ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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

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Susan Schultz

Happy and Healthy New Year to All! Personally, when it comes to resolutions, I make them on an as-needed basis throughout the year; why limit that humbling experience to one day! Nevertheless, I am also keenly aware of the seemingly instinctive need to welcome a new calendar year by taking stock and looking ahead. From the perspective of the ADR Section, what are we building on and what are we anticipating?

- **Committees** – the Section continues to refine its committee organization and encourages all members to become active in a committee.
  - The formation of the International DR Committee is raising awareness of the Section in foreign associations and providing us with the opportunity to evaluate our membership classifications. What does it mean to be an international member of the ADR Section?
  - With the upcoming legislative session, we are reviving the Outreach and Legislative Committee to encourage information exchange on bills that are of interest to the ADR community. How can we best get the information out? Can we use a member-only section on our website to send out updates?
- **Upcoming CLE Program:** the planning, the coordinating, the cajoling is pretty much over. If you have not registered yet, there's still time! I will see you on January 28, 2011 in Houston at the Crowne Plaza Hotel where we will spend the day with **Douglas E. Noll** talking about:

  Tactical Interventions in Mediation: Preventing Bad Settlement Decisions and Impasse Minute By Minute
- **ADR Section Name Change** – The more things change the more they stay the same. I reported to you that we received comments and concerns from other sections and individuals concerning our proposed name change to "Dispute Resolution." To allow

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us more time to hear these concerns and see if we can address them, the Council decided to table our request for the name change for the time being.

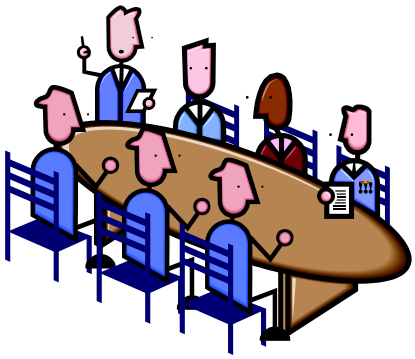
- **Presentation of CCA Arbitration Protocols** - the College of Commercial Arbitrators recently published *Protocols for Expeditious, Cost-Effective Commercial Arbitration.* These protocols developed out of a national summit convened in October 2009 that brought together the four major stakeholders in arbitration: in-house and outside counsel, arbitration provider organizations and arbitrators. Come for a morning presentation that will include an overview and panel discussions on **March 18, 2011 at the UT School of Law** in Austin.

- **Mediation on TV** – We often talk about doing a better job of explaining what we do in our different roles during an ADR process: mediators, arbitrators, representatives in mediation or arbitration. We sometimes also struggle with spreading the word about these processes. So, we have newsletters, blogs, conferences, and workshops …, but a TV series? Well, now we do! Thursday, January 20 at 9pm is the series premiere of **Fairly Legal** on the USA network. It will be very interesting to see how the show portrays mediation. It should provide great fodder for discussion!

- **ACR Draft Model Standards for Mediator Certification** – As the practice of mediation continues to mature, corresponding discussions are ongoing about what it means for mediation to be a "profession." What standards, responsibilities, obligations should be relevant to the practice of mediation? Various organizations, including the ADR Section, have ethical guidelines for mediators. In Texas, we also have the Texas Mediator Credentialing Association, a voluntary association that offers mediator credentialing designations to qualified mediators. We do not, as far as I know, have a mediator certification program in Texas. The Association of Conflict Resolution (ACR) recognizes that nationwide there are both credentialing and certification programs for mediators and believes that the time is ripe to look at these programs.

  In particular, ACR is spearheading an effort designed to elevate and inform the discussion regarding certification of mediators. As part of that effort, ACR has established a certification committee that has put forth a discussion draft of Model Standards for Mediation Certification Programs. At a minimum, we need to be aware of such initiatives. We can also use such documents to inform our own discussions concerning evaluations of and expectations for the practice of mediation in Texas.

Reminder: our next council meeting is scheduled on January 29, 2010 in Houston, the day following our CLE program. If you have suggestions for initiatives or projects that you would like the Council to consider, please email me or any other council member.



An Update
Uniform Collaborative Law Act
Uniform Collaborative Law Rules

Texas Uniform Collaborative Law Act

By Lawrence Maxwell*

The Uniform Law Commission (ULC) provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. Now in its one hundred and nineteenth year, the Commission has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable.

The Uniform Commercial Code, the signature product of the ULC working in conjunction with the American Law Institute, has recently been revised, updated and enacted in whole or in part in all jurisdictions. The Uniform Commercial Code is a prime example of how the work of the ULC has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

In 2006, with the use of the collaborative dispute resolution process ("Collaborative Law") becoming widespread throughout the country, the ULC identified a need for uniformity in the practice of collaborative law and established a Drafting Committee to codify the process in a uniform act.

The UCLA Drafting Committee included eight Commissioners, four ABA Advisors and several Observers. The State of Texas was represented in the drafting process. Peter Munson of Sherman, a voting Commissioner, served as Chair of the Drafting Committee; Harry Tindall of Houston, co-author of Sampson & Tindall's *Texas Family Code Annotated,* a voting Commissioner served as Chair of the Executive Committee; Norma Trusch of Houston, past president of the International Academy of Collaborative Professionals, served as an Observer on behalf of the IACP, and Lawrence R. Maxwell, Jr. of Dallas, a co-founder and president of the Global Collaborative Law Council, and co-chair of the ABA Section of Dispute Collaborative Law Committee, served as the Section's Advisor.

The stated purpose of the Uniform Collaborative Law Act is "to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties."

Overview of Collaborative Law

Collaborative law is a part of the movement towards the delivery of "unbundled" legal representation, as it separates by agreement representation in settlement-oriented processes from representation in adjudicatory processes. The organized bar has recognized unbundled legal services like collaborative law as useful options available to clients. The ABA Model Rules of Professional Conduct, Rule 1.2 (c) states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

As is the case with mediation, collaborative law has its roots in family law, and is expanding into many areas of civil law. The International Academy of Collaborative Professionals was established in 1999, as an organization of family collaborative lawyers. The organization has recently established a Civil Collaborative Committee and membership is expanding with members practicing in various areas of civil law. In 2004, the Texas Collaborative Law

Council (now Global Collaborative Law Council) was established to promote the use of the collaborative process for resolving disputes in all areas of civil law. In 2007, the ABA Section of Dispute Resolution established a Collaborative Law Committee to educate ABA members and the public as to the benefits of the collaborative process.

The collaborative process is a structured, voluntary, non-adversarial approach to resolving disputes wherein parties seek to negotiate a resolution of their matter without having a ruling imposed upon them by a court, arbitrator or other adjudicatory body.

The process is based upon cooperation between the parties, teamwork, full disclosure, honesty and integrity, respect and civility, and parity of costs. The collaborative process enables individuals, families, businesses and organizations to maintain control over their relationships with others by empowering them with the ability to resolve their disputes peaceably.

The Need for Uniformity from State to State

The collaborative process is initiated by the parties signing a "Participation Agreement." Research shows that most participation agreements will contain the core elements of the process: a stay of court proceedings while parties are in the collaborative process, confidentiality, a commitment to voluntary disclosure of relevant information and a requirement that attorneys withdraw in the event the process terminates without resolution. However, these fundamental provisions and other terms of the agreement vary widely from state to state.

Three states presently have collaborative law statutes in the area of family law--Texas, North Carolina and California. The State of Utah recently enacted a uniform collaborative law act applicable to all areas of law. State and local court rules governing the collaborative process are in place in a number of jurisdictions. Collaborative law participation agreements are crossing jurisdictional boundaries and there is no uniformity in the existing statues or in court rules.

As more and more individuals and businesses in different states utilize the collaborative law process, it will become increasingly unclear which state law applies to transactions. Further, without uniformity in the collaborative process, parties in the process cannot be assured of the enforceability of participation agreements, the evidentiary privilege against disclosure, the stay of court proceedings or the confidentiality of communications in the process.

Chronological Development of the Uniform Collaborative Law Act

Beginning in February 2007, the UCLA Drafting Committee conducted a series of conferences to codify collaborative law procedures into a uniform act. In July 2009, at its Annual Meeting in Santa Fe, New Mexico the ULC in a unanimous vote approved the Uniform Collaborative Law Act. The Collaborative Law Committee of the ABA Section of Dispute Resolution drafted an Executive Summary of the UCLA, which includes a section-by-section analysis of the Act.

The ULC customarily submits its uniform acts to the ABA for approval. In February 2010, the UCLA was before House of Delegates at the Mid-Year Meeting in Orlando, Florida. The Act was supported by number of ABA entities: including the Sections of Dispute Resolution, Individual Rights & Responsibilities, Family Law Section, Standing Committee on Delivery of Legal Services and many members of the House of Delegates.

However, in view of certain objections voiced by the ABA Judicial Division and the Litigation, Trial and Insurance Practice and Young Lawyers Sections, due primarily to lack of knowledge about the process and a stream of misinformation, the Uniform Law Commission, in consultation with proponents of the UCLA, decided to withdraw the Act from consideration by the ABA at that time.

In March 2010, in an effort to meet the objections that had been raised at the ABA Meeting in Orlando, the UCLA Drafting Committee reconvened and made certain amendments to the Act:

(1) The Committee drafted court rules that

mirror the statute, thereby giving states the explicit discretion to adopt the Act, or adopt court rules, or any combination thereof.

(2) The amended Act and Rules provide states with the option of limiting their application to matters arising under the family laws of a state, or imposing no limitation on matters that can be submitted to the collaborative process.

(3) The amendments provide that courts have discretion to approve stays of pending proceedings. The original Act creates an automatic stay when a court is notified that parties are in the collaborative process.

The amendments and court rules have been approved by the ULC. The Uniform Collaborative Law Act and Uniform Collaborative Law Rules (UCLA/UCLR) with amended Prefatory Note and Comments dated October 12, 2010, are available for introduction in state legislatures. The Collaborative Law Committee of the ABA Section of Dispute Resolution has prepared an Updated Executive Summary of the UCLA/UCLR, highlighting the revisions to the original 2009 UCLA.

States now have several options: to enact the original 2009 UCLA, or the amended 2010 UCLA, or the UCLR, or any combination thereof. The ULC has prepared a Legislative Activity Map tracking introductions and enactments in the various states. The map will be updated.

In February 2011, at the ABA Mid-Year Meeting in Atlanta, the UCLA/Rules will be submitted to the ABA House of Delegates for approval. Although ABA approval of products of the ULC is not required for introduction or enactment by states, the many supporters of the UCLA/UCLR are optimistic that the amendments to the 2009 UCLA and addition of court rules will satisfy objections voiced in Orlando, and the UCLA/UCLR will be endorsed by the ABA.

History of Collaborative Law Legislation in Texas

Texas was the first state to enact collaborative law provisions and such provisions have been a part of the Texas Family Code since 2001. Bills were introduced in the 2005 and 2007 Sessions of the Texas Legislature to include similar provisions in the Texas Civil Practice & Remedies Code, thereby expanding the statutory benefits of the collaborative process to all areas of civil law.

In the 2005 Session, the bill as unanimously passed in the Senate but died in conference committee with the House. In the 2007 Session, the collaborative law bill did not make it out of the Senate Jurisprudence Committee. In each Legislative Session the bills had broad based support and the only opposition to the bills came from two trial lawyer organizations, the Texas Trial Lawyers Association and the Texas Association of Defense Counsel. Since the UCLA was in the works, collaborative law legislation was not introduced in the 2009 Session.

Texas Uniform Collaborative Law Act in the 2011 Legislative Session

The growing number of Texas lawyers engaged in the collaborative practice are hoping that "the third time will be a charm." A lot has been learned in their legislative efforts over the past five years, and collaborative law practitioners welcome the opportunity to better educate the client community and legal profession as to the benefits of the process. Family and civil collaborative law practitioners have come together to draft legislation that will benefit all clients participating in the collaborative process and the entire legal profession.

The Texas version of the UCLA, which will be introduced in the 2011 Session of the Texas Legislature is essentially the original 2009 UCLA with certain modifications to the privilege and confidentiality provisions. The Texas UCLA incorporates the existing collaborative law provisions in the Texas Family Code, making them applicable to proceedings filed under Titles 1 or 5 of the Texas Family Code.

Final Thought: ***The Promise of Collaborative Law***

The collaborative dispute resolution process is well established in family law and the use of the process is rapidly expanding in other areas of law. The process can be tailored to the needs of the parties in the context of the unique characteristics of their dispute. Enactment of the Uniform Collaborative Law Act will encourage and support the continued growth of a voluntary, non-adversarial process for managing conflict and resolving disputes outside of the courthouse.

In our fast moving, complex and demanding world, a process which captures the exponential power of cooperation may be the business imperative of our time. Resolving disputes in litigation is simply too costly, too painful, too ineffective and too destructive. It just makes sense to focus on the interests and goals of the parties, have a full and complete disclosure of relevant information, avoid costly discovery fights and communicate face to face rather than through intermediaries.

The collaborative process encourages early and peaceable settlement of disputes, allows parties to maintain ongoing relationships, and to avoid the significant expense that will be incurred in any adversarial process. The process increases client satisfaction and promotes a more civil society. Collaborative Law has a bright future.

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REASSESSING STATE ARBITRATION LEGISLATION:

THE REVISED UNIFORM ARBITRATION ACT

By Stephen K. Huber*

I. INTRODUCTION

The National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Revised Uniform Arbitration Act (RUAA) at its annual meeting in August, 2000. NCCUSL has subsequently adopted the name Uniform Law Commission (ULC), but the web site address continues to be <www.nccusl.org> and a Google search using "Uniform Law Commission" as a search term produces NCCUSL responses. Use of <ULC> as a search term produces many references to the Universal Life Church, and some for a variety of other organizations, but the Uniform Law Commission is not among them. Accordingly, the more descriptive term NCCUSL will be used throughout this article.

The passing of a decade provides an opportune time to evaluate the status of state arbitration legislation since the RUAA was offered for adoption by the states. The RUAA was designed to replace the Uniform Arbitration Act (UAA), promulgated by the NCCUSL in 1955. The Reporter for the RUAA was Timothy J. Heinsz, then the Dean of the University of Missouri School of Law. Dean Heinsz wrote several articles about the RUAA process, the longest and most informative of which is: *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1. As time passes, the RUAA is being referred to as the UAA with increasing frequency. However, retention of the designations UAA and RUAA will facilitate comparison of the two model acts. (An alternative approach is to identify the model acts as the 1955 UAA and the 2000 UAA.) Texas enacted the UAA in 1965, with a few amendments of limited importance. So far, however, the RUAA has not been seriously considered by the Texas legislature.

The primary purpose of this article is to examine what has happened to the RUAA in the states over the last decade, rather than to detail the differences between the UAA and the RUAA. However, Part II provides a concise history of the NCCUSL's endeavors in the area of uniform arbitration acts, and Part III summarizes the differences between the 1955 and 2000 model acts. Part IV considers legislative activity (and inactivity) in state legislatures, while Part IV examines the nature and extent of non-uniform provisions adopted in the jurisdictions that have enacted the RUAA. Finally, Part VI considers whether the RUAA has been a success in terms of uniformity in state arbitration law.

My conclusion can be stated succinctly: while the RUAA is a better model for state arbitration legislation than the UAA, the end result has been to decrease uniformity because the RUAA has been enacted in only 14 states plus the District of Columbia. The UAA wrote on a clean slate in 1955, so enactment in far fewer than all American jurisdictions produced increased uniformity in state arbitration law.

