ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By Susan Schultz., Chair, ADR Section

Susan Schultz

"Coming together is a beginning, Keeping together is progress. Working together is success."
Henry Ford

We have come together and worked together as members of the Alternative Dispute Resolution Section for the past eighteen years. The Section was officially launched during the 1992 State Bar Annual Meeting. As we start a new Bar year and set our goals for the Section, I invite you to contemplate what "working together" and "success" look like to you as a member of this Section.

As you ruminate on those concepts, consider approaching them on at least two different levels: individually (as an individual member) and collectively (as a Section). Your new Council met immediately following the ADR CLE program at the annual meeting and affirmed one possible avenue for individual involvement: working together through committees. We are one of the largest sections of the State Bar (over 1200 members) and come from various backgrounds and disciplines. You each have a wealth of experiences that you bring to the field and to the Section. Consider sharing your experience and talent by participating in a committee. Below is the list of current and new committees from which to choose. Feel free to contact the Council members listed under each committee to sign up.

- **Annual Meeting Committee** – the section holds its annual meeting at the same time and place as the State Bar's annual meeting. This committee coordinates activities for the annual meeting. In particular, the committee plans and leads the CLE portion of the annual meeting. The Chair-elect of the section serves as Chair of the annual meeting committee.
  Joey Cope, Chair
- **Newsletter Committee** – works in conjunction with newsletter editor(s) to solicit articles and announcements for the quarterly section newsletter.
  Alvin Zimmerman, Council Liaison
  Stephen Huber, co-editor
  Wendy Trachte-Huber, co-editor
- **Website Committee** – works in conjunction with the State Bar webmaster to design, update and maintain a user-friendly, resourceful, and relevant section website for the benefit of the public and section members.
  Jeff Jury, Chair
  Patty Wenetschlaeger

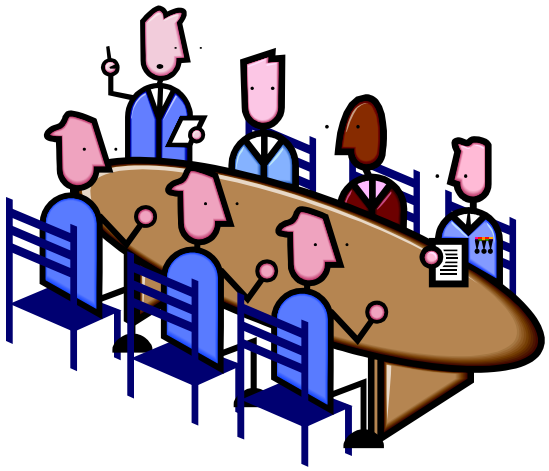
Inside This Issue:

- **Membership Committee** – recruits and retains members through communications (emails and phone calls), including welcome letters and invitations to participate in events and committees; identifies unmet member expectations; and receives feedback from members.
  Joey Cope, Chair
  Guy Hawkins
- **CLE Program Committee** – plans, proposes topics and speakers for Council approval, coordinates with the State Bar, and leads the section's stand-alone CLE program.
  Don Philbin, Chair
  Anne Ashby
  Sherrie Abney
- **Outreach and Legislative Committee** – establishes relationships with other sections of the Bar and other relevant organizations that the Council deems beneficial to the section; during Texas legislative sessions, monitors bills affecting dispute resolution processes outside the courtroom that involve a third party neutral, especially mediation and arbitration (the monitoring may be done in cooperation with other organizations); determines issues that the Section may wish to propose for the State Bar legislative agenda.
  Bob Gammage, Chair
  Susan Perin
- **Frank G. Evans Award Committee** – solicits nominations based on the criteria established for this award; presents list of finalists for Council approval by the Spring Council meeting of any year in which the award will be presented at the annual meeting; drafts article on award recipient for summer newsletter.
  Anne Ashby, Chair
  Ed Reaves
  Alvin Zimmerman
- **International DR Committee** - provides information and proposes training relevant to neutrals and advocates who seek to more effectively assist parties or represent clients when the matter has an international component.
  Wayne Fagan, Chair
  Bill Short
  Sherrie Abney
  Walter Wright

One of these committees must have struck a chord, sparked an interest! Join and see what happens. Furthermore, if there is a project that you think the Section ought to consider, please contact me or any other council member so that we may include it in our discussions.

Finally, what do we collectively as a Section want to accomplish? For example: when and for what purpose should the Section work with others (*e.g.* other sections of the State Bar, other ADR organizations in Texas and elsewhere – part of what the outreach committee might consider)? And, how does the Section measure success? We intend to address these questions throughout the year in Council meetings and in our committees, and look forward to your input.

As Chair this year, I personally commit to seeking answers through including as many as possible in the conversation. We live in a time when communications are possible through various media regardless of our location. Let's use that technology to be inclusive and participatory. I am very fortunate to be Chair at a time when the Section continues to grow in richness and diversity. Such richness and diversity are also reflected in your very capable Council members. Whether you choose to make your voice heard on one issue or many, by email or snail mail, to one person or a multitude, I invite you to share your ideas and thoughts on the business of this Section. Let the conversation begin!



Cecilia H. Morgan, Esq. Honored For Outstanding Contribution To ADR In Texas As Frank G. Evans Award Winner

By Anne Ashby

Cecilia H. Morgan, Esq. is the 2010 recipient of the Justice Frank G. Evans Award for Outstanding Contribution to ADR in the State of Texas. Ms. Morgan received the award at the State Bar of Texas Annual Meeting in Fort Worth on June 10. The award was created and dedicated as a living tribute to Justice Frank G. Evans who is considered the founder of the alternative dispute resolution movement in Texas. It is awarded annually to persons who have performed exceptional and outstanding efforts in promoting or furthering the use or research of alternative dispute resolution methods in Texas.

Cecelia is a full time mediator and arbitrator based in the Dallas Jams Resolution Center. She has more than 30 years experience as an attorney and ADR professional and is a respected member of JAMS Employment, Healthcare and Financial Services Practice Groups. Ms. Morgan has also been named one of Texas' Best Alternative Dispute Resolution Lawyers by The Best Lawyers in America every year since 2008. She earned her J. D. from Texas Tech University School of Law in 1977 and her B.A. from Abilene Christian University in 1974. "I am humbled to be a recipient of the Justice Frank G. Evans Award," said Ms. Morgan. "It is gratifying to receive this special award and I am happy to have been part of the movement promoting ADR statewide. As the use of ADR evolves in Texas, we will continue to find innovative ways to meet the needs of those seeking efficient, timely and cost-effective resolutions."

"Cecelia has been our colleague at Jams for 19 years. We could have not succeeded without her dedication and commitment. Her unselfish training and mentoring of others to establish and sustain this profession is a credit to all of her colleagues. For me, she is the best 'I can count on you partner.'" says Harlan Martin, Jams Mediator/Arbitrator in Dallas.

Ms. Morgan joins the other recipients of the Justice Frank G. Evans Award:

Honorable Frank G. Evans	(1994)
Professor Kimberlee Kovach	(1995)
Bill Lowe	(1996)
Honorable Nancy Atlas	(1997)
Professor Edward F. Sherman	(1998)
C. Bruce Stratton	(1999)
Suzanne Mann Duvall	(2000)
John Palmer	(2001)
Gary Condra	(2002)
Honorable John Coselli	(2003)
Professor Brian D. Shannon	(2004)
Maxel "Bud" & Rena Silverberg	(2005)
Michael J. Schless	(2006)
Cyndi Taylor Krier and Charles R. "Bob" Dunn	(2007)
Walter A. Wright and Robyn G. Pietsch	(2008)
Michael J. Kopp	(2009)

FROM THE EDITORS

Stephen K. Huber

E. Wendy Trachte-Huber

This issue opens with the Chair's Corner, by our new Chair, Susan Schultz. It is followed (after this piece) by a summary of Section events at the Annual Meeting of the State Bar of Texas, including a selection of photographs by Walter Wright and Alvin Zimmerman. Next come substantive articles about mediation of Balance-Billing disputes, which will be of interest to all of us in our capacity as patients as well as dispute resolution professionals; mandatory stays of arbitration under section 3 of the Federal Arbitration Act; and part II of an article about the scope of federal preemption of state laws related to arbitration. Finally, our three wonderful regular contributors – Suzanne Duvall, Kay Elkins-Elliott, and Mary Thompson have one again provided us with their interesting and challenging thoughts.

The Counsel of the Section on Dispute Resolution (DR) has requested that the Editors provide coverage of recent developments that relate to DR. We have done some of this is the past year, and will do more in the future. Case law is the most easily accessible to the Editors, but the same is true of our sophisticated readership. While case law is the primary source of new developments for arbitration, the same is not true for other DR areas. We regard the coverage of DR developments as a collaborative effort, with the Section membership bearing considerable responsibility for keeping Steve and Wendy up-to-date. Remember, we are just an e-mail away.

Our case law coverage for this issue focuses on recent arbitration developments in the United States Supreme Court. The Court decided two cases in 2010, *Stolt-Nielsen* and *Jackson*. In addition, the Court granted certiorari to review a decision by the 9th Circuit, which we will refer to as *Concepcion* – the name of a plaintiff in the case before the Supreme Court, although a different plaintiff's name was used by the court of appeals – that will be heard in the next term, with a decision unlikely before 2011. We present two versions of these cases for our readers. A brief summary of these decisions is presented first, followed by sharply edited versions of the actual decisions.

The two 2010 arbitration decisions reflect the commonly noted "conservative-liberal" division on the Court. In each instance the majority consisted of five justices: the Chief Justice, plus Justices Alito, Kennedy, Scalia, and Thomas. Justices Breyer, Ginsberg, and Stevens dissented in both cases. Justice Sotomayor dissented in one of the cases, and recused herself in the other one. This trend is disturbing because this common division among the Justices has not been evident in arbitration decisions over the last 25 years – both "conservative" and "liberal" justices have been broadly supportive of arbitration, particularly outside the context of consumer and employment contracts of adhesion.

In *Stolt-Nielsen*, the opinion for the Court opened by asking: "whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act"? The answer from the Court was No. Although the parties were sophisticated commercial organizations engaged in an international charter party transaction, the Court did not limit its conclusion to such transactions. The parties used a standard form contract, but all charter party agreements call for arbitration of disputes and are silent regarding class arbitration. The Court did not suggest that consumer or employment arbitration agreements would be subject to different considerations. Although the underlying contract specified that arbitrability would be determined by the arbitrators – standard practice with international arbitration agreements – the Court ruled that the arbitrators were wrong as a matter of law in ordering class arbitration, and declined to return the matter to the arbitrators for further consideration.

Jackson involved an employment dispute. The employee brought suit against the employer, who in-

voked the arbitration provision in their contract. The employee claimed that the arbitration provision was unconscionable, to which the employer responded that the contract called for the arbitrator to decide all issues related to the contract. Once again the Supreme Court commenced its opinion by stating the issue in the broadest terms: "W*e consider whether, under the FAA, a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator."* The answer: an unequivocal No.

The *Stolt-Nielsen* and *Jackson* decisions are likely to have an impact on the drafting of arbitration provisions. Restrictions on class arbitration (and other forms of joint action) are not rare, but their use is sure to increase dramatically — and they are less likely to fall to unconscionability challenges.

The assignment of arbitrability issues – "gateway" issues in the parlance of the Supreme Court – to arbitrators has heretofore been uncommon (international and labor arbitration are exceptions). Such provisions will soon be common in consumer and employment arbitration provisions.

So much for the Supreme Court's actual decisions; we now turn to predicting what the Court will do when it hears the *Concepcion* case in its October term. The underlying form contract with AT&T required arbitration of disputes, while expressly barring class proceedings. The 9th Circuit, relying on California law, ruled that the class limitation was unconscionable, and therefore unenforceable. In light of the *Stolt-Nielsen* and *Jackson* decisions, it appears a foregone conclusion that the Supreme Court will reverse the 9th Circuit decision in *Concepcion*, in an opinion that will be joined by (at least, but perhaps at most) five Justices, specifically Roberts, Alito, Kennedy, Scalia, and Thomas. The major open question is whether Justice Alito or Justice Scalia will write the majority opinion.

1. Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S.Ct. ___ (2010) (5-3 decision).

Justice ALITO delivered the opinion of the Court.

We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the FAA. [The answer is No.]

Petitioners are shipping companies that serve a large share of the world market for parcel tankers – seagoing vessels with compartments that are separately chartered to customers wishing to ship liquids in small quantities. One of those customers is AnimalFeeds, which supplies raw ingredients, such as fish oil, to animal-feed producers around the world. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party. Numerous charter parties are in regular use, and the charter party that AnimalFeeds uses is known as the "Vegoilvoy" charter party. Petitioners assert, without contradiction, that charterers like AnimalFeeds, or their agents – not the shipowners – typically select the particular charter party that governs their shipments. Adopted in 1950, the Vegoilvoy charter party contains the following arbitration clause:

> "Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the FAA and a judgment of the Court shall be entered upon any award made by said arbitrator."

In 2003, a Department of Justice criminal investigation revealed that petitioners were engaging in an illegal price-fixing conspiracy. When AnimalFeeds learned of this, it brought a putative class action against petitioners asserting antitrust claims for supracompetitive prices that petitioners allegedly charged their customers over a period of several years. Other charterers brought similar suits. ..The Judicial Panel on Multidistrict Litigation ordered the consolidation of then-pending actions against petitioners, including AnimalFeeds' action, in the District of Connecticut. See *In re Parcel Tanker Shipping Services Antitrust Litigation,* 296 F.Supp.2d 1370, 1371 (JPML 2003). The parties agree that as a

consequence of these judgments and orders, AnimalFeeds and petitioners must arbitrate their antitrust dispute.

In 2005, AnimalFeeds served petitioners with a demand for class arbitration, designating New York City as the place of arbitration and seeking to represent a class of "all direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from petitioners at any time during the period from August 1, 1998, to November 30, 2002." The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators who were to "follow and be bound" by Rules 3 through 7 of the AAA's Supplementary Rules for Class Arbitrations. These rules (hereinafter Class Rules) were developed by the AAA after our decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and Class Rule 3, in accordance with the plurality opinion in that case, requires an arbitrator, as a threshold matter, to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."

The parties selected a panel of arbitrators and stipulated that the arbitration clause was "silent" with respect to class arbitration. Counsel for AnimalFeeds explained to the arbitration panel that the term "silent" did not simply mean that the clause made no express reference to class arbitration. Rather, he said, "all the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." After hearing argument and evidence, including testimony from petitioners' experts regarding arbitration customs and usage in the maritime trade, the arbitrators concluded that the arbitration clause allowed for class arbitration. They found persuasive the fact that other arbitrators ruling after *Bazzle* had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration," but the panel acknowledged that none of these decisions was "exactly comparable" to the present dispute. Petitioners' expert evidence did not show an "intent to preclude class arbitration," the arbitrators reasoned, and petitioners' argument would leave "no basis for a class action absent express agreement among all parties and the putative class members."

The arbitrators stayed the proceeding to allow the parties to seek judicial review, and petitioners filed an application to vacate the arbitrators' award, invoking the District Court's jurisdiction under 9 U.S.C. § 203 and 28 U.S.C. §§ 1331 and 1333. The District Court vacated the award, concluding that the arbitrators' decision was made in "manifest disregard" of the law insofar as the arbitrators failed to conduct a choice-of-law analysis. Had such an analysis been conducted, the District Court held, the arbitrators would have applied the rule of federal maritime law requiring that contracts be interpreted in light of custom and usage.

AnimalFeeds appealed to the Court of Appeals, which reversed. As an initial matter, the Court of Appeals held that the "manifest disregard" standard survived our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), as a "judicial gloss" on the enumerated grounds for vacatur of arbitration awards under 9 U.S.C. § 10. Nonetheless, the Court of Appeals concluded that, because petitioners had cited no authority applying a federal maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of federal maritime law. Nor had the arbitrators manifestly disregarded New York law, the Court of Appeals continued, since nothing in New York case law established a rule against class arbitration.

Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error "or even a serious error." "It is only when an arbitrator strays from interpretation and application of the agreement and effectively"dispense[s] his own brand of industrial justice "that his decision may be unenforceable." *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.

We do not decide whether "manifest disregard" survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Assuming, *arguendo,* that such a standard applies, we find it satisfied for the reasons that follow.

In its memorandum of law filed in the arbitration proceedings, AnimalFeeds made three arguments in support of construing the arbitration clause to permit class arbitration:

> "The parties' arbitration clause should be construed to allow class arbitration because (a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under *Bazzle*; *(b) the clause should be construed to permit class arbitration as a matter of public policy*; and (c) the clause would be unconscionable and unenforceable if it forbade class arbitration."

The arbitrators expressly rejected AnimalFeeds' first argument and said nothing about the third. Instead, the panel appears to have rested its decision on AnimalFeeds' public policy argument. Because the parties agreed their agreement was "silent" in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation. Had they engaged in that undertaking, they presumably would have looked either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i.e.,* either federal maritime law or New York law. But the panel did not consider whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to determine what rule would govern under either maritime or New York law in the case of a "silent" contract. Instead, the panel based its decision on post-*Bazzle* arbitral decisions that "construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration." The panel did not mention whether any of these decisions were based on a rule derived from the FAA or on maritime or New York law.

The panel's reliance on these arbitral awards confirms that the panel's decision was not based on a determination regarding the parties' intent. All of the arbitral awards were made under the AAA's Class Rules, which were adopted in 2003, and thus none was available when the parties here entered into the Vegoilvoy charter party during the class period ranging from 1998 to 2002. Moreover, in its award, the panel appeared to acknowledge that none of the cited arbitration awards involved a contract between sophisticated business entities.

Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case. The panel was not persuaded by "court cases denying consolidation of arbitrations," see *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993); by undisputed evidence that the Vegoilvoy charter party had "never been the basis of a class action;" or by expert opinion that "sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration."

Accordingly, finding no convincing ground for departing from the post-*Bazzle* arbitral consensus, the panel held that class arbitration was permitted in this case. The conclusion is inescapable that the panel simply imposed its own conception of sound policy. In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers. As a result, under § 10(b) of the FAA, we must either "direct a rehearing by the arbitrators" or decide the question that was originally referred to the panel.

Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.

The arbitration panel thought that *Bazzle* "controlled" the resolution" of the question whether the Vegoilvoy charter party "permit[s]" this arbitration to proceed on behalf of a class, "but that understanding was incorrect. ... Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. In fact, however, only the plurality decided that question. But we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.

