ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By John K. Boyce, III, Chair, ADR Section

John K. Boyce, III

I write this message on the plane as I return from the Council's quarterly meeting in Dallas. Surrounding me is a sea of football fans wearing orange shirts, cocky after Texas's win over Oklahoma in the annual dispute resolution procedure at the Cotton Bowl.

As you might expect, our Council meeting reflected the thoughtfulness and passion of its members, who are committed to enhancing ADR's place in our jurisprudence system. We agreed on several items of action.

Our Section proposed two pieces of legislation for the next Texas legislative session, which will convene in January 2009. The first proposal is a technical "fix" that allows Texas appellate courts jurisdiction to hear interlocutory appeals arising from the Federal Arbitration Act. The State Bar Board of Directors voted to support this initiative, and it will become a part of the Bar's legislative package. The second proposal would add a new Collaborative Law chapter to the Civil Practices and Remedies Code and authorize Collaborative Law to function in contexts other than family law. The Bar's Board took a neutral position on the second proposal, which will not be part of the Bar's legislative package.

We expect the Legislature to address the status of arbitration. We anticipate bills that seek to radically amend the Texas General Arbitration Act. For instance, there is likely to be a proposal that would virtually do away with pre-dispute (i.e., contractually agreed) arbitration in consumer and employment contexts. Another proposal would go even further to allow the full panoply of appellate review of an award, as if it were a conventional judgment. Even a State Bar task force recommended that certain types of disputes not be subject to arbitration. Our input was not originally sought, though we presented our views much later.

There are similar moves in Congress where bills have been proposed to amend the Federal Arbitration Act to do away with pre-dispute arbitration not only in consumer or employment contexts but in franchise and nursing home disputes as well.

I cannot overemphasize what a serious threat some of these proposals present to the arbitration process and to those who believe in its distinctiveness. Arbitration could be relegated to a part of the continuum of dispute resolution processes with no clear boundary between where arbitration ends and litigation begins. As a practical matter, some of these proposals could end arbitration of important types of disputes. Having said this, we are not against change, per se. There may well be cases that, because of their impact on public policy, need to be in court.

In response to these assaults, your Council has been working for some time to assemble a "White Paper" of informational talking points designed to educate lawmakers on the arbitration process. As a quasi-governmental organization, we cannot lobby for or against bills, but we can serve as a "resource." Our perceived objectivity often gives us an important role. We intend to be above the fray, perhaps even serving as conduits or brokers between various groups (for which our mediation skills will come in handy). Accordingly, as in the past, we will be active in the upcoming Texas legislative session.

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Inside This Issue:

HIGHLIGHTS FROM THE 2008 NATIONAL COALITION FOR DIALOGUE AND DELIBERATION CONFERENCE IN AUSTIN

By Mary Thompson*

The National Coalition for Dialogue and Deliberation (NCDD) describes itself as "a community of practitioners, organizations, researchers, public officials, activists, artists, students, and others dedicated to solving problems through honest talk, quality thinking and collaborative action." NCDD's biennial national conference was held in Austin during the first week of October 2008.

The NCDD conference experience is unlike other national conferences such as the Association for Conflict Resolution or the ABA Dispute Resolution Section conferences. At this conference, the sessions and processes are actively experimental. Art, music and technology play active roles in both learning and discourse. Between sessions, people are intensely engaged in conversation. In many of the sessions, the audiences are as actively engaged and empowered as the presenters.

Conference sessions were a diverse offering of information, skills and reflections by presenters from various counties, cultures, racial and ethnic backgrounds, political parties and age groups. Titles included:

- "Taking Dialogue to Work"
- "The Underlying Dynamics of Conversations That Matter"
- "Speaking Truth to Power: Authentic Voices, Responsive Ears"
- "Embedding D&D into Government Systems"
- "Compassionate Listening: D& D from the Inside Out"
- "Tools for Dealing with Uncertainty, Ambiguity, and Paradox: Reflective Methods for Group Development"
- "Just Vision: Israeli and Palestinian Peacebuilding Narratives Open New Channels for Dialogue and Action"
- "Taking It to The Streets: Innovative Approaches to Dialogues Addressing Racism"

In addition, the conference offered a series of activities to enrich people's understanding and experience of the dialogue and deliberation field:

Conversation Café Facilitator Training, where conference participants could participate in the Conversation Café format and then be trained to facilitate the process. A facilitator's manual can be found at www.conversationcafe.org.

D&D Marketplace, where conference participants could circulate among practitioners and groups who had come to describe their programs and innovations. To see examples of their programs, watch the video at http://www.youtube.com/watch?v=47uusYBBGNg.

Saturday's Reflective Panel was typical of NCDD plenary sessions. The panel, which was to address challenges in the D&D field, conducted the session as an "Inquiry Circle." The format was designed to avoid the serial, long monologues usually seen on panels and instead keep an interactive conversation moving among the panelists and into the audience.

Graphic Recording is an emerging tool in the facilitation field that captures ideas from conversations in visual images. A team of graphic recorders worked on specific themes throughout the conference. Conference participants provided focus group feedback to evaluate the technique.

In the past ten years, many mediators and dispute resolution practitioners have been drawn to the aspect of our field that explores the roles of conversation, storytelling, and relationship transformation in conflict management. This year's NCDD conference was a stimulating setting to further that exploration.

Watch for announcements for the 2010 NCDD conference at www.thataway.org. To see the conference in action, look at the 2006 conference video at http://www.youtube.com/watch?v=6bYWi-rJ910.

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AUSTIN WAS THE SITE OF THE 2008 ANNUAL CONFERENCE OF THE ASSOCIATION FOR CONFLICT RESOLUTION

By Walter A. Wright*

The Association for Conflict Resolution ("ACR"), a prominent national and international organization of dispute resolution professionals, held its eighth annual conference in Austin on September 24-27, 2008. Entitled "Aspirations, Possibilities, and Realities: Expanding Principles, Practice, and Research in a Changing World," the conference attracted approximately 1,000 attendees from the United States and other countries.

ACR devoted the opening day, September 24, to several pre-conference institutes, including ACR International Day, the Spirituality Section's Empowering Institute, and institutes on Creating a New Literature of Conflict Resolution, Advanced Principles of Restorative Justice, the Art and Science of Apology, Boosting Mediator Curiosity and Increasing Reflective Practice, and Building and Marketing a Profitable Practice in the Conflict Resolution Field. An Advanced Commercial Mediation Institute lasted two days (September 24 and 25).

Lee H. Hamilton provided the keynote address on September 25. Hamilton, who served in Congress for thirty-four years representing Indiana's Ninth District, is currently president and director of the Woodrow Wilson International Center for Scholars in Washington, D.C., and he serves as director of the Center on Congress at Indiana University. He addressed the current state of U.S. foreign policy and discussed the challenges the next president will face in conducting foreign policy. He also described the occasions, when he was a congressman, in which members of Congress were able to work collaboratively to solve national problems. He stressed that current domestic and international situations will require a return to congressional and presidential bipartisanship if the U.S. is to resolve its own problems and participate effectively in helping to resolve global problems.

Following Hamilton's keynote address on September 25, the conference participants spent the remainder of the day attending two sets of afternoon breakout sessions with seventeen workshops each, plus six mini-plenary sessions. The topics of the mini-plenary sessions were: The Need for Greater Diversity in the Selection of ADR Service Providers; Community and Policy Responses to Immigration, Migration, and Complex Social Change; Conflict Resolution and Higher Education; Emerging Communities for Fostering Conflict Engagement in Health Care; The Legacy of Colonialism, Ethnic, Religious, and Racial Segregation, Discrimination and Slavery: Institutional Responses in the United States, Australia, and the North of Ireland/Northern Ireland; and Addressing the Needs of Soldiers and their Families: Conflict Resolution Responses to Returnee Issues.

On September 26 and 27, attendees were able to participate in five more breakout sessions with seventeen workshops per session. The conference closed on September 27 with a Presidential Luncheon at which ACR summed up its prior year's work, introduced new officers and directors, and distributed numerous awards to people who had made outstanding contributions to the ADR profession.

Numerous Texans participated in the conference at various levels. In addition to providing volunteers from Austin-area universities, the Austin Association of Mediators, and the Austin Dispute Resolution Center, Texans spoke at several of the institutes and workshop sessions:

- Mina Brees, Hon. Carlos Lopez, Jeff Jury, Hesha Abrams, and John Harvey all spoke at the Advanced Commercial Mediation Institute.
- Professor Edwin Dorn participated in a panel discussion that followed Lee Hamilton's keynote address.
- Anu Rao spoke at the mini-plenary session on increasing diversity in the selection of ADR service providers. Rao also presented a workshop entitled "Development, History and Outcomes for Successful Ombuds Office in World-Renowned University of Texas M.D. Anderson Cancer Institute."
- Lynda Frost, with colleagues from Arizona and Georgia, participated in a workshop entitled "Mediation with Clients with Mental Impairments."
- Barbara Manousso, along with colleagues from California and Massachusetts, participated in a workshop entitled "Elder/Adult Family Mediation: A New and Evolving Field."

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PERRY HOMES V. CULL: TEXAS SUPREME COURT FINDS HOMEOWNER WAIVED ARBITRATION RIGHTS

By Jeff Jury*

On the sixty-ninth anniversary of Lou Gehrig's consecutive games-played streak ending, a streak of another kind ended in Texas. For the first time, the Texas Supreme Court issued an opinion finding that a party waived its right to seek arbitration as a dispute resolution process in *Perry Homes v. Cull*.[1] Five justices joined in the majority opinion, with three justices writing separately. This decision, which emerged more than two and one-half years after the petition for discretionary review was filed, generated considerable commentary and law blog activity. Wherever individual passions may lie, Texas practitioners now have guidance as to what facts will support a finding of waiver.

This case concerned a home purchased from Perry Homes by Mr. and Mrs. Cull in 1996. The Culls also purchased a home warranty from two warranty companies. The warranty contained a broad arbitration agreement requiring that claims against Perry Homes or the warranty companies be submitted to arbitration under the Federal Arbitration Act.[2]

The home suffered significant drainage and foundation problems. The Culls filed suit in October 2000, and the warranty companies, but not Perry Homes, immediately moved for arbitration, which the Culls vigorously opposed with a seventy-nine-page objection. No one sought a ruling on the motion to compel arbitration, and discovery proceeded. The Culls sent written discovery and sought orders to compel production of documents. The parties took ten depositions.

In December 2001, four days before the case was set for trial, the Culls moved the court to order the case to arbitration. Let's put ourselves in the decision-maker's chair for a moment. The case file contained an old motion to compel arbitration, for which a hearing had never been requested, from two parties who were now opposing efforts to compel arbitration. On the day of the hearing, the defendants were opposing a request to send the case to arbitration from plaintiffs who, in the words of the majority opinion, had "spurned" the arbitration process. It might have seemed that the parties had entered a strange parallel universe where everything is reversed.

The judge, understandably, was reluctant to send the case to arbitration after so much time and effort expended on the litigation process: "I really have a problem with people who have competent counsel who wait fourteen months and after all this much effort in the courthouse has taken place, to come in and say that they have not waived that arbitration. That arbitration clause was there when the lawsuit was filed." Despite those reservations, the judge found that the defendants had not demonstrated they would be prejudiced by referral to arbitration, and ordered the parties to arbitrate. Perry Homes then sought mandamus relief, which was denied.

The case spent another year in arbitration. The final result was a Christmas Eve 2004 arbitration award to the Culls of $800,000. The award included repayment of the purchase price, mental anguish, exemplary damages, and attorney's fees. The defendants argued the award should be vacated on the ground that the case should never have gone to arbitration in the first place. The trial court denied the motion and confirmed the award. The appellate process moved forward, and the Supreme Court of Texas granted review on the issue of whether the Culls waived their arbitration rights

At the outset of the opinion, the court listed, then flattened, three of the Culls' arguments that appellate review of the decision to compel arbitration was untimely. First, the Culls argued that the denial of mandamus relief established the law of the case, and prohibited further review. The court cited a decision, issued while *Perry Homes* was pending before the court, which held that the discretionary nature of mandamus relief will not limit a party's right to appellate review.[3]

Second, the Culls argued that the review of orders compelling arbitration must be reviewed before the arbitration takes place. The court began by citing three of its own decisions and the *Green Tree Financial* decision from the United States Supreme Court,[4] which allowed post-arbitration review. The critical factor to the court, however, was that the Federal Arbitration Act specifically prohibits interlocutory appeals of orders compelling arbitration,[5] noting that Texas Arbitration Act contains a similar prohibition of pre-arbitration appellate review of orders granting arbitration.[6]

To the extent that the question required clarification, it is now certain that orders granting arbitration in Texas are reviewed on appeal, and do not have to be pushed through any interlocutory review before the arbitration is conducted.