The UAA proved to be an extraordinary success. As the drafters of the RUAA pointed out, in the Prefatory Note to the RUAA:

> been one of the most successful Acts of the NCCUSL. Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation. A primary purpose of the 1955 Act was to insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law. That goal has been accomplished. Today arbitration is a primary mechanism favored by courts and parties to resolve disputes in many areas of the law.

In view of this impressive success, it is reasonable to ask whether, and why, an updated statute was thought to be necessary, or even advantageous, because a reduction in uniformity for at least a period of years was readily foreseeable.

This article accepts the premise that the enactment of materially identical state arbitration statutes is a good idea, and that uniform state arbitration is a sound approach to achieving national uniformity. These two propositions are at the core of the uniform laws movement. If the reader thinks that this approach is self-evidently sensible, consider the following thought experiment: imagine how you might explain to a reasonable English legislator or attorney that there should be different arbitration (or negotiable instruments) statutes for London, Leeds, and Leicester.

There is a powerful argument that the most sensible road to uniform arbitration (and negotiable instruments) law is through federal legislation, but that remains a topic for another day. It should be noted that even if such a federal statute was enacted, state law would still govern procedure in state courts – the locus of the vast majority of arbitration cases. Congress could expand federal court jurisdiction to encompass all arbitration matters that meet the (minimal) test of affecting interstate commerce, but that possibility is entirely theoretical. And, so long as arbitration law is subject to state contract law, state law will continue to have a major impact on arbitration.

II. A CONCISE HISTORY OF THE UNIFORM ARBITRATION ACTS

The RUAA is the third model arbitration act promulgated by the NCCUSL. While the UAA and the RUAA are well known, NCCUSL also adopted a little remembered 1926 model arbitration act. The three versions of the UAA must be considered in sequence, because the 1955 UAA and the RUAA each was impacted by aspects of its predecessor.

A. The 1926 Uniform Arbitration Act

After the enactment of the FAA in 1925, the NCCUSL responded by promptly promulgating a model state arbitration act. The original UAA was a failure, primarily because it did not provide for the enforcement of pre-dispute arbitration agreements. The NCCUSL soon recognized that this was a fatal flaw, and withdrew the initial model arbitration act. The original UAA was enacted by only six states: Nevada, North Carolina, Pennsylvania, Utah, Wisconsin, and Wyoming. The state law predecessors of the 1955 UAA are discussed in Maynard Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act,* 10 VAND. L. REV. 685 (1957).

B. The 1955 Uniform Arbitration Act (UAA)

After the failure of the 1926 version of the UAA, the NCCUSL waited almost 30 years before making another attempt at adopting a uniform arbitration law – and innovation was not on the agenda. The 1955 iteration of the UAA closely tracked the FAA, resulting in a uniform act that was both short and general. This approach had the salutary effect of permitting a standard response to questions about UAA provisions and omissions: because the UAA tracks the FAA, an important answer when the goal is statutory uniformity.

The 1955 UAA, whatever its omissions or arguable imperfections, achieved the goal of national uniformity of state legislation. The standard claim of the NCCUSL is that the UAA was enacted in thirty-five states, with an additional fourteen states adopting substantially similar legislation. (The District of Columbia and Puerto Rico also enacted the UAA.)

The missing state is New York, and the pioneering 1920 New York Arbitration Act was the basis for the FAA, which in turn was the precursor of the UAA.

Uniformity has two aspects: widespread adoption of *some* legislation on a topic, and enactment of the *same* legislation. Both are required for uniformity, and by these standards the 1955 UAA was a magnificent success. There was one major category of non-uniform provisions in the versions of the UAA adopted by the states – limitations on the types of disputes that were subject to arbitration. However, the impact of these provisions was more apparent than real, because they were preempted by the FAA. The leading Supreme Court decision is Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). An exception is Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989). Naturally there were additional variations in some jurisdictions, and in several instances common law arbitration was not abolished. Still, the UAA came as close to achieving uniformity of state law as one could expect to find on a topic of importance and general interest.

C. The 2000 Uniform Arbitration Act (RUAA)

The NCCUSL appointed a Study Committee in 1995 to consider a revision of the UAA, and then a Drafting Committee in 1996 to produce a revised model act. The 1955 UAA achieved the goal of national enforcement of arbitration agreements, and making state law hostility largely (but not entirely) a historical artifact. However, more remained to be done; as the drafters observed (in the Prefatory Note to the RUAA):

> Today arbitration is a primary mechanism favored by courts and parties to resolve disputes in many areas of the law. This growth in arbitration caused the Conference to appoint a Drafting Committee to consider revising the Act in light of the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments of the law in this area.

The first draft of the RUAA was produced in 1997, and the final version was promulgated by the NCCUSL at its annual meeting in August, 2000.

The FAA is a bare bones statute, and so is the UAA. Effectively, American arbitration legislation had not been given a systematic review and analysis since 1925. That some organization should undertake a comprehensive rethink of arbitration law and practice struck your author as a sound idea in 1995, and still does so today. Of course, arbitration issues have been systematically considered by arbitration organizations that provide standard rules, notably the AAA. Many leading arbitration practitioners, organizations, and academics provided input to the RUAA process. The ABA appointed advisors who were active participants in the drafting process, and the RUAA was approved by the ABA House of Delegates in 2001.

The immediate impact of the RUAA, unlike the UAA, was to reduce uniformity in state arbitration law. The UAA increased uniformity as soon as it was enacted by a few states, as there was no uniform act for states to adopt previously. By contrast, the success of the UAA meant that as states began to enact the RUAA the level of uniformity decreased.

III. SUBSTANTIVE CONTENT OF RUAA

This part provides an overview of the major new provisions found in the RUAA. The RUAA supplemented the UAA, rather than making significant alterations in the former act, so the focus here is on the additional topics that were addressed by the RUAA. The drafters sought to avoid adopting provisions that would be subject to FAA preemption. After canvassing the topics newly covered by the RUAA, the discussion turns to important arbitration topics that were not addressed by the RUAA.

A. RUAA Provisions Not Found in the UAA

The goals of the RUAA are to provide for an arbitration process that is efficient, expeditious, and economical; fair to the parties; and final – i.e., very limited judicial review of arbitral awards. The major innovation in the RUAA is to adopt provisions relating to a number of issues not previously covered in arbitration statutes, including the following (the RUAA section is provided in parenthesis):

1. Notice regarding arbitration proceedings (2).

2. Prohibition or limitation of waiver of RUAA provisions (4).

3. Arbitrability: forum (court or arbitrator), and criteria (6).

4. Provisional remedies, including proper forum (8).

5. Process for initiating arbitration proceeding (9).

6. Consolidation of arbitration proceedings (10).

7. Arbitrator disclosures regarding potential conflicts (12).

8. Immunity for arbitrators and arbitral organizations (14).

9. Competency of arbitrators to testify regarding proceedings (14).

10. Powers of arbitrator to manage arbitration process (15):

    a. prehearing conferences;
    b. discovery and depositions;
    c. protective orders; and
    d. motions for summary disposition.

11. Subpoena of witnesses outside state of arbitration (17).

12. Judicial enforcement of pre-award arbitral rulings (18).

13. Arbitration remedies and related awards (21):

    a. punitive and other exemplary relief;
    b. attorneys' fees (by statute or contract);
    c. fees and expenses of arbitrators; and
    D. "just and appropriate" relief.

14. Vacatur of award for arbitrator nondisclosure (23, 12).

The RUAA provides for electronic communications in all aspects of the arbitration process. As has become standard practice in model acts at both the NCCUSL and the ALI, references to writings are replaced by the term "record," which covers both retrievable electronic information and written materials. Provision also is made for electronic signatures. The only required writing relates to the initiation of an arbitration proceeding. Absent contrary provision in the arbitration agreement, Section 9(a) requires notification by certified or registered mail, with a return receipt, or service as provided by state law for initiation of a civil action. The purpose of this requirement is to ensure that actual notice is received in a manner that truly draws this important matter to the attention of the recipient.

In addition to the proposed statutory language, each section of the RUAA is accompanied by extensive commentary – like the Uniform Commercial Code and the ALI Restatements, but unlike the UAA and FAA. Legislative history might be regarded as a substitute for explanatory comments, but state laws often have only a limited legislative record – particularly on recondite topics like the details of arbitration proceedings, and judicial supervision thereof.

B. Important Topics Not Addressed by the RUAA

The RUAA purposely does not address several of the most difficult and divisive arbitration topics. Pointing this out, and enumerating the omitted topics, is *not* a criticism of the NCCUSL or the drafters of the RUAA. Achieving uniform state legislation is

the *raison d'etre* of the RUAA, and taking a position on divisive topics is a sure way to undermine that objective. There is a place for bold legislative recommendations, supported by incisive analysis — but that place is in legal publications not in proposed uniform laws.

1. Opt-in Review of Arbitration Awards

The drafters of the RUAA extensively examined the question of whether to authorize parties to contract for expanded judicial review of arbitration awards. This issue brings into conflict the foundational principles of party autonomy and limited judicial review of arbitration awards. Thus it is not surprising that no consensus was reached regarding opt-in review. In the end, the RUAA is silent regarding opt-in review (but the topic is discussed at length in the comments to section 23). The drafters focused on review for errors of law. The options are not limited to any form of review that parties agree upon, or no opt-in review at all. As Judge Kozinski, who voted in favor of opt-in review observed: "I would call the case differently if the agreement provided that [the court] would review the award by flipping a coin or studying the entrails of dead fowl*." LaPine Technology Corp. v. Kyocera Corp*., 130 F.3d 884, 891 (9th Cir. 1997) (concurring opinion). This topic is discussed further in the section on non-uniform state amendments to the RUAA.

An important reason for opposing an opt-in review provision was a (misplaced) fear of federal preemption. This fear is clearly unwarranted, because the FAA provisions on review of arbitral awards apply only in federal courts. Any doubt about this matter was erased by *Hall Street Assoc., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 584–85 (2009). where the Supreme Court rejected opt-in review under the FAA, but expressly noted that a different result might obtain under state law.

The drafters of the RUAA also declined to address the validity of contractual provisions for arbitral appellate review. *See, e.g.*, William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531 (2000); Christian A. Garza and Christopher D. Kratovil, *Contracting for Appellate Review of Arbitration Awards*, 19-2 APP. ADVOC. 17 (Winter 2007). However, it appears clear that courts will uphold such provisions, and that they will decline to hear immediate appeals from an initial arbitration award, where the underlying agreement calls for arbitral appellate review. Where a party fails to file an appeal within the specified time period the initial award will become final, and not subject to any judicial review.

2. Non-Statutory Grounds for Vacatur of Arbitration Awards

There are two commonly referenced grounds for vacating an arbitration award that are not set forth in the FAA or state statutes: manifest disregard of the law and public policy. A few courts have recognized other formulations, but all of these could be encompassed by already recognized standards. (For that matter, all the cases that vacate arbitration awards on non-statutory grounds arguable could be decided the same way on the basis of the statutory grounds found in the FAA, UAA, and RUAA, but that is a topic for another day.) The drafters gave careful consideration to including provisions on manifest disregard and public policy, but in the end they decided to take no action on the matter. The consequence was to retain the *status quo* in each state that adopted the RUAA, thereby permitting the enactment of a uniform statute while allowing each state to retain its approach to non-statutory grounds for review of arbitral awards. Any other solution might have constituted an impediment to uniform state enactments of the RUAA.

a. Manifest Disregard of Law.

Although aware that manifest disregard was widely recognized as a ground for vacating an arbitral award in many (but not all) federal and state courts, the RUAA drafters decided to exclude this topic from the RUAA. The drafters were concerned, incorrectly, that serious federal preemption problems could arise if the Supreme Court rejected or radically limited manifest disregard as a ground for vacatur. The drafters also were concerned about the difficulty of formulating a bright line test for the doctrine, but the law is full of reasonableness and other open textures standards. Finally, the explicit

recognition of manifest disregard would encourage appeals and thus undermine finality.

The decision to exclude manifest disregard from the RUAA was sufficiently controversial that a motion to include this doctrine was made at the 2000 meeting of the NCCUSL that gave final approved the RUAA. This motion was defeated handily, but it indicates the depth of differences on this topic.

The status of manifest disregard as a basis for vacating an award has been in doubt in the federal courts since the Supreme Court, in dicta, questioned the viability of manifest disregard. Hall Street Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584–85 (2009). Many states courts will follow the lead of the U.S. Supreme Court, although they are not required to do so. The end result, in states that have enacted the RUAA, is that the status of manifest disregard can remain unchanged. In some states, the courts may decide that the adoption of new arbitration legislation without inclusion of manifest disregard, suggests that the state legislature did not desire to recognize this defense to confirmation of arbitration awards.

b. Public Policy.

As used here, "public policy" has a narrow meaning: an independent basis for vacating an arbitration award that does not fit within other established categories. At the federal level, the scope of the public policy defense is extremely limited, and is applied mainly in the context of arbitral orders to reinstate terminated employees in labor-management cases. Only a public policy that is explicit, well-defined, and dominant qualifies as a basis for vacating an arbitration award. In *Eastern Coal*, the Supreme Court upheld an arbitrator's award under this standard. Justice Scalia would have gone further and limited the scope of public policy to arbitral orders that violated positive law, an approach that reflects actual practice. Scalia articulated this conclusion with his usual panache:

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

Eastern Assoc. Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 68 (2000). Resort to public policy as a state law ground for restricting arbitration awards can be considerably broader than under federal law, because centrally important areas of state law are not governed by statute – e.g., contracts and torts. Family law is an area where arbitration awards are subject to judicial review under the public policy standard where an award has an impact on children. *See, e.g.*, Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984); Miller v. Miller, 620 A.2d 1161 (Pa. Super. Ct. 1993); Rakoszynski v. Rakoszynski, 663 N.Y.S.2d 957 (App. Div. 1997). Public policy has also provided the basis for striking down punitive damages awards by arbitrators. *Garrity v. Stuart*, 353 N.E.2d 793 (N.Y. 1976). The RUAA rejected this approach, as have most courts that have considered the matter. Other examples are distant forum provisions in arbitration agreements, Keystone, Inc. v. Triad Systems, Inc., 971 P.2d 1240 (Mont. 1998), and covenants not to compete in retirement agreements between lawyers and law firms. *Weiss v. Carpenter, Bennett & Morrisey*, 672 A.2d 1132 (N.J. 1995) (6-0 decision). *But see*, *Hackett v. Millbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95 (N.Y. 1995). The silence of the RUAA regarding public policy as a ground for vacating an arbitration award means that each state can shape this doctrine as it deems appropriate.

3. Adhesion Contracts and Consumer Issues

The most significant change in arbitration law and practice in the last two decades has been the widespread use of arbitration for consumer and employment disputes, including statutory claims. The Supreme Court first ruled that some statutory securities claims were subject to arbitration in 1987, expanding that ruling to all such claims in 1989. Only in 1991 did the Supreme Court rules that the claims of individual employees were subject to the same principle. Most consumer and employee disputes include federal and state statutory claims, so it made little sense for merchants and employers to make

use of pre-dispute arbitration provisions. Resort to this approach would only have produced dual-track dispute resolution, with some claims going to courts and others to arbitration. Once the Supreme Court required arbitration of statutory claims the use of mandatory pre-dispute arbitration provisions in consumer and employment contracts of adhesion quickly become standard practice.

