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MEDIATING FAMILY FINANCIAL CONFLICTS
Keeping the Peace and Preserving Family Wealth

BY JAY FOLBERG, ESQ.

Of all the cases I have mediated over the past 30 years, the most challenging and rewarding disputes have been those between family members over family property, estates, trusts and businesses. Brothers and sisters may fight over partnership property, but they are really sorting out old issues of sibling rivalry and dominance. Once a patriarch or matriarch of a family has given up control or passed away, adult children are often left in a position of ambiguity or, worse, contrary beliefs about their rightful role of control or benefit. Disputes surface that are usually less about malevolence than about conflicting feelings, misunderstandings of intent, divergent expectations, and resistance to change or unspoken fears.

The tremendous financial cost of litigation is only one downside of an intrafamily lawsuit. Court pleadings and proceedings are public. One of the principal advantages of private mediation over litigation of sibling and intergenerational family disputes is

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WORTH READING

A Life in Aikido: The Biography of Founder Morihei Ueshiba

By Kisshomaru Ueshiba. Kodansha International Publishers. 2008

REVIEWED BY RICHARD BIRKE

Chris Goelz, a very fine mediator and the head of the Ninth Circuit's Settlement Program Seattle office, once told me that Tony Piazza, a legendary mediator (still alive – a living legend) is an eighth degree black belt in Aikido. Chris said that Tony swears by the practice of Aikido as a path to better mediation skills. That statement stuck with me for years. Somewhere on my mental back burner, I stored a latent curiosity about what Aikido has to offer to mediators.

Then, as they say, "when the pupil is ready, the master appears." I walked into the largest bookstore in America – Powell's City of Books located in beautiful and soggy downtown Portland, Oregon – to find Master Ueshiba staring straight at me from the cover of a book on the "Recent Arrivals " rack. The book is a first-ever English translation of the biography of the

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BY JAY FOLBERG, ESQ.

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the confidentiality provided in keeping family fights from the public eye. The light of publicity often cements positions and makes compromise more difficult. There are, of course, other advantages of working out a settlement among warring family factions, including reconciling differences and healing. Courts are limited in the remedies they can impose and framing family disputes in legal terms inhibits the parties' ability to invent or accept creative solutions. Litigation rarely heals differences or promotes understanding.

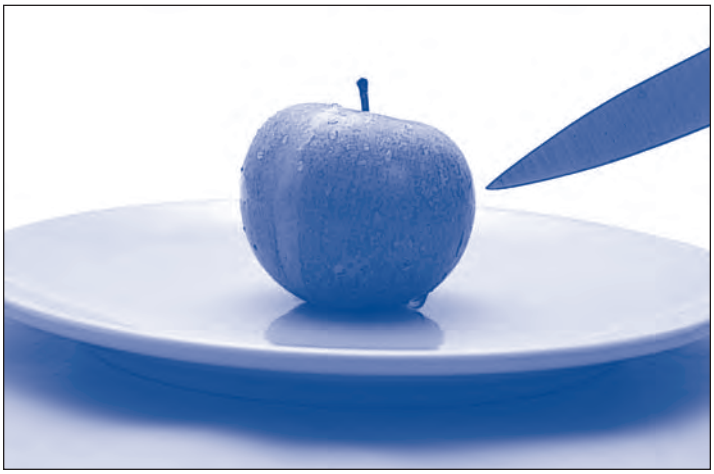
I would like to share with you four case scenarios based on family conflicts that I have mediated and what can be learned from them. While names and identifying characteristics are omitted from the stories, they shared something in common. Each involved high stakes for the participants and consequences that would be irreparable if the dispute were not constructively resolved.

The Case of the Real Estate Titans

Two brothers, Sam and Sid, became involved in real estate in the Santa Clara Valley when it was still known as a center of agriculture, prior to becoming the Silicon Valley. In the early 1960s, they befriended an older couple who owned fruit orchards in Sunnyvale that they no longer wished to manage and did not know how to develop. In exchange for their value enhancing initiatives and efforts, Sam and Sid took a piece of the action in the form of partial ownership in the apartment houses and strip malls they developed for the burgeoning population of Silicon Valley. As they aged, the brothers began to argue about the properties they eventually owned between them as partners. Sam, the older brother, wanted to conservatively manage the appreciated property and pass it on to his children unencumbered. Sid, the younger brother, wanted to leverage the property to create greater value with new developments in a vibrant market. Sid unilaterally mortgaged his share and created liens on the property that threatened Sam's desire for stability and financial security. Sam viewed this as a betrayal of trust. Sid viewed it as a sound financial move necessitated by Sam's conservatism and insensitivity to the needs of Sid's younger family.

