ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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Winter 2010

CHAIR'S CORNER
By John Allen Chalk, Sr., Chair, ADR Section

John Allen Chalk, Sr.

Thanks to Bill Lemons and CLE Committee

We are approaching the ADR Section's annual CLE seminar co-sponsored by the State Bar of Texas on January 29, 2010, in San Antonio. Bill Lemons and his committee, Kimberlee K. Kovach, Michael J. Schless, and E. Wendy Trachte-Huber, have done a great job with the seminar planning and implementation. The speakers are well-chosen and effective communicators. A second presentation of the same speakers and subjects will be presented by video in Houston, March 5, 2010, at the River Oaks Crowne Plaza Hotel Houston. Our special thanks to Bill Lemons and his committee.

ADR Section's Arbitration Roundtables

We have completed one of our Section's three Arbitration Roundtables. Our last two for this bar year will take place in Austin and Houston, Texas. The Austin Arbitration Roundtable will be held on January 16, 2010, at the State Bar of Texas Headquarters in Austin. The Houston Arbitration Roundtable will be held on February 20, 2010, at the South Texas College of Law in Houston. Each Roundtable will begin at 9:00 a.m. and end promptly at 1:30 p.m., local time.

These Roundtables bring together veteran and new arbitrators, arbitration advocates, academics, and other persons interested in arbitration as an ADR method. Each Roundtable involves eight case studies of problems and issues that arise in arbitration with a discussion leader for each case study and discussion by all participants of the case studies. The time flies as these problems and issues get discussed and suggestions are made for handling these issues in arbitration.

We have 4 hours of participatory CLE and 1 hour of ethics approved for each Roundtable. The $60.00 registration, including light lunch, is a great CLE buy! You still have time to register

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for the Austin and Houston Roundtable. Send an e-mail request for registration form to Amber Altemose at aaltemose@whitakerchalk.com.

Our special thanks to Brian Esenwein, Earl Hale, Melinda Jayson, James Juneau, Bill Lemons, Cecilia Morgan, Robert Prather, and William Short for their case studies and discussion leadership at the Fort Worth Roundtable.

Our special thanks to John K. Boyce, III, Wayne Fagan, John Fleming, Bob Gammage, Melinda Jayson, Kim Kovach, Bill Lemons, and Mike Schless for their case studies and discussion leadership at the Austin Roundtable.

New Arbitration Initiatives

In response to recent criticism that arbitration has become as costly, lengthy, inefficient, and complicated as litigation, several initiatives have occurred. The International Centre for Dispute Resolution has promulgated its "ICDR Guidelines for Arbitrators Concerning Exchanges of Information" in an attempt to make international commercial arbitration "simpler, less expensive and more expeditious form of dispute resolution than resort to national courts."

The CPR International Institute for Conflict Prevention & Resolution has issued its "Global Rules for Accelerated Commercial Arbitration" which when agreed by the parties calls for one neutral with significant new powers to control discovery and requires an award within six (6) months of the selection of the Arbitral Tribunal. The CPR International Institute has also adopted its "CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration" which presents suggested ways to improve "document disclosure and witness presentation" to counter arbitration "becoming increasingly more complex, costly and time-consuming."

The College of Commercial Arbitrators convened a one-day "National Summit on Business-to-Business Arbitration," in Washington, D.C., on October 30, 2009, jointly sponsored by the ABA Section of Dispute Resolution, AAA, CPR International Institute for Conflict Prevention and Resolution, Chartered Institute of Arbitrators, JAMS, and the Straus Institute for Dispute Resolution at Pepperdine University School of Law, in order "to develop a broad consensus" on what "prompt and decisive steps" can be taken "to drastically reduce the time and cost consumed" by commercial arbitration in the U.S. At this "National Summit" approximately one hundred thirty-five arbitrators, scholars, and other ADR professionals participated in the discussion and recommendation of "protocols" for arbitration business users and house counsel, arbitration providers, arbitration advocates, and arbitrators.

Former ADR Section Chair Michael Wilk, a CCA Fellow, Jay Elston, a CCA Fellow and member of our ADR Section, and I attended the Summit. Out of the meeting came four suggested sets of protocols for "How to Drastically Reduce Cost and Delay in Commercial Arbitration." The recommended protocols addressed increased economy, efficiency, and speed of business-to-business arbitration and will ultimately be published by the College of Commercial Arbitrators.

Mandatory Disclosure of Professional Liability Insurance

The Texas Supreme Court has put the mandatory disclosure by Texas lawyers to their clients of the existence or not of professional liability insurance back to the SBOT Board of Directors for an up-or-down recommendation. This will be the second time that the SBOT has addressed this issue, the first time being an SBOT committee recommendation that there be no mandatory disclosure. The SBOT Board of Directors will vote on mandatory disclosure of professional liability insurance at their January 29, 2010 meeting. It appears, based on this second request from the Texas Supreme Court, that it is the Court where our voices need to be heard the loudest regardless of which position you take on the issue. Watch for opportunities to let your views on this significant issue be known to the Texas Supreme Court. This question again raises the issue of whether ADR constitutes the practice of law and will ADR professionals in Texas be required to make this mandatory disclosure to all potential users of their ADR services.

Questions Raised by Mandatory Disclosure

There are the obvious self-interest concerns of Texas lawyers regarding mandatory disclosure. But there are also many questions that Texas clients and others should be asking about mandatory disclosure. (1) How much will such a requirement raise client legal costs in Texas? (2) If lawyers are required to disclose professional malpractice insurance, how soon will other licensed Texas professions be required to do the same? (3) How can lawyers required to make this disclosure do so and make a full, accurate, and informative disclosure? (4) In a "claims made" policy era, does today's disclosure become tomorrow's misrepresentation due to the changing effects of the internal operation of such policy type terms and conditions? (5) What will be the impact of mandatory disclosure on solo and small firm lawyers?(6) What will be the impact on the trust relationship between lawyer and client by mandatory disclosure? (7) How much will such a requirement imply to potential clients that "good" lawyers have professional liability insurance but "bad" lawyers don't? (8) How often do potential clients ask if a lawyer has this insurance? (9) What impact will mandatory disclosure have on professional liability insurers' annual revenues and profits? (10) Will mandatory disclosure force Texas lawyers to begin major lobbying of the Texas legislature for liability and damage limits that health providers now enjoy under tort reform? (11) How is disclosure of professional liability insurance relevant to a potential client's intelligent selection of the right lawyer for that client's problem? (12) Will access to justice for Texas citizens be lessened or improved by mandatory disclosure?

Let your State Bar Director know your views on this important pending vote.

ALTERNATIVE RESOLUTIONS

Our new co-editors, Stephen K. Huber and E. Wendy Trachte-Huber, produced excellent Fall 2009 and Winter 2010 issues of *Alternative Resolutions***,** our ADR Section newsletter. We deeply appreciate the time and effort that Stephen and Wendy give this major effort each quarter. Watch for subjects of interest to our members that you would like to write and submit to our co-editors for consideration and publication.

Have a healthy and prosperous 2010!

Notice of Solicitation of Nominations for the 2010-2011 ADR Section Council

The ADR Section's Nominating Committee is in the process of nominating new members and officers to the 2010-2011 ADR Section Council. The 2009-2010 Nominating Committee includes John K. Boyce, III (Chair of the Nominating Committee), Don Philbin, Anne Ashby, Tad Fowler, and Sherrie R. Abney. If you have any suggestions for new council members, please submit your suggestions to John K. Boyce, III, at jkbiii@boycelaw.net, no later than **February 28, 2010**.

State Bar of Texas
Alternative Dispute Resolution Section

Arbitration Roundtable

Houston, Texas

Saturday, February 20, 2010
South Texas College of Law
Emilie Slohm Dining Room
1303 San Jacinto Street
Houston, Texas 77002
9:00 a.m. to 1:30 p.m.
Tuition and Lunch - $60.00

Arbitration Case Studies Presented by:
John K. Boyce, III
Luecretia Dillard
Wayne Fagan
John Fleming
William Lemons
Michael Schless
Michael Wilk
Alvin Zimmerman
Moderator: John Allen Chalk, Sr.

Sponsored by SBOT ADR Section
4.0 hours Participatory CLE
1.0 hour Ethics

REGISTRATION
FOR
HOUSTON ARBITRATION ROUNDTABLE
FEBRUARY 20, 2010
SOUTH TEXAS COLLEGE OF LAW
Emilie Slohm Dining Room
1303 San Jacinto Street
Houston, Texas 77002
9:00 a.m. to 1:30 p.m.

NAME: _____

MAILING ADDRESS: _____

_____

WORK TELEPHONE: _____

E-MAIL ADDRESS: _____

BRIEF DESCRIPTION OF
ARBITRATION EXPERIENCE: _____

_____

PAYMENT TO "STATE BAR OF TEXAS-ADR SECTION" ($60.00)
(Includes light working lunch):

Check Enclosed: _____ Payment by Credit Card: MasterCard or Visa (circle)

Cardholder Name: _____

Card No.: _____

Expiration Date (Month/Year): _____

Authorized Signature: _____

Registration Fee to Amber Altemose, Whitaker, Chalk, Swindle & Sawyer, L.L.P.,
301 Commerce Street, 3500 D.R. Horton Tower, Fort Worth, Texas 76102-4186.

FROM THE EDITORS

By Stephen K. Huber and E. Wendy Trachte-Huber

LEARNING TO PRODUCE AND USE AN ELECTRONIC JOURNAL

Working with an electronic journal is a learning experience for all of us. Our approach to the text, formatting, and citations continues to be a work in progress. Please continue to provide your Editors with suggestions and comments – send them to: <shuber@uh.edu>. [Better yet, submit an article.] We are not using hyperlinks for e-mail addresses and citations because they tend to get lost in translation. The electronic trail of Alternative Resolutions proceeds in the following manner:

1. Author sends material, usually as an e-mail attachment to Editors.

2. Editors edit, communicate with author, and electronically ship the semi-final work product to Robyn Pietsch.

3. Robyn does formatting (and frequently catches errors).

4. Robyn electronically sends semi-final product back to Editors.

5. Editors make some changes (hopefully only a few) and return everything to Robyn, who then prepares the final product.

6. Robyn e-mails the full text of Alternative Resolutions to the State Bar.

7. The State Bar forwards Alternative Resolutions to subscribers (and also to the Section web page).

And that, Oh my best beloved, is how the ADR Section members get their quarterly journal. (Your editors are reading Rudyard Kipling's *THE JUNGLE BOOK* for our book club.)

This process of multiple mailings from different computers, and sometimes in different programs and formats, is an invitation for problems. Another consequence of this reality is that we are not making use of charts or other elegant approaches to presenting material. Constantly improving technology solves many problems, but it also leaves "non-techies" like your Editors continually struggling to learn about the "better" technology.

Communications from readers have resulted in two adjustments. The first relates to the size of the typeface. Ten point type is too small for some people to read easily. Your editors have this problem too, so we were easily convinced to switch to 12 point type – Times New Roman.

The second matter relates to how readers consume Alternative Resolutions. The alternatives are to print an issue, or read it on-line. On-line readers turn out to adopt two quite different approaches to reading: use of a full-size monitor, or a small telephone/computer unit to which numerous lawyers (and others) are addicted – whence the term "Crackberry." Many people read daily newspapers, and even journal articles, on their hand-held units. For such readers, the presence of footnotes are a problem, because viewing them requires scrolling down to the end of a page. Endnotes are even worse, because viewing them requires moving to the end of an article, and then back to the text. For this issue we are placing all note material in the text of articles, while dramatically reducing the amount of that material. Citations to leading cases, statutes, regulations, and scholarly writing are sufficient to offer guidance to the reader who wants to look further. Please offer up your reactions to this approach, along with suggestions for improvement.

In another nod to on-line readers, all contributions are presented on consecutive pages from beginning to end, and each article begins on a new page. This leaves some blank space on the last page of many pieces, but it allows reader to print a single article

without any unrelated matter. Alternatively, we could begin each new article immediately after the previous one, thereby reducing the number of pages for readers who prefer to read Alternative Resolutions in hard copy.

Alternative Resolutions is published quarterly, and we have moved to a tight schedule in order to provide readers with a timely work product. The publication dates are January 15, April 15, July 15, and October 15. The deadline for submissions is a mere one month prior to publication, but these are firm deadlines, because your editors need the full month to produce a quality publication in a timely manner.

Latest Dispatch from the "Arbitration is Everywhere" Department

A recent Op-Ed article suggested that museums be permitted to de-accession art works when faced with severe financial problems. Judith H. Dobrzynski, *The Art of the Deal*, New York Times (January 1, 2010). While sales of art works to finance the purchase of other works is an accepted practice, there is an unwritten ban on selling art to pay for operating expenses. How can museums be permitted to make such sales in economic hard times while avoiding the slippery slope problem – more frequent sales of art works? The solution offered by Ms. Dobrzynski is arbitration.

"Maybe it's best to amend the unwritten sales ban, but not end it. What if a museum had to argue its case for de-accessioning art before an impartial arbitrator? This neutral party would need to be schooled in art, art law and nonprofit regulations. Moreover, the museum would need to open its financial books completely, so that the arbitrator could see that all other reasonable avenues of fund-raising, as well as cutbacks, had already been exhausted. And it would need to open its cataloguing records and storerooms, to show that the departure of the works in question would not irreparably damage the collection and that no donor agreements would be violated."

Judicial Survey on Alternative Dispute Resolution Processes Preliminary Analysis and Report (2009)

By W. Reed Leverton*

In August, 2009 attendees at the annual Texas Judicial Conference were surveyed regarding their attitudes about alternative dispute resolution (ADR) processes, with a particular emphasis on mediation and arbitration. The survey was prepared by members of the Alternative Dispute Resolution Section Council and undertaken under the direction of the Council.

The Conference was attended by 566 trial and appellate judges (out of a total of 1,547 state judges). Each of the judges who came to the conference was asked to complete the survey, which was comprised of 12 questions, several with multiple sub-parts. The questions ranged from asking for basic information such as length of service on the bench and subject matter jurisdiction to multi-part "Likert Scale" questions designed to elicit the opinion of the responding judge as to the effectiveness and other qualitative aspects of ADR processes. (See example below.) The judges also were asked to offer their opinions regarding subjects such as appropriate training, experience, and roles for mediators and arbitrators. The respondents included trial court and appellate judges, with an average of 12 years on the bench. The Survey was completed by 89 of the 566 judges attending the judicial conference, a response rate of 16 percent (six percent of all invited state judges).

What follows is a brief summary of the findings. While further analysis will be necessary to develop more specific conclusions, it can be generally said that Texas judges are well aware of the various non-judicial processes available to litigants (especially mediation and arbitration), and further, that there is general acceptance within the Texas judiciary of the use of ADR modalities.

Mediation

The respondents reported that mediation is often used in their respective counties and were of the opinion that it's an effective way to manage their dockets. The judges were somewhat in agreement with the proposition that all civil and family law cases should be referred to mediation, and there was strong disagreement with the statement that "mediation usurps the role of the judiciary". A few of the judges reported some agreement with the idea that mediation can threaten the "rule of law" in that participants can reach outcomes not otherwise available in court. Generally however, the majority of the respondents did not feel that mediation threatens the rule of law.

With respect to court-referred mediations, 25 percent were done so by virtue of a local rule and 42 percent were by court rule. A significant number of judges also considered referrals on a case-by-case basis (50 percent) or on motion of the parties (53 percent). Few of the judges reported that they do not refer their cases to mediation (7 percent), and this figure includes at least two judges who handle only criminal cases. A mere 3 percent of the judges reported that they "never" grant an objection to a mediation referral order, 43 percent do so on a showing of **extraordinarily** good cause, 50 percent only on a showing of good cause, and 3 percent on motion of either party without a showing of good cause.

The respondents generally disagreed with the following statement: "mediation is a success only if an agreement is reached during the mediation itself." There was moderate agreement with the idea that mediators should provide participants with the mediator's opinions of **possible** trial outcomes, while only slight agreement as to mediators opining as to **probable** outcomes. There was also moderate agreement with the proposition that participants derived more satisfaction with mediated settlements (as op-

posed to going to court) since the parties had more control over the out come of their dispute.

Over 90 percent of the judges thought that mediators should be required to have the same amount of training currently required to receive court-referred cases, while 5 percent responded that more training should be required. Three percent of the judges thought that there should be no training requirements as a prerequisite to receiving court referred mediations. Additionally, and with respect to court-referred mediations only, 13 percent of the judges thought that membership in the Texas Mediator Credentialing Association should be required, and 16 percent reported that some specialized training should be required based upon the facts of the case. Finally, and significantly, 32 percent of the judges felt that mediators handling court annexed cases should also be a licensed Texas attorneys.

Arbitration

The respondents reported that use of arbitration in their counties ranked between "used sometimes" and "rarely used." While some judges felt that arbitration was an effective docket management tool, it did not score nearly as well in that category as did mediation or settlement conferences.

There was slight agreement that arbitrators are more predictable than juries, as well as with the proposition that generally arbitrations cost less than jury trials. There was also some agreement with the statements that arbitration threatens the rule of law in that sometimes arbitrators can make awards not available in the courts, and that arbitration usurps the role of the judiciary.

All of the respondents were of the opinion that arbitrators should have some formal training and/or other qualifications. Fifty-Five percent opined that arbitrators should be licensed Texas attorneys; 60 percent thought that arbitrators should have formal training; and 47 percent responded that they should have specialized training or background in the subject matter of the dispute to be arbitrated.

Set out below is one of the Likert Scale Questions, with Average Response Values:

Please evaluate the following statements using the following numerical standards:

1 = strongly disagree; 2 = disagree; 3 = no opinion or neutral; 4 = agree; 5 = strongly agree.

A. _____ Court-ordered mediation is an effective means to manage my docket.
(Average of all responses = 4.31)

B. _____ Absent a showing of good cause to the contrary, all civil cases (non-family) should be referred to mediation.
(Average response = 3.72)

C. _____ Absent a showing of good cause to the contrary, all family cases should be referred to mediation.
(Average response = 3.75)

D. _____ Mediation usurps the role of the judiciary.
(Average response = 1.1)

E. _____ Mediation threatens the "rule of law" in that parties can reach settlement agreements that contain outcomes not available if their disputes are submitted to judges or juries for final disposition.
(Average response = 1.73)

F. _____ When appropriate, mediators should tell the parties what the **possible** outcomes are on specific issues, verdict amounts, or even the entire case if it goes to trial.
(Average response = 3.8)

G. _____ When appropriate, mediators should tell the parties what the **probable** outcomes are on specific issues, verdict amounts, or even the entire case if it goes to trial.
(Average response = 3.25)

H. _____ Parties are more satisfied with mediated settlement agreements (as opposed to judgments or verdicts) because they have control over the outcome of their dispute.
(Average response = 3.82)

I. _____A mediation is a success only if an agreement is reached during the mediation itself.

(Average response = 2.07)

*** Reed Leverton** *was an Anthropology major at Wake Forest, before turning to the study of law at the University of Texas. He also received an LL.M. in Dispute Resolution from Pepperdine University. After practicing law for ten years, he served as a state district court judge for four years, ending in 2000. During the last decade Reed's practice has focused on arbitration and mediation – he has mediated over 1,000 contested matters.*

IMPROVING THE QUALITY OF HEALTHCARE: RESOLVING CLAIM DISPUTES IN MEDICINE

By Ian Wasser*

I. Introduction

A fundamental problem with healthcare treatment in the United States is the absence of a fair and effective non-litigation method for resolving denied benefits claims. Most patients with insurance participate in private health insurance plans. These plans delineate the scope of covered services. The ultimate decision of what treatment is covered, however, remains in the hands of health insurers. Unfortunately, there is no method short of litigation for challenging these treatment decisions.