The RUAA drafters recognized the issue, and expressed their concern about adhesive arbitration provisions, but they declined to make specific provision for consumer arbitration – largely because there was little if anything effective that could be achieved through a state statute. The Supreme Court's expansive reading of the preemptive effect of the FAA meant that model legislation that limited the enforcement of pre-dispute arbitration provisions would be an empty exercise at best. Recommending provisions to state legislatures that were unenforceable would provide a reason for states not to adopt the RUAA. Besides, many states already had enacted restrictive arbitration legislation, and these states would be unlikely to enact a different set of (unenforceable) restrictions on consumer arbitration.

Increased disclosure requirements regarding arbitration might be beneficial for consumers and employees, but this approach is also precluded by Supreme Court decisions. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). Unconscionability doctrine provides a legal basis for limiting the enforcement of arbitration agreements, in whole or in part, but this is a matter of state contract law. In short, the RUAA drafters rightly recognized that there was little that a state statute could usefully do regarding the enforcement of adhesive consumer and employment arbitration provisions. Only federal legislation can alter the applicable law, and this topic has been under active consideration by Congress for several years.

IV. RUAA IN THE STATES

A. Enactments of the RUAA: 2001 to 2010

Fourteen states plus the District of Columbia have enacted the RUAA during the last decade (see listing at end of article). As might be expected with a carefully crafted model law, there was an initial flurry of adoptions by states. The RUAA was enacted by twelve states during the initial five years (2001 to 2005). In the ensuing four years, only the District of Columbia (in 2008) adopted the RUAA, After completing the initial research for this article, your author expected to write an epitaph for RUAA because the enactment process had largely run its course. However, 2010 saw two enactments – by Arizona and Minnesota – plus legislative consideration in Alabama, Massachusetts, and Pennsylavania. Still, far more adoptions are required before one can begin to speak of the RUAA as a success.

B. Possibilities For Enactment of the RUAA in the Largest States

The approach of counting the number of enacting jurisdictions greatly exaggerates the impact of the RUAA, because it has not been adopted in any of the eight largest American states. Taken together, these states encompass roughly one-half of the U.S. population. No matter how many smaller states adopt the RUAA, the absence of the most populous states means that the goal of uniformity will not have been achieved. The four largest states, which together include about one-third of Americans, merit brief individual consideration.

1. California. Soon after the RUAA was promulgated the California Law Revision Commission (CLRC) commissioned a study of the Act. The resulting report recommended enactment of the RUAA, albeit with modifications that reflected existing California law. However, the CRLC voted not to recommend enactment of the RUAA, due in part to opposition from consumer groups. This inaction amounted to a death knell for the RUAA, which has never received legislative consideration in California.

2. Texas. In Texas, the RUAA has not even been seriously discussed in the dispute resolution community, let alone introduced in the state legislature. The Dispute Resolution section of the State Bar of Texas has evinced no interest in replacing the UAA (enacted in 1965), although the Section has supported other legislation initiatives. Attempts by your author to discuss the RUAA with leaders of the

Dispute Resolution section just drew blank stares. There is active opposition to the Uniform Mediation Act, because Texas enacted a comprehensive ADR Act years ago, and that factor might engender opposition to the RUAA if it were ever to be considered seriously. In addition, there would be vigorous opposition from the Consumer and Employment Sections of the State Bar, and perhaps other sections as well.

3. New York. Several New York state and city bar groups in have taken formal action in support of a modified version of the RUAA. The RUAA was last introduced in the New York legislature in 2008. The 2008 proposal differed from the RUAA in several respects, the most important of which was an express provision for expanded judicial review – an approach adopted as a non-uniform provision in the New Jersey RUAA..

The absence of provisions in the RUAA that limited consumer and employment arbitration resulted in opposition by consumer interests. Existing New York law severely restricts consumer arbitration, although these limitations are preempted by the FAA. Still, the RUAA approach would be a change from present state legislation. The RUAA arbitral immunity provision, which protects both arbitrators and providers of arbitration services, also drew some opposition, notwithstanding that such immunity is firmly entrenched by judicial decisions throughout the nation. *See generally* Stephen K. Huber & Maureen A. Weston, ARBITRATION: CASES AND MATERIALS 462–78 (LexisNexis 2011). Trial lawyers generally dislike arbitration, and therefore are willing to make common cause with other opponents of the RUAA. History also may be a factor in limiting support for the RUAA. The New York arbitration statute was enacted in 1920, served as a model for the 1925 FAA, and preceded the UAA by decades. (One might respond that being a leader requires keeping up with the times, but many will not be persuaded by that argument.)

4. Florida. The Florida legislature has not considered the RUAA, although final adoption of the Act took place at the NCCUSL's 2000 Annual Meeting in St. Augustine, Florida. Support for possible enactment of the RUAA, if it exists, remains well hidden.

5. Other Large States. The fifth through eighth most populous states – Illinois, Pennsylvania, Ohio, and Michigan – similarly have not enacted the RUAA. Among these states, only the Pennsylvania legislature even considered the RUAA in 2010.

C. Opposition to the RUAA

There appear to by systematic factors that explain the limited legislative success of the RUAA. This discussion is necessarily speculative because the reasons for inaction are far more difficult to determine than those for action. Simple inertia, or *status quo* bias, often is an important factor – or, to put the matter colloquially: "if it ain't broke, don't fix it." The RUAA does not address any burning problems that require a legislative solution, so there is little incentive for legislators to expend political capital to promote the RUAA.

In the view of most arbitration practitioners and organizations, there simply is no need for new state legislation. The UAA long ago filled the need for legislation that enforced predispute arbitration agreements. The strongly pro-arbitration decisions of the U.S. Supreme Court have provided all the support required for the expansion of arbitration, while the scope of state arbitration law is limited due to FAA preemption. The sort of useful supplemental provisions found in the RUAA can be supplied through private contracts, usually through incorporation by reference of the rules of provider organizations such as the AAA.

The expansion of arbitration over the last twenty years to include consumer and employment disputes has also generated opposition. No longer is arbitration a technical matter that is of interest only to banking and commerce. Now, any state arbitration legislation will face active opposition from consumer and employment interests. Trial lawyers also tend to be opposed to arbitration. From the perspective of banking and commercial interests, attempts by the drafters of the RUAA to provide a balanced process is a negative factor. Examples include provisions for punitive and other damages, as well as express provision for discovery. Even if the consequence would not be active opposition to enactment

of the RUAA, business interests have not undertaken affirmative action in support of the RUAA.

Enactment of the RUAA in a state is unlikely without the active and united support of the state bar association. While there are limitations on the legislative activity of unified (*i.e.*, public) state bars, they commonly have a legislative agenda – and a process for creating the agenda that includes input from its sections. Sections are unlikely to support possible legislation that divides their members; the litigation section and employment/labor sections provides the leading examples. Alternative Dispute Resolution sections tend to be dominated by mediators, who believe in real consent to dispute resolution processes, and others who are concerned about the expansion of arbitration. Every consumer law section in America would actively oppose state bar support for the RUAA. In short, the usual support of state bar associations for NCCUSL uniform acts is unlikely to be forthcoming for the RUAA in most states.

Even if the RUAA were to be enacted in most of the more populous states, these statutes are likely to include significant non-uniform provisions. Both the version of the RUAA introduced in New York, and that recommended to the California Law Revision Commission, included such provisions. It is not a coincidence that the RUAA has been enacted predominantly in smaller jurisdictions. These are the very ones that are less likely to have the resources for legislative drafting services, or extensive hearings. These legislative bodies also are more likely to have part time legislators, who typically receive lower compensation than their larger state compatriots. These factors increase the need for legislators to rely on prepackaged legislation, such as that offered by NCCUSL. Even if the RUAA is eventually enacted in the larger states, the number of non-uniform provisions is likely to increase substantially. And, because the RUAA differs in material respects from the FAA, proponents cannot argue – as they could on behalf of the UAA – that the proposed legislation is simply doing at the state level what the FAA already does at the federal level.

V. NON-UNIFORM PROVISIONS IN STATES THAT ENACTED THE RUAA

This section provides an overview of the non-uniform provisions that have been adopted in the states that have enacted the RUAA. The very fact that a non-uniform amendment to the RUAA survived the legislative process makes it worthy of note. In addition, similar proposals are likely to be raised in other states that consider adoption of the RUAA. At the same time, these deviations from the uniform text need to be taken in context; overall, the changes are neither numerous, nor of central importance. The states that have enacted the RUAA have largely followed the NCCUSL text. The non-uniform changes are organized into categories, the better to demonstrate that only a few areas of arbitration law were subject to changes.

1. Limitations on Disputes Subject to Arbitration

Adopting states have enacted several different types of restrictions on arbitrable disputes, but the importance of these limitations is quite modest in practice. Both insurance and labor arbitration present special situations: insurance because of state regulation of the insurance industry, and labor because collective bargaining agreements are governed by the federal Labor Management Relations Act (LMRA). Limitations on business consumer, and employment arbitration are subject to FAA (or other federal law) preemption. The Arizona version of the RUAA is unusual, and therefore merits separate consideration.

a. Insurance

Insurance is a highly regulated activity, and only state licensed entities are permitted to engage in the business of insurance. Although insurance clearly involves interstate commerce, Congress has nevertheless ceded authority to regulate "the business of insurance" to the states, under the McCarran-Ferguson Act. 15 U.S.C. § 1012(b). The consequence is that the FAA is "reverse preempted" so long as the state law regulates the "business of insurance" – a subject of considerable litigation. Given this context, it is not surprising that state legislators regard insurance regulation as within their

baliwick, and that they are comfortable enacting non-uniform arbitration provisions.

The Oklahoma RUAA initially excluded contracts that reference insurance. The Oklahoma UAA included an exception for contracts between insurance companies, and the Oklahoma RUAA was amended in 2008 to reinstate that exception. This approach created problems for reinsurance agreement that came to the courts during the interim period. *See, e.g. Mid-Continent Casualty Co. v. General Reinsurance Corp.*, 331 F. App'x 580 (10th Cir. 2009) (applying the 2008 version of RUAA even though enacted subsequent to oral argument in the 10th Circuit).

Oregon exempts reinsurance contracts from the listing on non-waivable provisions in section 4 of the RUAA. The District of Columbia RUAA includes limitation on insurance and reinsurance arbitration. Arizona and Alaska exclude all insurance agreements from the scope of the RUAA. The impact of these limitations cannot be determined without knowing more about the insurance law of the particular jurisdiction.

b. Collective Bargaining Agreements

Alaska, New Jersey, Oklahoma and Washington excluded collective bargaining agreements between labor unions and private employers from their versions of the RUAA. The LMRA, 29 U.S.C. § 185, unlike the FAA, confers jurisdiction on the federal courts to hears cases arising under the Act, so effectively all grievance and other labor-management disputes are heard by federal courts.

c. Consumer Protection Provisions

An assortment of state law efforts to offer protection to consumers, often through deceptive trade practices acts, are preempted by the FAA with respect to limitations on arbitration. The drafters of the RUAA recognized the preemption problem, and therefore did not include provisions specific to consumer transactions. State legislators often are more responsive to voter concerns, and several enacting states have added non-uniform consumer protection provisions.

The New Mexico RUAA includes a provision that bars language in an arbitration clause that limits or denies certain procedural rights. Reflecting concern about adhesive arbitration terms that are forced on weaker parties by merchants (and employers), the state legislator prohibited parties from asserting disabling civil dispute clauses. These include provisions requiring that:

– a less convenient, more costly, or more dilatory forum than a local judicial forum;

– the weaker party assume the risk of attorney's fees for discovery;

– one party required to forego appeal from a decision not based on substantial evidence or disregarding the rights of the consumer, tenant, or employee;

– a contractual provision limiting participation in a class action lawsuit; or

– one party required to forego claims for attorneys' fees, civil penalties, or multiple damages otherwise available in a judicial proceeding.

The New Mexico provisions regarding class arbitration and arbitrator bias are considered below. None of the RUAA states chose to enact a similarly comprehensive set of consumer protection provisions.

The Washington RUAA excludes disputes involving monetary claims up to $35,000. The New Jersey RUAA is inapplicable to personal injury claims of $20,000 or less, and automobile injury claims of $15,000 or less, as these are already covered under a separate New Jersey law. The Alaska RUAA invalidates arbitration agreements incorporated into contracts that were entered into based on fraud, thereby attempting to undermine the separabilty doctrine. The Oklahoma RUAA provides that arbitration provisions in form adhesion contracts "shall be closely reviewed for unconscionability based on unreasonable one-sidedness and understandable or unnoticeable language or lack of meaningful choice and for balance and fairness in accordance with reasonable standards of fair dealing." Many of these provisions are subject to preemption under the FAA.

d. Limitations on Class Arbitration Proceedings

Two enacting states included provisions regarding class arbitration, but these supplement rather than contradict the RUAA because the model act is silent on this topic. Section 10 of the RUAA permits consolidation of arbitration proceedings in multiparty disputes unless the arbitration agreement provides otherwise. However, the RUAA commentary expressly states that this section "is not intended to address the issue as to the validity of arbitration clauses in the context of class-wide disputes."

The New Mexico RUAA includes class action waivers among the unenforceable disabling civil dispute clauses discussed in the previous section. Interestingly, the New Mexico provision focuses on the stronger rather than the weaker party, by prohibiting the stronger party from asserting a contractual right not to participate in a class action proceeding. This approach is beneficial to consumers, who otherwise would have the burden of proof (and the associated costs) to show that the arbitration waiver is unconscionable.

The Oklahoma RUAA provides that class action waivers, among other features of an arbitration agreement in a standard form adhesion contract, "shall be closely reviewed for unconscionability based on unreasonable one-sidedness and understandable or unnoticeable language or lack of meaningful choice and for balance and fairness in accordance with reasonable standards of fair dealing." The focus on unconscionability, an aspect of state contract law recognized under section 2 of the FAA, is designed to avoid FAA preemption.

e. Restrictions on Arbitration Under the Arizona RUAA

Arizona enacted the RUAA in 2010 – on the ninth try. Success came at the price of compromising with interest groups by excluding contracts relating to banking, employment, insurance, and securities from RUAA coverage. These contracts continue to be governed by the Arizona UAA, thereby excluding application of the arbitration reforms and improvements that provided the basis for creating the RUAA. Outside the insurance arena, the FAA will continue its preemptive effect on arbitration provisions found in the excluded contracts.

2. Remedial Provisions

a. Exemplary Damages

RUAA § 21(a) permits (but does not require) an award of punitive and other exemplary damages if permitted in a civil action for the same claim. Colorado eliminated this provision, and instead maintained existing state law limitations on the award of punitive damages in arbitration. Nevada enacted section 21(a) but removed the reference to punitive damages, apparently at the behest of the insurance industry.

b. "Just and Appropriate" Arbitration Awards

RUAA § 21(c) authorizes the award of "such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding," notwithstanding that the remedy "could not or would not be granted" by a court. This approach generated considerable controversy during the consideration of the RUAA in Colorado. The State Senate limited section 21(c) to remedies that could be granted by a court, but the Colorado Bar Association objected to this restriction because it limited the authority of arbitrators to fashion creative awards.

A compromise solution was reached: both the RUAA and the Senate provisions were eliminated from the Colorado RUAA. In addition, legislative history was created by way of a colloquy on the floor of the Senate to the effect that the Colorado version of section 21(c) did not alter the existing authority of arbitrators to make appropriate awards. Whether the courts will make use of this approach remains to be seen.

3. Arbitrator Neutrality and Disclosure

Doubts about the adequacy of arbitrator disclosures, combined with a concern that businesses hire the same people as arbitrators on multiple occasions, have led to legislation outside the RUAA framework in several states, including California (2002), and Montana (2009). The RUAA disclosure standards,

found in section 12, apply to all neutral arbitrators, without regard to whether both parties are highly sophisticated or whether one party is a consumer or employee.