A suit for partition of the properties was filed by Sam and the attorneys for each of the brothers recommended that the dispute be brought to me for mediation. During the mediation I repeatedly asked "why?" Why did Sid feel the need to mortgage his half? Why did Sam consider this a betrayal? The brothers listened and, at least in part, seemed to understand the others' perspective. It was agreed that Sam would propose a division of the properties into two bundles of relatively equal value, and Sid, the younger, more aggressive brother would choose. The approach was similar to the classic

It was agreed that Sam would propose a division of the properties into two bundles of relatively equal value, and Sid, the younger, more aggressive brother would choose. The approach was similar to the classic parents' tool of allowing one child to cut the apple and the other to choose one of the two pieces.



parents' tool of allowing one child to cut the apple and the other to choose one of the two pieces. This simple distributive technique worked, and there was a tax bonus resulting from their cooperation on the timing of the exchanges. The needs and interests of the two brothers were different and they were each able to actively participate in the resolution and get substantially equal shares of the property in a way that filled their differentiated needs. (Sam was quite proud of creating a division that offered more development potential in one bundle and more secure rental income in the other property grouping.) Both brothers got what they most valued.

This case was really more about Sid's desires to be free of control by his older brother and to validate his independence. Sid had a strong need to enlarge his holdings and provide more for his growing family. Sam was able to acknowledge that the brothers' needs were not the same and take an active role in structuring the division of their properties to meet their tolerances for risk. This outcome and the process used to achieve it also allowed the children of Sam and Sid to put aside the dispute of their fathers and move on with their own family relationship, independent of joint ownership and the tension of their fathers' sibling issues.

Had the litigation proceeded, the next generation of cousins would have been drawn into the dispute, their relationship burdened with their fathers' conflict, and their inheritances diminished. Each of the brothers was able to pursue their own aspirations and the needs they felt most important for their families. The attorneys had the benefit of satisfied clients and the prospect of continuing work for the next generation of each family branch. It was perceived by all as a good set of outcomes.

Sean believed that he, unlike his nephews and nieces, understood Casey's dream of keeping the company under family ownership to perpetuate the family name and fortune. [T]here were also divisions between Casey's children. Two of the children wanted to remain shareholders and two wanted to divest their shares.

Re-Cementing Family Relations

An immigrant laborer in the 1940s, Casey, worked at construction sites as a hod carrier (mason's assistant). Mixing cement and mortar on site by hand was slow and labor intensive. Casey improvised various mixing devices driven by small motors which saved time and labor, as well as resulting in a better quality mortar mix. With financial backing from a contractor for whom he worked, Casey eventually obtained several patents for his portable mixers and created a company that manufactured cement mixers. The company succeeded and grew. In time, it was a closely held corporation that supported the families of Casey's four children, his brother Sean, his sister Patty, and three nephews. Following Casey's death in the 1990s, the company, which produced net income in excess of $10 million a year, was managed by Sean, as CEO. Sean had extensive management experience and had been close to his deceased brother. The other family members had corporate shares and seats on the corporate board.

Tension existed between Casey's children on the one side, and Sean, Patty and their children on the other (although the line of who was on whose side was not always clear). Outside acquisition offers for the company had been opposed by management and the rejection decision was confirmed by one vote margins on the Board of Directors. Casey's children were upset by the rejection of the offers and felt that Sean's resistance was influenced by his desire to retain his CEO position and company perks. Casey's oldest son, Marty, was particularly vocal about his objection to management and made statements at corporate meetings and by email accusing his uncle Sean of mismanagement, theft and company exploitation. Casey's four children brought a minority shareholders' action in federal court and Sean cross claimed against Marty for libel and slander.

During the mediation, the tension between Marty and Sean was palpable. In the joint session, Marty was vehement about what he thought

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were acts of mismanagement and lost company opportunities that he was sure would cause his father "to roll over in his grave." When one of the other siblings indicated that their father would be most disturbed by the discord in the family, I noticed what seemed like agreement by several around the table.

After the initial joint session of all parties and the two sets of attorneys, I asked if anyone would object if I met privately with each shareholder. In the caucus session I had with Marty, he confided that he had expected to head his father's company in which he had worked before going to school as an engineering student and he viewed Sean as an interloper who did not appropriately credit his father's role in creating a company that significantly improved masonry practices. Sean shared with me in caucus that his brother Casey had misgivings about any of his children managing the business because they had shown little interest in the company and each had other life goals. Sean also believed that he, unlike his nephews and nieces, understood Casey's dream of keeping the company under family ownership to perpetuate the family name and fortune. Further discussions revealed that there were also divisions between Casey's children. Two of the children wanted to remain shareholders and two wanted to divest their shares. All four of them had joined in the lawsuit because they didn't want to cross Marty, their older brother.