The cause of this problem is that health insurance companies, rather than physicians, make treatment decisions. Health insurance companies are typically for-profit entities that can maximize profit only by paying less for treatment. Physicians are often limited in how, when, and where they can treat a patient – not by their own medical judgment, but rather by health insurance company policies. As a result, the quality of healthcare in the United States is far below what it could be.

Congress responded to the denial of benefits problem in enacting the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1144. Under ERISA, health insurance companies are subject to state laws that directly regulate health insurance. ERISA also provides legal recourse for the unlawful denial of benefits. However, ERISA fails to provide non-litigation solutions for the improper denial of benefits, and also fails to require outside review of benefits determinations by third party physicians. Thus, the ERISA regime fails to improve the quality of medical care and fails to provide a method of alternative dispute resolution (ADR) for healthcare problems.

Healthcare practitioners provide medical treatment to individuals and are ultimately responsible for all treatment decisions. The treatments that a physician may prescribe for his patient are often limited by health insurance companies, because they pay only for treatments that are covered by a given health plan. In essence, health insurance plan documents determine what benefits are covered, and at what reimbursement level to a physician. This scheme often produces skewed approaches to treatment by physicians. Doctors are forced to practice defensive medicine to avoid potential medical malpractice liability while still limiting their treatment decisions to covered procedures. Doctors often "upcode" the treatments that they offer. For example, "upcoding" can involve submitting to an insurer that certain covered tests were performed, when other necessary but uncovered procedures were needed and performed instead. Additionally, doctors are frequently prevented from using experimental treatment options for patients, as many experimental or otherwise non-traditional treatments usually are not covered by health insurance plans.

This paper examines various elements of dispute resolution in healthcare, with a focus on ADR for denied benefits claims. The overall emphasis is on improving quality of care without involving litigation. Section two details some of the traditional roles of ADR in healthcare situations. Section three discusses the workings of private health coverage. Section four considers ERISA and relevant case law. Section five evaluates the nexus between ADR and ERISA. Section six considers what the goals of healthcare dispute resolution should be. Finally, section seven proposes several methods to improve the quality of healthcare, using methods of ADR, and thus avoiding ERISA litigation.

II. Alternative Dispute Resolution

ADR has become increasingly popular as a method for resolving healthcare disputes. Arbitration has been found to be very successful in resolving medical malpractice claims. Many physicians require their patients to consent to a mandatory arbitration clause instead of medical malpractice litigation. This approach saves money for all parties involved; the physician pays less for insurance and likely pays less for any damage award, while the patient pays less in health costs. Managed care organizations and insurers have also used arbitration provisions in their benefits plans. Indeed, external claim review, when used by a benefit plan administrator, is actually a form of non-binding arbitration because the result is decided by a neutral third party.

ADR does have certain recognized limitations in the healthcare setting. A major concern is privacy. ADR methods afford physicians privacy, especially when dealing with a sensitive area such as malpractice claims. However, such privacy can prevent other patients (or even the medical licensing board) from discovering the multiple errors being made by a licensed physician. Privacy concerns are also implicated in resolving denial of benefits claims. By using ADR and avoiding litigation, benefits providers can avoid setting any precedent that might bind them to future treatment decisions. In the case of policy language, ambiguous or poorly-worded insurance contracts might remain in the marketplace because a court will not have the opportunity to interpret the relevant contract language in a binding manner.

III. How Private Health Coverage Works

Private health coverage essentially includes every person who is covered by a non-public source. (Public sources include Medicare, Medicaid, and the Veterans Administration.) Private health coverage is mainly provided through the employer-employee relationship. In such a situation, the employer typically utilizes a third party insurer to formulate benefits plans, to make eligibility decisions, and to pay claims. Either a third party insurer or the employer will also be responsible for the actual payment of benefits.

Private health plans include commercial health insurers, Blue Cross and Blue Shield plans, Health Maintenance Organizations (HMOs), and Preferred Provider Organizations (PPOs). Traditional insurance plans include the Blue Cross and Blue Shield state plans, which pay for services rendered according to a fee reimbursement schedule. Modern medicine has invented the construct of managed care programs, including HMOs and PPOs. Managed care utilizes provider networks, network discounts, prior authorization, and capitation. Each of these elements serves to control health care costs by controlling treatment decisions of physicians.

Health insurance law is largely governed by the common law of contracts. When an enrollee joins a group health plan, he receives a contract that explains what procedures and treatments are available and "covered" by the plan. The plan typically provides maximum coverage limits, for both the entire body of covered services (a lifetime maximum) and for individual groupings of covered services (sometimes with a per-year maximum). The health insurance plan language serves as a binding contract between the insurer and the patient. Legally, then, an insurer must pay for any service that is determined to be "covered" by an insurance plan. Recent problems surrounding the interpretation of health insurance contracts have also shown that the language used in the contract often leaves a beneficiary with little actual guidance as to what treatments will be covered.

Health insurance is further regulated by overlapping state and federal laws. State laws can mandate minimum health coverage that must be included in group health plans. State law also establishes requirements for state-licensed health insurance organizations and individuals. Various state laws further regulate insurance, and include setting minimum financial standards, market conduct, premium pricing, access to coverage, policy forms, renewability, dispute resolution, and managed care regulation.

Federal laws also govern health insurance. The most important federal laws in this arena are ERISA and the Health Insurance Portability and Accountability Act (HIPAA). ERISA provides a regulatory framework for health insurance benefits claims, remedies, and enforcement. HIPAA mandates par-

ticular privacy, renewability and non-discrimination provisions which are relevant to health insurers. HIPAA also limits the period that may be considered when deciding if an ailment is a pre-existing condition.

Unhealthy people disproportionately decide to seek health insurance, a phenomenon known as "adverse selection." The primary tool for health insurers to protect themselves from responsibility for costs incurred from treating a chronic condition is the "pre-existing condition" limitation – an illness or medical condition for which a person received a diagnosis or treatment within a specified period of time prior to becoming insured under a policy. If a condition is determined to be pre-existing, then no coverage is available for a contractually specified period of time.

Few managed healthcare organizations (MCOs) have provided for ADR processes in their business contracts. Some argue that it would be a positive step for MCOs to make greater use of ADR. In doing so, MCOs would show their willingness to resolve disputes on a level playing field without involving costly and timely ERISA litigation. While MCOs have not embraced ADR methods, there are still steps that can usefully be taken before proceeding to court for a wrongfully denied benefits claim. ERISA requires all health insurance companies to establish and implement an internal system for resolving denial of benefits claims. So, if a claim is denied, the best course of action for the patient would be to: (1) gather, in whole or in part, the explanation of benefits (EOB) form that the insurance company provides, which explains the treatment and the coverage amount; (2) read the plan policy documents to determine if the health insurance plan was supposed to cover the treatment; (3) contact the insurance company and file an appeal if it is determined that you have been denied coverage for an apparently covered benefit; and (4) wait for the insurance company to respond to your appeal. Once the appeal process has been completed, the option is usually to appeal a second time or to proceed to other forms of dispute resolution — if necessary, all the way to litigation.

IV. The Employee Retirement Income Security Act (ERISA)

ERISA is a federal statute that regulates health insurance and other benefits plans. ERISA preempts state law regulation of health insurance ERISA provides a right to receive plan benefits. In the event that benefits are improperly withheld, ERISA provides a remedy whereby an employer or plan administrator can be sued in federal court for receipt of the withheld benefit ERISA. There are four central provisions of ERISA that affect resolution of coverage disputes.

A. Preemption of State Law

Section 1144(a), the so-called preemption clause, allows a civil action by a plan participant or beneficiary to recover benefits due, to enforce rights, and to clarify rights for future benefits claims. ERISA remedies supersede any and all State laws insofar as they relate to any employee benefit plan. ERISA provides an immediate cause of action for the improper denial of benefits; there is no requirement to exhaust administrative or internal remedies before filing suit.

The remedy afforded under ERISA is either (a) ordering the insurer to pay for the denied benefit; or (b) getting reimbursement for a denied benefit. 20 U.S.C. § 1132(a). ERISA requires claimants to bring a civil action to enforce their rights. ERISA further specifies that the "employee benefit plan may sue or be sued as an entity." Thus, the actual administrator of the plan may be served with a summons, but the employee benefit plan itself will be sued as an entity. Furthermore, any money judgment obtained against the benefits plan is only enforceable against the entity.

ERISA specifies that state courts of competent jurisdiction and district courts of the United States have concurrent jurisdiction over all ERISA matters. Actions that are brought under ERISA can be "brought in the district where the plan is administered, where the asserted breach took place, or where a defendant may be found, and process served." Thus, ERISA provides a comprehensive litigation framework for claimants to sue health insurers.

B. Savings Clause

The second major provision of ERISA is the "savings clause," which specifies that ERISA shall not be construed to exempt any person from any State law that directly regulates insurance, banking, or securities. (This approach is sometimes referred to as "reverse preemption.") If a state wishes to mandate the way benefits are administered by a health plan provider, that state must enact legislation that acts to regulate insurance, and not just insurance benefits determinations. The reader may wonder how the savings clause, mandatory preemption, and state regulation of insurance can coexist in a coherent legal framework. The short answer is, with great difficulty, and the courts have struggled mightily with this conundrum.

To take one important example, the Supreme Court has ruled that a state law that regulates an insurance company is saved from ERISA preemption, even if the state law produces a result that is at variance with ERISA. Thus, the Court ruled that a Massachusetts statute that required specific mental health benefits in health plans directly regulated insurance, and therefore was saved from ERISA preemption by the savings clause. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985).

C. Deemer Clause

The third major provision of ERISA is the "deemer clause," which provides that employee benefit plans (or trusts created thereunder) are not considered to be engaged in the business of insurance (or banking) under state law. The deemer clause finds its greatest applicability in the context of self-insured employers. State law may not subject such firms to regulation as an insurance company. Typically, self-insured employers insure their own employees and utilize a third-party insurance plan administrator. In addition, they commonly obtain reinsurance to cover health expenses beyond a certain threshold. The consequences of this approach may not be immediately apparent.

The effect of the deemer clause is to permit employers to offer insurance that does not comply with otherwise mandatory minimum standards. The deemer clause constitutes an invitation for employers to self-insure. An employer could choose to self-insure and thereby only offer benefits that seemed the most affordable to provide. Since the deemer clause prohibits a state from regulating the level of minimum services or the attachment point for secondary insurance (reinsurance), the self-insured employer can select a very low attachment point. See e.g., *FMC Corporation v. Holliday*, 498 U.S. 52 (1990) For example, the employer could specify that reinsurance is activated once $100 of benefits are paid for any given employee. In adopting this approach, the employer maintains the status of being self-insured to limit employee benefits but carries none of the risk that regular self-insured employers are given. Many view the deemer clause as an ERISA loophole. See e.g., Russell Korobkin, The Battle Over Self-Insured Health Plans, or "One Good Loophole Deserves Another," 5 Yale J. Health Pol'y, L. & Ethics 89 (2005).

D. Fiduciary Duty of Plan Administrators

The fourth important provision of ERISA is section 1104, which imposes a fiduciary duty on plan administrators in their interactions with plan beneficiaries. The plan fiduciaries owe a duty to all plan beneficiaries and not just to individual plan participants who bring personal claims. These fiduciary obligations only extend to issues of plan administration, and not to questions of plan scope or plan design. ERISA does not require employers (or other plan administrators) to provide any specific minimum levels of coverage. Plan administrators are bound to process benefits claims that are submitted by plan beneficiaries in a timely manner.

Fiduciary concerns arise most often in the common situation where an entity serves as both a plan insurer and plan administrator. The Supreme Court, recently addressed this situation, holding that when a single entity both determines when an employee is eligible for benefits and then pays for these benefits, a potential conflict of interest is created. *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008). The Court further determined that plan administrators are required to carry out their duties in respect to discretionary claims processing solely in the interests of participants and beneficiaries. Therefore, when a single entity makes mixed eligibility and payment decisions, the potential conflict of interest needs to be resolved to be certain that the de-

cision was not made for the sole reason of avoiding paying claims. Rather than provide definitive rules for lower courts, however, the Supreme Court provided only the somewhat Delphic guidance that a fiduciary violation is more likely "where circumstances suggest a higher likelihood that [the conflict of interest] affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration." Insurers, lawyers, and courts all over America will be grappling with the application of that standard for years to come.

The Supreme Court has also limited state common law remedies against insurance companies as being preempted by ERISA. In *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987), the Court held that common law causes of action are pre-empted by ERISA. The Court found that ERISA preempted any common law cause of action; the only possible remedy under ERISA would be to obtain the denied benefit. In coming to this conclusion, the Court opined that the common law "is no more integral to the insurer-insured relationship than any State's general contract law is integral to a contract made in the State." Under the Court's view of ERISA preemption, the worst possible outcome for an insurer from litigation about unlawfully denied benefits is simply paying for the denied benefit. Courts may also award court costs and attorneys' fees to the prevailing party.

Generally, a controversy that involves the withholding of benefits by a benefits plan is subject to complete ERISA preemption. Benefits determinations include activities such as pre-certification for services, utilization review, determining eligibility for benefits, disbursing benefits to patients, monitoring plan funds, and record-keeping are all administrative tasks that are regulated by ERISA. When a plan involves the actual delivery of medical services or advice directly to a patient, then the claim is not preempted by ERISA. Instead, medical services provided by a healthcare practitioner are regulated by state medical malpractice doctrine.

The Supreme Court further delineated the scope of the ERISA savings clause in *Rush Prudential HMO v. Moran*, 536 U.S. 355 (2002). The HMO plan promised to provide medically necessary services while maintaining broad discretion to determine if a given procedure would be covered. Moran sought approval of surgery recommended by her physician, which Rush refused. Moran still proceeded with (and paid for) the surgery, and then sued Rush for the denied benefit under an Illinois state law that provided for binding resolution of benefits determinations when an independent medical person evaluates a request for treatment. Rush removed the case to federal court by invoking ERISA.

The Supreme Court first held that the HMO provided both health care and health insurance, so the ERISA savings clause might apply. States are permitted to regulate the practice of medicine through direct regulation of health insurance. Thus, the Illinois law that required independent review of benefits determinations directly regulated insurance, and therefore was not pre-empted by ERISA. Under *Moran*, a state law regulates insurance, and saved from ERISA preemption, where that law is: (1) specifically directed toward entities engaged in insurance; and (2) substantially affects the risk pooling arrangement between the insurer and the insured.

Section 1132 includes both enforcement and regulatory provisions. A plan administrator must supply requested information to any plan participant. Failure to comply with information and review requests results in a separate violation for each beneficiary that is adversely affected. Sanctions up to $100 per day may be imposed, as well as such other relief as it deems proper.

ERISA includes rules and regulations for both administration and enforcement of benefits claims procedures. Every health plan is required to establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations. In particular, every health plan is required to establish a procedure for handling appeals of adverse benefits determinations. For group health plans, beneficiaries must be provided a full and fair review of any adverse benefit determination. The elements of a full and fair hearing are spelled out in the ERISA regulation.

Although ERISA requires any benefit provider to give a beneficiary the right to appeal an adverse benefit determination, there is no concomitant requirement that plan beneficiaries make use of that appeal mechanism. Instead, a plan participant can choose to immediately proceed to federal court

without exhausting internal plan remedies

Finally, ERISA provides no remedy for the wrongful denial of benefits other than access to that benefit. Thus, there is no real incentive for health insurers to comply with ERISA, since the worst punishment will be to pay for a patient's denied benefit. Simply stated, ERISA remedies under-compensate beneficiaries and under-deter providers.

V. The Collision between ADR and ERISA

Medical disputes often arise in the relationship between patients and providers. Patients are trying to receive quality care and physicians are trying to deliver good care. When an insurance company becomes involved in the doctor-patient relationship, as is true for nearly everyone with health insurance, doctors are sometimes limited in the quality of care that they can reasonably deliver to a patient. Furthermore, when disputes arise between a health insurer (or other plan administrator) and a patient regarding a denial of benefits claim, the atmosphere becomes hostile and the parties begin to fear imminent litigation will be needed to resolve the dispute. When this occurs the patient-doctor relationship is undermined, as the patient connects his feelings towards the claim dispute with his feelings towards the physician. As a result the quality of healthcare received is diminished.

Despite the preemptive provisions of ERISA, the statute makes little provision for dispute resolution other than litigation. Insurers need to listen to complaining patients, and provide them access to documents, but the insurer continues to be the decider. ERISA does not provide for the use of ADR. Health care plans could make provision for mediation or arbitration, but the limited judicial remedies available under ERISA makes doing so an unattractive option. When a request for services is denied, the only option for the patient is to file suit. The express authorization of access to the courts precludes the use of binding arbitration to settle coverage disputes.

States are given tremendous power under ERISA; any state law that directly regulates insurance is not subject to ERISA preemption. Therefore, states are free to enact legislation that would mandate ADR methods for resolving denial of benefits claims. More than forty states have laws that require independent external review of denial of benefits claims. One particularly promising form of ADR is independent medical review (IMR), or external review. IMR is typically available at the state level once a patient has exhausted at least one level of internal appeal, and the dispute is focused on the medical necessity of a treatment or service. IMR utilizes a panel of expert physicians who apply the terms of the insurance contract to the denied treatment or service.

It should be noted that ERISA does not cover federal health plans such as Medicaid and Medicare. When a claim dispute arises under either Medicaid or Medicare, claimants do not resolve the dispute in court. Instead, both the Medicaid and Medicare programs contain systems for external review of claims denials. As used in this context, external review is a form of ADR, with claims disputes being resolved through ADR methods such as external review.

Other commentators have suggested implementing methods of ADR into the healthcare system before conflict arises. In particular, they stress providing conflict management training to all employees that deal with denial of benefits claims. This could help to ease the frustration and anger that is often felt by a patient with a denied claim. Claimants can have appeal rights explained to them and contract language clarified, which will provide a better understanding of whether they have a legitimate claim for a wrongful denial of benefit determination. Another option is creation of ombudsman offices within managed care organizations to deal with outside grievances. This approach would serve the purpose of allowing conflicts and potential conflicts to be identified, addressed, and resolved before the conflict devolves to the point of litigation. An advantage of ombudsman offices is that the same person resolves all disputes. This same person or organization can then consistently resolve similar problems for similarly situated patients.

VI. What Should be the Goals of Healthcare Dispute Resolution?

Dispute resolution can have many goals, but healthcare benefits disputes raise a particular set of potential issues. The first is quality of care. The ultimate

goal of healthcare is saving lives and improving the quality of lives. Any method of ADR in a healthcare setting must bear in mind that a favorable medical outcome for the patient is the most important thing.