New Mexico prohibits a person from serving as a neutral arbitrator where the party preparing the contract is reasonably likely to be a future employer. The Minnesota, New Jersey, and Utah versions of the RUAA somewhat expand the scope of required arbitrator disclosures.

4. Expanded Judicial Review of Arbitration Awards

a. Contractual Standards for Expanded Judicial Review (New Jersey)

The New Jersey RUAA states that "nothing in this act shall preclude the parties from expanding the scope of judicial review of an award "by expressly providing for such expansion." N.J. STAT. ANN. § 2A:23B-4(c) The "expressly providing" language must be taken seriously, particularly if a party seeks to have such a provision enforced by a court outside New Jersey.

The New Jersey approach increased in importance after the Supreme Court, while holding that expanded review was inconsistent with the FAA, added that: "The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate *enforcement under state statutory law* ...." *Hall Street Assoc., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 590 (2009) (emphasis added); It will be interesting to see the extent to which contracting parties around the nation avail themselves of this opportunity for expanded judicial review by choosing New Jersey law to govern arbitration proceedings, and whether other states adopt similar legislation.

b. "Other Reasonable Grounds" Review (District of Columbia)

The District of Columbia RUAA includes an additional ground for vacating an arbitral award: a court may "vacate an award made in the arbitration proceeding on other reasonable grounds." D.C. CODE 16-4423(b). Subsection (a) tracks RUAA § 23(a), while § 23(b) becomes § 23(c). What constitutes a "reasonable ground" is uncertain, and the limited legislative history is silent regarding this seemingly important non-uniform provision. The D.C. appellate court has addressed the reasonable ground provision, but the opinion is less than definitive. *A1 Team USA Holdings, LLC v. Bingham McCutchen LLP*, 998 A.2d 320 (D.C. 2010).

A fee dispute between a law firm and its client resulted in arbitration. The law firm received a money award, whereupon the client sought to vacate the award under the reasonable ground standard. The client argued that the new standard required review of the merits of arbitration awards, to which the court responded – surely correctly – that the legislature did not intend such a sweeping change. This approach permitted the court to state what the statute does *not* mean, without saying anything about what "reasonable ground" does mean.

The client also made the more modest claim that the goal of the legislature was to broaden the scope of judicial review as a counterweight to a consumer-hostile arbitration process, an approach that had the merit of being consistent with the statutory language. The court responded that "when and why subsection (b) was changed to reflect the current language is a mystery." In the absence of D.C. legislative history, the court turned to section 23 of the RUAA and correctly concluded that nothing in the text or comments "even remotely suggests an intent to fundamentally change the nature of judicial review of arbitration awards." Since the language of the D.C. statute clearly calls for some level of expanded review, the relevance of the RUAA legislative history is not apparent.

c. Detailed Arbitration Award Requirement (Oklahoma)

Section 22 of the RUAA simply requires that the arbitrator make a record of the award. The Oklahoma RUAA added a non-uniform provision: "The award may, or may not, contain the evidence and conclusion upon which the award was based unless the parties' agreement specifies the type of award to be issued." While any alteration to a uniform act can cause trouble, this addition appears to be harmless.

However, Oklahoma also added a second non-uniform provision regarding arbitral decisions: "Upon rendering a final decision on the merits of a case, the arbitrator shall support his or her decision by *findings of fact and conclusions of law."* OKL. STAT. tit. 12, §1870(c) (emphasis added). Plainly, these two non-uniform provisions are in serious tension with one another, and there is no state legislative history to explain this conundrum. If these provisions are read to require extensive arbitral opinions, then many more arbitration awards will be subject to far more extensive judicial review. *See* Jeffrey S. Wolfe, *Oklahoma as Lex Mercatoria*? *Scrutinizing Oklahoma's New Arbitral Remedy*, 80 OKLA. B.J. 36 (2009).

VI. SUMMATION: HAS THE RUAA BEEN A SUCCESS?

When the NCCUSL undertook the RUAA project in the mid-1990s, neither the FAA nor the UAA had been the subject of a comprehensive review in decades. During that period, the scope of arbitration expanded dramatically to include consumer and employment disputes, as well as statutory claims. The judiciary, led by the U.S. Supreme Court, shifted from hostility toward arbitration to neutrality, and then to strong support – often preempting state law in the process. In this context, a careful review of arbitration law and practice that involved widespread input form all interested groups over a period of several years was a sound idea. The goal of writing a model act forced those arbitration professionals to move beyond general ideas to concrete drafting decisions on most topics.

The end product of the RUAA process was a model act that is "better" than the UAA (and the FAA), because it maintains the prior framework and core principles while adding provisions about many important arbitration topics. As discussed earlier, the RUAA does not address several important but controversial arbitration issues, but this approach reflects sound legislative strategy. The extensive commentary appended to the RUAA provides a useful supplement to the uniform text. Quite apart from enactment by states, the RUAA has had, and will continue to have, an impact on state legislatures and courts that grapple with arbitration issues in non-adopting states, and even the federal courts. The RUAA has been relied on as persuasive authority by the U.S. Supreme Court. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84–5 (2002) (relying on section 6 of the RUAA and the accompanying comments in deciding that waiver of times limits was a question to be decided by an arbitrator rather than a court).

In the previous two paragraphs, I have tried to briefly state the positive things that can be said about the RUAA. Even viewed in the best possible light, however, the RUAA has not been a success. The review of arbitration, with an eye toward reform, could better have been undertaken by the ALI, the ABA, or a consortium of leading arbitration organizations. This approach could have produced a work product that extended beyond state arbitration statutes, while addressing all major arbitration issues in a comprehensive manner – precisely because the constraints of producing a legislative text were absent. The state law focus of the NCCUSL meant that topics such as expanded federal legislation as a route to arbitral uniformity, and a better mesh between federal and state law, were not given serious consideration. Greater attention also could have been given to the role of contractual (as opposed to statutory) responses to *lacunae* in arbitration statutes. Standardized arbitration clauses have been provided by the AAA for many decades, and form arbitration agreements are used in many commercial settings.

The only reasonable standard for evaluating the success of the RUAA is in terms of the central goal of the NCCUSL: the promulgation and enactment of uniform state laws. Uniformity requires the enactment of substantially similar statutes in many states. As discussed in Part V, the enacted versions of the RUAA satisfy the "substantially similar" test. The non-uniform provisions are either preempted by the FAA or of minor significance. Finally, we come to the central problem with the RUAA project: the RUAA has been enacted in only 14 states and the District of Columbia, while none of the largest states have done so. After an early burst of enactments between 2001 and 2005, but far fewer than hoped for, the ensuing five years produced only three adoptions. A new burst of RUAA enactments is highly unlikely. Most states will stay with their current variants of the UAA. Meanwhile, the legislative

action will shift to the federal level, the very eventuality that the NCCUSL sought to avoid.

JURISDICTIONS ADOPTING THE RUAA (year of enactment in parenthesis):

Alaska: ALASKA STAT. §§ 09.43.300 *et seq.* (2004)

Arizona: ARIZ. REV. STAT. ANN. §§ 12-3001 *et seq*. (2010)

Colorado: COLO. REV. STAT. §§ 13-22-201 *et seq.* (2004)

District of Columbia: D.C. Code, §§ 16-4401 *et seq.* (2008)

Hawaii: HAW. REV. STAT. §§ 658A-1 *et seq*. (2001)

Minnesota: MINN. STAT. §§ 572B *et seq. (*2010)

Nevada: NEV. REV. STAT. §§ 38.206 *et seq.* (2001)

New Jersey: N.J. STAT. ANN. §§ 2A:23B-1 *et seq.* (2002)

New Mexico: N.M. STAT. 1978 §§ 44-7A-1 *et seq.* (2001)
North Carolina: N.C. GEN. STAT. §§ 1-569.1 *et seq.* (2003)

North Dakota: N.D. CENT. CODE §§ 32-29.3.01 *et seq*. (2003)

Oklahoma: OKLA. STAT. tit. 12, §§ 1851 *et seq*. (2005)

Oregon: OR. REV. STAT. §§ 36.600 *et seq*. (2003)

Utah: UTAH CODE ANN. §§ 78B-11-101 *et seq.* (2002)

Washington: WASH. REV. CODE §§ 7.04A.010 *et seq.* (2005)

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BETTER BUSINESS BUREAU DISPUTE RESOLUTION An Effective Dispute Resolution Forum for Consumers?

By Wesley Hamilton*

Better Business Bureau dispute resolution is "a fine example of the kind of mechanism needed to settle minor disputes out of court." – Chief Justice Warren Burger (1970)

I. Introduction

Marketplace disputes between consumers and businesses are commonplace. Only a small percentage of these disputes, however, are actually pursued through the judicial process. In many cases, the amount in controversy is simply insufficient to justify the time, emotional toll, and monetary expense of litigation. Additionally, many consumers lack the psychological predisposition to seek redress in the courts and simply allow the issue to drop. To borrow Professor Frank Sander's tagline, many consumer claims clearly **c**all out for "a forum to fit the fuss."

The Better Business Bureau (BBB) has a long history as a consumer dispute resolution service provider having provided conciliation services since at least 1935 and arbitration services since 1972. In 2009, the BBB processed a staggering 950,000 disputes between consumers against businesses. Some 74 percent % of these disputes were resolved mostly through some combination of conciliation, mediation and arbitration. [The data presented herein is based on BBB information, including personal interviews by the author. A vast amount of information about the BBB can be found on its web site at <BBB.org>.]

The BBB's dispute resolution program is not, however, free from criticism. The BBB receives most of its funding from the very business community against which consumer complaints are lodged. Can the BBB provide a truly neutral forum for dispute resolution? Further, the majority of complaints received by the BBB are lodged against non-member businesses. Can the BBB effectively resolve a substantial number of these complaints when it has seemingly little leverage to compel either an answer or good faith participation by the non-member business?

This paper reviews the history and current operations of the BBB, with an emphasis on the dispute resolution program. The effectiveness and neutrality of the dispute resolution program is critically reviewed through an analysis of statistical data, and comparison to other dispute resolution providers where appropriate.

II. The Better Business Bureau

A. Origins and History

The roots of the BBB date back to the "truth in advertising" movement during the early 20th century. Amid a spirit of caveat emptor, publications of the day were filled with advertisements for investment schemes, medicinal cure-alls, land deals, and other supposed bargains. For example, one advertisement offered "Complete Sewing Machines for 25 cents." Innocent consumers who mailed in their 25 cents received a box of twelve sewing needles. Such tactics soon tainted the reputation of even the most legitimate advertisers, and businesses began to form advertising associations for the purpose of self regulation. The Associated Advertising Club of America

was formed in 1904. In 1911, Samuel Dobbs, sales manager for the Coca Cola Company and President of the Associated Advertising Clubs of America, announced a crusade for the "Ten Commandments in Advertising." In 1912, local advertising vigilance committees were formed in numerous large cities, and were supported by a national vigilance committee. This system of vigilance committees was the beginning of the Better Business Bureau network. By 1924, there were member funded "Better Business Bureaus" in 43 U.S. cities.

B. Modern BBB Structure, Governance, and Significance

Today, the Council of Better Business Bureaus (Council) oversees a system of 109 local bureaus in the United States, and an additional 14 bureaus in Canada. The local bureaus are independent, non-profit organizations operating as licensees and subject to the controlling bylaws of the Council. The operations of each local Bureau are overseen by a board of directors comprised of local business leaders, and are managed on a day-to-day basis by an executive officer. The larger bureaus feature substantial organizational structures with 40 to 60 paid, full-time employees being common. Each local bureau is funded largely by fees received from member businesses. Interestingly, recent years have seen a significant number of mergers between bureaus as many smaller bureaus have struggled financially. This trend can be seen in the decrease of local U.S. and Canadian bureaus from the 178 in 2006 to 123 in 2010.

The services of the modern BBB include consumer education; active monitoring of local publications and media for deceptive advertising practices; a comprehensive dispute resolution program; a system of reliability reports on both member and non-member businesses; and, most recently, the BBBOnLine trustmark program which allows a direct link from a member's business website to their BBB reliability report. The BBB is clearly important to both consumers and businesses. Survey data shows that 81% of the general public is aware of the BBB, and that more than 70% of consumers would rather do business with a company that is a member of the BBB. In a survey of member businesses, more than 70% felt that BBB membership enhanced their credibility with customers. In addition to broad recognition, requests for service from the BBB continue to grow at a steady rate, especially amid the recent economic downturn. Between 2004 and 2008, consumer requests for reliability reports on businesses grew at a rate of 15% per year reaching a peak of 62 million requests in 2009. The volume of complaints handled by the dispute resolution program grew annually at an average rate of over 2% between 2004 and 2008, and spiked by 10% in 2009 to 950,000 matters.

C. Reliability Reports and Ratings System

The BBB maintains an on-line database of reliability reports that is open to the public, and includes records on over 4 million member and non-member businesses. The number of non-member businesses in the database significantly exceeds the number of member businesses. For example, the database includes 52,000 Houston area businesses of which only 8,600 are BBB members. In Chicago, 102,000 Chicago area businesses are included with only 7,000 being member businesses. The BBB reliability reports include contact information for the business, ownership and management information, and a summary of disputes processed against the business during the previous three years.

Perhaps most importantly, a reliability report also features the BBB's reliability rating for the business. Historically, the reliability rating was a simple satisfactory or unsatisfactory rating – much like a pass-fail grading scheme in an academic course. In 2009, however, after two years of pilot testing in several markets, the Council of BBBs implemented a new letter grading scheme with the goal of providing increased insight to consumers. Under the new grading scheme, businesses are assigned a rating on a scale of A+ to F using a proprietary formula that weighs 17 factors.

Notably, nearly 85% of the score is determined by complaint history including total number and severity of complaints, complaint trends, and whether the company has effectively responded to complaints filed by consumers. With respect to the number of

complaints, it is understood that some businesses (e.g. car dealers) generally receive more complaints than other types of businesses. For this reason, the rating scheme considers (albeit in a proprietary manner) the type of business involved and the performance of peer businesses. As might be expected, a lack of good faith participation in the BBB dispute resolution program can have a devastating impact on a business' reliability rating – independent of membership status. In practice the reliability reports are one of the strongest sources of leverage that the BBB has to secure participation by non-member businesses in the dispute resolution process.

D. Membership

There are approximately 400,000 BBB members in the United States and Canada. Market share data for eight large bureaus indicate that, on average, about 5% of all businesses are BBB members. A business may apply to become a member of the BBB once it has been in continuous operation for at least 12 months, and agrees to comply with the BBB Code of Business Practices. Upon receipt of a completed application, the local bureau verifies compliance with the BBB Accreditation Standards and submits a recommendation to the Board of Directors. Notably, a business will not be recommended for membership if it has outstanding unanswered or unresolved complaints on record, or if its membership has been revoked for cause within the past 12 months.

The BBB requires its members to participate in an ADR program. Interestingly, the membership agreements used by local bureaus have evolved to deal with the ADR requirement by incorporation of the BBB Accreditation Standards. Standard 6 requires a prompt response to all complaints; compliance with any settlements, agreements or decisions reached as part of the dispute resolution process; and "a good faith effort to resolve disputes which includes mediation if requested bby BBB." Standard 6 further provides that "other dispute resolution options, including arbitration, may be recommended by BBB, when other efforts to resolve a dispute have failed. BBB may consider a business' willingness to participate in recommended dispute resolution options in determining compliance with these standards."