Unfortunately, however, both the parties and the arbitration panel seem to have misunderstood *Bazzle* in another respect, namely, that it established the standard to be applied by a decision maker in determining whether a contract may permissibly be interpreted to allow class arbitration. The arbitration panel began its discussion by stating that the parties "differ regarding *the rule of interpretation* to be gleaned from the *Bazzle* decision." The panel continued:

> "Claimants argue that *Bazzle* requires clear language that forbids class arbitration in order to bar a class action. The Panel, however, agrees with Respondents that the test is a more general one – arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action.

However, *Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted. The decision in *Bazzle* left that question open, and we turn to it now.

While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion. We have said on numerous occasions that the central or "primary" purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the contractual rights and expectations of the In this endeavor, "as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes.

From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue. The critical point, in the view of the arbitration panel, was that petitioners did not "establish that the parties to the charter agreements intended to *preclude* class arbitration." Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. This recognition is grounded in the background principle that "when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204 (1979). An implicit agreement to authorize class-action arbitration, however, is not a term that

the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what _procedural mode_ was available to present AnimalFeeds' claims. If the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was _no agreement_ on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.

Justice GINSBURG, with whom Justice STEVENS and Justice BREYER join, dissenting.

When an arbitration clause is silent on the question, may arbitration proceed on behalf of a class? The Court prematurely takes up that important question and, indulging in *de novo* review, overturns the ruling of experienced arbitrators. All three panelists are leaders in the international dispute-resolution bar. The Court errs in addressing an issue not ripe for judicial review. Compounding that error, the Court substitutes its judgment for that of the decisionmakers chosen by the parties. I would dismiss the petition as improvidently granted. Were I to reach the merits, I would adhere to the strict limitations the FAA places on judicial review of arbitral awards. § 10. Accordingly, I would affirm the judgment of the Second Circuit, which rejected petitioners' plea for vacation of the arbitrators' decision. Alternatively, I would vacate with instructions to dismiss for lack of present jurisdiction.

2. Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. —, 2010 WL 2471058 (5-4 decision).

Justice SCALIA delivered the opinion of the Court.

We consider whether, under the FAA, a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator. [Answer: No.] Antonio Jackson filed suit for employment discrimination against his former employer, Rent-A-Center (RAC). RAC sought to enforce the written arbitration. Jackson responded that the agreement was unconscionable, and therefore unenforceable. The contract specified that the arbitrator "shall have exclusive authority to resolve" all contract-related issues.]

The FAA reflects the fundamental principle that arbitration is a matter of contract. The FAA places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms, Like other contracts, however, they may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. The Act also establishes procedures by which federal courts implement § 2's substantive rule. ... The Agreement here contains multiple written provisions to settle by arbitration a controversy. Two are relevant to our discussion. The first, titled "Claims Covered By The Agreement" provides for arbitration of all "past, present or future" disputes arising out of Jackson's employment with Rent-A-Center. Second, the section titled "Arbitration Procedures" provides that "the Arbitrator ... shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable" The current "controversy" be-

tween the parties is whether the Agreement is unconscionable. It is the second provision, which delegates resolution of that controversy to the arbitrator, that Rent-A-Center seeks to enforce. ... We will refer to it as the delegation provision.

The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. This line of cases merely reflects the principle that arbitration is a matter of contract. There is one caveat. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), held that courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. The parties agree the heightened standard applies here. ... Jackson does not dispute that the text of the Agreement was clear and unmistakable on this point. What he argues now, however, is that it is not "clear and unmistakable" that his *agreement* to that text was valid, because of the unconscionability claims he raises.

This mistakes the subject of the *First Options* "clear and unmistakable" requirement. It pertains to the parties' *manifestation of intent*, not the agreement's *validity*. It is an "interpretive rule," based on an assumption about the parties' expectations. In circumstances where contracting parties would likely have expected a court to have decided the gateway matter, we assume that is what they agreed to. Thus, unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

The *validity* of a written agreement to arbitrate (whether it is legally binding, as opposed to whether it was in fact agreed to "including," of course, whether it was void for unconscionability) is governed by § 2's provision that it shall be valid "save upon such grounds as exist at law or equity for the revocation of any contract." Those grounds do not include, of course, any requirement that its lack of unconscionability must be "clear and unmistakable"

There are two types of validity challenges under § 2: One type challenges specifically the validity of the agreement to arbitrate, and the other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. Only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable. The issue of the agreement's "validity" is different from the issue whether any agreement between the parties was ever concluded, and, we address only the former.

That is because § 2 states that a written provision to settle by arbitration a controversy is valid, irrevocable, and enforceable " without mention" of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.

But that agreements to arbitrate are severable does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4. In *Prima Paint*, for example, if the claim had been "fraud in the inducement of the arbitration clause itself," then the court would have considered it. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract. In some cases the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate. Thus, in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But even where that is not the case – as in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract – we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.

Here, the written provision to settle by arbitration a controversy that Rent-A-Center asks us to enforce is the delegation provision – the provision that gave the arbitrator exclusive authority to resolve any dispute relating to the enforceability of this Agreement, The remainder of the contract is the rest of the agreement to arbitrate claims arising out of Jackson's employment with Rent-A-Center. To be sure this case differs from *Prima Paint, Buckeye,* and *Preston,* in that the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration – contracts for consulting services, check-cashing services, and "personal management " or "talent agent" services. In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. The dissent calls this a "breezy assertion," but it seems to us self-evident. When the dissent comes to discussing the point, it gives no logical reason why an agreement to arbitrate one controversy (an employment-discrimination claim) is not severable from an agreement to arbitrate a different controversy (enforceability). There is none. Since the dissent accepts that the invalidity of one provision *within an arbitration agreement* does not necessarily invalidate its other provisions, it cannot believe in some sort of magic bond between arbitration provisions that prevents them from being severed from each other. According to the dissent, it is fine to sever an invalid provision within an arbitration agreement when severability is a matter of state law, but severability is not allowed when it comes to applying *Prima Paint*.

Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific written provision to settle by arbitration a controversy that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.

Jackson challenged only the validity of the contract as a whole. ... Jackson stated that "the *entire agreement* seems drawn to provide Rent-A-Center with undue advantages should an employment-related dispute arise." At one point, he argued that the limitations on discovery "further support his contention that the *arbitration agreement as a whole* is substantively unconscionable." (emphasis added). And before this Court, Jackson describes his challenge in the District Court as follows: He "opposed the motion to compel on the ground that the *entire arbitration agreement*, including the delegation clause, was unconscionable." (emphasis added).

As required to make out a claim of unconscionability under Nevada law, he contended that the Agreement was both procedurally and substantively unconscionable. But we need not consider that claim because none of Jackson's substantive unconscionability challenges was specific to the delegation provision. First, he argued that the Agreement's coverage was one sided in that it required arbitration of claims an employee was likely to bring – contract, tort, discrimination, and statutory claims – but did not require arbitration of claims Rent-A-Center was likely to bring – intellectual property, unfair competition, and trade secrets claims. This one-sided-coverage argument clearly did not go to the validity of the delegation provision.

Jackson's other two substantive unconscionability arguments assailed arbitration procedures called for by the contract – the fee-splitting arrangement and the limitations on discovery – procedures that were to be used during arbitration under *both* the agreement to arbitrate employment-related disputes *and* the delegation provision. It may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court. To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his fact-bound employment discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination. Jackson, however, did not make any arguments specific to the delegation provision; he argued that the fee-sharing and discovery proce-

dures rendered the *entire* Agreement invalid.

In his brief to this Court, Jackson made the contention, not mentioned below, that the delegation provision itself is substantively unconscionable because the *quid pro quo* he was supposed to receive for it that "in exchange for initially allowing an arbitrator to decide certain gateway questions," he would receive "plenary post-arbitration judicial review" was eliminated by the Court's subsequent holding in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), that the nonplenary grounds for judicial review in § 10 of the FAA are exclusive. He brought this challenge to the delegation provision too late, and we will not consider it.

Justice STEVENS, with whom Justices GINSBURG, BREYER, and SOTOMAYOR join, dissenting.

Neither petitioner nor respondent has urged us to adopt the rule the Court does today: Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator "the so-called delegation clause."

The Court asserts that its holding flows logically from *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), in which the Court held that consideration of a contract revocation defense is generally a matter for the arbitrator, unless the defense is specifically directed at the arbitration clause. We have treated this holding as a severability rule: When a party challenges a contract, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The Court's decision today goes beyond *Prima Paint*. Its breezy assertion that the subject matter of the contract at issue – in this case, an arbitration agreement and nothing more – "makes no difference," is simply wrong. This written arbitration agreement is but one part of a broader employment agreement between the parties, just as the arbitration clause in *Prima Paint* was but one part of a broader contract for services between those parties. Thus, that the subject matter of the agreement is exclusively arbitration makes *all* the difference in the *Prima Paint* analysis.

Certain issues – the kind that "contracting parties would likely have expected a court to have decided"– remain within the province of judicial review. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). These issues are "gateway" matters because they are necessary antecedents to enforcement of an arbitration agreement; they raise questions the parties are not likely to have thought that they had agreed that an arbitrator would decide. Quintessential gateway matters include whether the parties have a valid arbitration agreement at all, whether the parties are bound by a given arbitration clause, and whether an arbitration clause in a concededly binding contract applies to a particular type of controversy. It would be bizarre to send these types of gateway matters to the arbitrator as a matter of course, because they raise a question of arbitrability.

Questions of arbitrability thus include questions regarding the existence of a legally binding and valid arbitration agreement, as well as questions regarding the scope of a concededly binding arbitration agreement. In this case we are concerned with the first of these categories: whether the parties have a valid arbitration agreement. This is an issue the FAA assigns to the courts. Section 2 of the FAA dictates that covered arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." "Such grounds," which relate to contract validity and formation, include the claim at issue in this case, unconscionability.

We might have resolved this case by simply applying the *First Options* rule: Does the arbitration agreement at issue "clearly and unmistakably" evince petitioner's and respondent's intent to submit questions of arbitrability to the arbitrator? The answer to that question is no. Respondent's claim that the arbitration agreement is unconscionable undermines any suggestion that he "clearly" and "unmistakably" assented to submit questions of arbitrability to the arbitrator. The fact that the agreement's "delegation" provision suggests assent is beside the point, because the gravamen of respondent's

claim is that he never consented to the terms in his agreement. In other words, when a party raises a good-faith validity challenge to the arbitration agreement itself, that issue must be resolved before a court can say that he clearly and unmistakably intended to *arbitrate* that very validity question. ...

I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity. In my view, a general revocation challenge to a stand-alone arbitration agreement is, invariably, a challenge to the "making" of the arbitration agreement itself, and therefore, under *Prima Paint,* must be decided by the court. ... Because we are dealing in this case with a challenge to an independently executed arbitration agreement – rather than a clause contained in a contract related to another subject matter – any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement. They are one and the same.

3. Laster v. AT & T Mobility LLC, 584 F.3d 849 (9th Cir. 2009); cert. granted *sub nom* AT & T Mobility LLC v. Concepcion, 2010 WL 303962 (U.S.)

BEA, Circuit Judge:

This case involves a class action claim that a telephone company's offer of a "free" phone to anyone who signs up for its service is fraudulent to the extent the phone company charges the new subscriber sales tax on the retail value of each "free" phone. The phone company demanded the plaintiffs' claims be submitted to individual arbitration, pointing to the arbitration clause of the written agreement, which arbitration clause requires arbitration, but bars class actions. Because this is an action invoking diversity of citizenship jurisdiction, the plaintiff-subscribers point to California contract law, which they claim renders both the arbitration clause and the class action waiver unconscionable, hence, unenforceable.

At first blush, it seems we decided the invalidity of an arbitration agreement banning class actions in *Shroyer v. New Cingular Wireless Services, Inc.,* 498 F.3d 976(9th Cir.2007). But, the phone company points to a new wrinkle: unlike the arbitration clause in *Shroyer,* this arbitration clause provides for a "premium" payment of $7,500 (the jurisdictional limit of California's small claims court) if the arbitrator awards the customer an amount greater than the phone company's last written settlement offer made before selection of an arbitrator. Hence, says the phone company, the arbitration clause is not an artifice that has the practical effect of rendering it immune from individual claims.

We will find, on second blush, the new "premium" payment does not distinguish this case from *Shroyer,* and that under California law, the present arbitration clause is unconscionable and unenforceable. Further, we will also find no merit to the phone company's claim the FAA preempts California unconscionability law. ... This is an interlocutory appeal from the denial of a motion to compel arbitration. We review the denial of a motion to compel arbitration de novo.

A. AT & T's class action waiver is unconscionable under California law.

The district court did not err when it held AT & T's class action waiver was unconscionable under California law, and thus unenforceable.. "It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable." *Shroyer,* 498 F.3d at 981. To be unenforceable under California law, a contract provision must be both procedurally and substantively unconscionable. Both elements of unconscionability need not be present to the same degree; California courts use a sliding-scale: the more substantively unconscionable the contract term, the less procedurally unconscionable it need be to be unenforceable and vice versa. *Id.* at 981-82.

The California Supreme Court addressed the unconscionability of class action waivers in arbitration agreements for the first time in *Discover Bank v. Sup.Ct.,* 113 P.3d 1100 (Cal. 2005), holding that class action waivers were at least sometimes unconscionable under California law. ... We have interpreted *Discover Bank* as creating a three-part test to determine whether a class action waiver in a consumer contract is unconscionable: (1) is the agreement a contract of adhesion; (2) are disputes between

the contracting parties likely to involve small amounts of damages; and (3) is it alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money. In *Shroyer*, we noted that "there are most certainly circumstances in which a class action waiver is unconscionable under California law despite the fact that all three parts of the *Discover Bank* test are not satisfied." *Id.* at 983. Because we hold that the class action waiver at issue satisfies all three parts of the test, as was true in *Shroyer*, it is unnecessary to explore those circumstances here.

B. AT & T's premium payment provision does not negate the unconscionability of the class action waiver under California law.

AT & T contends the premium payment provision of its revised arbitration agreement prevents the class action waiver from being substantively unconscionable. AT & T reasons that the potential for the premium payment overcomes the problem of predictably small damages identified in *Discover Bank* and *Shroyer*. .... However, this is incorrect. The *Discover Bank* rule focuses on whether damages are predictably small, and in the end, the premium payment provision does not transform a $30.22 case into a predictable $7,500 case.

The $7,500 premium payment is available only if AT & T does not make a settlement offer to the aggrieved customer in a sum equal to or higher than is ultimately awarded in arbitration, and before an arbitrator is selected. This means that if a customer files for arbitration against AT & T, predictably, AT & T will simply pay the face value of the claim before the selection of an arbitrator to avoid potentially paying $7,500. Thus, the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22. ... As a result, aggrieved customers will predictably not file claims – even if the odds are that after the letter-writing and arbitrator-choosing, they will get a $30.22 offer – thereby greatly reducing the aggregate liability AT & T faces for allegedly mulcting small sums of money from many consumers. The premium payment provision has no effect on this conclusion, nor do any of the other provisions of AT & T's revised arbitration clause. The actual damages a customer will recover remain predictably small, thus under the rationale of *Discover Bank* and *Shroyer*, AT & T's class action waiver is in effect an exculpatory clause, hence substantively unconscionable.

In addition to the $7,500 premium payment, the revised arbitration agreement also provides: double attorney's fees in the event the arbitrator awards the customer more than AT & T's last written settlement offer before the arbitrator was selected; AT & T will pay all arbitration costs and fees unless the arbitrator determines that the claim was frivolous or brought for an improper purpose; AT & T will not seek attorney's fees if it prevails; either party may bring a claim in small claims court; the arbitration is not confidential; full court remedies, including punitive damages and injunctions, are available; arbitration will be conducted pursuant to AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, the arbitration will take place in the county of the customer's billing address, and that the customer can choose between an in-person, telephonic, or no hearing at all for claims of less than $10,000. [These factors were relegated to a footnote, but not otherwise considered by the Court.]

C. The Federal Arbitration Act does not preempt California unconscionability law.

The FAA does not expressly or impliedly preempt California law governing the unconscionability of class action waivers in consumer contracts of adhesion. The FAA does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause. *Shroyer* controls this case because AT & T makes the same arguments we rejected there.

1. The FAA does not expressly preempt California law. The FAA provides that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." § 2. Thus, if a state-law ground to revoke an arbitration clause is not also applicable as a defense to revoke a contract in general,

that state-law principle is preempted by the FAA. Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA.

AT & T contends the *Discover Bank* rule abandons the sliding-scale approach of California general unconscionability law and is therefore a "new rule" applicable only to arbitration agreements. This contention is incorrect. As we explained in *Shroyer*, "the rule announced in *Discover Bank* is simply a refinement of the unconscionability analysis applicable to contracts generally in California." 498 F.3d at 987. Essentially, the *Discover Bank* test applies the general sliding-scale approach to unconscionability in the specific context of class action waivers.

2. The FAA does not impliedly preempt California law. Neither does the FAA impliedly preempt California unconscionability law. A state law is impliedly preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Determining whether California's unconscionability principles stand as an obstacle to the FAA first requires identification of the purposes and objectives underlying the federal Act. In *Shroyer*, we identified two purposes: first, to reverse judicial hostility to arbitration agreements by placing them on the same footing as any other contract, and second, to promote the efficient and expeditious resolution of claims. In *Shroyer*, we held that California unconscionability law did not stand in the way of either of these identified purposes. Here, AT & T makes the same arguments regarding conflict preemption that we rejected in *Shroyer*.

ANNUAL SECTION MEETING AT THE STATE BAR OF TEXAS

The ADR Section of the State Bar of Texas conducted its annual meeting on June 10, 2010. During the annual meeting, the ADR Section members elected new officers for 2010-2011:

Susan B. Schultz, Austin, Chair
Joe L. Cope, Abilene, Chair-Elect
Alvin Zimmerman, Houston, Treasurer
Tad Fowler, Amarillo, Secretary

New members of the ADR Section Council were also elected: William B. Short, Jr., Dallas; Patty Wenetschlaeger, Abilene and Irving; Robert R. ("Bob") Gammage, Llano and Austin; the Honorable Donna S. Rayes, Jourdanton; and Guy Hawkins, Lubbock.

