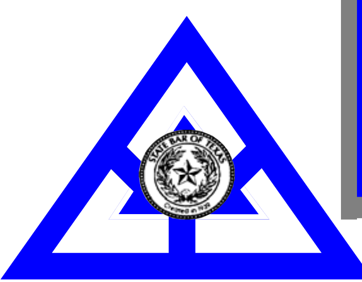

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Alternative Dispute Resolution Section

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CHAIR'S CORNER

by Michael S. Wilk, Chair, ADR Section

"FIRST QUARTER DEVELOPMENTS"

Since our last newsletter, your ADR section has been busy.

On October 28, 2005, we co-hosted the 6th Annual Institute of Responsible Dispute Resolution with South Texas College of Law. This was our second year to participate with South Texas. The institute was well attended, and the comments from those attending have been positive. The most innovative and provocative presentation was a moderated role-play illustrating differences among three mediation approaches. Law students played the parts of clients and lawyers at mediation of a pending divorce lawsuit. The moderator explained that the mediation would be conducted by juxtaposing the approaches of three experienced and effective mediators: Judge Ruby Sondock, illustrating the evaluative approach; Professor Kimberly Kovach, illustrating the facilitative approach; and Judge Josefina M. Rendón, illustrating the transformative approach. The moderator kept the process on track by focusing the mediators on specific issues and asking each mediator how she would deal with specific issues or react to a statement or action of a party or counsel. The role-play took an hour and a half and was followed by an interactive audience and panel discussion of the three approaches. I extend thanks to all of the people involved in planning, presenting, and completing the tasks that made the program a success. I thank Rob Kelly in particular for working with the students and mediators and moderating the comparative mediation role-play and panel discussion.

In June, the Supreme Court of Texas adopted the ADR Section's ethical guidelines for mediators. By doing so, the Supreme Court validated the assiduous efforts of the Supreme Court Advisory Committee. Please read the article in this Newsletter by Bruce Stratton and Bill Low, Co-Chairs of the Advisory Committee. Their comments review the history leading up to the Supreme Court's adoption of the ethical guidelines and the assistance given to the Supreme Court by the Advisory Committee and Texas Mediators Credentialing Association. They also point out that the ADR Section's Ethical Guidelines for Mediators have been adopted as mandatory (rather than aspirational) by the Texas Mediators Credentialing Association.

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COMMENTS ON THE SUPREME COURT OF TEXAS APPROVAL OF ETHICAL GUIDELINES FOR MEDIATORS

By C. Bruce Stratton and Bill Low
Co-Chairs, Supreme Court Advisory Committee

On Tuesday, October 14, 2003, the Advisory Committee met in Dallas to determine if it should make any further recommendations to the Supreme Court of Texas concerning mediation in Texas. The Committee members present were Bruce Stratton and Bill Low (Co-Chairs), Suzanne Duvall, John Estes, Margaret Mirabal, Bud Silverberg, Judge Frank Evans, Rena Silverberg, and Bill Morris. Justice Priscilla Owen was present on behalf of the Supreme Court. Judge John Coselli, Jim Gibson, and Cris Gilbert were present on behalf of the Texas Mediators Credentialing Association (TMCA). The meeting began at approximately 10:15 A.M., and it ended at approximately 2:30 P.M. The historical work of the Advisory Committee was reviewed along with the initial request to the Committee from the Supreme Court fashioned in 1996. The Advisory Committee had presented its original recommendations to the Supreme Court in the Spring of 1998. Then, after further discussion with the Court, a special ad hoc committee of the Advisory Committee drafted a registration program for mediators, which was presented to the Supreme Court for consideration in the Summer of 2001. Subsequently, the TMCA presented its credentialing program to the mediation community; that program had been in the development stage since October 1998. Ethics was the primary concern of the Supreme Court when the Advisory Committee was formed, and it continues to be such today. After much discussion at the Dallas meeting, which included the historical efforts of both the Advisory Committee and the TMCA, a motion was fashioned and voted on by the members of the Advisory Committee. The motion passed unanimously with all members present voting. At the Dallas meeting, the following concerns were discussed:

- Is there a consensus within the mediation community for or against the Court going forward with the registration program previously drafted and forwarded to the Court?
- Is there a consensus within the mediation community for or against the Court going forward with some type of credentialing program?
- What action, if any, should the Court take with regard to the credentialing program developed by the Texas Mediators Credentialing Association?
- Is there a consensus for or against the Court adopting the Rules of Ethics or the Ethical Guidelines for Mediators adopted and published by the ADR Section of the State Bar of Texas? The latter being an alternate suggestion set forth in the implementation recommendation drafted by various members of the Advisory Committee at the request of the Court and forwarded to the Court in 1998. Can the Advisory Committee monitor ethical conduct in mediation throughout Texas as well as the implementation effort of TMCA?
- Or should the Court do nothing at this stage?

The unanimous feeling of the Advisory Committee members present at the Dallas meeting was that there was not a consensus within the mediation profession in favor of the Supreme Court going forward with either a registration or credentialing program. The members present also felt that the Court should not be directly involved with the program promulgated by the TMCA. However, the unanimous consensus of the Committee members was that the Court should adopt a statement concerning ethics. The suggestion was made and agreed to that the Supreme Court should have the Advisory Committee continue to monitor the mediation activity in Texas, including unethical conduct, credentialing and/or registration, and recommend ways to improve the integrity of the system. The Committee noted that by the February following its Dallas meeting, the ADR Section's Ethical Guidelines for Mediators (adopted February 1994) would be ten years old. It was widely published and accepted within the mediation profession without change, and it served as an alternate suggestion in the implementation program previously recommended to the Court by the advisory committee team in 1998. It was, therefore, the unanimous decision of the members present in Dallas that the Supreme Court should adopt the ADR Section Ethical Guidelines for Mediators as aspirational ethics. The representatives of TMCA who were present welcomed this recommendation of the Advisory Committee to the Supreme Court. The motion drafted and unanimously adopted by the Advisory Committee members present in Dallas was as follows:

The committee does not believe there is a current consensus within the mediation profession in Texas as to whether the Supreme Court should become involved in credentialing and/or registration of mediators, therefore the committee recommends

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IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 05-9107

APPROVAL OF ETHICAL GUIDELINES FOR MEDIATORS

The Supreme Court of Texas has long recognized the need for oversight of the quality of mediation in Texas. During the initial public debate of the issue, some mediation practitioners proposed adopting ethical rules of mediators to enhance the quality of Texas mediation and mediators. Others advocated mediation licensing or credentialing.

The Court determined that, at minimum, ethical rules should be implemented and enforced. Thus, the Court created the Advisory Committee on Court-Annexed Mediations to formulate mediation ethics rules that address, among other things, the avoidance and disclosure of conflicts of interest and the timely disclosure of fees.[1] The Court also instructed the Advisory Committee to study whether further oversight, such as licensing or credentialing, was warranted.

The Committee began its work by gathering relevant materials from various organizations throughout the country, including organizations unrelated to the practice of law and the justice system. These voluminous materials were reviewed by individual members and subcommittees for presentation to the full Committee. The Committee met formally numerous times, and, as a result of this work, the Committee proposed several recommendations to the Court.

Ultimately, the Committee concluded that there currently was no consensus within the mediation profession in Texas as to whether the Supreme Court should become involved in credentialing and/or registration of mediators. Therefore, the committee

[1] Order Creating Advisory Committee on Court-Annexed Mediations, Misc. Docket No. 96-9125 (May 7, 1996). Members of the Committee were Tony Alvarado, Karl Bayer, Gary Condra, Herb Cook, Hon. Suzanne Covington, Claude Ducloux, Suzanne Duvall, John Estes, Hon. Frank Evans, Hon. Charles Gonzalez, Carol Hoffman, Dr. Lou Lasher, Bill Low, Hon. Tom McDonald, Hon. Margaret Mirabal, Lanelle Montgomery, William M. Morris, Hon. Jay Patterson, Ross Rommel, Michael J. Schless, Maxel "Bud" Silverberg, Rena Silverberg, Sid Stahl, Bruce Stratton, and Michael Wolf.

Misc. No. 05-9107

recommended that the Court take no action with regard to credentialing.

The Committee, however, concluded that there currently is consensus within the Texas mediation profession that the Court should promulgate ethical rules. Therefore, the committee recommended the Court adopt as its own aspirational guidelines those guidelines that the Alternative Dispute Resolution section of the State Bar of Texas has adopted.

The Court accepts this recommendation. The Court is committed to ensuring the continued quality of mediators and mediation services in Texas. Thus, the Court promulgates and adopts the attached Ethical Guidelines for Mediators.

These rules are aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

Moreover, counsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court. They are subject to the Texas Disciplinary Rules for Lawyers and any local rules or orders of the court regarding the mediation of pending cases. They should aspire during mediation to follow The Texas Lawyer's Creed—A Mandate for Professionalism. Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation.

In Chambers, this 15th day of June, 2005.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Misc. No. 05-9107

ETHICAL GUIDELINES FOR MEDIATORS

PREAMBLE

These Ethical Guidelines are intended to promote public confidence in the mediation process and to be a general guide for mediator conduct. They are not intended to be disciplinary rules or a code of conduct. Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly. These Ethical Guidelines are intended to apply to mediators conducting mediations in connection with all civil, criminal, administrative and appellate matters, whether the mediation is pre-suit or court-annexed and whether the mediation is court-ordered or voluntary.

GUIDELINES

1. Mediation Defined. Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

Comment. A mediator's obligation is to assist the parties in reaching a voluntary settlement. The mediator should not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves.

2. Mediator Conduct. A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.

Comment (a). A mediator should not use information obtained during the mediation for personal gain or advantage.

Comment (b). The interests of the parties should always be placed above the personal interests of the mediator.

Comment (c). A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.

Comment (d). Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.

Comment (e). A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

3. Mediation Costs. As early as practical, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator should perform mediation services at a reduced fee or without compensation.

Comment (a). A mediator should avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.

Comment (b). If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

4. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

Comment (a). A mediator should withdraw from mediation if it is inappropriate to serve.

Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

5. Mediator Qualifications. A mediator should inform the participants of the mediator's qualifications and experience.

Comment. A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

6. The Mediation Process. A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.

Comment (a). A mediator should inform the parties about the mediation process no later than the opening session.

Comment (b). At a minimum the mediator should inform the parties of the following: (1) the mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend.); (2) the mediation is informal (There are no court reporters present, no record is made of the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.); and (3) the mediation is confidential to the extent provided by law. (See, e.g., §§154.053, and 154.073, Tex. Civ. Prac. & Rem. Code.)

7. Convening the Mediation. Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator that they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

Comment. A mediator should not convene the mediation if the mediator has reason to believe that a pro se party fails to understand that the mediator is not providing legal representation for

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ANYPROPOSALS FOR THE 80TH TEXAS LEGISLATURE IN 2007?

While it may seem premature to begin thinking of proposals to make to the 80th Texas Legislature in 2007, now is truly the time, at least if you want the proposals to be initiatives of the Alternative Dispute Resolution Section of the State Bar of Texas. The organized bar is now requesting proposals for the 80th Legislature. If you have any proposal ideas, please send them to the ADR Section's chair-elect, John Fleming, as soon as possible, at jfleming@austin.rr.com.

ETHICAL GUIDELINES FOR MEDIATORS
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the pro se party. In connection with pro se parties, see also Guidelines #9, 11 and 13 and associated comments below.

8. Confidentiality. A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.
Comment (a). A mediator should not permit recordings or transcripts to be made of mediation proceedings.
Comment (b). A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.
Comment (c). Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impasse, or that the mediation was either recessed or rescheduled.
Comment (d). In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties that disclosure is required and will be made.

9. Impartiality. A mediator should be impartial toward all parties.
Comment. If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

10. Disclosure and Exchange of Information. A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

11. Professional Advice. A mediator should not give legal or other professional advice to the parties.
Comment (a). In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during, or after the mediation process.
Comment (b). A mediator should explain generally to pro se parties that there may be risks in proceeding without independent counsel or other professional advisors.

12. No Judicial Action Taken. A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.
Comment. It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator has had communications with one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem, or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believes nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity.

13. Termination of Mediation Session. A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

14. Agreements in Writing. A mediator should encourage the parties to reduce all settlement agreements to writing.

15. Mediator's Relationship with the Judiciary. A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.

WHEN AN ARBITRATION AGREEMENT GOES TOO FAR

By G. Scott Fiddler*

Editor's Note: This article and the article written by Erica Harris are companion articles prepared by the attorneys representing the opposing parties in In re Poly America, a mandamus action now pending in the Supreme Court of Texas. The case was known as In re Luna in the Houston Court of Appeals.

I. Background[1]

In October 1998, Poly-America[2] hired Luna as an operator at Poly-America's plant in Mont Belvieu, Texas. Poly-America required Luna to sign an arbitration agreement as a condition of employment. Later, Poly-America gave Luna an employee handbook containing a new arbitration agreement. On December 4, 2002, Luna suffered a neck injury on the job and three days later filed a worker's compensation claim. On January 10, 2003, Luna returned to work. On February 6, 2003, Luna told his supervisor he was still having problems with his neck and would need to go back to the doctor. The next day Luna was scheduled to work (February 11, 2003), Poly-America terminated Luna.

Luna attempted to retain an attorney to represent him in his wrongful termination case against Poly-America. Two attorneys refused to take Luna's case on a contingency fee basis because of Poly-America's arbitration agreement.

On June 3, 2003, Luna filed a lawsuit in Chambers County, Texas, against Poly-America for wrongful termination under Section 451.001 of the Texas Labor Code, alleging that Poly-America terminated him because he filed a worker's compensation claim. Luna also sought a declaratory judgment that the arbitration agreements were substantively unconscionable. Poly-America responded with a motion to compel arbitration, and on September 19, 2003, the trial court granted the motion. Luna then filed a mandamus action in the court of appeals.

The First Court of Appeals in Houston granted mandamus relief, finding the cost provisions and provisions precluding reinstatement and punitive damages "render the arbitration agreement, when considered as a whole, so one-sided in Poly-America's favor and so oppressive to Luna as to be substantively unconscionable . . . ."[3] Poly-America then filed a mandamus action in the Texas Supreme Court, where the case is currently pending.

Although the court of appeals only found the cost provisions and provisions limiting remedies to be factors weighing in favor of a substantive unconscionability finding, this article will also address the other provisions in Poly-America's arbitration agreements that Luna contends were unconscionable.

II. The Arbitration Agreements

Poly-America's 1998 arbitration agreement and arbitration provisions in its employee handbook are essentially the same. They, among other things: 1) require Luna to split the costs of arbitration up to an amount equal to his highest one month's salary in the preceding year ($3,300), pay a mediation fee, and pay a court filing fee if the parties cannot agree on an arbitrator; 2) preclude Luna from being reinstated; 3) preclude Luna from recovering punitive damages; 4) limit discovery to one deposition per side; 5) prohibit the use of requests for admissions; 6) preclude Luna from discovering financial information of Poly-America; 7) impose a cloak of confidentiality on the discovery process; and 8) shorten the statute of limitations.