At least two bureaus – New York and Sacramento – allow use of an approved alternative ADR provider (e.g. the AAA) where it is shown that use of another provider will not deprive the consumer of due process or place the consumer at a disadvantage. Other bureaus, including Houston, expressed strong opposition to allowing an alternate provider for fear that such a provision could easily make the process more burdensome to the consumer by subjecting them to an arbitration process with comparatively more rules and expense. Whether AAA consumer arbitration differs significantly from BBB arbitration is considered in more detail in the arbitration section below.

When required, membership revocation is initiated by a BBB staff recommendation to the Board of Directors or a committee of the board. Common causes for membership revocation include failure to answer or resolve a complaint, or failure to maintain a minimum reliability rating of "B" – as required under Accreditation Standard 1(D). Businesses that fall below the minimum rating may retain their membership by submitting an acceptable improvement plan and raising their reliability rating within a reasonable period of time.

III. BBB Dispute Resolution Overview

A. Complaint Intake

For many years, complaints were filed with the BBB by either telephone or mail. Today, however, most complaints are filed and managed online. The online filing process may be accomplished from either the national website, <www.bbb.org>, or from any local BBB website – e.g., <www.houston.bbb.org>. The consumer simply clicks on the "File a Complaint" link and follows the prompts. In performing research for this paper, I coordinated with the BBB of Metropolitan Houston to enter a complaint against a mock business (Tequila Leila's). Early in the process the consumer is prompted to enter identifying information for the

company against whom the complaint is being filed so that the company can be located in the BBB database. As with reliability reports, the BBB database is not limited to member businesses, and in fact, contains far more non-members than members. If the company cannot be located in the BBB database, the consumer is prompted to provide sufficient information to allow the BBB to contact the company. The consumer then is provided with contact information for the bureau that will process the complaint. Next, the consumer is prompted to enter his own contact information along with a detailed description of the dispute and the desired resolution. The consumer receives a confirmation email from the BBB once the complaint is submitted on-line.

Upon receiving a complaint, the local bureau promptly evaluates whether the complaint falls within the scope of matters handled by the BBB. The criteria for complaint acceptance are set by the Council of BBBs, and may not be modified by the bureaus. The National Complaint Acceptance Policy *excludes* the following types of complaints:

- Complaints submitted anonymously
- Complaints raising standard of care issues with respect to doctors, dentists, licensed therapists, veterinarians or lawyers.
- Complaints that are the subject of current or previous litigation, arbitration or settlement between the parties (except where a court has directed the parties to resolve their dispute through the BBB).
- Complaints that contain abusive language or serious threats.
- Complaints by an employee against his employer.
- Allegations of criminal violations by the company's employees, except those alleging theft.

For complaints that meet the acceptance criteria, the BBB notifies the business within two working days after receiving the complaint and sends both the business and the consumer an email link to the secure on-line account that will be used to monitor and manage the complaint throughout the process. If no response has been received from the business within 10 to 15 business days, the BBB handling the complaint must contact the business and encourage a response. If the business remains unresponsive after 30 days, the complaint will generally be closed as unanswered and noted as such on the company's public reliability report. For members, an unanswered complaint triggers the membership revocation process. The degree of "beyond policy manual" follow-up with non-responsive businesses, especially non-member businesses, before closing a complaint as unanswered varies among bureaus. At least two bureaus (Austin and Clearwater, Florida) reported significant improvements in non-member business response rates by increasing the level of telephone follow ups beyond what is strictly required by the policy manual.

In 2009, the nationwide rate of unanswered complaints by both members and non-members combined was 20%. As might be expected, there is a significant difference in response rate between member and non-member businesses. While the Council of BBBs declined to provide national data, three bureaus with large dispute resolution programs – Austin, Clearwater, and Greater Houston – provided a breakout of unanswered complaint rates between member and non-member businesses. The rate of unanswered complaints for member businesses at the three reporting bureaus averaged 1%. The rate of unanswered complaints against non-members was predictably higher at 24%. Notably, there were also significant differences between the three reporting bureaus with one bureau reporting 42% unanswered for non-members and another reporting only 10%. This could possibly result from a different business base in the two regions, but may also reflect differing approaches to follow-ups with non-responsive, non-member businesses. As discussed below, the percentage of unanswered complaints is often the largest driver in the bureau's overall settlement rate.

B. Complaint Statistics

1. By Bureau. Because each bureau is independently operated, and may manage its program in a slightly different (yet outcome determinative) manner, it is important to consider how the complaint volume is distributed across the 110 U.S. bureaus. A handful of bureaus handle a disproportionate share of the complaints In 2009, 17 bureaus handled 57% of the complaints, and 95% of the complaints were handled by 72 bureaus. The local affiliate bureaus handling the largest numbers of complaints in 2009 were as follows:

Rank	Location	No. of Complaints	% of U.S. Total
1	Los Angeles	113,079	11.9
2	Greater Miami	54,877	5.8
3	Chicago	42,439	4.5
4	Trenton, NJ	38,963	4.1
11	Clearwater, FL	21,599	2.3
12	Dallas	20,596	2.2
13	Houston	19,849	2.1
14	Austin	18,404	1.9

2. **By Membership Status**. The BBB membership status of the business against whom the complaint is filed has a significant impact on both the likelihood that the complaint will be answered, and subsequently settled. For this reason, it is interesting to examine the distribution of incoming complaints between member and non-member businesses. Nationwide data on 2009 complaint volumes against member businesses indicates that approximately 70% of complaints nationwide are against non-member businesses. Complaints against non-members constituted 77% of matters in Houston and Austin (excluding Dell), while the figure for Clearwater was 89%. All U.S. complaints against Dell are routed to Austin for resolution thereby skewing the Austin bureau statistics. The membership penetration – percentage of area businesses that are BBB members – for the Austin Bureau is 8.2% compared to 4.7% for Houston, but this disparity did not have the expected impact on member vs. non-member complaint volumes. Membership penetration for the Clearwater bureau was lower at 3.8%, as might be expected from the relatively lower percentage of complaints against members.

3. The membership penetration – percentage of area businesses that are BBB members – for the Austin Bureau is 8.2% compared to 4.7% for Houston, but this disparity did not have the expected impact on member vs. non-member complaint volumes. Membership penetration for the Clearwater bureau was lower at 3.8%, as might be expected from the relatively lower percentage of complaints against members.

and proudly to the Auto Line program, and to more recent initiatives with other industries (e.g. cellular phones) as examples of industry specific programs resulting from analysis of dispute resolution statistics over time. The Chicago bureau likewise points specifically to its close working relationship with the Chicago Automobile Trade Association.

From a broad perspective, service industries account for the largest volume of complaints nationally at 34%, followed closely by retail at 29%, and finance at 12%. At a more detailed level, the cellular phone industry and new car sales frequently top the national list with the new car sales also a high volume contributor at many local bureaus. New car sales also were at or near the top of the list in 1935 and in the late 1960's. Recently, banks have moved significantly up the national list, likely due to economic circumstances and an evolution of practices in the banking industry. Internet shopping is a newcomer to the list, owing to the huge in-

in the amount of purchases. As will become apparent below, settlement rates historically vary from industry to industry.

C. The Resolution "Funnel" – Let the Forum Fit the Fuss

The BBB operates a tiered system of dispute resolution mechanisms, with the number of unresolved complaints declining steeply at each successive step. This approach is designed to avoid unnecessary escalation, and thereby manage cost and inconvenience encountered by all parties. Ultimately, however, a mechanism for full resolution – binding arbitration – is provided if the parties remain engaged. In the absence of a pre-dispute agreement to arbitrate, an incoming complaint is placed into the conciliation process. Parties to complaints that remain unresolved after conciliation are offered the next step, which is typically either mediation or binding arbitration. Where mediation ends in impass, the parties are offered binding arbitration. A limited number of bureaus (e.g., Sacramento) offer non-binding arbitration as a pre-cursor to binding arbitration, while others feel strongly that non-binding arbitration does not add significant value.

Volume statistics clearly show that the vast majority of incoming complaints are resolved (if at all) through the relatively low cost conciliation process, with no more than a small percentage of the complaints ever reaching either mediation or arbitration. At those local bureaus where mediation is routinely offered (e.g., Houston and Austin), approximately one percent of the total dispute volume results in a formal mediation. At those same bureaus, approximately 0.16% of the total dispute volume results in a binding arbitration, due either to an impasse in mediation or a pre-dispute arbitration clause. As might be expected, the arbitration rate appears somewhat higher (0.36% of all disputes) at those bureaus (e.g., Chicago and Clearwater) where formal mediation is not regularly offered. Fortunately, there appears to be a trend among the local bureaus to install mediation as a precursor to arbitration, with at least two bureaus (Austin and San Diego) having added a mediation program within the past two years, and another (Chicago) currently working on rejuvenating its mediation program.

D. Closing the Complaint: Close Codes

Once a complaint has made its way through the dispute resolution process, it is marked as closed in the national database. The unique record for each complaint is assigned a "close code" which indicates the final disposition of the case. [There are also unique close codes for complaints which do not meet BBB acceptance criteria, and complaints that are routed to other bureaus for resolution.] Careful examination of these "close codes" provides significant insight into how complaints are ultimately resolved, and sheds light on several key questions including the neutrality and effectiveness of the program. The BBB close codes are as follows (with the percentage of disputes for 2009 in parenthesis)

- Resolved – A complaint is closed as "resolved" whenever (a) during conciliation, the parties mutually agree to a resolution of all matters in dispute; (b) the parties sign a mediated settlement agreement covering all matters associated with the claim; or, (c) the claim is settled through binding arbitration. (17%)
- Assumed resolved – A complaint is closed as "assumed resolved" whenever the business offers a resolution to the consumer's complaint that the bureau views as "substantial" and the consumer fails to either formally accept or decline that resolution. In essence, the bureau assumes that the consumer was satisfied with the resolution proposed by the business. (39%)
- Delayed Resolution – A complaint is closed as "delayed resolution" whenever the business later resolves a complaint that was initially closed as either unanswered or unresolved. (1%)
- Unresolved – A complaint is closed as "unresolved" whenever the business has not proposed a resolution which the bureau views as reasonable and refuses to submit the dispute to either mediation or arbitration. (3%)
- Administratively Judged – A complaint is closed as "administratively judged" when-

ever, in the opinion of the bureau, the business has made a fair and reasonable offer to resolve the dispute and the consumer has refused to accept this offer. Some bureaus require a review of the dispute and the settlement offer by two BBB employees prior to closing a dispute as administratively judged. A complaint will also be closed as administratively judged in situations where the complaint was not resolved during conciliation and the consumer declines an offer or either mediation or arbitration. (17%)

- Unanswered – A complaint is closed as "unanswered" when notice was successfully delivered but the business refuses to participate in dispute resolution to the point of settlement. (20%)
- Unpursuable – A complaint is closed as "unpursuable" whenever all attempts to contact the business are unsuccessful. This would typically be expected to occur whenever the business is no longer a going concern. (3%)

1. **Administrative Judgment**. The "administratively judged" close code is of perhaps the most interest as it most calls into question the neutrality of the BBB settlement figures.Theoretically, one can argue that all complaints should be continued through the process until a resolution is eventually reached, without regard to the perceived reasonableness of the business' proposal during conciliation. This approach, however, would greatly increase the number of mediations and arbitrations required, and would almost certainly over-tax the resources of the bureau under the current funding structure. Besides, it is almost a given that some complaints, such as those motivated solely by buyer's remorse, will be unfounded. A 1935 article observed that "some complainants are welshers who attempt to obtain the services of the Bureau to pull their chestnuts out of the fire." Edward Greene, *Better Business Bureau Activities in Aid of the Time Purchaser*, 2 Law & Contemp. Probs. 254, 254 (1935). Without arguing the necessity of the administrative judgment mechanism in the first place, I have looked at the statistical consistency of its application among the various bureaus for any indication that some bureaus might be using a statistically different process with respect to administrative closures? A few bureaus are indeed statistical outliers, closing in excess of 30% of their 2009 complaints as administratively judged. Fortunately, the five outlier bureaus together processed only 3.7% of the total BBB complaint volume during 2009.

2. **Resolved vs. Assumed Resolved**. The overall ratio of "assumed resolved" to "resolved" complaints is also of interest in evaluating the effectiveness of the BBB dispute resolution program. On average, the "assumed resolved" rate more than doubles the "resolved" rate. In how many of the "assumed resolved" cases did the consumer just get frustrated and give up? Perhaps some bureaus are better than others at monitoring the conciliation process? Is the process more closely monitored in the case of member businesses as compared to non-member businesses? Here again, it is easy to argue that BBB staff should more aggressively follow up with those consumers who essentially disappear at some point after the business provides an initial answer or settlement proposal. But, is such a scheme cost effective?

I looked at the data to determine if the bureaus are behaving consistently. A statistical analysis of the ratio of "assumed resolved" to "resolved" complaints revealed two bureaus as statistical outliers. These two bureaus had ratios in excess of eight times more assumed resolved than actually resolved, and accounted for 6.3 % of the complaints processed by the BBB in 2009. Even if these bureaus are removed from the analysis, however, the number of disputes that are assumed to be resolved still is very large.

E. Outcomes

The BBB calculates the officially reported settlement rate by counting as settled all cases that were closed as resolved, assumed resolved or delayed resolution. Total cases includes those closed as either unanswered or unresolved, but not those transferred to another BBB. In 2009, the national settlement rate was an impressive 74%. An exami-

nation of dispute categories sheds further light on settlement figures.

1. **By Membership Status**. The membership status of the business involved in a given complaint clearly impacts not only the probability that the complaint will be answered, but also the probability that the complaint, if answered, will be resolved. For example, the Houston bureau in 2009 saw a no-answer rate of 2% for members compared to a no-answer rate of 42% for non-members. Similarly, in cases where the complaint was answered, the settlement rate was 99% for members and 81% for non-members. These results are not unexpected considering that members are obligated to answer complaints and participate in the dispute resolution program as a condition of membership. The only real lever that the bureau has on non-members, on the other hand, is a poor reliability report.

In Austin (100%) and Clearwater (99%), essentially all members responded to BBB complaint inquiries, and 99% of these matters were settled. The settlement rates for non-members were markedly better than in Houston. In Austin, 81% answered, and 98% of these produced settlement, for an overall non-member settlement rate of 78%. In Clearwater, an astonishing 90 percent of non-members answered, although the settlement rate was only 81% for answered complaints – producing an overall settlement rate of 78%. The aggressiveness of a bureau in following up with non-member businesses to obtain an answer and keep them engaged in the process, as well as the distribution of complaints among different industries, may have a material impact on individual bureau results with respect to non-members. The Clearwater bureau reports that it has reduced their rate of unanswered complaints against non-member businesses by over 40% since 2007 by implementing a more aggressive policy for contacting and following up with non-member businesses.

2. By Bureau. Complaint settlement rates among the bureaus range from 94% to 48%. While bureaus can vary in settlement rate of answered complaints against non-members, close scrutiny of the nationwide data reveals that the largest driver of overall settlement rate, especially in those bureaus with the lowest settlement rates, is the percentage of answered complaints.

The bottom ten bureaus have an average settlement rate of 55%. Recalculating the settlement rates for these bureaus with the unanswered complaints excluded yields a much improved average settlement rate of 89%. On the other hand, a similar recalculation excluding the unresolved complaints yielded an average settlement rate of only 59%. In some cases, a high overall percentage of unanswered complaints in a bureau may be attributable to a disproportionately high percentage of non-member complaints. This is not always the case, however – the Houston bureau has a high rate of unanswered, non-member complaints when compared with the Austin bureau.