The court then rapidly dispatched the Culls' next challenge, in which they argued that the question of waiver by litigation is to be decided by the arbitrator or arbitration panel, instead of the courts. Citing eight of its own decisions, and decisions from

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IN RE FLEETWOOD HOMES OF TEXAS, L.P.: TEXAS SUPREME COURT RULES IN FAVOR OF PARTY SEEKING TO ENFORCE ARBITRATION AGREEMENT, DESPITE ASSERTIONS OF IMPLIED WAIVER AND UNCONSCIONABILITY

By Jamie L. Vaughan*

The Texas Supreme Court, in *In re Fleetwood Homes of Texas, L.P.*,[1] recently ruled in favor of a party seeking to enforce its arbitration agreement after beginning discovery and discussing possible trial dates. In analyzing an assertion of implied waiver, the court considered whether the party opposing arbitration had been prejudiced; in considering two assertions of unconscionability, the court considered whether the arbitration clause was fundamentally fair .[2]

Fleetwood Enterprises, Inc. ("Fleetwood") manufactured mobile homes. Gulf Regional Services, Inc. ("Gulf") owned and developed mobile home parks in southeast Texas. Gulf was also in the business of selling and leasing mobile homes. In January 2005, Fleetwood and Gulf entered into an agreement providing, in part, that Fleetwood manufacture homes for Gulf to sell or otherwise manage in a specified location. The agreement included an arbitration clause covering "any dispute, controversy or claim among the Parties."[3]

In August 2005, Fleetwood cancelled the agreement in the belief Gulf was going to sell or use mobile homes at a location other than that specified in the agreement.[4] Gulf filed suit in October 2005, and Fleetwood filed an answer demanding arbitration. However, Fleetwood did not move to compel arbitration until July 2006, after sending one written discovery request and exchanging emails with Gulf regarding proposed trial settings. Gulf opposed the motion on two grounds: express waiver and unconscionability.[5] The trial court held Fleetwood had waived arbitration, and a divided appellate court agreed, denying mandamus relief. Fleetwood petitioned the Texas Supreme Court to review the decision.[6]

The court, citing *Perry Homes v. Cull*,[7] defined waiver as "substantially invoking the judicial process to the other party's detriment or prejudice;" it further defined detriment as "inherent unfairness caused by 'a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage.'"[8] The court, reasoning the language in the emails regarding trial dates did not amount to express waiver, looked to case law to discuss the question of implied waiver. In *EZ Pawn Corp v. Mancias*,[9] although a party had filed an answer, sent written discovery, agreed to postpone a trial setting and more, the other party's failure to show prejudice resulted in a finding of no implied waiver.[10] Following the *EZ Pawn* precedent, the court determined that because Gulf could not show how it had been prejudiced, Fleetwood had not impliedly waived its arbitration rights.[11]

Gulf also argued the arbitration agreement was unconscionable because (1) arbitration limits discovery rights; and (2) the agreement allowed for recovery of attorney's fees for any prevailing party, not just a prevailing plaintiff.[12] The court first cited case law to define a substantively unconscionable agreement as one that is "so one-sided that it is unconscionable under the circumstances existing when the parties made the contract."[13] The court reasoned a main feature of arbitration is to limit discovery in order to streamline the litigation process. Furthermore, limited discovery affects both parties equally and can therefore not make an agreement unconscionable. Finally, the court pointed out that allowing both parties the opportunity to recover fees could only make an agreement more equitable for both parties, and could therefore hardly be considered unconscionable.[14\3]

Applying Texas precedent, the court ruled that Gulf had not impliedly waived its right to arbitration, and that the agreement was not substantively unconscionable. The court conditionally granted mandamus relief for Fleetwood and ordered the trial court to compel arbitration.[15]

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IN RE CITIGROUP GLOBAL MARKETS, INC.: SUPREME COURT OF TEXAS HOLDS ARBITRATION WAS NOT WAIVED AND CONDITIONALLY GRANTS WRIT OF MANDAMUS

By Sarah Klebo* and Isaac Villarreal**

In a recent decision on a petition for a writ of mandamus, the Supreme Court of Texas held an investment company's actions were not sufficient to constitute a waiver of arbitration (expressly or impliedly) and contracts with the investment company's predecessor bound investors to arbitrate with the investment company. As a result, the court conditionally granted a writ of mandamus and directed the trial court to compel arbitration.[1]

Robert and Natalie Nickell ("the Nickells") filed suit against Citigroup Global Markets, Inc. ("Citigroup"), a successor of Salomon Smith Barney, Inc., alleging fraud, breach of fiduciary duty, negligence, and violation of the state securities act.[2] The Nickells alleged they invested in WorldCom Inc. based upon reports provided by a Citigroup analyst and as a result lost more than $4 million.[3]

Citigroup immediately removed the case to federal court based upon its relation to WorldCom Inc.'s bankruptcy proceedings.[4] The Nickells subsequently moved to remand the case, while Citigroup moved to transfer the case to a federal multidistrict litigation court ("MDL") in New York that was managing similar WorldCom-related suits against Citigroup. Citigroup asked the federal court to stay the proceedings pending the MDL panel's decision, specifically reserving its defense "that Plaintiffs arbitrate, not litigate, their claims."[5]

The MDL panel conditionally transferred the case to the MDL court.[6] The Nickells requested that the MDL panel vacate the transfer order.[7] The panel denied the request before transferring the case.[8] Once in the MDL court, a stay was ordered effectively excusing Citigroup from filing an answer or pleading any defenses. Once again, the Nickells moved to remand the case to state court, at which point Citigroup agreed.[9] After a seven-month jurisdictional battle, the case was remanded to state court.[10]

Once the case was back in state court, Citigroup simultaneously filed an original answer and moved to compel arbitration.[11] The state trial court denied the motion to compel arbitration, and Citigroup filed a petition for writ of mandamus and an interlocutory appeal.

The court of appeals denied the writ and dismissed the appeal because it believed Citigroup waived arbitration by making statements in its filed motions indicating its intention to litigate.[12] Both parties agreed the Federal Arbitration Act applied to this case.[13]

As a basis for its decision, the court of appeals set forth the well-known rules that a party "waives an arbitration clause by substantially invoking the judicial process to the other party's detriment,"[14] that waiver was a legal question for the trial court based on the totality of the circumstances, requiring a court to decide whether a party has substantially invoked the judicial process to an opponent's detriment,[15] and that detriment means inherent unfairness caused by "a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage."[16]

Upon considering the applicable facts, the court of appeals held that Citigroup expressly waived arbitration, not by its conduct transferring the case to the federal and MDL courts, but by statements in those motions to transfer that suggested it was doing so for the purposes of litigation, not arbitration.[17]

The Supreme Court of Texas agreed with the legal principles stated by the court of appeals, but contrary to the court of appeals, held that Citigroup never opposed arbitration and did not expressly waive its arbitration rights. The supreme court held that Citigroup had reserved its right to request arbitration early on and informed the Nickells of the reservation.[18] Specifically, the latter court noted that Citigroup's statements in the various transfer pleadings about the case's similarity to others already transferred, the potential savings associated with consolidated discovery, and the potential convenience of parties and witnesses in consolidated proceedings were merely required by statute to justify transfer to the MDL court.[19] The court further opined that Citigroup's statements about how much discovery could be avoided if the case was transferred to the MDL reflected an effort to avoid litigation rather than duplicate it.[20]

Additionally, in response to the Nickells' argument that a transfer to an MDL court was inconsistent with seeking arbi-

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IN RE CITIGROUP GLOBAL MARKETS, INC.: SUPREME COURT OF TEXAS HOLDS ARBITRATION WAS NOT WAIVED AND CONDITIONALLY GRANTS WRIT OF MANDAMUS

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tration, the supreme court explained that arbitration is possible for consolidated actions as well as individual ones.[21] The court reasoned that because courts can issue inconsistent orders on arbitration just as they can on discovery or other matters that MDL courts are designed to coordinate, Citigroup's transfer to the MDL court did not indicate it had abandoned arbitration.[22] As such, the high court held that Citigroup did not expressly waive or object to arbitration.

The ultimate question for the court was whether Citigroup impliedly waived arbitration. In answering that issue, the court noted that Citigroup's actions and statements associated with the transfer to the MDL court clearly were factors to be considered in the totality of the circumstances test provided by the *Perry Homes* case.[23] However, the court held those actions and statements could not be taken out of the context in which they were made or taken independently from the remainder of Citigroup's litigation conduct.[24]

Citigroup's actual litigation conduct was limited to jurisdictional transfers and not the merits, as evidenced by the lack of any discovery requests or responses, filing of motions (or even an answer) relating to the merits of the case before seeking arbitration. Moreover, Citigroup engaged in no litigation conduct other than transferring the case to the MDL court. The supreme court, therefore, held that Citigroup's statements about what discovery might be saved in the MDL court were simply not enough to show a substantial invocation of the judicial process.[25]

Finally, in response to the Nickells' argument that their contracts bound them to arbitration with Citigroup's predecessors but not Citigroup, the court explained that each contract specifically provided it would "inure to the benefit of Smith Barney's present organization, and any successor organizations or assigns" and, therefore, because Citigroup had established it was a successor organization to Smith Barney, the Nickells were bound by the arbitration clauses with Citigroup.

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ENDNOTES

1 In re Citigroup Global Markets, Inc., 258 S.W.3d 623(Tex. 2008)(per curiam).
2 *Id.* at 625.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.* (citing Perry Homes v. Cull, 258 S.W.3d 580, 589-90 (Tex.2007)).
15 *Id.*
16 *Id.*
17 *Id.* at 626.
18 *Id.*
19 *Id.*
20 *Id.* (citing In re Serv. Corp. Int'l, 85 S.W.3d 171, 175 (Tex. 2002) ("Realtor's efforts in moving to dismiss and staying discovery were to avoid litigation, not participate in it.").
21 *Id.* at 626 (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003)).
22 *Id.*
23 *Id.*24 *Id.* (citing Perry Homes v. Cull, 258 S.W.3d 580, 590-92 (Tex. 2007)).
25 *Id.*

IN RE FLEETWOOD HOMES OF TEXAS, L.P.: TEXAS SUPREME COURT RULES IN FAVOR OF PARTY SEEKING TO ENFORCE ARBITRATION AGREEMENT, DESPITE ASSERTIONS OF IMPLIED WAIVER AND UNCONSCIONABILITY

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ENDNOTES

1 257 S.W.3d 692 (Tex. 2008).
2 *Id.* at 694-95.
3 *Id.* at 693-94.
4 *Id.* at 693.
5 *Id.* at 693-94.
6 *Id.* at 693.
7 258 S.W. 3d 580 (Tex. 2008).
8 *Fleetwood Homes,* 257 S.W.3d at 694 (quoting *Perry Homes*, 258 S.W.3d at 597).
9 934 S.W.2d 87, 90 (Tex. 1996).
10 *Id.*
11 *In re Fleetwood Homes of Texas*, *L.P.* 257 S.W.2d at 694.
12 *Id.* at 695.
13 *Id.* (citing In re Palm Harbor Homes, Inc. 195 S.W.3d 672, 678 (Tex. 2006)).
14 *Id.*
15 *Id.*

DISPELLING THE SEVEN DEADLY MYTHS REGARDING CIVIL COLLABORATIVE LAW

©By Sherrie R. Abney*

Family Collaborative Law and Civil Collaborative Law are two similar yet distinctly different forms of dispute resolution. Both dispute resolution procedures employ interest-based negotiation and participation agreements (contracts) containing provisions requiring the collaborative lawyers to withdraw if the parties do not settle, require voluntary disclosure of relevant information, and permit the parties to employ professionals able to provide neutral opinions and information regarding the issues in dispute. Despite these similarities, several differences must be taken into consideration when the collaborative process is used to resolve a civil dispute. The application of Collaborative Law to civil cases is a relatively new idea; consequently, many confused or inexperienced people have arrived at a number of incorrect conclusions regarding the civil collaborative process. The purpose of this article is to shed light on some of these misconceptions.

Myth Number 1: Interdisciplinary Teams are Mandatory

The first misconception applies to both family and civil collaborative disputes. This misconception is that an "interdisciplinary team" is required for all "true" collaborative cases. Interdisciplinary teams are used in many family collaborative cases and, in appropriate circumstances, these teams can be extremely beneficial for the parties and their children. There has been much discussion among the family collaborative community as to exactly who should be included in an interdisciplinary team. Generally, the team will have at least one mental health professional (MHP) and one financial person. If the parties have children, the team may also include a child specialist. The MHP may serve as a communications coach and/or assist in developing parenting plans for the children. The financial professional assists in devising plans to divide the parties' assets and help the parties determine how existing financial responsibilities will be handled.

There are many configurations for teams in various parts of the country. Some collaborative lawyers require a MHP for each party. If one of the parties requires therapy, a MHP may work with that person "off line" (outside the collaborative meetings). The MHPs who participate in the face-to-face collaborative meetings are neutrals, and they do not engage in therapy with any of the parties. The insistence of some attorneys that a full team be used in every case has resulted in many people believing the collaborative process is too expensive. Although the services of a full interdisciplinary team can provide added value to the parties and their children, some people simply may not be able to afford that luxury.