Outgoing Chair, John Allen Chalk, Sr., expressed the Section's appreciation to two outgoing council members: Regina Giovannini for her diligent work as the Section's treasurer for the last two bar years and to the Honorable Camile G. DuBose from Uvalde for her service on the Council.

Chalk highlighted some of the 2009-2010 activities for the Section.

- Section sponsored three Arbitration Roundtables in Fort Worth, Austin, and Houston. The events were well received and attended. At each, presenters worked through eight different case studies while interacting with all participants.

- The Section's white paper on arbitration continues to be widely used as the legislature and consumer groups continue to have questions about arbitration. Chalk encouraged the Section to update the white paper in the coming year.

- The Section sponsored its annual CLE program in January in San Antonio. The event was chaired by Bill Lemons.

- The ADR Section Council had its quarterly meetings in Houston, Dallas, and San Antonio. The fourth meeting was convened by telephone conference – a first-time experience for the ADR Section Council.

- The Section's newsletter, *Alternative Resolutions*, successfully transitioned to an electronic format. The last two editions were transmitted to members via email. Stephen Huber and Wendy Trachte-Huber are doing a tremendous job as an editorial team. The electronic format is allowing additional content to be included; the last issue was 63 pages. The editors are pleased with the high quality of submissions.

- The Section collaborated with the American Bar Association's Dispute Resolution Section in offering online webcasts and webinars.

Chalk thanked Wendy Trachte-Huber and Stephen Huber for their excellent work as co-editors of the Section's newsletter. He thanked Bill Lemons, San Antonio, for the CLE program in San Antonio, and the seventeen presenters in the three Arbitration Roundtables. Chalk also thanked the outgoing Council members and commended the Council and Section members who helped make the year a success for the Section.

By recommendation of the Council, the members were presented with two resolutions for their consideration and vote:

(1) amendments to the Section's Bylaws that would allow the Chair, with the advice and consent of the Council, to appoint the representative of the ADR Section to the Texas Mediator Credentialing Association Board and would provide that the ADR representative to the TMCA Board would be an *ex officio* position on the ADR Section Council; and

(2) changing the Section's name to "Dispute Resolution Section" of the SBOT, subject to the required approvals of the SBOT Council of Chairs and the SBOT Board of Directors.

Both these resolutions were adopted unanimously by the Section membership.

The Section presented its Justice Frank G. Evans Award to Cecilia H. Morgan. Alvin Zimmerman, chair of the committee that selected the 2010 award recipient, made the presentation. Ms. Morgan is also the current TMCA director appointed as the ADR Section representative.

John Allen then ceded the meeting to incoming Chair, Susan Schultz. Susan presented outgoing Chair, John Allen, with the ADR Section award to commemorate and show appreciation for his leadership as Chair of the ADR Section 2009-10, especially recognizing his initiative with the Arbitration Roundtables, and for his many contributions to the Section through the years.

Susan then gave a brief overview of the coming year:

- Past chairs of the Section were recognized for their service and contributions to the profession.
- Members were encouraged to increase their involvement in the Section and to enlist others to be members.
- The Council will be considering re-energizing its committee system. Section members will have the opportunity to serve on those expanded committees.
- Additional work is planned on updating the Section website to make it more useful and accessible to members and to the general public.

Susan invited questions and comments from members. There being none, the meeting was adjourned. The ADR Section program continued with CLE presentations.

ADR Section CLE Program at the SBOT Annual Meeting

We are very fortunate to have truly talented trainers and speakers within our members who generously stepped up to provide us with some very informative and at times very funny presentations.

The program proceeded as follows:

Breaking Through Self-Deception in Mediation, Joe Cope, Executive Director, Duncum Center for Conflict Resolution, Abilene Christian University

Joe described how we as human beings practice self-deception from time to time and how that can create a challenge in mediation. During his presentation, Joe provided us with helpful ways to assist parties in overcoming their own self-deception on the way to collaborative problem-solving. The illustrations included a very entertaining clip from a Bob Newhart Show.

Picture it Settled: Integrating the Power of Pictures into Settlement Negotiations, Don Philbin, Attorney-Mediator-Arbitrator-Consultant

Don very artfully showed us how to better deal with numbers in negotiations that will allow for a reasoned agreement. Through a video clip from Deal, No Deal, we clearly saw how some people pick numbers that mean nothing to the rest of us. Don shined the light on decision trees that take us on a more structured path and outcome.

Impact of New and Proposed Legislation on ADR at the Federal and State Levels, Sherrie Abney, John Fleming, and John Boyce

These presenters informed us of the current status of laws and proposed legislation impacting ADR, in particular the Uniform Collaborative Law Act and some of the arbitration bills.

Thank you to all the presenters for sharing their knowledge, talent, and energy!

OAXACA ADR SECTION COUNCIL MEETING

Photos Courtesy of Walter A. Wright & Alvin Zimmerman

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Photos Courtesy of Walter A. Wright & Alvin Zimmerman

NEW BALANCE BILLING LEGISLATION HB 2256 CREATES A WEIGHTY CONFLICT BETWEEN LEGISLATIVE COMPLIANCE AND A MEDIATOR'S CODE OF ETHICS

By John Allen Chalk* and Rebecca Currier**

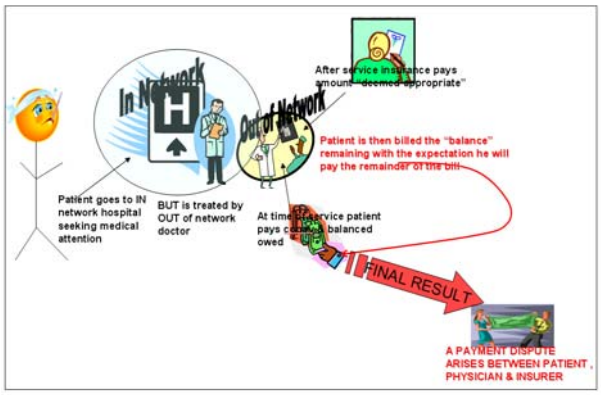
Healthcare reform is on the minds of many consumers and politicians. Factors weighing down the system include broader access to care, greater accountability to consumers, and the need for cost containment. One major issue targeted for reform by State Legislators is balance billing. Balanced billing is a challenge healthcare providers and payors have been grappling with for many years. States have taken various approaches to regulate balanced billing . In 2009, Texas passed HB 2256 which provides for mandated mediation to resolve balance billing disputes. This new legislation has implications for physicians, healthcare facilities, insurers, patients and mediators. This article describes the complex issues of balance billing from the view points of those affected, analyzes reform actions taken by various State Legislators, and weighs the positive and negative externalities that the legislation can create for mediators.

WHAT IS BALANCE BILLING?

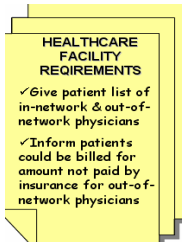
A hotly disputed topic in the healthcare industry is the practice of "balance billing." Balance billing occurs when a physician bills a patient for the difference between the physician's fee for a service and what an insurer pays the physician for that service. Hospital-based physicians do not always have contracts with the same health plans as the hospital where they practice. As a result, sometimes patients who select to obtain care from an in-network hospital later receive an unexpected bill from an out-of-network hospital-based physician who provided service at that facility. Out-of-network physicians have no contracted payment rate with the insurer, so the insurer can pay an amount that it "deems appropriate." The out-of-network physician then bills the patient for the difference between what the insurance company paid and what the physician charged; they bill the patient for the "balance" due. How could this happen if you went to an in-network hospital? Hospitals often contract with a spectrum of in-network and out-of-network physicians who perform various services such as X-rays, anesthesiology, blood work, etc. While your primary physician was in-network, he may have consulted with, or used the services of an out-of-network physician on your procedure. So despite your best proactive efforts to ensure the hospital had a current copy of your insurance on file and your co-pay was received, you still get a follow-up bill week after your visit that ranges from $200-$10,000 or more. See TAHP, Balance Billing an Overview (2007), at www.tahp.org. This process is graphically depicted in Diagram 1.

MEDIATION REQUIREMENTS UNDER TEXAS HOUSE BILL 2256

Texas HB2256 seeks to reform this process for those affected by "balance billing". As of June 19, 2009, physicians, insurers and the patients themselves are held to new requirements under this law.

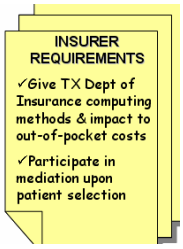


FOR THE HEALTHCARE FACILITY:



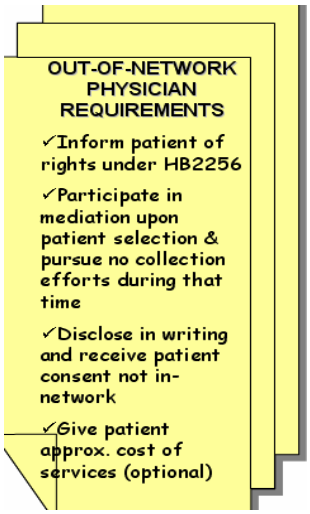
Facilties are required to give the patient a listing of all in-network and out-of-network physicians. Facilities are required to inform patients they could be billed for amounts not paid by their insurer if they are provided service by an out-of-network physician.

FOR THE INSURER:



Insurers must submit their methods for computing out-of network costs (i.e. maximum allowable amounts) to the Texas Department of Insurance (TDI). The must also submit how these methods can impact the patients out-of-pocket costs. If the patient elects to mediate over a balanced billing dispute, under HB 2256 the insurer is required to participate. If the insurer refuses to participate, the mediator must report them to TDI who must impose an administrative penalty against the insurer.

FOR THE OUT-OF-NETWORK PHYSICIAN:

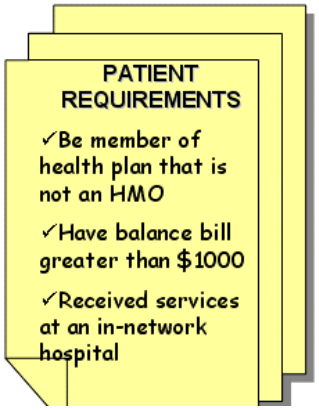


Out-of-network facility based physicians are required to inform the patient of the new mandated mediation process.. Facility based physicians include radiologists, pathologists, anesthesiologists, emergency department physicians, and neonatologists. Once the patient has requested mediation, the physician may make no collection efforts for balanced bill amount owed This prohibition on collection efforts lasts until the mediation is completed or the request for mediation is withdrawn. In an effort to settle claims before mediation, all parties must participate in an informal settlement telephone conference within thirty (30) days after the enrollee submits a request for mediation. If the physician refuses to participate in the mediation process, the mediator must report the physician to the Texas Medial Board which in turn must sanction the physician with an administrative penalty.

In addition, prior to providing medical care, the physician must disclose in writing that he has no contract with the patient's health plan and receive written acknowledgement from patient of his disclosure. If the physician goes a step farther and provides the patient with a project the out-of-pocket amount the patient may be responsible for, and bill only that amount or less, the physician maybe able to avoid the mandatory mediation requirement.

FOR THE PATIENT:

Under HB 2256 the patient may select mediation to resolve a balanced billing dispute. If the patient selects mediation and meets the requirements, the law mandates the out-of-network physician and patient's insurer to participate. To meet the requirements, the patient must (1) be an enrolled member of a health plan that is not a preferred provider or a Health Maintenance Organization; (2) have a remaining balance bill that is more than $1,000; and (3) have received service at an in-network hospital or facility.

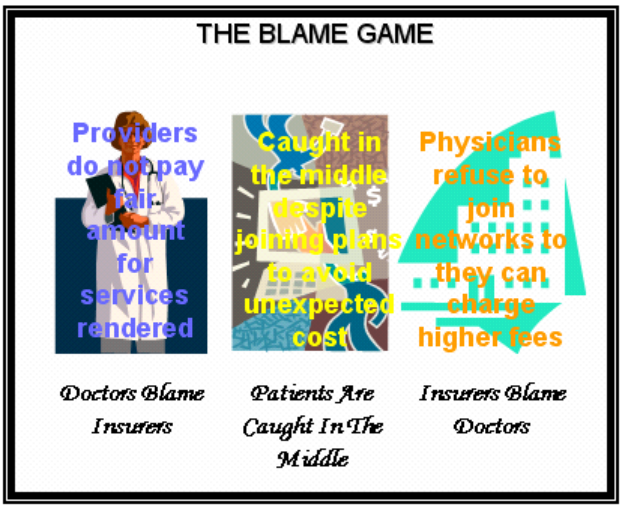


To select mediation to resolve the balance billing dispute, the patient completes and returns a form provided by Texas Department of Insurance (TDI). TDI then notifies the facility based physician and insurer to set up the mandatory mediation. If the mediation is unsuccessful, it is referred to a Special Judge who conducts a trial and determines ultimate liability. Only the provider and physician share in the cost of the mediation. If it does not settle, all parties share equally in the Special Judge's fees.

In addition to the mandated mediation option under HB 2256, the insurer's grievance process remains a viable option to file balanced billing complaints.

THE VIEW POINTS ON HB 2256 – THE BLAME GAME

There will always be a natural tension over payment between health plans and providers despite the best legislative reform efforts[3]. Health plans want to pay as little as possible to providers who want to be paid as much as possible often leaving the patients playing the role of monkey-in-the-middle. HB 2256 gives the patient the opportunity to step out of the middle and lead the game. While the bill does not resolve the payment tension it does force open lines of communication and disclosure of documents on the truth of what's really going on behind the scenes of the "balance bill". It also gives mediators an enhanced role in the healthcare sector. However, it may come at a tough price for the mediator who must balance her ethical duties with compliance with the requirements of this law.



DOCTORS BLAME HEALTH CARE PLANS

From the doctor's perspective health care plans are the source of the problem. The plans leave doctors in a lose-lose situation having to choose between their relationship with the patient and receiving a fair amount for their services. Health plans convey to the patient that out-of-network doctors will be paid "usually and customary" rates suggesting the plan will fairly compensate the physicians for their services. In reality, plans set neither "usual" nor "customary" rates instead they pay out-of-network doctors far below network doctors. In addition, physicians feel plans have provided poor service in paying their claims and in the past have often denied bona fide claims. This forces the out-of-network doctors to choose whether to surprise patients with the "balance bill" or accept below market rates for their services.

HB2256 gives doctors the opportunity to discuss this issue in mediation with the patient and health care plan. While the bill does not seek to mandate a certain standard of pay for health care plans to providers, it does give doctors the opportunity to improve their image. Doctors can provide documentation in mediation to patients that prove what they are saying and perhaps turn their situation into a win-win, saving their relationship with the patient and receiving a sum much closer to "fair" compensation for their services.

However, the downside of the bill for the doctor is the patient has no incentive to resolving the mediation as billing is postponed during mediation. The patient has nothing at stake in requesting expensive mediation process while the doctors must pay half of the cost of mediation for every patient that send in a request. Add to this the doctor's lost income during the time spent in mandatory mediation. Since the legislation targets all balanced billing procedures whether appropriate or not, on an aggregated basis this can be a tremendous cost for individual physicians who have done nothing wrong.

HEALTH CARE PLANS BLAME DOCTORS

According to health care plans it is the doctors who are the source of the problems. Plans maintain that physicians refuse to join a health plan's network so they can charge excessive fees far above those of their in-network colleagues. Many of the specialty physicians like anesthesiologist have negotiated "exclusive privileges" with the hospital to provide all the services needed in their area of specialty. This gives the facility based physicians a monopoly allowing them to charge 300 to 3,000% of Medicare fees leaving health care plans and patients to foot the excessive bill[1].

HB2256 gives health plans the opportunity to discuss this issue in mediation with the doctor and the patient. The downside is that now the plans must disclose how they calculate out-of-network fees and justify that calculation.

THE PATIENT-IN-THE-MIDDLE

Many patients choose preferred provider organization (PPO) health plans specifically to avoid unexpected costs. They are told by health care plans the out-of-network doctors will be paid "usual and customary" rates suggesting to patients doctors will be fully compensated. They choose an in-network hospital covered by the insurance suggesting after their co-pay they will not receive additional bills. Then, regardless of whose view point has merit, the unexpected costs are shifted to the patient in the form of a "balance bill' while the plans and doctors reap the profits. Patients get stuck in the middle of the facility based physicians desire for "fair" compensation for their services and the health care providers desire to pay only a "usual and reasonable" amount[4].

The new bill will take the patients out of the middle and force all parties involved to come to the table to resolve the problem. The patient will now have the opportunity to resolve its issues over the "balance bill" not by making numerous unproductive phone calls but face-to-face at the table with representatives from the health care plan and the doctor himself. It also provides a more cost effective alternative to the courts for patients who may not otherwise be able to raise their claims[4]. And the physician and insurer have an incentive to quickly negotiate a settlement as payment cannot be received until conclusion of the mediation process.

However, a negative aspect of the bill for the patient is if the matter is not resolved at the mediation stage, the patient will then have to foot part of the bill for arbitration. This can be more expensive than the amount of the bill.

STATE LEGISLATOR'S REFORM ACTIONS

Law makers across the nation are implementing creative solutions to reform balance billing. This provides excellent testing ground to see the impact of various methods and hybrid solutions. Nine states completely prohibit balanced billing; others use the "hold harmless" clause, standardized reimbursement rates, or direct payment by HMOs for non-network providers. This section evaluates a sampling of state policies to assess the impact of the different approaches.

PROHIBITED BALANCED BILLING – THE CALIFORNIA APPROACH

California Health & Safety Code §1379 as interpreted in the Prospect case declares balance billing to be an "unfair billing practice". The Court found that the law prohibited emergency room doctors from billing patients directly for the amounts in dispute. The law mandates that non-participating emergency department physicians accept an insurer's payment on behalf of its insured as "payment in full," with the physicians having no right to collect the balance directly from the patient. The physicians may pursue the insurers, but only by disproving the insurer's determination that the physicians had received the reasonable and customary fee for such services. This process may help to keep the patient out of the middle leaving the physician and insurer to resolve the billing dispute.

While outlawing the practice of balance billing creates an end all solution to the problem of the unexpected bill for the patient, it does not address the underlying issues discussed in the view points section above of balance billing. The court refused to consider evidence that health care plans routinely and systematically underpay out-of-network physicians while holding out-of-network providers are entitled to customary & reasonable value of their services. California Medical Association is taking up efforts to survey out-of-network providers to determine how egregious and prevalent the underpayment issue and if there are any particular providers who engage in these practices.