A settlement was reached in which a company value would be determined with the help of outside expertise. The method of selecting the evaluation consultant and an alternate evaluator, as well as a timeline, was agreed upon. If two or more shareholders objected to the initial evaluation, the alternate evaluator would reach an independent evaluation and the two evaluations would then be averaged. Based on the determined company value, a share surrender value would be set. The corporation would borrow as necessary to purchase the shares of any of the founder's children wishing to sell and all pending litigation would be dismissed. Casey's oldest son, Marty, and Casey's sister, Patty, agreed to collaborate in writing a history of the company, which would be printed and posted on the company's website. Peace prevailed. This case supports the mediation maxim that if you cannot resolve the dispute at its own level, you must learn what underlies the conflict and help fashion a settlement that meets the underlying interests.

The Grape Broker Who Found Salvation

A very successful wine and grape broker, Tony, who had been a dedicated husband and father of two pre-adolescent children, built a grape brokerage business that produced an annual net income in excess of $500,000 a year. The family had not been religious, but Tony became increasingly involved in a personal quest that led him to a spiritual community headed by a mystical eastern guru. The spiritual community had a compound located a couple of hundred miles from where Tony's family lived. The community was supported by grape growing and the sale of books and records it produced, as well as monetary contributions from its followers. Tony was spending more and more time at the spiritual conclave. He made several signifi-

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cant monetary contributions to the community and was appointed chief financial officer (CFO) of the winery. Tony's wife, Maria, a public school teacher, was very concerned that Tony would give away the brokerage business to the spiritual community. She was also worried that he might involve their two children, ages 10 and 12, in his new spiritual group activities or attempt to indoctrinate them. Maria filed a petition for divorce and obtained a temporary restraining order preventing Tony from transferring any business or family assets and restricting his visits with the children. Tony was incensed by Maria's mistrust and the restraining order. The restraining order not only interfered with his continuing relationship with the children, it also hampered his financial management of the brokerage company. Tony and Maria, who were no longer speaking, were each represented by capable attorneys who recommended mediation.

During the mediation, Tony was able to assure Maria that he had no intention of donating any part of the business to the spiritual community or indoctrinating the children. He did, however, want them to be aware of his beliefs and he wanted to remain involved in their lives. Maria expressed her worst fears about the communal values and sexual promiscuity she had heard the community shared, and about others who gave their lives and assets over to "cults." Tony was surprised with what he felt were false impressions. After further discussion, Maria agreed to visit the spiritual compound to make a personal assessment about the lifestyle and values manifested there. This visit dispelled her worst fears and improved communication with Tony.

A division of marital property was agreed upon which allowed Tony to retain sole ownership of the brokerage business and Maria retained the family home and other assets, totaling approximately one half of the marital estate. In addition to spousal and child support, irrevocable trusts were established for the children that generously assured their college education.

A parenting plan was prepared by which the children primarily resided with Maria and were with Tony every other weekend, as well as one night a week. Holidays and summers were split. It was stipulated that the children could participate in a family activity week at the spiritual center during the summer, but otherwise would not be involved in the spiritual community. The plan terminates when the children turn 16 and can make their own religious and spiritual choices.

This case illustrates the importance in resolving disputes by stating assumptions and fears so they can be assessed and addressed. After learning of Maria's worst fears, Tony was able to accept a financial and parenting plan that helped alleviate Maria's fears and allowed him the parental role he wanted. Because mediation outcomes are consensual, you get what you want and feel you need only if your counterpart gets what they want and need. The task in mediation is to help solve the other side's problem as the means of solving your own problem.

The Case of the Seaside Villa

Two brothers and a sister inherited in equal shares a stunning seaside villa in Southern California that had been built by their grandfather as a family retreat. The middle sibling, Jack, purchased the one-third ownership of his younger brother, Bob, making Jack two-thirds owner and his older sister, Ann, a one-third owner. Bob had offered to sell his third equally to Jack and Ann but only Jack had the financial resources to make the purchase. He received a substantial salary as the CEO of the successful business started by their grandfather and had invested well. Ann had a PhD in Business Management and was a widowed college professor.

Jack and his grown children lived in Southern California within driving distance of the Villa. Jack's work responsibilities made it difficult to plan use of the Villa much in advance and he particularly liked the freedom to meet his children and friends there on short notice. Ann, who lived on the East Coast and whose three children and grandchildren all lived outside of California, only used the Villa in the summer and during school holidays with much advanced planning.