This author believes there are many other advantages to the collaborative process that should still be available to low- and middle-income clients. Collaborative Law began with only the attorneys and the parties working as a team, and there is no reason this model cannot continue to be used when necessary—or when the parties desire it, since the dispute is theirs and they are paying the bills. Those who cannot afford a Mercedes can still arrive at their destinations by way of a compact car. The ride may not be as smooth, but it is certainly better than walking. An "attorneys only" model of Collaborative Law will not have all of the bells and whistles of a Mercedes, but it sure beats navigating through litigation.

That all being said, there are times when addiction, mental illness and/or physical or verbal abuse will require the assistance of an MHP whether or not the parties want that type of help or can afford it. In those instances, every effort should be made to use professionals trained to deal with these difficult issues; otherwise, whether the dispute is family or civil, the case will have very little chance of a peaceful resolution.

In the civil collaborative process, the use of a team requires considerations that do not exist in the area of family disputes, and the team will likely not be composed of the same professionals found in family cases. A mediator or MHP will be helpful as a facilitator—especially when there are more than two parties. A room full of lawyers and their clients usually requires a neutral to keep everyone on track. A MHP may also be helpful by coaching one or more parties off line to assist them in communicating in a more productive manner during the collaborative sessions. If the case involves serious injury or death, one or more parties may require off line counseling to cope with anger or grief associated with the issues in the dispute. Financial professionals normally employed in family cases may or may not be qualified for a particular civil case. Financial areas of expertise in civil disputes may include business appraisals, forensic accounting, estimates of economic damages, and tax advice on settlement proceeds. Personal injury cases will employ experts regarding structured annuities and special needs trusts. Other roles for MHPs and financial professionals will emerge as the civil collaborative process grows, but there will be many civil cases that will not employ an MHP or financial professional since other types of expertise may be necessary to address the parties' issues.

Thus far, civil collaborative cases have included partnership dissolutions, several disputes in probate courts regarding

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guardianships, trusts, and the administration of estates, and other cases involving sexual harassment and retaliation. One of the cases involved the participation of in-house counsel, who acted as one of the collaborative lawyers, and this case also involved a contingent-fee arrangement with the plaintiff's collaborative lawyer. All of the above cases have settled successfully in the collaborative process.

Other cases have been settled using collaborative skills, but due to no written participation agreements or withdrawal provisions, the cases cannot be considered Collaborative Law cases. These cases may be referred to as cooperative cases.

Cooperative cases have included business disputes, debt collection, and a dispute involving a construction defect. The construction case included a representative from an insurance company. The insurance policy covered the damages caused by a foundation defect. However, the adjuster agreed to make a gratuitous payment above the amount covered under the policy to assist the parties in correcting the defect that caused the damage, if the parties agreed to settle and avoid litigation. The parties settled and the home owner was able to get his home's foundation repaired in a matter of months instead of years. Although this was not a collaborative case, it was done cooperatively, the parties applied the steps of the collaborative process, and they relied on interest-based negotiation. The cost to the insurer was far less than the cost of litigation.

These types of collaborative and cooperative cases require a very different type of expertise from team members than what is required in family disputes. A sexual harassment/retaliation case might use an MHP, economic damages expert, and/or opinions of a labor lawyer. The construction case required an engineer. A medical-error case may require a physician and/or an expert on patient safety. With the wide variety of possible needs for expertise in civil cases, it is unlikely that a particular model will emerge that lawyers will attempt to apply to all civil cases. The important point to remember is that all teams should be designed to meet the needs of the parties and their dispute rather than contrived according to a preconceived idea of what comprises a "team" without consideration for the parties or the specific issues—including the parties' ability to pay.

Myth Number 2: The Withdrawal Provision Coerces Clients into Settling

Although some attorneys view the withdrawal provision as a disadvantage, most lawyers who have actually experienced the collaborative process believe the withdrawal provision is an advantage. The withdrawal provision requires a one hundred per cent focus on settlement. Lawyers are not required to keep changing hats all during the process—working to settle part-time and preparing for litigation part-time. In addition, the parties also have a greater incentive to settle.

Some critics of the collaborative process have considered the withdrawal provision in the participation agreement a negative incentive. They believe parties may feel coerced to settle if they cannot afford to leave the process and hire litigation lawyers. Question: is there a difference in the situation of a party in the collaborative process described above and that of a party in litigation when the retainer is exhausted? There is generally a point in litigation when the client is told his/her choices are to settle or come up with another $10,000.00 (or more) to go to trial. In reality, clients are in the same situation in any dispute resolution process when they run out of money.

The participation agreement is also useful as a road map to guide the parties and their lawyers through the collaborative process. In addition, the lawyers may use this agreement to terminate the process unilaterally without giving any explanation should they believe one of the participants is not proceeding in good faith or if their clients determine they do not wish to continue in the collaborative process. If a decision to terminate is made, none of the parties may march directly to the courthouse. Written notice must be given to all participants, and the parties have thirty days to obtain litigation counsel under the terms of the participation agreement. Without a written participation agreement, none of these protections is guaranteed.

Myth Number 3: Contingent Fee Contracts Are Impossible

As mentioned above, there has already been at least one collaborative case in which the plaintiff's attorney had a contingent fee employment agreement with the client, so contingent fee cases are not impossible. This author has always been amazed that humans have gone to the moon, but few believe that two lawyers are capable of figuring out how to share a fee if a case does not settle in the collaborative process and goes to litigation.

There are two obvious choices for the lawyers: First, if a collaborative lawyer fails to settle a contingent fee case, the collaborative lawyer is treated the same as a litigation lawyer who loses at trial and gets nothing. Second, a collaborative lawyer may, with the permission of his/her client, have a fee-sharing arrangement with a litigation lawyer with whom the collaborative lawyer is not associated in the practice of law or otherwise financially connected. This arrangement requires the collaborative lawyer to keep track of the time s/he works on the case. If the case settles, the collaborative lawyer keeps the entire fee. If the case does not settle and goes to litigation, the litigation lawyer must keep time slips. If the case settles or the litigation lawyer wins at trial, the lawyers share the contingent fee according to the amount of work each has performed on the case. If the case is lost at trial, neither lawyer is compensated.

Many collaborative lawyers are currently engaged in limited representation, also known as "unbundled" representation. Their employment agreements provide that they will withdraw if the dispute goes to litigation; consequently, those lawyers will not represent their clients in an adversarial proceeding whether or not there is a withdrawal provision or a participation agreement. If these lawyers formed relationships with litigation lawyers, each could take advantage of the others' skills. The litigation lawyers could refer cases that have opportunity and reason to settle quickly, remain private, and preserve on-going relationships to the collaborative lawyers. If a

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DISPELLING THE SEVEN DEADLY MYTHS REGARDING CIVIL COLLABORATIVE LAW©
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case did not settle or the collaborative process was not appropriate for the dispute, the case would be referred back to the litigation lawyers. The clients of these attorneys would have the best of both worlds—saving time and money when possible and experienced representation in the courtroom when necessary.

Applying Collaborative Law to contingent fee cases involving accident and medical-error claims for amounts under $100,000 is an excellent way to serve many clients who are often ignored by litigation lawyers due to the cost of discovery and expensive experts. Voluntary discovery and jointly retained experts used in the collaborative process significantly reduce the amount of time and money required for representation in these matters. Many hospitals are realizing this benefit and have abandoned their former positions of "deny and defend" imposed on them by their insurers. They are now freely disclosing information and settling cases when errors may have been made by them or a medical provider in their facility.

The collaborative process is especially appropriate for medical-error and product-liability cases since the process is able to provide relief that a judge is not able to order. The courts cannot order apology, nor can they order medical providers, manufacturers, or service providers to change their procedures in a particular way to avoid future injuries to other people. These matters are sometimes more important to parties than a money judgment, and they often play a significant role in settling disputes.

Myth Number 4: Voluntary Disclosure is too Risky

There have been questions regarding the ability of dishonest parties to commit fraud due to the absence of formal discovery in the collaborative process. Question: what guarantees are there in litigation that a party is truthful? In litigation, there is no guarantee that any party will produce all of the requested documents or tell the truth when answering interrogatories or while testifying in court or depositions. There would appear to be a greater likelihood that fraud or lying could be detected in a series of face-to-face collaborative meetings with the other parties and their lawyers than in litigation, where the parties and lawyers have little direct contact. The face-to-face meetings provide opportunity for the parties and their lawyers to question anything that is unclear or that becomes a concern. Moreover, the participation agreement is a contract that may be the basis for a fraud or breach action if any party fails to proceed honestly.

Although formal discovery is not part of the collaborative process, it is possible to use sworn documents to provide a party who may have been treated dishonestly by the other side with a sense of security. In most family cases, the parties provide notarized inventories and appraisements of their community and separate property to ensure that both parties are truthfully disclosing all of their assets. There is no reason a party to a civil case could not guarantee his/her word or a disputed fact in an affidavit with the understanding that the affidavit would later be admissible in court if the information averred to was found to be false. Affidavits or other formal discovery methods are not recommended as a common tool for the collaborative process, but if a simple affidavit will satisfy one of the parties, it is better than having the case go to full-blown litigation.

Myth Number 5: Business Lawyers Might Be Required to Give up Their Clients

In family collaborative cases, the collaborative lawyers agree they will not represent a collaborative client in an adversarial proceeding in the future. An assumption has been made by some lawyers that a civil collaborative lawyer who has had a long-term relationship with a business client would be required to permanently give up that client to another lawyer if the collaborative case did not settle. This assumption is not true. The collaborative lawyer would not be able to represent that client in a litigated dispute concerning the same party and the same subject matter of the collaborative case, but that is the extent of any limitations on future representation. If there were other cases pending against the same party that participated in the collaborative process, and the issues in the other cases were not the ones addressed in the collaborative process, the collaborative lawyer could litigate on behalf of the client unless the parties had agreed otherwise during the prior collaborative case.

There is much to be learned regarding the use of the collaborative process by large corporations. Although in-house counsel may act as collaborative lawyers for their employers, this may not be advisable in some situations. Before in-house counsel participates in a case as a collaborative lawyer, consideration should be given to the amount of involvement counsel has had in the events leading up to the dispute. If counsel was substantially involved in these events, the involvement could affect in-house counsel's ability to step outside the situation and be objective in regard to the other parties. In this instance, in-house counsel might behave more as a pro se party would behave rather than as an advocate. It is certainly not impossible for in-house counsel to participate in the collaborative process, but in some situations, an outside collaborative lawyer might be the better choice for a number of reasons too numerous to discuss in this article.

Myth Number 6: Multi-party Disputes Cannot Be Resolved in Civil Collaborative Law

There have already been multi-party cases successfully completed in Texas, Massachusetts, and Australia, so the question whether it is possible to have multi-party cases in the collaborative process is moot.

There are several ways to handle a multi-party dispute. The method chosen should be determined by the parties in light of the dispute's facts. Assume there are four parties; three wish to use the collaborative process, but one does not. Since the process is voluntary, no one can be forced to participate. These parties have the following options: the nonparticipating party may agree to hold off filing suit or agree to abate a previ

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PRESCRIPTION FOR SANITY IN RESOLVING BUSINESS DISPUTES: CIVIL COLLABORATIVE PRACTICE IN A BUSINESS RESTRUCTURING CASE IN MASSACHUSETTS

By R. Paul Faxon* and Michael Zeytoonian**

One of the ideal target markets for the application of Collaborative Law ("CL") in civil disputes (i.e., disputes other than divorce or family law cases) is the closely-held or family business dispute. The subject dispute described in this article is that of a closely held corporation owned by four partners. The successful use of CL in this case, one of the first truly collaborative civil cases using the purist CL model, validated our views and gave us an excellent case to analyze in this article.

Summary of the case

This collaborative case involved the break-up and restructure of an "S" Corporation incorporated in Massachusetts by the four original and equal shareholders. The four shareholders also constituted all the directors and officers as well as key employees of the corporation, thus making the entity a "closely held corporation" under Massachusetts law. As legal counsel reminded the parties on several occasions, the shareholders/directors/officers in a closely held corporation owe fiduciary type duties to each other under the Commonwealth's common law.

The profitable business in question had grown over five years to gross revenues of approximately $1 million and provided computer and software consulting services to the life science industry. No shareholder agreement existed at the time that three of the shareholders informed the fourth shareholder that a restructuring (buy-out) needed to take place due to "irreconcilable differences" that did not reflect questions concerning the fourth shareholder's technical competence, work ethic, or new client development acumen. Nonetheless, it was a painful and difficult revelation for the fourth shareholder to hear. As part of the CL settlement included a confidentiality agreement, the names of the corporation and the four partners will remain confidential. However, the clients were so satisfied with both the CL process and the result, they volunteered to offer us quotes of their views and authorized us to use them in articles about the case.