III. In re Halliburton Co.—A Model of Fairness

In In re Halliburton Co.,[4] the Texas Supreme Court reviewed Halliburton's employment arbitration agreement in response to an allegation of substantive unconscionability. The court looked at such factors as the cost of arbitration to the employee, whether the arbitration agreement denied the employee basic rights and remedies, as well as the overall balance of obligations and rights imposed by the arbitration agreement.[5] The court found Halliburton's arbitration agreement was not substantively unconscionable because its provisions protected the employee's rights.[6] For example:

1) Halliburton agreed to pay all the expenses of the arbitration except a $50 filing fee;
2) Both parties were to participate in the selection of the neutral arbitrator;
3) Halliburton provided up to $2,500 for an employee to consult with an attorney;
4) The rules provided for pre-arbitration discovery under the Federal Rules of Civil Procedure;
5) All remedies the employee could have pursued in court were available in the arbitration; and
6) The arbitrator could award reasonable attorney's fees to an employee regardless of whether such an award would be available in court.

In re Halliburton Co. is a clear statement from the Texas Supreme Court on what constitutes a fair arbitration agreement. Companies who follow its model in drafting arbitration agreements stand on firm ground. In stark contrast, under Poly-America's arbitration agreements:

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WHEN AN ARBITRATION AGREEMENT GOES TOO FAR
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1) Poly-America does not pay the full cost of arbitration and Luna will have to pay more than $4,000[7] to have his case arbitrated;
2) Luna must pay the cost of a separate court action to have an arbitrator appointed if the parties do not agree on an arbitrator;
3) Poly-America provides no remuneration to Luna for consulting with an attorney;
4) Luna is not entitled to discovery under the Texas or Federal Rules of Civil Procedure and instead is limited to far less discovery than provided by either;
5) Luna's remedies are severely limited compared to those he could have pursued in court (i.e., punitive damages and reinstatement); and
6) Luna is not entitled to an award of attorney's fees absent statutory authority.

Almost every provision the Texas Supreme Court relied upon in In re Halliburton Co. to find Halliburton's arbitration agreement fair is absent from Poly-America's arbitration provisions. Prior to filing Luna's lawsuit, Luna's attorney, recognizing that In re Halliburton Co. represented the standard for a fair arbitration agreement, offered on Luna's behalf to arbitrate with Poly-America if it would agree to arbitrate under the provisions the Texas Supreme Court found fair in In re Halliburton Co. Poly-America refused.

IV. How Poly-America's Arbitration Provisions Tilt the Playing Field

Poly-America's arbitration provisions tilt the playing field by: 1) precluding claims through a shortened statute of limitations; 2) discouraging the filing of claims by making them prohibitively expensive for the employee; 3) imposing rules of litigation that make it harder for an employee to win; and 4) limiting remedies of those who can overcome all the foregoing to obtain an arbitration award against Poly-America.

A. Limitations Provisions That Trap The Unwary

Poly-America's arbitration provisions require an employee to assert a claim within one year after the event upon which the claim is based, or within the limitations period for the claim in question, whichever is earlier. A claim not timely asserted is barred. This provision may seem benign enough to one who is not an employment lawyer or corporate litigant. Those who are know different.

By the time most employees are terminated, they have forgotten they signed an arbitration agreement (if they understood what they signed in the first place).[8] The lawyer and client then continue under the mistaken assumption they have two years (or more) to file a worker's compensation retaliation lawsuit, or Fair Labor Standards Act, Family and Medical Leave Act, breach of contract or federal race discrimination claim[9] only to discover there is an arbitration agreement and they have missed the statute of limitations.

If the employee asserts claims for retaliation or discrimination based on age, race, national origin, color, sex, religion or disability as covered by federal or Texas laws, he is required to first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days (if asserting Texas claims) or 300 days (if asserting federal claims only) from the date of the discriminatory act. Not knowing of the one-year statute of limitations in Poly-America's arbitration agreements, an employment lawyer will believe he has to wait (as required by law) until the EEOC gives permission to sue before filing a lawsuit.[10] It is not uncommon, for a variety of reasons,[11] for one not to receive permission to sue from the EEOC within a year of termination. Those who do not receive permission within a year and subsequently file a lawsuit will find their claims barred by the statute of limitations provisions in Poly-America's arbitration agreements.

Even those employees who are aware of the statute of limitations provisions in the arbitration agreements are subject to being lulled into missing deadlines because of the one year limitation. To a layman reading the limitations provisions, it would be easy to believe one had a year to file a discrimination claim—because that is the only time period stated—when in fact one only has 180 or 300 days.

The only claims left unaffected by the foregoing scenarios are claims subject to a one-year statute of limitations, such as slander and malicious prosecution—not exactly hot-item claims in employment law.

Of course, Poly-America could have simply adopted an arbitration provision applying the statute of limitations that already existed by statute or common law, but it did not. The statute of limitations provisions in Poly-America's arbitration agreements only take away rights from the employee, giving nothing in return, while at the same time providing Poly-America a bullet-proof defense that avoids a review of the merits of the employee's case. The shortening of a statute of limitations is a factor courts can consider in determining whether an arbitration agreement is substantively unconscionable.[12]

B. Cost Provisions That Discourage Claims

Poly-America's arbitration agreements impose a fee splitting provision on the parties that require Luna to pay arbitration costs up to a maximum of one month's salary ($3,300), mediation costs, and a court filing fee if the parties cannot agree on an arbitrator. Luna, who was making less than $40,000 per year, would have had to pay over $4,000 just to have his case arbitrated. This is separate and apart from any deposition costs, subpoena costs or other costs normally associated with litigation. Luna testified (by affidavit) before the trial court that he could not afford the more than $4,000 in arbitration and mediation costs he would surely incur.

The requirement of paying more than a month's pay to have one's dispute heard is a hurdle few, including Luna, can overcome. Add to that the fact that those asserting wrongful termination claims will likely be unemployed at the time, and the hurdle becomes even more insurmountable. Imagine if Poly-America had to pay arbitration costs equal to its highest month's gross receipts and had to do so at a time when the company was generating no revenue. Would Poly-America be inclined to pursue its claim or just move on? The fee provi-

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sions have another effect that discourages claims—they make it more difficult for a discharged employee to retain an attorney. An attorney must be willing to pay more than $4,000 in addition to litigation costs and his investment of time to take the case on a contingency fee. It is not surprising that two attorneys turned down Luna's case because of Poly-American's arbitration provisions.

Courts have traditionally questioned arbitration agreements that attempt to impose more than a nominal fee for arbitration costs on discharged employees.[13] Moreover, fee splitting provisions like Poly-America's have been found unconscionable when applied to employment disputes.[14] Further, courts have held that when an arbitration agreement is imposed on an employee as a condition of employment—as it was here—it is unconscionable to require the employee to pay anything more than a court's filing fee.[15] Arbitration under the Federal Arbitration Act ("FAA") is intended to be a reasonable substitute for a judicial forum.[16] It therefore undermines Congressional intent to require employees to pay ten and twenty times more for an arbitrator than they would have to pay for a judge to hear their case in a real court.

C. Procedures That Favor Poly-America Exclusively

An arbitration agreement limiting a party's right to conduct discovery is unconscionable if it tilts the playing field in favor of one party to the detriment of the other.[17] Poly-America's arbitration provisions do just that.

Discovery in an employment discharge case benefits the employee more than the employer. The employer has control over and access to most, if not all, of the witnesses it will call at arbitration, namely its own employees and managers. The employer will always know the alleged reasons for having discharged the employee. The employee's attorney, on the other hand, is as a practical matter precluded from speaking with current employees and managers without doing so in a deposition.[18]

Poly-America's arbitration provisions limit discovery to one deposition per party. In most employment discharge cases, the defendant-employer only takes one deposition—the deposition of the plaintiff-employee. The plaintiff, on the other hand, often must take three to five depositions to have any chance of winning. Consequently, this discovery limitation favors Poly-America.

Poly-America's arbitration provisions preclude the use of requests for admissions. Requests for admissions are used more by plaintiffs in employment cases than defendants because they allow a plaintiff to establish facts and authenticate documents cheaply and efficiently. As a result, the elimination of requests for admissions as a discovery tool favors Poly-America.

Poly-America's arbitration agreements preclude Luna from discovering financial information about the company though Poly-America can discover financial information about Luna. Financial information can be essential to an employee rebutting an employer's alleged reason for discharge, such as when an employer alleges a layoff or restructuring as the cause for termination. Thus, precluding an employee from discovering financial information favors Poly-America.

Poly-America's arbitration provisions state that, "[a]ll aspects of the arbitration, including the hearing, records, and outcome, shall be confidential." This provision would preclude Luna from even discussing evidence obtained in discovery with potential witnesses. For example, Luna would be precluded from discussing information obtained from the alleged decision makers with potential witnesses (former employees for example) who may be able to rebut such evidence. The confidentiality clause is not only detrimental to Luna but to others who may be terminated by Poly-America and who, as a result, will be prevented from showing a pattern of discrimination, if any, by Poly-America. Such confidentiality clauses can render arbitration agreements substantively unconscionable.[19]

Peter Costea, J.D., Ph.D., an employment attorney experienced in employment litigation and arbitration, testified (by affidavit) that each of the foregoing provisions benefited only Poly-America to the detriment of Luna and that they "significantly reduce the plaintiff's ability to prevail in an arbitration, regardless of how strong plaintiff's case is on the merits." Dr. Costea's testimony was not rebutted, and rightly so.

D. Limiting the Employee's Remedies

Under Poly-America's arbitration agreements, even if an employee could avoid the limitations snare, pay for arbitration, and overcome the tilted discovery playing field, he would then face limited remedies.

Poly-America's arbitration provisions prohibit an award of punitive damages and eliminate reinstatement as a remedy. One of the few benefits of arbitration to an employee is that a punitive damage award in arbitration will not ordinarily be reviewed in a subsequent judicial action.[20] Were the case filed in a Texas court, an appellate court reviewing such an award must specifically address in its written opinion evidence supporting liability and the amount of such awards.[21] Therefore, not only do Poly-America's arbitration provisions prohibit punitive damages, but in doing so they take away one of the only benefits to an employee in arbitration: a punitive damage award not subject to review on appeal.

The right to reinstatement is a remedy common to many Texas[22] and federal[23] employment statutes. Reinstatement is one of the most important statutory remedies available to a discharged employee because of its remedial effect in stopping the employee's economic losses and putting him back to work.[24] Poly-America's arbitration agreements preclude reinstatement.

The enforceability of arbitration agreements under the FAA is based on the assumption that an employee can effectively vindicate his statutory cause of action in the arbitral forum.[25] Therefore, under the FAA, an arbitration agreement that limits remedies of the statutory claims it purports to cover is suspect.[26]

V. Why In re Luna Is Important

Only an experienced employment lawyer or experienced corporate litigant could have understood how one-sided Poly-America's arbitration provisions were at the time they were imposed on Luna. To pretend arbitration agreements such as

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Poly-America's represent honest arm's length transactions between contracting parties is to encourage overreaching by employers in the future. To argue Poly-America's arbitration provisions are fair because most of them apply equally to both parties is to ignore the realities of employment litigation.

In re Halliburton Co. provides a model of a fair arbitration agreement. Halliburton's arbitration agreement protects the employee's procedural and statutory rights and is designed not to discourage valid claims. Halliburton's arbitration agreement is a standard for what is enforceable. Even though In re Luna did not hold that all the above-mentioned provisions were unconscionable, In re Luna is a good example of arbitration provisions that go too far. Poly-America was well-represented in the litigation, but Poly-America's arbitration agreements are indefensible.[27] If In re Halliburton Co. shows what makes an arbitration agreement fair, In re Luna shows what does not. As a result, In re Luna has helped define the boundaries of substantive unconscionability for all those who follow.

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ENDNOTES

[1] The factual summary in this section is based on the affidavit of Johnny Luna, which is part of the record on appeal.

[2] The defendants in the litigation are Poly-America, L.P., individually and d/b/a Pol-Tex International and Poly-America GP, L.L.C.. This article will refer to defendants generally as "Poly-America."

[3] In re Luna , 2004 WL 2005935, *11 (Tex. App.—Houston [1 Dist.] 2004, orig. proceeding [mand. pending]).

[4] 80 S.W.3d 566 (Tex. 2002).

[5] See id., at 572.

[6] Id., at 572 ("The Program has several terms that provide protection to the employee in the process.").

[7] The arbitration provisions include mandatory mediation as a condition to arbitration. Luna is responsible for paying his half of the total mediation fee for both sides. Expert testimony (by affidavit) at trial established the cost of a full-day mediation to be from $750 to $1,200 per side.

[8] Likely the arbitration agreement was just one of a stack of papers the employee signed when hired and therefore not likely to be remembered. If the arbitration provisions were contained in an employee manual they are even less likely to have been noticed. Employees seem to look at such manuals even less often than do their employers.

[9] The statute of limitations for race discrimination claims brought under 42 U.S.C. § 1981 is 4 years. Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 124 S.Ct. 1836 (2004).

[10] The one exception to this requirement to obtain permission to sue from the EEOC is the Age Discrimination in Employment Act which only requires that one file a charge of discrimination with the EEOC within 300 days (in Texas) but may file a lawsuit after the EEOC has had the charge for 60 days. 29 U.S.C. § 626(d).

[11] For example, some discharged employees try to find a job before making the decision to seek legal redress for their termination. Only after suffering lost wages from being out of work do they begin to look for an attorney. Others hire lawyers who, while aware of the statutory deadlines, wait to file until the deadlines are imminent to pursue settlement first, because of their case loads or for other reasons. The EEOC must then investigate the claim, and until fairly recently, it was not uncommon for the EEOC to take a year or more to investigate a charge of discrimination.

[12] Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1247-48 (9th Cir. 1994) (arbitration provisions that shortened statute of limitations along with precluding the recovery of attorney's fees and punitive damages was unconscionable).

[13] See Cole v. Burns Intern. Sec. Services, 105 F.3d 1465, 1484-85 (D.C. Cir. 1997) (unacceptable to require employee to pay any arbitration fees when arbitration was imposed upon employee as a condition of employment); see also Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 786 (9th Cir. 2002) (unconscionable for arbitration agreement to impose any arbitration costs on the employee in excess of real court's filing fee); Torrance v. Aames Funding Corp., 242 F.Supp.2d 862, 875 (D. Or. 2002) (requiring payment of arbitrator's fees is not permitted as a condition of arbitration); In re Halliburton Co., 80 S.W.3d at 572 (noting arbitration agreement was enforceable because it only required employee to pay $50 fee and did not require the employee to pay unreasonable costs or any arbitrator's fees and expenses).

[14] See Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1177-78 (9th Cir. 2003) (fee splitting provision in employment arbitration clause unconscionable); Geiger v. Ryan's Family Steak Houses, Inc., 134 F.Supp.2d 985, 996-97 (S.D. Ind. 2001) (fee splitting provision in employment arbitration clause unconscionable).