3. **By Industry** Available statistics reveal that some industries have consistently higher dispute settlement rates than others both at the national and local levels. Even though unpursuable complaints are not included in the settlement rate formula, it is interesting to note that settlement rate and unpursuable claims tend to trend together: higher settlement rates are accompanied by lower percentages of unpursuable complaints, and vice-versa.

   Notably many of the industries which perennially receive the most complaints have progressively increased their settlement rates. For example, between 2003 and 2009, the nationwide settlement rate for new car dealers increased from 76% to 83%. During the same period, the settlement rate for the cellular phone industry improved from 89% to 95%. The same cannot be said for used car dealers and home repair contractors.

IV. Conciliation

A. Introduction

Conciliation was the sole component of the Better Business Bureau's initial dispute resolution program. Over time, complementary processes – primarily, formal mediation and arbitration – were added, and the conciliation process itself evolved

from a phone and mail driven mechanism towards a more efficient on-line process. To this day, however, it is indisputable that conciliation remains the centerpiece of the BBB dispute resolution program. As noted above, only a small percentage of the disputes filed with the BBB require activity beyond the conciliation stage, meaning, that the BBB's overall settlement rate of 74% is largely a product of conciliation.

B. The Process

Within two business days after a complaint is filed, each party receives an e-mail link allowing access to the on-line account for the dispute. Upon entering the on-line account, the business will find the consumer's written complaint and desired outcome (s). The business may then submit its response and, if necessary, request additional information via the on-line account. The consumer may accept a resolution proposed by the business or submit a counter-proposal and additional information. The parties continue to exchange on-line responses in this manner until either:

a. one party accepts an offer made by the other by clicking the "accept resolution" button;
b. (once the business has provided a proposal for resolution the consumer ceases to respond, in which case the complaint is closed as "assumed resolved" after 30 days;
c. the business ceases to respond in which case the dispute may be closed as unresolved – but usually only after several attempts by BBB personnel to re-engage the business in the process; or,
d. the business requests that the BBB advance the dispute to either mediation or arbitration.

Throughout the conciliation process, the parties receive e-mail notification of any action taken by the other party. Also, the full status and history of the dispute is documented and available to either party at any time. Despite the on-line and seemingly detached nature of the process, BBB personnel remain involved on the periphery. For example, if the business ceases to participate in the conciliation BBB personnel are automatically notified, and they intervene by contacting and attempting to re-engage the business in the process. Additionally, cases that go beyond several exchanges between the consumer and the business are routed to a special queue for staff intervention. Lastly, in the few cases where consumers are not comfortable using the on-line system, bureau employees will conduct the conciliation either by telephone or mail.

On-line dispute resolution is not unique to the Better Business Bureau, and is undeniably a rapidly growing format in consumer and other dispute resolution arenas. The on-line system obviously leads to a more rapid exchange of information and counter-proposals among the parties than was possible in a mail driven system or even in a system featuring a BBB employee as an informal mediator by phone. Numerous BBB employees have commented during interviews that the on-line format results in a noticeably faster paced process. The low cost and benefit of essentially around the clock access to case status, history and supporting information also should not be underestimated. Indeed, the lower cost aspect of the on-line system is apparent in the BBB's ability to reduce staffing levels in their dispute resolution call centers while overall complaint volumes have increased. Furthermore, around the clock access facilitates resolution of disputes as bureaus receive more complaints resulting from internet transactions with out-of-state and out-of-country parties.

C. Effectiveness of Conciliation

The best evidence for the effectiveness of conciliation is the fact that only a small fraction of disputes progress beyond the conciliation stage, National data, after exclusion of unanswered, unpursuable and administratively closed complaints, indicates that about 73% of the answered complaints that enter the conciliation process are closed as either resolved, assumed resolved, or delayed resolution. Data from the bureaus that provided separate data sets for member vs. non-member complaints reveal an approximate 10 percentage point spread between member and non-member businesses, indicating that non-member businesses are somewhat less likely to remain engaged in or resolve the case through conciliation.

V. Mediation

A. Introduction

An increasing number of Bureaus offer formal mediation as the second tier of dispute resolution prior to binding arbitration. Notably, in my sampling of bureaus, I found that both the Austin and San Diego bureaus have started formal mediation programs within the past two years. Additionally, the Chicago bureau reported on-going efforts to rejuvenate its mediation program. Mediation allows the parties to work together with the assistance of a trusted and neutral third party to sharpen the issues in dispute; explore common ground; and, hopefully, craft their own customized and self-determined resolution of the dispute. A mediated settlement can be a "win" for both sides in contrast with the generally zero-sum games of arbitration or adjudication where there is little room for creative resolution. Additionally, there have been numerous studies showing that the parties are much more likely to perform a mediated settlement agreement than the terms of a judgment imposed unilaterally by an arbitrator or judge. See e.g., Marian J Borg, Expressing Conflict, Neutralizing Blame, and Making Concessions in Small Claims Mediation, 22 Law & Pol'y 115, 117 (2000). This factor is important to many consumers who want to avoid the hassle and expense of enforcing a judgment or award. One study of small claims cases found compliance with mediated settlement agreements in 71% of the cases compared to a 34% compliance rate in similar cases decided through adjudication without prior mediation. Craig McEwen & Richard Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 Me. L. Rev. 261-62 (1981). This study also showed that mediations ending in impass were not wasted efforts. The parties complied with the court decision in 53% of the cases decided after a mediation that ended in impass, compared with the 34% compliance rate in cases decided without prior mediation.

B. Who Pays?

The various bureaus appear to differ significantly in their policies with respect to charges assessed for mediation (and arbitration) services. Some bureaus draw the line based upon the membership status of the business. Mediation and arbitration services are free to both parties if the business is a BBB member at the time that the complaint is filed. For a non-member business, is a fee (ranging from $300 to $500). The obvious risk of this approach is that it chills participation by non-member businesses. In fact, at least one Bureau which uses this approach has very limited non-member participation in mediation and arbitration.

The Austin bureau has taken the approach of charging all consumers a nominal ADR fee (e.g., $70) regardless of the membership status of the business. Proponents of this approach argue that it removes barriers to participation by the non-member companies and reduces the volume of "trivial" disputes filed by consumers. Notably, in the bureaus following this approach, approximately 50% of the mediations and arbitrations involve non-members. In yet a third approach, some bureaus offer mediation and arbitration for no charge even where the business is a non-member. Finally, another bureau charges $150 per party where the business is a member and $225 per party where the business is a non-member with higher fees when the amount in controversy exceeds $2,000.

C. The Formal Mediation Process

The reference to "formal" mediation is meant to exclude informal efforts by BBB staff to promote settlement between parties. A simple reminder to a party that it has not responded to the other party recently, or encouraging parties to persevere in their settlement negotiations, often leads to a successful conclusion of the conciliation process.

1. Mediator Qualifications and Selection. All formal BBB mediations are conducted by volunteer mediators, a fact that should reduce any perception of bias towards the business at this stage of the process. The mediator roster tends to include local attorneys, retirees, and, in some bureaus, students from clinical programs at local law schools. BBB mediators must have completed a 40 hour training class, either through the BBB or another approved institution, prior to being placed on the roster. Once a case is scheduled

for mediation, the BBB staff appoints a mediator from its roster. Some bureaus (e.g., Houston) use an internet sign-up system which allows mediators to select cases and sign up on-line based upon the mediator's availability.

2. Setting the Date. The rules of the Council of BBBs are silent about the amount of advance notice given to the parties prior to the mediation session. In practice, local bureaus have adopted internal standards sufficient to prevent a large amount of rescheduling due to time conflicts. For example, the Houston BBB has uses a standard of 21 days advance notice. Several days prior to the mediation date, a member of the BBB staff contacts each party to confirm its intention to appear at the mediation. An additional reminder call is placed to each party on the day prior to the mediation. This approach reportedly results in a very low rate of last minute rescheduling, and improves the quality of the process for the parties and also the mediator.

3. The Mediation Forum. Most bureaus encourage the parties to mediate face-to-face whenever possible. The large geographical areas covered by some bureaus as well as the practice of referring all complaints against some large businesses (e.g. Dell, Verizon, etc.) to the bureau associated with the company headquarters, however, makes mediation by phone a practical necessity in some cases. Arguably, offering the flexibility of mediation by phone also removes a potential barrier to getting and keeping the non-member business engaged in the process. The actual percentage of mediations conducted by phone appears to vary significantly by bureau. In my small sample, I found a range of 10% to 67% which possibly was attributable to variation in referral volume, and also likely influenced by local bureau attitudes toward telephone mediation.

4. Conduct of the Mediation. In practice, an actual mediation at the BBB lasts an average of about 3 hours and does not differ greatly from the process used in many small claims courts and other dispute resolution systems. The mediator opens the process with an opening statement that provides an overview of the process; explains the neutrality and role of the mediator; and reviews the confidentiality guidelines. In explaining the mediation process, the mediator is careful to emphasize his role as one of facilitation and not adjudication – as would be the case in a courtroom setting or in arbitration. Despite prior education by BBB staff, many consumers reportedly arrive at mediation believing that the mediator will resolve the case with a ruling. In fact, the general public seems to struggle at times to differentiate between mediation and arbitration. A recent Business Week article stated, "The BBB offers consumers arbitration where a trained specialist acts as a mediator between the company and the consumer to resolve the disagreement." Jessica Silver-Greenberg, A Better Better Business Bureau, Business Week, February 21, 2008. No wonder customers, and many business representatives, are confused.

After explaining the process, the mediator provides each party with a copy of the BBB Mediation Rules and opens the floor to questions regarding the mediation process. The mediator then asks each party to sign the BBB Agreement to Mediate, which essentially states that the parties have read, understood and agreed to abide by the BBB Mediation Rules. After the agreement to mediate is signed, the mediator allows each party to tell its side of the dispute. Although the parties are allowed to have attorneys present, the BBB guidelines strongly encourage the parties to speak for themselves. If nothing else, this approach gives the parties a chance to cathartically vent their feelings concerning the dispute. Following the opening statements, most mediators facilitate a discussion between the parties until such point as the mediator feels a need to meet privately ("caucus") with each party. Mediators might call for a caucus for many reasons including a perceived imbalance of power among the parties, a need for private reality testing with one or both parties, or a sense that there is material information that one party may share with the mediator only in a confidential setting. In practice, the call to move to the private and strictly confidential "caucus" process depends largely upon the individual mediator. Some mediators prefer to conduct the full mediation in a joint session, absent extraordinary circumstances, while others use the "caucus"

The BBB mediation rules include an interesting and somewhat unique feature: explicit provision for the use of external experts during mediation. Under BBB Mediation Rule 6, the mediator may advise the parties to obtain expert advice or may consult an expert directly. In specific cases, especially those that hinge on technical issues, this feature provides the mediator with an additional tactic to break an impass. The mediator can use a phone conference with a relevant expert, and one or both parties, to provide an answer with respect to a key technical issue. For example, if an auto body shop involved in a mediation concerning a localized defect in a paint job argues that he need only repaint a small spot on a quarter-panel whereas the consumer insists that industry practice would require repainting of the entire quarter-panel, the mediator can poll one or more experts in the industry while in caucus with the parties to clarify the true industry practice. The BBB staff can readily provide the mediator with a roster of several experts in a given field.

The mediator helps the parties document the terms of any settlement in plain language on a one-page form provided by the BBB. The mediator and each party then sign the settlement agreement, which is enforceable in the same manner as any other contract. Each party is given a copy of the signed settlement agreement, and one copy is retained in the BBB case file for the dispute.

At the conclusion of the process, the parties are generally brought back into a joint session and thanked for their participation in the process. If the mediation ended in an impass, the parties are advised that a BBB dispute resolution coordinator will contact them regarding the next step in process. Interestingly, in my own experience, a formal closing meeting, as just described, can actually break an impass and lead to a settlement.

For purposes of quality control, each party is asked to complete a survey at the conclusion of the mediation session. This survey inquires about overall satisfaction with the process, the perceived neutrality of the mediator(s), and any suggestions for improving the process. Feedback provided on these forms appears to be overwhelmingly positive.

5. Post Settlement Follow-Up. BBB staff contacts each party several weeks after the mediation to confirm that the terms of the settlement agreement have been performed. In the rare cases where the terms of the agreement have not been performed by the business, the BBB will encourage the business to comply. If, after encouragement, the business remains non-compliant, the BBB will change the closed status of the case from "resolved" to "unresolved." This result will appear on the business' reliability report. In the case of a member business, the unresolved complaint will trigger a revocation of accreditation.

C. Mediation Settlement Rates

The Austin BBB reports a settlement rate of 83% in formal mediation. This rate of success is comparable to rates reported by other consumer dispute resolution providers such as the American Arbitration Association (85%) and the Financial Industry Regulatory Authority (86%). Interestingly, a published study of small claims court mediation in Maine reported only a 57% success rate in cases involving consumer complaints about services and a 55% success rate in cases involving consumer complaints about products. Craig McEwen & Richard Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 Me. L. Rev. 237, 250 (1981). Data for 2006 through 2009 from the Harris County Dispute Resolution Center indicate a 61% settlement rate in the community based mediation program, which includes mostly small claims court cases involving consumer disputes with businesses.

VI. Binding Arbitration

A. Introduction

Binding arbitration is the capstone process in the BBB dispute resolution program. In binding arbitration, the parties present their case to a trained, third party neutral who renders a written, reasoned, and binding resolution to the dispute. The BBB added arbitration to its list of services in 1972. By 1974, binding arbitration was reportedly available in a total of 84 bureaus including all major metropolitan bureaus. Dean W. Determan, The Arbitra-

tion of Small Claims, 10 Forum 831, 835 (1975). Fewer than 0.5% of the complaints filed with the BBB result in a binding arbitration. Even at that low rate, however, the BBB arbitration program conducts in excess of 4,000 arbitrations per year. By comparison, the AAA administered an average of 1,100 consumer arbitration cases per year between 2005 and 2007.

Disputes can enter arbitration at the BBB in several ways. If the dispute is subject to a pre-dispute arbitration agreement, the case is immediately routed to arbitration. For all other disputes, BBB bureaus actively encourage formal mediation – and some strictly require it prior to arbitration. Binding arbitration is then offered in matters where the mediation ends in impass.

B. The Arbitration Process

1. Submitting the Case to Arbitration. In the case of disputes that are not subject to a pre-dispute arbitration clause, the BBB starts the arbitration process by working with the parties to prepare a submission agreement that defines the scope of claims being submitted for arbitration, and the decision sought by each party. Each party must sign the submission agreement prior to the arbitration hearing. Unless specifically agreed by the parties, the arbitrator will not consider claims based upon a product liability theory; claims for personal injury; or claims where no deficiency or defect is alleged in the product or service.

In the case of disputes that are subject to pre-dispute clauses requiring arbitration, the party requesting arbitration submits a demand for arbitration to the BBB. The BBB then sends the arbitration demand to the other party, who may file a counterclaim within fourteen days of receiving the arbitration demand. The party receiving the counterclaim then has 14 days to submit an answer to the counterclaim. When a party fails to submit an answer to an arbitration demand or counterclaim, the non-answering party is deemed to have denied all claims against him.

The arbitration intake procedure described above for the BBB substantially mirrors the procedure followed by other significant providers of consumer arbitration. Notably, the majority of BBB cases are not the subject of a pre-dispute agreement to arbitrate; by contrast, approximately 96% of consumer disputes entering the AAA program are based on a pre-dispute agreement to arbitrate.