Ann paid one-third of the considerable property taxes and upkeep on the Villa, which was managed by Jack, and she expected use of the Villa one-third of the time, scheduled a year in advance. In addition to friction over scheduling use of the Villa, Jack wanted to renovate and "update" the Villa, which would require substantial expense because of coastal zoning and building restrictions. Ann was happy with the Villa as is, could not readily offer to pay one-third of Jack's proposed remodel plans and did not trust Jack's taste in "remodeling." The tension over the scheduling and standoff on the remodel work left Jack and Ann not

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speaking. Jack wrote Ann that he was prepared to buy her one-third ownership (valued at millions of dollars) or pay for all of the remodeling himself and allocate her one-third of the use as he felt was reasonable with as much notice as practicable. Upon the advice of their lawyers, Ann and Jack agreed to mediation.

Although I prefer joint face-to-face mediations, at least at the outset, Jack and Ann chose not to meet together for reasons both emotional and practical. During the course of the mediation, conducted in separately scheduled meetings with me and extensive telephone follow-up, the possibility of dividing the multi-acre property with several structures was discussed. A legal "partition" would have been messy, expensive and probably would have resulted in Jack buying Ann's third at market value. The market value would be difficult to determine and contentious because of the uniqueness and size of the property. Ann could not purchase anything comparable or as suitable for her large family for a third of the Villa's value. The increase in property taxes for Jack upon purchase of Ann's interest would be horrific and Ann would have to pay capital gains tax, which would consume a considerable part of sale proceeds. Just as important an impediment was their mutual desire to hold onto their family heritage and pass to their children and grandchildren the fond memories they had in family use of the Villa.

In our separate conversations it was revealed that Jack felt Ann did not appreciate that he "saved" the Villa from outside ownership when he stepped forward to purchase their younger brother Bob's one-third share when Bob felt the need to sell, nor did she acknowledge his generosity when he offered Bob the continued use of the Villa during Jack's time without charge. Ann felt that Jack pushed Bob to sell so Jack would have majority control and did not pay Bob full value. Jack also felt he was being magnanimous in the time consuming process of managing the property skillfully, securing necessary services and accounting to Ann, all without compensation. Ann thought Jack enjoyed control of the Villa detail and did not account thoroughly for the expenses she was charged. Jack felt unreasonably hampered by having to give notice months in advance of his summer use. Ann felt she was unreasonably disadvantaged not being able to plan family gatherings at least six months in advance…and so on.

In our discussion, it emerged that Ann felt her father nurtured Jack to run the family business, despite her being the oldest and obtaining degrees in business, because he was the oldest male. Jack felt he was obviously the most qualified to run the business and that Ann was more academic than practical. She had chosen to travel and pursue advanced degrees when he went right to work gaining helpful experience following his undergraduate education.

Both Ann and Jack expressed their desire to pass on to their children their ownership and use of the Villa, although they were aware of the increased complexity in expanding numbers of successive generations sharing the property. I discussed with them the importance of the example they provided to their children and the need to model cooperation. They began emailing one another messages we had separately discussed and then talking together on a three-way call with me. With well received coaching, they communicated their common goals for their children's continued use of the Villa and desire for their children to interact together. It was clear they had a deep, if strained, affection for one another.

They accepted my suggestion that we involve their children in the discussion by convening a meeting with me and one or more of their children representing each sibling group, after each side had talked further among themselves. The face-to-face meeting included one of Ann's children and one of Jack's along with Jack in person and Ann by telephone. The children both confirmed their desire to work out a sharing protocol and not perpetuate their parents' dispute. Each of the children articulated their parent's concerns and frustration, which they shared, but not in the same emotional way as their parents. They listened to one another, viewed the situation as a problem to be solved, engaged with me in prioritizing their interests, participated in brainstorming, and outlined a proposed property sharing protocol with choices and timelines.

The children modeled motivated collaboration and problem solving for their parents. Both families agreed to discuss the proposed sharing arrangement including, among other terms, confirmation of the 2/3 to

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1/3 cost allocation, Jack's authority to remodel without Ann's approval within defined limits and if building permits were not required, and Ann's one-year advanced reservation of any three consecutive weeks in July or August, with Jack's family having priority the rest of the summer. It was agreed that non-summer, non-holiday time would be open for week-by-week reservation through the caretaker, including use by "Uncle Bob" during the frequent times that Jack's and Ann's family were not in residence. They also agreed that Thanksgiving would remain open for all three families to share and that all would be encouraged to do so. The proposed protocol terms were tweaked and confirmed through email exchange with copies to all immediate family members and concurrence by Ann and Jack. It was also agreed that the protocol would be reexamined in two years and mediation scheduled, if necessary.

I received word that Thanksgiving was a copacetic occasion at the Villa with Ann, Jack, Bob and all three families well represented. This case illustrates the benefit of bringing in others with a stake in the outcome, but who did not create the problem. In commercial cases, this usually means going up the chain of command. In family matters it may require going down the hierarchy.