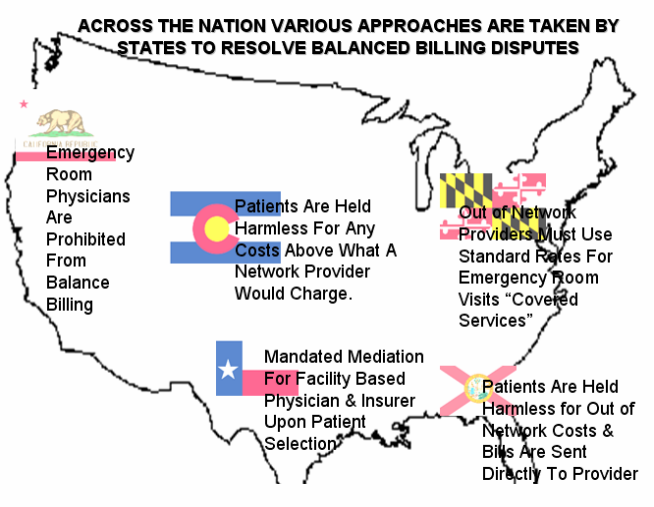
How the payment tension between providers and payors will be resolved and the patient kept out of the monkey in the middle game has yet to be determined in California as those affected by Propsect are now left with sorting out implementation of the Supreme Courts decision[2].

HOLD HARMLESS - COLORADO APPROACH

The majority of states follow Colorado's approach to accept the patient's insurers discounted rate as payment in full. The patient's insurer is responsible to ensure that if it fails to maintain an "adequate" network of providers, it arranges for the patient to

see an out-of-network provider at a no greater cost than as if the patient had been treated by a network provider. Patients who receive care at a network facility by an out-of-network physician must be held harmless for any costs above what they would have faced for treatment by a network provider. This puts the liability on the insurer to resolve the billing issue with the physician.

STANDARDIZED RATES – MARYLAND APPROACH



The standardized rates approach specifically addresses the emergency care room balanced billing situation by providing state regulated hospital rates for certain services. Out-of-network providers may not bill a patient for a "covered service" which is one authorized under the terms of a contracted rates. and also standardized by the State. The rates are based on percentage of rates within a geographic area and of Medicare based rates for the same covered services.

DIRECT PAYMENT – FLORIDA APPROACH

This approach is similar to the Colorado approach in that it holds the patient harmless for balanced bills in emergency care situations and other authorized services by the HMO. However, it goes a step farther in that it prohibits insurers from sending the balance bill to the patients and instead requires them to directly pay the provider.

PROPOSED LEGISLATION – NEW YORK & NEW JERSEY

New York has chosen a proactive approach to reduce the number of balance billing disputes by altering the method of determining "reasonable and customary" fees of one of the nation's largest insurers. Its Attorney General has made an agreement with United Health Group in efforts to prevent the number of payments that end up in patient-provider disputes.

New Jersey is proposing a similar approach to Maryland using a standardized rate instead of allowing a "reasonable and customary" charge. Providers would need to use an "allowed charge" which would be based on a standardized rate and would extend to hospitals as well as physicians.

ALTERNATIVE RECOMMENDATIONS FOR POLICY MAKERS

Texans have always been strong supporters for freedom to contract. Unlike the prohibited balance billing approach which forces doctors to accept a payment rate for which they did not contract, the Texas mediation approach upholds physician's freedom to contract. However, this may lead to some unintended consequences. This section discusses recommendations on how to prevent and mitigated negative consequences.

THE MEDIATORS CONFLICT

In Texas, to reform the "balance billing" process law makers have turned to mediation. Mediation is a form of alternative dispute resolution which has grown in success and credibility over the last several years. The three areas of the law that raise the biggest issues for Mediators are: The mandatory nature of the proceeding; the forced limitations on issues that can be addressed and the potential breach of confidentiality requirements.

Core to the mediation process is the willingness of the parties to participate in a collaborative setting with an impartial facilitator who guides them in reaching consensus. Bill 2256 mandates all parties to participation mediation. While this may increase participation in the process, mediators fear the result may be sacrificing quality for quantity. More mediations will occur, but the interest based construc-

tive bargaining that occurs when parties are willing participants will disappear and be replaced with destructive standoffs. While there are mandatory mediation requirement is other areas usually even when mediation is "mandatory," participants who are unable or unwilling to participate effectively in the mediation process are free to suspend or withdraw from mediation. Here that is not the case.

The limitations on issues that can be addressed may also impact the effectiveness of the mediation process. At the mediation, each party has an opportunity to speak and state their position. The mediator is only to consider three issues: (1) whether the amount charged by the facility-based physician was excessive; (2) whether the amount paid by the insurer for the service was the usual and customary rate or unreasonably low; and (3) determine the amount, after co-payments, deductibles, and coinsurance that the member owes the facility-based physician. The mediator is restricted to focusing on resolving these issues. This goes against the collaborative nature of the mediation process which promotes reconciliation and leaves the primary responsibility for resolution of a dispute rests with the parties. Mandating the issues to be considered by mediator can conflict with a fundamental step in mediation of interest based conflict resolution versus rights/power based resolution.

An even greater concern for the mediator is the removal of confidentiality and the ability of the physician to select the mediator. The Texas Mediator's Code of Ethics holds "together confidentiality, neutrality, and impartiality define the basic role of the mediator. Without them, one IS NOT A MEDIATOR. The three are intertwined." In an effort to compel serious mediation efforts, the law includes a requirement for reporting bad faith conduct, without providing standards. Requiring the mediator to determine and report a physician acting in "bad faith" to the Texas Medical Board is in direct conflict with the basic role of the Mediator as expressed above.. The law is vague on what constitutes bad faith providing little guidance for mediators. Another impact that this can have is that since physicians can choose the mediator, the mediator may be resistant to reporting bad faith conduct. Sine this could result in the physicians blacklisting the mediator from future cases.

While the new bill seeks reform through a proven process it removes elements fundamental to making the process successful. Mediators will need to determine how to balance their personal ethics in reporting "bad faith" with the incentive to remain a popular selection among physicians. To aid the mediator, the Texas Department of Insurance is currently drafting rules to define "bad faith", which is to take effect in September 2010. Mediators hope to get the bad faith reporting requirement adjusted in the regulations in order to maintain neutrality. If they are successful, the mandated mediation could begin to take a more similar form to court ordered mediation which may alleviate some of the concerns regarding voluntary participation of the parties.

CONCLUSION

One way or another, the states will turn this three way dispute game of the patient-in-the middle to a two-way dispute between the insurers and the providers. The rules of this new game are just now beginning to take shape. Alternative dispute resolutions, such as mediation, will play a key role in paring down the dispute to limited parties and limited issues. The question remains however, will the mediators be able to resolve the weighty conflict between the ethical issues and legislative compliance.

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MANDATORY STAYS UNDER SECTION 3 OF THE FEDERAL ARBITRATION ACT IN TEXAS AND THE FIFTH CIRCUIT AFTER ARTHUR ANDERSEN V. CARLISLE

by Walter R. Mayer* and Russell T. Gips**

Introduction

Section 3 of the Federal Arbitration Act ("FAA") directs a court, "on the application of one of the parties," to stay a suit or proceeding "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration." 9 USC § 3. The FAA provides for the stay mechanism for two reasons. First, the stay furthers the public policy favoring arbitration. The stay encourages and protects the parties' right to arbitrate. Second, the stay helps promote the parties' contract. The parties agreed to arbitrate their disputes, and the stay is consistent with the parties' agreement. This paper looks at recent jurisprudence examining the applicability of a mandatory stay under section 3 to a non-signatory. If the contract ground for staying the litigation is removed from the equation, can a court still justify issuing a stay?

A court may easily find itself facing such a situation. The following two examples show how relatively simple fact patterns, involving only three parties, can raise this thorny issue.

Example 1. Claimant and Respondent enter into an arbitration agreement. A dispute arises and Claimant initiates arbitration against Respondent. At the same time, non-signatory Plaintiff sues Respondent in litigation. Plaintiff is not a party to the arbitration agreement. The arbitration and the litigation against Respondent/Defendant involve the same issue. The Respondent/Defendant, fearful that effects from the litigation will hinder his chances in arbitration, moves for a stay under section 3. Plaintiff, eager to pursue his legal remedies, points out that he is not a party to the arbitration agreement, his claim is not referable to arbitration, and a stay is therefore not available to the Respondent/ Defendant.

Example 2. Claimant and Respondent enter into a contract containing an arbitration clause. Claimant and Defendant enter into an identical contract which does *not* contain an arbitration clause. Claimant/ Plaintiff brings breach of contract claims against both Respondent and Defendant. Respondent, relying on the arbitration clause, moves to compel arbitration. Defendant, though not a signatory to the arbitration clause, relies on the same clause to move for a mandatory stay under section 3. Claimant/ Plaintiff, having never agreed to arbitrate any dispute with Defendant, argues that Defendant is not a signatory to the arbitration agreement and therefore cannot move for a section 3 stay. Defendant argues that the arbitration and litigation involve identical issues and that the litigation should be stayed.

These situations present the court with the same dilemma. If the court stays the litigation in either scenario, the court could be criticized for failing to uphold the maxim that arbitration is a matter of consent. On the other hand, if the court allows the arbitration and litigation to proceed simultaneously, the court runs the risk of endangering the right to a meaningful arbitration, thereby running afoul of the well-established policy favoring arbitration. The situation loosely boils down to a question of contract versus public policy promoting arbitration.

The Supreme Court considered this situation in *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

Prior to discussing the Court's decision and its effects on non-signatories' rights under section 3, it is useful to take account of the state of the law before *Andersen*.

The Law Prior to *Andersen*

The language of section 3 provides no guidance for courts considering its application to non-signatories. In fact, it is the language of section 3 that "allows for the anomalous situation where a non-signatory requests a stay of litigation on an issue covered by an arbitration agreement." *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V. (RIMSA)*, 372 F.3d 339, 342 (5th Cir. 2004). Section 3 states (emphasis supplied):

> If any suit or proceeding be brought in any of the courts of the United States upon ***any issue referable to arbitration*** under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall ***on application of one of the parties*** stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

The plain language of the statute invites more questions than answers: Does the reference to "any issue referable to arbitration under an agreement in writing" mean that the parties to the litigation must have a written agreement referring the issue to arbitration? Does "parties" refer to the parties to the arbitration agreement or the parties to the litigation? Should the court look beyond the language of section 3 to determine its intent?

Parsing this language, the circuits had split on whether section 3 applied to, or could be invoked by, a nonsignatory. The Second, Third, Seventh, Eighth, and D.C. Circuits held that section 3 did not apply to nonsignatories. *See, e.g.*, *Mendez v. Puerto Rican Int'l Cos.*, 553 F.3d 709, 711 (3d Cir. 2009) ("We conclude that Section 3 was not intended to mandate curtailment of the litigation rights of anyone who has not agreed to arbitrate any of the issues before the court."); *IDS Life Ins. Co. v. Sunamerica, Inc.*, 103 F.3d 524, 529 (7th Cir. 1996) ("Although not expressly so limited, section 3 assumes and the case law holds that the movant for a stay, in order to be entitled to a stay under the arbitration act, must be a party to the agreement to arbitrate, as must be the person sought to be stayed."). Other circuits, including the Fifth Circuit, interpreted the language of section 3 as allowing any party to the litigation to move for a section 3 stay. *See Waste Management*, 372 F.3d at 342 (noting that the language and structure of section 3 "make[s] clear that *any* of the parties to the suit can apply to the court for a mandatory stay, and the court must grant the stay if the claim at issue is indeed covered by the arbitration agreement").

The Supreme Court partially addressed the circuit split in *Andersen.* As discussed below, the *Andersen* opinion presents its own set of interesting questions, particularly with regard to the existing case law in the Fifth Circuit and Texas.

Andersen

Andersen presented the Court with a question of appellate jurisdiction under section 16 of the FAA, which allows for appeal to be taken from an order refusing a stay of litigation under section 3. 9 U.S.C. § 16(a)(1)(A). The Sixth Circuit had dismissed an appeal for lack of jurisdiction, whereupon the Supreme Court granted certiorari to decide "whether appellate courts have jurisdiction under § 16(a) to review denials of stays requested by litigants who were not parties to the relevant arbitration agreement." *Andersen*, 129 S.Ct. at 1899.

The dispute in *Andersen* arose over a tax shelter. The plaintiffs — Carlisle, Bushman, and Strassel — sold their construction company and contacted Arthur Andersen about minimizing taxes related to the sale. Andersen put the plaintiffs in touch with Bricolage Capital, who in turn referred the plaintiffs to the law firm of Curtis, Mallet-Prevost, Colt & Mosle, LLP for additional tax advice. The plaintiffs entered into investment-management agreements with Bricolage that contained an arbitration clause. Neither Arthur Andersen nor Curtis Mallet was a party to these agreements. The plaintiffs, acting on

the advice of the tax planners, executed a tax shelter strategy. The IRS eventually declared the strategy illegal, and the plaintiffs filed suit in the Eastern District of Kentucky against Arthur Andersen, Bricolage, and Curtis Mallet, among others, raising claims of fraud, civil conspiracy, malpractice, negligence, and breach of fiduciary duty.

Bricolage, who had entered into the arbitration agreement with the plaintiffs, moved for a section 3 stay. While the motion to stay was pending, Bricolage filed for bankruptcy, which resulted in an automatic stay and rendered its section 3 motion moot. The remaining defendants sought their own section 3 stay based on a theory of equitable estoppel. The defendants argued that the plaintiffs could not avoid arbitrating the claims under the Bricolage contracts. The trial court denied the motion, and the defendants appealed under section 16 of the FAA. The Sixth Circuit dismissed the appeal for lack of jurisdiction. *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008). The Sixth Circuit reasoned that because there was no written agreement to arbitrate in place between the plaintiffs and defendants, section 3 did not apply. Consequently section 16 did not give the appellate court jurisdiction over the matter.

The Supreme Court disagreed. Writing for the majority, Justice Scalia stated that the Sixth Circuit and other courts that had dismissed section 3 appeals for want of jurisdiction had "conflat[ed] the jurisdictional question with the merits of the appeal." *Andersen*, 129 S. Ct. at 1900. Regardless of the merits behind the motion to stay, appellate courts have jurisdiction to hear the appeal under section 16. According to the Court, "any litigant who asks for a stay under § 3 is entitled to an immediate appeal from denial of that motion — regardless of whether the litigant is in fact eligible for a stay." *Id.*

Although it could have stopped with the jurisdiction question, the Court continued and discussed a non-signatory's ability to obtain a section 3 stay. Examining the statute, the Court found that section 3 unambiguously grants ***any party to the litigation*** the ability to apply for a stay. *Id.* at 1902 n.6. The Court explained that the statute simply was not limited to parties to a written arbitration agreement. Thus, on motion of any party to the litigation, the trial court should "stay the action if it involves an 'issue referable to arbitration under an agreement in writing.'" *Id.* at 1901–02 (quoting 9 U.S.C. § 3).

In determining whether the claim by or against a non-signatory is "referable to arbitration," the Court advised applying the "background principles of contract law regarding the scope of the agreement (including the question of who is bound by them)." *Id.* at 1902. These traditional principles of state contract law include assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel. If a non-signatory can enforce the contract under state contract law, the non-signatory is entitled to a section 3 stay. *Id.*.

Though some may find it unappetizing, the result is perhaps not entirely surprising. Courts have routinely used principles of contract law to allow non-signatories to compel arbitration under section 2 of the FAA. *See* 1 GABRIEL WILNER, ET AL., DOMKE ON COMMERCIAL ARBITRATION § 13:1 (3d ed. 2003 & Supp. 2009) (listing theories under which courts have bound nonsignatories to an arbitration agreement, including common-law contract principles). The Court's decision in *Andersen* avoids a situation in which a nonsignatory could be compelled to arbitrate a dispute (or could compel arbitration) but could not seek a stay of the filed litigation.

Justice Souter penned a dissent, joined by the Chief Justice and Justice Stevens. The dissent argued that giving appellate courts jurisdiction to hear section 3 appeals brought by non-signatories ignored the "longstanding congressional policy limiting interlocutory appeals." *Id.* at 1903 (Souter, J., dissenting). Allowing non-signatories the ability to appeal a section 3 denial would only encourage abuse and delay: "Why not move for a § 3 stay? If granted, arbitration will be mandated, and if denied, a lengthy appeal may wear down the opponent." *Id.* at 1904.

The *Andersen* holding effectively reversed the decisions in the Second, Third, Seventh, Eighth, and D.C. Circuits which had found that a non-signatory could not seek a section 3 stay under any circumstances. Further, the decision established theories —based on traditional principles of state contract

law — under which a non-signatory could seek (and a court could grant) a mandatory stay under section 3. But the decision did not clearly state whether state contract law was ***the*** means for a court to evaluate a non-signatory's motion for a section 3 stay or merely ***a*** means to evaluate. In other words, did *Andersen* announce a floor or a ceiling? This is an important question in jurisdictions like the Fifth Circuit and Texas which have announced their own tests for applying section 3 stay motions to nonsignatories.

The Fifth Circuit and *Waste Management*

Five years before *Andersen*, the Fifth Circuit announced its section 3 stay test in *Waste Management*. 372 F.3d at 343. The decision has gained traction in Texas as state appellate courts have recently relied on the *Waste Management* test in ruling on section 3 motions. *See In re Devon Energy*, No. 01-09-00174-CV, 2009 WL 1635364, at *3–4 (Tex. App.—Houston [1st Dist.] June 8, 2009, no pet.) (applying the *Waste Management* test); *Zuffa, LLC v. HDNet MMA 2008 LLC*, 262 S.W.3d 446, 450–51 (Tex. App—Dallas 2008, no pet.) (same).

In January 2000, RIMSA leased heavy equipment from Bethlehem Corporation. Waste Management, RIMSA's parent company at the time, supplied a performance guarantee in the form of a letter of credit. In August 2000, Waste Management sold RIMSA to Onyx. The purchase agreement executed between Waste Management and Onyx contained an arbitration clause. RIMSA itself was not a party to the purchase agreement. Later that same year, RIMSA failed to make payments under the equipment lease, prompting Bethlehem to draw down the letter of credit. Waste Management reimbursed the bank that had issued the letter of credit.

