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Arbitration and Mediation:
Resolving Disputes Outside of Court

Arbitration and mediation are two forms of what is commonly called "alternative dispute resolution," or ADR. Usually when a dispute arises between two or more parties, it gets resolved in the courts. However, the parties can agree to have their issue resolved privately outside the court system through one of these two methods.

Arbitration is a private court process. Usually, arbitration is agreed upon in the contract between the parties long before the actual dispute arises. For instance, your credit card company likely has an arbitration clause tucked somewhere in that little brochure that came with the card stating that any disputes which may arise between you and the company will be submitted to binding arbitration. A neutral third party chosen by the disputing parties acts as the arbitrator. Decisions are usually not published and carry no precedential weight; they are generally relevant only for the parties involved. Decisions are usually final and binding, and appeals to the court system are allowed only in rare circumstances. The idea is to make arbitration less time-consuming and less expensive, but it also limits the appeal options available if a party is handed an unfavorable decision.

Other advantages of arbitration besides privacy, savings in time, and finality include expert analysis and savings in cost. Often, where a complicated business dispute has arisen, arbitration provides the advantage of having an arbitrator who is an expert in the field decide the case. Cost savings are usually a direct result of arbitration taking less time and being less formal.

The fact that arbitration decisions are usually final can also be a disadvantage, however. Appealing an unfavorable decision is difficult and usually possible only if provided for by statute. Additionally, arbitrators often do not give reasons for their decisions, and their decisions do not bind anyone else except the parties involved. Thus, while arbitration may be uniquely useful in dealing with business disputes, it would likely not be appropriate where parties are trying to make an impact on public policy or press a constitutional issue.

Mediation, meanwhile, is the least formal of the alternative dispute resolution processes. It is not a court, or even court-like, process. Rather, mediation requires the parties to sit down, usually in private, with a neutral third party. This is known as the case analysis

—continued on page 2

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continued from page 1—

Arbitrtation and Mediation

phase of the process. Allowing each party to privately present a summary of its position to the mediator encourages more openness and honesty than is often seen in litigation. The mediator can play a devil's advocate role, forcing each party to consider whether its position is truly reasonable. Meeting initially in private also eliminates posturing by both sides, as well as their concerns that they may give away information which might be used against them by the other party in any later litigation. During negotiation, the second phase of mediation, the mediator actually gets both parties together to come to a final agreement.

The advantages of mediation go beyond its confidentiality. The fact that it is often voluntary differentiates it from arbitration. If a result is reached in mediation that is not acceptable to one of the parties, there is no obligation on either party to accept it, and either arbitration or litigation may be pursued instead. Another advantage is that mediation does not have the same adversarial character that may accompany arbitration or litigation. The process is designed to deal with bona fide disputes between parties in a way that won't damage their long-term relationship. Thus, businesses may find mediation a more satisfactory way to deal with customer disputes. Additionally, since parties in mediation are generally working together to find common ground, settlements reached may be more likely to be accepted by the parties and each side may be more inclined to implement not only the letter but the spirit of the agreement.

The flexibility that might make mediation attractive, however, can also cause problems. It is impossible to enforce a voluntary agreement reached through mediation, unless it is court sanctioned. In such cases, arbitration or actual litigation may be needed.

While arbitration and mediation are two alternatives to the traditional court system, they are best used for specific results and by specific industries. Often, ADR offers a less formal and less costly alternative to litigation, with the trade-offs including appeal rights and enforceability. An attorney can provide guidance on which process would be most advantageous given the situation you may be facing.

Whether in War or in the Workplace, It Still Applies:
Loose Lips Sink Ships!

Throughout World War I and II, the adage "Loose Lips Sink Ships!" appeared on War Department posters to serve as a pointed reminder that careless talk about things like weapons production and troop movements could lead to disaster if the information fell into enemy hands. A recent Nebraska Supreme Court case demonstrates that careless conversations, comments and correspondence about employees can spell trouble for an employer in the form of a lawsuit.

In *Bowley v. W.S.A., Inc.*, 264 Neb. 6 (June 7, 2002), plaintiff Thomas Bowley worked as the general manager of Harmon Glass from 1989 until September 1993. In August 1993, Thomas Adamson, the chief executive officer of a company affiliated with Harmon Glass, informed Bowley that the Harmon Glass store Bowley managed was possibly being sold to Frank Weaver, the owner of another glass company. Bowley had a history of problems with Weaver and, as a result, did not believe that Weaver would keep Bowley employed after the sale of Harmon Glass. Consequently, Bowley contacted Harding Glass–a competitor of Harmons from whom Bowley had previously received offers of employment–about possible employment. On September 1, 1993, Bowley accepted the offer of employment from Harding Glass, and he commenced his employment with the company on September 13, 1993.