Conclusion

These scenarios illustrate that family financial disputes, whether presented in the context of a business conflict, a divorce or a property case, are matters of the heart and the law. They present challenges of how emotions and family dynamics are to be weighed against and balanced with legal rights and obligations. A judicial decision or legal mandate may not address the underlying family conflict or fully resolve the dispute. The desire to resolve the conflict and preserve the family relationship is deeply imbedded. In most family financial disputes there is a dissonance between wanting to win by being proven right and desiring to make peace within the family. The role of the mediator is to help the peace motivation prevail.

The participants in a family financial dispute are more likely to reach a satisfactory agreement by talking and exploring options with the help of a mediator than they are by going through a judicial procedure where a decision is imposed upon them, whether by judicial degree or an outcome negotiated by their lawyers. Blame and anger beget blame and anger. In mediation blame and anger can be lessened through understanding and the parties are encouraged to develop a commitment to the process and to the agreement that they structure. Mediation is a proven way to avoid the long term adverse consequences of litigating family financial disputes. ■

Jay Folberg is former Dean and Professor Emeritus at the University of San Francisco School of Law. He is coauthor of Mediation: The Roles of Advocate and Neutral, *Aspen Publishers (2006), as well as other books on ADR. Dean Folberg is now a mediator and arbitrator with JAMS and heads the JAMS Institute. His email is jfolberg@jamsadr.com.*

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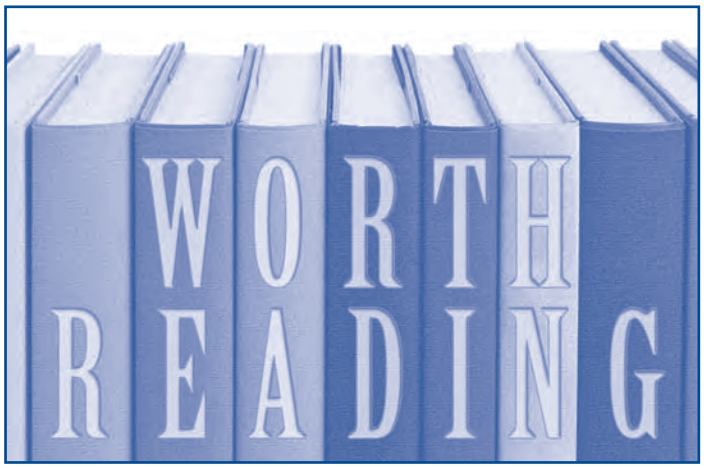

inventor of Aikido, written in 1978 (under the title *Aikido Kaiso Ueshiba Morihei Den*), written by his son and the heir to the title of Aikido Doshu. From a quick skim, I learned that the founder of Aikido, Morihei Ueshiba, described Aikido as "the way of harmony." He is said to have gone "far beyond simple methods of attack or self-defense," and instead created an art that "seeks to dispel any aggression through harmony, thus ultimately promoting peace." Settle cases through harmony? That sounded intriguing.

It's worth mentioning that this is not a book about Aikido – at least not how to do any Aikido moves. For that, you may want to seek out *Best Aikido: The Fundamentals* or *The Aikido Master Course* written by, respectively, Kissohomaru Ueshiba and Moriteru Ueshiba (son and grandson of Morihei). Frankly, if you want to learn how to "do" Aikido, you probably ought to take a class. Rather, this book is about the life of the founder. This biography describes what the life was like of a man who transcended mastery of gladiatorial combat to create a new, more peaceful path. This biography might contain valuable lessons for conflict resolution and it might shed some insight into the lives of great litigators who (sometimes) become great judges and then who become great mediators.

Talent in harmony creation was not obvious from birth. Morihei was the only boy in a large family of girls. His father was also an only son, and there had been no boys in the family for two prior generations. Morihei's grandfather and great grandfather married into the Ueshiba clan and took their wives' names. In 1883 in remote Japanese villages, being the only boy in a family meant that you were a pampered pup. The girls were forced to cook and clean and wash the clothes while little Morihei was allowed to sit around and play.

> The story of O Sensei tracks that of many great mediators I know. They start as strong students, then they turn into talented warriors, then they become leaders and conflict resolvers. And then they sit at the top of the mountain and ask: How can the various pieces of my life be integrated into one? How can I use the skills in mediation to impact my daily interactions? How can I "mediate all the time?"

Morihei wasn't especially strong or athletic. In fact, he would never grow taller than five feet. While as an old man he could bear the weight of two grown men sitting on one extended arm, as a boy, he was considered scrawny. The family business was farming and fishing, and Morihei's dad didn't think he was up to the rigors of that life.