The case raised both business and employment issues; and the solutions memorialized in the written restructuring agreement ("RA") included typical business law elements (e.g., restructuring, stock buy-out, non-competition and software reseller agreements) as well as employment considerations. Using CL, the parties and their attorneys were able to navigate through the departure of one of the shareholders, the restructure of the original corporation ("OC"), the compensation of the minority shareholder/departing shareholder ("MS/DP") for his equity and final employment wages, the creation of a new company by the MS/DP (with the cost of incorporation funded by OC). The parties also laid the groundwork for a joint public announcement, continuing cooperation and productive relationships between the two businesses after the separation. The CL process began shortly after the dispute arose, in January 2007, and was successfully concluded in May 2007. Legal fees incurred by all parties and the elapsed time to resolve the dispute were both a fraction of what would have been required in litigation.

The Process

The co-authors were the two CL lawyers in this case, both members of the Massachusetts Collaborative Law Council ("MCLC"). R. Paul Faxon, of The New Law Center in Cambridge, Massachusetts, represented the OC and three continuing shareholders of the OC (to also be referred to herein as "OC"). Michael Zeytoonian, of Hutchings, Barsamian, Mandelcorn & Zeytoonian in Wellesley Hills and Westborough, Massachusetts, represented the MS/DP. Faxon, who had been the OC lawyer since its inception, suggested the idea of using CL to all four shareholders as an alternative way of working through the dispute rather than litigation. The four shareholders agreed to consider using this approach, and Faxon took the valuable opportunity presented to provide all parties with contact information on CL lawyers, including Zeytoonian in particular. After an initial meeting between the MS/DP and Zeytoonian as his lawyer in which Zeytoonian informed the MS/DP on the CL process and the differences between it and litigation or arbitration, the MS/DP retained Zeytoonian as his CL counsel. Then the three remaining shareholders of the OC confirmed Faxon's retention. All four shareholders gave their informed, written consent to Faxon's representation of the three remaining OC shareholders.

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This was a pure CL case and process that incorporated the many elements of CL. The parties agreed to use best efforts to refrain from litigation. The lawyers affirmed their Collaborative Commitment by agreeing that their representation of the clients would be limited to the collaborative process and would not extend to serving as litigation attorneys should the CL process fall short. The parties also agreed to the open and voluntary exchange of all relevant information; the use of interest-based, non-adversarial negotiation at all times in the CL process; the use of two shared neutrals in the form of independent and jointly retained business valuators; respectful and civil behavior and communications at all times; six-way meetings; confidentiality; and the collaborative development of options that would serve the interests of all parties and facilitate a final resolution. These agreements and commitments were reflected in a written process agreement signed by all parties and both lawyers, which became an exhibit to the RA.

After Faxon explained the CL process to the four shareholders, both Faxon and Zeytoonian took the time to further explain the CL process to their respective clients separately and answer any questions and review the pros and cons of the CL process and the litigation process. The separate, informed consent of the parties was important, particularly in the case of the MS/DP, so he would recognize his rights and interests were being protected and represented in a non-adversarial process.

The CL process included several pre-meeting planning conferences and de-briefing conferences between the two lawyers. Two six-way meetings took place among counsel and the four shareholders, the first lasting about two hours and the second lasting nearly six hours. Rather than present a chronology or a play-by-play, this article focuses on some of the highlights of using the CL process in this case, some "Monday morning quarterback" observations, and some lessons learned.

As part of the advance planning for the first six-way, the lawyers jointly developed an agenda and determined that the meeting should be held in Zeytoonian's office, because as the party being asked to leave the OC by the majority of other shareholders, it was important that the meeting was held on MS/DP's "home turf." The lawyers carefully planned the agenda, determined who would present what, and determined how and when to actively engage the parties in presenting and assessing issues and concerns. Once the stage was properly set with advance planning, discussions in the six-ways flowed fairly freely and openly.

Joint experts were utilized efficiently, and they made important contributions to reaching a resolution. While neither joint expert was present for the six-way meetings, the findings of both joint experts were available prior to and presented at the second six-way meeting and were useful to the parties in determining business value, the basis for the valuation and the MS/DP's share of the value. The parties had agreed to jointly hire an accounting expert to give an independent limited valuation of the business for the purposes of the collaborative process. They later agreed to hire a second valuation expert, also retained jointly, to offer a second, more formal appraisal and to approach the business valuation from a different perspective. Both CL attorneys encouraged the parties to meet independently with the two experts, which they did before the second six-way meeting.

The work of the parties outside of the six-way meetings was critical to advancing the CL process and in reaching a deeper, more-lasting resolution. Both Faxon and Zeytoonian gave the clients joint "homework" assignments during the process. These assignments included discussing and reaching an agreement on how the company's existing clients would be divided, developing a set of public "talking points" to address the restructuring, and setting a discounted rate for MS/DP to resell certain difficult-to-value software being retained by OC. The counselors asked the parties to think about how a reseller agreement might look, anticipating the need for the parties to continue to work together as two separate companies and entities, servicing he same clients.

Before the first six-way, Zeytoonian met with his client, the MS/DP, to get acclimated, and to discuss the format and environment for meeting. Zeytoonian suggested that MS/DP decide ahead of time where he and his counsel should sit. MS/DP wanted to be facing his lawyer across the table and not next to him, but next to his fellow shareholders. Zeytoonian decided to position himself in the middle of the table opposite his client. During the six-way meetings, the two lawyers sat side by side, four shareholders sat next to each other along an oval table. Counsel for MS/DP purposely took the two "head" and "foot" chairs off the table before the meeting began. Drinks, coffee, tea and light refreshments were on the table for the first six-way meeting. This meeting began around 2 P.M., with a pre-determined decision to end no later than 5 P.M. and a goal of ending by 4 P.M. or whenever it became clear the point of diminishing returns had been reached. (The meeting did end precisely at 4 P.M..) The second six-way meeting began around 5:30 P.M., and dinner was brought in for this longer meeting, which went deep into the night. Both CL counsel did not hesitate to give their respective clients the evaluation that the window for a successful settlement was closing.

In both six-way meetings, there was a good deal of cross-communications, the parties talking with each other, with their own counsel as well as counterpart counsel. Among the issues collaborated upon were business valuation considerations, future dividing of clients in both a fair and practical way, assets brought to the company by each of the shareholders, the equitable and mutually efficient division of the company, the need for restrictive covenants and agreements between the parties going forward as two separate companies, and drafting the language for jointly issued press releases announcing the restructuring of the existing business and the initiation of the new company.

Both lawyers freely talked with all parties during both six-way meetings. In several instances, Faxon as the OC's corporate counsel suggested proposals that would benefit the MS/DP,

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and Zeytoonian, as MS/DP's counsel, made suggestions and offered counsel to the OC suggesting advantages of the non-compete and non-solicitation clauses to the OC in the event of its growth. Often parties and lawyers together freely brainstormed and looked at pros and cons of ideas.

Once all the relevant information had been gathered and assessed, creative ideas were suggested and weighed concerning how to treat income and cash flow, effective dates, announcements, and similar matters. The OC shareholders acknowledged, appreciated, and looked for ways to meet the MS/DP's interests and needs, such as his requirement for immediate funding for the new company without necessarily relying solely on an outright payment from the OC to the MS/DC. In delegating action items to be carried out between the six-way meetings, counterpart parties were often assigned tasks to perform together.

During the collaborative conferences, both CL lawyers modeled cooperative and collaborative efforts, freely allowing and then commending parties for coming up with excellent ideas and making important observations. The exercise of having the parties take turns on the white board to either present ideas or assess them proved effective. Parties were truly looking to find ways to benefit both the existing company and the emerging new one, discussing shared licensing and reseller agreements and subcontracting between each other so that the strengths of both counterparts would serve the interests of both.

Throughout the process, the parties would reach an agreement on an issue and the lawyers would confirm it and check back to make sure the agreed-upon option satisfied all interests and did not work against any interests. The CL attorneys commended the clients for the way they worked together as well as the collaborative and creative spirit they employed.

In discussing the dispute resolution clause the parties would eventually include in the RA, the parties agreed to use CL as their alternative dispute resolution vehicle of first resort. A conversation that quite transparently flowed from that discussion was the desire of the lawyers to use this case as a teaching and model CL case. The parties were willing to be interviewed and quoted as to their thoughts about the process, one joking that he would be happy to be interviewed in exchange for some reduction on the legal fees! The joke served to show the atmosphere of trust and cooperation, punctuated not by animosity and position taking but rather by commending each other for good ideas and the presence of humor.

Lessons Learned

What were the key components for accomplishing the collaborative commitment and to maintaining a "container of safety and trust" in this case? These included: (i) the specific facts of the case, including the opportunity to have all parties represented by CL counsel from the start; (ii) the complementary lines of business between the two corporations that emerged, (iii) the fiduciary requirements imposed under Massachusetts law on closely held business owners; (iv) the strong desire of the parties to resolve their issues through this process and their discipline in not allowing their emotions to overwhelm rational self-interest; (v) the opportunity to add value to both the OC and the MS/DP's new businesses through a RA that included positive public "spin" on the restructuring, non-competition covenants and software re-seller agreement where none existed before; and (vi) critically, the level of trust between the two lawyers that would stay true to both CLs' approach and values.

How critical was the trust between the lawyers? Vital. Both lawyers were trained in CL and had worked together on MCLC governance matters. Both factors proved to be essential, as not only did the CL training serve them well in strategizing for the meetings and working through impasses, but the fact that the two lawyers knew each other well and trusted each other was an essential component in the six-way meetings. This trust was crucial during the six-way meetings in several instances when one or the other lawyer would read the situation and essentially "call an audible" or need to improvise at the moment and when information was presented that was a complete surprise to the MS/DP and his counsel. In this particular case, the collaborative commitment was facilitated and carried out because of the above-referenced factors. The "litigation-attorney-disqualification" agreement in the RA may have helped to reinforce the collaborative commitment. However, the critical element to preserving an environment of safety and trust within which to operate was more a result of the trust between the lawyers and the willingness of the parties to choose to approach their dispute through CL and work well together within the process.

Why did the parties choose CL? The corporation's treasurer gave some insight on this choice: "We had heard horror stories about companies that almost went bankrupt on lawyers' fees while restructuring a business partnership. We wanted to prevent that from happening to us. We decided to give CL a shot, although it sounded too good to be true.**"** Sharing his post-agreement thoughts about using CL, one of the corporate directors/shareholders in this dispute put it this way: "CL allowed us a kinder, gentler, and cost-effective way to restructure our company**."**

Was CL cost and time-efficient? By utilizing this innovative form of alternative dispute resolution, the parties came to an agreement in four months, in approximately twenty percent of the time and legal costs than if the dispute had gone to litigation. One feature of using CL that appeals to clients in business or employment disputes was borne out in this case: Every minute of both lawyers' time billed in the CL process was spent directly on working to achieve a favorable resolution, as opposed to time spent complying with civil procedural discovery requirements, motion practice, or waiting for a case to be called in court proceedings.

Was the scope of the results broader, deeper and more meaningful than what a court would have typically provided? The final settlement resulted in a new corporation being spun off for the departing shareholder/officer; compensation to the de

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REFLECTIONS FROM THE EDGE

GETTING INTO THE HIDE OF THE PROBLEM

By Kay Elkins-Elliott*

At my last mediation training, one of my presenters used a phrase he had first learned in the Gerry Spence Trial Lawyers College: "You have to get in the hide of each juror." This goes beyond stepping into their moccasins! Barry Goldman, at the recent ACR annual conference in Austin, referred to this approach in his new book, *The Science of Settlement*, from ALI/ABA, which is discussed in this column.

Traditionally, law and business students have not been taught the cognitive science of settlement. My informal survey of those degree programs tells me that many of them still do not understand these important aspects of human behavior, although the social scientists have been writing about them for many years. Consumers are constantly being influenced by these truths because marketing professionals are taught them in school. Mediators from all professional backgrounds need to know the science of settlement. In this column, I must limit my remarks to just three aspects of that body of knowledge for two reasons: the column has length restrictions, and the human brain deals better with just a few new ideas at a time.

"We don't see things as they are, we see them as *we* are." That quote from the writer Anais Nin, is on the first page of Barry Goldman's book. The three aspects of human behavior in conditions of uncertainty that I want to address from that perspective are as follows: The Illusion of Control, The Endowment Effect, and Overconfidence. Of course, there are many more distortions in thinking that effect decision-makers: Self-Serving Bias, Fundamental Attribution Error, Belief in a Just World, and Regret Aversion - just to name a few that may appear in future columns.

The Illusion of Control: In one psychological experiment, subjects were asked to bet on horse races. Sometimes the horse race had been run but the results were not known. In the other situations, the horse race had not been run. Guess which condition provoked significantly higher bets? You got it - the experiments where the race had **not** been run. Statistically, the two situations are identical. The only explanation for this illogical outcome is that the people betting thought they could influence the outcome of the race! When children do this, we refer to it as magical thinking - wishing harm would come to someone they are mad at, then feeling guilty when that happens. What excuse do adults have? Did you know that people demand more for the sale of their lottery tickets if they picked the numbers than if they did not? Gamblers will bet more if they throw the dice than if someone else does. Why?