Two days later, on September 15, 1993, Adamson sent a letter to Bowley, and sent a copy of the letter to the president of Harding Glass. The letter stated:

> Dear Tom:
>
> I am very disappointed.
>
> A few weeks ago you asked me to trust you, which I did without hesitation. Now that trust has been broken several times by your continual attempts to undermine our efforts to sell/transition the Omaha operation.
>
> Perhaps you were mistreated in the past. I do not know. You never said you were.
>
> Perhaps you see this as a way to impress your new employer. Again, I do not know. I am not familiar with their method of operation or what they think of you.
>
> I do know that trust is an essential part of any business relationship, whether it is with a coworker, investor, supplier or customer. Are you a person that can be trusted, Tom? You should give it some thought–your future will depend on it.

At trial, Adamson testified that he sent the letter because he had been contacted by Weaver, who alleged that Bowley was hiring Weaver's employees to come work for Bowley at Harding Glass. Adamson sent a copy of the letter to the president of Harding Glass because he believed that Bowley's actions were motivated by Harding Glass.

—continued on page 8

The Do's and Don'ts of Giving a Deposition

One of your employees rushes into your office. He frantically tells you that he has just been called to testify in a deposition for the suit that has been brought against your company. He looks at you nervously and asks, "What should I do?"

While comforting your employee and preparing him for his deposition may seem like an impossible task, the following guidelines provide a good starting point. Give this checklist to the employee and tell him to review it so he knows what to do in the deposition.

- BE HONEST. While testifying at a deposition, you will be under oath and required by law to tell the truth to the best of your recollection. If you have some uncertainties about your answer or if your answer is based on some assumptions you have made, say so.

- LISTEN CAREFULLY AND SPEAK CLEARLY. Answer questions only after you have listened to the entire question. Always ask for clarification if you do not understand a question. When you answer questions, speak clearly and loudly enough that everyone in the room can hear you.

- ANSWER THE QUESTION. Answer only the question asked. Do not volunteer information. When the lawyer asks more than one question, do not answer until you have asked the lawyer to separate them out into separate questions. Always take a breath and pause to reflect before answering.

- PROJECT A PROFESSIONAL APPEARANCE. Dress appropriately for your deposition. Avoid insignias that associate you with particular groups or points of view. Convey a poised, confident and neat appearance through your dress, posture and overall demeanor. Avoid showing hostility, fatigue, anger, sarcasm and impatience, all of which can discredit your testimony.

- COMMUNICATE CLEARLY AND CONCISELY. Sound confident and competent, not aggressive or arrogant. Limit your answers to your area of expertise. If you don't know the answer to a question, say so. Do not bluff or make a guess in order to come up with an answer.

- BE CAUTIOUS OF OPPOSING COUNSEL. Opposing counsel may try a variety of deposition strategies to get the testimony he or she wants. Sometimes, counsel will appear to befriend you, to get you to relax and open up. Other times, counsel will have an accusatory tone to rattle you and get you to back down from something you have said. Focus on the question asked and give a confident and concise answer. Ignore the tactics of the questioner, and concentrate on the content of what you are being asked.

- BE OPEN WITH YOUR COUNSEL BEFORE THE DEPOSITION. It is imperative that your lawyer know all of the information you know before the deposition. Your lawyer must know your involvement in the case, your derogatory background information, as well as your expertise and qualifications. Being aware of this information allows your lawyer to prepare for any potential damage your testimony may create. In addition, it prevents your lawyer from being surprised should the information be addressed in the deposition.

- BE HONEST. Telling the truth at a deposition is so important, it is worth mentioning twice.

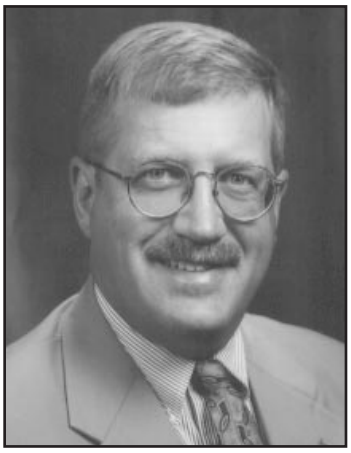
Source: Douglas Danner & Larry L. Varn, *Pattern Deposition Checklists; Do's and Don'ts of Testimony*, § 1.16 (4th ed. 1998).

