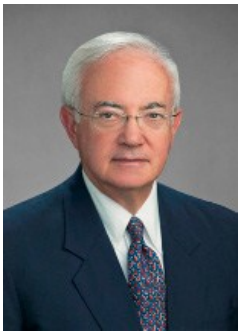
ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

Vol. 22, No. 1
Fall 2012

CHAIR'S CORNER
By Alvin L. Zimmerman, Chair, ADR Section



September, 2012 has been a very eventful month for ADR. The ADR Council met in Austin September 8, 2012, (Saturday) for our fall meeting and discussed the coming year"s events. As he had in prior meetings, Justice Bob Gammage was a strong contributor to the subject matter through his great knowledge and wit, which invariably germinated meaningful discussions for the Council. When he had the floor and spoke, all of us listened for we all were surely to learn from his comments. At the breaks in our meeting he exuded his warmth, fellowship, and kindness which always confirmed why he was so popular with our Council and all who knew him. Sadly, I report that I was shocked to learn the following Monday morning, that we lost a great person, lawyer, ADR advocate, and a real champion of the people when Justice Gammage succumbed to a heart attack at his home in Llano, Texas.

The Houston Chronicle reported on Tuesday morning of his death and reminded us how really fortunate the State of Texas was to have had Bob pass our way. He was part of the now famous "Dirty 30" – which was a group of Texas Legislators made up of conservatives and liberals in both parties "who rose up in opposition to the high-handed rule of the then-House Speaker Gus Mutscher, who soon would be enmeshed in the infamous Sharpstown scandal. "It was a badge of honor" he wore proudly. The Houston Chronicle went on to report: Not only was Bob a great legislator and a great senator, but he served with great distinction on the Supreme Court." Former Texas Gov. Mark White said: "He had a great feel for people, and always tried to protect the little guy against powerful interests." [Material from Houston Chronicle reprinted by permission.]

"Robert Alton Gammage was born in Houston on March 13, 1938. After graduating from Milby High School, he received his undergraduate degree from the University of Corpus Christi, now Texas A&M at Corpus Christi in 1963, and his Master's Degree from Sam Houston State University in 1965. He received his law degree from the University of Texas at Austin in 1969 and a Master's Degree in law from the University of Virginia in 1986. He served in the armed services and was a retired captain in the U.S. Naval Reserve. He was in private practice in Houston from 1969-1979 and was elected to the Texas House in 1970 and the Texas Senate in 1973."

Inside This Issue:

Bob is survived by his wife of 32 years, Lynda and three children from his first marriage, Terry Lynne Gammage, Sara Noel Gammage Newman, and Robert Alton Gammage Jr. and a son from his second marriage, Sam Gammage, a sister, and seven grandchildren. Justice Gammage's funeral was held in the Senate Chamber followed by burial at the Texas State Cemetery. Justice Gammage, may your example be a blessing to all of us who knew you and inspiration to those who know and will learn of your mighty ways.

I will miss his friendship; the ADR Council will miss his contributions; and the people of Texas will miss his contribution to improving the justice system through ADR.

I also learned that one of the real Deans of the ADR practice was taken from us when Roger Fisher died on August 25, 2012. He was one of the most accomplished authors, teachers, and lecturers in the filed of ADR and is well known for his book GETTING TO YES, the book that set the gold standard for dealing with impasse in a mediation. He had been a professor at Harvard for forty years where he was a co-founder of the Harvard Negotiation Project.

The ADR Section will be sponsoring a great one day CLE in Houston, Texas, on Friday, January 18, 2013, which will be held at:

Crowne Plaza River Oaks
2712 Southwest Freeway

This will be the Section's 11th Annual Dispute Resolution Course. The Program Chair is the Section's chair-elect, Ronald Hornberger of San Antonio. The topic for the Program is: Recognizing Cognitive Barriers to Creative Solutions and Real Tools to Deal With Them. The featured speakers will be the acclaimed Nina Meierding, a national leader in the field of conflict resolution, and Debra Berman, the Director of the Frank Evans Conflict Resolution Center, South Texas College of Law. We feel very honored that our Section could bring to you such notable speakers in this dynamic area.

I am also pleased to announce that the Section's new website is operational, and I invite you to click on www.TexasADR.org. I think you will find this a very helpful tool in your practice. A special thanks to Don Philbin and Joey Cope for their hard work in bringing this project to fruition.

IN MEMORIUM

Justice Bob Gammage
1938-2012

THE LATEST ON ARBITRATION

Lionel M. Schooler*

In this edition of recent arbitration developments, we will examine three new arbitration issues recently decided by either Texas courts or the United States Court of Appeals for the Fifth Circuit. These are:

(a) Where is the proper place to conduct post-arbitration proceedings?

(b) Is "actual bias" one subset of the statutory category of "evident partiality" as a basis for overturning an arbitrator's award? and

(c) What is a judge to do under the Federal Arbitration Act about arbitrator designations if there are three parties to an arbitration dispute who are at an impasse about selecting arbitrators, and the arbitration agreement contemplated there would only be two selected by the parties?