Apparently this strange behavior is linked to the brain's superior ability (honed through evolution) to see patterns and find causal relationships. We always want to know, when something goes wrong, what caused it, or more particularly in lawsuits, **who** caused it! There is a Latin phrase for this: *post hoc ergo propter hoc*. American version: "This happened after that happened, so the first event must have caused the second." Deborah Tannen points out in her book, *The Argument Culture*, that we want to believe there is one right answer to every problem or conflict and the way to find it is to have a debate, believing there are only two polarized positions or viewpoints, and one of them is correct. In fact, many factors may be correlated with an event, some that are independent and some that are dependent variables. In legal disputes, attorneys follow the logic that one true answer will emerge if both sides take polarized views and support them with evidence and arguments. In political races, if the economy is bad, the president in power must have caused it, so his political party should get the blame. In football games, if the quarterback's girlfriend is in the stands and he has a bad day on the field, it must be her fault, even if his finger is broken or he has a bad cold. Logically, we know events may be random, attributable to many variables or even "An Act of God." Are hurricanes this year worse because of global warming? Should we blame either Wall Street or President Bush for the recession? When a business partnership dissolves, which partner caused it? When an employee is fired, who is wrong - the employer or the employee? In a personal injury accident, who was speeding? Who ran the red light? Who was talking on the cell phone? Of course, these can be factors in liability or in other aspects of life, but is the answer always a result of dichotomous thinking?

It is really so much simpler and more comfortable to find fault and punish the wrongdoer than to look at an event rationally and objectively, applying science rather than superstition. By the way, in gambling situations, research shows there is more going on than telekinesis: when a gambler wants a high number, she throws the dice harder than when she wants a low number! We don't really want to deal with the anxiety of admitting that sometimes bad things happen to good people and sometimes really bad events (such as an economic depression) are cyclical and, to some extent, inevitable. In ancient days, if there was a flood or any other kind of natural disaster, the explanation was that the gods must be angry and someone human

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TEXAS ADR PROFESSIONALS PARTICIPATE IN PANAMA INITIATIVE II

By Walter A. Wright*

Panama Initiative II, the second phase of an international ADR initiative first featured in the Winter 2008 issue of this newsletter, pursued its mission to establish collaborative conflict-resolution strategies for the Americas and the Caribbean in a conference that took place in Panama City, Panama on August 13-14, 2008. Along with representatives of various Panamanian courts and government agencies, a contingent of Texans participated in an effort to introduce ADR concepts to approximately 200 Panamanian government officials. The leaders of the Texas delegation were Judge Frank G. Evans and Al Amado, both of Houston.

The conference opened on August 13 with welcoming remarks from Harley Mitchell, President Magistrate of the Supreme Court of Panama. Also participating in the welcoming ceremony were representatives of INADEH (a Panamanian government agency that directs vocational training and human development) and Ciudad del Saber (the City of Knowledge, where Panamanian business and nonprofit agencies, along with international nongovernmental agencies, have established their bases of operations for the region).

Following the welcoming ceremony, Al Amado moderated a panel of Panamanian government agency representatives who provided an overview of the diverse conflicts in which the agencies most frequently find themselves involved. The conflicts often concern infrastructure development, public services, integrated territorial management, business-labor relationships, the environment, indigenous peoples, and family and penal matters.

After the government officials set the stage for the conference, several Texas ADR professionals, along with Panamanian colleagues, participated in panels describing and analyzing processes for resolving the various types of disputes. The panels and their Texas participants included:

- "Labor Conflicts: Analyzing Culture, Power, and How We Can Collaborate to Arrive at Viable Solutions"; David López (Houston) and Dan Naranjo (San Antonio).
- "Ethnic, Cultural, and Indigenous Conflict"; David Garza (Austin), Daniel Hernández (College Station), and Walter Wright (San Marcos).
- "Family, Victim-Offender, and Penal Conflict"; Clara Gómez (Houston) and Josefina Rendón (Houston).
- "The Role of Public Policy, the Courts, and the Legislature in the Development of Efficient Methods for the Resolution of Conflict"; Frank Evans (Houston).
- "Growth, Resources, and Conflict: The Inherent Tension in Development and How to Achieve Sustainable Solutions through Collaborative Processes"; Rich Collins (a professor emeritus from the University of Virginia whom the Texans declared an honorary Texan for purposes of the conference).

The second day of the conference, August 14, was thoroughly interactive. Under Al Amado's guidance, the conference attendees divided themselves into four interest groups: Integrated Territorial Management; Labor Themes; Ethnic, Indigenous and Cultural Identity; and Family, Victim-Offender, and Penal. Amado assigned Texas participants to facilitate the groups' activities. Each group met privately to discuss the types of conflicts that arise in each area of interest, the usual protagonists in the conflicts, and the economic and social impacts of the conflicts. Afterwards, representatives of each group summarized that group's findings and presented the findings to all the other participants. A committee in Panama is now compiling a comprehensive conference report identifying the groups' findings, goals, and needs, which will provide a basis for the Panama Initiative's next steps.

On the evening of August 14, the Panama Canal Authority treated all of the conference participants to a private reception at the Miraflores Locks of the canal. At the reception, everyone observed ships passing through the locks, an unforgettable experience. On August 15, many of the participants toured the Barro Colorado Nature Monument, a beautifully preserved rain forest located in the canal and maintained by the Smithsonian Tropical Research Institute. The following day, the Texas participants returned home with many fond memories of their Panamanian adventure.

* *Walter A. Wright is Chair of the Newsletter Editorial Board of the ADR Section.*

Panama and Texas Participants in Panama Initiative II

Texas Participants in Panama Initiative II

INTERNSHIPS AND OTHER OPPORTUNITIES AVAILABLE IN PANAMA FOR STUDENTS AND PROFESSIONALS INTERESTED IN ALTERNATIVE DISPUTE RESOLUTION

By Walter A. Wright*

The Texas-based nonprofit LACEP (Latin American Collaborative Education Project) has developed a broad-ranging project for the implementation of innovative, collaborative, interdisciplinary programs for the comprehensive development of a conflict resolution system and training program in the Republic of Panama. The project is called The Panama Initiative, and the institutional base for this initiative is the Center for Knowledge and Resolution of Conflict in the Americas and the Caribbean (or CERCA, for its Spanish initials), based at the City of Knowledge in Panama City. CERCA will serve as the Panamanian facilitator for development of a wide network of collaborative and educational opportunities and training. The hope is to unite Panama and the region with leading educational, governmental, and nongovernmental entities and professionals in the United States interested in conflict resolution and alternative methods of dispute resolution. LACEP will act as the United States-based coordinating entity for the initiative and will foster and facilitate CERCA's access to and relationships with the multidisciplinary U.S.-based team needed to move the initiative forward.

The sustained exchange of ideas, technology, and cultures is an integral part of LACEP's and CERCA's work. Accordingly, LACEP/CERCA encourages international exchanges of students, faculty, and staff as part of its activities. An exchange of students from the U.S. to Panama, for example, offers an opportunity for research and applied learning for the students, but the work product is a benefit to and a learning experience for the people of Panama. Already LACEP/CERCA has facilitated student exchanges in the summers of 2007 and 2008. In 2007, four students from South Texas College of Law spent the summer working with the Panama Judicial Mediator's Program, which is a part of the Panama Supreme Court. In 2008, one student from South Texas College of Law spent the summer clerking for President Magistrate Harley Mitchell of the Panama Supreme Court, and one student from The University of Texas School of Law spent the summer with the Environmental Section of the Panama Canal Authority. The two students who visited Panama in 2008 agreed to be interviewed for this article.

Erich Sowell

Erich Sowell is a 2001 graduate of Clements High School in Sugar Land, Texas and a 2005 graduate of Texas A&M University, where he earned a B.S. degree in Economics with a minor in Business Administration. Currently, he is a third-year law student at South Texas College of Law in Houston. After Erich graduated from Texas A&M, he worked for a year as a manager for Hacienda del Secreto Resort in Playa del Carmen, Mexico, where he learned Spanish through immersion. Erich chose to work in Panama because he is interested in the resolution of international trade disputes, and he appreciates Panama's status as a major center for international trade. When he becomes a lawyer, he hopes to focus his practice on international commercial dispute resolution.

Judge Frank G. Evans and Al Amado, both associated with LACEP, helped Erich find his internship. Because of Erich's interest in arbitration, Evans and Amado persuaded Harley Mitchell, President Magistrate of the Supreme Court of Panama, to offer Erich a position with the Sala Cuarta, which deals with international arbitration appeals. While at the Sala Cuarta, Erich reviewed appeals from final arbitrations conducted in Panama and international affairs conducted in English. When there was no arbitration work, he performed research on Panama and U.S. ADR laws and compared the two in order to suggest changes that might improve Panamanian ADR processes.

Erich recalls two memorable experiences unrelated to his work at the Sala Cuarta. "I attended the Panama v. El Salvador World Cup qualifier with two of Harley Mitchell's bodyguards. Panama won 1-0. Amazing experience!" Also, "With Al Amado, I went to the San Blas Islands in the Comarca of the Kuna Yala Indians. We studied indigenous conflicts and the Kunas' systems of conflict resolution. I really enjoyed the archipelago of over 300 tropical islands."

Erich believes his internship in Panama benefited him in sev-

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INTERNSHIPS AND OTHER OPPORTUNITIES AVAILABLE IN PANAMA FOR STUDENTS AND PROFESSIONALS INTERESTED IN ALTERNATIVE DISPUTE RESOLUTION

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eral ways. "I increased my knowledge of Latin American business transactions, the Panamanian legal system, local culture, and Spanish terminology. Through networking, I made great contacts in the Panamanian business and legal communities. Altogether, it was a valuable work and personal experience."

Denton Nichols

Denton Nichols is a 2002 graduate of Mercer High School near Seattle, Washington and a 2006 graduate of Rice University, where he received a B.A. degree in Sociology and Hispanic Studies. He has been studying at the University of Texas at Austin since the Fall 2007 semester, where he is enrolled in a dual-degree program for a J.D. degree and an M.A. in Latin American Studies. Denton began to study Spanish in middle school, continued studying the language while in high school, and spent a summer in a Spanish-language immersion program in Costa Rica when he was seventeen years old. While at Rice University, he spent his summers in Mexico, Venezuela, and Brazil (where he learned Portuguese).

When asked how he chose Panama for an internship, Denton replied, "Because my dual-degree program lasts four years, I have an 'extra' summer to do what I always had done over my summers in college: go abroad. While other law classmates were looking at firms or organizations here in the U.S., I was keeping my ear tuned to what I could do in another country, besides traditional study abroad. Unfortunately, these types of opportunities don't come looking for you like domestic gigs do. I was lucky in that I met a Houston lawyer, Al Amado, at last year's U.S.-Mexico Bar Association conference in San Antonio. Al, who has been very helpful to us UT students in the past, knew of my interests and thought he might be able to connect me with an institution in Panama. We sent solicitations to a few organizations in Panama, and the Canal Authority's Environmental Division got back to us with a 'Sí.' I am very grateful to Al, since without him I don't think I could have gotten this chance . . . ."

Denton worked in an office dedicated to the Interinstitutional Commission for the Hydrographic Watershed of the Panama Canal (the Spanish-language acronym is "CICH"). He developed a legal research proposal looking at similar watershed commissions in the U.S. According to Denton, the proposal was "a sort of case study overview that might lend the Panamanians some background on what to do—and what to avoid—in designing and operating an interinstitutional watershed commission." Tiany López, Denton's supervising attorney, readily approved the proposal. "The CICH and the Canal have mastered the latest and greatest in watershed management theory, but are less familiar with actual experiences of their sister commissions in the U.S.," says Denton, so the project proved useful to CICH. "I also derived a benefit from the project, asserts Denton, "as it elevated my understanding about the challenges of implementing environmental policy in our multi-jurisdictional, multi-agency nation, and introduced me to one great way to meet those challenges: inter-institutional commissions. That kind of high-level policy making and analysis is not something that you normally get in your first year at law school, so I count myself fortunate to have done it under the wing of Tiany Lopez, who is so passionate about environmental issues and public service."

When asked about lessons he learned from his internship, Denton replied, "Through my research project in Panama on these kinds of inter-institutional commissions, I've learned that the mechanization of ADR in the public sector can go well beyond traditional mediation and arbitration—which usually come on the scene after a confrontation arises—to the design of permanent deliberative bodies that aim to solve shared problems before they become finger-pointing matches. When thinking about how to resolve recurring conflicts, particularly among states and governmental bodies, I think one question that should be asked is, 'Can we expect this kind of problem to recur frequently?' If so, a permanent interinstitutional commission is one method to harmonize otherwise uncoordinated and conflicting practices by public actors."