The second set of major issues includes speed, efficiency, and cost. Healthcare often must be delivered in a timely basis for it to have its greatest effectiveness or to even save a life. Therefore, if there is a dispute about whether a potential procedure or treatment will be covered, and this dispute is preventing that medical intervention from happening, then time is truly of the essence. For after-care disputes over benefits claims, speed becomes less of an issue. Instead, the prime issues become efficiency and cost. Litigation is expensive, takes a lot of time, and requires the investment of considerable emotional resources for all parties. Thus, from the standpoints of speed, efficiency, and cost, ADR and ADR-like methods would be better suited to resolving healthcare disputes.

The third major issue is fairness to patients in benefits determinations. (Medical malpractice issues are beyond the scope of this paper.) A patient doesn't go to a hospital or doctor's office and request a painful or invasive procedure be performed on his body because it seems like fun. Instead, a patient goes to see a doctor in an office and gets whatever procedure the doctor feels is necessary. For an insurance company to later claim that this nasty procedure wasn't really necessary is not fair to the patient. The patient is likely relying on a hopefully positive result from that test or course of treatment. The patient might now question the validity of his test or the skill of his physician.

The fourth and final issue is respect for the medical judgment of a physician. ERISA resolves denial of claims benefits through litigation, with the decision being made by a judge (and, often, a jury). The result is that a slow, costly, and inexpert decider determines the medical necessity of a medical treatment, and whether that treatment is covered by the benefits plan. An ADR plan could instead use a neutral arbitrator with a medical background, which would at least guarantee that the final decision is being made by a person with medical expertise.

VII. Using ADR to Improve Quality of Care

Litigation under ERISA for benefits determinations is a costly endeavor. A patient who is denied benefits must file suit in federal court. The insurer must prepare an answer and come before the court. Ultimately, the result is time-consuming litigation and a burdening of the already strained court system. In this final section, I explore several ways to improve the quality of care by avoiding ERISA litigation, reflecting both well established and innovative ADR methods.

The ultimate solution would be a legislative solution. If Congress enacted a national standard for minimum healthcare plan benefits and coverage, then the controversy over benefits determinations would be partially eliminated. This law would specify the minimum levels of coverage that any health insurance plan (traditional, HMO, or PPO) must have. Such a statute should specify a means for dispute resolution that is different from the remedies of ERISA. The legislation might require that health benefits plans include a provision such as the following:

> The health benefits policy describes precisely what is covered under the plan. The medical necessity of a medical procedure is subject to review. If a conflict arises between the medical opinions of the treating physician and the reviewing plan physician, the claim will be subject to arbitration. Arbitration shall be conducted by a neutral three-member physician panel and decisions are binding to the fullest extent permitted by law.

As discussed above, the only remedy presently afforded to patients by ERISA is access to the wrongfully denied benefit. Furthermore, ERISA requires litigation for the enforcement of rights. The civil enforcement provisions of ERISA, found in § 1132, could be amended to explicitly provide for resort to ADR processes, such as ombusman and mediation, as a precursor to arbitration or litigation.

In this modified enforcement regime, ERISA claimants would have the option of binding arbitration to settle their benefits disputes. Claimants can be fur-

ther assured that a neutral panel of physicians will assess the claim; this will be the first time that, at least in the claimant's mind, the dispute has been presented to and evaluated by someone not affiliated with the insurance company.

There are other advantages to a federally-mandated national standard for minimum healthcare coverage. Under such a regime, physicians would be universally informed about what treatments and what procedures would be covered. Under this system, there would be no variation in coverage from patient to patient due to differences in insurance plans. This could translate into no variation in the quality of treatment between similarly situated patients with common medical conditions. Even if government-mandated moves toward uniformity are rejected, resort to arbitration (perhaps together with other ADR approaches) will be fairer to patients than the present system – and less costly as well.

Healthcare law and insurance law have traditionally been areas of law that are regulated by the individual states. Under a federally-mandated standard for minimum healthcare coverage regime, states could still be free to exceed the federal minimum threshold and establish higher standards for the minimum levels of plan coverage. Thus state autonomy could be somewhat maintained in the area of healthcare and insurance.

Employers often choose to self-insure if they recognize that state-mandated minimum health coverage would make covering their employees too expensive. As discussed above, self-insured employers are exempted from ERISA and are also free to develop health benefits plans that offer virtually any combination of benefits. In some ways, the deemer clause of ERISA reduces the quality of medical care that employees of self-insured employers can get. However, a national minimum standard for health benefits would force these self-insured employers to comply with the federal law. This would effectively improve the quality of medical care for those who have this type of insurance. Under this approach, the original intent of the deemer clause – to prevent states from deeming a self-insured employer a health insurer – will not be compromised.

Self-insured employers could also improve the lives of their employees by using ADR methods. Since self-insured employers design their insurance contracts, they can always include ADR provisions to help resolve disputes. Specifically, health insurance contracts could specify that all disputes over benefits determinations are subject to binding arbitration by a three-doctor panel of arbitrators. This would allow for faster resolution of disputes and also save all of the involved parties considerable money. Furthermore, avoiding litigation would help lighten the heavy dockets of the courts.

An intermediate program that could be introduced quite apart from health benefits legislation would be ERISA "gap" insurance. In essence, the program would seek to cover any medically necessary procedure or treatment that was otherwise legitimately excluded from a claimants own health insurance plan. There are two advantages to this approach: (1) less litigation under ERISA, and thus an effective form of ADR; and (2) improved quality of health coverage. Of course, the "gap" insurance program would require extensive funding – either privately or by government. A readily apparent problem with this is approach is that, in the absence of minimal coverage requirements, private health insurers would have an incentive to reduce or even eliminate coverage for some medical procedures, armed with the knowledge that this care would be covered by the backup government or private plan.

An alternative approach to dispute resolution is available within the current ERISA framework, based on the fact that individual states are saved from ERISA preemption when they legislate in a manner that directly regulates insurance. Accordingly, states already have the power to require the inclusion of mandatory and binding ADR provisions in health insurance contracts. Many states already make provision for some form of ADR in disputes involving claim administration. However, no state presently mandates resort to binding arbitration, by an external medical review panel, for all benefits determinations that are based on medical necessity.

A potential drawback of the state approach is the "race to the bottom" problem epitomized by Delaware and the law of corporations. It is possible that one or more states might adopt very administrator-friendly regulatory regimes for health insurance. If

such is the case, then it is possible that all health insurance contracts will be written to be governed by the laws of that particular state. Such a potential loophole in state regulation would need analysis under a conflict of laws framework to discern how individual state laws could regulate health insurance practices in another state.

A final proposal involves improving the database of electronic health records. The best form of ADR is to avoid reaching the point of actual dispute; electronic records might help to support that goal. Privacy concerns aside, if a health insurance company had a complete health record for each claimant then many of the denial of benefits decisions would be avoided. The greatest enemy of plan benefits being timely reimbursed is the lack of available information regarding the patient, the medical condition, and the care to be delivered. If the insurer had more information about each of these elements, then far fewer claims would be disputed or denied each year.

VIII. Conclusion and Summary

A major problem in healthcare is the absence of a neutral non-litigation method to challenge benefits determinations under ERISA. Although healthcare practitioners provide medical treatment to individuals and are ultimately responsible for all treatment decisions, their judgment is effectively controlled by managed care organizations. Various forms of ADR can be used to address adverse benefits determinations more expeditiously and fairly than through litigation. Implementation of ADR methods to resolve benefits disputes will improve the quality of patient care, since expert and neutral parties, rather than self-interested insurance companies, will serve as the ultimate decision maker for determining what treatment or care is medically necessary.

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MEDIATION OF MEDICAL LICENSURE ISSUES BEFORE THE TEXAS MEDICAL BOARD

By Laura Sanger*

I. Introduction

Medico-legal issues, such as licensure disputes between the licensing board and physicians, medical malpractice lawsuits, and disputes between physicians and other healthcare professionals or provider organizations are particularly amenable to resolution through mediation. This paper will focus on mediation in medical licensure disputes – mainly under Texas law and practice. Two closely related topics also will be considered: mediation as a resolution tool in medical malpractice litigation, and medical licensure regulation in states beyond Texas.. I conclude that mediation should be used more frequently to resolve medico-legal issues, particularly medical license disputes in Texas.

Mediation can offer advantages over seeking judicial or administrative adjudication in resolving both malpractice claims and disciplinary actions. Mediation, as a vehicle in which communication may be enabled, may provide a neutral and confidential forum in which some non-judicial objectives can be achieved. A simple apology, which would be unlikely in a courtroom setting, can readily be offered in the mediation setting. Explanations of the injury and treatment may occur in the more candid and straight-forward setting afforded by mediation. Likewise, communication between a physician and an injured party is regularly enhanced in the mediation setting.

II. Comparison of Disciplinary Actions and Medical Malpractice Claims

While this paper focuses is on medical disciplinary actions, most of the medical mediation literature has studied the use of mediation in related settings, notably medical malpractice. In both disciplinary actions and medical malpractice actions, issues such as quality of care and physician-patient communication may be central to the dispute. Resolving these issues in an ADR setting may benefit physicians by providing an opportunity to avoid some of the penalties associated with judicial resolution of these cases, such as peer review and denial of hospital privileges. Patients may benefit by not having to testify in open court and by having non-judicial complaints (e.g. desire for an apology) addressed. Society may benefit by modification of the physician's practice style, or the requirement of education or remedial training, which might help prevent future incidents while maintaining the physician as a resource for his or her community

Medical disciplinary actions and medical malpractice claims are similar in origin; they differ primarily in what is at stake. Medical malpractice cases involve monetary damages, while disciplinary actions risk administrative sanctions against the physician. In both instances, the central issue is whether the physician's action met the duty of care owed to the patient.

There are a number of important reasons why patients brings claims against physicians, whether before a court or an administrative agency. These include:

- Advised to do so by a physician or other knowledgeable acquaintance;
- Financial needs;
- Believe they or their loved one would have no future because of the injury;
- An explanation for the injury; and
- Communication issues with their physician.

III. Medical Licensure and Disciplinary Actions

This section offers the reader an overview of medical practice and disciplinary actions in Texas. There are currently about 61,000 physicians licensed to practice in Texas; 57,000 of these hold medical degrees (M.D.) and 4,000 are osteopathic physicians (D.O.). In fiscal year 2008, the Texas Medical Board (TMB) received 6,500 complaints about physicians, many of which were quickly dismissed. Seventy-three percent of the disciplinary actions before the TMB in 2008 involved quality of care issues. http://www.tmb.state.tx.us/agency/statistics. In 2008 the TMB oversaw 10 temporary suspensions, and had 641 practitioners under compliance oversight; compliance also oversaw 8,345 drug screens

In the decade encompassing the years 1989 through 1998, the TMB meted out sanctions in 1130 disciplinary actions meted out by the Texas Medical Board; 190 (17%) involved license revocation, and 940 (83%) resulted in lesser disciplinary actions. A review of license revocation by the TMB found that negligence/incompetence, prescribing practice issues, and substance abuse were the most common violations associated with license revocation. R. Cardarelli R & J. Licciardone, *Factors associated with high-severity disciplinary action by a state medical board: A Texas study of medical license revocation.* JAOA (2006); 106(3): 153-156. Other factors that correlated with license revocation were increased years in practice and a history of previous disciplinary actions. Based on national data, about four percent of disciplinary cases involve sex-based complaints. Dehlendorf & Wolfe, *Physicians Disciplined for Sex-Related Offenses*, JAMA (1998);279 (23);1883-1888. Another study noted that the most common correlates with medical disciplinary action were: male gender, increased aged, non-United States/Canadian medical education, and lack of board certification. Kohoatsu, et.al., *Characteristics Associated with Physician Discipline: A Case-Controlled Study*, Arch. Intern. Med. (2004); 164: 653-658.

IV. Medical Profession Disciplinary Proceedings in Texas

A. The Statutory Structure for the Regulation of Physicians in Texas

The principal statute that governs the licensing, supervision, and regulation of physicians by the State of Texas is the Medical Practice Act. The Medical Practices Act, in turn, is one part of the Texas Occupations Code, Title 3, Subtitle B, Chapter 155 ("License to Practice Medicine"). Under §164.007 (a) of the Medical Practice Act, the Texas Medical Board (TMB) is required to establish procedures for handling contested cases, such as disciplinary actions, that fall under the jurisdiction of the State Office of Administrative Hearings (SOAH). The procedures adopted by the TMB are found in Chapter 187 of the Texas Administrative Code. Chapter 154 of the Texas Administrative Code covers the rules of procedure used by SOAH in contested cases. Disciplinary actions and procedures are set forth in Chapter 164 of the Occupations Code. Actions that may (and in some instances, must) result in disciplinary action include substance abuse, failure to practice medicine in an acceptable professional manner consistent with public health or welfare, engaging in deceptive advertising, and prescribing drugs of non-therapeutic value. This listing is far from all-inclusive, but its does illustrate the primary function of the board in protecting the public through regulation of physicians. The Board is enjoined to distinguish between complaints about serious forms of misbehavior – physician impairment, quality of care, and sexually-related complaints – and minor transgressions.

The Texas statutory scheme currently allows for information contained in a complaint filed with the TMB to be maintained as confidential – including the identity of the complainant. The TMB is not required to reveal the identity of non-testifying complainants. Proposed (but not enacted) legislation would remove the complaint from information classified as privileged and confidential. See HB 3816 , 81st Legis. (2009). There are concerns, not limited to Texas, that the confidential complaint system is subject to abuse, but that important topic is beyond

the scope of this article.

A number of sanctions are possible, depending on the severity of the case, if the incident is isolated or if the physician has been disciplined before, and other factors. The Board will consider whether the violation concerns only an administrative issue, or if the concern involves patient care. Sanctions may range from required education or counseling to revocation of the license to practice medicine. Significant public disciplinary actions such as license revocation, suspension, or public reprimands are reportable to the National Practitioners Data Bank (NPDB), which was created for the purpose of tracking information pertinent to a physician's career, including medical malpractice claims and disciplinary actions. This databank may be accessed by hospitals to which the physician has (or seeks) privileges, and allows information regarding physician disciplinary action in one state to be accessible in other states where that same physician may be licensed to practice.

The NPDB was established under the Health Care Quality Improvement Act of 1986, and is promulgated by the regulations at 45 Code of Federal Regulations (C.F.R.) Part 60. The database allows licensing boards to review issues such as a physician's (or dentist's) medical malpractice history, license history, and record of clinical privileges. Keeping a negative item from being reported to the NPDB would represent a definite advantage to the physician; conversely, it could be perceived as contrary to the interests of justice, in that society might claim an interest in having exactly that classification of information available. This sort of trade-off will be discussed briefly in the conclusions section of this paper.

B. Processing of Complaints

This section considers the initial processing of complaints about doctors. Texas medical licensure issues are determined by the TMB, the state administrative body that issues, renews, and reviews medical licenses in the State of Texas. Disciplinary actions by the Board are conducted according to Procedural Rules found in Chapter 187 of the Texas Administrative Code. These procedures aim to justly and efficiently resolve medical license issues and provide for public participation in these decisions where appropriate.

Upon receiving a complaint, the first step for the TMB is to determine whether the matter is properly before the agency. Some complaints are dismissed as "non-jurisdictional" because the complaint is against someone that the TMB lacks the authority to license, or the subject matter of the complaint does not touch upon the Texas Medical Practice Act (TMPA). For example, the TMB does not consider complaints about long delays in waiting rooms. In FY 2008, about 30% of the complaints received were determined to be non-jurisdictional.

A TMB disciplinary proceeding is initiated once it has been determined that the matter concerns someone whom the TMB licenses, and that the complaint, if proven would constitute a violation of the TMPA. During the initial review of the complaint, the licensee is contacted and provided an opportunity to demonstrate that no violation took place. If the licensee can show that the asserted violation did not occur, the complaint is closed with a status of "jurisdictional, not filed." In FY 2008, about 29% of the complaints were dismissed in this manner.

Thus, well over half of the 6,500 complaints received in FY 2008 were summarily dispatched as lacking in merit This left a balance of 2725 complaints that proceeded to the investigation stage by the TMB's Enforcement Division. Those cases found to involve a potential failure to meet the standard of care are sent to the Litigation section, which then schedules an Informal Settlement (Show Compliance) Conference. There were 520 Informal Settlement Conferences in 2008, and 450 of these resulted in a settlement. The remaining 70 matters were filed with the State Office of Administrative Hearings (SOAH). See http://www.tmb.state.tx.us/agency/statistic

Consistent with general administrative law practice, the decision of the ALJ is provisional, but if any party challenges any aspect of the award, the decision constitutes a recommendation to the TMB. Agencies usually give considerable weight to the ALJ – like a trial judge, the ALJ is the person who has seen the witnesses and carefully reviewed all the underlying documents – but the final decision is

made by the agency. After all, the agency members typically are appointed the Governor (state) or President (federal), with the advise and consent of the Senate. The ALJ is a mere government employee, while the members are the agency, and are responsible for all the affairs of the agency. The agency members are analogous to the directors of a corporation. Proposed legislation would eliminate the role of the TMB in medical licensure adjudication. Instead the decision of the ALJ would constitute final action, with any appeal going directly to state district court. HB 998 (2009).

It should be noted that administrative adjudication (as opposed to rule making) is itself a form of ADR. Claims are heard by an administrative law judge (ALJ) who is similar to an arbitrator in that the ALJ possesses substantive expertise, and adjudicatory findings are rarely reversed by a court. So long as there is substantial evidence in the adjudicatory record to support the result, the decision of the ALJ will be affirmed. Even if a physician succeeded in having an ALJ's decision reversed, the usual consequence is a rehearing at which the TMB is likely to correct the evidentiary lacunae.

The TMB reports restrictions on practice to the National Practitioners Data Bank; restrictions on the license are not reported (i.e. administrative penalties and extra continuing medical education) to the NPDB. Disciplinary actions are published, both at the licensee's profile at the TMB (along with medical malpractice history), and through TMB publications such as the TMB newsletter and the *Texas Medical Board Bulletin*. This information is referenced by the licensee's name; in the case of minor administrative penalties, the information is not reported by name.

C. Administrative Procedure for Processing of Contested Matters

In Texas the medical license disciplinary process is comprised of three steps: (1) an informal proceeding, (2) an Informal Show Compliance Proceeding, and (3) a formal hearing before an ALJ. The process is designed to work as expeditiously and efficiently as possible; not all stages may be necessary to resolve an issue.

The use of mediation is available to resolve issues involved in the process. There are necessary procedural details to attend to when mediation is being pursued; a general denial still needs to be timely filed, as well as a motion for abatement of discovery and the motion for mediation itself. Customarily the mediator divides a mediation involving a licensure dispute before the TMB into two stages. The first phase consist of filing the appropriate documents, such as answering the complaint, the motion for abatement of discovery, and the motion for mediation. The second phase is the mediation itself, with the length of the proceeding being determined by such factors as the number of claims, severity of claims, and contentiousness of the mediation.

The Informal Proceeding is designed to allow those who have allegedly committed violations an opportunity to show compliance. Where the issue does not involve patient care – which includes standard of care issues, and sexual and drug misconduct violations that might affect or harm patients – the Quality Assurance Committee of the Board can recommend agreed settlement or dismissal. If it appears that there has been a violation, or the violation involves patient care issues, the matter is transferred to the legal division for an Informal Show Compliance proceeding.