Proper Venue For Arbitration Proceedings & Post-Arbitration Enforcement Proceedings

In *In Re Lopez*, __S.W3d __ (Tex. 2012), 2012 WL 2052955, 55 Tex. Sup. Ct. J. 852, the Texas Supreme Court (in an original proceeding) addressed a question of first impression: what constitutes the proper "venue" for an arbitration proceeding, and for companion post-arbitration enforcement proceedings? The situation arose in the context of a nursing home treatment dispute. The parties to the arbitration agreement specified that arbitration was to occur in Victoria County.

The Lopezes submitted a demand for arbitration of survival and wrongful death claims to the American Arbitration Association (AAA). They requested Victoria County as the location for the hearing. However, the parties eventually agreed to have the arbitration submitted to a specific arbitrator located in Travis County, who conducted the arbitration there. Thus, although the arbitration agreement was never explicitly modified, the arbitration took place in Travis County, with a ruling in the Lopezes' favor.

The nursing home filed an application in Victoria County to vacate the arbitration award, arguing that it had been denied its opportunity to be heard, as the arbitrator was allegedly sleeping during the presentation of the evidence. The Lopezes filed a motion to transfer venue to Travis County, arguing that that county constituted the mandatory venue location.

The case presented the Supreme Court with the task of harmonizing the provisions of Texas Arbitration Act, sections 171.096(b) and (c), codified in the Texas Civil Practice and Remedies Code. Section 171.096(b) states as follows:

> "If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of that county."

Section 171.096(c) states as follows:

> "If a hearing before the arbitrators has been held, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of the county in which the hearing was held."

In addressing the competing commands of "mandatory venue" from §§171.096(b) and 171.096 (c), the Court took the common sense approach that §171.096(c) applied because the arbitration had already occurred. In so ruling, the Court declined to adopt the nursing home's assertion that §171.096(b) had the effect of "fixing" venue for all purposes from the outset of the arbitration, noting that §171.096(c) contained its own "mandatory" venue provision ("a party ***must file*** the application . . . ").

In the Court's view, the two sections did not conflict with each other, but rather established different venue schemes to address different situations.

The Court also noted in passing that "[i]n this case, the parties themselves chose to disregard their previous contractual agreement." The Court was clearly not enthusiastic about the nursing home's effort to return the litigation to Victoria County after having voluntarily participated in the arbitration proceeding in Travis County.

In this case of first impression, therefore, the Court directed the parties to conclude their litigation where arbitration had been initiated, in Travis County.

ACTUAL BIAS BY THE ARBITRATOR

The second recent case of interest came from the First Court of Appeals in Houston. *See FCA Construction Co. v. J&G Plumbing Services*, 2012 WL 761147 (Tex. App.-- Houston [1st Dist.] no writ 2012)) (not reported in S.W.3d). That Court addressed a question that it had never before considered, whether and the extent to which the standard of "evident partiality" contained in §171.088(a)(2)(A) of the Texas Arbitration Act, TEX. CIV. PRAC. & REM. CODE §171.088(a)(2)(A), as a basis for overturning an arbitration award incorporated within its contours a test for "actual bias."

The underlying case involved the relationship between FCA, the general contractor, and its plumbing subcontractor (J&G Plumbing) concerning construction of a fitness center. When disputes arose between them, these were submitted to final and binding arbitration.

The arbitrator who was appointed notified the parties at the time of appointment that a family relative of his had been represented recently in a matter by counsel for one of the parties, and further that this same law firm was currently representing at least two of the arbitrator's firm clients in commercial and/or construction cases referred to it. The arbitrator further disclosed having referred several clients to this same firm over the prior decade, and being personally acquainted with two of the named partners of that firm. In his disclosures, the arbitrator concluded by stating that "[t]he above disclosure will not impact or impair my ability to serve as a fair and impartial arbitrator in this matter."

After having due time to consider such disclosures, FCA agreed that this individual could preside over the arbitration. The arbitrator then conducted a three day arbitration, and entered a final award, the result of which was no recovery by FCA, and a monetary award to the subcontractor. The award was confirmed by the trial court.

On appeal, FCA's fundamental challenge to the award was a claim of evident partiality of the arbitrator. The First Court commenced its analysis of this claim by noting that the standard for claims of evident partiality had been established by the Texas Supreme Court's well-known decision in *Burlington North Railroad Co. v. Tuco, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997).

The *FCA* Court emphasized that the *Tuco* Court recognized that the most capable arbitrators are often those "with extensive experience in the industry, who may naturally have had past dealings with the parties," *id*. at 635; and that the *Tuco* Court rejected a standard of "per se" disqualification where the arbitrator had a business relationship with a party, opting for a standard premised upon the balancing of competing goals of expertise and impartiality. *Id*.

The *FCA* Court further emphasized an important teaching of *Tuco*, that the balancing was to be performed by the parties before the arbitration, not by the courts after the arbitration. It then noted that as the result of the *Tuco* decision, an arbitrator's failure to disclose facts was itself sufficient to establish evident partiality, irrespective of the existence of actual bias.

