 2004).
- ⁷³ *Manion v. Nagin*, 394 F.3d 1062 (8th Cir. 2005).
- ⁷⁴ *Banks v. International Union Electronic, Elec., Technical, Salaried and Machine Workers*, 390 F.3d 1049, 1054 (8th Cir. 2004).
- ⁷⁵ *Cornerstone Propane, L.P. v. Precision Investments, L.L.C.*, 126 S.W.3d 419 (Mo. Ct. App. 2004).
- ⁷⁶ *Jackson v. Flint Ink North American Corp.*, 370 F.3d 791 (8th Cir. 2004).
- ⁷⁷ *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001).
- ⁷⁸ *In re: Disciplinary Matter of Fletcher*, 424 F.3d 783 (8th Cir. 2005).
- ⁷⁹ *Nwachukwu v. St. Louis University*, 114 Fed. Appx. 264 (8th Cir. 2004).
- ⁸⁰ §487.100, Mo. Rev. Stat.; *Blackburn v. Mackey*, 131 S.W.3d 392 (Mo. Ct. App. 2004).
- ⁸¹ *Williams v. ConAgra Poultry Co.*, 113 Fed. Appx. 725, 729 (8th Cir. 2004).
- ⁸² *Id.*