In the summer of 2009, LACEP/CERCA proposes to host an interdisciplinary group of students to serve as interns in a variety of setting. The following are some of the internship opportunities that have been discussed:

- Regional mediation centers of the Supreme Court of Panama;
- The Attorney General of Panama (mediation of domestic violence or victimless crimes cases);
- The Panama Canal Authority (issues related to contract, labor, or environmental issues and policies);
- The Panama Maritime Authority (policy issues regarding maritime commerce);
- FunTrab (labor and management workforce issues);
- MinGob (diverse issues within the Ministry of Government including training of police to handle domestic violence issues and typical conflict situations and human trafficking issues); and
- ANAM (issues related to conflict, development, and the environment).

Additionally, the following international NGOs located at the City of Knowledge have expressed interest in developing internship and exchange opportunities through LACEP/CERCA:

- Forest Stewardship Council;
- CATHALAC (water resources);
- Organization of American States;
- International Organization for Migration;
- PLAN (global development issues);
- UNICEF;
- UN Refugee Agency; and
- UN Development Programme.

The interns will focus their work on research and writing tasks related to those specific issues that the particular office has

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REFLECTIONS FROM THE EDGE
GETTING INTO THE HIDE OF THE PROBLEM
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(or perhaps an innocent lamb) must be sacrificed to appease the gods. Why? Because it is too scary to admit that bad things are going to happen sometimes, just as good things are going to happen sometimes. Fortunately we have statistics, math, psychology, and other scientific tools to help us at least calculate the probability of events occurring and the expected value of each outcome. What do we have to deal with the emotional fallout of these realities? We have mediators, and we have mental health professionals!

Do lawyers believe they have control over the lawsuit? Yes. Do **both** lawyers believe they have control over the law suit? Yes. Is that rational? How many clients in mediation believe they will lose, or have better than a 50% chance of losing, at the upcoming trial? Do clients even want to answer that question? If lawyers actually are sophisticated negotiators, they already know the probability of winning or losing and could have shared that good—or bad—news with their clients to prepare for a mediation. How often have you seen this in practice? I have mediated many cases, and I seldom see clients who have been coached to negotiate realistically and actually know, through decision analysis, the expected value of their cases under different assumptions. Why is this true? The knowledge is out there - lawyers can access it and mediators can too. Why would we rather guess than learn how to do some decision trees and figure out our actual bargaining zone and that of the other side? Do we prefer magical thinking to actually thinking? If so, the explanation must be that it is more emotionally comforting.

The Endowment Effect has been well researched, yet most of us operate as if it were not a human factor. Do you know anyone who is a pack rat? Have you ever walked into a friend's home that has a year's issues of the local newspaper stacked in the living room? Sometimes in training, I show how this works by giving someone in the group a token gift: maybe a special mug, or a sweatshirt with a certain logo, or a cup holder that is unusual. I explain that it was recently purchased at a local store, is a new design, is my special gift to the recipient, or is unusual in some other way. After talking a few minutes, I give everyone in the room a chance to bid for the item by passing written offers to the new owner, who is asked to write down the price he or she would accept for this new possession. Invariably, the buyers value the item much lower than the seller. Even in those few minutes, the new owner has felt the endowment effect and has allowed that to influence his bargaining zone.

Apparently, it isn't even necessary to have a tangible item to place in someone's hands. Barry Goldman forgot one day to bring anything to auction, so he came up with a new experiment: give half the class an imaginary sweat shirt and let the other half try to buy it. The effect was the same. People who were given the imaginary sweatshirt, on average, demanded twice as much for it as the rest of the class wanted to pay. They had become attached to an imaginary object in two minutes. Early in human development, the group or person with superior technology ("this is my spear - sharpened stick - and you will have to kill me to get it from me") didn't want to share it because it decreased the safety and the status of the giver/seller. Those people survived, and others, who were more naive or generous, apparently did not because this distortion in the brain still exists in situations where it is not conducive to good decision making.

In the drawers of many people, including me, is a bunch of garbage: unused lipsticks, old compacts with flaky face powder, tiny nubs of eye-liner pencils, business cards, scraps of paper, dried-up ballpoint pens, a few drops of a favorite perfume, foreign currency of low value, and antique breath mints. Years ago, my husband was home for the day and decided to throw all of it away to "help me." I was aghast! I felt grief! Now if anyone had showed up and tried to sell me the same items from their own drawer, I would have laughed. But when it was *my* stuff, the loss was painful! Of course, he never did that again, and my drawers are again happily messy and familiar with worthless but *valued* trash.

In negotiating the settlement of a lawsuit, mediators need to take this factor into account. Of course, the seller will always want to maximize the price, not only for economic reasons but because if it is my stuff, it is valuable to me. In the movie, The Wedding Crashers, you see a couple trying to mediate a division of their assets. The subject of frequent-flier miles comes up. Admittedly, that has some extrinsic value, but the issue seems to be more about the husband wanting to keep them because he earned them blissfully flying up to see his girlfriend than it did the utility value. Since the wife knows that, she is even more determined to get those miles - until they realize the marriage is really over, the reciprocity norm kicks in, and they are able to negotiate successfully. How many times have we seen a multi-million dollar divorce threaten to impasse over a worthless item that each claimed was precious? I know of one couple who had reached a huge settlement agreement on many, many valuable items, but almost went to court because each claimed the cow bell that they found on the neck of a Swiss bovine when they were walking through the Alpine valleys on their honeymoon. This was a case where both parties were very eager to end the marriage for quite different reasons, but they sparred over a worthless yet valued cowbell! These people have doctorates, and one is a former CEO of a huge company, and a military general, yet the cow bell was critically important to both of them! What endowment effect are we dealing with here? I believe the cowbell symbolized many years of marriage, three wonderful children, and the dreams that had died. If they couldn't have the expected future where they went through old age hand in hand, at least they could have the tangible representation of those dreams. Each person emerged from a successful negotiation with their ego intact and went on to even more personal satisfaction with a new life, but only one got the cowbell. The other is literally still searching for a replacement!

This is one reason parties value lawsuits differently, even when the parties are extremely intelligent and nice people.

Overconfidence shouldn't really have to be illustrated as a distortion in thinking, since we experience it constantly. Why

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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, or fax it to 214-368-7258.

You are an attorney-mediator who has been mediating for over 15 years in a large, metropolitan area. You enjoy a good reputation for your effectiveness, professionalism, and integrity. You have a substantial mediation practice thanks to the numerous appointments you get from the civil courts in the county as well as a long-time and well-established relationship you enjoy with twenty-or-so law firms of various sizes.

Your daughter, from whom you have been estranged for approximately ten years (ever since a bitter divorce from her mother), has just been hired by one of the largest firms in town, which happens to be one of your primary sources of mediation business. Your daughter is married and hasn't used her maiden name for several years, including on her law school diploma and her law license.

You have just received an order from the court appointing you to mediate a seven-party case in which one of the parties is represented by an attorney in the firm that just hired your daughter, an attorney for whom you have mediated dozens of cases over the last decade.

Is there an ethical issue that needs to be addressed? If so, how would you address it? Would your answer be different if you had a close relationship with your daughter?

G.R. (Randy) Akin (Longoria): Appearance of impropriety is the issue, not impropriety itself. A close or distant relationship with my daughter is not relevant. On the basis of appearance, I believe I need to address the issue directly by fully informing each of the attorneys representing the parties who will have an interest in the mediation. The attorneys will have to give me a written "okay" to mediate the case. It is analogous to a waiver of a conflict with a client.

Because I still practice paw on both sides of the docket, and because East Texas is a close-knit community, I have to inform attorneys of potential conflicts from time to time just like the above situation.

Will Pryor (Dallas): I disclose that my daughter is an employee of the firm. Not a close call. I probably would not be shy about describing the distance in our relationship, and indicating that the relationship, from my perspective, would not prevent me from serving as a neutral mediator. Nevertheless, it is absolutely a decision that the mediation participants are entitled to make. The issue is whether there is a circumstance that could give rise to the appearance of a conflict. There is!

This raises an issue I have been wrestling with for awhile, and that is the different levels of disclosure that I engage in for mediations, as opposed to arbitrations. On potential arbitration matters, I am strict. My disclosures sometimes go on for two or three pages. I describe my practice over the last fifteen years (2,500 + mediations) and indicate it is inevitable that I will have mediated with virtually every firm in town. I give a very rough estimate of the number (10? Dozens?) with the specific firms. And, because I am a (failed) politician, I also try to address the issue of whether I received political campaign contributions from lawyers in a particular firm. I invite further inquiry, if desired, and point the reader to the Federal Election Commission website, where my financial disclosures are available online. But, I will confess that in mediation, I have a much more relaxed standard, relying more on the general information about me available on my website, and an assumption that it is common knowledge that any experienced mediator is going to have extensive contacts with most firms in the community.

Comment: This puzzler appears simple on its face: disclose the relationship and avoid even the appearance of impropriety. However, that question raises additional issues that are much more complicated. Chief among them is the issue of how *much* information is the mediator bound to disclose? When should the disclosure be made? To whom should the disclosure be made (i.e., the attorneys, the parties, or both)? What is the proper response from the mediator if *anyone* (whether attorney or party) objects to the mediator serving on the case for *any* reason (ranging from, "I don't like your looks, " to "I believe you have a direct conflict of interest because your spouse represents one of the parties in the mediation)?

Guidance can come from a variety of sources: the Supreme Court's Ethical Guidelines for Mediators, the ADR Section's Ethical Guidelines on the website at www.texasadr.org, and

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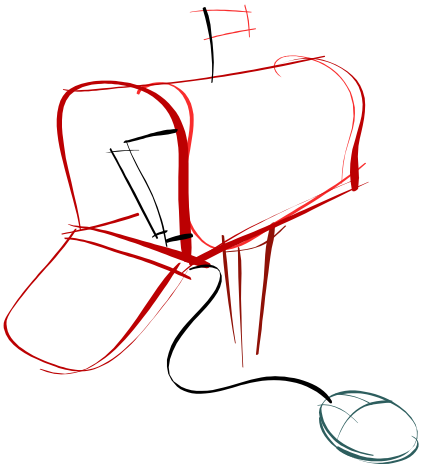

ADR on the Web

By Mary Thompson*

Brains on Purpose: Neuroscience and Conflict Resolution

http://westallen.typepad.com/brains_on_purpose/

Developed by Stephanie West Allen and Jeffery Schwartz, this blog contains articles and links relating to the intersection of brain science and conflict management. West is an attorney and long-time mediator based in California. Schwartz, a research psychologist at UCLA, has written extensively on the capacity of the mind to control the brain's chemistry. Together, they host Brains on Purpose, a site that contains content on a number of topics, many of which relate to dispute resolution: mediation, conflict, and negotiation.

A sampling of articles from these key content areas shows the range of topics that may be of interest to ADR practitioners:

Mediation. In a brief video, law professor Len Riskin discusses moving from the reactive brain to the reflective mind in mediation and in advocacy. Many Texas mediators are aware of Riskin's work on mindfulness in the fields of law and mediation. In this two-part video, Riskin explains how mindfulness can free practitioners from the reactivity of habitual patterns of thinking and help improve calmness and mental clarity.

Conflict. "Long Overdue Conversation about the State of Mediation" provides a link to an article in which Joseph McMahon questions the current lack of party-to-party dialogue in mediation. McMahon also explores the impact of litigation on mediation formats, and warns that response to mediation market demands could undermine the potential of the mediation profession.

Negotiation. "Recent Studies on Fairness and Empathy" contains a link to a discussion of the comparative advantages of empathizing vs. perspective taking in negotiation. The article provides a link to the original research as well as to an analysis and rebuttal by Stephanie West Allen.

This site may be a bit theoretical for those looking for practical information. Yet the neuroscience field appears to have a growing presence in the dispute resolution world. Earlier this year, the North Texas Conflict Resolution Conference (founded by ADR Section member Kay Elliott) held its 2008 conference entitled "Brain Science of War and Peace." In September, at the Association for Conflict Resolution's National Conference, Canadian mediator and psychologist Larry Fong offered a pre-conference session entitled, "Thinking About Your Thinking: Boosting Mediator Curiosity and Increasing Reflective Practice." Even this year's ABA Dispute Resolution Section Conference included a session by Oregon law Professor Richard Birke entitled "Does Neuroscience Have Anything to Offer Teachers of Mediation and Negotiation?"

As is evident in *Brains on Purpose* as well as in recent presentations in the ADR field, the answer is "yes."

***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

Ethical Puzzler
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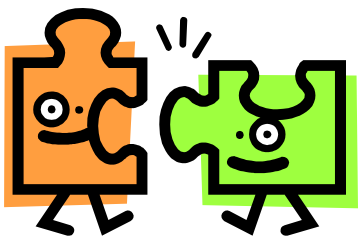
from that inner voice that proclaims loud and clear, "This just doesn't feel right to me." Search all of these sources for answers to this—and all—ethical puzzlers.