The *FCA* Court then noted that in this case, FCA was not claiming a failure by the arbitrator to disclose pertinent facts. Instead, FCA was challenging the award on the basis of the ***actual bias*** of the arbitrator, which it contended constituted a "second standard" by which to establish "evident partiality." It premised the existence of this second standard on a decision by the El Paso Court of Appeals in *Las Palmas Medical Center v. Moore*, 2010 W L 3896501, *12 (Tex. App. -- El Paso 2010, pet. de-

nied), which had adopted such a standard based upon its review of federal law. The *FCA* Court interpreted the *Moore* decision as requiring a party asserting "actual bias" to produce "specific facts" demonstrating that "a reasonable person would have concluded that the arbitrator was partial to one party."

Turning to the record on appeal, the *FCA* Court rejected FCA's contention that the arbitrator was not fair or impartial. In response to FCA's assertion that the arbitrator had assumed an adversarial posture against FCA, and that he had disproportionally subjected FCA witnesses to cross-examination and to challenges to their veracity, the *FCA* Court found that while the arbitrator participated actively in the hearing, questioning witnesses, managing the presentation of evidence, and controlling the procedure, he had actually questioned witnesses from both sides and made evidentiary decisions favoring both sides. The *FCA* Court also rejected the notion that the arbitrator was "cross-examining" FCA's witnesses, or that he had voiced displeasure over the alleged refusal of FCA witnesses to recant testimony.

The *FCA* Court ultimately did not endorse the adoption of the "actual bias" test, but indicated that even if it were willing to follow the *Moore* Court's lead, that FCA's allegations had failed to rise to the level of producing "specific facts" from which a reasonable person would conclude that the arbitrator was partial to one party. The Court also noted that FCA had failed to provide any authority for the proposition that the Court was empowered to "infer bias" based on an arbitrator's questioning of one side's witnesses more extensively than the other side's. It therefore affirmed confirmation of the award.

JUDICIAL MODIFICATION OF AN ARBITRATION AGREEMENT

Section 5 of the Federal Arbitration Act, 9 U.S.C. §5, contains a little known and rarely used provision authorizing federal courts to interject themselves (under certain circumstances) into the arbitration selection process. Section 5 specifically directs the district court to follow any method provided in the agreement for naming or appointing an arbitrator or umpire, but

> if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, ***or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy***, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

The United States Court of Appeals for the Fifth Circuit recently confronted the issue of the proper Section 5 role of the judiciary in becoming involved, and in the extent to which it could be involved, in arbitrator designation in a manner not agreed to by the parties in their arbitration agreement. *See BP Exploration Libya Ltd. and ExxonMobil Libya Ltd. v. Noble North Africa Ltd.*, __ F.3d __, 2012 WL 3065317 (5th Cir. 2012). As explained below, the Fifth Circuit in *BP Exploration* upheld the District Court's determination that a lapse in the naming of arbitrators in the parties' agreement had occurred, such that the district court was authorized to exercise appointment power under 9 U.S.C. §5. At the same time, the Fifth Circuit vacated the District Court's decision to require a panel of five (5) arbitrators chosen by a court-devised selection plan, because such a decision deviated from the parties' express agreement to arbitrate before a three-member panel.

As the style of the case suggests, the underlying dispute in this international transaction focused upon a disagreement among the parties over the appointment of arbitrators to decide the alleged breach of an assignment agreement. The case arose from an underlying dispute implicating the interests of three parties, under an agreement to arbitrate that was designed for a "two-party" dispute.

The Agreement in question (quoted below) contemplated two different arbitration scenarios: one being an arbitration over any dispute between Exxon and BP; and the second being an arbitration over any dispute to which Noble North Africa was a party. Specifically, in the Assignment Agreement, the parties agreed:

> Any difference arising out of or in connection with the terms of the Assignment Agreement (regardless of the nature of the question or dispute) shall as far as possible be settled amicably. Failing an amicable settlement within (3) three months of the written notification by one party to the other of a difference, or such longer period as the parties may agree, any dispute or difference arising out of [sic] relating to this Assignment Agreement shall be referred to arbitration before three (3) arbitrators in accordance with the International Arbitration Rules of the American Arbitration Association. Each Party shall appoint one (1) arbitrator. The two (2) arbitrators so appointed shall appoint the third arbitrator, who shall chair the arbitral tribunal. . . .
>
> For avoidance of doubt, the parties agree that the dispute resolution mechanism in this section 3[3] shall apply *only* to disputes between [Exxon] and [BP] and that any disputes to which [Noble] is a party shall be governed by the *language contained in Sections 18.1 and 18.2 of the [Drilling] Agreement* which are incorporated by reference herein and made a part hereof for such purpose as though set out in full herein.

Section 18.1 of the Drilling Agreement simply stated that the "General Maritime Law of the United States" would govern the validity of the Drilling Agreement. The more pertinent provision turned out to be Section 18.2:

> "Any dispute arising out of, or in connection with, this contract shall be finally settled by arbitration under the rules of the Arbitration and Conciliation Act 1990, by three (3) arbitrators appointed in accordance with such rules . . . ." Thus, for any dispute to which Noble was a party arising out of the Assignment Agreement, BP and Exxon and Noble agreed to arbitrate before three arbitrators appointed in accordance with the rules of the Arbitration and Conciliation Act 1990 ("ACA").

