ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By Ronald Hornberger, Chair, ADR Section

This is my last Chair's Letter for my year as Chair of the Section. Its been fun, its been enlightening, and, with the help of a wonderful group of colleagues on the Council, its been a successful year for the Council and the Section.

My goals for the year were to institute a Council Retreat (more on that later), continue the efforts toward a new edition of the ADR Handbook that was so successful years ago, make sure that the project to redesign and reinvigorate the Section's website was completed, and try to do what I could do to make sure that the long tradition of outstanding Section CLE programs was continued, both at the January Annual Section CLE and at the Annual State Bar Convention.

During the year, from time to time, I have tried to feed potential article topics to others by keeping an eye out for interesting cases published on mediation and arbitration topics. It has been successful only because we have so many who genuinely are intellectually interested in what we all do as mediators and arbitrators. Their efforts as contributors to our Newsletter has improved the experience of membership for us all. Remember, whenever you have the urge to write, our Newsletter always has a need for quality, relevant content.

One of the missions of the Council last year and this year has been to entirely rework our Section's website making it more user friendly and accessible, with many more features and more content and useful references. This Spring that project was completed and the new site "went live" on March 26, 2014! It can be found at www.texasadr.org. The tireless efforts of our Chair Elect and fellow Council member, Don Philbin, and of Bre Binder at the SBOT have born fruit!

Our site now is a far more delicious collection of content and features all presented in a user friendly venue that all of us will find to be a wonderful tool. Our goal is to keep the site "relevant", "helpful" and robust. Thus, each of our members is invited to peruse the site at your leisure and to give feedback to the new Section Chair re corrections, suggestions for further features and/or content, or, of course to praise the results achieved! I think you'll like it!

Another mission of the Council last year and this has been to rework entirely and to re-publish the ADR Handbook that was so successful some years ago. This has been and is a monumental task! A highly qualified and dedicated group of editors and contributors have been working diligently towards our goal of re-publishing what we know will be a very useful reference for all

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of us. It is an exciting project that has been led by Hon. Justice Linda B. Thomas, Ret'd and her merry band of motivated and incredibly dedicated and talented contributors, highly qualified people in the ADR profession who know whereof they speak. Working with Justice Thomas is Prof. Kay Elliott. The chapter topics have been settled upon and the list of contributors is astounding. We hope that during the 2014-2015 year this project will be concluded and that this newly reinvigorated asset will be available to us all.

Earlier this year our Immediate Past Chair, Alvin Zimmerman, saw to the completion for the Section of the Newsletter Digitization project and is happy to report that the project is complete and that the past newsletters are posted on the website. As they are published in the future they will be added to the site. Alvin's tenacity and hard work in shepherding this project to completion is greatly appreciated and as a result, we have a wonderful resource available to us on the Section's newly completed, redesigned and reinvigorated website!

In January of this year the Section's annual CLE was held in Dallas. Our Course Director, Hon. Linda Thomas, corralled an incredible group of speakers who made this a fulfilling experience and an interesting and entertaining event. Every year, and this year was no different, this Section's annual CLE event is interesting, educational and filled with practical advice and lessons. If you missed it, order the materials and the recordings from the Bar. Oh, and sign up for the Section's CLE to be presented at the State Bar Convention in June in Austin. It promises to continue and enhance the reputation of the Section for its quality CLE programs.

In April the Council conducted its first of what I hope will be an annual Council Retreat. The format was of an expanded "regular meeting" but one that allowed the Council to more fully address each item on the agenda and give more concentrated attention to projects in process and to brain storm potential new projects and new directions for the Section to improve the experience of membership for us all. It was held at the La Torretta Lake Resort at Lake Conroe, a beautiful destination and a lovely site for a Retreat or any other meeting. Perhaps some future Annual ADR CLE will be held there. This format allowed the Council to give more quality time to topics sometimes short changed in the hustle and bustle of the usual 2-4 hour quarterly meetings, topics such as the number and make up of our Section and how to grow the membership and spread our message as a group of professionals engaged in alternate dispute resolution techniques and methods, topics such as how to add resources and functionality to the website and how to bring more and better resources to our membership.

Being Chair of this Section has meant much to me and many have made it a joy beyond the fact of being Chair. My sincere gratitude goes out to Alvin Zimmerman our Immediate Past Chair and to Joey Cope for being there for me whenever I lost balance and was about to stumble in some way. Alvin was a giving and wise mentor upon whose good counsel I have depended and for which I am ever grateful. While serving as our Treasurer, Justice Linda Thomas maintained her steadfast efforts to push along the Handbook project and, together with Professor Kay Elliott, has enlisted a terrific group of contributors, all of whom are hard at work to finish the project. I cannot thank them enough.

Don Philbin's work on the website can be seen by all simply by visiting the site. It now is a very much improved venue and will prove to be a valuable resource to us all. Our hope and intention is that it will continue to grow in content and design, so, everyone's suggestions and input is invited. Don, I thank you and the Section thanks you for all the creative effort that has gone into this wonderful redesign. And, Erich Birch's quiet, steady hand as our Secretary has been of great help to me. Everyone on your Council has pitched in this year to assure that we have been able to accomplish much and maintain the pace on projects still in process.

Lastly, I cannot end this letter without acknowledging and thanking Tracy Nuckols, Bre Binder and all of the many folks in the Sections department at the State Bar. We, as members of the Bar, sometimes take for granted the incredible resource that is the State Bar's staff. They can do anything! Seriously, anything! And, they do it all with a ready smile and a 'can do' attitude that is second to none! May we never be without them!

The Value of Economic Analysis in Mediation

By Donald R. Philbin, Jr.

"Why?" the child asks, negotiating a reprieve from eating green beans in favor of an early desert. "Because green beans are good for you," may have a hollow ring. "Because I said so" may work only to the extent of the power imbalance. Children want to know how their parents reach the conclusions that they serve up as positions. They probe for underlying rationales and interests. Litigants have the same need to understand how their opponents reach their conclusions.

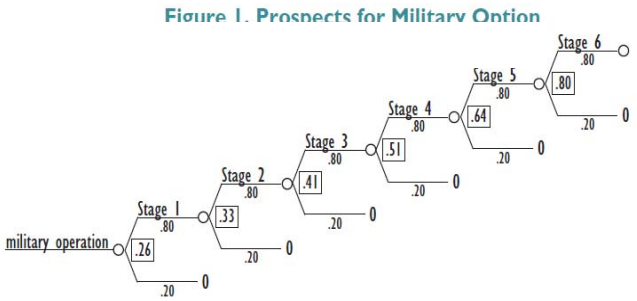
If 98% of filed cases will have negotiated outcomes, preparing to negotiate or mediate should focus more on underlying rationales than on positions, and for this the parties need a common vernacular though which to discuss the rationales that inform their decisions.

This article discusses economic decision analysis as a tool to assist practitioners and their clients in preparing to negotiate or mediate. Of course, an economic analysis is only as good as the legal and factual analysis upon which it is built. It should show the legal remedies allowed by law and the facts supporting them.

A sound economic analysis will get a party beyond the simple conclusion that it has a "good case" because there is some chance of a high or low award. A litigant wants to understand how the adversary got to its "good case" conclusion and what "good case" means.

Take this military example. An 80% chance of success in each of six crucial stages of military operation does not make for good odds. Even though a president may be tempted to give the go-ahead if the generals reports that the overall chances for the operation are good, the combined results are a surprisingly low 26%. Mathematically, the problem is represented as 0.80 to the sixth power or 0.80 x 0.80 x 0.80 x 0.80 x 0.80 x 0.80 = 0.26. Graphically, it looks like this:

Figure I. Prospects for Military Option



With the facts narrowed and the potential outcomes identified by legal analysis, it is possible to use economic analysis to graphically depict and value various scenarios in a litigated case. While we may not know with certainty what will happen in a specific trial, we do have an idea of the types of results that would flow from trying the same case 100 or 1,000 times. For example, we may get seven heads in 10 coin tosses — a high success rate. But that rate will be quite different (i.e., a "normal distribution") if you tossed the coin 100 or 1,000 times. Just ask anyone who has been to Las Vegas.

Stacking an economic analysis atop our legal analysis will also help us unravel the psychological biases that skew our results. Anchoring, overconfidence, imperfect information, attribution errors, reactive devaluation, and other recognized biases account for noticeable differences in the answers different parties give to the same question. While we may not be able to completely "de-bias" the analysis, we can recognize that the same person will value the same object (house, car, etc.) differently depending on whether she is buying or selling.