In May 2002, Onyx initiated an arbitration against Waste Management on claims arising out of the purchase agreement. Waste Management filed a counterclaim in the arbitration, alleging breach of contract and seeking payment for the funds it had paid on the letter of credit. At the same time, Waste Management sued RIMSA in Texas state court, again seeking reimbursement for the funds it had paid on the letter of credit. After removing to federal court, RIMSA filed an emergency motion to stay the litigation based on the ongoing arbitration between Onyx and Waste Management. The district court denied the motion, and RIMSA appealed. The Fifth Circuit stayed the litigation pending the appeal. Waste Management argued that the appellate court lacked jurisdiction under section 16 of the FAA because RIMSA was not a signatory to the arbitration agreement between Waste Management and Onyx, and therefore had no rights under section 3.

At the outset, the court stated that it would have jurisdiction of the appeal under section 16 if section 3 applied to RIMSA's motion to stay. While noting that section 3 usually only applies to signatories, the court stated that under the language of section 3, "in certain limited circumstances, non-signatories do have the right to ask the court for a ***mandatory*** stay of litigation, in favor of pending arbitration to which they are not a party." *Waste Management*, 372 F.3d at 342 (emphasis in original). The court also noted that the language of section 3 seemed "to make clear that ***any*** of the parties to the suit can apply to the court for a mandatory stay." *Id.* (emphasis in original).

In making its determination of whether RIMSA's claims would be covered by the arbitration agreement, thus allowing RIMSA the ability to stay the litigation, the Fifth Circuit examined past cases addressing similar situations. Synthesizing Fifth Circuit precedent, the *Waste Management* court announced a three factor test: a court must analyze whether: 1) the arbitrated and litigated disputes involve "the same operative facts;" 2) the claims asserted in the arbitration and litigation are "inherently inseparable;" and 3) the litigation will have a "critical impact" on the arbitration. *Id.* at 343. Applying its three factor test, the court held that RIMSA's claims were "referable to arbitration." Therefore, the Fifth Circuit had jurisdiction over RIMSA's appeal and reversed the district court, finding that RIMSA was entitled to a mandatory stay under section 3.

In the process, the court emphasized the favored position of arbitration in the juridical landscape. The court expressed its concerns with "the integrity of the arbitration and the preservation of [the signato-

ries'] rights to [their] contractual agreement." *Id.* at 345.

Though other courts in the Fifth Circuit have embraced *Waste Management*'s three-factor test, the *Waste Management* court itself noted that in making a determination of a non-signatory's rights under the FAA, "there is neither an explicit balancing test nor bright line rule." *Id.* at 343 n.6. The court described the factors in its test as "neither required (in that articulation) nor exhaustive." *Id.*

Texas, *Waste Management,* and *Merrill Lynch*

The Texas Supreme Court has adhered to the policy underlying the *Waste Management* test rather than the same precise words of the test itself. In accordance with the goal of furthering arbitration, in *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007), the Texas Supreme Court stayed claims against nonsignatories until the completion of an arbitration proceeding involving the same issues.

In *Merrill Lynch*, the plaintiff had a contract with Merrill Lynch which contained an arbitration clause. The plaintiff sued a Merrill Lynch employee and two Merrill Lynch affiliates but not Merrill Lynch itself. The defendants moved to stay the litigation and compel arbitration. Both the trial court and the appeals court denied the defendants relief. The Supreme Court ruled that the claim against the employee, as an agent for Merrill Lynch, was subject to the arbitration agreement with Merrill Lynch. However, the court found no theory under which the affiliates could invoke the arbitration agreement to compel arbitration. *Merrill Lynch*, 235 S.W.3d at 195. The court next examined the affiliates' ability to stay the litigation.

While citing to *Waste Management* for the proposition that an arbitration generally has priority over litigation, the *Merrill Lynch* court chose not to adopt or even apply the *Waste Management* three-factor test. Instead, the Court seemingly set out a one factor test, concentrating solely on the issues involved in the litigation and arbitration: "Assuming the same issues must be decided both in arbitration (against [a signatory]) and in court (against [a non-signatory]), we hold the latter must be stayed until the former is complete." *Id.*

Issuing a stay in this situation ensured that the arbitration was not adversely impacted by parallel litigation. The court noted that "the Federal Arbitration Act generally requires the arbitration to go forward first." *Id.* Thus, *Merrill Lynch* emphasizes the importance of arbitration as a legislatively-recognized dispute resolution mechanism, even if such emphasis comes at the expense of a party's right to litigate its dispute. Accordingly, the court stated that while "[trial judges cannot deny a party its day in court, [] they have always had wide discretion to say when that day will be." *Id.*

The First Court of Appeals used the *Merrill Lynch* one-factor test in *In re Banc One Inv. Advisors Corp.*, No. 01-07-01021-CV, 2008 WL 340507, at *3 (Tex. App.—Houston [1st Dist.] Feb. 7, 2008, no pet.). In *Banc One*, the plaintiff sought tax advice from Deutsche Bank and a number of Bank One Defendants. The plaintiff executed an agreement with Deutsche Bank that contained an arbitration clause. The Bank One Defendants were not signatories to that agreement. Another defendant in the action, White & Case LLP, moved to compel arbitration of the claims against Deutsche Bank and White & Case. The Bank One Defendants also attempted to compel arbitration and stay the litigation, but the trial court denied the Bank One motion. Bank One filed a mandamus action to overturn the lower court's rulings. The First Court of Appeals denied the Bank One motion to compel but granted the Bank One motion to stay. In doing so, the court followed *Merrill Lynch*, examining only the issues involved in the litigation and arbitration. *Banc One*, 2008 WL 340507 at *3. The court noted that "[t]he fact that the Bank One Defendants are nonsignatories to the arbitration agreement is irrelevant." *Id.* Finding that "many of the same issues are addressed in litigation and arbitration," the court stayed the litigation in order to avoid "render[ing] the arbitration moot." *Id.* Again, the court exhibited a concern for the public policy favoring arbitration, citing to the FAA and the Texas Arbitration Act.

Months later, in *Zuffa*, the Fifth Court of Appeals in Dallas stayed a nonsignatory's claim pending the completion of an arbitration. The *Zuffa* court, however, relied on *Waste Management*'s three-factor

test instead of *Merrill Lynch*'s one-factor test. *Zuffa*, 262 S.W.3d at 450–51. In this case, Zuffa entered into a contract with ultimate fighter Randy Couture, whereby Zuffa agreed to promote Couture's fights. The contract contained an arbitration clause. Before the termination of the contract, Couture entered into another promotion contract with HDNet MMA. HDNet then filed suit, seeking a declaratory judgment for the date on which the Couture-HDNet contract could become effective without violating the Couture-Zuffa contract. Zuffa filed for arbitration against Couture pursuant to the parties' promotion contract. In trial court, Zuffa moved to compel arbitration of HDNet's claim and stay the litigation. The trial court denied the motions and Zuffa petitioned for a writ of mandamus. The Dallas appeals court reversed and stayed the litigation. Though it ultimately applied the *Waste Management* test, the *Zuffa* court cited to both *Merrill Lynch* and *Waste Management* for the proposition that the integrity of the arbitration takes precedence over a related lawsuit. *Id.* at 450.

Almost one year after *Banc One*, the First Court of Appeals again considered the ability of a nonsignatory to stay litigation pending an arbitration in *Devon*. The court used the three-factor *Waste Management* test. *Devon*, 2009 WL 1635364, at *4–5. *Devon* involved a breach of contract suit brought by two plaintiffs, Ferris and Ellison, against Devon and Devon-related entities. Ellison and Devon had entered a contract containing an arbitration clause. Ferris was not a party to that contract. During the pendency of the litigation, Ellison and Devon agreed to arbitrate Ellison's claims pursuant to the arbitration clause. Devon moved to stay Ferris' claims pending the outcome of the arbitration with Ellison. The trial court denied the motion to stay, but the First Court of Appeals, applying the *Waste Management* factors, reversed. The court found that "Ellison's arbitration and Ferris's litigation involve the same operative facts, and the claims asserted in the arbitration and litigation are 'inherently inseparable.'" *Id.* at *4 (citing *Waste Management*). To avoid "jeopardize[ing] the integrity of the parallel arbitration," the court stayed the litigation. *Id.* at *5. Texas courts embraced the policy considerations found in both *Waste Management* and *Merrill Lynch*. Both opinions promote arbitration at the expense of parallel litigation proceedings. It is less clear which test Texas courts will ultimately adopt: *Waste Management*'s three-factor test or *Merrill Lynch*'s one-factor test. The answer to this question gains importance in the face of the Supreme Court's opinion in *Andersen*.

Squaring *Waste Management* and *Merrill Lynch* with *Andersen*

As discussed above, *Andersen* does not make clear whether "background principles of state contract law" is the exclusive means, or merely one of many means, of enforcement of an arbitration clause by or against a non-signatory under section 3. If *Andersen* represents the floor, the *Waste Management* and *Merrill Lynch* tests remain valid tests for section 3 stays. The more interesting question arises if *Andersen* is the ceiling, and traditional principles of state contract law are the sole means through which section 3 applies to nonsignatories. If so, do the *Waste Management* and *Merrill Lynch* tests survive after *Andersen*?

The *Waste Management* court did not name, label, or categorize its test. Nor did the court refer to background or traditional principles of state contract law. The *Waste Management* court merely distilled existing case law into three enumerable factors. Interestingly, the Fifth Circuit had discussed these same factors almost thirty years earlier when discussing a discretionary stay against nonsignatories in *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976) ("The charges against these two defendants were based on the same operative facts and were inherently inseparable from the claims against Eteco. If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."). A later case noted that while *Reisfeld* did not "apply equitable estoppel ***per se***," the rationale of the *Reisfeld* decision supported the application of equitable estoppel to compel a signatory to arbitrate a claim with a non-signatory. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (emphasis in original). The *Waste Management* test then would at least seem to have some relation to an established estoppel doctrine. Thus, it can at least be argued that the *Waste Management* test falls within the "traditional notions of state contract law" al-

luded to in *Andersen*.

Still less certain is whether the *Merrill Lynch* test would survive if *Andersen* is to be considered a ceiling. As discussed above and reiterated in *Banc One*, "*Merrill Lynch* articulates one standard to determine whether litigation should be stayed: if collateral litigation addresses the same issues as arbitration, thus threatening to render the arbitration moot, the litigation must abate pending the arbitration." *Banc One*, 2008 WL 340507, at *3. Interestingly, for purposes of compelling arbitration, the *Merrill Lynch* court explicitly found "no contract theory" tying the claims against the nonsignatories to the arbitration agreement. *Merrill Lynch*, 235 S.W.3d at 187, 195. Nonetheless, the court still stayed these claims pending the outcome of the arbitration. This suggests that the *Merrill Lynch* test for a mandatory stay is based on principles beyond traditional contract law. The test is therefore called into question if *Andersen* announced the exclusive means for evaluating litigation stays by or against a non-signatory.

Conclusion

While the *Andersen* decision firmly established a non-signatory's right to appeal a denial of a motion to stay and put to rest the idea that a non-signatory can never obtain or be affected by a section 3 stay, it leaves unanswered the question of when a non-signatory can obtain or be affected by a section 3 stay outside of those instances in which the agreement is applied to the non-signatory via state contract law. Further attention to this portion of the opinion is warranted, especially in those jurisdictions which evaluate a non-signatory's right to a section 3 stay using tests which are not founded on or based in traditional notions of contract law.

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This Article is written in the authors' personal capacity and does not reflect the views of any other person or entity.

TEXAS MEDIATOR CREDENTIALING ASSOCIATION SYMPOSIUM

Save the date: TMCA Symposium Saturday, November 6th, 2010, 8:00 a.m. - 4:45 p.m.

The annual Texas Mediator Credentialing Association symposium is scheduled for Saturday, November 6th at the State Bar Law Center at 1414 Colorado St., Austin, Texas. The theme this year will focus on styles of mediation: facilitative, transformative and evaluative**.** Last year's symposium proved quite thought provoking and our goal is to make this year's even better and equally valuable for all mediators regardless of background or style. We'll be back to you in mid-summer with more information. Block out the November 6th date on your calendar for this year's TMCA symposium.

Sincerely,
Cecilia H. Morgan
TMCA Board Representative to the
ADR Section of the State Bar of Texas

FEDERAL SCOPE OF PREEMPTION OF STATE LAW RELATED TO ARBITRATION – PART II

by Stephen K. Huber*

Part I of this Article, published in the Spring, 2010 issue of Alternative Resolutions, addressed the scope of federal preemption of state laws that have an impact on arbitration. It demonstrated that the extent of FAA arbitration is considerably narrower than thought by most practitioners and scholars. Part II examines specific contexts where state law may properly have an impact on arbitration law and practice, particularly where state courts have authority over the arbitration.

IV. Professional Regulation of Arbitrators

A. Certification and Licensure

The permission of state government is required to cut hair, clean septic tanks, trim trees, massage bodies, sell food, stuff animals (taxidermist), and to undertake a vast array of other economic activities. (An exception is commonly made for pro se and volunteer activities.) Consequently, it is easy to make an a fortiori argument for regulating arbitrators – whether through full-scale professional licensing of the sort to which physicians and attorneys are subject, or some lesser form of regulation. Professional regulation has largely been left to the states, although the federal government could, under the commerce clause, engage in expansive occupational regulation, and has done so in a few instances. The most notable example of resorting to this approach is the comprehensive regulation of securities brokers and firms – which industry includes arbitration as its universally used method of dispute resolution. Serious professional regulation (beyond mere registration) is of two types: certification and licensure.

1. Certification. Under a certification system, the government certifies that individuals have specified skills, but the same activities may be undertaken by persons who are not certified.. This definition excludes private assertions of quality such as "best buy" ratings from Consumer Reports, Newsweek's rankings of professional schools, or membership in exclusive professional organizations that admit only people with specified qualifications. Anyone may engage in the business of helping people with the design of a house, for example, but in most states the title of "architect" is reserved for individuals who have met state certification standards. As with accountants and appraisers, this example is not a pure one, because in each instance some classes of work – typically the most complex, prestigious, and remunerative work – are reserved for licensed practitioners.

2. Licensure. Under a licensing system, the practice of an activity is limited to persons who have met the standards for licensure established by state law. The standards typically include education (both pre-licensing and continuing education), examination, practice, and work experience. An unlicensed person who performs the licensed activity, or holds oneself out to the public as providing such services, engages in unauthorized practice and is subject to legal sanction. One of the important functions of state professional associations, such as state bar associations, is to police against unauthorized practice.

The licensing of arbitrators (and also other dispute resolution professionals) has been suggested before, but heretofore no state has adopted such a scheme. See e.g., Jeffrey Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 Nev. L.J. 251, 260-64 (2007); Cameron L. Sabin, *The Adjudicatory*

Boat Without a Keel: Private Arbitration and The Need For Public Oversight of Arbitrators, 87 Iowa L. Rev. 1337, 1372-73 (2002) (concluding FAA would not preempt state licensure); Theodore A. Levine & Peter R. Cella, *Arbitrator Training and Selection*, 63 Fordham L. Rev. 1679 (1995) (discussing licensing and oversight for securities arbitrators); Benjamin Aaron, *Should Arbitrators be Licensed or Professionalized?*, 29 Nat'l Acad. Arb. 152, (1976) (labor arbitrators). Even if the comprehensive licensing system that is a way of life for attorneys is not enacted, some features of a licensure regime might be adopted. The availability of the professional licensure model also provides an *a fortiori* argument for implementing lesser forms of regulation.

B. Arbitrator Disclosure Standards – And Taking Them Seriously

California has adopted mandatory ethics standards that specify extensive, minimum, disclosure standards for arbitrators. See, *Ethics Standards for Neutral Arbitrators in Contractual Arbitration* (2002). Contractual waiver of these standards is expressly prohibited. California is hardly alone in mandating substantial disclosures by arbitrators – both pre-selection and during the arbitration process. Of particular note and importance are the long-established standards issued jointly by the ABA and the AAA. Similar principles are embodied in the AAA Commercial Arbitration Rules, as well as the rules of the other major arbitration organizations, notably the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"). In view of the abdication of oversight by the Securities and Exchange Commission ("SEC") in recent years, a new look at qualifications and neutrality of securities arbitrators seems in order.

Both the Ninth Circuit and the California Supreme Court have ruled that the California Ethics Rules are preempted by the Securities Exchange Act – but **not** by the FAA. *Credit Suisse v. Grunwald*, 400 F.3d 1119, 1121 (9th Cir. 2005); *Jevne v. Superior Court*, 111 P.3d 954, 957 (Cal. 2005). These courts declined to adopt a limited preemption approach by striking some, rather than the entire body, of the California ethics rules. Both decisions are limited to the securities context, and they do not purport to limit the application of the California Ethics Rules in other types of arbitration. These decisions also are limited to the current California Rules. Notably, neither the Ninth Circuit nor the California Supreme Court suggested that all state rules regarding arbitrator ethics are preempted by the FAA. The leading state case outside the securities arena upheld the California Ethics Rules is *Ovitz v. Schulman*, 133 Cal. App. 4th 830, 35 Cal. Rptr. 3d 117 (2005) (expressly rejecting FAA preemption arguments).

Rules must have consequences, else they are merely suggestions. The California Ethics Rules have an important consequence: the failure by an arbitrator to make mandated disclosures can result in vacatur of the ensuing arbitration award. Unfortunately, the courts are generally unwilling to enforce arbitrator disclosure standards, notwithstanding that they are incorporated into the arbitration agreement between the parties. As Judge Richard Posner stated the matter, in *Merit Ins. Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 680 (7th Cir. 1983) (emphasis supplied):

> even if the failure to disclose was a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially. Although we have great respect for the [AAA] Commercial Arbitration Rules and the [AAA/ABA] Code of Ethics for Arbitrators, *they are not the proper starting point for an inquiry into an award's validity*.

In plain English, the arbitrator standards that the parties contracted for are worthy of "respect" but not worthy of enforcement. Provider organizations, such as the AAA, are welcome to impose sanctions on arbitrators they appoint, but such is not the business of the courts because they are limited to applying the FAA or state law judicial review provisions. Arbitrators and organizations that provide arbitration services are protected from being sued by quasi-judicial immunity, so recourse against them is unavailable. This is true even where the party stated the basis for seeking recusal of the arbitrator before the start of the proceeding, but the arbitrator refused to withdraw and the provider organization agreed. The quasi-judicial immunity approach, which effectively means total immunity, is far too well estab-

lished through judicial decisions to be changed, except through legislation. For a detailed review of the law related to arbitral immunity, and a critique of the scope of immunity, see Maureen A. Weston, *Re-examining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 Minn. L. Rev. 449 (2004).