Incorporated as part of the Laws of the Federation of Nigeria, the ACA is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, and the 1976 UNCITRAL Arbitration Rules ("1976 UNCITRAL Rules").

In the dispute at hand, Exxon took the position that BP was responsible for paying Noble under the terms of the Assignment Agreement; BP disclaimed any such obligation. Noble was therefore left with no party paying the rate to which it believed it was entitled. Accordingly, Noble invoked its status as "a party" to a dispute arising out of the Assignment Agreement between BP Exploration and Exxon, and served an arbitration demand on BP and Exxon, maintaining that one or both of them was responsible for payment and seeking damages related to their alleged breach of the agreements. (In its notice of demand, Noble also designated its arbitrator in accordance with Article 7 (1) of the ACA Rules.)

The impasse to commencing the arbitration proceeding arose because neither BP nor Exxon was willing to restrict itself to the "joint" appointment of the "second" party-appointed arbitrator, each insisting that it had the right to designate its own arbitrator, and each, in turn, actually designating such a party-appointed panelist.

Confronted with such a mechanism and the impasse it fostered, where each party could legitimately have been characterized as having agreed to arbitrate before a panel of three arbitrators albeit under two separate arbitration regimes, the District Court, in an effort to fit the arbitration agreement to the dispute at hand, ordered the parties to proceed to arbitration before five arbitrators: three of these being party-appointed arbitrators, and two of these being neutral arbitrators selected by the "panel of three." The District Court further directed that if the party-appointed arbitrators could not agree on the selection of the two neutral panelists, the parties were to petition the Secretary-General of the Permanent Court at The Hague (the "PCA") for appointment of the two neutral arbitrators.

In fairness to the District Court, the "panel of five" structure was advocated by BP Exploration. BP Exploration requested that the district court intervene under § 5, dismiss the three arbitrators the parties

had appointed, and order the parties to select arbitrators under a different procedure. BP proposed four alternative procedures: (1) order that the parties exchange lists of suitable arbitrators, from which each party would exercise a certain number of strikes before the court selected a panel from the remaining names; (2) order an appointing authority, such as the PCA, to select the entire panel; (3) order the parties to proceed to arbitration before a five-member panel, comprised of the three party-appointed arbitrators, who would choose two other arbitrators; or (4) order the parties to arbitrate before a three-member panel selected by the district court.

In an elaborate analysis of the agreements in question together with the provisions of international arbitration rules (such as UNCITRAL) invoked by the parties, coupled with a similarly elaborate analysis of Section 5 jurisprudence, the *BP Exploration* Court first agreed with the District Court that a Section 5 "lapse" had occurred such as to frustrate the efforts of the parties to submit their dispute to arbitration.

However, the Court went on to note its disagreement with the District Court's exercise of its authority under Section 5. Focusing upon the dual principles of enforcing arbitration agreements according to their terms, and the "very circumscribed" judicial involvement in the arbitral process prior to the arbitration award contemplated by Congress in enacting Section 5, the *BP Exploration* Court ultimately determined that the parties' clear agreement to arbitrate this particular dispute before three arbitrators precluded the District Court from establishing a separate arbitration proceeding to be conducted by five arbitrators.

The Court felt that ensuring the proper composition of the arbitral panel was "of the utmost importance." This principle occupied preeminence for the Court because it concluded that parties agreeing to arbitrate require a panel that consists of arbitrators chosen by the parties or chosen in a manner that is neutral and fair to all parties concerned, requiring that the District Court respect the intentions of the parties.

This meant that when a lapse cognizable under 9 U.S.C. §5 occurred, the District Court was limited to appointment of three arbitrators, rather than having *carte blanche* to fashion its own remedy arising out of the deadlock. Having violated that requirement, the District Court was found to have issued an order that could not stand.

In so holding, the *BP Exploration* Court recognized that strict adherence to an arbitration clause mandating a panel of three arbitrators presented a challenge in this tri-partite dispute in terms of selecting the arbitrators. Even so, the Court stated that the District Court's order substituted its own notion of fairness in place of the explicit terms of the agreement and deprived them of the benefit of their bargain.

Having vacated the order in question, the *BP Exploration* Court concluded with the following directions to the District Court on remand:

> On remand, the district court is directed to enter an order appointing three arbitrators. In the light of the parties' intent to arbitrate under the ACA Rules, and to appoint three arbitrators in accordance with those rules, we believe that the parties' intent, as expressed in their agreement to arbitrate, can best be embraced by the following procedure, which we direct the district court to consider, as is allowable and workable. Thus, the district court should consider entering an order: (1) requiring BP and Exxon, as the co-respondents to Noble's arbitration demand, to appoint a second arbitrator, who would follow the agreed procedure for selecting a neutral member of the arbitral panel; (2) if BP and Exxon cannot agree on a second arbitrator by a certain date to be determined by the district court, the district court shall appoint the second arbitrator; and (3) if the two arbitrators cannot agree on the selection of a neutral member of the arbitral panel in accordance with the agreed procedure, the district court shall appoint the neutral arbitrator.
>
> We direct the district court to consider this procedure, but without taking away any discretion of the district court to modify, revise, supplement, or replace

this suggested method of selecting the arbitrators or otherwise come to a resolution, so long as it is not inconsistent with this opinion. Of course, nothing in this opinion prohibits the parties from reaching an agreement between or among themselves upon which they can agree for the appointment of arbitrators to hear this dispute.