2. The Arbitrator. All BBB arbitrations are conducted by a sole arbitrator, except in those rare instances where a larger panel is required either by law or by the pre-dispute arbitration clause. Each local bureau maintains a roster of volunteer arbitrators who have completed a BBB approved arbitration training program. Many of the arbitrators are local attorneys. For a given case, the BBB provides the parties with a list of two or more potential arbitrators and their biographies. The parties are then given five days to reject the name of any arbitrator candidate who is conflicted due to a financial, competitive, professional, family or social relationship, and then to force rank the remaining candidates in order of preference (first choice, second choice, etc.). After receiving feedback from the parties, the BBB makes the final arbitrator appointment. The BBB rules do not allow a party to strike the name of a potential arbitrator on a basis other than a conflict or interest. Party participation in arbitrator selection and the ability to challenge an arbitrator appointment in cases is similarly limited under the AAA's consumer dispute rules.

The BBB does not consider expertise in the field of the dispute when proposing potential arbitrators. Rather, the BBB rules allow for arbitrator consultation with a technical expert provided by the BBB. This approach has created concern among those businesses, such as homebuilders, that are commonly engaged in higher value, more technical disputes. It is not clear that these businesses would fare better under the AAA consumer arbitration scheme. They could, however, argue for the inapplicability of the consumer rules to their cases.

Once appointed, the BBB arbitrator signs an oath pledging to conduct the arbitration in an impartial manner. In the event that the arbitrator later discov-

ers a conflict of interest the conflict is disclosed to both parties, who may decide to waive the conflict and allow the arbitrator to continue on the case.

3. The Hearing. The BBB sets the time, date, and place of the arbitration hearing and provides the parties with at least ten days advance notice. Although almost all hearings are currently conducted face-to-face, the rules do provide for presentation of statements and evidence either in writing or by phone. The rules also provide for post-hearing presentations by those parties that do not attend the hearing.

At the hearing, each party is placed under oath and given an opportunity to present its side of the dispute. Similar to other consumer arbitration providers, formal rules of evidence are not applicable in the arbitration hearing; however, the arbitrator has authority to limit overly repetitive or irrelevant presentations of evidence. The parties may either present their own case or use an attorney. The BBB rules require an eight day advance notice when an attorney will be used. In those cases where the BBB is notified that one party will use an attorney, the other side is promptly notified so that it has time to retain an attorney if desired.

At the conclusion of the hearing, the arbitrator may request that one or both parties submit additional evidence to the BBB coordinator before a specified deadline. Any post hearing submissions are forwarded first to the adverse party for comment and then to the arbitrator. The BBB rules also empower the arbitrator to call for one or more additional in person hearings to consider new evidence. Once the arbitrator determines that all parties have had adequate opportunity to submit additional evidence, she will officially close the hearing.

4. The Award. Within approximately five days after closing the hearing, the arbitrator issues a written, reasoned decision that outlines the resolution of the dispute. In reaching a decision the BBB arbitrator is guided by fairness and equity, and is explicitly not bound by legal principles or rules of law (unless otherwise agreed by the parties). See BBB Rule 28 (a). The Austin BBB reports at least one case where the business unsuccessfully challenged an award in court on the basis that it did not adhere to legal principles. The district court upheld the arbitral award on the ground that the parties had agreed to arbitration under the BBB rules.

Under BBB Rules for cases subject to a pre-dispute agreement to arbitrate, the arbitrator can award any remedy that is permitted under applicable law (unless otherwise agreed by the parties). In cases where there is no pre-dispute agreement to arbitrate, however, the default remedies are more restricted. Unless otherwise agreed in the submission agreement, there is a $2,500 cap on actual out of pocket loss or property damage and a prohibition against awarding lost wages, punitive damages, or attorney's fees.

Perhaps the characteristic of any binding arbitration that most distinguishes it from adjudication is the finality of the decision. The BBB rules provide limited opportunities to clarify the decision, correct factual mistakes, or challenge the award as impossible to perform. The rules are clear that these devices do not provide a means for challenging the basis for the arbitrators decision or rearguing the case. The BBB rules do not provide for an appeal of the arbitral award.

5. Post-Award Follow Up By the BBB. As with both mediation and conciliation, the BBB contacts the parties approximately two weeks after the arbitration decision is issued to verify that the decision is being performed. In cases where the business has not performed the award, the BBB initially encourages performance. In the rare instance where the business continues its non-performance, the bureau changes the case to an unresolved status on the business's reliability report and recommends membership revocation to the Board of Directors. The Sacramento BBB, which allows arbitration by an approved alternate provider, reports that it also follows up on the performance of arbitral awards issued by alternate providers in cases that originated with the BBB.

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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.

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You are serving as the mediator in a particularly contentious lawsuit. There is a long history of animosity between and among counsel and between and among the parties they represent.

In a caucus session the attorney for one of the parties demands that you deliver to the other side a particularly insulting, demeaning and threatening personal message and, the attorney assures you, if you fail to do so promptly both he and his client will walk out of the mediation (just when you were beginning to make some progress!).

What do you do? Why? Would your answer be different if the message you were asked to deliver (while equally insulting, demeaning and threatening) had to do with one or more legal issues involved in the lawsuit as opposed to a personal attack? Explain.

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Earl F. Hales, Jr., (Dallas): Assuming you could not persuade the attorney to change his mind about the highly unprofessional personal attack, I would give him back his mediation fee and tell him I was terminating the mediation and that I was returning the other side's check as well and sending the parties home. I would let him worry about whether the real reason would ever see the light of day. My guess is he would change his mind about the attack. He could not face the risk of exposure that the reason for the abrupt termination was his unprofessional conduct. I have found that when a mediator is willing to forego the mediation fee to uphold important professional principles the party advocating the misbehavior crumbles. If unexpectedly he didn't change his mind, then I could sleep with the clean conscience of standing up for my beliefs and not risk the charge that I was just interested in getting paid without working for it.

If the comment was about a legal issue, I would have no problem continuing. That's just the market place of ideas.

Steve Nelson, (Austin): I'd like to think I could "mediate" myself out of the box you describe. There are several ways to approach this scenario, whether the insults are aimed at some one or at some legal point.

First, I think most of us would try to ask something along the lines of, **"Ok, if I were to go in there and tell him that he's a scum suckin no count fool as you have asked … and he responds that you are a pantywaist retard and so is your mom … will we have moved the ball forward at all?"** And, that might get the demand for message delivery off the table.

Secondly, humor might help. I've got to believe that I could deliver, **"Hey, get this, they want me to tell you that you are a scum suckin' no count fool. I knew that would be especially helpful to this process, so I ran right over with the message"** and not have it escalate out of control. It's a matter of delivery.

I think both of the forgoing can be done ethically and without doing any more damage than the offending party seems intent on inflicting on the process. We are more than message takers. And, we aren't duty bound to deliver every message asked of us. I think we can decline to deliver anything we find offensive, inappropriate, or not conducive to the process, so long as we tell the party that is what we are or are not going to do. If it kills the effort so be it….but I'll bet it won't in 99 out of 100 cases.

Michael Curry, (Austin): Let me first say that the real world solution to this puzzler is a matter of technique not ethics. I am confident that a mediator would be able to successfully defuse the situation or deflect the request by drawing upon the rapport that the mediator had established during the mediation process and his or her experience and skills.

In the unlikely event that, despite the mediator's efforts, the attorney continued to insist that the mediator convey the "particularly insulting, demeaning and threatening personal message," the mediator can ethically decline to do so. The mediator does not have an ethical obligation to convey extraneous information.

While there are well-known practice standards and statutory provisions which expressly prohibit a mediator from conveying certain party communications (i.e. confidential information) there are no standards of which expressly require a mediator to convey party communications of any kind. There is probably an implied ethical obligation to convey substantive offers and demands as directed by the parties because those are integral to the mediation process and are an extension of a party's right to informed self-determination.

Arguably, for the same reason, there is also an implied ethical obligation on the part of the mediator to convey, as requested, the positions of the parties regarding the merits of the dispute. At the very least, a mediator who intends to assume the prerogative not to convey offers or substantive arguments should so advise the parties prior to the mediation as part of the mediator's duty to "inform and discuss with the participants the rules and procedures pertaining to the mediation process." See, Texas Supreme Court Ethical Guidelines for Mediators, Para. 6. However, personal attacks, unlike offers and arguments, are not an integral part of the mediation process or necessary for self-determination and do not have to be conveyed by the mediator. In fact, a mediator who facilitates personal attacks violates his or her duty as guardian of a process designed to have integrity, to be procedurally fair, and to promote mutual respect, safety, reconciliation and settlement. See e.g. Model Standards of Conduct, Standard VI.

If the message dealt with legal issues and was "insulting, demeaning and threatening" only because of its implications (e.g. "Tell them that they missed the deadline to file any expert report so they are going to have to pay our attorney's fees.") there would be no ethical roadblocks to conveying that information and arguably, if the party insisted, it would have to be conveyed. When and how it is conveyed is a matter of technique.

As tempting as it might be, a mediator cannot tell a party that the mediator has conveyed certain information when it has not been conveyed – so that easy solution is off the table. (Model Standards of Conduct for Mediators, Standard VI(A)(4) ("a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation").

The party's threat to walk out of the message is not conveyed (even though progress is being made) is in Hitchcockian terms, only a MacGuffin.

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Comment: The Supreme Court's Ethical Guidelines for Mediators require that the mediator protect the integrity of the mediation process, be impartial towards all parties and terminate the process if one or more of the parties is unwilling or unable to participate meaningfully in the mediation.

This ethical puzzler challenges the mediator on all three points by attempting to lure him/her into being an active participant in the "games" and "gotchas" of one of the attorneys and his client, thereby allowing them to attempt to sabotage the integrity of the mediation.

However, each of our three respondents to the puzzler have come up with unique and ethical techniques that effectively deal with the situation without sacrificing either the process or the opportunity for the resolution of the dispute.

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REFLECTIONS FROM THE EDGE

Mediating Money Matters - Practical Approaches

By Peter Conlon* & Kay Elkins Elliott**

.Recently a very fine mediator, Jeff Abrams from Houston, complained that mediators are not being taught "hardball" mediation when money is the main issue and no future relationship is wanted. There are lots of mediations in which this is the primary focus, however in recent years the literature on mediation training has mainly consisted of a different approach: the more "Getting to Yes" style, an integrative bargaining approach. Jeff is right that the pendulum may have swung too far in that direction and he has been invited to do a presentation at my next mediation training. That conversation, which occurred in November 2010, at the Jeffrey S. Abrams mediation competition at the University of Houston, is the genesis for this article. My colleague, Pete Conlon, a mediator and arbitrator with great expertise in the financial field (he is a FINRA mediator and arbitrator) and I co-authored a previous article in this newsletter about mediating financial matters - particularly in divorce cases. This collaboration however will be about mediating employment cases when an employee is not seeking future employment with his employer.

In the book *Making Money Talk* by J. Anderson Little, a North Carolina mediator and mediation trainer, this subject is explored in depth - with specific techniques and tips explained. So, drawing from that source, and with Pete's help, here is what we suggest mediators think about the next time they are called on to mediate an employment termination case or, in fact, any case in which money matters most!

On the process side, in facilitating risk analysis the mediator must become grounded in the realities of the case. Trial lawyers understand that information is the key to effective litigation and that the discovery of a single fact can completely change one's legal analysis and ultimately the outcome of the case. After all, trials are about the truth of a past event, and each fact is potentially the missing piece of the information puzzle. Much of the conversation that occurs in the mediation of a civil case concerns the value of the case — the most likely outcome at trial. Well prepared mediation advocates don't need a mediator's help in facilitating case analysis because they have already done that for themselves. Mediators therefore need to be very cautious when discussing case value because the risk of deeply offending lawyers is great.

If the mediator is naive, and the lawyer senses that the mediator doesn't think the lawyer has done his job, the lawyer will be resentful and uncooperative, making it more difficult to get closure. Despite that fact, mediators and litigators have to reckon with an important fact: conversations about case value are difficult for any lawyer to have with a client but especially for plaintiff's lawyers where the client is generally risk averse, a one time player and views the lawsuit as a potential gain. The defense, on the other hand, particularly in insurance cases, is risk neutral or even risk seeking, a repeat player and views the lawsuit as a potential loss. Each side brings these cognitive realities into the mediation and that affects their perception of value. Valuing a case is not an exact science, but the job of lawyers prior to mediation is to learn about the case, compare it with other cases that have produced settlements and verdicts, and reach a conclusion about its value, or the range of values.

There is an approach that mediators can use that facilitates an inherently evaluative process without being directive. Here are some useful questions for mediators to ask in the context of civil trial court mediation that translate into questions about dam-

ages, liability, costs and collection:

> 1. What are you expecting to get at the courthouse? What is the most likely result in monetary terms? Do you have data to support that estimate? (Liability and Damages)
>
> 2. What are your chances of obtaining that outcome? What are the strengths, weaknesses and unknowns of your case? (No case is perfect - be realistic in assessing the risk factors)
>
> 3. What does it **cost** to get that outcome? Do the costs exceed or seriously reduce the expected outcome? If so, is the settlement value today less than the expected trial verdict?
>
> 4.What are your chances of collecting on a judgment if you obtain one as a result of trial? Will the other side appeal if you prevail? What will that cost in time and money?

One advantage of asking questions this way is to get information and clarity from each side, hopefully before either puts a proposal on the table. In this way the team on each side is more likely to formulate an opening proposal that resembles its case analysis and will send a message that they really are prepared and understand the potential bargaining zone.

Another way mediators can help is in correlating the analyses of damages and liability. Assume that the plaintiff's assessment of damages is $100,000 (the amount the jury would award if the plaintiff wins) and that her chances of winning are only 50/50. Statisticians would say the settlement value is $50,000. So what does the plaintiff typically do when the other side offers $40,000? Usually reject it because it is so far from the $100,000 value anchored in her brain. A careful review of the probabilities of winning or losing and the costs of staying in the lawsuit can make a huge difference in how a plaintiff responds to the defendant's proposal of $40,000. If, for example, the defendant wins the case, the plaintiff, in some jurisdictions, may have to pay the defendant's attorney fees, as well as her own, and that can easily reduce a $50,000 probable value to $40,000 or even wipe it out entirely. A mediator can point out that a $40,000 certain payment now is a sure gain, increasing the chance the plaintiff will favorably view the offer.

When mediators bring up this fact, the costs of pursuing litigation and the costs incurred if one loses, or even if one wins, they may be perceived as using that discussion as a threat - a way of talking someone into settlement, rather than as a way of establishing the true zone of possible agreement. Certain expert witness fees, court reporter fees, and other costs of court may be taxed to the losing party depending upon the law in the state.

The timing of the discussion about costs is also important. Talking about this too early can cause the parties to think the mediator is being manipulative. One way to avoid this impression is to postpone that conversation until one of the parties brings it up. Sometimes the discussion about costs will be conducted away from the mediator's ears because lawyers often offer to reduce their fees as an inducement to settlement. Obviously mediators want to be subtle, though persuasive, in facilitating risk analysis and in helping the parties view the lawsuit as a business venture, not a private war.

If the plaintiff's lawyer is on a contingent fee, this type of discussion can be particularly helpful since the lawyer is sharing the risk with the client and may have some reluctance to seem pessimistic (realistic) about the trial. Contingent fee lawyers obviously benefit from a settlement in terms of hours invested in a case. If they sense from their discovery that the case is a "loser", a mediator's help in facilitating trial risks is appreciated. Sometimes their own client is the weakness of the case and this is extremely difficult to say but a mediator can suggest that a jury might not believe what the client is testifying to and help the attorney.