Plaintiffs and defendants are no different. The legal system essentially forces defendants to write call options that are either in or out of the money depending on the final outcome. The challenge is to rationally derive that strike price in advance. So we account for biases as we build tiered analyses.

Value of Economic Analysis

Intuition and experience can help lawyers and clients gauge the prospect of "winning" a lawsuit. Economic analysis takes this "gut" assessment to another level. It urges a systematic analysis of the different outcomes, from the lowest (zero) to the highest. Once these potential outcomes are determined, they can be depicted in decision trees that MBA students have used for years.

Potential outcomes are not much help until they are assigned a probability of actually occurring. For example, having a chance at winning a $12 million lottery payoff is nice, but it is more helpful to assess the probability of winning, which may be worse than getting hit by lightening. People are likely to have to have different views on the likelihood of particular outcomes. Those different assessments can be graphed out and rolled back mathematically to determine the impact they have on overall valuation. Some may dramatically affect the net expected value (NEV) while others will not.

After the potential outcomes are identified and the probabilities are assigned, we do some basic arithmetic to determine NEV for each outcome (the product of multiplying the outcome by its probability). Notice that in the process, we have animated what we mean by "probable," "reasonably possible," and "remote" in a way that makes sense to financial types and decision makers — whether or not they agree with the underlying assumptions. It is a clearer way of talking about a "good case" or a "bad case" because it focuses on a range of potential future outcomes, rather than just the historic events that underlie the suit.

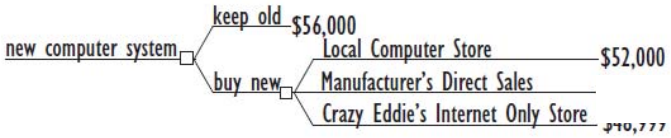
The exercise also increases the confidence of the negotiator who can now articulate how the "good case" conclusion was reached. That confidence tends to produce more favorable outcomes.

Using Decision Trees

Decision trees present alternatives in a graphic manner. They can help people make decisions under uncertain conditions by helping value the intangible dollars The more information that goes into the decision tree and the determination of probability, the greater the precision: but discovering that information comes with a price.

Here is a decision tree representing the issue of whether a small business owner should replace its aging computer system with a new one.

Figure 2. Business Computer Buyer's Decision



In deciding whether to replace the current system, the buyer first must research different replacement cost options. It must also determine the price at which it will decide not to buy a new system and keep the current one — it's "walk away" alternative. In this example, that figure is $56,000, but it's kept close to the vest during negotiations.

The decision tree shows that the buyer identified three viable purchase options, all less than its walk-away number: buying from (1) a local dealer for $52,000,;(2) a manufacturer's direct sales division for $50,000; or (3) an Internet-only seller for $48,999. Those options and the costs associated with them are shown as branches on the right side of the tree.

Armed with this information and its walk-away number, the buyer could decide to try to negotiate a lower price from the local dealer, from whom it might get some reciprocal business. It could choose to take the risk of buying from the Internet dealer, especially if the computer system comes with the same manufacturer's warranty. The buyer may feel more comfortable with the mid-priced system from the manufacturer's direct sales unit.

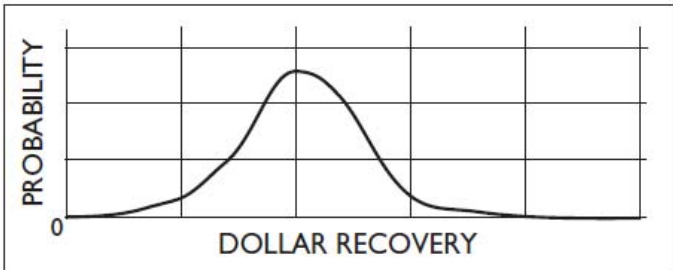
The same basic analysis applies to options in a litigated case. Parties to a dispute can decide to negotiate their own solution to a problem (with or without a mediator) or turn it over to someone else to impose a decision (as in arbitration or litigation).

For each type of claim (e.g., breach of contract or warranty, misrepresentation, violation of consumer protection statutes, etc.), there are associated legal remedies (economic loss, treble or punitive damages, etc,), which provide the range of potential outcomes to a dispute. These outcomes can be depicted in a decision tree, just like the outcomes in the purchase decision.

But before getting to those remedies, to simplify, let's say the plaintiff has two options: to settle or litigate. This decision is completely within the parties' control and is represented in the decision trees as a square (called a "decision node"). However, the potential legal remedies that might result if the parties do not settle are represented by a circle (called a "chance node"), since a jury, judge, or arbitrator would then determine the outcome for them.

In the following decision tree, let's assume that the computer system turns out to be defective and that it cannot be fixed under a written warranty. The small business owner in this example can mount a claim under the state consumer protection statute, which provides for treble damages, as well as a claim for breach of contract and for repair costs. For brevity, we will not get mired down in credits for a returned product, remedy elections, time value of money, etc. —though such assumptions could be progressively worked into the analysis in the context of a live mediation session.

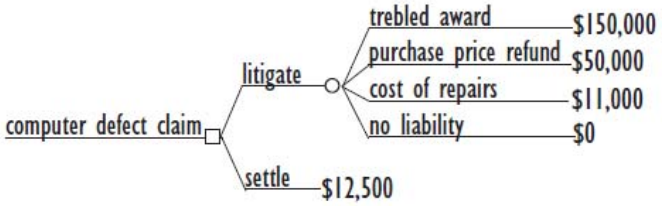
Figure 3. Outcome Distribution



Let's start by assuming four possible outcomes depicting high, medium, low and zero awards. The "bell curve" we hoped to forget from school provides an illustrative structure. It shows that if you had 100 trials of the same dispute, there will be high and low results, but the majority will probably lie somewhere in between.

There is usually some chance of no recovery (left). Better results, for example recovery of repair costs, or the purchase price, or even treble damages, are shown as the curve moves to the right along the horizontal axis. At some point, the probabilities start coming back down. The likelihood of treble damages is less than recovery of the purchase price, which may be less that the probability of repair costs. The outcomes with the highest probabilities form the top of the curve. Those that are possible, but less likely, form the sides that approach zero probability at the horizontal axis.

Figure 4. Basic Claim



Of course, more data points will result in more definition, but our goal is to build a relatively simple model that provides a vehicle for evaluating and discussing plausible options while narrowing the open issues. Using this model can have a highly beneficial effect because it moves the parties away from heated discussions of past events, allowing them to make rational decisions based on the probability of various plausible future outcomes and the NEVs of each option.

In this example, the plaintiff will decide whether to take a chance on various legally available but uncertain outcomes at trial, or to negotiate a settlement. The defendant faces a similar decision, the value of the settlement offer is assumed to be $12,500 in this round.

The next step is to assign a value to each potential litigation outcome and the probability that each might occur. The parties' lawyers will have a good sense for these values as they shift into the role of investment banker during negotiations. But two investment bankers valuing the same intangible may reach differed conclusions based on different biases.

For example, sellers and plaintiffs routinely seek more than buyers and defendants are willing to pay—and if they switch roles, those views too will reverse. Studies have been done of overconfidence. One showed that over 80% of entrepreneurs considered their chance of success as 70% or better while 33% described it as "certain." That compares with an actual success rate of 33% for new firms (with actual success considered surviving for five years).

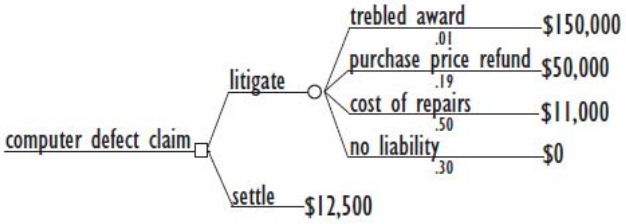
Similarly couples about to be married tend to be overconfident that the marriage will last. They estimated their chances of later divorcing at zero, even though most know that the divorce rate is between 40-50%. Likewise, negotiators in baseball arbitration (in which the arbitrator selects the most reasonable offer) overestimated the chance that their offer would be chosen by 15%. Surveys find this

"Lake Wobegon above-average" effect across all kinds of demographics—college professors, high school students and truck and taxi drivers.