[15] See Ferguson, 298 F.3d at 785; Cole, 105 F.3d at 1484-85.

[16] See Cole, 105 F.3d at 1484.

[17] See Ferguson, 298 F.3d at 786-87 (arbitration agreement which included limitations on discovery tilting the playing field in favor of employer-defendant was unconscionable); Geiger, 134 F.Supp.2d at 996 (S.D. Ind. 2001) (limitations on available discovery was unconscionable). See also, In re Halliburton Co., 80 S.W.3d at 572 (finding arbitration agreement enforceable in part because it provided for discovery under Federal Rules of Civil Procedure).

[18] See Tex. Disciplinary R. Prof'l Conduct 4.02 reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Tex. State Bar R. art. X, § 9). While this prohibition may not extend in theory to current employees of a defendant-company, it does in practice. Employees are often instructed by their employer or the employer's attorney not to discuss the case with the plaintiff's attorney.

[19] See Torrance v. Aames Funding Corp., 242 F.Supp.2d 862, 865 (D.Or. 2002).

[20] Tex. Civ. Prac. & Rem. Code § 171.088.

[21] Tex. Civ. Prac. & Rem. Code § 41.013.

[22] See Tex. Lab. Code § 21.258(b)(1) (identifying reinstatement as a remedy for victims of discrimination based on race, color, disability, religion, sex, national origin and age); Tex. Civ. Prac. & Rem. Code §122.002(b) (providing right of reinstatement to person terminated for serving as a juror); Tex. Gov't Code § 554.003(b) (providing right of reinstatement to public employee terminated for reporting violation of law); Tex. Health & Safety Code § 242.133(d) (providing right of reinstatement to nursing home employee terminated for reporting a violation of law); Tex. Health & Safety Code § 161.134(e) (providing right of reinstatement to employee of hospital terminated for reporting violation of law).

[23] See e.g., 42 U.S.C. § 2000e-5(g) (listing reinstatement as a remedy to victims of discrimination based on race, color, religion, sex or national origin); 42 U.S.C. § 12117(a) (incorporating by reference Title VII remedies for victims of disability discrimination); 12 U.S.C. § 1831j(c) (providing reinstatement as remedy for bank employees terminated for whistleblowing); 38 U.S.C. § 4313 (providing right of civilian reemployment to members or armed forces returning from duty).

[24] See e.g., Blim v. Western Elec. Co., 731 F.2d 1473, 1479 (10th Cir. 1984) (holding that reinstatement is the preferred remedy under federal age discrimination laws because it best serves Congress' purposes in enacting the statute).

[25] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

[26] See Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1059-60 (11th Cir. 1998) (finding a provision covering Title VII claims but limiting damages to "contractual damages" to be unconscionable); see also, Graham Oil Co, 43 F.3d at 1247-48 (arbitration provisions that excluded punitive damages and attorney's fees was unconscionable); Powertel, Inc. v. Bexley, 743 So.2d 570 (Fla. Dist. Ct. App. 1999) (agreement under FAA was unconscionable because

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IS THE TIDE TURNING AGAINST ARBITRATION? THE CASE OF *IN RE POLY AMERICA*

By Erica Harris*

Editor's Note: This article and the article written by G. Scott Fiddler are companion articles prepared by the attorneys representing the opposing parties in In re Poly-America, a mandamus action now pending in the Supreme Court of Texas. The case was known as In re Luna in the Houston Court of Appeals.

After more than two decades of Texas Supreme Court decisions emphasizing the strong public policy favoring arbitration and compelling the enforcement of arbitration agreements, the Texas Supreme Court must now decide whether the tide will turn against arbitration. Currently pending before the Court, the case of *In re Poly-America*[1] presents several significant issues, the determination of which will have a tremendous impact on how arbitration agreements are drafted and whether and how they are enforced. The decision in the case will determine whether discovery will be the norm rather than the exception on motions to compel arbitration, whether cost-sharing provisions are practically enforceable or merely theoretically so, and whether severability clauses in arbitration agreements are meaningless.

I. How Did We Get Here?

The underlying dispute involves two separate employment agreements between Poly-America and Johnny Luna, one which Mr. Luna executed when he was hired initially (the "1998 Agreement") by Poly-America and a second agreement which he executed during his tenure at Poly-America (the "2002 Agreement").[2] The agreements, which are similar but not identical, both provide for the mutual selection of an impartial arbitrator, allow document and deposition discovery, and cap Mr. Luna's costs to approximately one month's salary. The 2002 Agreement caps "total fees incurred" by Luna; the 1998 Agreement caps the "costs associated with arbitration." Both agreements contain severability clauses.

Despite his agreements to arbitrate all disputes with Poly-America, Mr. Luna instead elected to file a wrongful termination lawsuit in state court against Poly-America. In his petition, Mr. Luna claimed that the 2002 Agreement was procedurally and substantively unconscionable for virtually every reason an agreement can be unconscionable. After Poly-America pointed out that Mr. Luna had signed the 1998 Agreement as well as the 2002 Agreement, Mr. Luna alleged the 1998 Agreement was unconscionable as well.

Mr. Luna's challenges evolved in other respects as well. After Poly-America pointed out that Mr. Luna failed to assert a reinstatement claim (such that his statutory remedies were not limited), Mr. Luna amended his petition to assert a claim for reinstatement. Originally, Mr. Luna alleged that the 2002 Agreement should not be enforced because he did not understand the one paragraph acknowledgment in Spanish that appeared above his signature, testifying under oath that he only signed the Spanish version because the company had "run out" of forms in English. After Poly-America pointed out that the acknowledgment form signed by Mr. Luna in Spanish was double-sided with the English translation on the back (such that it was Mr. Luna who chose the Spanish side of the form rather than the English side), Mr. Luna then argued that the real problem with the arbitration agreements was that the agreements were not "fair" and that he could not "afford" what he was told were the likely costs of arbitration.

After several rounds of briefing and a hearing, the district court rejected each of Mr. Luna's arguments, upheld the arbitration agreements as enforceable, and ordered the parties to arbitration. Mr. Luna filed a petition for writ of mandamus.

In a remarkable turn of events, the Texas Court of Appeals conditionally granted Mr. Luna's writ without even hearing oral argument on the petition.[3] The Texas Court of Appeals held that while the limitations on remedies and the capped cost-sharing provision were enforceable by themselves, they "combined" to render the agreements unconscionable as a whole. The Texas Court of Appeals further held that it could not sever those provisions because the provisions were "integral" to the agreements; according to the Court of Appeals circular logic, the provisions were integral because they are what rendered the agreement unconscionable. The Court of Appeals refused to reconsider its ruling, requiring Poly-America to seek mandamus in the Texas Supreme Court.

II. Will Discovery on a Motion to Compel be the Rule or the Exception?

Not the least of the problems with the ruling by the Court of Appeals is that it runs counter to the Texas Supreme Court's holding that motions to compel arbitration should be decided summarily; according to the Texas Supreme Court, the legislature never intended that motions to compel arbitration, as a general rule, could only be resolved after a "full evidentiary hearing."[4] While the Court of Appeals may not have appreciated the practicalities of its ruling, the effect of the ruling, should the Texas Supreme Court let it stand, will be to necessitate a full and complete evidentiary hearing in virtually every case where a party is seeking to compel arbitration.

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This outcome, antithetical as it is to the whole concept of arbitration, results from the holding by the Court of Appeals that an affidavit by the party opposing arbitration which states that the party cannot afford the costs of the arbitration – no matter how small or how constrained those costs may be – is sufficient to call a cost-sharing provision into question. Important factors, such as the reasonableness of arbitration expenses when viewed by objective factors and the fact that the party resisting arbitration would likely incur greater costs if the party proceeded in court rather than arbitrations, are simply irrelevant and have no significance.

As a result, if the ruling stands, a prudent party moving to compel arbitration will not move to compel on the basis of affidavits alone, since the party opposing arbitration can prevail simply by claiming in an affidavit that it cannot afford the costs of the arbitration. Since no one can attest to the invalidity of another party's subjective belief regarding the affordability of particular arbitration costs, whether $50 or 3,300, the party seeking to compel arbitration will have to resort to cross-examination and document discovery in order to rebut an affiant's subjective claim that he cannot afford particular arbitration costs – no matter how small. The resulting, necessitated discovery will be relatively extensive since the question of "affordability" is a relative one. For example, in this case, it would not have been enough for Poly-America to have simply obtained Mr. Luna's bank records. In the affidavit, Mr. Luna never testified that he did not have $3,300 in the bank. He simply affirmed that $3,300 was "way more than he could afford." In this case, as in others in the future, the party opposing the arbitration may have had the requisite amount and more in his bank account but still not be able to "afford" the costs of arbitration – because he's saving for a new house, car or TV; because he owes a friend money; or because he finally has some savings that he does not want to spend. In the *Luna* case, Mr. Luna could have many different reasons for believing $3,300 is "way more than he could afford" to spend pursuing his claim. To determine whether Mr. Luna's subjective belief was grounded in and supported by the evidence, Poly-America would have to both cross-examine Mr. Luna and discover his entire financial status – assets and debts – all to disprove Mr. Luna's subjective claim in his affidavit of an inability to afford costs.

Contrary to the scenario necessitated by the Court of Appeals' ruling, parties should not have to engage in substantive, in depth discovery before being able to enforce arbitration agreements. The more reasoned position is that Texas courts should be required to consider not only an affiant's <u>subjective</u> claim that he cannot "afford" arbitration costs, but also evidence that such costs are <u>objectively</u> reasonable in light of (a) the affiant's total wages and (b) the comparative costs of proceeding in court. This is the approach taken by other courts around the country.[5] Such an approach offers parties to arbitration agreements some measure of certainty, while still allowing courts to make an individualized factual determination.

In contrast, the Court of Appeals' decision leaves Texas citizens with no ability to predict whether cost-sharing provisions will be enforced; all arbitration agreements will be open to challenge if a party is willing to claim that the costs are subjectively "unaffordable." Failing to follow the majority approach not only makes no sense, but also dramatically increases the costs of enforcing arbitration agreements in the first instance.

III. Are cost-sharing provisions really enforceable?

The Texas Supreme Court rejected the idea that uncapped cost-sharing is *per se* unconscionable in *In re FirstMerit*,[6] and a Texas Court of Appeals has held that an uncapped cost-sharing provision was enforceable in *Pony Express Courier Corp. v. Morris*.[7] Yet, in *In re Luna*, the Texas Court of Appeals held that a cost-sharing provision that capped costs to as little as approximately one month's wages rendered the entire arbitration agreement unconscionable.

The underlying facts highlight the inconsistency of these holdings. On one hand, in *FirstMerit*,[8] the plaintiffs were buyers of a mobile home who bought the mobile home under a retail installment financing agreement and in *Pony Express*,[9] the plaintiff was a warehouse worker. On the other hand, in *Luna*, Mr. Luna was a supervisor, making approximately $40,000 a year. It simply defies logic that <u>uncapped</u> cost-sharing provisions could be fair and conscionable for the plaintiffs in *FirstMerit* and *Pony Express* while a <u>capped</u> cost-sharing provision that limits costs to one-twelfth of an annual wage (or zero if unemployed) would be unconscionable for Mr. Luna.

It is axiomatic that one's costs in an arbitration where one's costs are capped are always going to be less than one's costs in an arbitration where one's costs are uncapped. Thus, if one adopts the reasoning underlying the Texas Court of Appeals' decision in *Luna*, it becomes a virtual certainty that every uncapped cost-sharing provision must be unconscionable, which of course would be contrary to reasoning of the Texas Supreme Court in *In re Firstmerit*. In addition, if the decision by the Court of Appeals in *Luna* stands, drafters of arbitration agreements having been forced to utilize capped cost-sharing provisions, will still have no way to know whether the particulars of the capped cost-sharing provision that they have chosen will survive challenge.

Given this uncertainty (as well as the Court of Appeals' holding that severability clauses are ineffective to cure any misjudgment), cost-sharing provisions – capped and uncapped – will be a thing of the past. The practical effect is that no prudent rafter of an arbitration agreement will risk the enforcement of an entire arbitration agreement by including any sort of cost-sharing provision – capped or uncapped. Finally, not only is the Court of Appeals decision in *Luna* inconsistent with the prior holdings of the Texas Supreme Court and at least one Texas Court of Appeals, but it also runs counter to the practical reality that generally parties spend much greater amounts of money litigating a case in court than in arbitration.

IV. Are severability clauses in arbitration agreements enforceable?

It seems like such an easy question. Texas courts have long held that severability clauses in other contracts are enforceable, and the Texas Supreme Court has repeatedly held that tradi-

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tional contract principles apply to arbitration agreements. So why would severability clauses in arbitration agreements not be enforced? Unfortunately, the Texas Court of Appeals did not shed much light on that issue when it refused to enforce the severability clause in Poly-America's arbitration agreements with Mr. Luna.

In *Luna*, the Court of Appeals held that the provisions it combined to render the agreements unconscionable were "integral" to the agreements because those provisions combined to render the agreements unconscionable. By this circular logic, a court would never be able to sever any unconscionable provision in an arbitration agreement; the offending provision will always, necessarily be the reason that the arbitration agreement was unenforceable and thus, by the Court of Appeals' circular reasoning, always be "integral" to the agreements and thus not capable of being severed.

Again in stark contrast to the ruling by the Court of Appeals, the Texas Supreme Court held more than a quarter century ago that where the subject matter of a contract is legal, but the contract contains one or more illegal or unenforceable promises, "the invalid provisions may be severed and the valid portions of the agreement upheld provided the invalid provision does not constitute the main or central purpose of the agreement."[10] As a Texas Court of Appeals recently summarized:

> The doctrine of severability is an exception that applies in circumstances in which the original consideration for the contract is legal, but incidental promises within the contract are found to be illegal. In such a case, the court may sever the invalid provision and uphold the valid portion, provided the invalid provision does not constitute the main or essential purpose of the agreement. Severability of the contract is determined by the intent of the parties as evidenced by the language in the contract. The issue is whether the parties would have entered into the agreement absent the illegal parts.[11]

In the *Luna* case, as evidenced by the express language of the severability clauses, the intent of the parties was to sever unenforceable provisions and enforce the remaining terms. It is clear that the parties would have entered the agreement to arbitrate even if the agreements had not contained the cost-sharing provisions and limitations on remedies. Indeed, it would be illogical for Mr. Luna to claim that he would not have executed the arbitration agreements had they not contained the provisions limiting his remedies and requiring him to share in the arbitration costs (*i.e.* the very provisions about which he now complains). Likewise, the inclusion of the severability clauses in the agreements expressly demonstrates that Poly-America (which drafted the agreements) would have entered into the agreements to arbitrate absent those provisions. Simply put, the provisions at issue can be severed without thwarting the essential and primary purpose of the agreement – *i.e.*, to arbitrate.

Every other Texas court that has considered the question of severability has enforced severability provisions in the contract and upheld the arbitration agreements at issue.[12] Other jurisdictions have held similarly.[13] The only cases in which courts have refused to sever offending provisions are ones where the agreement was filled with "so many biased rules" that it created a "sham system unworthy even of the name of arbitration."[14] This is not such a case, and the refusal to honor the express written agreement of the parties to sever illegal provisions is inconsistent with the fundamental principle that contracts will be enforced as they are written.