Morihei described himself to his son as "frail and pathologically oversensitive." He read quite a lot, and like many a scrawny, overprotected boy, Morihei was good in school and exceptional in math. He enrolled at age 10 in the Yoshida Abacus Academy – one of the best abacus academies in Japan, according to the book.

Unfortunately for the abacus industry, Morihei grew bored and decided to enlist in the army. There, he was initially refused a combat position because of his diminutive stature. Frustrated at being denied something he wanted – for perhaps the first time in his life – Morihei began a lifetime of rigorous physical training. He started to learn every martial art he could find and upon his return home, his father built him a dojo – a home gym where he became so strong that the army promoted him to a battlefield position. He excelled and his career in the military seemed promising.

Until his father pulled the plug. Given how rare boys in the clan were, he didn't want his son to die, so he prevented Morihei from enrolling in officers' training school. Morihei, frustrated, accepted a government offer to relocate clans to remote

regions of the country. Morihei gathered a group of some 20 families and under his leadership, they trekked more than a month through snow-filled ravines before settling in a wilderness on Hokkaido, one of Japan's smaller islands. Morihei was said to spend many hours every day chopping down three-foot-thick trees with homemade machetes. It was here, tilling the land, fending off displaced members of the former Samurai class and building fields and shelters, that Morihei's physical prowess and his interpersonal acumen became ever more keenly honed. He was not only the leading builder and teacher, he was the town leader and first citizen.

One fateful winter, while Morihei was away on expedition, a raging fire consumed more than 80 percent of the village. Shortly thereafter, news arrived that Morihei's doting father was dying. Morihei began the massive trek back home, and he found himself in a remote village where he encountered one of Japan's great martial artists, Master Onisaburo. He stayed awhile with Onisaburo and by the time Morihei reached his home village, his father had passed away. Distraught, Morihei moved his family back to Ayabe, the village where Onisaburo was spiritual leader.

Ayabe was devoted to a thriving religion called "Otomo." The religion was based in large part on the writings of a woman said to be illiterate except for a period of trance-like possession. Here, Morihei learned to appreciate more keenly the possibility that martial arts and spirituality could be deeply merged. It is here, the story goes, that Morihei achieved enlightenment.

Morihei became Onisaburo's pupil and confidante. Onisaburo and Otomo were popular with Japan's military and cultural elite, so Morihei met many great people while serving Onisaburo. When Onisaburo sought to erect a huge mountaintop shrine, Morihei led the effort. Once again, his physical strength and stamina gave rise to many stories and legends, so much so that the youth of Ayabe began to revere Morihei almost as if he were Onisaburo. Once Onisaburo caught on to this, he insisted that Morihei open his own martial arts school and lead the local youth brigade. Thus began Morihei's life as a teacher.

Morihei decided to stop teaching a traditional martial art and he departed from his mentors in Daito-ryu, Sojutsu and Kenjutsu (popular styles of the day) and devoted himself to creating a holistic style. He was said to practice alone in the mountains late into each evening. His devotion to the self-guided creation of an ultimate martial art became the stuff of legend, and that legend spread far and wide.

He developed such a following that admirals in the Japanese navy temporarily gave up their commissions to study under Morihei. The rich and powerful joined side by side with various youth groups (with great names, like "the Youth Dragon Squad" and "the White Tiger Squadron" and my favorite, "the Young Female and Infant Army") to witness the birth of a new art.

Morihei insisted that his pupils work hard in the dojo but also in the community and on the farm. He adopted the old samurai ethic that a relationship to the land is the same as a relationship to a martial art. The soldier-farmer aesthetic (probably developed as a political means to repatriate vast squads of roving samurai after the end of Japan's feudal era) led Morihei to create a martial art that permeated all aspects of one's existence.

One of the ways Morihei felt that the art should manifest is in word. He is said to have focused on two beliefs called "Kotodama" and "Musubi." In practice, these translate into very mindful actions – extending to everything one does, including speech. The idea is roughly embodied by the phrase "words spoken by someone who has perfected themselves in body and mind are imbued with spiritual energy."

Morihei started to see connections between everything. He felt that his breath, his martial art, his relations with others – every aspect of his life was in service to a greater spirit. A pupil of Morihei wrote, "The path is like the blood that circulates in the body. It must be in harmony with the benevolent heart of God, functioning according to the principle of oneness of God and man. If this flow departs even a fraction from the heart of God, the path will be broken." This kind of all consuming devotion was new to the world of martial art. Gone was the focus on the strike or the defense, or even the physical. Mental discipline was not in service to physical prowess. Rather, everything was in service to everything else. Balance and harmony became key to every aspect of living.