Let's assume that plaintiff's counsel has determined that the client is more likely to recover repair costs or the sales price then treble damages because a trebled recovery requires proof of malice, which might be difficult to establish in this case. Thus the chance of recovering treble damages is assumed to be remote, possibly 1%. For illustration, the .01 estimate is placed just below the branch leading to the trebled outcome.

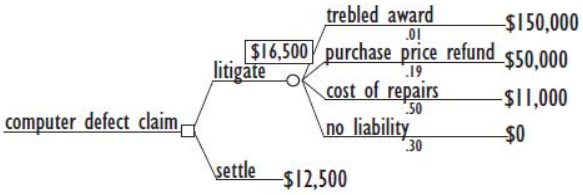
Let's also assume that plaintiff's counsel has determined that recovery of the purchase price has a greater probability of success, 19%, while recovery of repair costs is the most probable, estimated at 50%. Plaintiff's counsel also assumes that there is a 30% chance that it will lose at trial. These probabilities are placed below the relevant tree branch.

Figure 5. Plaintiff's Initial Probabilities



The probabilities must add up to 100% and they do/ (.01 + .19 + .50 + .30).

Figure 6. NEV of Plaintiff's Initial Probabilities

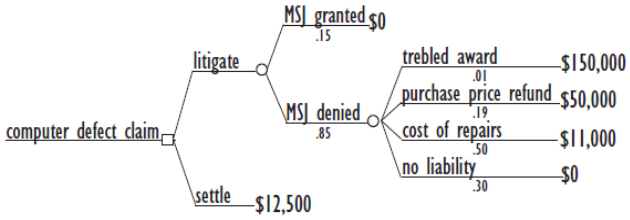


Next we need to determine the NEV of each branch of the litigation decision. We do this by multiplying the value of each potential outcome by its probability. Thus we multiply .01 by $150,000, which equals $1,500, and we do the same for the other outcomes. Then we add the products of each of these multiplications.

1% times $15,000 = $1,500
19% times $50,000 = $9,500
50% times $11,000 = $5,500
30% times $ = $0

%16,500 is the NEV for the litigate branch.

Figure 7. Summary Judgment Branch Added



Because $16,500 exceeds the hypothetical $12,500 settlement offer, the plaintiff decides to litigate. But that assessment may change as different contingencies are considered.

Now assume that the defendant files a motion for summary judgment (MSJ), which its counsel assesses to have 15% chance of being granted in the hypothetical jurisdiction. This means that there is an 85% chance that the motion will be denied. These assumptions are additional factors to consider when assessing the anticipated outcomes. The MSJ and its potential outcomes are added to the decision tree at the end of the litigate branch. Note that the potential trial outcomes now branch from a circle chance node on denial of the MSJ.

Adding this additional decision fork with its two possible outcomes and probabilities affects the NEV of the litigate branch. If summary judgment is granted to the defendant, the case goes away and the NEV of the litigation option is discounted to zero.

On the other hand, if summary judgment is denied, which has an 85% chance of occurring, the NEV of the litigate branch is only reduced by the 15% chance of the MSJ. So there remains an 85% chance that the plaintiff will get to take a swing at the trebled award and the other litigation options that fork from the denial of the MSJ.

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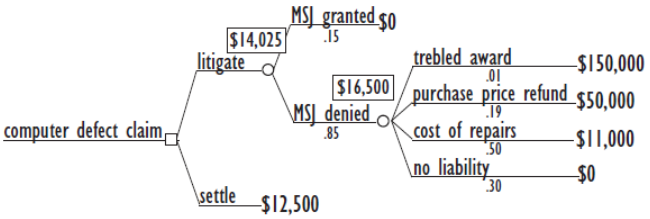
Thus, the NEV of all trial options ($16,500) as discounted by the good chance (85%) of over coming a MSJ. This contingency, however, reduces the value of the litigate options to $14,025 (the product of $16,500 times .85). This is depicted in Figure 8.

Figure 8. Calculations of NEV based on Figure 7



Now, if we examine the discounted value of each litigate option, we find that the $150,000 trebled award (which is plaintiff's best-case scenario) is slightly less likely to occur because of the additional contingency. Instead of having a 1% chance of occurrence, it has a 0.85% chance of occurrence (0.01 times 0.85 = 0.0085). Recall that the NEV of the $150,000 award is $1,500 ($150,000 times the 1% (.01) probability of winning that award) pre-MSJ.

To take into account the odds of summary judgment being denied (85%), we need to multiply $1,500 by .85. This gives us $1,275. We do the same for the other litigate options to arrive at the weighted average (NEV). The plaintiff's worst-case scenario (zero recovery) is unchanged because any number multiplied by zero is zero.

However, the probability of getting zero is slightly less, reduced from 30% to 25.5% (.85 times 0.30) due to the summary judgment contingency. The plaintiff's chance of obtaining contract damages (.19 times .85) is discounted to 16% instead of 19%, which when multiplied by $50,000 results in an MSJ discounted award of $8,000 (down from $9,500). The plaintiff's chance of obtaining repair costs is discounted to 42.5% (.50 times .85). When .425 is multiplied by $11,000, the discounted result is $4,620.

Before discounting the potential litigation recoveries by the odds of a denied MSJ, the plaintiff has a 70% chance of recovering something more than zero (50% + 19% + 1% —from figure 6). If we discounted that aggregated percentage, it is reduced to 60% (.85 times .70) in figure 8 for the MSJ. Thus, the plaintiff could be said to have a "good chance" of winning something. But like the lottery, winning doesn't always mean a big win. Here plaintiff does not have a "good case" for a big win ($150,000), the amount we would all want to recover if playing the plaintiff's role.

Transaction Costs

Another important factor is missing from our analysis of possible outcomes. That is the impact of transaction costs on each scenario. Since the time it takes to bring and defend claims, discover facts, file and defend motions and argue the case is expensive, we would do well to bake those costs into the analysis.

Let's assume that the plaintiff has negotiated a 25% contingency fee, which pays if the plaintiff wins the case. To take this into account, we need to reduce each potential litigate outcome by 25% (ignoring potential fee recoveries for now). Thus winning $150,000 would cost $37,500, leaving a $112,500 net recovery; winning $50,000 would cost $12,500, leaving a $37,500 net recovery; winning $11,000 would cost $2,750, leaving a $8,250 net recovery. These outcome adjustments affect the NEV of the litigation option, as well as the discounted NEV, taking into account the MSJ.

So, instead of a NEV of $16,500, we get a NEV of $12,375, which is the sum of

1% times $112,500 =	$ 1,125
19% times $27,500 =	$ 7,125
50% times $8,250 =	$ 4,125
30% times $0 =	0
	$ 12,375

Then, instead of a discounted NEV of $14,025, we get a discounted NEV of $10,519, which is less than the anticipated settlement amount, calculated as follows: $12,375 times .85 = $10,518.75. This is depicted in Figure 9 below.

The Defendant's Transaction Costs

Now we look through the other end of the telescope at the decision the defendant faces. Our defendant may not be able to negotiate a contingency fee, but let's assume that it ca get a reduced fee due to other similar suits. So for purposes of this example we are going to assume that the de-

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fendant will incur conservative legal costs of $5,000 through summary judgment and another $5,000 if the case goes to trial.

The defendant's best-case scenario is winning the MSJ, in which case it will have only spent $5,000 in legal fees. Its worst-case scenario is losing the MSJ and the plaintiff winning treble damages. Its costs would then be $160,000 (i.e., $150,000 + $10,000, its own legal fees).

This does not fully account for the downside risk if the state deceptive practices statute allows a prevailing plaintiff to recover its attorney fees from the defendant. If the plaintiff's legal costs are shifted to the defendant, the litigate scenarios look like this.

Figure 9. Plaintiff's Transaction Costs

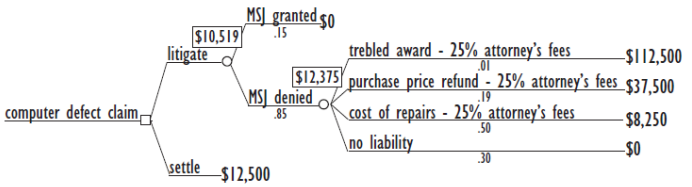
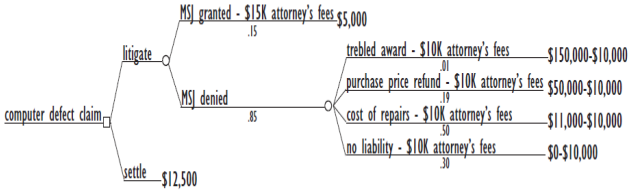


Figure 11. Defendant's Scenario with Plaintiff's Transaction Costs (bottom of page)

The worst case for the defendant is a treble damages award plus an award of the plaintiff's legal costs. To this must be added the defendant's own legal fees ($150,000 + $37,500

Figure 10. Defendant's Transaction Costs



+ $10,000 = $197,500). But the assumed probability that this scenario will occur at trial is 1% and the plaintiff must overcome the defendant's MSJ to get to trial. Following the path of the claim from left to right, the plaintiff has an 85% chance of overcoming the defendant's MSJ and a 1% chance of ringing the bell at trial thereafter. That's an .0085 chance of obtaining $197,500 or $1,678.75.