V. Conclusion

Arbitration has been a boon for our judicial system and for justice. The Texas Supreme Court has spent more than two decades developing the case law in this area and largely set up rules that encourage arbitration and favor the efficient enforcement of arbitration agreements. The decision by the Texas Court of Appeals in *Luna* undoes much of that work. We can only hope that the Texas Supreme Court will step in to prevent this turning of the tide against arbitration as an efficient mechanism for alternative dispute resolution.

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ENDNOTES

1. *In Re Poly-America, L.P., Ind. and d/b/a Pol-Tex International, and Poly-America GP, L.L.C., Relators*, No. 04-1049, In the Supreme Court of Texas.

2. *See generally In Re Johnny Luna*, 2004 Tex. App. LEXIS 8241 (Tex. App. [1st Dist.] B Houston Sept. 9, 2004), *writ pending*.

3.. *Id.*

4. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992).

5. *See, e.g., Morrison v. Circuit City Stores, Inc*., 317 F.3d 646, 675 (6th Cir. 2003) (*en banc*) ("courts should consider the costs of litigation as the alternative to arbitration"); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.4d 549, 556 (4th Cir. 2001) (looking at the "expected cost differential between arbitration and litigation in court and whether that cost differential is so substantial as to deter the bringing of claims" in order to determine whether cost-sharing provision was burdensome to the particular plaintiff); *Shadeh v. Circuit City Stores, Inc.*, 334 F. Supp.2d 938, 943 (W.D. Ky. 2004) (considering potential arbitration costs and noting A[t]he normal costs in civil litigation, including deposition originals easily exceed this amount@); *Gipson v. Cross Country Bank*, 294 F. Supp.2d 1251, 1259 (M.D. Ala. 2003) ("Moreover, the costs of litigating her case in arbitration may actually be less than in court.").

6. *In re FirstMerit, N.A*., 52 S.W.3d 749, 753 (Tex. 2001).

7. *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 822 (Tex. App. B San Antonio 1996, no pet.)

8. 52 S.W.3d at 752

9. 921 S.W.2d at 819

10. *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978).

11. *In re Kasschau*, 11 S.W.3d 305, 313 (Tex. App. B Houston [14th Dist.] 1999, no pet.) (internal citations omitted). *See also* RESTATEMENT (SECOND) OF CONTRACTS '603 (stating that an agreement should be enforced if disregarding an illegal provision "will not defeat the primary purpose of the bargain").

12. *See Hadnot*, 344 F.3d at 478 (". . . with its unlawful limitation on the types or permissible damage awards lifted the arbitration clause remains capable of achieving this goal. In fact, the lifting of that illegal restriction enhances the ability of the arbitration provision to function fully and adequately under the law."); *Carter v. Countrywide Credit Industries, Inc.*,189 F. Supp. 2d 606, 620

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(N.D. Tex. 2002) (invalidating fee-splitting provision where plaintiff presented evidence that fees would be $9000 per day for the hearing plus additional costs for motions and discovery Abut holding the rest of the contract enforceable under the severability clause found in . . . the contract"); *Jones v. Fujitsu Network Comms*., 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (invalidating one provision but enforcing the remainder of the arbitration agreement).

[13.] *See, e.g., Anders v. Hometown Mortg. Services, Inc*., 346 F.3d 1024 (11th Cir. 2003) ("Because any invalid provisions are severable, the underlying claims are to be arbitrated regardless of the validity of the remedial restrictions.@); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001) ("The essence of the contract is an agreement to settle their employment dispute through binding arbitration. The punitive-damages clause can be severed without disturbing the primary intent of the parties to arbitrate their disputes.")

[14.] *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999). *See also Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1168, 1180 (9th Cir. 2003) ("Any earnest attempt to ameliorate the unconscionable aspects of [the agreement] would require [the] court to assume the role of contract author rather than interpreter.").

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it limited punitive damages and other remedies available to the plaintiff); Rembert v. Ryan's Family Steak Houses, Inc., 596 N.W.2d 208, 226 (Mich. Ct. App. 1999) (holding an arbitration agreement subject to FAA to be enforceable only if it does not limit the employee's substantive statutory rights and remedies). See also, In re Halliburton Co., 80 S.W.3d at 572 (finding an arbitration agreement subject to FAA enforceable in part because all remedies available to employee in court were available in arbitration).

[27] Poly-America relied heavily on Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 822 (Tex.App.—San Antonio 1996, no pet*.).* However, the Pony Express court did not consider whether the arbitration agreement was substantively unconscionable as a whole because the parties did not provide sufficient facts to the court to allow it to make that determination. See id., 921 S.W.2d at 822. Second, though the Pony Express court did mention equal cost sharing provisions, it noted that there was no evidence before the court as to the employee's ability to afford the arbitration or the cost of arbitration. Id., 921 S.W.2d at 822. Luna provided such evidence. Third, while the Pony Express court did mention that the agreement limited damages, it did not say how the damages were limited, but indicated that it was permissible because the agreement did not limit statutory rights—as Poly-America's arbitration provisions do. See id., 921 S.W.2d at 822. Fourth, there was no indication that there was evidence before the Pony Express court that the limitations on discovery favored the employer over the employee, as there was in In re Luna.

COMMENTS ON THE SUPREME COURT OF TEXAS APPROVAL OF ETHICAL GUIDELINES FOR MEDIATORS

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the Supreme Court take no action at this time with regard to those matters.

The committee does believe there is a current consensus within the mediation profession in Texas as to whether the Supreme Court should promulgate ethical rules; therefore the committee recommends the Supreme Court adopt as its own aspirational guidelines the same guidelines adopted by the ADR Section of the State Bar of Texas (including the "Comments") along with the additional language: "Counsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court and are subject to the Texas Disciplinary Rules for Lawyers, and any local rules or orders of the court regarding the mediation of pending cases and should aspire during mediation to follow *The Texas Lawyer's Creed- A Mandate for Professionalism*. Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation."

The additional wording concerning counsel set forth in the motion is the identical language of paragraph 7 of the *Texas Rules of Ethics for Mediations and Mediators* previously adopted by the Advisory Committee. It should also be noted that the TMCA has adopted the ADR Section's *Ethical Guidelines for Mediators*, except that they are mandatory rather than aspirational. It was the feeling of the Committee members in attendance at Dallas that by the Supreme Court adopting aspirational guidelines, it would be a positive and beneficial step for the mediation community while showing positive support by the Court in the effort to improve the image and integrity of the profession.

Subsequent to the Dallas meeting, a memorandum was sent by email and fax to each member of the Advisory Committee not present, requesting that they give their approval or disapproval of the motion adopted in Dallas. The result of that voting was completed with all twenty-four members of the Advisory Committee casting their votes in favor of the motion. Those members were Bruce Stratton, Bill Low, Suzanne Duvall, John Estes, Margaret Mirabal, Bud Silverberg, Frank Evans, Rena Silverberg, Bill Morris, Claude Ducloux, Lanelle Montgomery, Mike Schless, Carol Hoffman, Jay Patterson, Ross Rommel, Karl Bayer, Tom McDonald, Lou Lasher, Herb Cooke, Tony Alvarado, Sid Stahl, Suzanne Covington, Gary Condra, and Michael Wolf.

It was, therefore, the unanimous recommendation of the Advisory Committee on Court-Annexed Mediation that the Supreme Court of Texas adopt the State Bar of Texas Alternative Dispute Resolution Section's Ethical Guidelines for Mediators as the aspirational ethical guidelines for mediators in Texas. We are pleased to note that on June 15, 2005, the Supreme Court of Texas, at Misc. Docket No. 05-9107, signed "Approval of Ethical Guidelines for Mediators" thereby adopting the ADR Section's aspirational ethical guidelines for mediators in Texas, along with the additional wording that had been recommend by the Advisory Committee.

SAN ANTONIO COURT OF APPEALS FINDS ARBITRATION AGREEMENT UNCONSCIONABLE

By Laura Salinas-Castro*

When is an arbitration agreement unconscionable, and which party has the burden of proving the unconscionability? These are the questions posed to the San Antonio Court of Appeals in a recent case, Olshan Foundation Repair Company v. Ayala, 2005 WL 2138237 (Tex. App.—San Antonio 2005, no pet. filed) (Westlaw registration required).

This case began when Remigio and Martha Ayala (the Ayalas) filed suit against Olshan Foundation Repair Company (Olshan). The Ayalas had contracted with Olshan for the installation of foundation stabilization to their home at a cost of $22,650. The Ayalas alleged that the foundation system failed and asserted claims against Olshan for breach of contract, violations of the Deceptive Trade Practices Act, fraud, and negligence. Olshan moved to compel arbitration pursuant to an arbitration clause in the parties' contract. The trial court granted Olshan's motion and ordered the parties to arbitrate.

The parties initiated arbitration with the American Arbitration Association ("AAA") as provided by the contract's arbitration clause, which also required the parties to split the costs of the arbitration. The Ayalas received notice that the arbitration of the case would cost the parties approximately $63,670.00, of which the Ayalas would have to pay $31,150. The Ayalas reasserted their objection to arbitration in the trial court, claiming that their inability to pay the costs of arbitration effectively barred them from asserting their claims, thus rendering the arbitration clause substantively unconscionable.

The trial court granted the Ayalas' motion and, following an evidentiary hearing, denied Olshan's motion to compel arbitration based upon its finding that the cost of arbitration rendered the agreement unconscionable. Olshan appealed, arguing that the trial court had abused its discretion in denying Olshan's application for arbitration because the arbitration agreement treated both parties to the agreement equally.

The San Antonio Court of Appeals, in a majority opinion written by Justice Catherine Stone, reasoned that "[t]he mere fact that both the Ayalas and Olshan will owe a similar amount does not somehow make the amount owed fair, reasonable, or conscionable. Indeed, the fees to be charged for arbitration of the Ayalas' claim are, by any definition, shocking."

The court noted that both the United States and Texas Supreme Courts have recognized the possibility that excessive arbitration costs might, under certain circumstances, render an arbitration agreement unconscionable. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000); In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001). The San Antonio court further observed that, "in FirstMerit Bank, the Texas Supreme Court noted that 'the existence of large arbitration costs could preclude a litigant from vindicating her . . . rights [in the arbitral forum].'" FirstMerit Bank, 52 S.W. 3d at 757 (quoting Green Tree Fin. Corp., 531 U.S. at 91).

The San Antonio court recognized that, given the strong policy favoring arbitration agreements, the party opposing arbitration must prove the likelihood of incurring such costs. Id. While neither the Green Tree court nor the FirstMerit Bank court had specified "how detailed the showing of prohibitive expenses must be," the San Antonio court observed that, "the Texas Supreme Court did hold that 'there is no doubt that some specific information of future costs is required.'" Id. (quoting Green Tree Fin. Corp., 531 U.S. at 91, which held that the mere risk that a plaintiff might bear such costs was too speculative).

The court of appeals found that the Ayalas, unlike the parties seeking to avoid arbitration in Green Tree and FirstMerit Bank, had presented evidence during the hearing, uncontroverted by Olshan, that the AAA would preside over the arbitration, that a panel of three structural engineers approved by the AAA would conduct the arbitration, and the arbitration would cost the parties $63,670.00. The court also noted that the Ayalas had asserted that the costs would serve effectively to deprive them of the opportunity to bring their claim against Olshan. Mr. Ayala attested that the costs of AAA arbitration represented approximately forty-five percent of his annual gross earnings, as well as twenty-eight percent of the Ayalas' combined annual gross income. Mr. Ayala testified that, because of the arbitration costs, he could not afford to vindicate his claims or proceed with the arbitration.

The San Antonio court further stated that "even more compelling than Ayala's personal inability to pay the arbitration fee, is the actual amount of the fee in relation to the amount of the underlying claim," which was almost three times the cost of the original contract between the Ayalas and Olshan. The Court held that the disparity between the amount in controversy and the amount charged to arbitrate the controversy was so large that the trial court acted within its discretion when it ruled the arbitration agreement unconscionable.

The San Antonio Court of Appeals upheld the decision of the trial court and found that the lower court had the information

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DETERMINING SEPARABILITY OF ARBITRATION CLAUSES IN (ARGUABLY) VOID CONTRACTS: RESPONSIBILITY OF JUDGE OR ARBITRATOR?

By Ralph Rodriguez*

The U.S. Supreme Court has granted certiorari in Buckeye Check Cashing, Inc. v. Cardegna,[1] an appeal from a decision of the Florida Supreme Court that denies the applicability of the separability doctrine to an arbitration clause in a contract that arguably is criminal and void ab initio under state law. Florida law requires state courts to determine whether a contract is criminal and void ab initio before enforcing any of the contract's provisions, including an arbitration provision. The question presented in Cardegna is whether the Federal Arbitration Act ("FAA") preempts Florida's law and requires a Florida state court, pursuant to the separability doctrine, to compel arbitration before it determines whether a contract exists.[2]

The separability doctrine arises from Prima Paint Corporation. v. Flood & Conklin Mfg. Co.,[3] a case in which the U.S. Supreme Court held that the FAA preempts state contract law and that an arbitrator, not a state judge, should decide whether an agreement that contains an arbitration clause is voidable for fraud in the inducement. The separability doctrine adopted in Prima Paint separates an arbitration clause from an arguably voidable contract, elevates the arbitration clause above the other contract provisions, and requires a state judge to enforce the arbitration clause by compelling arbitration. Once the judge compels arbitration, the arbitrator decides whether the contract is voidable under state law. The U.S. Supreme Court, interpreting and applying Section 4 of the Federal Arbitration Act ("FAA"), justified the separability doctrine as follows:

> [The FAA] . . . authorizes federal courts to fashion a federal rule to make arbitration clauses "separable" and valid. And the Court approves a rule which is not only contrary to state law, but contrary to the intention of the parties and to accepted principles of contract law -- a rule which indeed elevates arbitration provisions above all other contractual provisions.[4]

The Supreme Court of Florida held in Buckeye that an arbitration provision in a contract that arguably is void under Florida law cannot be separately enforced while there is a voidness claim pending in a Florida trial court.[5] The Florida court reasoned that the rationale of Prima Paint should not be extended to the facts of Buckeye.[6] The Florida judges opined that there is a key distinction between the claim in Prima Paint and the claim in Buckeye. In Prima Paint, they argued, the claim of fraud in the inducement, if true, merely would have rendered the underlying contract voidable.[7] In Buckeye, however, the underlying contract at issue would be rendered void from the outset if it were determined that the contract indeed violated Florida's usury laws.[8] Therefore, if the underlying contract were held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well.[9]