A provider organization could purchase insurance and contract to provide payments to the parties when an arbitration award is vacated due to disclosure failures by an arbitrator (or other failures that lead to an award being vacated). This approach would lead to a dramatic increase in compliance by provider organizations, as well as improved policing of the arbitrators that are named to their panels. Furthermore, parties seeking arbitrators would have an added incentive to have a third-party nominate arbitrators, rather than continuing to make use of the troubled party appointment approach. Judicial willingness to enforce state-mandated disclosure rules would have a remarkable and rapid impact on the behavior of provider associations. The provision of demonstrably neutral, as well as substantively qualified, arbitrators (perhaps accompanied by an insurance option) could easily be turned into a competitive advantage for the major arbitration provider organizations.

The goal of greater disclosure is – greater disclosure, not increased litigation. Indeed, expanded (and consistent) disclosure should improve the arbitration process and provide a shield against judicial vacatur of awards. Once proper disclosure is made, failure to object to a proposed arbitrator constitutes a waiver of any objections. As the level of disclosure increases, any particular failure to disclose is less likely to be treated as material. The legal hook for vacating awards due to inadequate disclosure is the long-established statutory ground of "evident partiality."

C. Disclosure Regimes and the Revolution in Information Technology

Modern information technology, still in its infancy, can greatly assist in the effective implementation of mandatory disclosure standards for arbitrators, The arbitrator selection process could be dramatically improved through use of a public data base with information about arbitrators, or one that is made available to persons considering an individual as an arbitrator. How difficult can it be for an arbitrator to maintain a list of every arbitration in which she participated, listed from the earliest to the latest? Nothing more is required than continuing a list with the latest entries placed at the end of each section – a process that requires only a few strokes on a computer. Academics, not the most organized of people, manage to maintain resumes listing every publication, all group memberships, and often every professional presentation.

V. Evident Partiality as Basis for Vacating Arbitration Awards

"Evident partiality" is the legal standard for vacatur of an arbitration award due to an appearance of improper arbitrator bias. Proof of actual arbitrator bias is all but impossible, short of a string of incriminating e-mails, so apparent bias is the only realistic option for establishing that vacatur is warranted. This open-textured, flexible standard is found in the FAA and both versions of the UAA. The usual consequence of a finding of arbitrator partiality is that the arbitration award must be vacated and the arbitration process started anew, because the statutory authority of courts to remand a matter to an arbitrator or to modify an arbitral award is quite limited. Acceptance of an arbitrator by a party after timely disclosure of all material information constitutes a waiver of objections, and protects the award from challenge by the losing party.

Serious thinking about evident partiality requires a dose of legal realism. The party raising the evident partiality claim is always the one that lost in arbitration, so courts are properly suspicious that the real complaint about the arbitration is the outcome rather than arbitrator bias. The usual claim is that, had the complaining party only known – fill in factual information gleaned from an exhaustive study of the arbitrator's background – then that party would have sought to remove the arbitrator. This approach does not bespeak cynicism; rather, it merely recognizes the reality that firms and individual are self-interested rational maximizers.

Analysis of issues related to decider bias is a more difficult problem with arbitrators than with judges. Judges are neutrals with expertise in judicial procedure, but not in particular substantive topics. Unlike arbitrators, judges who do not depend on parties for appointment, do not lose income if they recuse themselves, and are not concerned about future clients. Arbitrators, by contrast, are often chosen precisely because of their industry or subject-matter expertise – e.g., board certified orthopedic surgeon, CPA, executive experience in reinsurance industry, licensed architect, structural engineer. Decisions by arbitrators can directly affect future income, or indirectly do so through the selection of a provider organization that maintains specialized panels of arbitrators.

In general, disclosure solves all claims of arbitrator bias, because failure to object constitutes waiver of any bias claim based on disclosed information. Upon occasion, a provider organization will reject a challenge to an arbitrator, but this approach puts at risk the ensuing arbitration award if the complaining party loses. The losing party can make the powerful argument that it is not merely engaging in 20-20 hindsight, as evidenced by the pre-arbitration complaint about the arbitrator's bias.

A. The U.S. Supreme Court's Approach to Evident Partiality: *Commonwealth Coatings*

It should not come as a surprise to any student of the law that reasonable people can, and do, is agree about the meaning of a general term like "evident partiality," both in the abstract and in its application to particular circumstances. All discussions on the subject necessarily begin with the *Commonwealth Coatings* decision, the one and only time the Supreme Court has examined the topic of arbitrator partiality. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). There are two basic approaches to evident partiality, commonly described as broad (more receptive to vacating arbitration awards) and narrow (less generous to vacating arbitration awards). These terms are relative, because courts vacate awards due to evident partiality (or any other reason) relatively infrequently. (Similarly, few trial court decisions are appealed, or reversed on appeal.)

The meaning of Commonwealth Coatings is disputed, in important part because there was not a majority opinion for the Court. Justice Black wrote for four justices, while Justice White wrote a concurring opinion for two justices – while he also joined in Justice Black's opinion. Some courts have used the absence of a majority opinion to treat Justice White's opinion (for two justices) as the narrow holding of the Court, and rejected the approach taken by Justice Black's plurality opinion (for four justices).

Justice Black's opinion mandated the disclosure of dealings between parties "that might create an impression of possible bias," with the consequence of failure to disclose being vacatur of the arbitration award. It was not the purpose of Congress to support decisions by "arbitration boards that might reasonably be thought biased against one litigant and favorable to another." Id. at 149. Some courts have adopted the "appearance of bias" standard, while other courts have adopted a more rigorous standard and required that evidence of partiality must be "direct, definite and capable of demonstration rather than remote, uncertain or speculative" in order to vacate an arbitration award. An example of each approach is discussed below.

Justice White, while pointing out the importance of full disclosure of potential conflicts, cautioned against overly strict disclosure requirements because the parties to an arbitration commonly are sophisticated commercial organizations. On the merits, Justice White agreed with Justice Black, and nothing in the concurring opinion questions the "impression of possible bias standard." The opening sentence of Justice White's opinion states that he was "glad to join" in Justice Black's opinion. Id. at 150. Justice White was clear that any non-trivial prior business relationships between a party and an arbitrator's firm must be disclosed. Justice White's opinion did not discuss, let alone disavow, Justice Black's appearance of bias standard, but White was concerned that Justice Black's evident partiality discussion might be read too broadly by other courts.

Despite the divergent views about the scope of evident partiality among both federal and state courts, the Supreme Court has not revisited this topic. As a

result, the applicable law regarding evident partiality in a jurisdiction can vary depending on whether a case is heard in state or federal court. This statement does not just reflect a theoretical possibility; it describes the state of the law in Texas today. The decisions of the Texas Supreme Court in *TUCO*, and of the Fifth Circuit in *Positive Software*, are representative of the two central approaches to evident partiality.

B. The Texas Supreme Court's Approach to Evident Partiality: *TUCO*

In *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629 (Tex. 1997), the Texas Supreme Court adopted the broad view of evident partiality, and vacated the arbitration award. The rule adopted by the Texas Supreme Court was that an arbitration award will be vacated if a neutral arbitrator fails to disclose "facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality" Id. at 630. One of the arbitrators failed to disclose that during the hearing of the dispute an attorney at the law firm representing the prevailing party in the arbitration had referred a major piece of work to the arbitrator. (Neither of the attorneys at the law firm knew of the activities of the other). This situation easily meets the reasonable impression of partiality test.

C. The Fifth Circuit's Approach to Evident Partiality: *Positive Software*

In *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007) (en banc), the Fifth Circuit, in a dispute arising under Texas law, adopted the narrower view of evident partiality. Typifying the disdain of federal courts for the handiwork of their state court brethren, neither the majority nor the dissenting opinion in *Positive Software* discusses the *TUCO* decision. The losing party in Positive Software sought to have the arbitration award vacated because arbitrator Shurn failed to disclose a prior co-counsel relationship between his law firm ("Firm A") and the law firm representing New Century ("Firm B"), the prevailing party in the arbitration. (The names of the law firms, and additional background about the Intel representation, can be found in the *Positive Software* opinions.) Firm A, including Shurn, and Firm B, including Camina, the partner who represented New Century, had jointly spent several years as co-counsel representing Intel Corporation in a major patent matter. By the time this high stakes matter finally ended it had produced three published United States district court opinions, as well a decision by the Federal Circuit. See *Cyrix Corp. v. Intel Corp.*, 77 F.3d 1381 (Cir. 1996). (Counsel for Cyrix included the highly respected firms of Vinson & Elkins and Fish & Neave.) Shurn was a major participant in the Intel matter; the role of Camina was more limited, with the extent of her role in the representation of Intel being a matter in dispute between the parties here.

The AAA Notice of Appointment reminded arbitrators of their "obligation to disclose any circumstances likely to affect impartiality or create an appearance of partiality" The notice went on to specify that the arbitrator must disclose "any past or present relationship with the parties, **their counsel**, or witnesses, direct or indirect. . . ." To aid arbitrators with making disclosures, the AAA further specified the disclosure of "**any** professional or social **relationship with counsel for any party to this proceeding or with the firms for which they work**." (Emphasis supplied.) Although disclosure by Shurn of his relationship with Firm B was expressly required under the AAA Rules, and also by the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Shurn never disclosed that Firm A and Firm B were co-counsel in the Intel matter.

The Fifth Circuit refused to vacate the arbitration award, despite Shurn's failure to make the disclosures required under the AAA Rules. Clearly, the leaders in the field of arbitration have concluded that requiring extensive disclosures is beneficial to arbitration rather than harmful, and important to its credibility. As for finding senior lawyers and other experienced professionals willing to serve as arbitrators, such work is ideal for quasi-retired and senior experts. The AAA turns away hundreds of applicants each year who want to become members of its roster of arbitrators. In short, there is no risk that rigorous disclosure requirements, which are the norm and not the exception, will keep the most

qualified and experienced professionals from seeking to serve as arbitrators.

Recently, both the Second and Ninth Circuits have vacated arbitration awards where the arbitrator lacked actual knowledge of a conflict of interest but failed to investigate the matter. *New Regency Prod. Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007) (vacating award – arbitrator has duty to investigate possible conflicts arising from new employment during arbitration, and also duty to disclose the new employment to parties); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi*, A.S., 492 F.3d 132 (2d Cir. 2007) (vacating award – duty to investigate, or notify parties of potential conflict and fact that arbitrator is avoiding any knowledge about a potential conflict). Two cases do not make a trend, but the increased sensitivity of two such important courts to disclosure concerns certainly is suggestive.

The appropriate scope of arbitrator disclosures is not just some technical issue of interest only to insiders; nothing less than the integrity of arbitral decisions hangs in the balance. Fortunately, an easy solution is at hand for prospective arbitrators: disclose, disclose, disclose. For those who lack the intelligence or the imagination to determine what should be disclosed, a ready answer is found in the rules of provider organizations such as the AAA (Commercial Arbitration Rule R-16) or the CPR Institute for Dispute Resolution (Rule 7). Given the economic incentives for nondisclosure, the responsible solution for potential arbitrators is to go the extra mile in making disclosures. This is by far the best solution to evident partiality concerns.

VI. Public Policy As Basis For Vacating Arbitration Awards

The term "public policy" tends to be used loosely, and sometimes reflects nothing more than a conclusory label reflecting a disputant's wished for result. Here, the usage is quite specific: an independent basis for vacating an arbitration award that does not fit within the other established categories. Under U.S. Supreme Court decisions, the availability of "public policy" as a ground for vacating an arbitration award is quite limited, and is applied mainly in the context of arbitrator orders to reinstate terminated employees in labor-management cases. The potential scope of public policy as a state law limitation on arbitration awards is considerably broader.

In *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000), the Supreme Court upheld the order of a labor arbitrator that reinstated a fired employee who engaged in safety sensitive work, despite two drug use violations. Only a public policy that is explicit, well-defined, and dominant can qualify as a basis for vacating an arbitration award. Justice Scalia, writing also for Justice Thomas, would have gone further and limited the scope of public policy to arbitration awards that violated positive law – an approach that reflects actual practice. Justice Scalia articulated this conclusion with his usual panache:

> There is not a single decision, since this Court washed its hand of general common-lawmaking authority, see *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1935), in which we have refused to enforce on "public policy" grounds an agreement that did not violate, or provide for a violation of, some positive law.

While this statement is accurate with respect to Supreme Court decisions, prior to Eastern Coal the lower federal courts applied the public policy limitation more broadly, almost always to overturn pro-union arbitration awards. The decisions of the Fifth Circuit provide a notable example. See, e.g., *Exxon Corp. v. Baton Rouge Oil & Chemical Workers Union*, 77 F.3d 850 (1996).

The scope of "public policy" under state law has the potential to be considerably broader than under federal law, and not only because a state has the power to adopt public policies that are at substantial variance with those of the federal government or other states. The scope of state law is considerably broader than federal law, and centrally important areas of state law are not governed by statute – e.g., much of the law of contracts and torts. In addition, there seems to be far greater concern at the state level than at the federal level about issues associated with the consumerization of arbitration. A few illustrations will suffice to indicate the potential breadth

of public policy as a basis for reviewing arbitration awards.

1. Punitive Damages

Strikingly, public policy was the basis for decision in the single best known state arbitration case, *Garrity v. Stuart*, 353 N.E.2d 793 (N.Y. 1986). In *Garrity*, the New York Court of Appeals ruled that arbitrators were prohibited from awarding punitive damages. This determination reflected the fundamental public policy that punishment is limited to the state. The contract in Garrity was silent about punitive damages, but the court stated that this rationale applied equally to contract provisions that authorized the award of punitive damages, because "freedom of contract" does not encompass the freedom to punish. See also *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 517 (2d Cir. 1991) (FAA does not preempt New York common law rule prohibiting punitive damages in arbitration award.), cert. denied, 502 U.S. 1120 (1992).

At a time when the usual "public policy" concern about punitive damages awards is that a few awards appear far too high, whether measured in absolute terms or relative to actual damages, it is useful to quickly recall the quite different scenario in Garrity. A publisher behaved badly, even maliciously, in refusing to pay $45,000 of royalties due an author. The arbitrator ruled for the author and added punitive damages of $7,500 – a mere 17% of the actual damages award. The real problem in Garrity might be seen as the absence of an award for costs and attorneys' fees. Such recovery is far more common in arbitration than in judicial proceedings, usually under standard arbitration rules.

Garrity is the minority rule among the states. Even Oregon, whose arbitration legislation was modeled on the New York statute, has rejected *Garrity*. See, *Russell v. Kerley*, 978 P.2d 446 (Or. App. 1998). The usual default provision under state law is that an arbitrator may award punitive damages unless limited by the underlying agreement, and the rules of arbitration organizations typically make the same provision. Contract provisions that require, permit, or prohibit punitive damage awards are policed (inadequately) through state contract law – notably unconscionability, which is itself a form of public policy. In New Mexico a practice arose whereby an arbitrator could make a recommended award of punitive damages, which recommendation was then considered by a court in the context of an action to confirm or vacate the award. The court could accept the punitive damages recommendation in whole or in part, whereupon the punitive damages award would become that of the court rather than the arbitrator. *Aguillera v. Palm Harbor Homes, Inc.*, 54 P.3d 993 (N.M. 2002). This approach provides an interesting example of state law innovation, and the ability of states to try out approaches that might be regarded as unduly risky if offered, without field testing, for imposition on the entire country. (New Mexico subsequently enacted the 2000 UAA, so there is now a statutory basis for arbitrators to award punitive damages.)

The 2000 UAA permits the recovery of costs and fees where authorized by state law for a similar civil action. UAA. § 21(b) Many states do not hew to the "American rule" that each party bears its own costs and fees. In Texas, for example, recovery of attorney's fees by the prevailing party is authorized in several types of cases, notably breach of contract claims. Section 21 of the 2000 UAA authorizes arbitrators to award punitive damages or other exemplary relief, unless otherwise limited by state law. In awarding exemplary relief, the arbitrator must follow applicable state law. To avoid overuse of the power to allow punitive damages, and to facilitate judicial review of such award, the amount of punitive damages and the basis for awarding them must be set forth in the arbitral award (unless waived by the parties).

2. Family Law

State courts regularly exercise a supervisory role in the context of family law matters where children are involved, in order to safeguard the best interests of the child. An arbitration award regarding any aspect of child custody, visitation, or finances is potentially subject to judicial review. See e.g., *Faherty v. Faherty*, 477 A.2d 1257 (N.J. 1984). Where a state has specialized family courts, it may be unclear whether jurisdiction to review an arbitration award regarding a child should be heard by the family court or the court of general jurisdiction specified in the state arbitration statute.

The reported case law in this area is sparse, but the increasing use of arbitration in family dissolution matters suggests that more litigation should be expected. In determining the appropriate standard of review, courts will then have to resolve the tension between two public policies, one calling for limited review of arbitration awards and the other calling for intrusive review based on the best interests of children. An in-between standard involving some deference to a (written) arbitration award that materially affects a child is a plausible option. Clearer rules might increase resort to arbitration in family cases – particularly where mediation has failed.

3. Distant Forum Provisions

Unlike the federal courts, Montana state courts do not enforce distant forum provisions in arbitration agreements. Keystone, Inc. v. Triad Systems, Inc., 971 P.2d 1240 (Mont. 1998) ($250,000 transaction between merchants). The practical effect of this position is to permit a Montana party to obtain in-state arbitration, provided it prevails in the arbitration equivalent of the "race to the courthouse." If the other party files first for arbitration in the state specified in the contract, then arbitration is likely to be ordered at the place specified in the agreement. Let us suppose that arbitration occurs in the distant (to the Montana resident) forum, the Montana party loses, and a court in the state where the arbitration took place confirms the award. If the Montana party has no out-of-state assets, the prevailing party will need to seek the aid of the Montana courts in collecting on the award. May the Montana courts refuse to enforce the out-of-state award based on the public policy against the enforcement of distant forum clauses? The question is one of power, and the answer is yes. So long as the Montana courts refuse to enforce distant forum provisions in judicial as well as arbitration proceedings, while mandating local arbitration, the state law approach is neither discriminatory against nor hostile to arbitration.