* **Lionel M. Schooler** *is a Partner in the Houston office of Jackson Walker L.L.P. and the 2012 co-recipient of the Justice Frank Evans Award conferred by the Section. Mr. Schooler is a frequent writer and speaker on the topic of arbitration.*

Review of Arbitration Awards for Mistakes of Law or Fact

Michael S. Wilk*

Binding arbitration has a number of advantages over courtroom litigation – cost-savings, shorter resolution time, expert decision-makers, privacy and confidentiality, and relative finality.

Arbitration awards have relative finality because the grounds for overruling or modifying arbitration awards are limited. The Federal Arbitration Act (FAA) and state statutes, including the Texas Arbitration Act (TAA), list the statutory grounds for vacating or modifying arbitration awards. The statutory grounds specify various arbitrator failings:

> corruption,
>
> fraud,
>
> evident partiality,
>
> misconduct, and
>
> exceeding authority.

However, mistakes of law or fact by the arbitrator do not constitute a basis for vacating an arbitration award.

In some transactions, particularly large complex transactions, parties may want the speed, expertise and reduced cost of arbitration, but may also want to guard against an aberrant award caused by an arbitrator's serious mistake of law or fact. Seeking such balance, parties have included provisions permitting judicial appellate review where the arbitrator's findings of fact are not supported by substantial evidence or where the arbitrator's conclusions of law are erroneous.

In *Hall Street Associates L.L.C. v. Mattel Inc.,* 532 U.S. 576 (2008), the U.S. Supreme Court held that grounds for vacating and modifying an arbitration award under the FAA are exclusive and cannot be supplemented by contract. The court's opinion in *Hall Street*, however, is limited to the FAA and does not exclude review based on authority outside the federal statute, such as enforcement understate arbitration statutes or common law.

In *Nafta Traders Inc. v. Quinn*, 343 S.W.3d 84 (Tex. 2011), the Texas Supreme Court examined the *Hall Street* decision and held that under the TAA, contracting parties have the right to contractually agree for judicial review for mistakes of fact or law by expressly providing that the arbitrator does not have the authority to enter an arbitration award that is contrary to the law or the facts, thus subjecting the award to judicial review for reversible error under the statutory ground of an arbitrator exceeding his or her authority. The agreement at issue in the *Nafta Traders* case expressly limited the authority of the arbitrators, by specifying that:

> The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.

Although the Texas Supreme Court recognized that it was required to follow *Hall Street* in applying the FAA, it concluded that in construing the TAA the Texas Supreme Court was obligated to examine the reasoning in *Hall Street* and reach its own judgment. The Texas Supreme Court concluded that the U.S. Supreme Court's analysis of the FAA did not provide a persuasive basis for the Texas Supreme Court to construe the TAA in the same way.

The Texas Supreme Court also examined the doctrine relating to federal pre-emption of state law in the context of arbitration. Generally, federal law preempts state law to the extent that state law conflicts

with federal law and stands as an obstacle to the accomplishment and execution of the objectives of the FAA. The agreement in *Nafta Traders* involved federal and state law. Although the FAA and the TAA both applied to the contract in *Nafta Traders,* the court held that the FAA did not pre-empt the applicability of the TAA to the provision in the arbitration agreement mandating that the arbitrator did not have the authority to make a mistake of law or fact in the award.

The Texas Supreme Court reasoned that the primary purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms and that Texas law recognizes and protects a broad freedom of contract. Thus, the Texas Supreme Court held that the FAA does not pre-empt the TAA with respect to the contractual provision allowing judicial review of an arbitration award in instances where an arbitrator exceeded his or her authority by making a mistake of law or fact. A petition for certiorari in *Nafta Traders* was denied by the United States Supreme Court, 132 S.Ct. 455 (Oct. 17, 2011).