Buckeye, the party advocating the applicability of the separability doctrine in this case, argues that: (1) under the separability doctrine of Prima Paint, the arbitration clause in the contract is "separable" from the rest of the contract, and allegations that address the validity of the contract in general, as opposed to the arbitration clause in particular, should be decided by the arbitrator, not the court; (2) Prima Paint held that only an arbitrator -- and not a state court -- can decide any challenge to a contract, even a challenge to whether a contract was formed or exists at all, if the challenge relates to the entire contract and not just the arbitration clause; (3) any state law providing that a state court should not enforce an arbitration clause in a criminal agreement that is void ab initio is preempted by the FAA; and (4) the separability rule must be applied and arbitration provisions must be enforced whenever there is assent (or an agreement) to an arbitration provision.[10]

Cardegna, the party opposing the applicability of the separability doctrine in this case, argues that: (1) as a threshold matter, the separability rule enunciated in Prima Paint cannot preempt state law in this case, because the arbitration issues here arose in Florida state court; (2) Prima Paint's holding was grounded in the language of Section 4 of the FAA, which on its face only establishes a procedural rule for federal court proceedings and applies to petitions brought in "any United States district court"; (3) the separability rule, likewise only applies to suits "brought in any of the courts of the United States" and it was appropriate for the Supreme Court to apply Section 4 of the FAA in Prima Paint because that case was an appeal from federal courts. Because the arbitration issues in this case arose in state court proceedings, however, Prima Paint has no application here; and (4) Buckeye is asking the Court to extend Prima Paint to preempt state law in state court cases, and to enforce arbitration clauses in agreements that are void ab initio under generally applicable rules of state law, not just valid contracts allegedly voidable by one party as a defense. That attempt to extend Prima Paint is contrary to the FAA itself.[11]

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CHAIR'S CORNER
ADR SECTION READY FOR ANOTHER GREAT YEAR
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At the end of October, the Supreme Court of Texas entered an opinion in *In re Weekley Homes, L.P. No. 04-0119* (October 28, 2005), granting a mandamus compelling arbitration of personal injury claims of a party who had not signed the contract containing the arbitration agreement. The Court found that precedent holding nonparties bound to an arbitration clause when the rules of law or equity bind them to a contract generally applicable to the *Weekley Homes* case. The opinion cites the recent case of *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 223 (Tex. 2005), for the proposition that a party, who did not sign the contract containing the arbitration provision, may be compelled to arbitration if the party seeks to derive benefit from the a contract containing the arbitration provision. The *Kellogg* opinion reasoned that although the particular plaintiff was not presenting a claim based on the contract, once the plaintiff sought substantial and direct benefits from the contract, equity prevented such party from avoiding the arbitration clause that was part of that agreement.

Weekley Homes is only the latest of several recent important arbitration cases. As we all know, arbitration is a growing forum for dispute resolution. Growing use leads to more litigation and thus to court decisions. This newsletter has four articles that review the importance of fairness in arbitration clauses in employment contracts, unconscionability**,** and the question of whether the court or arbitrator determines the enforceability of the arbitration provision. Scott Fiddler, Erica Harris, Laura Salinas-Castro, and Ralph Rodriguez have excellent articles that discuss these timely issues.

We recently retained a new web master who has experience in working with the ADR community. We are working with her to continue to improve the web site and the members-only section. At our council meeting, we discussed ways in which we could assist victims of Hurricane Katrina and Hurricane Rita. We are considering working with the Dispute Resolution Centers, the American Arbitration Association, and others to provide volunteers to mediate and arbitrate disputes for those in need. We also approved a $1,000.00 contribution to the Texas Access to Justice Foundation.

The ADR council is here to serve its members. If you have any questions about the Section, comments about what we are doing, or suggestions, please contact me or another member of the council.

I wish all of you a Happy Holiday Season and Happy New Year.

SAN ANTONIO COURT OF APPEALS FINDS ARBITRATION AGREEMENT UNCONSCIONABLE
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necessary to consider the policy of the unconscionability doctrine and evaluate the oppressiveness of the fees and costs of the arbitration in reaching its decision.

In her dissenting opinion, Justice Karen Angelini argued that when a court determines whether a contract is unconscionable, it should consider only the circumstances as they existed at the time of contract formation. Justice Angelini observed that the Alayas did not argue, nor did the trial court consider, the facts and circumstances as they existed at the time the parties entered into the arbitration agreement. Therefore, in Justice Angelini's opinion, the trial court abused its discretion when it failed to order the parties to return to arbitration.

**Laura Salinas-Castro is a native of Mexico City. She received her Juris Doctor degree from St. Mary's University School of Law. She received her Bachelor's degree from Texas State University with majors in Psychology and Spanish. She is a certified mediator. She has an avid interest in speaking foreign languages. She speaks Spanish, English, French, German, and is learning Japanese. Her hobbies include playing chess, bike riding, skating, and most importantly, reading.*

DETERMINING SEPARABILITY OF ARBITRATION CLAUSES IN (ARGUABLY) VOID CONTRACTS: RESPONSIBILITY OF JUDGE OR ARBITRATOR?
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The U.S. Supreme Court hearing has been set for November 29, 2005. Following the hearing, the Court will decide this important issue of arbitration law. The author of this article will provide an update of this case following the Supreme Court's decision.

** Ralph Rodriguez, a native of San Marcos, Texas, graduated from San Marcos High School. He received an undergraduate degree from Southwest Texas State University in San Marcos in 1989, and he currently is enrolled in the graduate Legal Studies Program at Texas State University. His wife is employed at the University of Texas at Austin, and his son is eighteen years old. He is employed as a paralegal at the Law Offices of Deborah Green & Kris Hochderffer, L.L.P.*

ENDNOTES

1. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 861 (Fla. 2005) cert. granted, 125 S. Ct. 2937 (2005) (No. 04-1264, 2004 Term).
2. Brief for the Respondents, Cardegna v. Buckeye Check Cashing, Inc., 2005 WL 2376814 (Sept. 23, 2005).
3. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
4. Id. at 411.
5. Cardegna, 894 So. 2d at 865.
6. Id. at 863.
7. Id.
8. Id.
9. Id.
10. Id. at n. 1.
11. Id. at n. 2.

San Antonio Court of Appeals Upholds Mediated Settlement Agreement in Family Case

By Amy M. Reyes*

The San Antonio Court of Appeals recently affirmed a divorce decree signed pursuant to a mediated settlement agreement. Zimmerman v. Zimmerman, 2005 WL 1812613 (Tex. App.—San Antonio August 3, 2005, pet. filed). John Zimmerman, the ex-husband who appealed the decree, admitted that the settlement agreement complied with all statutory requirements, yet he asserted several creative grounds for setting aside the decree, none of which the court of appeals sustained.

Mr. Zimmerman's complaints about the behavior of his mediator, Senior Judge Henry Schuble, may be of greatest interest to other mediators. Mr. Zimmerman contended that even though an attorney represented him at the mediation, the mediator coerced him into signing the settlement agreement. At the mediation, Mr. Zimmerman indicated he wanted at least "equal time" with his child and no child support payments. The mediator's reactions, according to Mr. Zimmerman, included the following:

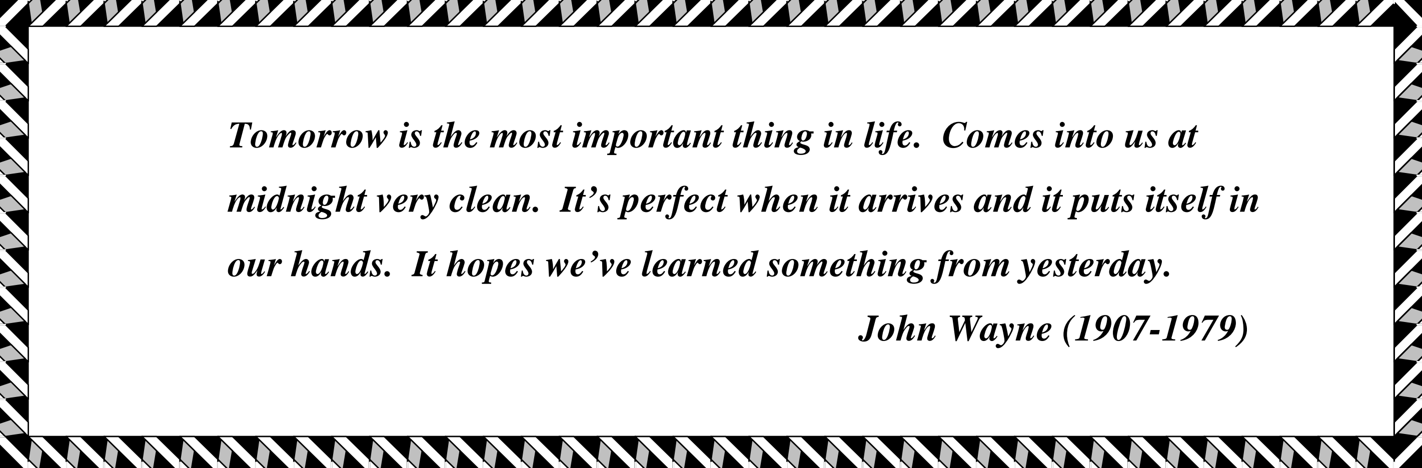
- Telling Mr. Zimmerman that, "You're not going to get any of that from a judge, and a jury is not going to give it to you either."
- Writing down what he believed would be the outcome of a trial.
- Telling Mr. Zimmerman that if he did not continue with the mediation, he could testify to that in court.

Mr. Zimmerman testified that he knew the mediation agreement was a "bad deal," yet he signed it because he believed he had no other choice. The testimony of Mr. Zimmerman's lawyer supported the allegation that Judge Schuble evaluated the case, but the lawyer's testimony, as described by the court of appeals, did not appear to support allegations of coercion.

The court of appeals observed that Mr. Zimmerman's only evidence of coercion was his own testimony about "his perceptions of the mediator and how the mediator made him feel." The appellate court also noted that the trial court had stated on the record that it had not found Mr. Zimmerman's testimony credible. Recognizing that the trial court, as the finder of fact, was the sole judge of Mr. Zimmerman's credibility, the court of appeals held that the trial court did not commit error when it concluded that Mr. Zimmerman's signature on the mediated settlement was not coerced.

Mr. Zimmerman filed a petition for review of this case with the Supreme Court of Texas on October 11, 2005. If the high court grants the petition for review, the author of this article will advise the readers of this newsletter of further developments.

** Amy M. Reyes received a Master of Arts degree with a major in Legal Studies from Texas State University in San Marcos. While attending Texas State, Amy completed necessary hours to obtain a mediation certificate and a paralegal certificate. She obtained her Bachelor of Arts degree in Criminal Justice from St. Mary's University. Amy is originally from Castroville, Texas and plans to attend law school in the near future.*



DENHAM LISTS

By Michael J. Schless*

My good friend Alfred Denham is a very successful mediator in McAllen. He is well-known and widely respected in the Valley as an effective and prolific neutral. I met Alfred when he and I, along with Rey Ortiz, another respected lawyer in McAllen, served together on a three-member panel in a lengthy arbitration. Alfred is a big man with a big laugh, a big heart, and many good friends.

In mid-August, Alfred was seriously injured in a freak auto accident. He has undergone several surgeries on his leg and face, and he remains hospitalized as of this writing. It will be a long time before Alfred is able to return to what has been, until now, a very demanding ADR practice.

Shortly after the accident, several of his mediator friends got together with Alfred's fantastic assistant, Sandra Bitner, and we sent a letter to all of the parties who had mediations scheduled with Alfred. We asked them not to cancel the mediations. We explained that we had volunteered to do the mediations for Alfred in his absence, and they could choose, from the mediators on the list, which volunteers they wanted to mediate their disputes. We further explained that the fees would go to Alfred, that we were volunteering out of friendship, and that we hoped to assure that Alfred's practice remained afloat in his absence. So far, the system has worked well, and the participants have expressed great satisfaction with the work of the replacement mediators and their coverage system.

We are now going to send out another letter asking Alfred's devoted "repeat customers" to continue to schedule with Alfred's office any mediations they would ordinarily schedule with him if he were there. The volunteers will continue to cover for Alfred until he is able to return to his practice.

While on my way to McAllen last week to do the first of my volunteer stints for my friend, it occurred to me that what happened to Alfred could happen to any of us. Maybe it wouldn't be an auto accident. It could be a heart attack or other catastrophic illness. Or it could be a death or illness in the family that requires our prolonged absence on a sudden and unexpected basis. I believe that we can all learn a lesson from Alfred's unfortunate mishap. Rather than waiting for the tragedy before we swing into action, perhaps we could be proactive by setting up mutual-assistance groups in advance.
In honor of my buddy, we could call them "Alfred Groups" or, if puns are in your genes like they are in mine, "Denham Lists." (Get it? Genes…Denham? Sorry.)

We could create groups of a dozen or so people. Each group could have a standard form letter with blanks ready to be filled in as appropriate to the particular incident that causes the group to swing into action. The letter could be sent to all clients with a mediation scheduled and to all of the "regulars" who mediate often with the absent neutral. The letter would list the other members of the group who are volunteering their services and a method of selecting volunteers. The office staff of each group member could get to know each another well enough to be prepared to spring into action with a plan for gathering the calendars of the volunteers, checking for conflicts, and scheduling.

Take just a moment to imagine what your world would be like if you were in Alfred's position. Think how much easier it would be to know that your good friends were looking out for you and keeping your practice afloat in your absence in accordance with a plan that you had carefully crafted in advance and tailored to fit your unique needs.

Folks with whom I have shared this experience and the idea of a Denham List have been quite moved by it. In fact, two mediator friends of mine, who do not even know Alfred, have asked to be added to the list of his volunteer replacements. I am pleased to report that Alfred is making good progress in his recovery. He has a loving family to take care of him while he convalesces in the hospital and at home. He also has friends in his profession who, under ordinary circumstances, are his "competitors," but who care enough about him to rush to his aid in this time of need. That is a fine tribute to a great man. It would be an even finer tribute to Alfred and to our profession if each of us took the time to create a Denham List within our circle of professional friends.

Alfred, we all wish you a speedy and complete recovery. We look forward to hearing that huge laugh once again.

** Michael J. Schless is an Austin mediator and a former Chair of the Alternative Dispute Resolution Section.*

A good listener is not only popular everywhere, but after a while he gets to know something.

Wilson Mizner (1876-1933)

SKILLS FOR TRANSFORMATIVE GROUP FACILITATION

By Ron Kraybill*

Introduction

Meetings take place—by the million—every day in our world. Some are satisfying and productive for the people involved. But many are deeply frustrating. People depart feeling annoyed, unheard, and unsettled. The last hour—or five—has delivered one more hit on their faith in humanity and their hope for the future.

The single biggest factor in determining whether a meeting is rewarding or disappointing is the skill of the leader. Unfortunately, skills for facilitating meetings are rarely taught. People seem to assume that white hair, or a good education, or the title of CEO, chair, or reverend, somehow equips leaders with skills adequate to lead meetings. Well, maybe. Or maybe not . . . .

The good news is that a small number of facilitator skills can greatly enhance the ability of anyone to lead transformative meetings. These skills are not a substitute for broad competence. A number of excellent, highly readable books on meeting facilitation now exist, and every group leader ought to have at least one on his or her bookshelf.