From here, Morihei's path became intertwined with the fate of Japan. Former students sought him out as a military advisor. Morihei led the leaders on treks to Mongolia, on fighting campaigns, through rebellions and into the pages of history. He was offered every honor the nation could

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think to bestow, but he refused all reward. Instead, his new art spread to every corner of the country and his fame was unparalleled. Morihei was hailed as a being who had undergone a divine transformation.

In one much written about incident, a brash military officer wished to show that he could best Morihei in a fight. He repeatedly tried to hit Morihei with a short blunt club, and each time Morihei moved just enough to prevent the blow from landing. This went on until the officer collapsed from exhaustion without Morihei becoming at all tired, and without his ever striking a single blow.

Morihei announced that his new art would be called Aikido, in which training was meant to harmonize one's mind and body with the movements of the universe and to harmonize the essential energy ("ki" or "chi" or "qi") that connects the body and mind with the movements of the universe. "Only those who are able to train in these ways at the same time, not as a theory, but in the dojo and in their daily life, can be called practitioners of Aikido."

The outside world renamed Morihei "O Sensei" or "Great Teacher."

The remainder of the history details O Sensei's battle with cancer (he won – what did you expect) and the spread of Aikido through Japan (including a phase called "The Era of Hell Dojo" – I'm glad I wasn't there!). Fascinating aspects of the teachings are that O Sensei ceased all efforts at describing how to practice Aikido. He believed that words were inadequate to describe what must, at bottom, be a feeling. Schools grew and spread not only throughout Japan, but throughout the world. A New York student remarked that he had been stuck in his Zen practice and Aikido provided the breakthrough. He dubbed it "Zen in Motion."

O Sensei continued throughout his life to impress. He beat masters of Judo and Sumo, military fighters, practitioners of many martial arts, mostly by letting them wear themselves out while he appeared to do nothing.

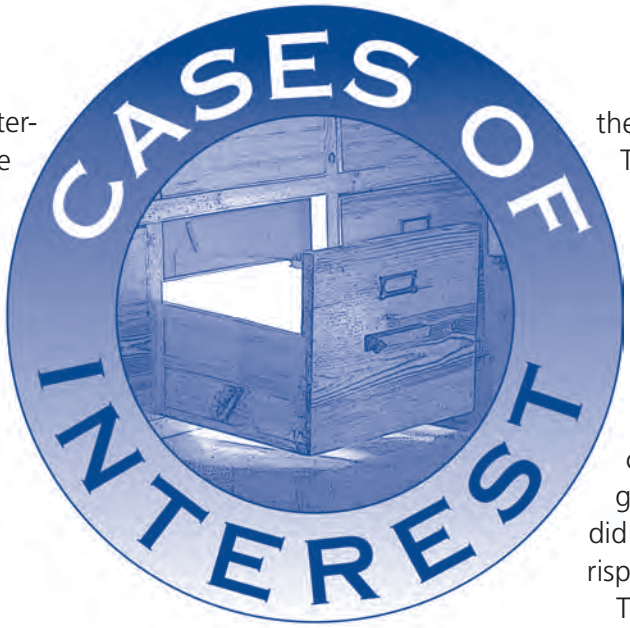
O Sensei started an outdoor dojo in another remote area, now teaching hundreds of students at once. All the while, O Sensei eschewed financial reward. It was said that he rarely had even a coin in his purse and he never took pleasure from grand meals or nice clothes. He lived a life that was inwardly rich and outwardly impoverished. Despite this, he was appointed political envoy to many countries and he counted kings and rulers from many nations as devoted disciples.

O Sensei retreated to study to avoid participating in what he saw as the horrors of World War II. There, he devoted himself to the construction of a shrine to Aikido (not to himself, of course) and from its dedication in 1967 to today, the shrine continues to attract devotees from the wide world.

Prior to his death in 1969, O Sensei summed up his feelings about Aikido in five points. (1) Aikido is a Great Path that endures forever. It is a philosophy that absorbs and integrates all things. (2) Aikido is a truth granted by Heaven and Earth. (3) The path and philosophy of Aikido seek to create harmony among heaven, earth and human beings. (4) Aikido becomes complete when each person follows the path according to their own nature, practices ascetic training, and seeks to become one with the greater universe. (5) Aikido is a path of great compassion, resulting in the glory and prosperity of the universe.

So there we are, from birth to death, with the creation of a new art along the way. The story of O Sensei tracks that of many great mediators I know. They start as strong students, then they turn into talented warriors, then they become leaders and conflict resolvers. And then they sit at the top of the mountain and ask: How can the various pieces of my life be integrated into one? How can I use the skills in mediation to impact my daily interactions? How can I "mediate all the time?" And like O Sensei, they discover that the answer starts with an inward quest for peace and quiet, and they start that search by paying attention to simple things.