Contracting parties desiring to fall within the precedent established by *Nafta Traders* and provide for judicial appellate review of awards because of arbitral mistakes in law or of fact should consider the following in drafting an arbitration agreement:

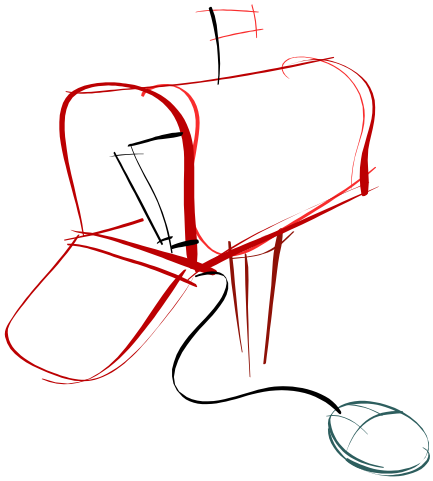
1. Express language that the TAA shall apply to the arbitration and to the judicial review of an award entered in an arbitration proceeding. By providing in the contract that the TAA governs the conduct of an arbitration, as well as the judicial review of the award, avoids any confusion of which statute applies for appellate review. Mere reference in the choice of law section of the contract that the laws of the State of Texas shall govern the interpretation and enforcement of the contract may be insufficient.

2. Specify that the award includes findings of fact and conclusions of law.

3. Provide for a record including the live pleadings, relevant motions and orders, and all exhibits and an official transcript of the evidentiary hearing instead of judicial appellate review, the parties may agree to an appeal to another arbitrator or arbitration panel.

Various alternative dispute resolution providers and institutions have rules and sample contractual clauses for appellate arbitration review. Most users of arbitration appreciate the advantage of relative finality and limiting appeal to the statutory grounds of the FAA and TAA. However, as the volume of arbitrations for commercial disputes increases, there are those who believe that in some cases a second look to ensure that the decision reached in the arbitration is not only faster and less expensive than a trial, but that the decision is correct and subject to being confirmed as correct by an appellate forum.

*** Michael S. Wilk** *is president of Hirsch & Westheimer in Houston, and a member of its Executive Committee. He is an honors graduate of the University of Texas Law School, were he was an Associate Editor of the Texas Law Review. Since 1991, he has focused on alternative dispute resolution. He has acted as mediator or arbitrator in hundreds of cases involving complex commercial and business disputes.*



ADR ON THE WEB

By Mary Thompson*

Harvard Law School Program on Negotiation

http://www.pon.harvard.edu/

The Program on Negotiation (PON) has long been a reliable resource for articles, seminars and training materials on negotiation. In recent years, PON has offered its "Daily Blog", with current postings on a range of topics related to dispute resolution, organized by topics:

Business Negotiation

Articles include:

Turn Your Adversary into Your Advocate: How to Ask for Advice describes the three guidelines for making this an effective negotiation tool.

Bring Back Your Deal from the Brink provides 10 strategies to address the difficult individual who is an obstacle in the negotiation.

Resolving First-Offer Dilemmas in Business Negotiations describes why a negotiator might want to make the first offer if they care only about the economic outcomes and why it might be less important if the ycare about satisfaction with the negotiation process.

Mediation

Articles include:

When Lose-Lose Wins contrasts the implications of creating joint gain vs. relationship building in negotiation and mediation.

Equal Time in Mediation describes the implications of an imbalance of talking time in negotiations.

How Lawyers Affect Mediation reports findings from a Canadian study of the impact of the presence of attorneys in mediated workplace disputes.

Conflict Resolution

Articles include:

The Darker Side of Perspective Taking describes research by the University of Chicago and Harvard University that suggests how taking the perspective of the other negotiator can increase the chances of impasse.

Why Your Lawyer Could Be Wrong about Apologies clarifies the positive impact of an apology and suggests three guidelines for offering an effective apology.

Other People's Interests: How Two Sisters Can Share a Diamond Ring provides a link to an article from the Fletcher School of Law and Diplomacy on the opportunities of compatible interests.

Other topic areas include conflict management, crisis negotiation, dispute resolution, international negotiation, meeting facilitation and negotiation skills.

Obviously, this is primarily a negotiation resource. Many of the "mediation" articles on this site are basic for most mediation practitioners. But for attorneys who negotiate in mediations, or for mediators

who see themselves as facilitators of negotiations, much of the information is valuable, engaging and thought-provoking.

The blogosphere is littered with abandoned blogs, as well blogs that are rarely updated. PONS offers an up-to-date, solid resource for neutrals, advocates and trainers in the dispute resolution field.

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

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 an attorney representing one of the parties in a large ($50 million) case. Because of the nature and the value of the case, you and the other counsel agreed to hire an expensive, high-profile mediator with a reputation for "getting the job done."

Mediation began at 8:00 am. At approximately 10:00 p.m. the mediator informed you and your client that there was an agreement and that he was going to meet with the other side to work out the Mediated Settlement Agreement. When the mediator had not returned for an hour-or-so, you went to search for him only to be told by the opposing counsel that the mediator had left shortly after 10:00 p.m. because he had an early morning flight for his two-week vacation in the Virgin Islands.

You have not been able to meet and/or talk with the mediator since the mediation and both you and the opposing counsel have been fighting over drafting language in the MSA ever since the mediation which, incidentally, has cost your client (who is "hopping mad" at you and your firm) an additional $50,000 in legal fees.

What, if any, are the ethical issues involved? What, if any, are your remedies against the mediator?