4. Competition Concerns: Covenants Not to Compete

State government and state courts are fully supportive of the American commitment to competition – often more so than their federal counterparts. The body of competition law is found in some combination of legislation, administrative rules, and common law. An area of particular concern that regularly arises under state law is non-compete covenants, notably in employment agreements. When an arbitrator enforces a non-compete provision in a contract, a conflict arises between the public policies of upholding arbitral awards and protection of competition, particularly avoiding limitations on the ability of individuals to obtain meaningful employment. The discussion here is limited to a single example in which the highest courts of New York and New Jersey reached different conclusions – one that should be of particular interest to a largely attorney audience.

Law firm retirement agreements commonly place limitations on departing partners, people who might be thought to be naturally disposed to disputing about the financial consequences of departure. To avoid public disclosure of law firm dealings, and to prevent departing partners from using the threat of court proceedings as leverage in settlement negotiations, these agreements normally call for arbitration of disputes (and also mandate confidentiality).

In *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95 (N.Y. 1995) (5-0 decision), the New York Court of Appeals unanimously ordered the confirmation of an arbitration award upholding law firm plan, although the lower courts had vacated the award as contrary to public policy. In a less than ringing endorsement of the arbitrator's decision, the court upheld the award due to the strong public policy in favor of arbitration combined with the fact that "the award does not on its face clearly violate public policy." Id. at 158. If arbitration awards will pass muster whenever they do not clearly violate public policy on their face, the pro arbitration public policy will almost always trump other public policies.

In *Weiss v. Carpenter, Bennett & Morrissey*, 672 A.2d 1132 (N.J. 1995) (6-0 decision), by contrast, the New Jersey Supreme Court unanimously vacated an arbitral award upholding a law firm plan – notwithstanding the strong pro-arbitration public policy. The court established the following test for public policy review of arbitration awards:

> if the arbitrator's resolution of the public-policy question is not reasonably debatable, and plainly would violate a clear mandate of public policy, a court must intervene to prevent enforcement of the award. In such circumstances, judicial intervention is necessary because arbitrators cannot be permitted to authorize litigants to violate either the law or those public-policy principles that government has established by statute, regulation or otherwise for the protection of the public. Id. at 1144 45.

The New Jersey court discussed *Hackett*, and concluded that the rule it adopted was consistent with the *Hackett* decision, with the different outcome reflecting factual differences between the two situations. The court explained the result in Hackett as premised on the arbitrator's finding that the supplemental payment was primarily an economic safety net for departing partners, whereas the payment in Weiss reflected undistributed firm income. Some will be persuaded by this effort to reconcile Hackett and Weiss, while others will remain unconvinced. Of course, there is no need to reconcile these decisions, since states are free to weigh public policy considerations differently.

VII. Appeal of Vacated Arbitration Awards Prior to Rearbitration

Suppose that a federal district court vacates an arbitration award and directs a rehearing of the matter – whether before the same or different arbitrators – and the party that just lost its arbitration award seeks to appeal the district court determination. Under the FAA, an immediate appeal is expressly permitted in federal court proceedings. 9 U.S.C. § 16(a)(1)(E) (permitting appeal from any order vacating, modifying, or correcting, an arbitration award); *Atlantic Aviation, Inc. v. EBM Group, Inc*., 11 F.3d 1276 (5th Cir. 1994). Prior to the enactment of section 16 in 1988, however, an immediate appeal was not available under federal law.

Could a state reject the current federal policy, and require re-arbitration as ordered by district court, with an appeal of the initial order only after completion of the arbitration process? Not only may states do so, most states have in fact adopted precisely this approach. Both the 1955 and 2000 versions of the UAA prohibit appeals from orders vacating an award and ordering a new arbitration. UAA (1955), § 19(a)(5); UAA (2000), § 28(a)(5). Where the district court does not order a new arbitration, the court's order is final rather than interlocutory and an appeal is permitted. The authors of the 1955 UAA stated that the objective was "to limit appeals prior to judgment to those instances where the element of finality is present." See UAA (1955), Prefatory note 7. Texas has recently adopted a different position, and permits immediate appeals of vacated awards where the court orders additional arbitration. *East Texas Salt Water Disposal Co., Inc. v. Werline*, — S.W.3d—, 2010 WL 850161 (Tex. 2010) (5-1-3 vote).

No special treatment for arbitration appeals is envisioned; indeed, the UAA specifies that an appeal is to be treated in the same manner as an appeal of an order or judgment of a civil action. UAA (1955), § 19(b) (1955); UAA (2000), § 28(b). Courts commonly note that remands to trial courts or administrative tribunals are similarly treated as interlocutory, and not subject to immediate review. Neither the Supreme Court nor any federal court of appeals has seriously suggested, let alone decided, that FAA § 16 supplants different state law in state courts.

VIII. Conclusion: The Benefits of a Federal System

One of the glories of American federalism is that individual states can try different and original approaches to problems deemed worthy of attention. By contrast, changes at the national level involve greater risk and therefore inhibit innovation. The state law approach reduces the costs of failures, while allowing successes to be adopted by other jurisdictions. This does not mean that states will agree on a single best approach. In some instances, different jurisdictions may be satisfied with multiple approaches to a particular matter—whether due to different perceptions of appropriate public policy, or simply because no problem has arisen that warrants changing the status quo. And, even if a particular

approach to a problem is widely viewed as seriously flawed, it may be impossible to find consensus in favor of any one of several better alternatives. Policies in different states will not remain static, because adjustment to changing circumstances is an iterative process, and those who are subject to rules commonly adjust their behavior to best suit their perceived interests

A few state law experiments which employ the threat that an arbitration award will be vacated have been tried, but these have been quite modest. There is room for a considerable variety of new approaches to the arbitration process and the review of arbitral awards state law. The states are the appropriate level of government to take the lead with this task. There is much room in arbitration for innovation and improvement—the glory of America, except in the legal system. I do not purport to know where the process of change will lead, but I am excited about the prospect. Let the experimentation proceed vigorously.

**** Stephen K. Huber*** *is Foundation Professor at the, University of Houston Law Center.* *I presented a version of this paper at the Cardozo Journal of Conflict Resolution's 10th Annual Symposium (a largely academic audience), and to the Houston International Arbitration Club (a largely practitioner audience). I received valuable comments, questions, and suggestions from the participants at both programs. All errors, of course, remain entirely my responsibility. This piece is based on, and largely draws upon, Stephen K. Huber, State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts, 10 Cardozo J. Of Conflict Resol. 509 (2009).*

ETHICAL PUZZLER

By Suzanne M. Duvall

This column addresses hypothetical 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 to214-368-7528.

As mediation has become an integral part of the court system in Texas and across the country, mediators are increasingly faced with situations in which their relationships with the judiciary are tested. As a mediator, how would you handle the following situations?

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1. You receive an ex parte voice message from the judge who has appointed you to mediate a complex business matter before his/her court telling you what you ought to do (including the strategies you need to employ) to assure that the case settles and does not proceed to trial.

2. After mediating a case in Judge X's court, you receive a telephone call from Judge X chastising you for having mediated the matter at the request of counsel for the parties without having inquired as to whether or not Judge X had appointed another mediator. According to Judge X, you and all mediators have an affirmative duty to (a) inquire if another mediator has been appointed by the court and (b) if so, to refuse to mediate the case. Because of your breach of this affirmative duty, Judge X informs you that you are forever ineligible to receive appointments to mediate from his/her court.

3. It is abundantly clear to you that Judges A, B and C will not appoint you to mediate cases in their courts unless you contribute to their campaigns. Is this quid pro quo a cause for an ethical dilemma? What on the other hand, do you do in this event that you want to exercise your right to make political contributions as would any other ethical dilemma to make campaign contributions at all?

Adam McGrough, (Dallas):

Q. (1): Ex Parte Judicial intervention prior to mediation.

"Thank you judge, may I have another." I appreciate judicial appointments, and I always employ every bit of skill, experience, knowledge and energy that I have to assist parties to settle their case. The voice mail from the judge may raise my ethical radar, but it does not affect me moving forward in the mediation. I often ask parties for suggested strategies, but I do not necessarily rely on the suggestions. Similarly, I can only assume that the strategies made by any outside party, including the judge, have only minimal actual value to the process. A mediator should protect the integrity and confidentiality of the process. On these facts, I do not feel like the judicial interference matches the level of challenging the integrity of the process. Unless the judge offers information that would cause bias toward one of the parties, any advice about strategy is not all that valuable to me, and does not cause me ethical concern.

A mediator must also avoid the appearance of impropriety in the mediation's relationship with the judiciary. The opportunity is created by this voice mail to use the information during the course of the mediation. It may be persuasive that the judge in the case strongly supports settlement, and it may score some mediator credibility points to mention that the judge in the case at issue has such an affinity with me as the mediator that she is willing to provide some inside information to assist the process. Transparency is crucial to mediation, but I would be hesitant to use the communication as a tactic to encourage settlement due to the potential aura of impropriety it could create.

Finally, the Texas ADR Statute states that a mediator may not compel or coerce the parties to enter into a settlement agreement. Under most circumstances, I will do whatever I can to encourage parties to reach an agreement that is apparently in their best interests, but one voice mail request to, "assure that the case settles and does not proceed to trial," causes me pause. I can only assure two things 1) I will do my very best to serve the parties through the process of mediation with the goal of crafting a lasting agreement, and 2) I will uphold the highest ethical standards throughout the process. Most of the time, that is enough to reach a settlement, but no matter how much I want to impress a particular judge of source of referral, I cannot assure a settlement. So thank you judge for your attempt to help, but please leave the mediation process up to me. And, I look forward to the next appointment.

Q. (2): Affirmative duty to discover potential conflicting appointments by the court and duty to refuse mediation.

You win some, and you lose some. Judge X has misread the ethical guidelines for mediators established by the Supreme Court of Texas. Under guideline 2 Comment (c) it states that, "A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or parties unless the previous mediation has been concluded." When I successfully mediated the case, I had no knowledge of the previous appointment, and the counsels apparently chose not to inform me of the fact. It may be a good idea to affirmatively ask counsel if any judicial appointments have been made, but it would be overly burdensome to create a duty and attach it to mediators. The parties or representatives are in a better position to address any issues surrounding mediator appointments.

My response to Judge X would be respectful, and conciliatory; however, it would seem that the offended party is actually the previously appointed mediator. I would attempt to contact the mediator and do my best to work with my colleague to address any issues. If there were any additional tasks or remaining issues from the underlying mediation that warranted the resources, I would consider working with the mediator and sharing fees. Hopefully, Judge X would change her opinion and allow me to continue mediating cases for her court. In smaller jurisdictions, this would be more troublesome, but here in Dallas, I guess I would have to take the hit. If I did ever get a referral on a case in Judge X's court, I would certainly contact the court to make sure there was no other appointment.

Q. (3): Campaign contributions & appointments.

A game I can't play. Professional ethics has a tendency to play out in a world of gray. Like most professional mediators, I would love to mediate complex cases with interesting parties just about every day. I would like to receive appointments from every court and be judged on the merits of my knowledge and performance. If it becomes obvious that appointments are ties to contributions, I would probably have to pursue new sources of cases. I only contribute on or endorse people in whom I believe. So, if I contribute to a judicial campaign or support a candidate, I do not have to worry if I end up benefitting from mediation appointments. My support has no basis on any future appointments or promise of any benefit.

In the spirit of the question, a mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation. As long as the mediator exercises the right to make political contributions, follows the law, and avoids even the appearance of impropriety, it would seem that the mediator is acting ethically. The reason anyone supports a candidate is because, on some level, we will receive a degree of benefit if that candidate is elected. When that benefit becomes financial, it tends to change things.

This particular set of facts raises a question of judicial ethics as such as the mediator ethics for me. If I

know that to enter the field I have to play that game, it probably means that the particular judge is not a person I would support. Of course it is naïve, but I have to tell myself that eventually my value as a mediator will trump the political games that will always be played. Our entire profession is based on helping parties identify and address self-interests. I just have to work a little harder to find other interests I can meet through my professional competence to earn the mediation appointments. In the perfect world, all appointments would be based on skill, availability and performance. Until we get to that place, the game will be played. While technically ethical, it is just a game that I don't play.

Hon. Mark Whittington (Retired), (Dallas):

Q. (1): Ex Parte Judicial intervention prior to mediation.

First, I want to stress that I am limiting my response to the facts as stated and to ethical considerations to be considered by the mediator, not the judge. Having said that, it seems to me the ethical dilemma faced by the mediator is to what extent he or she should pay heed to the judge's instructions.

One of the cornerstones of the mediation process is that it is separate and distinct from the judicial process. Self-determination is an essential ingredient that makes mediation work. This is in a contrast to the judicial process where a judge or jury will determine the outcome of the dispute. The mediator's job is to support and encourage the parties to reach their own decisions and resolve the dispute on their terms. The mediator should avoid injecting his or her own opinions into the process, much less those of a third party.

Several ethical guidelines are relevant here. First and foremost, the mediator should protect the integrity and confidentiality of the mediation process. See Misc. Docket No. 05-9107, Approval of Tex. State Bar ADR Section, Ethical Guidelines for Mediators, guideline 2 (Tex. June 13, 2005). Any communication between the mediator and a third-party regarding the merits of the underlying dispute jeopardizes the integrity of the mediation process itself. Obviously, a party participating in mediation would be very uncomfortable to learn that the mediator has relied upon comments about the case by the judge who will resolve the dispute if mediation is unsuccessful. Second, the mediator's impartiality would be called into question would he or she rely upon comments by the judge regarding how to resolve the dispute. Impartiality means freedom from favoritism or bias in work, action and appearance; it implies a commitment to aid all parties in reaching a settlement. Ethical Guidelines for Mediators, comment, guideline 9. The mediator should enter the mediation process without preconceived notions about the dispute and focus on developing a discussion that aids the parties in reaching a settlement on their own terms. Any discussion or outcome that is instigated by a third-party prior to the beginning of the mediation session runs the risk of favoring the interest of one party over another. Further, such considerations are contrary to the precept that mediation is designed to give the parties an opportunity to resolve the dispute on their own terms.

A mediator who receives a communication from a judge about how to conduct a mediation session should consider the above ethical guidelines. The mediation belongs to the parties, not the judge. Self-determination and party autonomy are essential to the integrity and success of the mediation process. [Note: there was no response to Question 2.]

Q. (3): Campaign contributions & appointments.

Again, I limit my response to the ethical dilemma faced by the mediator, not the judge. As long as Texas selects its judiciary by popular vote, judges must raise money if they want to continue to hold office and serve the citizens of the state. If so inclined, mediators should exercise their right to support good judges in contested races through campaign contributions. The ethical dilemma faced by the mediator is simply one of intent in deciding to make the contribution in the first place. Several ethical guidelines shed light on this consideration.

A cornerstone of the mediation process is the appointment of a qualified mediator. A mediator's qualifications and experience constitute the foundation upon which the mediation process depends. Ethical Guidelines for Mediators, comment, guideline 5, a mediator should inform the participants of his or her qualifications and experience and withdraw if any objection is raised or the mediator feels unqualified to serve. Ethical Guidelines for Mediators, guideline 5, a judicial appointment of a mediator that is made as a quid pro quo for a campaign contribution would necessarily fail to take into account this important ethical guideline. Thus, on this basis alone, it would be inappropriate for a mediator to make a campaign contribution to a judge with the expectation of receiving a mediation appointment in return.

Another relevant ethical consideration involves the mediator's relationship with the judge and the judge's staff. "A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation." Ethical Guidelines for Mediators, guideline 15, although somewhat general, this guideline would clearly prohibit the giving of a campaign contribution by a mediator with the expectation of receiving an appointment in return. In avoiding an appearance of impropriety with the respect to campaign contributions, the mediator also safeguards the integrity of the mediation process and protects judges from charges of favoritism and inappropriate financial dealings. Such charges have led to investigations and rule changes with respect to judicial appointments of attorneys and could easily spill over to the mediation arena.

As with any questions involving intent, whether or not a mediator acted inappropriately with respect to judicial campaign, contributions would be difficult to determine in a specific case. In general, a mediator has a right to support a judge of his or her own choice through campaign contributions. That said, the mediator should not contribute with the expectation of receiving anything in return.

Hon. Anne Ashby (Retired), (Dallas):

Q. (1): Ex Parte Judicial intervention prior to mediation.

I would not mediate the case. I would find some way to respectfully decline.

Q. (2): Affirmative duty to discover potential conflicting appointments by the court and duty to refuse mediation.

I think you were correct in mediating the case because I do not think that there is any such affirmative duty to inquire if another mediator has been appointed by the Court.

Q. (3): Campaign contributions & appointments.

This is not a cause for an ethical problem. You need to do what you think is right and not worry about getting appointments. You may be poor, but at least your heart is clear.

Joe L. Copeland, (Abilene):

Q. (1): Ex Parte Judicial intervention prior to mediation.

Two issues surface in this set of facts. First, did the judge, in telling the mediator "what to do," indicate what the judge thought an appropriate settlement should be in this case? If the judge did provide his or her opinion of what the outcome should be, the mediator should take appropriate action. Paragraph 9 of the Ethical Guidelines for Mediators states that "(a) mediator should be impartial toward all parties." If the mediator believes that the ex parte communication from the judge compromised his or her impartiality, then the mediator should "offer to withdraw." (While the Ethical Guidelines seems to leave some room here for the mediator to continue with the consent of the parties, as a practical matter I would withdraw. For even if the parties gave consent to the mediator's continued involvement, if the

eventual outcome even resembles the judge's suggestion, the mediator is at risk.)

If the mediator does not feel the communication compromised her or his impartiality, the mediator should disclose to the parties and their counsel the fact that the communication occurred and enough information to allow them to determine whether the mediator should withdraw. If the mediator believes that the judge shared information that would be inappropriate to disclose to the parties, the mediator should simply withdraw.

Second, if the judge's message merely encouraged the settlement of the case and made generic recommendations regarding the handling of the case – coaching tips, but not the outcome – the mediator could proceed as long as she or he did not experience a compromise of her or his impartiality or the creation of a conflict of interest with or bias against the parties. The line here seems to be the nature of advice the court provides regarding strategies and the emphasis regarding settlement. Once again, if anything the judge said could be perceived as an indication of preferred outcome, the mediator should disclose and, if appropriate, withdraw.