But reading and planning are no substitute for the interactional skills required of good facilitators. These skills are like oil in a hard-working engine, easing human interaction and helping things run more smoothly.

Perhaps more important, they have a transformational impact. When leaders use good listening and summarizing skills, when they have a well-honed ability to recognize the varying and somewhat contradictory phases of making a decision and can guide a group calmly through them, they help groups and individuals to grow. People regain a sense of confidence in themselves and those around them. From that confidence comes an expansion of spirit and capacity. And in that expansion lies the energy and hope to become all that our Creator has meant us to be.

Paraphrasing

Paraphrasing involves saying in your own words what you understand another person to have said. Paraphrasing is a powerful tool:

- For communicating understanding to others and thus setting the stage for the conversation to deepen.
- For slowing down the conversation between the parties.
- For "laundering" vicious or insulting statements so as to be less inflammatory while retaining the basic points that were made.

A caution: Paraphrasing is a positive and powerful tool in interacting with most, but not all people. In some cultures, paraphrasing may be perceived as disrespectful, in particular if used by lower-status people addressing people of higher status.

Summary

Facilitators often summarize a statement or a whole series of statements made by people in a group. Summary is similar to paraphrasing, but it covers more ground. Whereas a paraphrase summarizes only a few sentences or paragraphs, a summary is a condensation of a longer statement or of many statements. Facilitators use several kinds of summaries, these include:

Summary of content, summary of agreement, summary of disagreement, summary of process.

Phasing: Using "Modest Rituals of Cooperation" in Facilitation

It is hard for groups to do more than a few things well at once. It is not possible to simultaneously hear and acknowledge feelings, identify and support needs, define problems, seek and articulate points of agreement, develop creative solutions, evaluate those solutions, make binding decisions, and work out the details of implementation all at the same time or even in the same hour.

With phasing, a facilitator guides group discussion to take place in phases, so that people can cooperate on one task rather than trying to do many things at once. By enabling the parties to cooperate in the many activities involved in successful decision-making in a common way, phasing creates a sense of safety and order in the group. By agreeing to take turns or to define what the problem is before trying to solve it, for example, participants affirm their willingness to work together in a common process. In this sense, phasing is a ritual of modest, short-term cooperation that symbolizes and assists in reaching the goal of larger, long-term cooperation.

Examples of Phasing

- Phase the <u>categories of discussion</u>.
- Phase the various activities involved in <u>decision-making</u>.

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- Phase moments of social interaction with issue-oriented work, so as to intersperse times of work with times of relationship-building.
- Separate dialogue from the phase of decision-making.
- Separate agreeing (e.g., naming the points of agreement or listing a set of common shared principles) from clarifying the differences (e.g., listing the points of disagreement or contention).
- Separate joint education or information gathering from the phase of decision-making or negotiation.
- Phase intellectual activity with physical activity.

Moving Discussion to Deeper Levels

People in conflict often focus their attention on blaming and attacking each other or each other's ideas, with the consequence that discussion never moves to the deeper levels of understanding required to transform the conflict.

How to assist parties to move beyond this to deeper levels of reflection? The temptation is for facilitators to pressure people to see new things. Often this achieves the opposite, and parties become more intransigent.

Some useful strategies

Focus on understanding people who are upset rather than moving quickly to solve their problems. A slightly different way of saying this is the general principle: never debate solutions until you are clear about the nature of the problem.

Develop a repertoire of "deepening queries". These are questions facilitators can ask that draw people deeper. "Explain that farther . . . ." "Say more about that . . . ."

Look for opportune moments to invite people to talk about the things that always deeply influence them but rarely get conscious attention - their hopes, dreams, hurts, fears, values.

None of these skills alone will work magic. But used together, guided by a heart committed to the service of others, they can make a big difference in the quality of meetings. More important, they have the capacity to transform the people in those meetings. Used on a consistent basis, these skills create space where human beings grow. Individuals become more confident and more trusting. Organizations become more flexible, more humane, more empowering, more effective, more connected to the depths of Spirit that endlessly seeks to transform our world.

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FOR MORE ON THESE SKILLS AND HOW TO LEARN THEM:
See a fourteen-page essay by Ron Kraybill about how to use these skills and how to learn them, entitled Group Facilitation: Skills to Facilitate Meetings and Training Exercises to Learn Them. Available in edoc ($1.95) or hardcopy ($2.95 plus shipping) at RiverhouseePress.com. You can go directly to the booklet at:

http://www.riverhouseepress.com/Group%20Facilitation%20-%20More%20Information.htm.

* *Ron Kraybill is a professor in the Conflict Transformation Program at Eastern Mennonite University in Harrisonburg, Virginia. He is author of Style Matters: The Kraybill Conflict Response Inventory, a culturally sensitive five-style conflict-response inventory used by over 10,000 people worldwide. In addition to many published essays, he has also written Peace Skills: A Manual for Community Mediators (Jossey Bass 2001), Repairing the Breach: Ministering in Community Conflict (Herald Press, 3d ed. 1982); with Lynn Buzzard, co-edited Mediation: A Reader (Christian Legal Society 1979), and edited Training Manual for Conflict Transformation Skills (Mennonite Conciliation Service, Akron, Pa. 1988). In recent years, he has spent blocks of time as a consultant and trainer and peacebuilder in India, Sri Lanka, Guyana, and Burma.*

SUBMISSION DATE FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Winter	January 15, 2006	February 15, 2006
Spring	March 15, 2006	April 15, 2006
Summer	June 30, 2006	July 15, 2006
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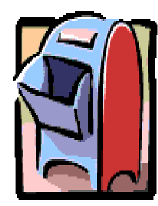

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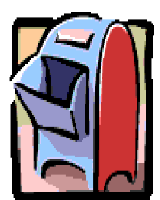

MEXICAN STATE OF GUANAJUATO AT THE VANGUARD OF ALTERNATIVE MEANS OF CONFLICT RESOLUTION

San Miguel de Allende, one of the most-visited tourist destinations in Mexico, now has a mediation center established under the Judicial Power of the State of Guanajuato

By Lic. Juan Carlos González García*

(Note from the Chair of the Newsletter Editorial Board: This article continues a series, begun earlier this year, whose purpose is to expose our readers to perspectives on Alternative Dispute Resolution from other parts of the world. If you are aware of ADR initiatives in other countries that may be of interest to our readers, please contact Walter A. Wright at ww05@txstate.edu.)

Mediation appeared with conflict itself, given humans' need to maintain unity in tribes or social groups where conflict developed, because each problem that arose between people subtracted strength from the group's ability to achieve its objectives. Throughout history, mediation has been practiced in all social environments in order to settle a large quantity of conflicts, including those of a legal character.

Notwithstanding the length of time that mediation has been practiced in Mexico, agreements reached through this means used to lack legal standing; therefore, the culture of confrontation continued to grow, consequently bringing with it the clogging of the courts and a resulting inefficiency in the delivery of justice.

In April 2003, following an initiative made by a visionary man, Lic. Héctor Manuel Ramírez Sánchez, who was President of the Supreme Court of Justice of Guanajuato from January 2002 to March 2005, the State Congress decreed a reform of Article 3 of the Political Constitution of the State of Guanajuato, which established the conditions for giving legal sustenance to mediation and conciliation as alternative means for the solution of conflicts. The terms of that article are as follows:

> **Article 3. Law is the same for everyone, from it emanate the powers of the authorities and the rights and duties of all persons found in the State of Guanajuato, whether residents or transients. Everyone is entitled to the enjoyment of its benefits and the respect of its provisions.**
>
> **Each person has the right to justice administered by courts that will be expeditious in imparting it within the periods and terms fixed by the laws, issuing their resolutions in a quick, complete, and impartial manner. Their services will be free, and judicial costs consequently will be prohibited.**
>
> **The law will establish and regulate mediation and conciliation as alternative means for the resolution of controversies between individuals, with respect to the rights to which they have free disposition.**
>
> **Mediation and conciliation will be guided by the principles of equity, impartiality, speed, professionalism, and confidentiality. The Judicial Power will have a mediation and conciliation body that will be free of cost and available at the request of interested parties. Such body will have the organization, powers, and functions that the law provides.**
>
> **The Judicial Power is independent of the other powers of the State. The Executive will guarantee the full execution of judicial resolutions.**

The three mediators for the Regional Site of the State Center for Alternative Justice at San Miguel de Allende, Guanajuato, Mexico (left to right): Lic. Juan Carlos González García, Lic. José Arturo Delgado Arredondo, and Lic. Juan Carlos Luna Alfaro. The mediators are standing in front of their offices in San Miguel de Allende.

On May 27, 2003, as a result of the additions to Article 3 of the Political Constitution of Guanajuato, the Law of Alternative Justice of the State of Guanajuato was published, the provisions of which regulate the practice of mediation

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MEXICAN STATE OF GUANAJUATO AT THE VANGUARD OF ALTERNATIVE MEANS OF CONFLICT RESOLUTION
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in the State by official mediators as well as private mediators. Most importantly, with this law, legal standing was given to agreements reached by mediating parties; their agreements have the same effect as a court's judgment. The Law of Alternative Justice became effective in Guanajuato on November 27, 2003, and with it was born the State Center of Alternative Justice (SCAJ), which began its operations with the opening of five regional sites located in the cities of León, Guanajuato, Irapuato, Salamanca, and Celaya. The twenty-seven mediators who began this challenging work, chosen by the Judicial Power of Guanajuato through a rigorous selection process, were trained as part of the Project for Mediation in Mexico, through the American Bar Association, the United States Agency for International Development, plus the Institute of Mediation in Mexico and the University of Sonora.

The training received by the mediators of the SCAJ is oriented towards transformative mediations, with the fundamental objective of settling conflict at its origin; that is to say, one looks for the emotional reason for the conflict in order to channel the parties towards the total restoration of their relationship, what we call "mediation with the heart."

At the beginning, we expected to reach 1,000 agreements, but given the arduous work of diffusion and the mediations practiced with the heart, we greatly exceeded the initial expectations, so that as of October 10, 2004, 1.5 months before completing a year, 2,101 agreements were registered, of which 58% were of civil character, 30% mercantile, 10% family, and 1% criminal. With these results arose the need to increase the coverage of SCAJ, and on May 20, 2005, three more regional sites were opened in the cities of Acambaro, San Francisco del Rincón, and San Miguel de Allende.

Given the tourist orientation of San Miguel de Allende and that its population consists of a high percentage of foreign residents, we mediators must take special care in the mediation sessions when additional challenges like cultural diversity and language present themselves. Nevertheless, as of October 3, 2005, we have reached 95 agreements in 168 requests for mediation received, an efficacy of 56%.

Mediation in the State of Guanajuato is practiced with the heart because we work with the desire of creating a "Culture of Peace"; this is our motto, and we feel proud to belong to the State Center of Alternative Justice of the Judicial Power; good for Guanajuato, good for Mexico.

** Lic. Juan Carlos González García is the Subdirector of the Regional Site of the State Center of Alternative Justice located in San Miguel de Allende, Guanajuato, Mexico. Walter A. Wright translated this article from Spanish to English, and he accepts full responsibility for any translation errors.*

ADR Section Calendar

2006

As a member of the ADR Section, you are always cordially invited to attend any of the quarterly Council meetings. We ask that as many members as can try to attend the annual meeting each year that is held in conjunction with the State Bar Annual Meeting. Next year, it will be in Austin. Please note our calendar:

Council Meetings

January 7, 2006
10:00 a.m.—3:00 p.m. Texas Law Center—Austin

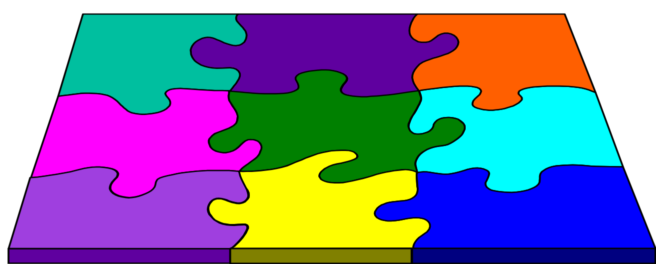
April 8, 2006
10:00 a.m.—3:00 p.m. Location to be Determined—Houston

June 16, 2006
2:30 p.m.—4:30 p.m. State Bar Annual Meeting—Austin

October, 2006
9:00 a.m.—3:00 p.m. Location to be Determined

General ADR Section Meeting

June 16, 2006
10:00 a.m.—2:00 p.m. State Bar Annual Meeting—Austin



ETHICAL PUZZLER

by Suzanne Mann Duvall

This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, and Office #214-361-0802 and Fax #214-368-7258.

Back by popular demand (that now has become an annual event), this issue's Ethical Puzzler asks ADR professionals throughout the State to share their own ethical dilemmas and the ways in which they were resolved (or not!). Enjoy.

Jay A. Cantrell (Wichita Falls): Husband and wife participate in a court-annexed mediation relative to their divorce case. The principal issue is the division of the community estate. Wife contends that there are fault grounds for the divorce. Accordingly, she takes the position there should be a disproportionate division of the community estate in her favor. Also, the parties have disagreements regarding the valuation of several community assets, including an oil and gas lease. There is no dispute that the lease will be awarded to the husband, but the wife has obtained an appraisal of the lease that is greatly in excess of the value placed on it by husband at the time of the mediation.

During the course of the mediation, it becomes apparent that the two major issues in the case are: (1) the valuation of the oil and gas lease and (2) whether the wife is entitled to a disproportionate division of the community estate. In the middle of the afternoon, husband decides that he should obtain an independent appraisal of the oil and gas lease before continuing with negotiations. The wife and her attorney are advised of this fact, and the parties agree to adjourn the mediation. I note in my mediation file: "no settlement, parties to get back with me."

After the mediation is adjourned, husband concludes that it is fruitless to reconvene the mediation and directs his attorney to set the case for trial. A setting is obtained by husband's attorney, with notice to opposing counsel. Shortly before the trial, I am contacted by wife's attorney, who states that he has filed a motion for continuance of the trial because he needs additional time to prepare for trial. He also states that he was under the impression that the mediation was not concluded and would be reconvened. He has cited this fact as one of the grounds for his motion for continuance. He also states that it is his recollection that the only issue remaining in the case is valuation of the oil and gas lease. Further, wife's attorney states that it is his understanding that husband has obtained an appraisal of the lease which indicates a value within a few hundred dollars of the value stated by wife's expert; and, in light of that development, he is certain the parties can reach an agreement on the remaining issues in the case. He wants me to appear at the hearing on his Motion for Continuous in person in support of his motion and indicates he can subpoena me.

<u>**My Response:**</u> During the initial phone call from wile's attorney, I advised him that I did not believe I could appear and testily unless both parties agreed. <u>See</u> Tex. Civ. Prac. & Rem. Code §§ 154.053(c) & 154.073(b). I checked the annotations to these statutes to see if there was any case law dealing with reports to the referring court relative to adjournment or reconvening of mediations, but I did not find any authority. The order for referral to mediation (prepared by husband's attorney and signed by the judge) states, in pertinent part: "After mediation, the Court will be advised by the Mediator, parties and counsel, only that the case did or did not settle." There is no other provision in the order for a report to the court.