The Informal Show Compliance Proceeding (ISC) includes a written statement of the allegations, and provides the licensee with an opportunity for appearance and response. The licensee may be asked specific questions, in order to obtain written answers from the licensee regarding the matter. In cases where standard of care is involved, the Expert Physician Reviewer's Report will also be provided to the licensee along with the notice of ISC. ISC proceedings and Settlement Conferences based on personal appearance require the presence of at least two board members; in the case of medical license issues, one of these must be a physician member of the board.

Without belaboring the nuances of this process, the ISC will look at the allegations and the evidence pertinent to those allegations. This may include a summary of the allegations and evidence the Board believes could be supported at a formal hearing. (Again, for medical board issues, at least one of the members present during the ISC must be a physi-

cian.) At the ISC hearing, both the board and the licensee present facts and evidence that each considers would be relevant to supporting their case at a formal hearing. The licensee is given the opportunity to present a closing argument.

The possible outcomes of an ISC hearing are the following:·

- Dismissal of the issue;
- Formulation of a mutually agreed order;
- Deferment pending further investigation;
- Forwarding of a formal complaint to SOAH;·
- A recommendation of temporary suspension or restriction of license.

A proposed agreed order is drafted by the ISC, whereupon it is accepted or reject by the licensee. If an agreed order is accepted, it moves on to the Board for approval. Normally the Board approves the agreed order; however, in the event that new information is received during negotiation of the agreed order, or if prompt action is indicated in order to protect the public, the recommendations may be modified during formulation of the agreed order. A proposed settlement may be presented directly to the Board, without an ISC determination, in order to quickly resolve complaints.

Formal proceedings before the State Office of Administrative Hearings (SOAH) are the subject of detailed Procedural Rules. These proceedings are public and heard before an Administrative Law Judge (ALJ); formal proceedings before SOAH may be referred to mediation. Orders issued by the ALJ may be vacated or modified by the Texas Medical Board. See, 22 TEX. ADMIN. Code, §§ 182.22-187.34. Before a proposed revocation or suspension of a license, the licensee is provided with notice of the adjudicative hearing, including a statement about what matters are at issue. Reasonable pre-hearing opportunities for discovery are available to the licensee.

The SOAH Rules make express provision for the use of mediation to resolve disputes. The parties to this mediation are SOAH and the licensee; TMB members, especially those members who attended the ISC, will be invited to the Mediated Settlement Conference (MSC). It is particularly valuable (and normal practice) to have a physician board member present. The resulting settlement agreement will contain findings of fact, conclusions of law and the Board's actions. These items will be reduced to writing and signed by the parties at the settlement conference. The TMB must approve the mediated agreed order, but that is normally a *pro forma* matter.

If the complaint against the licensee is not resolved during ISC or MSC proceedings, the matter is set for a formal hearing before the Board. The ensuing decision of the Board is final, although subject to limited judicial review. Evidence presented at the Board hearing may include medical records pertinent to the issue, peer review proceedings, deferred adjudications, evidence in the form of documents or copies of documents, and statements regarding standard of care and how the alleged conduct violated that standard. Oral arguments are heard before the Board from both the parties and the ALJ. Deliberations of the Board may be held in private, but the decision is rendered publicly.

Subsequent to a decision by the TMB, decision there in an opportunity to file a motion for rehearing. Modification or termination of agreed orders and disciplinary actions may occur either as a function of the order or action itself, or at the discretion of the Board.

V. Texas Medical Board Licensee Mediation

TMB mediations are conducted by the State Office of Administrative Hearings (SOAH), pursuant to rules that were most recently revised in November, 2008. The new rules formalized practices that had been standard in SOAH mediations, but had not been explicitly stated in the prior rules. The rule adopted the term "mediation," in lieu of the former "mediated settlement conference."

A successful mediation results in an agreed order, which is subject to approval by the TMB. This usually occurs during TMB board meetings, which are subject to the Open Meetings Act and the Medical Practice Act. TMB Board meeting minutes are available on the Internet. In many instances Agreed Order are approved as presented; however, the TMB

can reject the Agreed Order – whereupon further action is required.

Mediated orders are "published" on the Internet, often scanned in their entirety. After reciting the satisfaction of procedural requirements, the order will state the findings or fact and conclusions of law. Part of the order will state that the respondent waives any further hearings or appeals to the board or to any court in regard to all terms and conditions of the agreed order," and acknowledged that the order is a public record. In addition, agreed orders are usually contingent upon the Respondent not engaging in continuing, or additional, acts that warrant disciplinary review.

A. Examples of Mediated Orders

Summaries of three (written and signed) mediated orders are set forth to provide readers with a flavor of the type of issues that arise, and the available remedies. The names of the physicians have been redacted by the author, but the affected physician is named in each publicly available order.

The claim against Dr. A was that he failed to document and communicate his treatment plans for a patient with the patient's concurrent healthcare providers. The physician was cited for a failure to maintain complete and accurate medical records, in violation of Board Rule 165. Dr. A agreed to attend an approved medical record keeping course, submit to six months of monitoring by a physician, and allow the Compliance Division of the TMB to review new patient medical records. Dr. A. was required to pay the costs associated with the monitoring process. The completion of the required education and chart monitoring triggered the termination of the agreement.

Dr. B, a family practitioner, advertised chelation services: "chelation could possibly unblock vessels and allow a patient to avoid bypass surgery." Board Rule 164.3 governs deceptive or false advertising claims made by physicians. The TMB considered the attitude of Dr. B favorably (he was "contrite"), and the Respondent's involvement was limited (he did not write the ad, or intend it to create unreasonable expectations). The Respondent also initiated a corrective action, in which he published "appropriate" advertising. The TMB assessed an administrative penalty of $1,000.

Dr. C served as an investigator on a medical research trial using the drug Clozaril. In the Agreed Order, the Respondent still denied any wrongdoing, but settled the matter. The crux of the complaint was a violation of Section 164.053(a)(8) of the Texas Occupations Code, which concerns physician supervision of individuals under his or her supervisory oversight. The Agreed Order required the payment of a $5,000 administrative penalty, taking a medical records course, oversight of the investigator's studies by an independent protocol supervisor, and submission to the oversight of two Institutional Review Boards.

B. Arguments for Use of Mediation to Resolve Medical Licensure Cases

As noted above, the medical license disciplinary system may mirror some of the issues and goals within the field of medical malpractice law. Medical malpractice, as an instrument of protecting societal interests, enumerates goals such as promoting safer medical practices, compensating for injury and other losses through damage awards, and serving as a vehicle for "corrective justice." The fundamental idea is that the imposition of sanctions, together with the potential damage to the reputation of the physician, will make bad medical and interpersonal practices undesirable, and consequently the physician will not engage in such practices in the future. In addition, the pain and suffering of the maltreated patient or disciplinary action complainant will be assuaged by a monetary award and perhaps the thought that their actions have deterred future bad acts. These notions are significantly limited in that they presume money alone to be the primary motivator and primary punishment for negligence and malfeasance. Other forms of currency, such as emotional relief for the patient (or patient's family) or rehabilitation of a physician who can continue to contribute to society, are undervalued in the current tort system.

The advantages of mediation for the doctor include avoiding having the matter going onto the court record, and a quicker less costly resolution process.

The TMB normally allots about an hour to the informal conference, not enough time to convince the TMB of the unwarranted nature of the case, or to show the panel sufficient information. The 6 to 8 hours available in mediation allows the physician more time to present his/her side of the story; additionally, the evidence shown can result in the case being dismissed as unwarranted, or allow the TMB and the physician to work out an administrative remedy. Mediation allows time for the physician to demonstrate that an apparently serious matter is in actuality a more minor administrative issue. Mediation can facilitate a "doctor-to-doctor" meeting between the TMB and the physician on the issue(s), with the attorneys out of the room. This allows the medical professionals to meet and discuss the issues and remedies between themselves. – and effective and often successful approach.

The physician's attitude may brighten in a mediation setting, feeling more comfortable in this informal setting than in an adversary proceeding. There is also the opportunity to come before a neutral third party, to express one's views about the matter at issue, and to and tease out the issues from one another. Issues may be whittled down from being major disciplinary infractions to being recognized as violations of Board Rules. In mediation, an infraction might be reduced from unacceptable, unprofessional conduct to a lesser offense meriting only a few thousand dollar fine.

For the TMB, the advantage of mediation is that the TMB spends less money on mediation. For example, the TMB does not have to hire the expert witnesses for a trial, or invest staff time in a trial. A few such trials can have a significant negative impact on the TMB budget.

Additionally, the physician is also immediately regulated, as opposed to waiting the year or more for the trial process. [Formal TMB approval of a mediated agreement may be delayed for up to two months, due to the need to get the item on the Board's agenda, but failure to immediately take action consistent with the agreement would constitute an invitation for the TMG to reject the agreement.] This is not to say that mediation completely cleanses the record of the mediated matter. The mediated issue does stay on the record to a certain degree; for example, if a doctor violated an advertising rule which was resolved by mediation, and then has a standard of care issue arose at a later time, the previous advertising rule violation can be considered -- either as part of a pattern, or to indicate that the physician is possibly somehow impaired.

Mediation also serves to protect patients and serve the public's interests. Contrasted to a (jury) trial, where it is anyone's guess how things will come out, mediation provides a controlled forum in which issues are identified, weighted, and resolved. This allows patients to know that the physician is being regulated. There is a distinction between *regulating* and *prosecuting* in the area of licenses. The end result of mediation is that the doctor can be "made safer, faster," while at the same time people will know what has happened.

Occasionally it may be beneficial to have a less public forum, as opposed to open court or open administrative hearings, in which to resolve disputes in order to save patients from ongoing or future emotional trauma. Studies of sexually-related violations by psychiatrists have concluded that patients often are unwillingly drawn into court proceeding concerning physician-patient sexual contact, contrary to the interests of the patient. J Morrison and T Morrison, Psychiatrists Disciplined by a State Medical Board. Am J Psychiatry 2001; 158: 474, 487.

The notion that creative, and perhaps more satisfactory, solutions are more readily obtained through mediation should not be discounted. As suggested above, the concept that dollars alone will make a plaintiff or complainant whole is often insufficient. Non-monetary remedies – notably, some form of apology – may even have more value to a patient than just money.

Mediation has a peculiar advantage in that it can facilitate ongoing relationships. In the case of a doctor and a patient, a doctor and the board, or a doctor and another doctor, mediation recognizes that the parties may – or will – have future interactions. Preventing future conflict, and enabling ongoing relationship, can be part of the solution that mediation offers. Something as subtle as establishing how the parties address each other can create an atmosphere for settlement. Establishing effective communication

skills, even something as straightforward as vocal tone, can assist in conveying information and improve interpersonal rapport. An ADR venue allows for discussion of the direction of future relationships, as opposed to a traditional courtroom setting, where once the ruling is issued the matter is considered closed.

Quality improvement may benefit from the utilization of mediation as a form of dispute resolution. In a mediation setting, all questions may be asked and evaluated, owing to the creative and less restrictive environment of mediation. Indeed, one of the recurring themes in the literature is that medico-legal disputes may not be so much about money, as about preventing similar errors, or addressing other non-financial remedies. See generally, E.A. Dauer & L.J. Marcus, Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvements. 60 Law & Contemp. Probs 195 (1997).

C. Arguments Against Mediation as a Dispositive Method of Resolution in these Cases

There are arguments against using ADR methods as a means of resolving medico-legal disputes. The central concern is lesser remedies and public information, which can lead to a perception that the state medical board is "going easy" on physicians. This might be regarded as an example of the "capture thesis," which posits that administrative agencies become captives of the regulated industry or activity. Conversely, public or political pressure may lead an agency to regulate too harshly, in order to avoid allegations of laxity. Both patients and physicians have advocacy organizations, which can increase pressures on state disciplinary bodies.

Mediation is not a panacea for all disciplinary action ailments. Reaching an agreement between physician and Medical Board should be tempered with the recognition that, active disciplinary actions may have negative consequences for the physician with regards to insurance provider status and credentialing. It may be advisable for the attorney representing the physician to steer the mediation towards a remedial order, involving administrative fine payments and/or continuing medical education; satisfaction of payment of the penalty, or completion of the coursework may serve to terminate the agreement. These solutions may apply well to minor, more "bookkeeping" types of violations. For more severe violations, such as chemical dependency, the attorney may wish to consider seeking a confidential rehabilitative order; this type of solution allows for secrecy, providing the doctor complies with the order, and does not require reporting to the NPDB or provider networks. These solutions may hinge on the physician demonstrating appropriate responsibility for his or her actions, and a dedication of the physician to complying with the order and preventing future misadventures. If well designed, the order can then serve the Board's mandate of protecting the public and administering professional discipline, while also serving as vehicle to allow the physician to be re-credentialed into provider networks and not face a potentially catastrophic loss of patient access.

Discussions of protecting patients reflect an unstated assumption of an urban model, in which there are lots of doctors available. In much of Texas, doctors are scarce and the loss of one physician is a major problem for patients. This relative shortage of physicians may be felt most acutely by patient populations such as the elderly, who may not be able to travel very well, or where the specialty is already underrepresented in the rural community (e.g., lack of obstetricians/gynecologists in some areas).

Finally, mediation may not be an effective tool where significant egos and physician-to-physician conflicts are involved. In today's modern healthcare setting, physicians may be perceived as competing against one another, and disagreements over management, health care standards, or interpersonal rivalries may make mediation untenable if the parties can no longer effectively communicate – much less negotiate – with one another. In the context of submitting disciplinary or standard of care complaints to the TMB, if personal vendettas are perceived to be part of the impetus for submitting those concerns, it is unlikely that the parties will enter into mediation in a spirit of good faith, much less reconciliation. Baseless and unfounded complaints may be dismissed directly by the Board. However, the fact remains that factors such as inter-personal conflict and direct competition can severely undermine me-

diation (or other forms of ADR).

There are many situations where a skilled mediator can work miracles. But if mediation only works in easy cases, it is not worth much. The true test of mediation as a tool in resolving medico-legal issues, be they disciplinary or other matters, is in the mediation process proving itself capable of assisting parties in resolving the more difficult cases.

VI. Conclusions & Summary

The trend towards utilizing ADR techniques and practices to resolving disputes in the medico-legal arena is increasing. Forms of ADR, particularly mediation, are already in existence and can satisfy many of these goals. This applies not only to the malpractice arena, but also to disciplinary actions, peer review, staff relations, physician-physician relationships, and other issues which could potentially benefit from the economies of time and expense mediation can offer.

The mediation process allows for the physician, and the other party, to take in information and process it in such a way that resistance to resolving the issue may give way to understanding the concerns of the other party, and being dedicated to a settlement of the issue. Regarding physicians and licensing boards, if a disciplinary action is not determined, the patient may be left with little recourse to address their concerns. In addition, the physician, insurer, or physician's institution may posture defensively with regard to the issue. If the desired end result is an alteration in practice habits, mediation may provide a workable solution in which assurances of future conduct may be obtained in exchange for an agreed settlement.

The medical profession is becoming more sensitive to ethical and safety violations within its own community, and recognizing the need to report unprofessional behavior. Potential problems may not yet be ripe for litigation, but in the context of fitness to practice disputes, might be well suited to mediation, wherein the matter can be identified and regulated before developing into a serious problem or patient safety issue.

In July 2008, the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) issued a Sentinel Event Alert that outlined new leadership standards. This document was drafted to assist in the implementation of interpersonal relationship practices designed to support a culture of safety, primarily through reduction of adverse practices such as bullying and intimidation. Among the suggested recommendations was the use of mediation-type skills for the resolution of conflicts, and the use of mediators and conflict coaches when professional dispute resolution skills are needed.

The increased use of mediation as a means of dispute resolution in medico-legal matters can reduce costs vis-à-vis comparable litigation, while also having a positive impact on overall healthcare costs to society. As a result of medical malpractice lawsuits, many physicians opt to practice "defensive medicine," by ordering tests ("assurance behavior") and avoiding invasive procedures ("avoidance behavior") in order to mitigate against possible lawsuits. One author has suggested that these costs are approximately $15 billion a year. John M. Luce, *Medical Malpractice and the Chest Physician*, Chest (2008); 134: 1044-1050, 1048. If the use of ADR could pare down these costs, even incrementally, the resulting savings could benefit society, not only in cost savings, but in the reduction of patients undergoing the cost and risks of extra tests, or not having their disease treated aggressively enough for fear of potential litigation.

The disposition of cases involving minor infractions, such as record-keeping, in which patient safety is not at issue, is already being phased in. In the UK, for example, minor misconduct is being moved towards closure by agreements between UK's General Medical Council (GMC) and individual physicians. See C. Dyer, *GMC to Introduce "Plea Bargaining" for Less Serious Misconduct Cases*, BMJ (2007); 334: 763.

In addition to malpractice and disciplinary cases, mediation may provide a forum for resolution of other issues, particularly those where the adversary parties are both physicians. The latter type of dispute may include peer review issues, or "medical divorces," in which former colleagues may now find themselves opposing one another. In these cases there is likely to be some sort of continuing interac-

tion between the physicians, as local medical communities are relatively small and interconnected; in addition, there is a usually a goal to keep disruption of medical staff relations, hospital management, and patient practice to a minimal level and maintain a civil and productive atmosphere. Mediation, or other forms of alternative dispute resolution, may keep these goals in mind while resolving conflicts and proposing workable solutions to the parties.

Finally, mediation may also be more congruent with the medical arts than litigation because of an emphasis on problem solving. The practice of medicine is based on three core values: autonomy, informed decision making, and confidentiality. Mediation evinces many of the same core concepts. There is an implied respect for persons, in that the parties are provided the opportunity to get together and resolve their own dispute; there are provisions for confidentiality, and a prescribed process that does not deprive the parties of other courses of action if mediation does not work out for them. The ADR process is designed to allow for the personal investment of the parties in resolving the dispute, and hopefully benefit more than the "standard practice" of litigation. The interests of justice are two-fold: (1) parties can decide upon solutions and remedies that they might not be able to otherwise avail themselves of, and (2) society benefits from having disputes resolved expeditiously and by mutual agreement of the parties. These qualities make ADR particularly attractive in the medico-legal environment.

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Thankful for Unanswered Prayers? Unconscionability Equilibrium

By Donald J. Philbin, Jr.*

Much has been written about what the United States Supreme Court has done to enforce arbitration agreements. In case after case, the Court has interpreted the FAA expansively, holding that, among other things:

there is a national policy favoring arbitration;
the FAA invokes the full preemptive power of the Commerce Clause;
the FAA preempts inconsistent state laws; and
the FAA separates the arbitration clause from the surrounding contract.

But University of Houston Law Center Professor Aaron Bruhl notes that the "Supreme Court has been less aggressive in combating unconscionability rulings than one might expect, given its strongly pro-arbitration preferences." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1499 (2008). In his article, Bruhl meticulously analyzes cases seeking to enforce arbitration agreements invalidated by lower courts on the basis of unconscionability (and related state law defenses).

Because section 2 of the FAA makes written agreements to arbitrate enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," there are a wide variety of outcomes and much depends on venue. Bruhl notes – and sent this author a list of – dozens of certiorari petitions raising the unconscionability issue since 2000, many filed by prominent Supreme Court litigators. Several of these petitions urge the Supreme Court to rule that arbitrators, not courts, should decide whether an arbitration clause is unconscionable under state law. However, these petitions have gone unanswered.