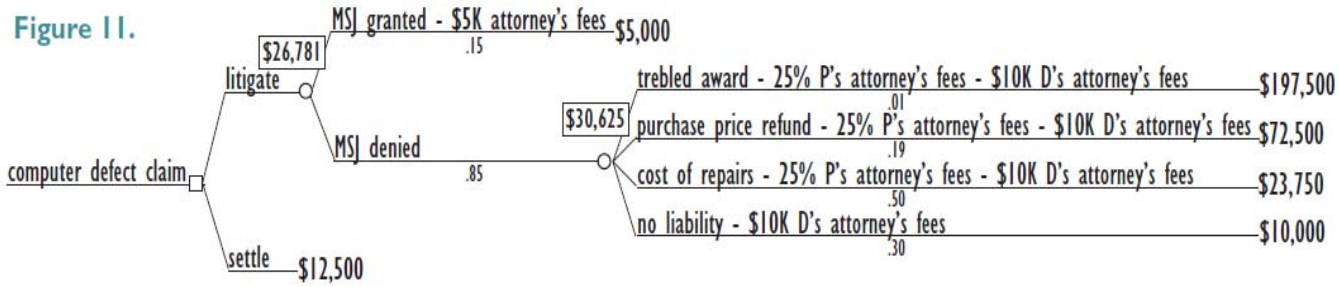
But there are four different trial outcomes to the right of the MSJ branch. Therefore, we must factor each outcome by the same percentages and then sum them to reach NEV for the litigate alternative (including the MSJ and trial outcomes). $11,708.75 (.85 times .19 times $72,500), plus $10,093.75 (.85 times .19 times $72,500), plus $10, 093.75 (.85 times .50 times $23,750), plus $2,550 (.85 times .30 of $10,000 plus the $1,678.75 above equals $26,031.25 ($1678.75 + $11,708.75 + 10, 093.75 + $2,550.00). To the $26,031.25 we must add the 15% chance that the defendant wins its MSJ but still has in, the NEV equals $26,781 for the litigate branch with a summary judgment contingency. At that juncture, a defendant would presumably prefer to settle for $12,500 over the NEV of the litigate option ($26,781).

The plaintiff may not like the $10,519 NEV in Figure 9 and the defendant may be equally unmoved by its $26,781 NEV in Figure 11. But now they can argue about the component assumptions making up those numbers rather than arguing that my "good case" results in valuations at either end of the bell curve.

The economic analysis exercise helps break down the broad conclusions we all tend to make Not only does that begin to project valuations, it helps unravel the psychological biases we all bring to the process. It also gives us a way to disagree with the assumptions the other side is making without devolving to general assessments—"she's wrong, we will get $197,500." Without an objective assessment, we would all continue to jump from a "good case" assumption to the number we like the best ($150,000 or more for the plaintiff, and $0 liability for the defendant.)

Mediators Help Overcome Bias

Figure 11.



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Because we do not naturally question our own conclusions and we surely do not want our lawyer advocates to do it either, brining in a neutral third-party mediator with knowledge of economic analysis can be very helpful. In private caucus, the mediator can help the parties unearth and discuss the assumptions embedded in their conclusory positions. Moreover, a neutral mediator's suggestions will be received quite differently than suggestions by their adversary — even if substantially the same. This is due to reactive bias.

A Cold War experiment quantified the magnitude of this type of bias. Soviet leader Mikhail Gorbachev made a proposal to reduce nuclear warheads by one-half, followed by further reductions over time. In the experiment the subjects were asked to react favorably or unfavorably to the proposal based on three assumptions: the proposal was made (1) by President Ronald Reagan, (2) by a group of unknown strategists, or (3) by Gorbachev himself.

The surprise was not that the group reacted differently to the same proposal depending on its source, but the wide range of difference. When attributed to Reagan 90% reacted favorably. That dropped marginally when attributed to the third-party (80%), and then by half (44%) when attributed to the Soviet leader.

Not surprisingly, proposed peace agreements between Israel and the Palestinians were also viewed differently depending on whether the proposal was said to have emanated from the Israeli government or the Palestinian authority.

When economic analysis is used in mediation, the parties may agree on a range of potential outcomes and then discuss the probabilities—along with a cathartic discussion of past events—with the mediator in private caucus. For example the mediator could reflect back to the plaintiff, "Let's assume Mr. X is Darth Vader and did try to ruin your business with faulty computers. How does that change your future options and potential outcomes?"

Whether an economic analysis is done before or during mediation, it lays a foundation for a constructive conversation, a means of keeping the discussion focused on probable or reasonably probable outcomes, as well as a common language to discuss hose outcomes. It also helps the parties refine and discuss their expectations.
Instead of arguing that one side has a "good case" or a "bad case," the parties can visualize a possible range of outcomes. The parties may see that if they decide to litigate, the cumulative effect of their assumptions is NEV, rather than their preferred result. The exercise shows that a party can expect A in an assumed percentage of total outcomes, and that the probability of result A, whether low or high is only one of several potential outcomes. Thus, the analysis recognizes the possibility that someone else may be right (even if those chances are low), and this has powerful psychological implications on decision making.

The variables in this analysis can easily be changed and other variables can be added, for example present value (internal rate of return, adjusted for pre– and post-judgment interest), fee shifting, and business impact.

Taking attorney's fees and other transaction costs into account can illustrate how far apart the parties have to be in order to eliminate settlement, either through continued negotiation or mediation. Changing the assumptions and adding new variables helps the parties measure the impact of their biases. They can see whether reaching a settlement may make more or less sense under certain outcomes than it does under others. The process helps everyone more clearly understand what a "good case" or a "good chance" means in a common vernacular. That improves the process by defusing a fight and focusing on the assumptions that drive party aspirations and interest.

Conclusion

Decision makers are likely to make more rational decisions when they have the benefit of an economic analysis. They are less likely to make decisions based on emotions and hard line positions.

Economic analysis provides a basis for productive future-oriented negotiations, which can be facilitated by a mediator. Combined with other business evaluation tools, it can help parties make the best possible decisions as to how to resolve disputes with imperfect information.

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ETHICAL CONSIDERATIONS FOR COLLABORATIVE LAWYERS

By Sherrie R. Abney

Obtaining Informed Consent

For centuries the legal community depended on litigation and arbitration to resolve clients' disputes, and clients often relied on a single lawyer to handle all of their legal matters. In the 20th century, several groups of professionals, including attorneys, began to limit the scope of their services. Today, a family litigator who represents a client in a divorce is not expected to also represent the client in an intellectual property dispute, and a collaborative law lawyer hired solely for settlement purposes is not expected to proceed to litigation should a client's dispute fail to be resolved in the collaborative process. Limited (and specialized) services allow lawyers to become more proficient in their chosen areas of practice, and to provide better services for their clients. Alaska Bar Association Ethics Opinion 2011-3 requires that lawyers and clients sign an employment agreement that is separate from the participation agreement, and which states that the lawyer's services are limited in scope.

The limited scope – or unbundling – of legal services has been accepted throughout the legal community. ABA Formal Opinion 07-447, Ethical Considerations in Collaborative Law Practice (2007). Opinion 07-447 states that "Rule 1.2(c) permits a lawyer to limit the scope of representation so long as the limitation is reasonable under the circumstances and the client gives informed consent." Lawyers are familiar with unbundled services. Clients, on the other hand, may not know or understand limited scope representation; consequently, lawyers who limit the scope of their work should set out the range of their services in an employment contract signed by the lawyers and their clients. For example, Alaska Bar Ethics Opinion 2011-3 requires that lawyers and clients sign an employment agreement that is separate from the participation agreement and states that the lawyer's services are limited in scope.