Shortly after receiving the phone call from wife's attorney, I received a call from husband's attorney. He advised that husband believed further mediation would be fruitless because his client would never agree to a disproportionate division of the community estate. I advised husband's attorney that it was my recollection that the mediation had been adjourned, not concluded, and told him that I had a file note to myself indicating the parties would get back to me. I then called wife's attorney, told him I had spoken with husband's attorney and advised husband's attorney of the notation on my file that the parties would get back with me.

"A constant dilemma for any mediator is how much assistance to provide in the negotiation between the parties when the only issue is the dollar amount"

I was not subpoenaed and did not testify at the hearing on the motion for continuance. The parties appeared at the hearing on the motion for continuance, attempted to settle the outstanding issues, but were unable to do so. The trial setting was continued.

I have had several circumstances arise recently where the parties agree to adjourn mediation. I then receive a call from the court coordinator wanting to know the status of the case and, in some cases, asking for a written report. In these situations, I have advised the parties of the request from the court and have sent a proposed report letter for their approval. I intend to amend my procedures as follows:

When a mediation is adjourned by agreement of the parties, I will endeavor to get an agreement of the parties on a date to reconvene. I will also prepare a report letter to the judge and ask both parties to agree to it before adjourning the mediation.

M. Scott Magers (San Antonio): A constant dilemma for any mediator is how much assistance to provide in the negotiation between the parties when the only issue is the dollar amount. Often, both parties will tell the mediator that their goal is a certain amount and they want the mediator to tell them how to reach that goal (or even a little under or over depending on whether they are plaintiff or defendant). My response is always that I cannot negotiate for them; however, I do not think it is improper for a mediator to suggest to a party a monetary move is too small if they want to reach their goal without the other

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Ethical Puzzler
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party getting discouraged. Experience shows that the only two issues relevant in reaching a monetary settlement are: one, the amount of the final defendant offer and two, whether the plaintiff will accept that number in settlement. Consequently I think it is important for the mediator to caution the two parties (or multiple parties) from becoming discouraged by the perceived gap in the monetary demands and offers.

Near the end of the negotiation, when the parties are reaching their final numbers, it is extremely important for the mediator not to disclose confidential information about the true intent of the parties. It is not unusual for a mediator to know that a "final" offer or demand in writing could be increased or reduced, but such information is certainly not to be shared with the other party. In such a situation, where the mediator is asked whether there is any more flexibility, I believe the correct response is: "I was told final means final, but I never know when negotiators might change their minds." It does not seem inappropriate for a mediator to encourage negotiation until one party or the other signals a firm and clear decision to end the negotiation.

Kay Elkins-Elliott (Fort Worth): After co-mediating a very contentious post-divorce marital property dispute for 7 hours, the mediators are in a caucus with the husband and his attorney. The husband grins and says to his attorney, "Shall we tell the mediators what is really going on now? Okay, I signed a Rule 11 settlement agreement promising to give my ex-spouse 50% of the appraised value of my company. The agreement stipulated that if I didn't do that within one year, I would sell the company and divide the proceeds with her. Since that time, with my attorney's help, I have transferred just enough shares to my employees that I can't do what the agreement stipulates. My employees don't want the company sold to an outsider because they might lose their jobs. Her fallback plan isn't worth the paper it is written on. That is why I am offering her so little money to settle this dispute. Worst case, the company will be sold on the courthouse steps and someone in my family will buy it cheap and give it back to me. She better take my offer or she will get less. All of this is confidential."

What I did: Recusing myself would not end the mediation because the other mediator did not have a problem with the defendant's disclosure. A full disclosure of the words spoken in the defendant caucus would be a breach of confidentiality. I decided to go back to Negotiation 101. All day, the plaintiff had insisted that any offers made at the mediation would have to be superior to the best alternative to a negotiated agreement, and that alternative was the existing agreement, reached before the divorce, to sell the company. I wanted to explore the stability and the strength of that BATNA earlier in the mediation, before the defendant's admission, but there were many other pressing issues on the agenda. I decided, therefore, to go back to the plaintiff's caucus room and initiate an analysis of the reality of that alternative.

Once this line of inquiry was opened, the wife became very suspicious and began to question whether there were facts unknown to her attorney and her accountant that altered their perception of the bargaining range. Although the question I asked was not a repetition of the words spoken by the defendant, this was certainly a clue that there were facts unknown to the wife that gave the husband power in this negotiation. As the probability of her receiving 50% of the true value of the business began to diminish, the original objective of the mediation disappeared. Reaching agreement was impossible when the two parties were not negotiating in good faith. The wife really had no BATNA,, and the business would have to be sold on the courthouse steps at a reduced price. Soon after the realization that the facts had altered and the wife was not going to be receiving good-faith offers to resolve the dispute, the mediation ended.

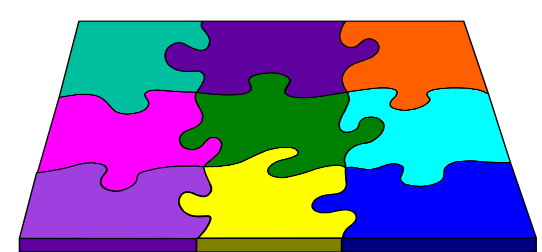
My co-mediator did not agree with my decision to ask questions regarding the previous contract and took the position that we should have continued to do shuttle diplomacy to see if any agreement could be reached despite the fact that one side did not have current and accurate information on the husband's ability to perform his contract. Other mediators I have discussed this case with have suggested that when the husband made the admission, I should have asked him whether he had updated the court since the settlement agreement reached before the divorce was approved the court.

Most mediators reading this will take issue with my decision and will probably also believe that the confidentiality of the process trumps all other duties, unless the issue is sexual abuse of a child or elder abuse, statutory exceptions to the confidentiality provisions of the Texas ADR Act. This mediation reinforces the lesson that when co-mediating, it is important to consult with the other mediator, privately, when ethical issues arise. A coordinated approach will always be superior to the situation I experienced.

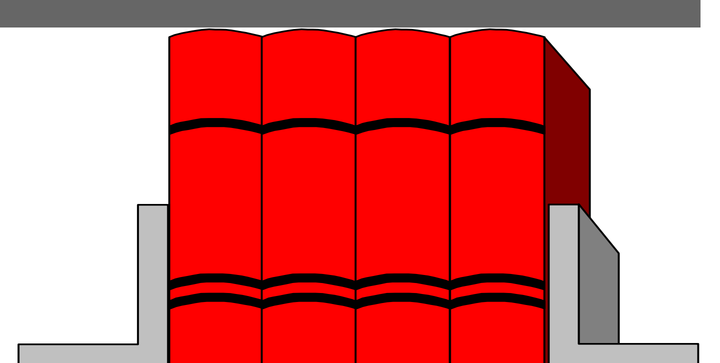
Comment:

Once again, our contributors (all experienced and distinguished mediators) prove that its not the occurrence of such dilemmas that is important, it is the awareness that there may be a problem that makes us good at what we do.

If you too have experienced an ethical dilemma in your practice, let us know, and we will be happy to put it out for feedback. Today, more than ever, ethics are crucial in our practice. On June 13, 2005, the Supreme Court (misc. Docket No. 05-9107) published its Approval of Ethical Guidelines for Mediators, which apply both to mediators and counsel representing parties in mediation. See the Court's Order on pages 3-4 and accompanying article by Bruce Stratton and Bill Low on page 2.



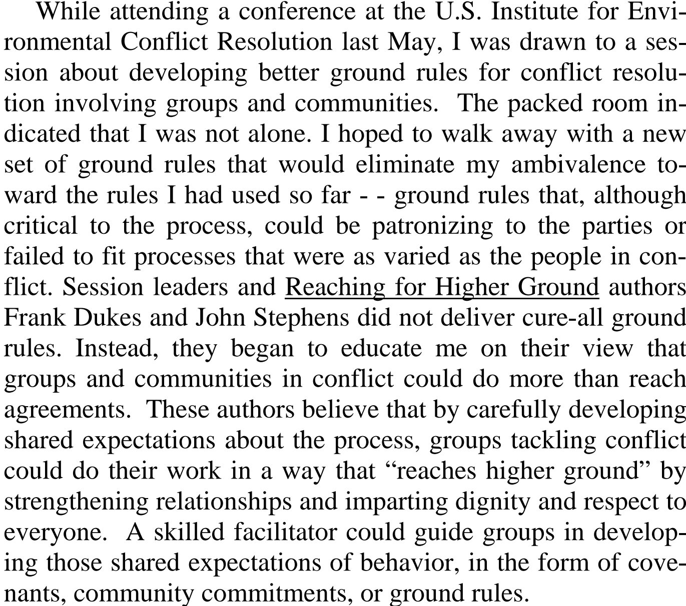
BOOK REVIEWS



REACHING FOR HIGHER GROUND IN CONFLICT RESOLUTION: TOOLS FOR POWERFUL GROUPS AND COMMUNITIES

By E. Franklin Dukes, Marina A. Picolish, and John B. Stephens, Jossey Bass, 2000.

Reviewed by Margaret Menicucci*



While attending a conference at the U.S. Institute for Environmental Conflict Resolution last May, I was drawn to a session about developing better ground rules for conflict resolution involving groups and communities. The packed room indicated that I was not alone. I hoped to walk away with a new set of ground rules that would eliminate my ambivalence toward the rules I had used so far - - ground rules that, although critical to the process, could be patronizing to the parties or failed to fit processes that were as varied as the people in conflict. Session leaders and Reaching for Higher Ground authors Frank Dukes and John Stephens did not deliver cure-all ground rules. Instead, they began to educate me on their view that groups and communities in conflict could do more than reach agreements. These authors believe that by carefully developing shared expectations about the process, groups tackling conflict could do their work in a way that "reaches higher ground" by strengthening relationships and imparting dignity and respect to everyone. A skilled facilitator could guide groups in developing those shared expectations of behavior, in the form of covenants, community commitments, or ground rules.

Using ground rules, along with other tools, enables mediators to create a safe space for parties to discuss their conflict. At the beginning of a process, mediators usually recommend basic ground rules about communication such as "don't interrupt," "turn off your cell phones," and so on. We refer back to those rules when the parties' communication styles and methods impair their ability to understand and negotiate the issues. When working with multi-party, public policy issues, the development of ground rules or "protocols" is a key component in planning the process. Mediators or facilitators frequently recommend ground rules or protocols that identify the purpose of the process, who will attend, how the participants are expected to behave, what level of agreement will be achieved (consensus or something else), and length and frequency of the meetings. Often, the participants hastily negotiate these process ground rules because they are anxious to get to the substance of the dispute.

The authors remind us that, especially with large groups either in conflict or with a difficult mission, *process matters.* They use the notion of "higher ground" as a metaphor for a place where people treat each other as they wish to be treated and come to new understandings about their shared work, relationships, and potential. Before exploring what this "higher ground" may look like, the authors first explain how people come to meetings and mediations with "Unspoken Rules of Engagement." These rules describe the varied perspectives about conflict that may be held by individual participants; perspectives usually based on how conflict was handled in our homes, workplaces and communities. The authors also look at how the misuse of ground rules undermines a process. Typical misuses may be the inconsistent application of the ground rules or the failure to have an agreed-upon process to revise the rules to accommodate a more flexible process.

The authors then elaborate on the metaphor of "higher ground." They describe higher ground as principled ground, where truth telling and truth seeking are honored, integrity is valued, and trust is given because it is earned. Higher ground is new ground, providing an opportunity to explore what was not previously imagined; a new and enlarged perspective, incorporating the whole picture of a conflict or project as well as the way each individual fits within that picture. Higher ground can be a refuge, where communication is achieved without the incivility that often accompanies conflict. Higher ground must be shared ground, where the considerations of constituencies as well as those who may be left behind--the unrepresented--are brought into the process. The authors recognize that striving for higher ground in a meeting or ADR process can make the process more difficult or lengthy, especially at the beginning, but believe that the end results are worth the effort.

With those foundations laid, the remainder of the book more directly addresses how to develop shared expectations about the meeting or ADR process that will help groups reach higher ground. In these chapters, the authors identify six steps to developing successful covenants. Following these steps, mediators or facilitators would assess what a group needs, educate and inspire a group to develop covenants, promote full participation and accountability, and assist the group in regularly evaluating, revising and recommitting to the covenants or ground rules. The authors use snapshots of their varied facilitation and mediation experiences to discuss the steps and lessons learned. Specific techniques and recommendations for developing and evaluating shared expectations appear in special sections called "Toolboxes" throughout these chapters, moving the book from theory and examples, to concrete strategies.

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Regardless of your mediation style and practice, the chapter on "Unspoken Rules of Conflict" provides additional insight on communication problems and assumptions that can plague participants in conflict. For mediators of disputes in which the parties will continue in their relationships, such as employee disputes, family conflicts, and neighborhood conflicts, the tools for striving for higher ground are worthy of understanding. I am among the optimists who believe the mediation process can show the participants new ways for continued communication of sensitive issues and differing perspectives. Foremost, this book focuses on the work of groups and communities. For mediators who want to expand their practices to facilitating group processes, or for those who find themselves answering phone calls from the PTA, the business association, or leaders of the religious community, seeking assistance with a conflict, this book provides food for thought as well as actual tools for developing a strong group process.

Note: If the book is difficult to find through normal channels, you may want to contact John Stephens at the University of North Carolina or Frank Dukes at the University of Virginia, Institute for Environmental Negotiation.

* **Margaret Menicucci** is an attorney, mediator and facilitator, living in Austin, Texas.

Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals

David B. Lipsky, Ronald L. Seeber and Richard D. Fincher,

Reviewed by Lisa Weatherford*

Comprehensive, organized, and well-researched, this book is a relatively recent addition to the unofficial progression of guides that challenge traditional reactive approaches to work-related disputes and suggest better ways to deal with them.[1] Like its predecessors, Emerging Systems for Managing Workplace Conflict ("Emerging Systems") provides the reader with the methodological and informational tools to design, implement, and evaluate an ADR process that can effectively prevent and manage workplace conflict. However, Emerging Systems is more than a how-to guide. It introduces and explains the rise of conflict management in terms of its political and social contexts—a product of labor-movement dynamics—and concludes with an insightful discourse about the future of conflict management in the workplace.

As the subtitle indicates, the book's audience is primarily management and dispute-resolution professionals; however, human-resource and other business professionals, corporate counsel, legal-support personnel, and students will find the book useful and informative as well. It is technical, but not esoteric, so Emerging Systems also works well as a text in academic settings, especially in conjunction with an assignment that asks students to design a conflict-management system for a fictional business entity. Although it might be a bit much for an average employee to digest, a company contemplating changes in the way it handles conflict should make this book required reading for its executives, human-resources staff, and all levels of management at the very least.