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Wayne I. Fagan, San Antonio

When I first read this Ethical Puzzler, my first reaction was that the answer is obvious but when I considered the source of the question, Suzanne Duvall, I thought I should go back and re-read the question because Suzanne would never put forth a question the answer to which was obvious. I then decided that it would be helpful if, for guidance, I reviewed some of the recent Ethical Puzzlers and the answers to them by our distinguished colleagues. One of the first answers I read that caught my attention was from Bill Leonard (see Alternative Resolutions, Summer 2012, Vol. 21, No. 4) who wrote "... I was astonished to learn that such stalwarts as Ross Stoddard and Trey Bergman had, contrary to general public perception, never settled a case as Mediator..." Bill went on to conclude "... I have to constantly try to remember that it is not my case and certainly not my call." If Bill, Trey and Ross are correct that as Mediators they do not settle cases the parties do, one has to ask what obligations/ responsibilities does the Mediator have in our Ethical Puzzler for his (the Puzzler refers to the Mediator in the masculine) acts or omissions.

In thinking through that question, I asked myself the following questions: Where did the mediation occur, i.e. in Texas of outside of Texas, does it matter? Was the mediator from Texas or not, does it matter? Was the mediator an attorney or not and if so was he licensed in the state where the mediation occurred - does it matter? The mediator informed me and my client "... there was an agreement..." was there really an agreement? We do not know what the agreement was, however, we do know that when the parties set out to memorialize the agreement in writing there were details still to be worked out - as the saying goes "the devil is in the details": The mediator had left but opposing counsel was still at the mediation - was counsel working on the settlement paperwork

even though the mediator was not there? Did opposing counsel have a problem with the mediator having left? Was opposing counsel aware that the mediator had not informed me that he was leaving - does it matter? Was there a written agreement retaining the mediator, if so, what did it provide for - does it matter? Was the case ever ultimately settled? What was my understanding of the deal when the mediator announced there was an agreement?

If the case was ultimately resolved were the settlement terms more or less favorable to my client than what I understood the deal to be when the mediator announced there was an "agreement"? Would it matter to the analysis if all of the facts in the hypothetical were the same except that the mediator stayed engaged in the process through phone calls, e-mails, and other forms of communication after he left? Is the mediation over or in recess? Is the mediator a TMCA credentialed Mediator? No way of knowing how much more it would have cost my client had the mediator remained and not gone out of town.

For the purpose of my analysis I assumed the mediation occurred in Texas , the case was pending in Texas, and the mediator was a TMCA credentialed mediator. For guidance I reviewed the following: Ethical Guidelines for Mediators (SBOT ADR Section); TMCA Standards of Practice and Code of Ethics; if the mediator was an attorney licensed to practice in Texas, I would also review the applicability, if any, of the following: a) Texas Disciplinary Rules of Professional Conduct; b) Texas Lawyer's Creed - A Mandate for Professionalism; c) The State Bar Act; d) The State Bar Rules; and e) Texas Rules of Disciplinary Procedure (TRDP).

Legal Analysis: Having reviewed all of those materials, we now our attention to the question "... What, if any, are your remedies..." That assumes the Mediator did something wrong. If he did something wrong does my client have a legal cause of action and if so what are my client's remedies/damages? An argument could be made that the Mediator breached a legal duty to my client, however, even if that were so, what are my client's damages, this becomes highly speculative and implicitly is bottomed of the assumption that had the mediator handled things in a different way a settlement would have been finalized. What about Mr. Lemon's comment that it is the parties deal not the mediator's deal if that is the case what was to prevent the parties from finalizing the deal without the mediator, that in fact often happens after a Mediator has declared an impasse but the Mediation itself put in motion dialogue that eventually leads to a settlement.

Ethical Issues: If successful legal action is too speculative, does it follow that the Mediator acted ethically, absolutely not. See TMCA Standards of Practice and Code of Ethics: a) Rule 1 "...The primary responsibility for the resolution of dispute rests with the parties." Also see comment to Rule 1 "A mediator's obligation is to assist the parties in reaching a voluntary settlement" Query: Can the Mediator provide effective assistance if he leaves the mediation without advising counsel for one of the parties that he is leaving and not returning phone calls from counsel for that party following the mediation;

b) TMCA Rule 2 "A mediator shall protect the integrity and confidentiality of the mediation process". Comment (b) to Rule 2 "The interests of the parties shall always be placed above the personal interest of the mediator..." Comment (c) to Rule 2 "A mediator shall not accept mediations which cannot be completed in a timely manner..." Query: did the mediator's actions here meet the standards of Rule 2?

c) TMCA Rule 7 "the mediator should not convene a mediation session unless...an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive..." Query, is it implicit in this rule that the mediator as well as the parties should allocate an adequate amount of time, what is an adequate amount of time;

d) TMCA Rule 13 "...A mediator should postpone, recess... "Query: This rule refers to the parties but should it also apply to the mediator. We do not know from the facts we have been given if the Mediator advised counsel prior to the mediation of his vacation schedule. Even if he had, does that excuse the manner in which the mediator left the mediation or his failure to respond to phone calls thereafter; and e) TMCA Rule 14 "A mediator should encourage the parties to reduce all settlement agreements to writing "Query: is it sufficient for the mediator to simply state "I encourage you to reduce your agreement to

writing" and then just leave without telling one side he is leaving?