In addition to unbundled services gaining popularity, the choices for dispute resolution procedures have expanded to include alternative methods of obtaining final resolution outside the courtrooms. In the 1980's, mediation emerged as a means of avoiding trial. Soon mediators developed their own styles that included facilitative, evaluative, and transformative approaches. These third party neutrals found success in being able to settle the majority of cases they mediated.

However, mediation often is tied closely to adversarial forms of dispute resolution such as litigation and arbitration, and adversarial forms of dispute resolution frequently result in one party attempting to place liability on another party or parties. Prior to the parties reaching mediation, accusations often are made and tempers flare commonly resulting in damages to relationships. Moreover, a great deal of money may be spent on experts, depositions and formal discovery—which, for the most part, is never used if the case settles and does not continue to trial.

Many lawsuits are unnecessarily destructive to business and personal relationships and far too expensive for most small business owners and individuals. As a result, some lawyers and mediators began looking for other options to resolve disputes. The search for more efficient and less damaging methods resulted in people such as Stu Webb, who developed Collaborative Law, and Karl Slaikeu, who created Two Track, discovering new opportunities for non-adversarial techniques to negotiate settlements. See, SHERRIE R. ABNEY, CIVIL COLLABORATIVE LAW, THE ROAD LESS TRAVELED 53 (TRAFFORD PUBLISHING) (2011). There are a number of differences in Collaborative Law and Two Track, but both procedures involve the lawyers providing limited services and with clients being clearly informed about the scope of each lawyer's representation.

ABA Formal Opinion 07-447 (2007), quoted above, condones limited scope representation; however, limited scope representation may be taken on by the lawyers only "so long as the limitation is reasonable under the circumstances…." Lawyers who limit the scope of their services to litigation apparently have no specific obligation to determine if litigation is the most appropriate approach to resolving their clients disputes; however, collaborative practice places a duty on collaborative lawyers to consider whether or not they believe that clients will have reasona-

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ble opportunities to completely and safely settle their disputes through the use of collaborative law. To discover the form of dispute resolution that is most appropriate for a particular client, collaborative lawyers should begin by interviewing clients for the purpose of determining whether or not the circumstances surrounding their disputes require action beyond the scope of their services.

There are situations that may require immediate third party intervention to preserve the safety of individuals or property. So long as the parties have not signed a written participation agreement, the collaborative lawyers may file for a temporary injunction and then explore the possibilities of the parties entering into the collaborative process. On the other hand, if circumstances indicate that the other parties will not agree to collaborative law, lawyers must either withdraw or be prepared to go forward without the protections that are found in a participation agreement.

In situations where violence has occurred, collaborative lawyers should never proceed unless the clients, after being informed about the diverse aspects of the collaborative process, request it, and the lawyers reasonably believe that the parties will be safe. See, Sherrie R. Abney & John Lande, Suggested Protocol to Obtain Clients' Informed Consent to Use a Collaborative Process, http://www.collaborativelaw.us/articles/Final_ABA_SDR_CL_Informed_Consent_Protoco_9-1-09%5B1%5D.pdf

Once lawyers are satisfied that a dispute is appropriate for limited scope representation, they must discover some information about their prospective clients to determine if the clients are candidates for collaborative law. For the collaborative process to have the greatest likelihood of success, participants must be prepared to 1) voluntarily proceed honestly and in good faith, 2) willingly cooperate in voluntary discovery, 3) accept responsibility for their parts in creating the disputes, and 4) possess a readiness to carry out those actions necessary to resolve their differences with the other parties.

To establish clients' suitability for participation in collaborative law, lawyers may employ opened-end questions regarding the clients' feelings about matters such as voluntarily disclosing information to the other parties about themselves that may not be favorable and whether or not clients are prepared and able to hire litigation lawyers if their dispute does not settle in the collaborative process.

Collaborative lawyers must discover what the individuals or entities expect to accomplish, and the expectations they have on how to achieve their goals. Questions collaborative lawyers might ask prospective clients include:

> Is time of the essence?
>
> Is confidentiality important?
>
> How flexible is your schedule?
>
> Do you rely on someone other than yourself when you make important decisions?
>
> Would you be comfortable sitting in the same room with the other parties and their lawyers?
>
> Do you want to be directly involved in negotiations or would you prefer to stay out of negotiations as much as possible? Why?
>
> What do you know about the other parties?
>
> Given the opportunity, would you be able to explain what you have told me to the other parties and their lawyers?
>
> What do you expect of me if I represent you in this matter?
>
> Is there anything we haven't talked about that I should know?

None of these questions suggest a particular form of dispute resolution, but all of them can assist lawyers in discovering what sort of dispute resolution procedure might suit prospective clients. If lawyers fail to properly screen clients, they may place them in the wrong dispute resolution procedure, and placing the wrong people in the collaborative process is a disservice to them and to the other collaborative participants.

When the circumstances for representation of clients in the collaborative process are appropriate, collaborative lawyers move to the next ethical consideration and verify that "the client gives informed consent" for the limited scope representation. ABA Opinion 07-447. For the purposes of this paper the term "informed consent" shall be defined as *the permission a client gives his or her attorney to limit the scope of representation and pursue a particular dispute*

resolution procedure. Viewed from this perspective, clients are in control of decisions regarding which form of dispute resolution their lawyers should pursue, and lawyers must not proceed without their clients' express approval.

The position of collaborative lawyers might be compared to a son asking his father for permission to use the family car. The son would not plan to invite passengers who would mistreat the car's interior, nor would he knowingly leave the car parked in an area where it might be vandalized. From Dad's point of view, the son will not get the car keys until Dad knows where the son is going, who is going with him, and what time he is expected to be home. The son is required to make some responsible decisions, and Dad must have some information before he will agree to give permission to the son to use the car. Like the son, lawyers will examine the circumstances of the disputes to protect their clients' interests and ascertain whether the clients are candidates for interest-based negotiations prior to asking permission to go forward. The clients, like Dad, are entitled to some details regarding what is in store for them prior to giving permission for their lawyers to pursue a course of action. Most importantly, lawyers should remember that it is their clients who possess the keys to the car.

ABA Opinion 07-447 continues by stating: "Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation." Since it is impossible for clients to select an option if they are unaware that options are actually available to them, lawyers must educate their clients. Options for dispute resolution will usually consist of litigation, arbitration, mediation, collaborative law, and cooperative law. The advantages and disadvantages of each procedure should be explained in enough detail to give prospective clients the ability to choose the dispute resolution procedure that they believe will best serve their interests.

Some collaborative law "purists" refuse to recognize the existence of the dispute resolution procedure known as cooperative law, but cooperative law does exist. The difference in collaborative law and cooperative law is that cooperative law does not require a written participation agreement containing a withdrawal provision. [The withdrawal provision is sometimes referred to as the disqualification provision. The two terms both refer to the requirement that new lawyers must be hired should the parties proceed to an adversarial form of dispute resolution.] Cooperative lawyers will agree to cooperate on some aspects of the dispute and may or may not put their agreements in writing, but the cooperative agreements will fall short of a true collaborative case.

Due to the use of collaborative law being new to disputes (other than those found in family cases), few lawyers are trained in the civil collaborative process. Lawyers unfamiliar with civil collaborative law usually will not agree to sign participation agreements containing withdrawal provisions. Even so, some untrained lawyers may agree to oral or written participation agreements that contain provisions for such things as voluntary discovery, jointly retained experts, or confidential face-to-face meetings to discuss the interest and concerns of the parties.

Rather than sending clients to what might become full blown adversarial battles, it is this author's opinion that this type of "cooperation" with lawyers who will not agree to participate in collaborative law is appropriate for clients who prefer to resolve matters peaceably and desire to stay out of court. As long as clients are fully informed and lawyers define the scope of their representation in their employment agreements, lawyers may limit representation to settlement negotiations only and withdraw if clients fail to settle whether the case is labeled cooperative or collaborative. Nonetheless, lawyers should keep in mind that unless a written participation agreement contains a provision requiring the collaborative lawyers to withdraw should the collaborative process terminate, it is not a collaborative law case and should never be labeled one.

Eleven jurisdictions that have published ethics opinions, and eight jurisdictions have enacted some form of the Uniform Collaborative Law Act (UCLA), which require attorneys to obtain the informed consent of clients prior to clients signing participation agreements. The ethics opinion states are Minnesota (1997), North Carolina (2002), Pennsylvania (2004), Maryland (2004), Kentucky (2005), New Jersey (2005), Colorado (2007), Washington (2007), Missouri (2008), South Carolina (2010), and Alaska (2011). The UCLA jurisdictions are Alabama, Hawaii, Nevada, Ohio, Texas, Utah, Washington D.C., and Washington.