The authors collectively spent five years researching the use of ADR in corporate America before they decided to combine their data and collaborate on Emerging Systems. They interviewed representatives from the Fortune 1000, including human-resource managers, corporate-litigation executives, and other managers and executives at several levels. They also surveyed the active membership of the National Arbitration Association (NAA), the primary professional labor-management organization. Comprised of empirical data from four separate, but interrelated, research projects, the results are selectively interspersed throughout the book and provide case studies that supplement the book's core material.

Although some professionals use the terms interchangeably, the authors make an important distinction between dispute management and conflict management. A conflict is "nearly any organizational friction that produces a mismatch in expectations of the proper course of action for an employee or a group of employees,"[2] and may or may not become a dispute, which is "a subset of the conflicts that require resolution, activated by the filing of a grievance, a lawsuit against an organization, or . . .a written complaint."[3] Traditional ways to resolve disputes, such as litigation, or even settlement prior to a trial, address the issues after they become disputes; few, if any, attempts are made to resolve the matter before a lawsuit is filed. Conversely, conflict management is an integrated, multi-process system that aims to prevent conflicts from becoming disputes.

The authors declare two primary objectives for the three-part book. The first objective, outlined in Part One, "explain[s] the rise of conflict management systems in the United States."[4] They contend that "the dramatic rise in alternative dispute resolution and conflict management systems in U.S. organizations . . . is the consequence of forces that are giving rise to a new social contract at the workplace,"[5] a contract that is still emerging, and hasn't yet reached its final form. Nevertheless, this partially formed social contract is having a profound effect on the way companies do business. Ironically, the disintegration of the old social contract began in the "turbulent" 1960s, with its emphasis on individual rights and challenges to authority. The litigation surge in the 1970s, globalization, a restructuring of the U. S. economy, the political climate, deregulation, tort reform, the professionalism of human-resource management, the decline of unionism, and a reorganization of the workplace, individually and collectively took their toll on what was left.[6]

In this atmosphere, many companies are examining the way they handle workplace conflict, with varying results. Based on the authors' research, companies use ADR because it is mandated in a contract, it is company policy, it is court ordered, or they use it voluntarily or for other reasons.[7] Companies typically reject ADR processes for the following reasons:

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- Senior managers are opposed.
- Middle managers fear loss of control.
- ADR is too difficult or too complicated to initiate.
- Arbitration and mediation are not confined to legal rules.
- Opposing parties are unwilling to consider using ADR.
- ADR results in too many compromise settlements.
- Managers lack confidence in neutrals.[8]

Based on their research, the authors present an analytical model to explain how companies decide on a conflict-management strategy. They assert that companies typically adopt one of three conflict-management strategies: contend, settle, or prevent. They begin with an overview of how the managers they interviewed perceived conflict management, which would in turn influence their strategy. For instance, contenders perceive conflict resolution as a zero-sum game, with a clear winner and loser, so they typically choose traditional litigation over ADR methods. Settlers tend to be more pragmatic, and take several factors into consideration before they decide what to do about each individual situation. Less competitive managers, those who do not view conflict resolution as a win-lose proposition, are more likely to end up in the prevent category, and it is these managers who are amenable to ADR methods. Several environmental and organizational factors act as variables, which can further influence the decision.

Part Two, essentially the how-to section, addresses the second objective, which is to "give readers an understanding of how organizations build conflict management systems."[9] This material will be somewhat familiar to those who have read other books on designing conflict-management systems. Emerging Systems advocates following a process that includes four distinct, yet overlapping stages organized by chapter:

- "Design of Conflict Management Systems: Internal Features" focuses on the types of conflicts that arise in the workplace, and how those conflicts can be resolved within the organization through open-door policies, ombuds, hot-lines, inside mediators, facilitators such as managers, peer reviews, and executive panels.[10]

- "Design of Conflict Management Systems: External Features" focuses in particular on the use of professional mediators and arbitrators who are not employees. Most of this section deals with arbitration—its pros and cons, legal precedent, and controversial issues such as whether to require employees to sign a pre-dispute contract that mandates binding arbitration to settle future claims.[11]

- "Implementation of Conflict Management Systems" discusses the six phases that are necessary to start the system and keep it running: 1) create the organizational foundation on which the system can be built; 2) gather the necessary information; 3) develop a preliminary structure, which is the core of the system, the details; 4) finish the design and incorporate requested changes; 5) train support personnel, launch and market the system; and 6) instill trust and credibility in the system and perform ongoing maintenance.[12]

- "Evaluation of Conflict Management Systems" is an important, but often overlooked, step. The system should be evaluated regularly to ascertain if it is working as intended, to determine the costs and benefits, and to analyze the system for future improvement.[13]

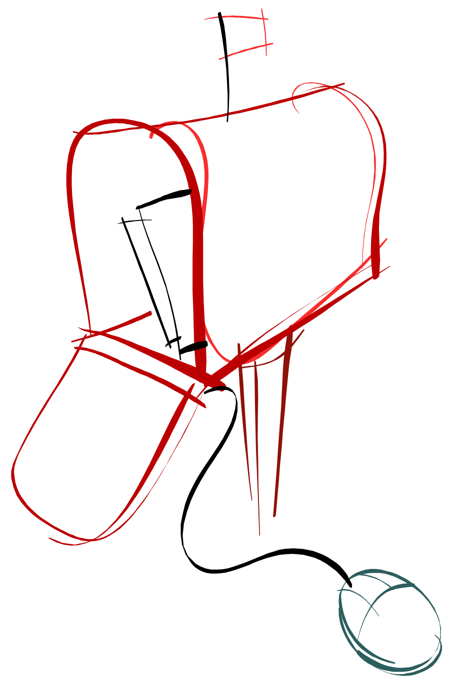
Part Three is a frank discussion of the future of corporate conflict management in this country, and relies heavily on the research data. The authors, who state up front that the future of conflict management in the workplace is uncertain, are cautious but optimistic. Their interpretation of the data indicates that "the future of ADR in U. S. corporations depends on the extent to which ADR policies and practices becomes institutionalized . . . whether they become a more or less permanent part of the culture of the organization."[14] The people in leadership roles are the greatest obstacle to growth because many are skeptical of ADR, resistant to change in general, and reluctant to take the risk, especially when the evidence of ADR's efficacy is not conclusive.

The book's final chapter identifies trends that the authors believe could influence that future, both positive and negative. Not only do they predict that workplace systems will become institutionalized, but will also be integrated into the entire framework of organizations. They anticipate a rise in Internet-based resolution, and point out that there are already several companies that operate exclusively as online dispute specialists. Nevertheless, the authors are honest and realistic, and admit that conflict management faces "key challenges" to its universal acceptance. They point out the considerable problems that could impede growth, many of which pertain to arbitration, but despite those concerns, the book ends on a mostly positive note that conflict resolution in the workplace will continue to grow for at least another generation.

** Lisa Weatherford holds an M.A. in English from New Mexico State University and is a second-year student in the graduate Legal Studies Program at Texas State University in San Marcos. Lisa has taught college-level composition, business writing, literature, and public speaking, and has worked in retail, hospitality, petroleum, insurance, and recently, in the field of archaeology.*

ENDNOTES

[1] See, e.g., Karl A. Slaikeu & Ralph H. Hasson, Controlling the Costs of Conflict: How to Design a System for Your Organization (1998).
[2] David B. Lipsky et al., Emerging Systems for Managing Workplace Conflict 8 (2003).
[3] Id.
[4] Id. at 25
[5] Id. at 31.
[6] Id. at 54-65.
[7] Id. at 98.
[8] Id. at 110.
[9] Id.
[10] Id. at 155.
[11] Id. at 183.
[12] Id. at 225-26.
[13] Id. at 263.
[14] Id. at 299.



ADR on the Web

INTERNATIONAL ONLINE TRAINING PROGRAM ON INTRACTABLE CONFLICT

By Mary Thompson ✶

http://www.colorado.edu/conflict/peace/index.html

This site is one of several developed by the Conflict Research Consortium at the University of Colorado. Two of their better-known sites, Beyond Intractability and CRInfo, contain extensive information in the area of dispute resolution.

The International Online Training Program on Intractable Conflict provides a list of key issues in conflict resolution (e.g., framing, escalation, exchange, etc.) Each issue can be approached from a "Problem" or "Solution" perspective.

For example, the topic "Exchange" refers to negotiating win/win trades. Approaching this topic from the "Problem" perspective, the web site identifies eighteen problems related to exchange, including:

- Poor timing
- Refusal to negotiate
- Wrong parties at the table, and
- Power imbalances.

Each of these problems in turn takes the reader to more in-depth information on that problem. Clicking on "Poor Timing," for example, provides links to:

- An overview of the problem of timing in negotiation
- Links to cases illustrating timing problems
- Links to possible solutions to timing problems, and
- Links to related problems.

Approaching the topic of "Exchange" from the "Solutions" perspective provides a list of strategies, including:

- Distributive bargaining
- Negotiation loop-backs
- Pursing negotiable sub-issues, and
- "Yes-able" propositions.

Clicking on any of these solutions provides further in-depth information on each specific strategy.

If one can tolerate the confusing structure of this website, there really is a huge amount of content that relates to real-world practice. Although the site is designed for a general audience of conflict resolution practitioners, the content has clear applications for mediators, mediation trainers and attorneys serving as advocates in mediation.

** Mary Thompson, Corder/Thompson & Associates, is a mediator, facilitator and trainer in Austin.*

If you are interested in writing a review of an ADR-related web site for Alternative Resolutions, contact Mary at emmond@aol.com.

2005—2006 CALENDAR OF EVENTS

Mexico Conference: Fifth National Conference and First World Conference of Mediation ★ ***Universidad de Sonora, Hermosillo,*** Sonora, Mexico. ★ Conference dates: November 23-26, 2005. ★ Pre-conference events: November 3-22, 2005. Post-conference events: November 28-30, 2005. ★ For further information, visit www.congresodemediacion.org or contact Walter A. Wright at ww05@txstate.edu.

Binding Arbitration Training★ Houston ★December 1-2, 2005 ★ ***Worklife Institute*** ★For more information call 713-266-2456, Fax: 713-266-0845 or www.worklifeinstitute.com. Elizabeth or Diana, 713-266-2456, www.worklifeinstitute.com; info@worklifeinstitute.com or dcdale@aol.com. All training meets the TMTR standards, if applicable

40-Hour Basic Mediation Training ★ Austin ★ December 5-9, 2005 ★ ***Center for Public Policy Dispute Resolution - The University of Texas School of Law***★ For more information call 512.471.3507 or Check out this website for more information: www.utexas.edu/law/cppdr

Workplace Conflict Resolution Training ★ Houston ★December 8-10, 2005 ★ ***Worklife Institute*** ★For more information call 713-266-2456, Fax: 713-266-0845 or www.worklifeinstitute.com.

Mediator Ethics ★Houston ★December 17, 2005; 3 hours ★ ***Worklife Institute*** ★ C. Dale and Elizabeth F. Burleigh ★ For more information call 713-266-2456, Fax: 713-266-0845 or www.worklifeinstitute.com..

2006

40-Hour Basic Mediation Training ★ Houston ★ January 13, 14, 15 continuing January 20, 21, 22, 2006 ★ *University of Houston Law Center A.A. White Dispute Resolution Center*★ For more information call Robyn Pietsch at 713.743.2066 or www.law.uh.edu/blakely/aawhite

Transformative Mediation Training ★ Houston ★ January 26-28, 2006 ***Worklife Institute*** ★ Diana C. Dale and Elizabeth F. Burleigh ★ For more information call 713-266-2456, Fax: 713-266-0845 or www.worklifeinstitute.com.

Basic 40-Hour Mediation Training ★ Austin ★ January 25-29, 2006 ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

Basic 40-Hour Mediation Training ★ Houston ★ February, 9-11 continuing 16-18, 2006 – 2 Thursdays: 4:30 P.M. – 8:30 P.M., 2 Fridays and Saturdays: 9 A.M. – 6:00 P.M.; ***Worklife Institute*** ★ Trainers: Diana C. Dale and Elizabeth F. Burleigh ★ For more information call 713-266-2456, Fax: 713-266-0845 or www.worklifeinstitute.com.

40-Hour Basic Mediation Training ★ Houston ★ March 14, 18. 2006 ★ ***University of Houston Law Center A.A. White Dispute Resolution Center***★ For more information call Robyn Pietsch at 713.743.2066 or www.law.uh.edu/blakely/aawhite

Negotiation Workshop ★ Austin ★ March 23-26, 2006 ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

The Association of Attorney-Mediators Annual Meeting and Advanced Attorney-Mediator Training ★Little Rock, Arkansas ★ March 31/April 1, 2006 Please visit the web site at www.attorney-mediators.org for more information or contact the AAM National Office at 1-800-280-1368

Basic 40-Hour Mediation Training ★ Houston ★ April 20-22 continuing 27-29, 2006 – 2 Thursdays: 4:30 P.M. – 8:30 P.M., 2 Fridays and Saturdays: 9 A.M. – 6:00 P.M.; ***Worklife Institute*** ★ Trainers: Diana C. Dale and Elizabeth F. Burleigh ★ For more information call 713-266-2456, Fax: 713-266-0845 or www.worklifeinstitute.com.

Advanced Mediation & Ethics ★ **Austin** ★ **May 18-21, 2006** ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

Basic 40-Hour Mediation Training ★ **Austin** ★ **May 21-25, 2006** ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

40-Hour Basic Mediation Training ★ **Austin** ★ **June 5-9**,. 2006 ★ ***Center for Public Policy Dispute Resolution - The University of Texas School of Law***★ For more information call 512.471.3507 or Check out this website for more information: www.utexas.edu/law/cppdr

Family Mediation Training ★ **Austin** ★ **August 24-27, 2006** ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

Conflict Resolution ★ **Austin** ★ **October 12-15, 2006** ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ Section Newsletter *Alternative Resolutions* is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ Valuable information on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

✓ Continuing Legal Education is provided at affordable basic, intermediate and advanced levels through announced conferences, interactive seminars.

✓ Truly interdisciplinary in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

✓ Many benefits are provided for the low cost of only $25.00 per year!

STATE BAR OF TEXAS
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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2005 to June 2006. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

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ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. Articles must be submitted for publication no later than 6 weeks prior to publication. The deadline for each issue will be published in the preceding issue.
2. The article must address some aspect of alternative dispute resolution, negotiation, mediation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. If possible, the writer should submit article via e-mail or on a diskette (MS Word (preferably), or WordPerfect), double spaced typed hard copy, and some biographical information.
4. The length of the article is flexible: 1500-3500 words are recommended. Lengthy articles may be serialized upon author's approval.
5. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.
6. All quotations, titles, names and dates should be double checked for accuracy.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.

2. In the event of a decision not to publish, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right to edit articles for spelling, grammar, punctuation and format without consulting the author.
2. Any changes which affect the content, intent or point of view of an article, shall be made only with approval of the author.

Future Publishing Right

Authors reserve all their rights with respect to their article in the newsletter, except that the State Bar of Texas Alternative Dispute Resolution Section obtains the rights to publish the article in the newsletter and in any State Bar publication.

ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website addresses or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

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