Litigation Practice Group of Rembolt Ludtke & Berger LLP

Our litigation practice encompasses virtually every area of civil litigation. Much of it focuses on business-related matters, but we handle numerous personal cases such as divorce, personal injury and adoption. The diversity of practice areas in the firm provides the litigators with expert advice in-house, enabling them to provide effective representation in a variety of matters. We make extensive use of paralegals and law clerks to help minimize the cost to clients.

Rembolt Ludtke attorneys appear in Nebraska state and federal courts on both the trial and appellate level. We also represent clients in administrative proceedings before local, state and federal governmental agencies.

Our ultimate goal is to provide practical and result-oriented legal services. We recognize that frequently a trial in a court of law may be the least favorable outcome for all parties involved. So we strive, through a combination of thorough case preparation, a realistic analysis of the law and the facts, and the use of various means of alternative dispute resolution, to resolve matters in a fair and cost-effective manner, to avoid the uncertainties and expense involved in a trial.



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Pete works in both our Lincoln and Seward offices in the areas of personal injury and wrongful death, family law, and products liability. He earned his B.A. from the University of Nebraska-Lincoln and his J.D., with distinction, from the University of Nebraska College of Law, where he was the associate editor of the Nebraska Law Review. Pete is active in the community and within professional organizations, including the Nebraska Association of Trial Attorneys.

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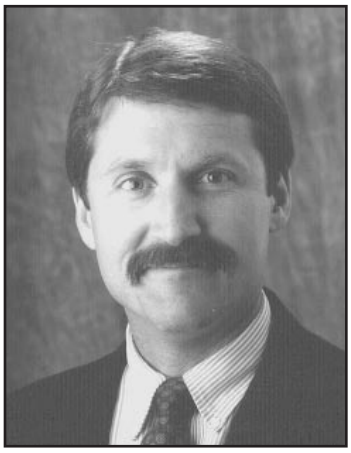

Dan joined Rembolt Ludtke & Berger LLP in 1984, after practicing for a time in Colorado. He remains a member of the Colorado Bar. He earned his B.A. from Nebraska Wesleyan University and his J.D., with distinction, from the University of Nebraska College of Law, where he was the Executive Editor of the Nebraska Law Review, and is currently an adjunct professor teaching pre-trial litigation. Dan is a civil litigator, with experience in a variety of areas, including corporate and commercial litigation, antitrust, securities, and environmental issues.

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Jane received her B.A., with high distinction, and J.D., with highest distinction, from the University of Nebraska, where she was the Executive Editor of the Nebraska Law Review. She joined Rembolt Ludtke & Berger LLP in 1995, having clerked with the firm during law school. Jane is active in the Nebraska Bar Association, serving on the Executive Committee and the Young Lawyers Section Executive Council. She has been an adjunct professor at Nebraska Wesleyan University. Her primary practice concentration is in commercial and corporate litigation, family law, and insurance corporate practice.

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Mark received his B.S. and J.D., with high distinction, from the University of Nebraska. After graduation, he served as judicial clerk for a Nebraska Supreme Court judge, and as Chief of Staff/Legislative Director for a member of Congress. Mark joined Rembolt Ludtke & Berger LLP in 1997, practicing in the areas of labor and employment, business litigation, worker's compensation defense, and government relations. He has published several articles, is a frequent seminar speaker, and is an adjunct professor at the University of Nebraska College of Law teaching employment law.

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Brian received his B.S. and J.D., with high distinction, from the University of Nebraska, where he served as Editor-in-Chief of the Nebraska Law Review. He joined Rembolt Ludtke & Berger LLP in 2000, having clerked with the firm during law school. Brian's litigation practice focuses on the areas of commercial and corporate litigation. This fall, Brian will also be an adjunct professor at the University of Nebraska College of Law, teaching legal research and writing.

A "Reasonable" Solution

A Landowner's Duty to Protect

Let's face it, the costs associated with property ownership can be staggering. Property taxes, maintenance costs, and property improvements alone can constitute a hefty bill for owners and possessors of land. An often overlooked but potentially costly addition to this list is the exposure of a property owner or possessor to civil liability resulting from a failure to adequately warn and protect individuals that enter onto the premises. This article will provide an overview of the duty owed to the different types of individuals that may enter onto your property, whether it be with permission or on their own recognizance.