Now let's move into some other issues in employment termination cases.

Think about the separation anxiety experienced when a child leaves home (either by the child or parent), or when a puppy feels lonely soon after leaving the litter. This anxiety can also describe feelings that

an employee can experience when leaving a job. Maybe it has happened to you.
Leaving a job can either be voluntary or involuntary. The voluntary leaving usually is a planned event by the employee and most of the relevant factors have

been considered before resignation occurs. Involuntary leaving of a job can be the result of a downsizing, unexpected early retirement offer, or an outright termination. It is within these three general categories where differences of understanding may arise between the employer and employee. For these situations mediation can assist with resolving the conflict.

As mediators we need to be aware that the outcome desired may be more driven by the bottom line dollars and benefits offered by the employer, or expected by the employee. Closure is driven by a currency other than the emotional issues mediators may face in other employment related issues (workplace conflict). Here are some of the issues mediators should listen for and be prepared to aid in resolving.

One of the most complicated benefits involved with an involuntary leaving of a job is health care. This benefit may have directions dictated by ERISA, which would be specified in a Summary Plan Description. However, other laws could influence what can and can not be offered. In 1986 the Consolidated Omnibus Budget Reconciliation Act (COBRA) was enacted. The goal of this law was to provide continuation of *group* health coverage that otherwise might be terminated. Unfortunately, many employees assume that they, and their families, are automatically eligible for COBRA continuation coverage, and some assume that their coverage will continue for the same premiums they were paying through their employer.

The original COBRA rules established specific criteria for plans, qualified beneficiaries, and qualifying events. There are general exemptions from coverage for plans of small employers (less than 20 employees) and some exempt entities regardless of number of employees. The specifics of the plan in question as to eligibility and cost will be outlined in a required notice provided by the plan administrator not later than 14 days after the plan administrator has been notified of a qualifying event. These terms and conditions are generally non-negotiable and are set by law. For qualifying events that occurred on or after September 1, 2008 former employees may have additional features under the American Recovery and Reinvestment Act of 2009 (ARRA), as amended.

Age of the employee could also be a factor. Those close to Medicare eligibility may want to evaluate their particular circumstances and see how Medicare and COBRA interact. Problems can occur for those in the 55-62 age brackets, too young for Medicare and possibly too old (not healthy) for individual insurance. Generally speaking COBRA coverage is 18 months for qualifying events due to employment termination. Other events may permit coverage of 36 months. Although COBRA specifies certain periods of time that continued health coverage must be offered to qualified beneficiaries, COBRA does not prohibit plans from offering continuation health coverage that goes beyond the COBRA periods.

With the phase-in over the next several years of the Affordable Care Act of 2010, issues concerning health care could change from case to case even with the same employer. The caution for a mediator is to be cognizant of the party's awareness of the actual rules affecting this benefit and how long the benefit is available.

Employee Stock Options, lump sum payments, or bonuses for some employees could represent a significant portion of their assets. Employees should consult with a tax adviser (CPA) that is fully versed on the type of package being offered. There may be opportunities to negotiate a deferred payment to a future year, thus reducing the current year tax liability. For employees approaching Medicare eligibility, this could assist in lowering the income considered for determining the Medicare Part B premium they would be paying.

One of the authors consulted on a case in which we were able to defer a large cash distribution to the following year. This accomplished three main points for the client: lowering his potential current year tax liability (he was changing from married to single); lowering his income to where he would only be paying the standard Medicare Part B premi-

ums; and in the year he received the funds he was able to contribute to a Roth IRA based on the portion of the distribution that was classified earned income.

As mediators we do not provide advice, however it may be prudent to verify that proper independent tax advice was received. This verification could prevent a party later claiming that the mediator "approved" the distribution.

The next time you mediate, try to use some of these tips and see whether your new approaches help you in *Making Money Talk*!

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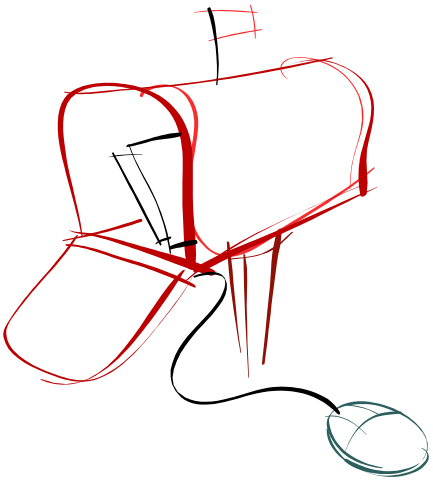
***** Kay Elliott****, JD, LL.M, has arbitrated and mediated over 1,800 cases since 1980. She has taught in and coordinated ADR graduate programs at Texas Woman's University and Texas Wesleyan School of Law since 1990, where she has coached championship negotiation and mediation advocacy teams. She is ACR Dallas President, Council Member of TMTR, Board Member of TMCA, a frequent contributor to ADR publications and seminars. Kay co-edited the SBOT ADR Handbook (2003) with Frank Elliott.*



ADR ON THE WEB

By Mary Thompson*

ADR Case Law

Cross Collaborate is published by John Folk-Williams, an environmental mediator, author and teacher. He is well-known in the public policy mediation field for his work in collaborative, multi-party natural resource conflicts in the West, including in Texas. Although his blog focuses largely on the use of collaboration in government decision making, it contains a number of articles relevant to dispute resolution, interest-based bargaining and collaborative problem solving.

Examples of his articles include:

How Diversity Improves Collaborative Problem-Solving
http://www.crosscollaborate.com/2010/05/diversity-improves-collaborative-problem-solving/

This review of Scott Page's book *The Difference* describes three types of diversity: Cognitive, Identity and Preference. Page's research finds that Preference diversity (related to interests) is the most disruptive of the elements for collaboration. Page's work challenges our assumptions that negotiators representing diverse interests achieve the best outcome.

Mediating on Two Tracks: The Rational and the Rest of Human Nature
http://www.crosscollaborate.com/2009/12/mediating-rational-human-nature/

Folk-Williams reflects on the challenges of addressing emotion, distrust and tension beneath the surface of controlled and rational negotiations. He also discusses the pressures faced by mediators to "keep a lid on" emotions in situations where meaningful resolution may depend upon allowing the expression of strong feelings.

Bernard Mayer: Staying with Conflict
http://www.crosscollaborate.com/2009/09/bernard-mayer-staying-conflict-mediation/

In this summary of Mayer's book, Folk-Williams looks at the unique challenges of long-term conflict and the tendency of the meditation field to focus on short-term solutions, at the expense of a more lasting and meaningful "constructive engagement."

Peter Adler and the End of Mediation
http://www.crosscollaborate.com/2009/04/peter-adler-and-the-end-of-mediation/

Reflecting on Adler's much-circulated article from 2009, Folk-Williams offers his own thoughts regarding the mediation field. He describes a trend whereby mediation practitioners have moved toward "collaborative practice" in response to a market increasingly needing not only conflict resolution, but also planning, visioning and change management.
Folk-Williams is a talented and thoughtful writer. By offering content from a variety of fields, Cross Collaborate reflects both the transformation and the interdisciplinary potential of the mediation profession.

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

JUSTICE FRANK G. EVANS AWARD

Justice Frank G. Evans Award Selection Criteria

Policies and Procedures for Selection of Recipients

- The Evans Award is created and dedicated as a living tribute to Justice Frank G. Evans who is considered the founder of the alternative dispute resolution movement in Texas.
- The award is awarded annually to persons **who have performed exceptional and outstanding efforts in promoting or furthering the use or research of alternative dispute resolution methods in Texas.** The recipients should be persons who are recognized leaders in the field of ADR. Although the award is presented by the ADR Section of the State Bar of Texas, the recipients do not have to be either a member of the State Bar, a member of the ADR Section, a lawyer, or a practicing third-party neutral.
- **Up to two awards may be awarded annually.**
- Each nomination submitted will be considered for two consecutive years but persons are encouraged to re-submit nominations yearly.
- Anyone may submit nominations provided the nominations are timely submitted on forms provided by the Awards Committee. The person making the nomination does not have to be a lawyer, a member of the ADR Section, or a third-party neutral.
- Nominations **must be received by March 1** of each year.
- Nomination forms may be obtained from any member of the ADR Section Directors Council or from the ADR Section Liaison at the State Bar of Texas.
- The nomination form will also be published at least once a year annually in the news bulletin of the ADR Section, preferably in the Fall edition. In addition, other non-State Bar ADR associations will be encouraged to publish or distribute the nomination form annually to their memberships.
- Selection of the recipients will be made by an Awards Committee of the ADR Section with approval of the Council. **Awards Committee voting membership will be comprised of five members of the Council.** The Chair and the voting members of the Awards Committee will be appointed by the Chair of the ADR Section. The Chair of the Section will not serve as the Chair of the Awards Committee. If an Awards Committee member is nominated, consideration of that nomination shall be delayed to the first subsequent year when the nominee is no longer a member of the Awards Committee.
- Persons who are members of the council as of March 1 are ineligible for consideration for the Evans Award for that calendar year. Ex-officio members are eligible.
- Although duration of involvement is not a requirement for selection of a recipient, special consideration will be given to nominees who have devoted themselves to alternative dispute resolution over an extended period of time.
- Presentation of the Award will be made at an appropriate ceremony at the annual State Bar Convention with a report of the presentation submitted for subsequent publication in the State Journal and the ADR Section bulletin.

Recipients

2010 Cecilia H. Morgan
2009 Michael J. Kopp
2008 Robyn G. Pietsch
2008 Walter Wright
2007 Cynthia Taylor Krier
2007 Charles R. "Bob" Dunn
2006 Michael J. Schless
2005 Maxel "Bud" Silverberg and
Rena Silverberg
2004 Professor Brian D. Shannon
2003 Honorable John Coselli
2002 Gary Condra
2001 John Palmer
2000 Suzanne Mann Duvall
1999 C. Bruce Stratton
1998 Professor Edward F. Sherman
1997 The Honorable Nancy Atlas,
Judge, Southern District of Texas
1996 Bill Low, First Non-Attorney Recipient
1995 Professor Kimberlee K. Kovach

NOMINATION FORM
JUSTICE FRANK G. EVANS AWARD

PRESENTED BY THE ALTERNATIVE DISPUTE RESOLUTION SECTION

I hereby nominate the following person for the Justice Frank G. Evans Award in recognition of the nominee's outstanding contributions toward, and achievements in, furthering the use or research of alternative dispute resolution in Texas [Attach additional pages as necessary]:

Nominee (Print) _____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ FAX: _____ E-Mail: _____

1. Is the nominee an attorney licensed to practice law in Texas? (Y) (N) (Circle one)

2. What is the nominee's occupation and business address:

_____

_____

3. List ADR methods in which the nominee has received training (e.g., mediation, arbitration) and, if possible, identify the training organization, length of training, and training year:

_____

_____

_____

4. List ADR methods in which the nominee has conducted training (e.g., mediation, arbitration) and the number of courses and the organizations:

_____

_____

_____

5. List the number of years that the nominee has been a member of the ADR Section of the State Bar. De-

scribe in detail the extent of involvement:

_____

_____

_____

6. List the areas in which the nominee serves as a third-party neutral (e.g., family law, government, environmental):

_____

_____

_____

7. List honors, awards, and recognitions received by the nominee in the field of ADR:

_____

_____

_____

8. List the ADR organizations (national, state, and local) to which this nominee belongs or has belonged. Describe the extent of involvement, including offices (with dates) held by the nominee in the organizations:

_____

_____

_____

9. List articles on ADR written by the nominee. Include the names of the publications in which the articles were published and the dates of publication:

_____

_____

_____

_____

10. On additional pages, please explain in detail what acts of outstanding achievement the nominee has performed in furthering alternative dispute resolution in Texas that qualifies the nominee for consideration for this award. Attach all documentation necessary, including letters of recommendation, to support the nomination and submit this completed form and all attached documentation as a single nomination packet.

Nominated by: _____
(Please Print)

Signature: _____ Date: _____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ FAX: _____ E-Mail: _____

Note: Nominations must be received by **March 1, 2011**

Submit nomination packet to:

Hon. Anne Ashby
One Lincoln Centre
5400 LBJ Freeway, # 525
Dallas, Texas 75240
972-661-2622 – Office
214-384-0674 – Cell
aashby@cblegal.com

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Spring	March 15, 2011	April 15, 2011
Summer	June 15, 2011	July 15, 2011
Fall	September 15, 2011	October 15, 2011
Winter	December 15, 2011	January 15, 2012

SEND ARTICLES TO:

Prof. Stephen K. Huber
University of Houston Law Center
Houston, Texas 77204-6060
shuber@uh.edu

CALENDAR OF EVENTS 2011

TAM Annual Conference * San Antonio * The Magic of Conflict Resolution * Feb. 25 - 26, 2011 * For more information: Website www.txmediator.org

40-Hour Basic Mediation Training * Houston * January 10-14, 2011 * *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

Specialized Course in Commercial Arbitration * Houston * January 12-15, 2011 * *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 * Denton * January 19-23, 2011 * *Texas Woman's University* * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

40-Hour Basic Mediation Training * Austin * January 19, 20, 21, 25, 26, 2011 * *Corder/Thompson* * For more information visit www.corderthompson.com or call 512.458.4427

40-Hour Basic Mediation Training * Ruidoso, NM * February 28– March 4, 2011 * Dispute Resolution Center of Lubbock County * For more information please contact Jessica Bruton or Crystal Stone at 866.329.3522 or 806.775.1720 Website: www.co.lubbock.tx.us/drc

40-Hour Basic Mediation Training Course Part I * Kerrville, TX * March 24-26, 2011 * Hill Country DRC * For more information please contact Ed Reaves at 830.792.5000 or hcadrc@ktc.com. Website: www.hillcountryadrc.com Class size limited.

40-Hour Basic Mediation Training Course Part II * Kerrville, TX * April 15-16, 2011 * Hill Country DRC * For more information please contact Ed Reaves at 830.792.5000 or hcadrc@ktc.com. Website: www.hillcountryadrc.com Class size limited.

40-Hour Basic Mediation Training * Houston * June 3-5 continuing 10-12, 2011 * *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

Civil Law & Mediation * Arlington * February 2, 2011—March 16, 2011* University of Texas Arlington * For more information contact Stephanie Brougton at broughtons@uta.edu or 817-272-2581 Website: www.uta.edu/ced

Mediating Construction Disputes * Houston * Friday, April 1, 2011 * *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

Family Mediation Training * Denton * May 12-15, 2011 * *Texas Woman's University* * For more information contact Christianne Kellett E-Mail: ckellett@twu.edu Phone: 940.898.3466 *
Website: http://www.twu.edu/ce/Mediation.asp

ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. Alternative Resolutions is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.

2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.

3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.

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

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

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

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

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

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

Selection of Article

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

2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.

2. Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

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

ALTERNATIVE RESOLUTIONS
POLICY FOR LISTING OF TRAINING PROGRAMS

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

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

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

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

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

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

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

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

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2010, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

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Patty Wenetschlaeger

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 2010 to June 2011. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____

Public Member_____ **Attorney**_____

Bar Card Number_____

Address_____

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

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

E-Mail Address:_____

2009-2010 Section Committee Choice_____

_____

_____

ALTERNATIVE DISPUTE RESOLUTION SECTION

State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

http://www.texasadr.org