Perhaps Garth Brooks was right in 1990 when he sang the country chart topper *"Unanswered Prayers*." Congress's consideration of the Arbitration Fairness Act (AFA) and related bills may be subtly influencing the Supreme Court not to paint a bright line rule in this area. The fact that the Court has not answered the prayers of arbitration proponents – while the efficacy of consumer arbitration has been greatly hampered by state unconscionability law – may be causing some in Congress to wonder if they should enact broad legislation that may have adverse, unintended consequences on commercial arbitration generally, and international arbitration in particular.

Could the Supreme Court be allowing squishy state law doctrines like unconscionability to work as a pressure release valve, knowing that Congress is considering legislation that would override several of its pro-arbitration decisions? Could Congress be considering substantial arbitration policy shifts not because it wants London to become the unrivaled commercial arbitration capital, but to keep pressure on the Court not to formulate bright-line rules that reduce the effectiveness of these state contract law challenges to arbitration?

SILENT NEGOTIATION

Both sides of the issue are unhappy. Those favorable to consumer arbitration decry the rise of unconscionability analysis, while consumer activists and employee advocates find unconscionability an unsatisfactory defense against the spread of arbitration.

Mediators often smell a potential solution when opposing sides are equally tentative. No one would expect the Supreme Court and Congress to admit that they may effectively be engaged in a silent negotiation of sorts concerning the FAA, but they nevertheless seem to have found a rough state of equilibrium

that attempts to strike a balance between a perceived need for states to protect consumers, and the concomitant demand that arbitration agreements be enforced as written.

No doubt the United States still has a policy favoring arbitration. Along with Germany, Switzerland, and the United Kingdom, America can be considered one of the principal seats of arbitration for international, commercial transactions. That has huge implications for U.S. business interests. Can you imagine doing a deal across the globe and having to seat your arbitration in a foreign land because your counterparty wants the law of the "seat" country to support arbitration? For a more extensive discussion of the potential implications of pending legislation on international, commercial arbitration, see American Bar Association Resolution on the Arbitration Fairness Act, adopted at the annual meeting in August, 2009.

Many courts have carved out an important exception to arbitration, particularly in consumer and employment cases. Courts get to decide whether arbitration agreements are unconscionable under applicable state law, which varies – sometimes significantly – from state to state. And, in the absence of a choice-of-law clause, applicable state law is subject to the vagaries of a judicial forum's conflicts-of-law rules. This approach has the tacit support of the same Supreme Court that has so often declared, and continues to declare, a powerful, federal pro-arbitration policy. Yet, a truly pro-arbitration policy would commit these determinations to the arbitrators, subject only to deferential judicial review.

A BRIEF HISTORY

One could reasonably wonder why the U.S. Supreme Court is tacitly or otherwise addressing state law arbitration doctrine at all. Early in the 20th century, members of the New York business and legal community, led by the Chamber of Commerce, sought to bolster the city's image as a national and international center of commerce and finance. Revocability of pre-dispute arbitration clauses was thought to undermine that effort. After the group in 1920 persuaded the New York legislature to adopt an arbitration statute that repealed the common-law rule of 1920, it sought to resolve the remaining state-by-state patchwork of arbitral hostility with a federal law. Congress reconciled state differences by adopting the New York approach in the Federal Arbitration Act (FAA) of 1925. To some — Justice Hugo L. Black, and later, Chief Justice William H. Rehnquist, Justice Sandra Day O'Connor, and others — the FAA was a procedural statute applicable only in federal courts. And even as the New Deal and World War II expanded federal authority, the Supreme Court did not expand the scope of the FAA to match the full reach of that expanded constitutional power.

But that changed in the 1980s. And while the current Congressional debate over arbitration takes on partisan overtones, the Court lineup often has inverted those expectations. "The FAA found support from left-leaning nationalist Justices." Bruhl, at 1429. In fact, one of the Court's most liberal members, Justice William J. Brennan Jr., wrote the *Moses H. Cone* decision that announced a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."

Justice Clarence Thomas, on the other hand, has consistently taken the position that he does not believe that the FAA applies to state court proceedings, and presumably would permit state courts to nullify arbitration agreements under state law as they see fit. Justice Antonin Scalia, writing for a 7-1 *Buckeye Check Cashing* majority, however, effectively put to rest any remaining question as to whether the FAA applied in state courts and whether Section 2 created a body of federal, substantive law favoring the enforcement of arbitration agreements.

A STATE LAW CARVE-OUT

So we are left with federal substantive law that carves out state common-law defenses applicable to contracts generally. Written agreements to arbitrate are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Because the FAA does not confer independent subject matter jurisdiction on the federal courts, and because *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) – decided 13 years after the

FAA was enacted – declared that state law provides the rule of decision in diversity cases, state courts are left to apply their own common-law defenses as exceptions to the FAA.

It is no real surprise that the outcomes and reasoning of judicial decisions appear to be inconsistent, and geographically diverse. One California study found that unconscionability challenges to arbitration agreements, which accounted for about two-thirds of all unconscionability challenges, succeeded at a rate several times higher than the rate for other types of contracts. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act,* 3 Hastings Business L.J. 39, 44-48 (2006). A divided panel of the Ninth Circuit recently held that the court should determine unconscionability even though the agreement specified that the arbitrator would decide any enforceability issues, Jackson v. Rent-A-Center West Inc., 2009 WL 2871247 (9th Cir. 2009), and a recent California appellate court opinion illustrates the slippery slope of questionable enforceability. Parada v. Superior Court, 98 Cal.Rptr.3d 743 (Cal.App. 4 Dist. 2009).

Litigants have historically sought to avoid arbitration by raising a variety of common-law contract defenses, such as lack of consideration, state law preemption, unconscionability, fraud, duress, and material breach. As many of the other oft-argued defenses have become less successful, unconscionability has become favored. Resort to unconscionability as a defense to arbitration has increased in recent years, both in the absolute number of cases and as a percentage of overall arbitration challenges. The increase is borne of necessity and creativity. The unconscionability argument takes advantage of the tension between federal and state law by allowing sympathetic judges a route to deny a motion to compel arbitration, with a better chance of appellate success. Because lower courts cannot simply hold arbitration clauses to be *per se* unconscionable, the analysis typically focuses on particular aspects of the arbitration clause that allegedly renders it unconscionable or otherwise impermissibly frustrates the exercise of the plaintiff's substantive rights." Examples include:

(1) limitations on the type or amount of relief, such as punitive damages;
(2) provisions forbidding class-wide relief;
(3) "nonmutual" arbitration clauses;
(4) clauses that select arguably biased arbitrators;
(5) cost-allocation clauses; and
(6) confidentiality provisions.

Many states require that an agreement display some degree of both procedural and substantive unconscionability before it will be invalidated. Procedural unconscionability concerns problems with contract formation, such as unfair surprise, while substantive unconscionability concerns the fairness of the arbitration clause itself – whether it is oppressive (one-sided or overly harsh). Other states require only one form of unconscionability for success – nearly always substantive concerns. In Washington State, for example, "substantive unconscionability alone can support a finding of unconscionability." *Kam-Ko Bio-Pharm Trading Co. Ltd-Australisia v. Mayne Pharma (USA) Inc.*, 560 F.3d 935 (2009); *Alder v Fred Lind Manor*, 103 P. 3d 773, 782 (Wash. 2004). As a practical matter, it is often difficult for an appellate court to determine whether the trial court has analyzed the arbitration clause in the same way it would have if the contract did not contain an arbitration clause. Those "apples-to-apples" comparisons are often difficult to make. And typically, the result is that the remainder of the contract remains enforceable so that the consumer (and the merchant) has something on which to base its claim on the merits.

SEVERABILITY IS THE SOURCE

Some of the unconscionability defense's popularity is a byproduct of the *Prima Paint* severability principle – that the arbitrator generally decides defensive issues unless they are directed specifically at the arbitration clause. Rather than proving to an arbitrator that an entire contract was fraudulently induced, litigants are carefully aiming procedural and substantive unconscionability rifle shots at arbitration clauses. Under the separability doctrine, as explicated by the Supreme Court in *Prima Paint*, such questions normally are decided by courts rather than arbitrators.

And it makes a considerable difference which court answers questions about arbitration. Attempts to vacate arbitration awards were attempted more frequently, and succeeded more often, in just three states than anywhere else in the nation. Of 120 cases in which vacatur was sought in a state court, 27 were brought in California, 25 in New York and 12 in Connecticut." Lawrence R. Mills, et al., *Vacating Arbitration Awards: Study Reveals Real-World Odds of Success by Grounds, Subject Matter and Jurisdiction*, Dispute Resolution Magazine, 23, 25 (Summer 2005).

Some courts are more likely to find expressly or assume tacitly that the challenge goes to the arbitration clause and proceed to determine unconscionablity. "[I]t is fair to say that, rightly or wrongly, many courts have for a long time ruled on unconscionability challenges to various aspects of arbitration agreements, and many courts still do – occasionally expressly stating that the matter was for the court, other times simply so assuming without a second thought. Even fairly recently, defendants often did not even argue that such matters were for the arbitrator. Others may apply *Prima Paint* and leave the unconscionability question to the arbitrator.

While the distinction between a challenge to the arbitration clause itself and one to the contract as a whole might seem esoteric, it is often the pressure point. If parties litigate the arbitration clause in court, the claimed benefits of arbitration, such as time and cost savings, may be lost. On the other hand, if litigants are left to the arbitration process they are trying to avoid, they are denied meaningful review of an issue that may arguably concern the validity and enforceability of the arbitration agreement itself.

DOES TENSION EQUAL BALANCE?

The availability of relatively easy fixes for addressing unconscionability issues begs the original question: Is the tension between state and federal law keeping the domestic arbitration system in a relative state of balance? For example, a pro-arbitration fix might be the Supreme Court modifying the *Prima Paint* severability doctrine, so that arbitrators decide unconscionability challenges, even if they are directed at the arbitration clause itself. That would certainly limit FAA satellite litigation on this subject. But the Court has passed on a number of opportunities to do that. And it may be that certain unconscionability challenges directed to an arbitration clause arguably should be determined by a court, subject to ordinary appellate review, as opposed to the limited and deferential review available under FAA Sections 10 and 11.

The easy fix on the anti-arbitration side would be for Congress to amend the FAA to abrogate the separability doctrine. For example, the House version of the Arbitration Fairness Act of 2009 provides that courts, rather than arbitrators, should rule on challenges to the validity or enforceability of an agreement to arbitrate, "irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement." This approach would likely precipitate unintended consequences, particularly in international arbitration, and commercial arbitration involving only sophisticated business entities. New York attorney Edna Sussman raises a number of unintended consequences of the act, suggesting it might:

> (1) be a "serious threat to . . . the United States as a friendly place to arbitrate";
> (2) add significant costs and delays to many arbitrations;
> (3) risk breaching the spirit of longstanding treaty obligations;
> (4) impose a significant additional burden on the courts; and
> (5)alter the economics of numerous transactions.

Edna Sussman, "The Unintended Consequences of the Proposed Arbitration Fairness Act," 56 *Federal Lawyer* 48 (May 2009); see also ABA Resolution at pp. 2-3; 5-12. Some of these concerns may have been addressed in the Senate version of the bill, or could be addressed in future versions of the House or Senate bills, and other consequences may in fact be intentional.

What may not be so intentional is the impact that the proposed legislation may have on the acceptability of the United States as an arbitral seat, and the implications that might have on transactions of American companies. If anything is clear from the differ-

ing geographical reactions to the enforcement of arbitration agreements, as discussed above, it matters where you litigate. And the seat of arbitration is generally where satellite arbitration litigation will be venued.

There are a number of implications to U.S. companies having to seat their arbitrations outside the U.S. Sussman quotes foreign arbitrators who expect that to happen: "the proposed legislation would have a marked impact on the acceptability of the United States as an arbitration-friendly jurisdiction." A New York State Bar Association report by its dispute resolution section on the Arbitration Fairness Act and other federal arbitration bills goes further: "As the changes in U.S. law become known, the U.S. will no longer be viewed as a friendly forum for international arbitration, and parties engaged in international commerce would shun the U.S. for fear of being dragged into U.S. domestic courts." ABA Resolution, at p.8.

Almost everything reduces to a balancing test. That is not to say, however, that everyone agrees on the weight to be attached to each side of the balance. Here, concerns over alleged abuses in consumer arbitration, and to a lesser extent employment, franchise and civil rights arbitration, spurred clarion calls for change. Congress is pressed to fundamentally change an 80-year-old law that was designed to make New York, and later the U.S., more arbitration-friendly and, some would say, business-friendly.

Existing laws were used to force the National Arbitration Forum, of St. Louis Park, Minn., one of the largest providers of consumer arbitration services, to withdraw from the consumer debt arbitration field. The nation's largest provider of arbitration services, the New York-based American Arbitration Association, followed suit and voluntarily suspended its consumer debt collection arbitration business. Two of the largest banks and credit-card providers, J.P. Morgan Chase and Bank of America, have abandoned consumer arbitration in their credit card relationships.

So there is effectively no forum for this type of consumer arbitration, and the bank issuers of most credit cards do not need one. The balance has shifted considerably and that may beg the question of whether the AFA's radical surgery is still worth the unintended consequences.

There are few better at balancing tests than Harvard Law School Professor Cass Sunstein. He is a great thinker and prolific writer on the relationship between law and human behavior. Sunstein understands behavioral economics and scenario planning, decision analysis, and psychology. President Barack Obama has nominated Sunstein to be his regulatory czar – officially, the head of the White House Office of Information and Regulatory Affairs (OIRA). Since there are regulatory proceedings pending or contemplated that would affect, among other areas, securities and consumer arbitration, there is a good chance that Sunstein will have a chance to regulate with a scalpel rather than a meat axe, and not have to preside over or recommend the vetoing of sweeping legislation that may have significant adverse but unintended consequences.

For now, the Court is leaving prayers for a bright-line rule unanswered. And Congress has continued to consider, but not yet pass, sweeping changes to the 1925 FAA. While those on both sides will continue their fight to push that balance one way or the other, it could well be that a workable, if often uncomfortable, policy equilibrium is actually working. In this roughly balanced state of affairs, the U.S. maintains the nominally pro-arbitration stance that the New Yorkers thought they needed to be a financial and commercial law capital nearly a century ago. At the same time, state law defenses, especially unconscionability, provide pressure valves that keep the system in an equally disagreeable state of equilibrium.

Unfortunately, we won't really know if such a state of suspended equilibrium exists until one side or the other puts an elbow on the scales. Only then will the unintended consequences of the policy shift become evident. So perhaps we should be thankful for unanswered prayers.

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ated hundreds of matters and serves as an arbitrator on several panels, including the Panels of Distinguished Neutrals of the CPR Institute. He is an adjunct professor at the Straus Institute for Dispute Resolution at Pepperdine University School of Law in Malibu, Calif. This article is based in part on a longer article that appeared at 76 *Defense Counsel Journal* 338 (2009), and was excerpted to the October 2009, cover story at 27 *Alternatives* 145. The author thanks *Alternatives* and *DCJ* for permission to run this piece.

UNCONSCIONABILITY AND ARBITRATION

By Stephen K. Huber

I. Introduction and Overview

This purpose of the materials collected here is to supplement Don Philbin's fine article about unconscionability and arbitration, and to provide some background about that important topic. During 2008 and 2009, no less than ten state supreme courts addressed unconscionability issues in arbitration cases, and all but one of the eleven decisions to some degree upheld the unconscionability challenge to aspects of the arbitration agreement. (There were two decisions from the New Mexico Supreme Court.) The only decision that rejected an unconscionability decision would have been decided the same way in most if not all states. See, *State ex rel. Clites v. Clawges*, 685 S.E.2d 693 (W.Va. 2009).

The subject of unconscionability has played a central role in your author's legal life, so the discussion begins with some autobiographical material. This is followed by a commentary by Professor Charles Knapp on the Aaron Bruhl's unconscionability piece that is discussed in Don Philbin's article. Next comes a Populist reaction to the greatly expanded enforcement of consumer and employment arbitration agreements in contracts of adhesion. Finally, this article reviews the state supreme court unconscinability and arbitration decisions. Detailed attention is given to the *Poly-American* decision by the Texas Supreme Court, while the decisions by other state supreme courts are given more summary consideration.

II. A Personal Reminiscence

The editors have kindly allowed your author to commence this article by briefly reflecting on the role of unconscionability in his legal life. It is curious that such a topic could continue as a thread throughout a lengthy legal career. During my second year at the University of Chicago Law School, I was introduced to the Uniform Commercial Code in general, and unconscionability in particular, by Professor Soia Mentschikoff – the co-reporter of the UCC, together with Karl Llewellyn. She was also a leading proponent of arbitration, and discussed that topic in Commercial Law – a then unheard of innovation. See Soia Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846 (1961). At that time, the UCC was not mentioned in the first year Contracts course, a practice that has long changed – at least in my Contracts classes. Subsequently, I took a Consumer Law course at Yale Law School from Art Leff, the author of what is still the leading article on unconscionability. Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967).

Within a few years, my career took me to Washington D.C., where I was a Division Director at the Legal Services Program, a part of the Office of Economic Opportunity. [There I worked with Dick Cheney and Don Rumsfeld, but that is another story.] D.C. was the source of the leading unconscionability case, both then and now, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). For many years, Walker-Thomas continued to do business at 7th and L Street, N.W., and as a fan of famous cases I have stopped by several times when visiting D.C. The last legal word from Walker-Thomas was in an adversary proceeding in the bankruptcy of a third party. *Rockstone Capital, LLC v. Walker-Thomas Furniture Co., Inc.* (*In re Smith*), 2007 WL 2429450 (Bkrptcy. D.D.C.). Although Walker-Thomas is no longer in business, its sign still existed – rather the worse for wear – as late as March 13, 2009. See the photo at <dckaleidoscope.wordpress.com>.

During my academic career, I have taught Contracts on a regular basis, and also Sales. The *Walker-Thomas* decision has featured prominently in each of those courses. In addition, I have adapted the *Walker-Thomas* scenario into a negotiation and me-

diation exercise. In recent years, arbitration has become the most common occasion for courts to consider unconscionability claims. It would be impossible to teach an Arbitration course today without extensive consideration of unconscionability. Most recently, I reviewed and commented upon a draft of the arbitration and unconscionability article by my University of Houston Law Center colleague Aaron Bruhl that is discussed at length in Donald Philbin's article that precedes this one. I also am friendly with Charlie Knapp, whose most recent article is discussed next, and have taught from is Contracts casebook.

III. Professor Knapp on Arbitration and Unconscionability

Professor Charles L. Knapp has recently published an article that provides data on unconscionability as a defense to arbitration, while also responding critically to Professor Aaron Bruhl's article. S*ee, Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 San Diego L. Rev. 609 (2009). In the course of arguing that unconscionability decisions represent a systematic effort by state courts to defy the United States Supreme Court in its expansive support for arbitration, Professor Bruhl suggested an analogy to state opposition to school desegregation, an approach that offended Knapp (and others). Knapp responded that:

> invoking the history of the civil rights struggle on behalf of the *proponents* of mandatory arbitration is at least ill-advised, perhaps even – dare I say it? – unconscionable. ... If the current arbitration controversy is appropriately to be seen as analogous to the civil rights struggle of the 20th century, this could be because once again the ability of relatively powerless individuals to have unfettered access to their governmental institutions is being threatened by powerful interests who seek to deny that access, and who are supported by some of the very institutions by which those rights should be protected. But this time, instead of leading the fight to establish and protect individual rights, the Supreme Court has enlisted on the other side – on behalf of the forces of what in this context one might fairly call "oppression and unfair surprise." (627-28)

The quoted phrase comes from comment one to section 2-302, where the drafters of the Uniform Commercial Code explain unconscionability: "The principle is one of the prevention of oppression and unfair surprise, and not of disturbance of allocation of risks because of superior bargaining power."