Duty of Reasonable Care For Lawful Visitors

In 1996, the Nebraska Supreme Court simplified the law concerning the duty owed to visitors that enter upon a land possessor's premises. *Heins v. Webster County*, 250 Neb. 750, 552 N.W. 2d. 51 (1996). Instead of continuing to distinguish between the duty owed to licensees and invitees, the Court abolished the confusing common law distinctions and held that a landowner owed a duty of reasonable care to all lawful visitors. The factors that are taken into account in determining whether a landowner has met the burden of maintaining his premises for the protection of visitors are as follows:

- The foreseeability or possibility of harm to the visitor
- The purpose for which the visitor entered the premises
- The time, manner, and circumstances under which the visitor entered the premises
- The expected use of the premises by the landowner
- The reasonableness of the inspection, repair, or warning of the danger given by the landowner
- The opportunity and ease of repair of the defect on the property
- The burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection

Under Nebraska law, it should be stressed, owners and occupiers of land are not to be considered insurers of their premises, nor do they have an unrealistic burden to maintain their property from every defect. Instead, the focus is on the protection of visitors from injuries that are foreseeable and can easily be prevented. Furthermore, the duty of reasonable care applies only to those individuals who lawfully enter onto the premises. Those that trespass, or illegally enter onto an occupier's land, are owed a more limited duty.

Duty Owed to Trespassers

Under Nebraska law, an occupier of land is required only to refrain from "willfully or wantonly" injuring a trespasser. *Terry v. Metzger*, 241 Neb. 795, 491 N.W. 2d. 50 (1992). For a landowner's conduct to be deemed "willful and wanton," two requirements must be met. First, a landowner must have actual knowledge that a danger exists on the property, and second, he must intentionally fail to act to prevent the harm which was reasonably likely to result. Thus, a landowner has no duty to protect a trespasser from dangers he does not know exist. Furthermore, very little affirmative action must be taken to protect unlawful visitors from dangers which landowners do know about. Nebraska case law indicates that doing as little as posting "No Trespassing" signs at the edges of property and near areas that might prove to be dangerous are a sufficient safeguard to protect them from liability against trespassers.

As with most things, bringing children into the

—continued on page 8

Do Your Employees Need a Business Endorsement on Their Vehicles When Making Deliveries for the Business?

It's a common occurrence in the business world. Your business has a product to deliver to a customer and one of your employees uses his personal car to make the delivery. Or maybe an important client is coming in from out-of-town and one of your employees goes to the airport to pick her up. If your employee is in an accident while engaged in one of these activities, you, as the employer, may be liable for the injuries that result.

Most personal auto insurance policies provide coverage for personal or business use of an automobile. However, there is usually an exclusion in the liability for persons who carry persons or property for a charge.

In an 8th Circuit Court of Appeals case, *United States of America v. Milwaukee Guardian Insurance Company,* 966 F.2d 1246 (1992), a Postal Service worker killed one person and injured another while delivering phone books with his personal car. The worker was an employee of the Postal Service, and was paid mileage and a salary for delivering the phone books. The Postal Service charged a fee for delivering. The worker's personal automobile insurance policy excluded coverage under an omnibus clause for bodily injury or property damage arising out of the ownership, maintenance or use of a vehicle when used to carry persons or property for a charge. The court held that because the Postal Service charged a fee for delivering the phone books and the worker was clearly an employee of the Postal Service, the policy clause excluded coverage for the accident.

The court indicated that the exclusion applies where a charge or fee is paid to the owner/insured for the use of the vehicle. Mileage reimbursement alone, however, may not acuate the exclusion.

Several cases have followed the analysis in Milwaukee, giving rise to certain basic guidelines regarding coverage by an employee's personal auto insurance for accidents occurring during a business errand. The chart below outlines these rules. Once you have decided whether your employee's policy will apply, you will naturally want to know what you, as an employer, can do to avoid liability for your employee's accident on the job? You have several options for limiting your liability.

The simplest solution is not to charge a separate delivery fee that is passed through to your employee. This allows the employee to continue to use his/her personal auto insurance while on the job and eliminates the employer liability. The employee can also change his/her personal auto coverage to business usage. This option is usually 20-25% more expensive than regular personal auto insurance, but if your employee receives a fee for delivery, he may be already adequately compensated for the increase in insurance.