Remedy: If the mediator was a TMCA credentialed mediator, the disgruntled client has the option of filing a grievance with the TMCA grievance process (see TMCA Grievance Procedure www.txmca.org.)

Conclusion: In the movie "Moneyball" the general manager of the Oakland A's baseball team was fond of saying "It is a process, it is a process...either you believe in the process or you don't..." So to mediation is a process, it is the role of the mediator to assure that the process works, that does not always result in a settlement. True it is up to the parties to either settle or not to settle but in the Hippocratic oath doctors are taught "do no harm", mediators should follow that same oath, did the mediator in this puzzler live up to that standard? I think not.

Melynda Z. Gulley, San Antonio

The first rule of mediation is "do no harm." In this case, besides breaking that unwritten rule, the behavior described is just plain rude. When you couple these points with the harm done to the reputation of an entire profession by the behavior of one representative person the results of this mediator's influence is extremely harmful.

Additionally, the main ethical standard violated is this mediation is simply a lack of integrity from the mediator. Leaving mediation without notifying the parties, and with an unfinished settlement agreement and with parties and their counsel in complete disarray for weeks following is nothing if not unethical.

Each mediator is the face of our profession to those who use their mediation services. The number 2 guideline of ethics for mediators stresses the point of protecting the integrity of the mediation process which means to me, that my actions reflect on the others in my profession. Thus I have a responsibility to carry out the process of mediation with the utmost care and consideration of the impact I will have on the entire profession.

More tangible violations of the ethics code are guideline #2, comment C, which states that a mediation should not be accepted if it cannot be completed in a timely manner, leaving for a vacation is not an exception to this rule. Also guideline #14 states that settlement agreements should be reduced to writing... this is the culmination of the mediation process, usually the reason for going to mediation.

The only recourse for this unethical activity in a profession is a business which holds its members accountable. The Texas Mediators Credentialing Association (TMCA) provides such accountability with a grievance process; a great reason to require your mediator to be credentialed.

John Palmer, Waco

Unfortunately, the mediator did not recess the mediation and invite the parties and their attorneys to the Virgin Islands. Instead, the mediator abandoned the parties and exposed himself to personal and professional liability.

A mediator has the duty to protect the integrity of the mediation process. Texas Mediator Credentialing Association (TMCA) Standards of Practice and Code of Ethics Rule 2, Mediator Conduct and Texas Supreme Court *Ethical Guidelines, Rule 2.* Note, the TMCA rules use the word "shall" and the Supreme Court Rules use the word "should". Comments b and c of Rule 2 specifically address the mediator's lapse of judgment:

> ***Comment (b).*** The interests of the parties shall always be placed above the personal interests of the mediator.
> ***Comment (c).*** A mediator shall not accept mediations which cannot be completed in a timely manner or as directed by the court.

Robert Prather, Dallas

Cryptic, but maybe something different.

Individually --Lied about
- there being an agreement
- He would return
- He was working on the agreement - instead, went home

Not complete the mediation
Not return calls - unprofessional

As mediator --

> All of above is not ethical for a mediator.

If mediator is an attorney:

> Even though mediation may not be the practice of law, you are lying in a legal proceeding and taking someone's money for services you have not completed and caused them additional costs.

Remedies:

> File grievances
> Report tot he court, to disallow fee as costs and if court can sanction
> Sue for breach of contract, fraud and disgorgement of his fee and other damages

Christina Schroer, Austin

The first ethical issue relates to contracting to conduct a mediation knowing you might not have the time to complete it. To agree to serve as a mediator and receive payment while not completing the job is morally unacceptable.

One remedy would be to sue for breach of contract. Another remedy is that if the mediator is a member of a mediation organization, you could notify them. This way the word would get out about unprofessional conduct and would not be contacted for future mediations.

Comment: It is often said that a Code of Ethics in any profession is only the bare minimum standard of conduct to which a member of that profession should adhere. Beyond a Code of Ethics lies professionalism - a code of personal conduct that impresses upon the profession the mandate to not only "do no harm" but, also, to always act with the highest degree of personal and professional integrity.

In this Ethical Puzzler, there are violations of the Supreme Court's Ethical Guidelines and of TMCA's Ethical Rules. But beyond these violations, the situation just doesn't seem to pass the all-important "sniff test" - it just doesn't smell right.
Are there remedies? Perhaps. But, more important than the ability to file a TMCA grievance, or a breach of contract lawsuit, or ask the court to act through its enforcement powers, lies the duty of each of each practitioner to go beyond the bare minimum standards towards the goal of personal and professional integrity.

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

CALENDAR OF EVENTS 2012

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Issue	Submission Date	Publication Date
Winter	December 15, 2012	January 15, 2013
Spring	March 15, 2013	April 15, 2013
Summer	June 15, 2013	July 15, 2013
Fall	September 15, 2013	October 15, 2013

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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.

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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.

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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.

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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.

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ALTERNATIVE DISPUTE RESOLUTION SECTION

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