Since the majority of lawyers practicing today limit the scope of their representation to specific areas of practice, it is within reason that the lawyers' duty to obtain their clients' informed consent should extend to all lawyers

irrespective of whether the lawyers' practice concerns settlement negotiations, litigation, or some other area of the law. Nonetheless, the only area of practice in which lawyers have been specifically selected for this responsibility is collaborative law.

II. The Participation Agreement

The participation agreement is a contract the parties and lawyers agree to follow as they work toward settlement. As previously mentioned, in order for the matter to be considered a collaborative case, the contract must state that the collaborative lawyers will withdraw from representation (or that the parties must obtain new counsel) if the parties fail to settle and they proceed to an adversarial forum. This provision is important to the collaborative process as well as the participants because it:

1) discourages parties and lawyers who do not intend to attempt to settle from entering the collaborative process;

2) allows the collaborative lawyers to focus all of their time and skills on finding ways to resolve the issues; and

3) provides a safe environment for the exchange of the interests and concerns of the parties since the withdrawal clause guarantees that no lawyer in the face-to-face meetings will ever be able to cross-examine one of the parties in an adversarial proceeding.

In short, there are no ifs, ands, or buts; the parties are required to hire new lawyers if the collaborative process terminates and the parties proceed to litigation. Collaborative lawyers have a duty to inform clients that termination of the process is a possibility and that there is no guarantee that the collaborative process, or for that matter any other dispute resolution procedure, will completely succeed in settling their dispute.

In addition to the inability of collaborative lawyers to cross-examine the other parties in an adversarial procedure, the collaborative process provides further safety features in the participation agreement through the inclusion of confidentiality clauses. All participation agreements should include language stating that no admission, offer to settle, or any other comment made by participants in the collaborative process is admissible into evidence in a court of law or any other adversarial forum. The confidentiality clause also eliminates public records of the proceedings and allows all exchanges to remain private unless all parties to the dispute agree otherwise in writing. To avoid any arguments over the confidentiality of agendas, meeting minutes, or other documents created during the collaborative process, all documents produced in the process should be labeled "Confidential."

Other topics that may be addressed in the participation agreement include voluntary discovery, various types of jointly retained experts, how experts will be paid, how the process can be terminated, how the parties will proceed in the event of impasse, a thirty day moratorium for any court hearings after the termination of the process except for emergencies, and any other terms to which the parties may agree. It is imperative that collaborative lawyers make certain their clients fully understand the participation agreement and exactly what is expected of them under the terms of this contract since this agreement could be the basis of a lawsuit by one of the parties if it is breached.

Colorado is the only jurisdiction where the State Bar has issued an ethics opinion that criticized collaborative law. Colorado State Bar Ethics Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts. The Bar's disapproval stemmed from the terms of the participation agreement. The Colorado Opinion basically states that Rules 1.7(b) of Colorado Rules of Professional Conduct are violated when a lawyer participating in the collaborative process enters into a contract with an opposing party and the lawyer is required to withdraw if the process terminates. The opinion continues by stating, "The Committee further concludes that pursuant to Colo.RPC 1.7(c) the client's consent to waive this conflict cannot be validly obtained." This opinion was immediately rebuffed by the American Bar Association that stated, "We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2)."

When the collaborative process first began, lawyers signed the same participation agreements that were signed by the parties. These agreements held the lawyers and clients to the same standards and put each collaborative lawyer in privity of contract with every other lawyer and client who signed the agreement. After the Colorado Opinion was published, the Colorado collaborative lawyers no longer signed participation agreements that held them to the same level of responsibilities as their clients. As a result, Colorado collaborative participation agreements now employ language stating that in the event of

termination of the collaborative process the parties agree to retain new lawyers if they wish to go forward to an adversarial forum. This terminology replaced the provision stating that the lawyers agreed to withdraw. Currently, Colorado lawyers sign the participation agreement not as parties but simply to verify that they represent one of the parties in the collaborative process. Some lawyers in other jurisdictions were not comfortable being in privity of contract with the other parties and lawyers, and these lawyers have adopted language similar to the Colorado lawyers. In most jurisdictions, collaborative lawyers are able to negotiate the clauses and language to be included in participation agreements just as they would for any other contracts; still, as additional statutes and rules are enacted, this may change.

III. Voluntary Disclosure

Many lawyers have a tendency to avoid disclosing as much information as they are able and still be incompliance with the discovery rules of their jurisdictions, so voluntary discovery may be somewhat disconcerting to lawyers who are not trained in the collaborative process. Since voluntary discovery is a necessary component of the collaborative process, it is important that lawyers and clients understand that they are expected to provide any and all information that would influence the terms of an agreed settlement whether or not the information has been requested by another party to the dispute.

Moreover, if a participant knows information that another party is relying on is false, that participant has a duty to correct the other parties' misconceptions. Parties also agree that they will not request any information that is not relevant and necessary for them to make informed decisions about the matters in dispute. If anyone is not prepared to cooperate with voluntary disclosure, that person does not belong in the collaborative process and should not attempt to participate.

The adverse risks to clients involved in any form of discovery will depend on the facts of the case, the issues in dispute, and the use the other parties make of the disclosures. Formal discovery will generally supply the same relevant information as voluntary discovery, but relevant information in formal discovery will be accompanied by a great deal of irrelevant information and willbe obtained a only after longer periods of time and at much greater expense to clients.

Litigation lawyers often base their objections to voluntary discovery in the hope that the opposing lawyers will not ask the right formal discovery questions and fail to obtain damaging information from their clients, so they do not want to contract to deliver relevant information. Being able to conceal information due to the other lawyers not asking the right questions is possible but not likely. Moreover, as was previously stated, parties must be prepared to assume responsibility for their part in disputes; consequently, parties and lawyers who would attempt to evade disclosure of relevant information do not belong in the collaborative process.

Another objection to voluntary discovery is that the parties are not under oath during the information gathering discussions, so there is no guarantee that they will be truthful. There appears to be no guarantees that all parties will be truthful when they are under oath, so this objection does not present a viable argument against voluntary discovery.

In the collaborative process, the parties sit face-to-face in informal discussions and have opportunities to questions each other about the information that is being gathered and reviewed. This seldom happens in adversarial forms of dispute resolution. If any collaborative party is not convinced that the other parties are being truthful and that party wishes to end the process, he or she may give notice and walk away without further accountability. Litigation is not always that easy to exit.

Gauging which and how much information is enough to disclose to the other parties should not be a difficult task. Participants are asked to put themselves in the shoes of the other parties when deciding the importance or relevancy of information. If the information is something that the other lawyers and clients would want or need to know before agreeing to settle then it must be disclosed. If uncertainty exists regarding the relevancy or importance of information, the information should be disclosed to allow the other parties to determine its importance from their point of view.

The prompt delivery of necessary information is required of clients, and collaborative lawyers must not allow clients to drag their feet or cause needless delays. If clients are not promptly delivering information, lawyers may remind them that they have signed a contract regarding their responsibilities to the other participants, so unless they intend to terminate the process or breach their agreements, they must avoid delays and move forward.

IV. Sharing Information with Team Members and Communications among Participants

An important goal of the collaborative process is for the parties, their attorneys, and any additional professionals to form a team. The goal is that the "us versus them" in adversarial disputes becomes the "collaborative team versus the problem" in the collaborative process. The team work begins with the lawyers planning how to start the parties moving toward resolution and explaining this course of action to their clients.

Lawyers should inform their clients that they will have conversations with the other collaborative lawyers outside the presence of parties. The purpose of these conversations are to plan agendas, consider whether additional resources or team members should be recommended to the parties, and discuss what needs to be done to keep the process on track and moving forward. The lawyers' conversations among themselves and any additional professionals hired to assist the parties will only concern moving the parties and the procedure forward. Discussions regarding the terms of settlement will always include the parties.

The collaborative team has other rules and limitations that parties ought to understand prior to beginning the process. First, attorney client privilege cannot be waived by anyone except the clients who possess the privilege, so lawyers cannot share any information that clients do not want shared with the other team members. The simplest way to handle this privilege is for lawyers to request that their clients specifically identify any information the clients do not want shared with the other members of the team.