Professor Knapp is clear about the message that is being sent by the state courts – they are sounding an alarm. He is also clear about the needed response, which is stated in the last sentence of the article. "Hopefully, someone or something with the power to do so will hear the sound of the whistle blowing and come to their aid."

IV. Justice Trieweiler: Arbitration And Federal Law

In *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), the Montana Supreme Court refused to order arbitration of the underlying dispute. This decision was reversed by the United States Supreme Court in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). While the *Casarotto* decisions did not address unconscionability, the concerns raised by the case are ones that courts have addressed via unconscionability.

In an approach that is unique in my experience of reading judicial decisions, Justice Trieweiler wrote two opinions in the Casarotto case. In addition to writing the opinion of the Court, Trieweiler penned a special concurring opinion. Major portions of the second opinion are set out below, with emphasis added to highlight the most biting parts of Justice Trieweiler's *crie de coeur*. Trieweiler's approach might be characterized as Populist, a point of view that currently is having a renaissance in America. Students of Texas history will recall that many Texans used to be proudly populist.

Terry N. Trieweiler is a distinguished Montana trail lawyer. He was elected President of the Montana Trial Lawyers Association in 1984, and President of the State Bar of Montana in 1986. Trieweiler served as a Justice on the Montana Supreme Court from 1991 to 2003. He now practices law in Whitefish, Montana.

TRIEWEILER, Justice, specially concurring.

The majority opinion sets forth principles of law agreeable to the majority of this Court in language appropriate for judicial precedent. I offer this special concurring opinion as my personal observation regarding many of the federal decisions which have been cited to us as authority.

To those federal judges who consider forced arbitration as the panacea for their □heavy case loads□ and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy, I would like to explain a few things.

In Montana, we are reasonably civilized and have a sophisticated system of justice which has evolved over time and which we continue to develop for the primary purpose of assuring fairness to those people who are subject to its authority.

Over the previous 100 years of our history as a state, our courts have developed rules of evidence for the purpose of assuring that disputes are resolved on the most reliable bases possible. Based on the presumption that all men and women are fallible and make mistakes, we have developed standards for appellate review which protect litigants from human error or the potential arbitrariness of any one individual. We believe in the rule of law so that people can plan their commercial and personal affairs. If our trial courts decline to follow those laws, our citizens are assured that this Court will enforce them.

We have rules for venue, and jurisdictional requirements based on the assumption that it is unfair to force people to travel long distances from their homes at great expense and inconvenience to prosecute or defend against lawsuits. **We believe that our courts should be accessible to all, regardless of their economic status, or their social importance, and therefore, provide courts at public expense and guarantee access to everyone.** While our system of justice and our rules are imperfect, they have as their ultimate purpose one overriding principle. **They are intended for the purpose of providing fairness to people, regardless of their wealth or political influence.**

We have contract laws and tort laws. We have laws to protect our citizens from bad faith, fraud, unfair business practices, and oppression by the many large national corporations who control many aspects of their lives but with whom they have no bargaining power.

What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the FAA, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it. The procedures we have established, and the laws we have enacted, are either inapplicable or unenforceable in arbitration.

I am particularly offended by the attitude of federal judges, typified by the remarks of Judge Selya in the First Circuit, which were articulated in *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989). Judge Selya considered increased resort to the courts "as the cause for tumefaction of already-swollen court calendars." He refers to arbitration as "a contractual device that relieves some of the organic pressure by operating as a shunt, allowing parties to resolve disputes outside of the legal system.? He states that the hope has long been that the Act could serve as a "therapy for the ailment of the crowded docket." He then bemoans that fact that, "as might be expected, there is a rub: the patient, and others in interest, often resist the treatment."

Judge Selya refers to the **preference in the various state jurisdictions to resolve disputes according to traditional notions of fairness**, and then suggests that the FAA was enacted to overcome this "anachronism." He considers it the role of federal courts to be on guard for "artifices in which the ancient suspicion of arbitration might reappear."

This type of arrogance not only reflects an intellectual detachment from reality, but a self-serving disregard for the purposes for which courts exist. The notion by federal judges, like Judge Selya, that

people like the Casarottos have knowingly and voluntarily bargained and agreed to resolve their contractual disputes or tort claims by arbitration, is naive at best, and self-serving and cynical at worst.

To me, the idea of a contract or agreement suggests mutuality. There is no mutuality in a franchise agreement, a securities brokerage agreement, or in any other of the agreements which typically impose arbitration as the means for resolving disputes. National franchisors, like the defendant in this case, and brokerage firms, who have been the defendants in many other arbitration cases, present form contracts to franchisees and consumers in which choice of law provisions and arbitration provisions are not negotiable, and the consequences of which are not explained. The provision is either accepted, or the business or investment opportunity is denied. Yet these provisions, which are not only approved of, but encouraged by people like Judge Selya, do, in effect, subvert our system of justice as we have come to know it. **If any foreign government tried to do the same, we would surely consider it a serious act of aggression.**

With all due respect, Judge Selya's opinion illustrates an all too frequent preoccupation on the part of federal judges with their own case load and **a total lack of consideration for the rights of individuals**. Nowhere in Judge Selya's lengthy opinion is there any consideration for the total lack of procedural safeguards inherent in the arbitration process. Nowhere in his opinion does he consider the financial hardship that contracts, like the one in this case, impose on people who simply cannot afford to enforce their rights by the process that has been forced upon them. Nowhere does Judge Selya acknowledge that the □patient□ (presumably courts like this one) who resists the □treatment□ (presumably the **imposition of arbitration in lieu of justice**) has a case load typically three times as great as Justice Selya's case load.

Furthermore, if the FAA is to be interpreted as broadly as some of the decisions from our federal courts would suggest, then it presents a serious issue regarding separation of powers. What these interpretations do, in effect, is **permit a few major corporations to draft contracts regarding their relationship with others that immunizes them from accountability under the laws of the states where they do business**, and by the courts in those states. With a legislative act, the Congress, according to some federal decisions, has written state and federal courts out of business as far as these corporations are concerned. They are not subject to California's labor laws or franchise laws, they are not subject to our contract laws or tort laws. They are, in effect, above the law.

These insidious erosions of state authority and the judicial process threaten to undermine the rule of law as we know it.

Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as "therapy for their crowded dockets." These decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up. **It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens. The last I checked, there were plenty of capable people willing to do so.**

V. Arbitration and Unconscionability: The Texas Supreme Court

In re Poly-America, L.P. 262 S.W.3d 337 (Tex. 2008) (6-1 decision).

Johnny Luna sued Poly-America for retaliatory discharge based on the filing of a Workers' Compensation claim. Poly-America sought arbitration, to which Luna replied that the arbitration clause in the employment contract was unconscionable, and therefore unenforceable. Before turning to the merits of this claim, the Court addressed a procedural matter. Under both the TAA and the FAA, trial court decisions that deny arbitration are subject to an immediate appeal, but not "compel-and-stay" orders (which compel arbitration and stay litigation). In Poly-America, however, the trial court ordered arbitra-

tion, so mandamus provided the only basis for appeal – and mandamus is rarely granted. The federal courts use a three-part test

1. no other adequate means to attain the desired relief;

2. showing that right to issuance of the writ is clear and indisputable; and

3. issuing court determines the writ is appropriate under the circumstances.

Cheney v. U.S. District Court, 542 U.S. 367, 380-81 (2004). The standard employed by the Texas Supreme Court is similar, requiring a two-part showing regarding the trial court action:

1. clear abuse of discretion by failing to correctly analyze or apply the law; and

2. benefits of mandamus outweigh detriments such that appellate remedy is inadequate.

In re Prudential Insurance Co. of America, 148 S.W.3d 124, 135-36 (Tex. 2004). Justice Brister dissented in *Poly-America* because he thought the Court should not have granted mandamus.

As with any infrequent outcome, it is reasonable to ask: why this time? The Supreme Court provided a specific answer to this question: the need to provide guidance to the lower courts (and arbitrators) about the evaluation of unconscionability claims. "If ... unconscionability determinations (were) the sole realm of arbitrators, development of the law as to this threshold issue would be substantially hindered if not precluded altogether." To ensure that lower courts and counsel do not take this decision as an invitation to file more mandamus claims, the Supreme Court noted:

> Because arbitration is intended to provide a lower-cost, expedited means to resolve disputes, mandamus proceedings will often, if not always, deprive the parties of an arbitration agreement's intended benefits when a compel-and-stay order is at issue; accordingly, courts should be hesitant to intervene,.

Now for the merits of the unconscionability claim. A wide array of the arbitration provisions were challenged, so the *Poly-America* decision provides a useful guide to the analysis of limitations on claimants' rights in arbitration, at least in the context of employment disputes. Each of the claims of unconscionability will be considered in turn.

Central to the unconscionability analysis was the fact that the employee was asserting a statutory claim. Contractual limitations on federal statutory claims are unenforceable when a party is forced to forgo the substantive rights afforded by the statute, as opposed to merely submitting to resolution in an arbitral, rather than a judicial, forum. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985). The same rule applies in Texas courts – with the exception that state laws which specifically disfavor arbitration are preempted by the FAA.

Among the goals of the Texas Workers' Compensation Act, Tex. Lab. Code §§ 451.001-.003, are to prohibit retaliatory sanctions against employees who file claims under the Act, and generally to prevent employers from imposing important substantive and procedural restrictions on the rights of employees. With these fundamental purposes in mind, the Court proceeded to consider the provisions of the contract that were arguably unconscionable. The analysis is the same whether the applicable provision is included in the arbitration clause or found elsewhere in the contract. Put another way, the separability doctrine does not preclude a court from evaluating the conscionability, *vel non*, of generally applicable (i.e., not limited to arbitration) substantive and procedural limitations that are found outside the arbitration section of a contract.

1. Limitation of Remedies. The remedies under the Texas Workers' Compensation Act include reasonable compensatory damages (which includes exemplary damages), and job reinstatement. The *Poly-American* contract expressly excluded reinstatement and recovery of punitive damage, so Luna's statutory remedies could not be vindicated, as required by *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 28 (1991). Accordingly, the Supreme Court determined that these remedy-stripping provisions were void because they "undermine the deter-

rent regime the Legislature specifically designed to protect Texas workers." Unconscionability offers a rationale for this result; an alternative view is that the Court relied on the power of the legislature to limit the scope of waivers of statutory rights.

2. Fee-Splitting Provision. The agreement provided that all costs associated with the arbitration proceeding would be shared equally between Luna and Poly-America, with the proviso that the responsibility of the employee was capped at his highest monthly salary in the twelve months prior to the rendering of the arbitration award. Luna's highest recent monthly income was $3,300. This approach benefits lower income employees because the lower the income, the less their maximum exposure for arbitration costs. This standard is uniform, easy to apply, and plausible in amount. Luna said he could not afford the $3,300, and could not find a contingent fee lawyer who would cover this cost. It is a fair point that $3,300 is a lot of money for someone who earns less than $40,000 – but initiating litigation would involve some costs as well.

The Court might simply have ruled that one month of salary is not unconscionable, while suggesting that larger amounts would be open to question. Instead, the Court took a more circuitous route to enforcing the contract provision – without any comment on higher employee arbitration charges. The Court began with sympathetic words for employees: "we agree that fee-splitting provisions that operate to prohibit an employee from fully and effectively vindicating statutory rights are not enforceable." The Court then proceeded to place the initial burden of proof on the party least able to meet that burden: the employee.

The arbitration provision referred to the highest monthly salary in the 12 months prior to the arbitration award, which cannot be determined prior to arbitration, and therefore the record lacked any "fact-based estimation of Luna's wages in the relevant time period and, thus no evidence of his likely share of arbitration costs." Since the future is unknowable, it appears that Texas employers can evade judicial review of even severely unconscionable fee-splitting (and other) provisions by the simple expedient of tying the obligation to a future event.

The Court also was concerned about its lack of knowledge: "at this stage of the proceedings, much of this evidence is necessarily speculative, and thus counsels against a court's *ex ante* interference with arbitration." Besides, the arbitrator is in a better position to determine "whether the cost provision in this case will hinder effective vindication of Luna's statutory rights and, if so, to modify the contract's terms accordingly." The Court notes that noting would prevent the arbitrator from adopting this course of action. However, it is equally true that nothing would prevent an arbitrator from *not* taking such action. Since the arbitrator could have an award vacated for failing to apply the contract provision, but not for applying the contract term, the incentive structure clearly favors the employer. Add the fact that employers are "repeat players" who often share information about arbitrators with other employers, and arbitrator behavior can be predicted with some confidence.

3. Discovery Limitations. The contract included five separate limitations on discovery, four of which facially applied equally to both parties. These provisions were drafted by Poly-America for its benefit. These limitations on discovery were:

a. Single set of no more than 25 interrogatories and 25 requests for production.

b. Only a single deposition, not to exceed six hours.

c. Prohibition on requests for admission;

d. No inquiry into Poly-America's finances; and

e. Confidentiality required of parties and counsel regarding all aspects of the arbitration.

Luna argued that this collection of discovery limitations was unconscionable because their collective effect was to effectively prevent proof of the retaliatory discharge claim. The court concurred that "limitations on discovery that unreasonably impede effective prosecution of such rights are unenforceable." The burden of proof is placed on the employee – a burden that effectively cannot be met prior to arbitration. This leaves the conscionability of discovery limitations to be determined by arbitra-

tors, because they are in a better position to assess these claims than appellate tribunals.

Luna obtained an expert witness who testified that in employment discharge cases the employer only needs to take a single deposition – that of the former employee – while rebutting a "job-related basis for dismissal" defense normally requires testimony from several witnesses. A "pattern or practice of discrimination" claim requires the employee to obtain testimony from several people, while the employer can just make use of its own employees. Thus, the discovery restrictions severely limit the worker's ability to prevail in arbitration, regardless of how strong a plaintiff's case is on the merits.

The Court agreed that the discovery limitations would be unenforceable if they served to "prevent effective presentation of Luna's claim," but nevertheless rejected the unconscionability claim because discovery needs are best assessed by the arbitrator. "At this point in the proceedings, we cannot conclude that the evidence presented to the trial court compelled a finding that the discovery limitations were *per se* unconscionable."

The Court appears to be applying to arbitration the rule for trial court proceedings that appeals of evidentiary matters must await completion of the trial. This is entirely a matter of timing. The grounds for vacating an arbitration award, however, are far narrower than those for trial court decisions. For the misconduct grounds, see TAA, § 171.088(a)(3). One ground is that arbitrator exceeding the authority granted by the arbitration agreement – which can be raised by an employer who loses in arbitration. The other three specified grounds relate to the manner in which the arbitrator conducts "the hearing." Even if the word "hearing" can be broadly defined to include discovery, severe harm will be difficult to establish because standard arbitration practice is to admit any and all evidence offered by the parties at the hearing – including evidence that would be inadmissible in a court.
In the United States, arbitration awards usually do no more than state the outcome; at most, they offer a perfunctory statement of the reasons for the conclusion. Arbitration proceedings are usually not transcribed – and a party that wants transcription must pay for it. In the absence of a transcript and a reasoned decision, it is nearly impossible for a party to get an arbitration award vacated on the basis of unconscionability

4. Prohibition on Inquiry into Good Cause. The Court determined that this provision was not unconscionable because it merely specified that this was an "at will" employment agreement, and therefore the arbitrator should not apply a "good cause" standard for termination. Luna's concern was that an arbitrator (or a court) would not permit an inquiry into the motives for termination, and the Supreme Court agreed that such an inquiry was proper. By so interpreting the contract, the Court easily found that this provision did not raise conscionability concerns.

5. One-Year Limitations Period. The Workers' Compensation Act specifies a two-year statute of limitations that was reduced to one year by the employment contract. However, Luna suffered no harm from this provision, as he filed suit within the one year period specified in the contract.

Typically, appellate wrongful dismissal cases provide an unequal battle between an employer with the finest legal representation that money can buy, and an employee who will be represented at all only if he is fortunate enough to find counsel who will handle the matter on a contingent fee basis. The contrast between the representation of Poly-American and Johnny Luna nicely illustrates this disparity. Poly-American was represented by two of the great law firms in America: Winstead and Susman Godfrey. Lead counsel from Winstead was Craig T. Enoch, a former Justice of the Texas Supreme Court.

Luna was represented by Scott Fiddler, a solo practitioner whose Houston office is not in downtown but in a much lower rent area some 20 miles away. He agreed to represent Mr. Luna as a matter of principle, despite the fact that the case was a clear money loser for him. Mr. Fiddler clearly did a good job of representing his client, but Mr. Luna essentially lost in the Texas Supreme Court. The only point on which Luna prevailed was that state law trumps inconsistent private contract remedies, a proposition that was conclusively demonstrated over 400 years ago. See William Shakespeare, *The Merchant of Venice (*1598). (Portia's method of avoiding en-

forcement of the pound of flesh remedial provision was more elegant than a mere resort to public policy, but that topic is beyond the scope of this article.)

The approach taken to burden of proof issues in employment disputes by the Texas Supreme Court (and most other states) fails to recognize the disparity in both knowledge and power of employers and employees. To place the burden on a recently fired employee with very limited resources and no experience in employment disputes is to put a thumb on the scale of justice, and to do so in favor of the powerful in their disputes with the weak. Add the ruling that the impact of cost and other contract provisions on an arbitration is too uncertain for a court to determine, and the Texas Supreme Court effectively precluded conscionability challenges to contract provisions created by employers.

What happened after the Texas Supreme Court rendered its verdict in the *Poly-America* case? As so often is the case after an important judicial decision, the parties settled their dispute.

VI. Arbitration and Unconscionability: Other State Supreme Courts

During 2008 and 2009, state supreme courts rendered eleven arbitration unconscionability, nine of them being strongly supportive of the unconscionablity claim. The Texas Supreme Court decision in *Poly-America*, discussed in the previous section, was somewhat receptive to the arbitration unconscionability claim. In the only decision that rejected the unconscionability claim, *State ex rel. Clites v. Clawges*, 685 S.E.2d 693 (W.Va. 2009), the employer had agreed to pay all arbitration costs beyond those that the employee would incur in a judicial proceeding, and situs for arbitration was the city of employment.

The inception of the unconscionability cases follows a standard pattern. The consumer, employee, patient, or other weaker party to a written contract that includes an arbitration provision files suit, whereupon the party that drafted the contract seeks arbitration (with the suit stayed). The trial court addresses this issue (and perhaps others), whereupon the dispute makes its way to the state supreme court. Except as otherwise noted, all the cases discussed below proceeded in this manner.

The state supreme court decisions cases are presented in alphabetical order, by state. Interestingly, none are from California, the state that has generated by far the most unconscionability decisions. The only duplication is two decisions by the New Mexico Supreme Court. The summaries that follow are concise and conclusory, and do not do justice to the underlying judicial work product. This approach reflects my perception that these decisions will be of only modest interest to many Alternative Resolutions readers.