Q. (2): Affirmative duty to discover potential conflicting appointments by the court and duty to refuse mediation.

Situation (2) While no apparent "affirmative duty" exists for a mediator to inquire regarding the appointment of another mediator, best practice would indicate that such an inquiry be made of either the attorneys requesting the mediator serve or the presiding judge on the case.

The Texas ADR Act makes it clear that selection of mediators for appointments to court-annexed litigation is at the sole discretion of the court. Collegiality with judges and among the mediators is an important thread in the fabric of the mediation community. In this particular case, I would apologize to the judge; ask for clarification regarding my "affirmative duty," and ask for another opportunity to serve.

Q. (3): Campaign contributions & appointments.

Paragraph 15 of the Ethical Guidelines for Mediators states that "(a) mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation."

If indeed Judges A, B and C have communicated (directly or indirectly) that appointments are contingent on campaign contributions, the matter should be reviewed and approached through the Code of Judicial Conduct. I would counsel against making any political contributions that are solicited under coercion.

In regard to individual decisions regarding political contributions, a mediator should take two concerns into considerations. First, in the context of the local mediation and court communities, would such a contribution provide even the appearance of impropriety? If so, the mediator would be best served to abstain from making campaign contributions. Second, the mediator should question her or his own motive in making the contributions. If the mediator makes the contribution in an effort to secure appointments, I would argue that she or he is seeking an improper relationship with the court.

Comment: To sum it all up, you do indeed need to "do what's right" and avoid even the appearance of impropriety in these tricky ethical quandaries.

**** Suzanne Mann Duvall*** *of Dallas is well-known for her many contributions to the Texas ADR movement. She has received the highest awards for service and achievement in the mediation profession.*

Reflections From the Edge
Are We An Intimacy Starved Culture Because We Avoid Conflict?

By Kay Elkins Elliot*

As part of the Negotiation, Interviewing and Counseling Course at Texas Wesleyan School of Law, students are being taught to value silence, learn to be active listeners, communicate respectfully - even empathically - with parties in disputes, improve their emotional intelligence and confront conflict by being tough on the substantive problem but soft on the people. Most of these are learned skills. We cannot change our IQ but we can change our EQ - if we work at it. Certainly these skills are not typical of traditional training for advocates in trials or appeals. Some law schools, however, are now including courses in problem solving, mindfulness, collaborative law, restorative justice and, of course, negotiation and mediation. At Harvard Law School there is a required first year course in problem solving. A few schools are even offering courses in the role of neuroscience as a tool to resolve cases.

One example of being soft on the people is a hostage negotiation situation. Terrorists are usually excited and unreasonable. One of the lecturers in the Texas Wesleyan course is a Fort Worth hostage negotiator. To illustrate techniques used with terrorists or other hostage takers, she had her husband, a law student, pretend to be a terrorist and take the whole class hostage. Our fearless negotiator then proceeded to soothe him, reason with him, listen to his concerns and his interests, and get the "prisoners" freed. These law students are being taught not to assume that when another party or attorney is being mean and hostile the most effective communication is to be meaner and nastier. Hopefully, they will not automatically go into fight mode, but into negotiation mode.

Another part of the preparation for being a counselor at law (whether with your own client or with an opponent in settlement discussions) is to become an excellent listener. A mental health professional, who is also a communications coach for many of the most skilled collaborative lawyers, conducts three hour workshops on the benefits of being a great listener as part of this problem solving course.

At least three skills are involved in being a successful counselor at law or a problem solving professional: Communication Skills, Negotiation Skills, and Closure Skills. For further discussion of these skills, see Voyles, Rick, Without the Three Skills Necessary, You May Fail as a Conflict Management Practitioner, mediate.com, April 2008).

Communication skills are a major part of the resolution of conflict. These skills are designed to keep the door open (just as the hostage negotiator does before the SWAT team gets sent in!), not to get closure. Being able to be silent, to listen, to clarify, to be calm, to be articulate and focus on the other person, to remain available - emotionally and cognitively - while another is venting or attacking verbally, is a difficult and counter-intuitive set of behaviors. But if one cannot master this set of skills the other two may as well be forgotten. William Ury, the author of numerous highly regarded books on negotiation, tells this story from his own experience. He was sent to Venezuela by an international organization to confer with its president, Hugo Chavez, about a way to resolve the many conflicts facing Venezuela and to make peace. Ury walked in and was introduced to President Chavez who then leaned forward into his face, shouted and angrily vented for 45 minutes while Ury said nothing. Ury related his own internal dialogue: "Why should I sit here and be verbally abused by this man - after all I am a world recognized peacemaker and I was sent here to help him! I should just walk out or tell him I won't tolerate this kind of behavior!" To which his other self reasoned: "Perhaps when he has expressed all of this hostility he will be calmer and I can begin a dialogue with him. After all I am here to help him and his country and I can't be any help to him if I

walk out just because I am resentful of the way he is treating me." After 45 minutes, Chavez suddenly stopped shouting, leaned back in his chair, and said quite calmly, "So Ury - what should I do?"

This type of internal debate between what some writers call the old brain and the newer brain is not uncommon - particularly in the minds of professional peacemakers and problem-solvers. Indeed, research shows that the newer brain is capable of soothing the rage-infested old brain! In my own life there have been such moments. In one instance, over 30 years ago, there was a dispute with my former husband that provoked an unusually intense negative emotion in me and my newer brain watched as my hands went for his throat! Just as in Ury's example, a voice inside said:" Why are you letting him provoke you to an action you will regret?" That question soothed my anger and gave me clarity. Dropping my hands and lowering my voice to a calmer pitch, signaled that the dispute was over. His former threat was retracted and he even admitted that his behavior was a ploy to persuade me to stop divorce proceedings. Violence would have produced more violence but calmness and reason from me produced a similar attitude in him.

The psychologist, Dr. Paul Ekman, who is the director of the Human Interaction Laboratory at the University of California at San Francisco Medical School, is the world authority on the meaning of facial expressions. He has proved, scientifically, that Darwin was right about the universality of expression: this is an important part of the unity of humankind. When an emotion, such as anger or fear occurs, there is an increase in heart rate, and sweating occurs. But in anger, the hands get hot, while in fear the hands get cold. All people experience the same physiological responses to the same emotions. Ekman's research has shown that most people are easily misled by deception - even policemen, psychiatrists, lawyers, and customs officials. He believes that we all can learn to better detect lies - with training. Another odd finding of his is that if you intentionally change your facial expression your physiology will also change. Simply putting on a smile drives the brain into activity that is typical for happiness, just as putting on a frown will produce a brain activity typical of sadness. He and Dr. Daniel Goleman, cochair of the Consortium for Research on Emotional Intelligence at Rutgers University, believe that increasing our own self - awareness, a fundamental skill needed to be intelligent about our emotions, can be and should be taught and learned. Destructive Emotions: How Can We Overcome Them? A Scientific Dialogue with the Dalai Lama, narrated by Daniel Goleman, pp. 128 - 131 (Bantam Books 2003). Improving emotional intelligence would mean we all could become aware of destructive emotions as they are first stirring - not when they have gripped our mind. This would give negotiators and mediators, for example, the ability to respond quickly and accurately to what is happening at the table.

On a more practical level, often one negotiator will take a very hostile, adversarial tone and push hard for distributive gains. The reciprocal behavior is to respond in kind. The better response, recommended by negotiation scholars and trainers, is to attempt to move the interaction to a different conflict style - one that is more collaborative than competitive. William Ury, in his book "The Power of a Positive No" gives a 3 step method for doing this. The first step is to summarize and powerfully emphasize to the other negotiator what your own interests and values are in this case - he calls that the YES! Then the positive no can be stated as a refusal to accept the last demand because it does not meet those interests and values. So the NO! is the second step. Followed by a statement of what demand or offer could be made by the other side that you would say YES to because it would meet your interests and values. Mediators have many opportunities to use this method to keep the negotiation dance moving forward rather than crashing to a halt.

Negotiation skills are not instinctive - though a predisposition to a competitive or cooperative negotiation *style* has been well documented in large studies of attorneys. Surprisingly, most attorneys are cooperative - not competitive - in their negotiation style. A high percentage of those are also effective at negotiation - that is getting the other side to do what they want them to do. Negotiation skills include communication skills, but go beyond them to include the ability to define the correct issue to be negotiated, the preparation that includes identifying all parties' motivation and objectives, creating a list of partial solutions that can be brought into the nego-

tiation, researching external standards that can be used to find a fair solution, understanding what alternatives there are to making a deal with the other party and then, of course, being able to work with the other party to find ways to meet each others' interests and objectives that are better than any self help alternatives. It would be very interesting to have been a fly on the wall when Obama and BP recently negotiated a 20 billion dollar escrow fund! Because very few people actually are trained in negotiation, many negotiators resort to threats, demands and stonewalling. Every professional attorney, mediator, collaborative lawyer and peacemaker must be an excellent negotiator if they are to be successful at getting resolution.

Closure skills blend with negotiation skills but are distinct. Every resolver needs to be able to separate the exploration for needs from the self determination goals of each party. Arbitrators and judges resolve conflicts, but they do not do so through negotiation. Negotiators can be very skilled but never get closure because they lack closure skills. At the July, 2010, Negotiation course at Texas Wesleyan, law students will participate through their computers and a skype presentation, originating in Vermont, using new computer software to evaluate a case prior to negotiation or mediation in order to accurately establish the zone of possible agreement within which the case could, and probably should, settle. See generally, www.winbeforetrial.com; the soon to be published book, Winning Settlements, by Dr. Michal Palmer; and Donald R. Philbin, www.adrtoolbox.com.

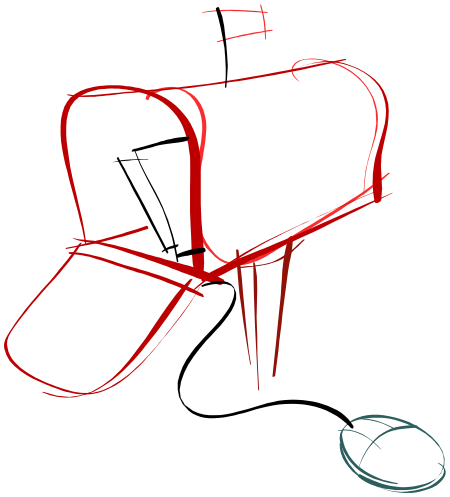
Because most of us dislike conflict, we try to avoid it and work hard to master conflict *avoidance* skills. Instead lawyers, as problem solvers, counselors, and mediators need to master the three skills of communication, negotiation, and resolution. Then conflict can be a method for *improving* both intimate and business relationships rather than an excuse for destroying them. Instead of teaching our kids to walk away from conflict, we should be teaching them to be peer mediators in elementary school - as is being done in the Crowley Independent School District. Last year the Texas Wesleyan law school hosted 40 of those young peacemakers (5^{th} graders) and honored them for being courageous enough to NOT avoid conflict but to help find solutions - just as attorneys do when they engage in representing their clients.

There is a very successful program for children: Promoting Alternative Thinking Strategies (PATHS) developed by Mark Greenberg, which has been successful in helping "deaf children learn how to use language to better understand and manage their own emotions - to become aware of and recognize their feelings and those of others, and to regulate them." It is actually a model for teaching emotional literacy and has expanded beyond the teaching of deaf children to 100 school districts and to schools in the Netherlands, Australia, and England. To date, it is not being used outside schools to teach adults. It could be. The teachers in the school districts are being taught with the children to use a 5 step method of managing their emotions:

1. Calm down (decrease the recovery period from emotional arousal);
2. Increase awareness of emotional states of others (step in their shoes);
3. Outward discussion of feelings as a way to solve conflict;
4. Planning and thinking ahead to prevent future similar conflicts;
5. Understand how our behavior affects others (part of empathy).

Maybe it is just me, but doesn't this look a lot like most of a successful mediation model?
If we could all learn to do this, just as many children already have, might we *not* be an intimacy starved culture?

**** Ms. Elliott*** *maintains a private practice, Elliott Mediations, serves as ADR coordinator and adjunct professor at Texas Wesleyan University School of Law, and is a founding member of the Texas Mediation Trainers Roundtable. Ms. Elliott is a board member of the Texas Mediator Credentialing Association, the only organization in Texas that offers credentialing to mediators. She served on the State Bar of Texas ADR Council, is co-editor of the Texas ADR Handbook, 3rd edition and writes a mediation column in the Texas Association of Mediators Newsletter and the TCAM Newsletter.*



ADR ON THE WEB

By Mary Thompson*

Three Views on Negotiation—Is it Just About the Money?

Is there such as thing as a "pure money" negotiation? Is there a role for interest-based bargaining when the parties just need to agree on the numbers? Three authors weigh in on the issue.

The Language of Numbers: Negotiating Claims for Money
Mediation, Inc
J. Anderson Little
http://www.mediationincnc.com/articles/

J. Anderson Little is an attorney and mediator in North Carolina, and the author of the 2007 book, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Damages*. His article, "The Language of Numbers" appears on the Resources page of his website, Mediation, Inc.

In this article, Little has identified two phenomena in his personal injury work, which he feels are not adequately addressed in most interest-based mediation trainings:

- Multiple rounds of offers continue long after the discussions of case evaluation and risk assessment have ended.

- In individual sessions, emotions tend to escalate, even when the joint session had been quite cordial.

Little concludes that the dynamics of money negotiations are a reaction to what is communicated, or assumed to be communicated, in the negotiation process. Because the negotiators don't feel they can communicate directly about their settlement range or bottom line, they communicate indirectly through offers and counter offers. As a result, the parties and their attorneys often miscommunicate and make incorrect assumptions, resulting in escalation of the dispute, lack of movement and impasse.

A key role for the mediator is to help the parties maintain movement, but in a strategic way. Providing several case examples of how negotiators actually undermine the effectiveness of the settlement process, he offers strategies mediators can use to encourage the parties to 1) think though what they are communicating through each move, and 2) base their actions on a planned settlement range, rather than on retaliation. Little will ask the parties while in caucus:

> Is the movement you're about to make consistent with your game plan? Or is it only a reaction to the other side's movement? Is it communicating where the case can settle, or is it communicating a settlement range much higher than intended?

For Little, effective money negotiations are about:

1) thorough discussion and exchange of information
2) informed risk assessment and analysis; and
3) movement in the actual negotiations.

Although he does draw from interest-based concepts

for these cases, he suggests that the interest-based approach neither adequately explains nor helps address the special dynamics of these negotiations.

Negotiating Money Issues
Mediate.Com
Steve Barber
http://www.mediate.com/articles/barber1.cfm

A California-based consultant and negotiator, Barber challenges the claim that interest-based processes do not work in money negotiations. Barber contends that this misconception arises from negotiators framing the issues and focusing the process too narrowly, and thus increasing the likelihood of an adversarial and zero-sum result.

Barber suggests that negotiators consider the following interest-based strategies for resolving money issues:

- Separate the substantive issues from the relationship issues. When relationship issues are not addressed, the money issues to become emotionally-charged and undermine settlement.
- Allow adequate time to learn about the interests and needs in the case, rather than jumping prematurely to positional bargaining.
- Develop a shared description of the problem, including the data and information needed to make a good decision.
- Re-frame the negation from "what we can give or get" to a joint search for mutual gain.

He concludes his article with a reminder of the importance of creatively and a list of examples of creative solutions of money disputes.

There Are No Non-Relational Zero-Sum "Pure Money" Negotiations
Negotiation Law Blog
Victoria Pynchon
http://www.negotiationlawblog.com/2008/04/articles/advice-for-young-lawyers/there-are-no-nonrelational-zerosum-pure-money-negotiations-part-i/

In this brief article on her blog, mediator and attorney Victoria Pynchon also challenges the notion of the "pure money" negotiation. Pynchon claims that opportunities are lost when the mediator or negotiators ignore the interests that inevitably impact how, when and for how much a case will settle.

Pynchon's three responses to believers in the "non-relational/pure money" negotiation:

1. Money represents interests.
2. Although there may not be a future relationship between opposing parties, there are certainly ongoing relationships among the parties on each side, and their well being, livelihoods and reputations depend upon those relationships.
3. Even with no ongoing relationship between the parties in conflict, the relationship during the negotiation matters. As Pynchon suggests: "Even though the disputing parties may never *again* be in a relationship, they're sure the heck in a relationship *now.*"

Summary

These articles both underscore the applicability of interest-based processes and raise questions about their adequacy, especially in cases focused on money. Attorneys, who may have attended 100 personal injury mediations as an advocate, attend their first mediation training and struggle to find the relevance of the course materials to the cases they expect to mediate. As practitioners, trainers, and researchers, we need to do a better job of helping make that connection.

**** 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*

CALENDAR OF EVENTS

Advanced Family Mediation Training * Houston * August 11-14, 2010 * *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.

Commercial Arbitration Training (Domestic & International) * Houston * August 18-21. 2010 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation Training * Austin * August 18, 19, 20, 24, 25, 2010 * *Corder/Thompson* * For more information visit www.corderthompson.com or call 512.458.4427

Conflict Resolution Training * Denton * August 26-29, 2010 * *Texas Woman's University* * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu
* Website:www.twu.edu/lifelong

40-Hour Basic Mediation Training * Houston * September 10-12 cont. September 17-19, 2010 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation Training * Nacogdoches * September 13-17, 2010 * 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: www.co.lubbock.tx.us/drc

40-Hour Basic Mediation Training * South Padre Island * September 27—October 1, 2010 * 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: www.co.lubbock.tx.us/drc

Family Mediation Training * Denton * October 7-10, 2010 * *Texas Woman's University* * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu
* Website:www.twu.edu/lifelong

Group Facilitation Skills * Austin * November 17, 18, 19, 2010 * *Corder/Thompson* * For more information visit www.corderthompson.com or call 512.458.4427

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Fall	September 15, 2010	October 15, 2010
Winter	December 15, 2010	January 15, 2011
Spring	March 15, 2011	April 15, 2011
Summer	June 15, 2011	July 15, 2011

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
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P.O. Box 12487
Capitol Station
Austin, Texas 78711

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2010 to June 2011. 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. Alternative Resolutions is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.

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. Names, dates, quotations, and citations should be double-checked for accuracy.

5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.

6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.

7. Check your mailing information, and change as appropriate.

8. The author should provide a brief professional biography and a photo (in jpeg format).

9. The article may have been published previously, provided that the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The 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, 2010, 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

ALTERNATIVE DISPUTE RESOLUTION SECTION

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