* ***Suzanne M. Duvall** is an attorney-mediator in Dallas. With over 800 hours of basic and advanced training in mediation, arbitration, and negotiation, she has mediated over 1,500 cases to resolution. She is a faculty member, lecturer, and trainer for numerous dispute resolution and educational organizations. She has received an Association of Attorney-Mediators Pro Bono Service Award, Louis Weber Outstanding Mediator of the Year Award, and the Susanne C. Adams and Frank G. Evans Awards for outstanding leadership in the field of ADR. Currently, she is President and a Credentialed Distinguished Mediator of the Texas Mediator Credentialing Association. She is a former Chair of the ADR Section of the State Bar of Texas.*



INTERNSHIPS AND OTHER OPPORTUNITIES AVAILABLE IN PANAMA FOR STUDENTS AND PROFESSIONALS INTERESTED IN ALTERNATIVE DISPUTE RESOLUTION
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identified as a priority. These internships would serve public policy research interests and further future work. Further, CERCA plans to facilitate and encourage professional, educational/training exchanges involving lawyers, judges, and academicians from Texas/U.S. and Panama/Latin America and the Caribbean.

Further, as part of its work in the region, LACEP/CERCA identifies emerging issues and develops strategic relationships that foster opportunities for consultancies and research for students and faculty of interested educational/training institutions. These research projects allow these educational institutions useful and beneficial opportunities for partnerships in and enhanced contact with the region. Such consultancies and academic projects provide opportunities for future training courses, policy analysis, and formulation. The objective here is to identify interdisciplinary consultancy prospects and fieldwork opportunities for faculty and students in diverse universities in the U.S., Latin America, and the Caribbean. These opportunities will also foster public/private partnerships (between Panama citizens and businesses and educational entities in the U.S., Latin America, and the Caribbean) as well as inter-institutional relationships (between LACEP/CERCA and government/nongovernmental entities in Panama and educational institutions in the U.S., Latin America, and the Caribbean).

Rather than simply offer occasional training programs, the Panama Initiative will provide a comprehensive and sustained learning atmosphere with the following benefits:

- Continuing training, education, and conference opportunities;
- Interdisciplinary, collaborative, clinical, and exchange opportunities;
- Research opportunities; and
- Partnerships with leading educational, governmental, nongovernmental, and business entities.

Anyone interested in the internship and other opportunities described in this article should contact Al Amado directly at alamado@mac.com.

ENDNOTE

For further information on the Panama Initiative and LACEP/CERCA, see Al Amado & Frank G. Evans, *The Panama Initiative: An Interdisciplinary and Collaborative Approach for the Solution of Emerging Development Issues in Panama, Latin America, and the Caribbean,* ALTERNATIVE RESOL., *Winter 2008, at 20.*

** Walter A. Wright is the Chair of the Newsletter Editorial Board of the ADR Section.*

***PERRY HOMES V. CULL:* TEXAS SUPREME COURT FINDS HOMEOWNER WAIVED ARBITRATION RIGHTS**
continued from page 4

every federal circuit that has answered the question, the court held that waiver questions are the responsibility of the courts, not arbitrators.

The heart of the opinion that followed is the long-waited analysis of what constitutes waiver by "substantially invoking" the litigation process. The court observed that the burden of overcoming the presumption against waiver of arbitration is onerous, citing six of its opinions covering the past ten years.[7] After discussing the type of factors that have been considered and applied by other courts, the Supreme Court concluded that "substantial invocation" of the judicial process is a fact inquiry that depends upon the totality of the circumstances.[8] While this may seem to offer minimal guidance, the court reasoned that substantial invocation can only be determined by applying a reasonableness standard within the context of the facts, citing language from a United States Supreme Court opinion that "… few answers will be written in black and white; the grays will dominate, and even among them the shades are innumerable."[9] Perhaps the clearest guidance offered by the court was the conclusion that waiver is an appropriate finding only if the conduct supporting waiver is "unequivocal,"[10] and it requires a showing of prejudice.

The court was critical of the Culls' conduct in first resisting, then insisting upon, arbitration. It detailed that the Culls had vigorously opposed arbitration when it was first proposed, then requested it four days before the case was set to trial, more than one year after the lawsuit was filed. The court then described how the Culls obtained information and documents in the litigation process that they probably would not have been entitled to obtain under arbitration. The court concluded that the Culls had engaged in "manipulation of litigation for one party's advantage to another's detriment," prejudicing the builder and the warranty company unfairly, and held that "having gotten what they wanted from the litigation process, they could not switch to arbitration at the last minute like this."

This case presents unusual facts, in which one set of interests had stops and starts about the choice of dispute resolution processes. Whether a party waived its right to invoke the arbitration process will be determined by the surrounding facts and circumstances, with the resisting party required to show prejudice.

One post-*Cull* waiver case has been released, demonstrating how to conduct waiver analysis in a multi-theory case with both arbitrable and non-arbitrable claims. To see how the Fort Worth Court of Appeals worked through the issue, read the September 18, 2008 decision in *Wee Tots Pediatrics, P.A. v. Morohunfola.*[11]

There will likely be a stream of other cases calling upon the appellate courts to slice, dice and weigh the evidence on waiver. Be on the lookout for more "I know it when I see it"[12] discussions of waiver.

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DISPELLING THE SEVEN DEADLY MYTHS REGARDING CIVIL COLLABORATIVE LAW©
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ously filed case until the other three parties have an opportunity to settle. Why would the non-participant do that? Depend ing on the circumstances, it might be to the nonparticipant's advantage to see what the others are able to accomplish before proceeding in litigation. If the nonparticipant refuses to wait, the other parties have the choice of proceeding with litigation alone or to proceed with litigation and the collaborative process simultaneously.

If all parties agree to use Collaborative Law to attempt resolution, the parties may incorporate the terms of their involvement in the participation agreement. For example: the parties may decide that if one of them should withdraw from the collaborative process, the withdrawing party will not initiate any adversarial proceeding for a specified period of time to allow the other parties an opportunity to arrive at an agreement.

Myth Number 7: Collaborative Law is a Threat to Litigation Lawyers and the Courts

There have always been—and will continue to be—people and disputes requiring third-party decision makers to resolve their differences. Many people, both attorneys and clients, are not suited to the requirements of the collaborative process, and the collaborative process is not suited to them. The process requires a great deal of hard work by both the lawyers and their clients. Many clients will not want that responsibility. Moreover, many lawyers and clients do not have the patience or inclination to sit through two-hour face-to-face meetings. It is easier for some people to just let the judge or jury decide their fate.

When mediation was introduced in the 1980s and 1990s, rumors ran rampant that litigation would be replaced with mediation. That certainly did not happen. Collaborative Law is filled with many unexplored possibilities, but it will never replace litigation. Nonetheless, Collaborative Law is an important tool for attorneys who desire to serve the needs of their clients, and clients should be informed regarding all dispute resolution processes available to them—including Collaborative Law. After all, it is the clients' dispute, and they should have a choice regarding the services they purchase.

**** Sherrie R. Abney** is a collaborative lawyer, mediator, arbitrator, and collaborative trainer. She has served as chair of the Dallas Bar Association's ADR and Collaborative Law Sections and is a founding director of the Texas Collaborative Law Council. Sherrie is member and past secretary of AAM, presenter and trainer for the International Academy of Collaborative Professionals, and a member of the Civil Committee of the Dispute Resolution Section of the ABA. She recently began a three-year term on the ADR Section's Council.*

Chair's Corner
continued from front page

Our Council will approach TexasBarCLE to allow members of our Section to speak on ADR topics during the programs of the major Sections such as Litigation, Family, and Appellate. To that end, we need your help with any personal contacts you may have in introducing us to the leaders of these Sections or the course coordinators of upcoming programs. We will persist in making the broader legal community aware of the trends in ADR and correcting any misconceptions. As an example of a misconception, a speaker at a recent family law conference said there is no code of ethics for mediators!

The Council is assembling an ADR survey to be presented to state and federal judges, seeking their views on the acceptance and effectiveness of mediation and arbitration in their courtrooms.

Finally, after months of work, your CLE committee has assembled an outstanding program in Houston for Friday, January 30, 2009. It promises to be outstanding. In a first-of-its-kind arrangement, our Section, TexasBarCLE, and the American Arbitration Association are collaborating to host Randy Lowry and Peter Robinson, both associated with the Straus School of Dispute Resolution at Pepperdine University. These nationally preeminent practitioners will conduct an intensive one-day interactive course in cutting-edge dispute resolution techniques using non-traditional parties and fact situations. This program is designed to energize experienced practitioners.

I particularly want to thank Talmage Boston, Director of the State Bar and liaison to our Section, for his attendance at the recent Council meeting and his constructive suggestions for heightening our visibility and effectiveness.

As a reminder, our next Council quarterly meetings are: January 29, 2009 (Houston), April 18, 2009 (San Antonio), and June 25 or 26, 2009 (Dallas).

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Winter	December 15, 2008	February 15, 2009
Spring	March 15, 2009	May 15, 2009
Summer	June 30, 2009	August 30, 2009
Fall	October 15, 2009	November 15, 2009

SEE PUBLICATION POLICIES ON PAGE 28 AND SEND ARTICLES TO:

ROBYN G. PIETSCH, A.A. White Dispute Resolution Center, University of Houston Law Center, 100 Law Center, Houston, Texas 77204-6060,

AUSTIN WAS THE SITE OF THE 2008 ANNUAL CONFERENCE OF THE ASSOCIATION FOR CONFLICT RESOLUTION

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- Walter Wright and three colleagues from Argentina presented a Spanish Track workshop entitled "Mediación en los Conflictos Sociales" (Mediation of Social Conflicts).
- LaCrisia "Cris" Gilbert, Carl Lucas, Kathy Bivings-Norris, and Marlene Labenz-Hough presented a workshop entitled "Texas Dispute Resolution Centers: Practical Successes and Case Studies."
- Margaret Leeds, Mike McMullen, Frank Rizzo, and Mary Alice Smallbone presented a workshop entitled "Peer Mediation 'Texas Style' Is Alive and Well."
- Stuart Elovitz presented a workshop entitled "Smart Sentiment in Dispute Resolution."
- Connie Barnaba facilitated a discussion entitled "The Impossible Dream: A Black Man in the White House?" She also presented a workshop entitled "Mediator Neutrality: Real or Imagined?"
- Michael McDowell, Beber Helburn, and Lynne Gomez presented a workshop entitled "Decision-making and Award Writing in Labor and Employment Arbitration—Advanced Concepts."
- Nancy Ferrell presented a workshop entitled "Forgiveness and Healing."
- Kay Elkins-Elliott, Suzanne Duvall, and Hon. John Coselli presented a workshop entitled "Promoting Quality Mediation through Credentialing."
- Beverly Reeves and Will Harrell, accompanied by colleagues from Oregon and Hawaii, participated in a workshop entitled "Ombudsman Applications within Public Institutions—Alive and Well?"
- Suzanne Schwartz and Susan Schultz presented a workshop entitled "Stakeholder Participation in Environmental Flow Decisions in Texas."
- Laury Adams presented a workshop entitled "Changing the Way People Divorce."
- John Boyce, along with colleagues from California, Arizona, New York, and Virginia, participated in a workshop entitled "Emerging Trends in ADR: Navigating the Future."

The ninth annual ACR conference will take place in Atlanta, Georgia on October 7-10, 2009. For further information about that conference, visit http://www.acrnet.org/conferences/index.htm.

** Walter A. Wright is Chair of the Newsletter Editorial Board of the ADR Section.*

Some of the Texans who attended

PERRY HOMES V. CULL TEXAS SUPREME COURT FINDS HOMEOWNER WAIVED ARBITRATION RIGHTS

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** Jeff Jury is a founding partner of Burns Anderson Jury & Brenner, L.L.P. in Austin. In addition to his business and construction law practice, he serves as a mediator and arbitrator of civil disputes. He is a Fellow in the International Academy of Mediators, and holds the credential "Distinguished Mediator" from the Texas Mediator Credentialing Association.*

ENDNOTES

[1] Perry Homes v. Cull, 258 S.W. 3d 580 (Tex. 2008).

[2] The arbitration clause stated "Any 'unresolved dispute' (defined below) that you may have with [Perry Homes or the warranty companies] shall be submitted to binding arbitration governed by the procedures of the Federal Arbitration Act . . . ."

[3] Chambers v. O'Quinn, 242 S.W. 3d 30, 32 (Tex. 2007)

[4] Green Tree Fin. Corp. –Ala. v. Randolph, 531 U.S. 79, 80 (2000)

[5] 9 U.S.C. Sec. 16 (b)(2)

[6] Tex. Civ. Prac. & Rem. Code § 171.098.