Another clarification regarding the lawyers as team members is that clients must recognize that the lawyers are only advocates for the parties that retained them. Lawyers may make comments in the face-to-face meetings that are helpful to the other parties, but each party must rely only on his or her counsel when seeking advice.

There are times when the lawyers and parties will need additional expertise or require another professional to act in the capacity of a neutral in the process. When another professional or expert is necessary, the expert's participation agreement will state that the collaborative process is confidential; but the parties must understand that any private communications they have with the one of these additional professionals will be shared with parties' lawyers.

Family collaborative law has developed a number of models for collaborative cases that have expanded the collaborative process from clients and lawyers to the inclusion of clients, lawyers, financial experts, and one or more mental health professionals. Although the additional professionals provide added value for clients, especially those with children, there are a number of clients who cannot afford the luxury of paying from two to four or five additional professionals. Furthermore, there are clients with situations that do not warrant the additional professionals. At times, the lawyers and parties can save both time and money if the parties retain additional team members; nevertheless, collaborative lawyers should assess their clients' situations prior to making recommendations for additional professionals rather than automatically expecting clients to employ the lawyers' favorite practice model or preferences.

Unlike adversarial dispute resolution procedures, the parties to collaborative cases often work together to obtain and review information; however, this is a choice that the parties make. If one of the parties does not wish to have contact with another party outside of the face-to-face collaborative meetings then participants should agree to honor these requests. There are also times when one lawyer's client may go to one of the other lawyer's offices to deliver information or sign documents that have already been approved by the parties and their lawyers. The key to these arrangements working toward resolution rather than causing problems is transparency. Private attorney/client communications are kept private, but other contacts and communications are shared with the team, so everyone knows exactly what is going on and why.

VI. Transferring the Case to a Litigation Lawyer

The collaborative portion of the case should not be a waste of time if the parties fail to settle. When cases terminate early on, the parties will have spent very little time and money. Participants who have met for no more than one face-to-face meeting still will have learned the interests and concerns of the other parties and have a better understanding of the disputed issues.

If the case has progressed past several meetings, the parties will have gathered important information and eliminated or substantially narrowed the scope of formal discovery. Should collaborative lawyers believe that the process is not moving toward settlement; the lawyers must

discuss this with the other professionals to see what might be done to go forward. If no progress is possible, the lawyers have a duty to recommend that the process terminate.

Collaborative lawyers usually provide their clients with notebooks at the beginning of the process. The notebooks will contain tabs for participation agreements, agendas, minutes of meetings, copies of important documents, and notes that the parties have taken during the face-to-face meetings. Parties may deliver these notebooks to their new lawyers, so the lawyers will have a complete record of what transpired during the collaborative process. Although the new lawyers will have knowledge of what went on during the collaborative process, any evidence that they intend to have admitted in an adversarial proceeding must be obtained outside of the collaborative process; for that reason, contents of the client notebooks are inadmissible. In addition, the client notebooks usually will eliminate the need for lawyers who are hired after the collaborative process terminates to contact the parties' collaborative lawyers to question them regarding the dispute.

Clients must understand that collaborative lawyers may not make unilateral court appearances on their behalf except in emergencies to obtain protection for the clients or their property, nor can collaborative lawyers become coaches for litigation or arbitration lawyers should the process terminate. In the same way, collaborative lawyers must understand that, no matter how much they desire to go forward, they may not continue to represent their clients in litigation or any adversarial form of dispute resolution against the same parties regarding the same subject matter of the collaborative dispute.

In Conclusion

Collaborative lawyers must maintain a higher standard of practice than is ordinarily required by the legal profession's rules of professional conduct. The lawyers must become sufficiently informed regarding the suitability of their clients and the circumstances of the clients' disputes, so that the lawyers are able to form valid opinions regarding the reasonableness of representation of the clients in the collaborative process.

Next, lawyers must explain the various forms of dispute resolution procedures that are available to clients in order to satisfactorily inform them of their options. After receiving this information if the clients' choice is collaborative law, the lawyers must acquaint clients with the responsibilities the clients assume when they enter into participation agreements.

Lawyers who are successful in the collaborative process must have their primary focus on their clients' interests, concerns, and preferences. Not all lawyers are able to make the shift from an adversarial to a non-adversarial dispute resolution approach, and the same is true of some clients. Nevertheless, it should be the task of every lawyer to recommend the form of dispute resolution that best suits each client's needs and nature whether or not that recommendation will result in the lawyer being retained by every prospective client who comes through their door.

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Who Decides Arbitrability (Scope): The Court or Arbitrators?

Ben H. Sheppard, Jr.*

Disputes over the scope of the arbitration agreement (commonly referred to as the "arbitrability" issue) have generated more reported court decisions than any other aspect of the arbitration process. The arbitrability issue typically arises when one of the parties to a contract containing an arbitration clause files a lawsuit in state or federal court asserting claims for tort, statutory violations or other non-contractual claims in an effort to circumvent the application of the arbitration agreement. The defendant, in order to preserve its rights under the arbitration agreement, is obliged to file a motion for a stay of the lawsuit based upon the arbitration agreement. At its option, the defendant may also move for an order compelling arbitration.

The resolution of disputes over arbitrability in this context has traditionally been viewed as a matter for the court. When presented with a motion to stay a lawsuit or to compel arbitration, courts in the United States have ordinarily undertaken to resolve disputes over the scope. Even if ultimately successful in securing an order staying the lawsuit and compelling arbitration, the party seeking to enforce the arbitration agreement must endure the delay and expense of proceedings in the trial court and, depending upon the ruling of the trial court, the delay and expense of an appeal.

Fortunately, there is a viable alternative in many cases—referral of the arbitrability issue to the arbitrators for determination—based upon a recognized exception to the general rule that the court determines arbitrability.

The General Rule: The Court Determines Arbitrability

Section 3 of the Federal Arbitration Act provides that "the *court* in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" shall stay the action pending arbitration. 9 U.S.C. Section 3 (emphasis added). This includes the determination of the scope of the arbitration clause—the "arbitrability" issue. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986).

The Texas General Arbitration Act provides that the court shall order the parties to arbitrate on the application of a party showing an agreement to arbitrate and in the event of a dispute over the application of the arbitration agreement "the *court* shall summarily determine the issue." Tex. Civ. Prac. & Rem. Code Ann., Section 171.021 (b) (emphasis added). The Texas Supreme Court has admonished trial courts to determine summarily issues on a motion to stay or compel arbitration under a stream-lined procedure generally applicable to cases under the Texas Act or the Federal Arbitration Act. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992).

The Exception: Clear and Unmistakable Delegation to the Arbitrators

The Supreme Court of the United States has expressly recognized that parties to an arbitration agreement may agree that arbitrators should decide arbitrability if there is "clear and unmistakable" evidence that they did so. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

Delegation of arbitrability to the arbitrators can have two distinct advantages for the party requesting arbitration. First, the party avoids the delay and expense of court proceedings to determine whether the disputes are arbitrable. Second, if the parties have agreed to arbitrate arbitrability, the decision of the arbitrators on arbitrability is subjectto limited, deferential judicial review; "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *Id*. at 942.

Parties may delegate arbitrability to the arbitrators by express delegation in their arbitration clause, or by their adoption of arbitral rules conferring such jurisdiction.

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Express Delegation to the Arbitrators in the Arbitration Clause

The parties may "clearly and unmistakably" agree to arbitrate arbitrability through an express delegation in their arbitration agreement. For example:

> "Disputes Subject to Arbitration. Any dispute or difference of any kind whatsoever arising out of, relating to or in connection with this contract, whether in contract, tort, statutory or otherwise, *including any question about the scope of this agreement to arbitrate*, or any questions regarding the validity, existence, breach or termination of this contract, shall be resolved by final and binding arbitration pursuant to the procedures set forth herein." (Emphasis added.)

Delegation to the Arbitrators Under Arbitral Rules

Most arbitral rules, including rules applicable to non-administered ("ad hoc") arbitration proceedings – *e.g.*, CPR Rules for Non-Administered Arbitrations, UNICITRAL Arbitration Rules – vest arbitrators with jurisdiction to determine their own jurisdiction. Rule 7(a) of the Commercial Arbitration Rules of the American Arbitration Association is representative, providing that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

Several lower courts have held that the adoption of such arbitral rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. See, e.*g.*, *Petrofac, Inc. v. DynMcDermott Pet. Op. Co.*, 687 F.3d 671 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009); *Sys. Research & Applications Corp. v. Rohde & Schwarz Fed. Sys., Inc.*, 840 F. Supp.2d 935 (E.D. Va. 2012); *Schlumberger Tech. Corp. v. Baker Hughes, Inc.*, 355 S.W.3d 791 (Tex.App. 2011).