1. *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091 (Alaska 2009) (5-0 decision)

Employee claimed that the arbitration agreement was unconscionable because it has a $50,000 appellate threshold, and required the employee to pay arbitration costs. The Alaska Supreme Court declared the appellate threshold to be unconscionable, and ordered arbitration – provided that the employer agreed to pay the costs of arbitration.

The employee's claims for unpaid overtime compensation and liquidated damages, as well as for recovery of costs and attorney's fees, arose under the Alaska Wage and Hour Act (AWHA). The Court stated that all of these rights are substantive, and therefore are not subject to advance waiver. Accordingly, the arbitrator was required to award any damages available under the AWHA.

2. Feeney v. Dell Inc., 908 N.E.2d 753 (Mass. 2009) (5-0 decision).

Consumers brought a class action against Dell alleging that collection of sales tax on optional service contracts violated the Massachusetts consumer protection statute. The trial court ordered arbitration, which order was not subject to appeal. The arbitrator denied class certification, and ruled in favor of Dell on the individual claims. The Massachusetts Supreme Judicial Court rejected this approach.

The first question for the court was what law to apply, because the contract contained a Texas choice of law provision and Texas law permits enforcement

of "no class arbitration" provisions. Resort to Texas law was rejected as contrary to public policy, whereupon Massachusetts law governed the dispute. The court then ruled that the class action limitation was contrary to public policy, while noting that other states have used unconscionability to reach the same result. Class relief was deemed to be of particular importance in consumer cases, where the aggregation of small claims offers the only realistic basis for obtaining relief. Furthermore, the class relief provision was not severable from the remainder of the arbitration provision.

3. Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock, 14 So.3d 695 (Miss. 2009) (7-0-1 decision).

This nursing home admission case was not the first faced by the Mississippi courts, and the Supreme Court was upset that these adhesive contracts have not been altered by nursing homes. "Despite this Court's admonitions to the drafters of such contracts to eliminate unconscionable clauses and the reluctance of courts to reform and rewrite contracts, a veritable deluge of contests over arbitration issues continues in the courts of our state."

Covenant Health conceded that several aspects of its dispute settlement provisions had been ruled unconscionable and unenforceable in prior cases. The Mississippi Supreme Court had offered a previous warning of its concerns:

> Neither is it wise to allow companies to draft arbitration clauses with unconscionable provisions and then let them try them out in the marketplace, secure in the knowledge that the courts will at worst sever the offending provisions after plaintiffs have been forced to jump through hoops in order to invalidate those agreements.

The court refused to reform the arbitration provisions, because to do so would "constitute an undeserved reward for unconscionable conduct. In so doing, the Mississippi Supreme Court disavowed two of its prior decisions that involved "nearly identical contracts."

4. *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Missouri 2009) (6-0-2 decision)

This case represents a common unconscionability scenario: the nursing home admission case where the contract is signed by the patient and/or a relative acting on behalf of the patient. The ensuing wrongful death claim is a derivative action under Texas law, but Missouri and many other states treat the claim as a new cause of action where none existed at common law rather than reviving an action that belonging to the decedent. As such, the arbitration agreement in the admission agreement is immaterial, and does not bind even the signatory relative(s).

The two concurring judges would have ruled that arbitration provisions in adhesive nursing home admission contracts were both substantively and procedurally unconscionable. "An individual seeking nursing home care would not reasonably expect that any claims arising out of the Nursing Home's care might have to be resolved through arbitration rather than litigation."

5. *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) (5-0 decision).

Fiser brought a class action against Dell, which responded by seeking arbitration. Dell's form contract banned class actions, and required the application of Texas law. As class action waivers are enforced in Texas, the first step for the New Mexico Supreme Court was to reject the application of the Texas approach as contrary to New Mexico public policy. The availability of a viable dispute resolution mechanism is a "fundamental New Mexico policy," and the availability of class actions is "critical to enforcement of consumer rights." Since the amount of actual damage (apart from costs and statutory damages) claimed by Fiser was under $20, some form of mass claim was essential to a viable action, whatever the forum. The same public policy analysis provided the basis for finding the class action waiver to be substantively unconscionable.

Finally, the New Mexico Supreme Court ruled that the entire arbitration provision failed because the class action provision could not reasonably be severed. The *Fiser* decision provides an example of a complete victory for a party challenging an arbitration provision on unconscionability grounds.

6. *Woodruff v. Bretz, Inc.*, 218 P.3d 486, (Mont. 2009) (4-2 decision)

The Montana Supreme Court, held that the arbitration clause within a contract of adhesion was unenforceable upon a showing by the purchaser of a mobile home that she did not reasonably expect that she waived the protections of a judicial tribunal. A contract of adhesion will not be enforced against the weaker party when it (1) is not within the reasonable expectations of said party or (2) is within the reasonable expectations of said party but, when considered in its context, is unconscionable or against public policy. The dissenting opinion would have treated the arbitration agreement as within the consumer's reasonable expectations.

7. *Cordova v. World Finance Corp. of NM*, 208 P.3d 901 (N.M. 2009) (5-0 decision)

form arbitration provision required arbitration of disputes between lender and borrower. The New Mexico Supreme Court held that the arbitration provision was substantively unconscionable, and that the remedy was to enforce the contract without the arbitration term. The court relied heavily on the just-discussed *Fiser* decision.

8. *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008).

Mortgagors filed a class action lawsuit alleging unlawful conduct in connection with credit life and disability insurance policies sold with their loans. The contract of adhesion that prohibited joint actions (class proceedings or joinder of claims) was held to be both substantively and procedurally unconscionable. Plaintiffs were represented by counsel hired on a contingency fee basis, and they demonstrated that representation could not have been financed except for a collective action.

9. *McKee v. AT & T Corp.*, 191 P.3d 845 (Wash. 2008) (en banc) (8-0-1).

Customers who resided outside of the city limits brought a class action against AT & T for imposing a city utility charge on them. The issues and analysis regarding arbitration paralleled that of the *Fiser* decision by the New Mexico Supreme Court, except that the choice-of law clause specified the application of New York rather than Texas law. The New York approach of enforcing class arbitration waivers was held to be contrary to the public policy of Washington.

ONE SHOT
OR
TWO SHOTS ARBITRATION

Mauro Rubino-Sammartano *

Mixed Feelings

Few legal creatures have given rise to opposite feelings as much as arbitration. The first reaction to arbitration by given State Courts was for a long time one of strong dislike, probably due to jealousy.

In *Mitsubishi* the United States Supreme Court admitted this without hesitation. *National Courts will need to shake off the old judicial hostility to arbitration …."*

The judges' reaction was joined by scholars who were against new solutions, and by practitioners who, surprisingly enough, even if rarely happy with court proceedings, were reluctant to try new solutions, of which they had little knowledge.

On the opposite side, one finds admirers of arbitration who look at it, as I have suggested in other writings, in a sort of blind admiration which reminds of those who adore a cruel goddess who can only be worshipped.

A Taboo

Blind admirers do not wish their "goddess" to be modified. The award should not be "touched" even by another arbitrator.

This attitude is not just an assumption. When the first ICSID awards were challenged, reviewed and set aside by an Ad Hoc Committee, the first instance arbitrators took it as an insult.

Even review of the award by state courts was strongly disliked. As an exception to this approach when Courts' review of awards was reduced Wallace a highly respected construction lawyer, strongly opposed it.

His view was opposed by Mayer, a similar highly respected French law professor of conflicts of law who argued that, if the merits of the award could be reviewed by state courts, then arbitration would become merely a prelude.

Mayer went further and stated that nothing prevented that the merits be reviewed by other arbitrators.

It is suggested that this view is shared by others.

In court proceedings, a final review of the merits by the appellate court is a well established right of the loser. If that right were abolished, one would rightly consider this as a denial of justice.

If arbitrators know that whatever mistake in the appreciation of the facts or in law they make, there is no remedy for it, and the only ground to set aside this award is a breach of the procedural law or rules, that will not help to ensure that they decide the merits properly.

The conclusion which is submitted is that the award cannot be a *taboo* and that, as the decision by state courts in the first instance, it may be reviewed on the merits – on request – by rehearing the case.

Search for Solutions to Obtain Judicial Review of the Award

The lack of a review of the merits of arbitration awards has induced a search for another solution.

The *obiter dictum* in Justice Reed's opinion in *Wilko* v. *Swan* as to the possibility that an award be reviewed for *manifest disregard* of the law has inspired many challenges of the awards. However only some circuits have allowed this challenge, and

in any event it was construed as limited to situations where the arbitrator knew what the law was and deliberately disregarded it.

This doctrine seems not to be flourishing.

Litigants have then turned to expansion of judicial review of the award by contract.

The argument in favour of contractual expansion is that the freedom of contract of the parties allows them to provide that the award may be reviewed on other grounds in addition to the statutory ones.

However even this attempt to obtain a review of the merits has not been successful. In *Hall Street Associates* v. *Mattel* the Federal Court has not allowed expanded judicial review.

Appellate Arbitral Proceedings Already in Place

Apart from generally limited powers of the first arbitrator to correct its award, the review of an award by other arbitrators is already available in ICSID arbitration, in some trade industry arbitrations, and in the rules of the European Court of Arbitration.

Review of the merits of arbitral award is allowed in several jurisdictions such as in England, France, Germany, Spain and Switzerland.

The European Court of Arbitration Appellate Arbitration Rules

The ICSID Arbitration Rules limit themselves to providing that the Ad Hoc Committee may set aside the first award, without authority to decide the case again. The parties have then to go through a third stage of arbitral proceedings, which does not seem to be a satisfactory solution.

The European Court of Arbitration appellate proceedings may be characterised as follows.

Appellate proceedings are subject to a leave to appeal. As a rule the leave is granted if the loser makes a deposit equal to the amount of the award.

In case of partial victory, the deposit is determined based on the loss and or the cost of the appellate arbitral proceedings.

This allows the appellate arbitral tribunal to order the monies which it should grant to the winner to be paid immediately to the winner, out of the compulsory deposit of money by the appellant, which achieves what has always been the *impossible dream* of arbitration, i.e. to be *self-executory*.

The Arbitral Tribunal

The appellate arbitral tribunal consists of three arbitrators, all appointed by the Court. The appellate tribunal must decide within one year.

Attacks Against the Appellate Award

The appellate award must be subject to review by state courts on procedural grounds. Domestic legislation must provide that, in case of review by an arbitral tribunal, the first instance award may not be attacked otherwise in the meantime.

Criticism of Review of the Merits by Appellate Arbitral Tribunal

Strong dislike of review of the merits by an appellate arbitral tribunal (which is referred to also as intra arbitral review) has been expressed on several grounds.

Duration

The intra arbitral review makes arbitral proceedings last longer.

If this very fact may not be denied, one must compare the duration of the two stages (one year for the first instance, one year for the second one) with the average duration of arbitral proceedings which according to many arbitration rules and practice, is two years.

Furthermore, the appellate proceedings may and should last no more than six months, if no oral evidence has to be reheard.

Costs

The appellate arbitral proceedings cause additional costs. If one compares the fees of three arbitrators, with the fees of a sole arbitrator in the first instance and of three in the appellate proceedings, only the fees of the fourth arbitrator are to be considered, but this is not an increase out of proportion to the advantage of a full review of the merits.

If the schedule of fees is not high, the increase will be frequently acceptable.

Quality of the Appellate Arbitrator

It has been wondered how can one ensure that the appellate arbitrators are better than the first ones.

First, this problem exists also in court proceedings.

Second, if the three arbitrators are all selected by the arbitral institution, this is already an advantage of appellate proceedings. For the rest, the institution has to make its appointment carefully taking into account that big names do not always mean top quality.

CPR

It is of comfort that the CPR (International Institute for Conflict Prevention and Resolution) is amending its rules to allow appellate arbitral proceedings and that a very learned scholar as Hans Smit has broken a lance (as one used to say in medieval tournaments of knights) in favour of appellate arbitral proceedings.

This issue was to object of previous comments by this writer.

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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.

It is that time of year again – time to get personal by asking several well-respected alternative resolution professional throughout the state to submit their own ethical dilemmas along with their solutions for your contemplation, and your comments. Enjoy.

Thomas J. Smith, (Houston): Here is my ethical puzzler, which I'm disguising somewhat since it actually happened during one of my mediations. The setup is as follows:

The mediator is conducting mediation between a brother and a sister, in a dispute out of the local Probate Court over their mother's estate. The size of the estate is approximately $2,000,000. The biggest single asset is a condominium unit in a local condominium project. Both the brother and the sister are from out of town, as are their lawyers. The brother and sister have agreed that the condominium will go to one or the other of them, and will not be divided. During the course of the day, in trying to divide up mother's Estate, the condominium unit has bounced back and forth between the brother's side and the sister's side.

The mediator, because he is local and active in the real estate community, knows that there has been extensive litigation involving the project and that the project has serious asbestos and foundation problems. The mediator knows that the project will probably be demolished and the value of mother's interest in the land will be minimal, maybe $25,000.

It's late in the day and these people are about to settle with the condominium project now firmly in the column of one of the siblings.

What, if anything, should the mediator say because of his particular knowledge about the value of this asset?

Answer: Aware that it was not his duty to impose his unique knowledge on the process, the mediator nevertheless continued to "gently" question the attorneys about the value of the condominium unit. Frankly, the mediator was concerned about the possibility of any agreement being set aside because of the error as to the unit's value. In addition, one of the lawyers may be opening himself up to a malpractice claim. Finally, late in the day, the lawyers asked the mediator to recommend a realtor who listed the property and discuss with them an appropriate "asking price." The mediator gave them the names of three realtors. After about five minutes, both lawyers came back and told the mediator that the realtor refused to list any of the units for sale because of litigation, asbestos and foundation problems. The lawyers then asked the mediator whether he was aware of this fact and the mediator assured them he was not. The mediator complimented the lawyers on their decision to make the phone call and the case was settled, with each sibling owning an undivided one-half interest in a largely worthless condominium unit.

John K. Boyce, III (San Antonio): Several years ago a leading national trial consulting firm retained

me, as one on a panel of three, to hear a mock arbitration of a complex financial case involving a large accounting firm. For an entire day we listed to openings, summaries of testimony, closings and so forth. The consultant's staff interviewed us in excruciating detail at every step of the way on our impressions, attitudes, convictions, biases, and so forth. They even observed our deliberations through a one way window.

At no time were names of the parties disclosed to us, to say nothing of which one was the consultant's client. I don't specifically recall we signed any sort of confidentiality agreement but we were told that everything was confidential. As the day wore on, it became obvious, as the documents and witness summaries were provided to us, both who the parties were and which one was the consultant's client. It couldn't be avoided. As I flew back to Texas, I assumed that was the end of that…or so I thought.

Several weeks later, an administrator, (the CPR Institute), asked to list me as a potential arbitrator on a panel involving the same accounting firm on completely unrelated facts. I disclosed my participation in the mock arbitration. I got an angry call from an executive of the consultant who reproached me for having violated the confidentiality "agreement." I pleaded my ethical obligations under the ABA-AAA Code of Ethics as well as the code for the CPR Institute. He said that I should have looked at this as a law school exercise: "you wouldn't have disclosed this if this were moot court?" I demurred, explaining that any doubts had to be resolved in favor of disclosure.

DID I HANDLE THAT SITUATION PROPERLY? WOULD THE ANSWER BE DIFFERENT IF I HAD SIGNED A CONFIDENTIALITY AGREEMENT?

Answer: Soon after the call from the executive, I discussed the issue with staff counsel for the administrator who deals with conflict issues. She confirmed I had absolutely made the correct decision to disclose. (P.S. The consultant hasn't asked me to hear any more mock arbitrations.)

Susan Perin, (Houston): You are the arbitrator in an employment case and during Plaintiff's testimony at the arbitration hearing, he mentions that he worked for the Defendant's company for the last three years and worked for his previous employer for ten years. Five years ago, you were the arbitrator in a case in which his previous employer was a party so you know Defendant was employed there at the time of your arbitration. Do you disclose this prior to the arbitration, during the hearing, and if so what procedure do you follow? Does the procedure differ if there is an administrative agency involved in the current arbitration?

1. Do You Disclose? If you are asking yourself whether you should disclose, you have already answered the question. If it is important enough to consider, then disclose. There is no clear rule about time, for instance, do you disclose that you had a mediation ten years ago with one for the witnesses in an arbitration or that you went to high school forty years ago with one of the attorneys. The best practice is to disclose regardless of time. One of the grounds for a party to assert in attempting to vacate an arbitration award is "evident partiality by an arbitrator." You have a duty to disclose all matters which might create a reasonable impression that you are partial to one side and the duty begins from your appointment as arbitrator and continues throughout the case.

2. When, How, and What Do You Disclose? Your disclosure should be made as soon as you learn about the issue so if it is during the hearing, announce a break and make the disclosure in writing. Include as many details as possible regarding the who, what, when, where and why. However, since arbitration is a confidential proceeding, you should frame your disclosure accordingly. For instance, you should not discuss the identity of the other parties to the arbitration or the results.

3. What Procedure Do You Use to Disclose? Disclosure is easy when an administrative agency is involved. As soon as the need to disclose arises and you announce a break, call the case manager with the administrative agency, advise that you have a disclosure and email your disclosure to the case manager. The case manager will call the parties at the arbitration, read the disclosure to the parties,

give them an opportunity to discuss it, and ask if either party has an objection to your continued service. If there is no objection, the case manager will confirm your appointment in writing. If there is an objection, the administrative agency will rule on the objection and decide if you are disqualified as arbitrator.

Disclosures are more problematic in cases without an administrative agency. If a party has an objection, there is no one to rule on the objection except you. If you believe you can be impartial, do you overrule the objection and proceed or do you withdraw as arbitrator in every case there is an objection? Will one side who thinks the hearing is not going well, object for the sole purpose of trying to end the hearing and get another arbitrator?

During the initial conference call in your case, discuss the issue of disclosure and a procedure to address objections if you have to make a disclosure during the case. One procedure you can use is have the parties agree on a person to appoint at the beginning of the case to rule on any objections and remove yourself completely from the decision making about objections. If you decide not to use this procedure, when you get an objection to your continued service after a disclosure, you have to judge whether you should remain as arbitrator from the outside looking in, putting aside your knee jerk reaction that you can of course be impartial. After all, your decision in the arbitration will be binding upon the parties and they deserve and are entitled to an arbitrator without any real or perceived partiality.

Earl Hale, (Dallas): Under what circumstances, if any, may a mediator properly charge one side of a mediation a different fee from the other side? I'm not sure every mediator agrees on the answer to this question. Here is my analysis.

I charge a flat fee for a half-day or full-day mediation. My mediation information sheet invites a party to discuss with me any particular need a party may have about my fee. When one side approaches me asking for special consideration regarding *that* party's fee obligation, I explore the need expressed and make a decisions regarding whether the request is well-founded. *If* I reduce the fee for one side, I disclose the reduction to the other side. If the second side wants the same reduction, I give it to them. If the second side objects to my reducing the fee to the other side, I insist on my position. If my insistence is unacceptable, and the second side doesn't agree either to pay the full fee or take the reduction, I offer to withdraw.