While *A Life in Aikido* is a bit stilted in its language – as a pretty direct translation, there are rough patches – the story is interesting and inspiring. It's a story of adversity overcome, of never being satisfied with the status quo, of rejecting fame and fortune in search of something higher. It's a story with fascinating historical moments and perspectives. And it's a story that says that you can start small, scrawny and spoiled and pass through a period as a gladiator in training and end up as the embodiment of harmony and peace. If even one skinny kid becomes a trial lawyer and then a mediator, it will have been well WORTH READING. ■



There are many more cases of interest than we can report, but here are two significant cases that signal a split among Federal Circuits and may give rise to a new Supreme Court ruling.

Manifest Disregard Still a Valid Ground for Vacatur in the Ninth Circuit – The *Hall Street* Case Does Not Change the Law

Comedy Club, Inc. v. Improv West Associates C.A.9, January 29, 2009

Improv West granted a license to CCI to open improvisational comedy clubs. The contract contained a clause prohibiting CCI from opening "non-improv" comedy clubs. When it failed to meet terms, CCI was informed that Improv West would seek arbitration. CCI filed a complaint in federal court seeking declaratory relief.

CCI argued that the "no non-improv clubs" clause was void under California law and that CCI's failure to meet schedule terms did not revoke its rights to use various Improv club marks or to open improv clubs outside the schedule.

Improv moved to compel arbitration and the district court granted the motion.

Six months later, an arbitrator entered a partial final award that stated that CCI had defaulted on its scheduled openings, that CCI forfeited its rights to open clubs under the Improv mark, that Improv could contract with a new party for the opening of those clubs, that CCI could open only clubs already underway, that CCI could not change the names of any current clubs, and that CCI had to pay attorney fees.

CCI appealed, and in 2007, the Court ruled that it did not have jurisdiction to review the order compelling the arbitration, and that the arbitrator did not exceed his authority in combining equitable claims with monetary claims, that the arbitrator acted within his authority in enjoining acts of non-parties (partners of CCI that wanted to open clubs), that his award was "not completely irrational," BUT that the arbitrator's enforcement of the covenant not to compete was in manifest disregard of the law.

The case went up to the US Supreme Court which remanded the case to the Ninth Circuit for reconsideration in light of the *Hall Street* case.

The Ninth Circuit noted that CCI's appeal on the order compelling arbitration was untimely – far in excess of the 180 days allowed by the federal rules of appellate procedure.

In all other respects, the Court affirmed its earlier rulings, including the finding of manifest disregard. The Court noted that the US Supreme Court left it open as to whether manifest disregard is a statutory ground for reversal or vacatur under the FAA. Because the Ninth Circuit had ruled that manifest disregard (or exceeding powers or where an award is completely irrational) are statutory grounds under the FAA, *Hall Street* did not affect prior Ninth Circuit jurisprudence.

The arbitrator's award was affirmed in all respects save one – the covenant not to compete was ruled unenforceable because it violated California law and therefore, the portion of the arbitral award that allowed Improv to enforce the covenant was in manifest disregard of the law. That portion of the award was vacated.

Fifth Circuit Holds That the *Hall Street* Case Ends the Manifest Disregard Standard

Citigroup Global Markets, Inc. v. Bacon C.A.5 (Tex.), March 05, 2009

Debra Bacon discovered that Citigroup had allowed her husband to withdraw $238,000 from her IRA. She was awarded $256,000 at arbitration. Citigroup moved to vacate the award, and the district court complied, finding that the award was made in manifest disregard of the law. The court held that the matter was barred by Texas law that required a complaint within 30 days of the withdrawal (Bacon complained later

See "Cases of Interest" on Page 12

Cases of Interest CONTINUED FROM PAGE 11

than that), and so it found that the arbitrator's award violated that law.

Bacon appealed to the Court of Appeal for the Fifth Circuit which read the Supreme Court's *Hall Street* decision to strictly limit the grounds for vacatur of an arbitration award to those listed in FAA sections 10 and 11, which sections make no mention of the ground "manifest disregard of the law." As such, manifest disregard is, according to the Fifth Circuit, no longer a valid ground for vacatur of an arbitration award. The Court notes that it was one of the last circuits to accept manifest disregard as a ground for vacatur and that it employed the ground only in extreme circumstances. The Court makes it clear it was primed to reverse and Hall Street provided a perfect excuse. The Court notes that other circuits have already read *Hall Street* differently, but they found no reason to follow the circuits that read *Hall Street* to allow manifest disregard to remain viable.

As a result, the district court's vacatur of the award was reversed and the case was remanded for determination of whether vacatur was supported by one of the section 10 or 11 grounds.

And with this case, it is a little more likely that we'll see another Supreme Court opinion to clarify *Hall Street* – stay tuned. ■

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