[7] In re Bank One, N.A., 216 S.W.3d 825, 827 (Tex. 2007); In re D. Wilson Constr. Co., 196 S.W.3d 774, 783 (Tex. 2006); In re Vesta Ins. Group, Inc., 192 S.W.3d 759, 763 (Tex. 2006); In re Serv. Corp. Int'l, 85 S.W.3d 171, 174 (Tex. 2002); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999); In re Bruce Terminix Co., 988 S.W.2d 702, 704 (Tex. 1998).

[8] *See* Burton-Dixie Corp. v. Timothy McCarthy Constr. Co., 436 F.2d 405, 407–08 (5th Cir. 1971) ("There is no set rule, however, as to what constitutes a waiver or abandonment of the arbitration agreement. The question depends upon the facts of each case and usually must be determined by the trier of facts."); Joel E. Smith, Annotation, *Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein*, 98 A.L.R. 3d 767, 771 (1980) ("In those cases involving the issue of whether the defendant's participation in an action constitutes a waiver of the right to arbitrate the dispute involved therein, no general rules are readily apparent for determining waiver other than the general adherence by the courts to the principle that waiver is to be determined from the particular facts and circumstances of each case . . . .").

[9] Estin v. Estin,. 334 U.S. 541, 545 (1948).

[10] *See* Van Indep. Sch. Dist. v. McCarty, 165 S.W.3d 351, 353 (Tex. 2005); First Valley Bank of Los Fresnos v. Martin, 144 S.W.3d 466, 471 (Tex. 2004); Jernigan v. Langley, 111 S.W.3d 153, 156 (Tex. 2003); Equitable Life Assurance Soc'y of U.S. v. Ellis, 152 S.W. 625, 628 (Tex. 1913).

[11] No. 02-08-00178-CV (Fort Worth Court of Appeals, September 18, 2008.

[12] Famously, from Jacobellis v. Ohio, 378 U. S. 184 (1964)(Stewart, J., concurring)

REFLECTIONS FROM THE EDGE
GETTING INTO THE HIDE OF THE PROBLEM
continued from page 18

do we get married with a divorce rate of 56%? Why are the only people who have a realistic view of their true talents the clinically depressed? Why do we buy houses knowing they will require constant upkeep? Why do we smoke, or do drugs, or overeat, even though we know these are all health risks?

We tend to be much more confident of our abilities than we have any right to be. Because of evolutionary biology, we think we know more and can achieve more than, according to statistical probabilities, we will. The higher our IQ, the more we fall into this trap. A brilliant plaintiff's trial lawyer will overestimate her chances of success at trial, even in a case with many high-risk factors (a key witness is dead, the client is abrasive and makes a poor witness, the evidence shows her client was speeding at the time of the accident), and in a county where jurors statistically are very conservative. Some research on trial verdicts shows that parties routinely turn down offers at mediation that are better than their trial outcomes.

As Goldman points out, our overconfidence leads to results that couldn't be more serious. In some legal negotiations or mediations, this is manageable: one overconfident negotiator intimidates the other negotiator and effectively bluffs her way to a better outcome than if the negotiator were more scientific. But when both negotiators are overconfident, the result is usually disastrous and irrational. This is the classical over-expensive, emotionally draining litigation, where the legal outcome is a loss for both parties and often for third parties.

Goldman points out there is a difference in being actually overconfident and appearing overconfident. When you are actually overconfident, you have not coolly and objectively evaluated your case. When you appear confident, but know better, you are strategically using a behavior that can distort optimal outcomes. Some experts believe, however, that to convincingly tell a lie, you need to believe it. I tend to agree with this view, because we are often more astute in detecting deception from others than we are at detecting denial or a thinking distortion in our own minds.

For mediators, there is much value and a richly rewarding world of social science research and scholarship that will enhance settlement outcomes for your clients. Why don't you test the waters?

**** Kay Elkins-Elliott**, J.D., LL.M., M.A., has arbitrated and mediated over 1700 cases since 1982, specializing in employment, family, and business matters. She served for three years as an Administrative Law Hearing Officer for the EEOC. She has taught ADR, Mediation, Family Mediation, Settlement Advocacy, and Negotiation at Texas Wesleyan University School of Law for 13 years, and during that time has coached national championship teams in Negotiation and in International On-Line Negotiation, and regional championship teams in Client Counseling and Representation in Mediation. She has coordinated the Certificate in Conflict Resolution program for Texas Woman's University for 9 years, teaching courses on Arbitration, Conflict Resolution, Mediation, Family Mediation, and Negotiation. She is a Life Fellow of the Texas Bar Foundation, president of ACR, Dallas , Council Member of the Texas Mediation Trainers Round Table, a former Council Member of the ADR Section of the State Bar of Texas, a Credentialed Distinguished Mediator, and serves on the Board of the Texas Mediator Credentialing Association. She was co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003).*

PRESCRIPTION FOR SANITY IN RESOLVING BUSINESS DISPUTES: CIVIL COLLABORATIVE PRACTICE IN A BUSINESS RESTRUCTURING CASE IN MASSACHUSETTS
continued from page 13

parting shareholder for his stock on equitable terms based on a jointly commissioned valuation but in a manner that did not cripple the other shareholders; a constructive and equitable process of mutually determining and agreeing on which customers would go with the newly created company; mutually beneficial non-competition covenants; a software re-seller agreement covering a difficult-to-value software product; a positive, jointly issued statement to the public; and maintenance of working relationships among the principals for future business joint ventures.

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**** R. Paul Faxon**, Esq,. of The New Law Center in Cambridge, Massachusetts, concentrates his practice in the areas of business and real estate transactions and Collaborative Law. He can be reached at: pfaxon@thenewlawcenter.com*

***** Michael Zeytoonian**, Esq., of Hutchings, Barsamian, Mandelcorn & Zeytoonian, LLP in Wellesley Hills and Westborough, Massachusetts, concentrates his practice in the areas of employment and business law, preventive law, ombudsman services, mediation and Collaborative Law. He can be reached at: mzeytoonian@hutchingsbarsamian.com*

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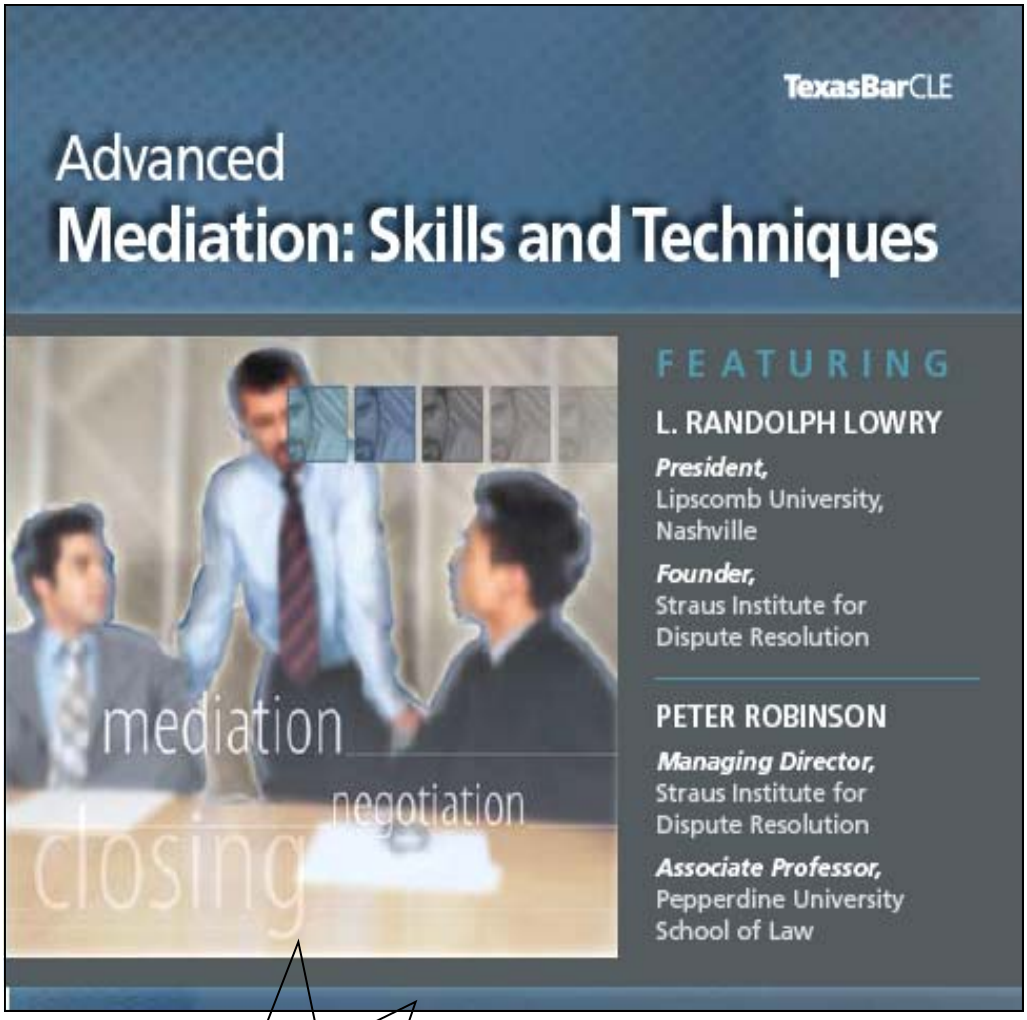

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2008—2009 CALENDAR OF EVENTS

40-Hour Basic Mediation Training * Austin * December 1-5, 2008 * Center for Public Policy Dispute Resolution—University of Texas School of Law, Austin. For more information visit www.utexas.edu/law/cppdr

Basic Mediation Training * Tyler * December 1-5, 2008 * Dispute Resolution Center of Lubbock County * For more information please contact Jessica Bruton or Crystal Stone at 866.329.3522 or 806.775.1720 Website: drc@co.lubbock.tx.us

Group Facilitation Training * Austin * December 8, 9, 10, 2008 * For more information visit www.corderthompson.com or call 512.458.4427

Specialized Course in Commercial Arbitration * Houston * January 14-17, 2009 * University of Houston Law Center—A.A. White Dispute Resolution Center * Ben Sheppard, course director * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * or visit www.law.uh.edu/blakely/aawhite

Managing the Difficult Group Conversation * Austin * January 15, 2009 * University of Texas at Austin Center for Public Policy Dispute Resolution * For more information please call 512.471.3507 or email cppdr@law.utexas.edu

An Introduction to Group Dialogue Processes * Austin * January 15, 2009 * For more information visit www.corderthompson.com or call 512.458.4427

Basic 40-Hour Mediation Training * Dallas * January 16, 17, 23, 24, 30, 2009 * Contact Cris Gilbert at DMS at 214-754-0022 or visit www.dms-adr.org

40-Hour Basic Mediation * Houston * University of Houston AA White Dispute Resolution Center * January 16-18 continuing January 23-25, 2009 * (approved for 41.75 participatory hours and 04.50 ethics hours) * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

Basic Mediation Training * Austin * Feb 4, 5, 6, 10, 11, 2009 * For more information visit www.corderthompson.com or call 512.458.4427

Basic 40-Hour Mediation Training * Houston * February 5-7, continuing February 12-14, 2009 * 2 Thursdays 4:00 p.m.-8:30 p.m.; 2 Fridays and Saturdays 9:00 a.m. - 6:00 p.m. * *Worklife Institute* * 1900 St. James Place, Suite 880 * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

Family Mediation Training * Dallas * March 6, 7, 13, 14, 2009 * Contact Cris Gilbert at DMS at 214-754-0022 or visit www.dms-adr.org

Advanced Family Mediation Training * Houston * March 11-14, 2009 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, efburleigh@aol.com or see www.worklifeinstitute.com

40-Hour Basic Mediation * Houston * March 16-20, 2009 * University of Houston AA White Dispute Resolution Center * * (approved for 41.75 participatory hours and 04.50 ethics hours) * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

Facilitating Powerful Coalitions * McKinney Roughs State Park, Austin * April 14-16, 2009 * A hands-on program for NGO's, * sponsored by the Center for Public Policy Dispute Resolution, CDR Associates and Consensus Building Institute

Basic 40-Hour Mediation Training * Houston * April 16-18, 23-25, 2009 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, efburleigh@aol.com or see www.worklifeinstitute.com

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.

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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 2008 to June 2009. 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. An author who wishes an article to appear in a specific issue of the newsletter should submit the article by the deadline set in the preceding issue of the newsletter.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. All quotations, titles, names, and dates should be double-checked for accuracy.
5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. If possible, the writer should submit an article via e-mail attachment addressed to Walter Wright at ww05@txstate.edu or Robyn Pietsch at rpietsch@central.uh.edu. If the author does not have access to e-mail, the author may send a diskette containing the article to Walter Wright, c/o Department of Political Science, Texas State University, 601 University Drive, San Marcos, Texas 78666.
8. Each author should send his or her photo (in jpeg format) with the article.
9. 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.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.
2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

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

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT 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 address 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."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2008, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

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ALTERNATIVE DISPUTE RESOLUTION SECTION

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