Another option is for you to carry Employers Non-ownership Liability Insurance. This coverage insures you for liability from your employee's use of his/her own auto on company business. Either you or your employee can buy an Extended Non-Owner Liability endorsement. This is an endorsement to a personal auto policy that provides broader liability coverage only for specified named individuals. It provides coverage for non-owned autos provided for the regular use of an insured, use of autos to carry individuals or property for a fee, and broader coverage for autos used in the course of business.

As with all insurance needs, it is best to consult with an expert before taking any action. As a firm, we deal with insurance on a regular basis. We would be happy to assist you in finding the right match for your insurance needs.

Fee Charged	Mileage Paid	Employee Paid Fee	Employee's Insurance
Yes	Yes	Yes	Coverage Excluded
No	No	No	Covered
Yes	Yes	No	Probably Covered
Yes	No	No	Covered
Yes	No	Yes	Coverage Excluded
No	No	Yes	Probably Excluded
No	Yes	No	Covered

continued from page 6—

A "Reasonable" Solution

picture complicates this seemingly simple analysis of the duty owed to trespassers. Under the "attractive nuisance doctrine" a possessor of a premise may be liable for a young child's injury or death if the possessor fails to exercise reasonable care to eliminate danger from the premises or otherwise protect young children from the dangerous conditions of the property that children are likely to trespass on. *Wiles v. Metzger*, 238 Neb. 943, N.W. 2d. 113 (1991). Thus, unlike the duty owed to a mere trespasser, an occupier must take affirmative steps to eliminate those artificial and natural conditions on the possessor's land that are likely to subject a child to an unreasonable risk of death or serious bodily injury. Factors that courts will take into account in determining whether this affirmative burden is met are the ability of the child to appreciate the condition on the land, as well as the costs associated with eliminating the danger as compared to the risk that it presents. Consequently, a land occupier must make a reasonable attempt to remove or reduce the danger of those "attractive nuisances" that might expose a child trespasser to injury.

Conclusion

It is clear that a landowner or possessor's liability for injuries that occur on their land is highly dependent on the nature of the land and the dangers that may be on it. An important aspect of our legal practice focuses on the prevention of costly litigation. If you have any further questions on what you can do to protect yourself from exposure to liability from land that you own or are in possession of, please contact us.

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continued from page 2—

Loose Lips Sink Ships!

After the president of Harding Glass received the letter, he visited with Bowley about it. Soon thereafter Bowley's duties at Harding Glass were limited and Bowley believed his job performance came under greater scrutiny by Harding Glass management. Harding Glass subsequently terminated Bowley's employment, and Bowley was unable to find employment with the more than fifty area glass companies he applied to, either as a manager or in sales.

Bowley brought an action against Adamson and his company alleging that the letter Adamson sent to Bowley was defamatory. The jury found for Bowley, and awarded Bowley $150,000. Adamson and his company argued that the verdict was excessive and moved for a new trial, which was granted by the trial judge.

On appeal, the Nebraska Supreme Court held that the jury verdict was supported by the evidence and that the motion for new trial should not have been granted. Specifically, the court noted that by the time of trial Bowley had been unable to find work as a manager or salesman in the glass industry, and was forced to work as a glazer earning an hourly wage without most of the fringe benefits he previously received.

Lesson: The *Bowley* case serves as a timely reminder that communications regarding current and former employees can have significant consequences. In *Bowley*, the former employer alleged that the letter to his new employer was defamatory–*i.e.*, a false, unprivileged statement about another person that is disclosed to a third-party and that harms that person. In addition to defamation, work-related communications can give rise to claims of invasion of privacy, such as the public disclosure of private information about a current or former employee, as well as claims for tortious interference with an employment relationship, such as where a former employer communicates to other employers in an attempt to frustrate a former employee's ability to obtain other employment. Moreover, improper communications about current or former employees can also give rise to claims of retaliation under federal and state discrimination laws. To avoid falling into the trap that Adamson fell into in the *Bowley* matter, consult with your legal counsel before sending any such communications. If the employer in *Bowley* had done just that instead of having "loose lips," it could have avoided paying both the attorney's fees it incurred defending its actions, and the $150,000 jury verdict.

– Mark A. Fahleson, Esq.