A mediator must charge a reasonable fee. I believe this means a reasonable fee to each party. I wouldn't feel comfortable charging a different fee to one party unless there was disclosure of the reduced fee and an offer to take the reduced fee from both parties. It is not up to one of the parties to dictate what I think is reasonable; an objecting party can either take the reduced fee, pay the original fee, or get a new mediator.

Comment: Anyone who has been involved in any form of alternative dispute resolution for any period of time knows that each and every case has the potential for ethical issues to raise their ugly heads. Our contributors have demonstrated, however, that along with knowledge of the ethical standards imposed on each discipline comes the potential for an ethical solution to these ethical puzzlers.

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
2009: A Year of ADR Ideas

By Kay Elkins Elliot*

In keeping with the beginning of a new year, and borrowing from the New York Times magazine December 13, 2009 issue, this first column in 2010 will be my highly arbitrary selection of the best ideas that first came to my attention in 2009. Using the metaphor of the magazine, like a magpie building its nest, I have hunted eclectically but, hopefully with discrimination, for ideas that not only intrigue me but seem to have some future usefulness for conflict resolution specialists. These noteworthy ideas, like string and fabric scraps of creativity, when woven together, just might create a new cognitive nest for the future of ADR, a place in which your curious minds can incubate, hatch, and take flight. The Times covered the entire alphabet – don't panic, I won't do that! Presented here are the top 5 ideas from me to you. If you will write to me at <k4mede8@swbell.net> with your top tips, I will include them in future columns — and provide you with attribution!

1. Peter Reilly published a provocative paper, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 Ohio State J. Disp. Resol. 200 (2009), in which he argued that we can never effectively prevent lying in negotiation through ethics rules or legislation, so we need to combat it in practice. After reviewing the many law review articles written on ethical issues surrounding lying, he proposes techniques for minimizing exploitation. Acknowledging that information exchange (or the lack thereof) is the lifeblood of any negotiation, he believes "behaviors influencing whether, when, and how information is obtained and/or exchanged are extremely important in the process of defending oneself (or one's client) against lying and deception."

Basic assumptions of the article include the normalcy of lying, and that lying is more often unconscious than analytical. Lawyers lie, even mediators. See Robert Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 Mediation Q. 3, 17 (1995). He describes "noble lies" told by mediators as ways to "shift and reconfigure the thinking of disputing parties, especially in the midst of conflict and confusion, and to foster and further their cooperation, tolerance and survival."

Departing from the belief in trial as the best process for obtaining the truth, Donald Langevoort has observed that: "Instructions to tell the whole truth notwithstanding, it is generally not considered perjury in a trial or deposition for a witness to give a technically true but evasive answer." *Half - Truths: Protecting Mistaken Inferences by Investors and Others*, 52 Stan. L. Rev. 87, 89 (1999). Twenty years ago, Larry Lempert surveyed fifteen lawyers regarding four negotiation situations presenting various ethical challenges. In 2008 , Reilly surveyed thirty different lawyers on the same situations. Let's look at two of those situations:

Situation 1: Your clients, the defendants, have authorized you to pay $750,000 to settle the case. In settlement negotiations after you make an offer of $650,000, the plaintiff's attorney asks, "Are you authorized to settle for $750,000? Can you say, "No I'm not"?

1988: Yes: Seven (47%); No Six (40%);

Qualified: Two (13%).

2008: Yes: Eight (27%); No: Eighteen (60%);

Qualified: Four (13%).

Situation 2: You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing?

1988:Yes: One (7%);

No: Fourteen (93%);

Qualified: None (0%).

2008:Yes: Six (20%);

No: Twenty (67%);

Qualified: Four (13%).

What would you say?

Reilly found that strong differences of opinion still exist and in situation 2 there is less consensus today than in 1988. He also believes that, because settlement negotiations are private, enforcement of even the clearest ethical rules and standards will always be difficult if not impossible. Some of his specific defense tactics follow:

a. Use the Internet to do background research on the other parties to the negotiation or mediation. Look at websites established by private companies, government entities, and various nonprofit groups for criminal, financial, and other background checks. (Law student in my negotiation class use information about their opponent law student, such as conflict style, prior profession, age, culture, gender, class standing and prior negotiation behavior in the class, as part of their external preparation.) People develop a "reputation" based on previous negotiation behavior so talk with their colleagues and previous counterparts.

b. When possible, be proactive in selecting potential negotiation counterparts by using referrals, recommendations, or outside introductions. Indicate that you prefer a long-term relationship with this counterpart. Research suggests that even the possibility of this type of relationship "raises people's ethical standards and lowers exploitative conduct such as lying".

c. Create a relaxed atmosphere in which empathy, sincerity, impartiality and civility will flourish. This is the special talent of good mediators! Such an environment does not guarantee candor, but it does encourage the responder to share increased amounts of information. Specific tactics include the following: exclamations of encouragement; requests for clarification or elaboration of information; using playful questions such as "May I play the devil's advocate?" Research also shows that people are "more inclined to lie by omission" than to create elaborate fabrications, according to Reilly, so asking for more data may motivate them to back away from a previous statement. In a recent mediation, I used these tactics to get some trust and information from a participant who was reputedly manipulative, deceptive and narcissistic. I obtained a wealth of information that was useful in getting the case resolved.

d. Ask the counterpart to justify her position by demanding she reference an objective standard. People are less inclined to lie when objective standards are constantly sought by the other party. The caveat is that no standard is the whole story. Use many of the tactics listed to come up with the most favorable deal.

e. Ask the magic question near the end: "Is there something important known to you, but not to me, that needs to be revealed at this point?" The answer should be written down and, if necessary, used later to support a claim of fraudulent nondisclosure.

Informed with the above assumptions and tactics, advocates and mediators will be able to minimize the risk of exploitation and, in Reilly's words, "understand, interact with, and protect themselves from others who would try to gain unfair advantage through lies and deception." Offense may well be the best defense.

2. A smarter future for conflict resolvers may emerge from **neuroimaging**. A recent article on how the brain functions, *What Does a Smart Brain Look Like?*, Scientific Am. Mind 26 (Nov/Dec 2009), shows that not all brains work in the same way, even though the IQ scores of those people may be identical or quite similar. Brain structure and metabolic efficiency may underlie individual differ-

ences in intelligence, and imaging research is pinpointing which regions are key players. Smart brains work in many different ways, and men and women with the same IQ show different underlying brain architectures. In children, girls show increasingly well defined paths between two disparate brain regions - in their right hemisphere- as they age. Boys, however, show this developmental trend in their left hemisphere. Every individual uses some combination of intelligence-related brain areas in a unique way.

In 2007, two scientific researchers reviewed 37 neuroimaging studies on intelligence. They found 14 separate areas, from structural and functional brain studies, distributed throughout the brain, refuting the earlier belief that the frontal lobes are primarily responsible for intelligence. Areas of both the parietal (known to be involved in sensory integration) and frontal lobes form a network of intelligence, called the P-FIT, parieto-frontal integration theory of intelligence. The identification of the P-FIT network provides a new definition of general intelligence based on the brain's measurable characteristics.

In March, 2009, psychologist Roberto Colom and colleagues of the Autonomous University of Madrid reported on the relation between gray matter volume and different intelligence factors in 100 young adults. One of the findings of this study is that a positive correlation exists between scores on general intelligence (the *g* factor) and the amount of gray matter in certain areas. Another is that there is a positive correlation between scores on the *g* factor and the amount of gray matter in several brain areas predicted by the P-FIT. Also, gray matter volume in certain brain areas is related to the other specific intelligence factors.

The ideas coming from these studies are startling: neuroimaging could one day become a supplement or even a substitute for traditional intelligence testing and, in education, a learning program could be tailored for an individual student, at any age, based on that student's brain characteristics. Vocational success might also be predicted - patterns of gray matter across some areas would predict who would be the best mediators or negotiators. But as we know the brain is plastic! A brain profile using these sophisticated technologies would be merely a guide - not a prescription. Could we not even imagine that the brains of people with low empathy or poor EQ could be "taught" these skills and would therefore be better able to prevent and resolve their own or other people's conflicts?

3. Lewis Kaplow et. al., *Analytical Methods for Lawyers* (2003) focuses on the skills of problem solving and analysis, based on the mastery of language and techniques derived from disciplines such as economics, accounting, finance, and statistics, notably absent from many law school classrooms. (This book has been used for years at Harvard Law School, but only came to my attention in 2009, when it was first used at Texas Wesleyan School of Law.) The first chapter introduces students to **decision analysis**, a set of techniques traditionally taught to first-year MBA students. Because practicing lawyers increasingly make use of decision trees to review litigation strategies and settlement offers, mediators and negotiators must understand these decision tools. The concept of a BATNA becomes much clearer when a settlement offer is compared to various branches on a decision tree. Concepts such as probability, expected values, sensitivity analysis, risk aversion, and the value of obtaining additional information are explained in the book and can be practiced with the many examples and exercises. Although most lawyers still do not give legal advice based on these tools, because the explicit study of decision analysis is totally absent from the traditional law school curriculum, computer programs and this text equip any negotiator, *any mediator*, to do so.

Texas mediation training programs do not include decision analysis, as far as I know. I will be incorporating it into my mediation courses this year for the first time. It is already a feature of my negotiation course and may well be taught by my colleagues. This year I taught a course in Negotiation Skills with Don Philbin at the office of the Attorney General of Texas. Don, a brilliant attorney and mediator from San Antonio, has written extensively on this subject and has created a computer program to enable negotiators and mediators to create decision trees in cases to facilitate settlement. You can learn more from his website at <www.adrtoolbox.com>.

4. There are wars that cannot be won with guns or

bombs. This is not news. Martin Luther King and Ghandi and Mandela have all said this, in one way or another. Kenneth Cloke wants to drop mediators, not bombs, to achieve peace. Greg Mortenson, and David Oliver Relin have written a book, *Three Cups of Tea*, to describe their answer.

Recently I became aware of a remarkable movement that is combating terrorism in Pakistan and Afghanistan. The governments of Pakistan and Afghanistan are failing their students on a massive scale, particularly the girls. In an age when politicians have little but rhetoric to offer for the seemingly irreconcilable mess of warfare and cultural conflicts awash in the Middle East and Islamic territories in Central Asia, Mortenson's solution is stunningly simple: make peace by building **schools** for girls. When girls are educated, teen pregnancy rates go down, family income goes up, and the entire community benefits. The latest book, *Stones Into Schools*, takes us further down the journey Mortenson is making. A few women have already graduated and returned to their remote villages to provide medical services. Journalists report that the accomplishments of this American say more about our country's commitment to the region, to the people who live there, than the more expensive and elaborate aid programs we have established for the region.

As of 2009 Mortenson had established 81 schools, including 15 new schools in Afghanistan and additional schools in regions of Azad Kashmir, Pakistan that were devastated by an earthquake in 2005. Three Cups of Tea is a freshman, honors or campus-wide required reading selection in over 80 universities and hundreds of schools. It is required reading for senior U.S. military commanders, Pentagon officers in counter-insurgency training, and Special Forces deploying to Afghanistan. The book has been published in over thirty-one countries. For more information see <www.threecupsoftea.com>. The answer to war may very well be a dedication to achieving universal literacy and education for all children, especially for girls. Since more than 145 million of the world's children are deprived of education due to poverty, exploitation, slavery, gender discrimination, religious extremism and corrupt governments, this one book can be a catalyst to bring the gift of literacy to each of those children says the author.

In our own country where free education for all children is the law, we can support this movement and give thanks that hundreds of years ago our founding fathers realized the necessity for schools. The CAI movement also serves as another example of the power of a single person and a single idea to promote peace.

5. During 2009, I made 4 presentations to mediation groups on the subject of creating and finalizing Mediated Settlement Agreements. Most lawyers, as you know, expect the mediator to do this task, and most mediators do so. However *State Bar of Texas Ethics Opinion No. 583* (2008) suggests (requires?) a different conclusion – is clear and uncompromising language:

"Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and **other necessary documents to effect an agreement resulting from the mediation.** Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce."

Why this needed to be explicitly prohibited is not clear, but we all know that before there was an ADR statute in Texas there were dispute resolution centers, and the custom in those centers has been that the mediator prepares the final mediated settlement agreement. Every dispute center has forms for that purpose. Mediation trainers typically teach (though I do not) how the mediator should prepare the mediation agreement. Many reasons are given for this practice: the parties are illiterate or at least incapable of doing this task; the mediator can do it better than anyone else because only the mediator knows exactly what has been agreed; the lawyers expect the mediator to do so as part of the mediation fee and because that is the way it has always been done.

None of these reasons trump the ethics opinion, There is another problem. In at least one Texas case, the Unauthorized Practice of Law Committee sued a mediator for doing exactly this. That case did not go to trial on the merits, but the mediator incurred hefty legal expenses defending the suit. Despite the absence of numerous law suits against mediators, there

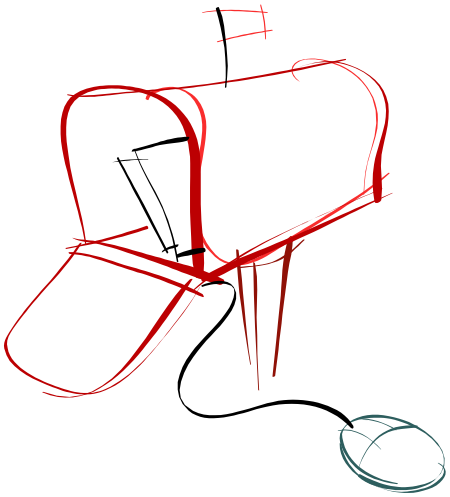
is danger and this is unethical. We need a professional protocol that does not subject mediators to liability, adverse scrutiny, or any other negative consequence.

This topic will be debated further at the 2010 TAM conference. Whether you are an attorney or a non attorney, once you step into the mediator's chair, you are not practicing law but when you prepare a binding contract, you are practicing law. There are no perfect answers to this question, as the lively discussion at the 2009 TMCA symposium illustrated!

Have a very happy 2010 and send in your ideas for best practices for mediators and mediation advocates!

With more than 1200 hours of training, Kay Elkins Elliott brings to the classroom a wide range of knowledge in mediation and conflict resolution. An attorney and mediator for more than 30 years, she has litigated, arbitrated, or mediated over 1,800 cases to resolution.

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. She is a biographee in Who's Who in American Law, Who's Who in the World, a charter member of the Institute for Responsible Dispute Resolution, and the director of the Granbury Dispute Resolution Center.



ADR ON THE WEB

By Mary Thompson*

Making Mediation Your Day Job

http://makingmediationyourdayjob.com/

US News and World Report included "Mediator" on its list of Best Careers of 2009, promoting the image of mediation as an accessible, rewarding profession. But Tammy Lenski seems to know what we know: making a living as a mediator is not so easy – it requires hard work, patience, marketing, and a long-term perspective on practice development.

Lenski is a mediator and conflict consultant based in New Hampshire. Her blog, Making Mediation Your Day Job, provides advice and resources for building a career in mediation. Blogs come and go in the meditation field, but hers has been around since 2005 and it is regularly cited as the go-to resource on practice development.

Most of the relevant content on this site is found in The Blog/Archives section. Here one can find detailed information about, and links to, practical topics such as invoicing, business cards, web images, using social media, and scheduling software. There is also a list of general topics, which include the following:

ADR Practice Management. Posts include: Discussion of voicemail, case management software and the paperless office.

Mastering Mediation. Posts include: Views on certification, David Armano's theory of Agile Creativity, and the four elements of "integrated practice."

Mediation Career. Posts include: An introductory Q &A with Lenski for those interested in the field; a discussion of competitiveness among mediators and its impact on the profession; and an announcement of the new Career Center sponsored by the Association for Conflict Resolution.

CafeMediate Podcast. This is one of the most recent and interesting features on the site. This audio feature is designed to bring together experienced practitioners to reflect upon issues of practice. In this initial 48 minutes podcast, bloggers Diane Levin (The Mediation Channel) and Amanda Bucklow (The Mediation Times) join Lenski to discuss billing, fees and pricing. Their conversation covers:

- The tendency of both mediators and institutions to undervalue mediation
- The problems with hourly rates
- How to get the client to shift their focus from price to value
- Hidden costs and "scope creep" in dispute resolution jobs
- "Value-based billing" as an alternative to fees
- Listen to this podcast on the blog or at <http://tammylenski.libsyn.com/>

Making Mediation Your Day Job offers some practical ideas for those considering the mediation profession or starting out in the field. For experienced mediators, this blog offers an updated look at some of the latest tools, standards and considerations in sustaining and renewing a mediation practice.

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

SUBMISSION DATES FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

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

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CALENDAR OF EVENTS

40-Hour Basic Mediation Training* Dallas * January 7, 8, 14, 15, 16, 2010 * *Dispute Mediation Services* * Contact Cris Gilbert at *DMS* at 214-754-0022 or visit www.dms-adr.org

**Commercial Arbitration Training (Domestic & * ** Houston * January 13-16, 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 * Houston * January 22-24 cont. January 29-31, 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 * January 27, 28, 29 cont. February 2, 3, 2010 * *Corder/Thompson* * For more information visit www.corderthompson.com or call 512.458.4427

Basic Professional Mediator Training * Houston *February 11-13 cont. February 18-20, 2010 * *Worklife Institute* * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

Group Facilitation Skills * Austin * February 16-18, 2010 * *Corder/Thompson* * For more information visit www.corderthompson.com or call 512.458.4427

40-Hour Basic Mediation Training* Dallas * February, 18, 19, 25, 26 27, 2010 * *Dispute Mediation Services* * Contact Cris Gilbert at DMS at 214-754-0022 or visit www.dms-adr.org

Texas Association of Mediators Annual Conference * Austin * February 26-27, 2010 * *Texas Association of Mediators* * For more information visit http://www.txmediator.org/conference/ or contact contact Toylaine Spencer via email at tspencer@birchbecker.com and/or Tracy Watson at TWatsonADR@aol.com

40-Hour Basic Mediation Training * South Padre Island, TX* March 1-5, 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: drc@co.lubbock.tx.us

Advanced Family Mediation Training * Houston * March 10-13, 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.

40-Hour Basic Mediation Training * Houston * March 15-19, 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 * Ruidoso, NM* March 22-27, 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: drc@co.lubbock.tx.us

40-Hour Basic Mediation Training * Austin * March 24, 25, 26 cont. March 30, 31, 2010 * *Corder/Thompson* * For more information visit www.corderthompson.com or call 512.458.4427

Advanced Mediation Training* Denton * April 15-18, 2010 * *Texas Woman's University* * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

Basic Professional Mediator Training * Houston *April 29-30, May 1 cont. May 6-8, 2010 * *Worklife Institute* * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

OUT OF STATE

3rd International Conference on Conflict Resolution— Education Building Infrastructures for Change: Innovation in Conflict Resolution Education (CRE) and Justice Initiatives * *CRE Education* * Cleveland, Ohio * March 26-27, 2020 (Pre-Conference March 24-25, 2010) For more information visit www.CREducation.org

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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:
State Bar of Texas
ADR Section
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 2009 to June 2010. 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.

Name_____

Public Member_____ **Attorney**_____

Bar Card Number_____

Address_____

City_____ **State**_____ **Zip**_____

Business Telephone_____ **Fax**_____ **Cell**_____

E-Mail Address:_____

2008-2009 Section Committee Choice_____

ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines or 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. Previously published articles may be submitted, provided 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

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http://www.texasadr.org