Litigation Strategy

A party seeking to preserve its rights to arbitrate should promptly file a motion to stay the lawsuit and, if also sought, a motion to compel arbitration. As primary relief, the motion should request that the court refer the dispute over arbitrability to the arbitrators based upon either an express clause in the contract or upon the parties' adoption of arbitral rules vesting the arbitrators with such jurisdiction, or upon both if applicable.

In order to establish that the parties "clearly and unmistakably" agreed at the time of contracting to arbitrate arbitrability, a party relying upon the adoption of arbitral rules should submit evidence of the arbitral rules in effect at the time of the contract. The motion should request that the court stay the suit pending the arbitrators' ruling on whether the parties agreed to arbitrate the merits, maintaining the case on its docket in the event the arbitrators determine that any or all of the claims are not subject to arbitration.

In the alternative, and without waiving the motion to refer the arbitrabilty dispute to the arbitrators, the movant should assert that the claims in the lawsuit are arbitrable, citing the strong national policy favoring arbitration and the principle that all doubts about the scope of an ambiguous arbitration clause are to be resolved in favor of arbitration. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

There are two reasons to request the alternative relief. First, the trial court may not accept that the adoption of arbitral rules constitutes a clear delegation to the arbitrators absent controlling precedent from the highest court in its jurisdiction. Second, a persuasive argument in favor of the application of the arbitration agreement may provide some degree of comfort to the trial judge that the referral of the arbitrability issue to the arbitrators is an appropriate course of action.

Conclusion

Parties seeking to enforce their arbitration agreements have an effective method to move disputes over arbitrability out of the court system and into arbitration.

* ***Ben H. Sheppard, Jr.*** is a Distinguished Lecturer and the Director of the A.A. White Dispute Resolution Center at The University of Houston Law Center. From 1969-2005, he practiced law with Vinson & Elkins L.L.P., where he was a partner and co-chair of the firm's international dispute resolution practice.

New Rules on Special Education Dispute Resolution: Non-attorney Representatives, Mediator Selection, Confidentiality Agreements

By Steven Aleman, Esq.* & Erin Lawler, Esq.**

Mediators and advocates in the area of special education should be aware of recent regulatory changes. As of the start of 2014, the state regulations governing disputes around the provision of special education to students with disabilities under the federal Individuals with Disabilities Education Act (IDEA) have changed. Among other things, the new regulations allow for non-attorneys to represent parties at special education due process hearings, clarify the processes for selecting a special education mediator, and allow for parties to enter into voluntary confidentiality agreements as part of the resolution process prior to a due process hearing.

Representation by Non-Attorney Advocates

Don't be surprised if there is a non-attorney representative at your next special education due process hearing. In response to Senate Bill 709 from the 83rd Texas Legislative Session, the Texas Education Agency (TEA) adopted a new rule, 19 Tex. Admin. Code § 89.1175, which establishes qualifications for non-attorney representatives in special education due process hearings.

Background

Senate Bill 709 sought to resolve uncertainty about whether a non-attorney could represent a party in a special education due process hearing. The uncertainty stemmed from a gap between federal and state law. The IDEA allows parties in a due process hearing the right to "[b]e accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, *except that whether parties have a right to be represented by non-attorneys at due process hearings is determined under State law*." 34 C.F.R. § 300.512(a)(1)(2012) (emphasis added). Prior to the passage of Senate Bill 709, Texas state law was silent on the question of whether parties had the right to be represented by non-attorneys in due process hearings.

In an effort to resolve this uncertainty, the TEA requested an opinion from the Office of the Attorney General (OAG) in 2011 on three questions (paraphrased):

1) whether non-attorney representation at special education due process hearings constituted the unauthorized practice of law?
2) whether the answer to the first question would change if the TEA had a specific rule allowing non-attorney representation at special education due process hearings?
3) whether the TEA had the authority to adopt a rule allowing or prohibiting non-attorney representation at special education due process hearings?

The OAG responded in Opinion No. GA-0936 in 2012 ("Opinion"). With respect to the first question, the Opinion stated that while Texas law generally limits the practice of law to licensed attorneys, the Legislature can — and does — create specific, functional exclusions to this rule that allow a person who is not an attorney to act on behalf of another in a legal proceeding (e.g. in forcible entry and detainer actions, administrative proceedings under the Texas Workers Compensation Act, certain tax matters, and certain appraisal review board decisions).

In the absence of such a Legislatively-created exclusion specific to special education due process hearings, however, a non-attorney may not practice law at a special education due process hearing. The Opinion went on to state that the OAG generally cannot determine whether particular conduct constitutes the practice of law, and specifically cannot determine whether certain conduct at a special education due process hearing by a non-attorney is prohibited. With respect to the second two questions, the Opinion stated that the TEA had the authority to adopt rules governing the representation of a party at a due process hearing, but that if the rules allow a non-attorney to engage in conduct that constitutes the practice of law, a court reviewing the rules would have a basis to determine the rules invalid.

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Senate Bill 709, effective September 1, 2013, attempted to fill the state law silence on this question. Bill sponsor Senator Eddie Lucio, Jr.'s statement of intent referred to the "confusion" over the extent to which non-attorneys could assist parties during due process hearings. The bill added language to the Texas Education Code allowing a party to a due process hearing to be represented by "an individual who is not an attorney licensed in this state but who has special knowledge or training with respect to the problems of children with disabilities." Texas Education Code § 29.0162(a)(2). The bill also directed the Commissioner of the TEA to adopt by rule "additional qualifications" for non-attorney representatives.

Disability advocates were generally supportive of the changes proposed in Senate Bill 709. They viewed the changes as a way to level the playing field in due process hearings between parents who generally cannot afford attorney representation and school districts that are almost always represented by an attorney. Senate Bill 709 resolved the uncertainty about whether a non-attorney could represent a party in a special education due process hearing, which stemmed from a gap between federal and state law.

The IDEA allows parties in a due process hearing the right to "[b]e accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, *except that whether parties have a right to be represented by non-attorneys at due process hearings is determined under State law*." 34 C.F.R. § 300.512(a)(1)(2012) Prior to the passage of Senate Bill 709, Texas state law was silent on the question of whether parties had the right to be represented by non-attorneys in due process hearings.

Highlights of Regulatory Changes

On December 27, 2013, the TEA adopted final rules pursuant to Senate Bill 709. These rules, found at 19 Tex. Admin. Code § 89.1175(a)-(j), became effective on December 31, 2013. The rules stipulate that parties to due process hearings may still represent themselves, and they may still choose to be represented by licensed Texas attorneys. Alternatively, parties may choose to be represented by an individual who is not a licensed Texas attorney, but who has "special knowledge or training with respect to problems of children with disabilities" and who satisfies the qualifications of the regulatory section.

If a party wishes to be represented by a non-attorney, then the party must file a written authorization with the hearing officer promptly after filing the request for a due process hearing, or promptly after retaining the services of the non-attorney. The party must forward a copy of the written authorization to the opposing party at the same time that the written authorization is filed with the hearing officer.

The party's written authorization of the non-attorney must be filed on the Authorization of Non-Attorney Representative form available on the Secretary of State's website for the Texas Administrative Code. The form requires a description of relevant special knowledge and training, including: educational background; knowledge of state and federal rules and procedures that apply in due process hearings; and knowledge of state and federal special education laws, regulations, and rules. In the written authorization, the party must acknowledge that:

- the non-attorney has full authority to act on the party's behalf with respect to the hearing;
- the actions or omissions by the non-attorney are binding on the party;
- documents are deemed to be served on the party if served on the non-attorney;
- communications between the party and the non-attorney are not generally protected by the attorney-client privilege and may be subject to disclosure during the hearing proceeding;
- relevant laws do not provide for the recovery of fees paid to the non-attorney;
- it is the party's responsibility to notify the hearing office and the opposing party of any changes in the status of the authorization; and
- the authorization shall remain in effect until the party notifies the hearing officer and the opposing party of the party's revocation of the authorization.

A non-attorney may not serve as a party's representative if (a) the non-attorney has prior employment experience with the school district and (b) the school district objects based

on this prior employment experience. No other objections to a non-attorney's representation are permitted. For example, in its comments explaining the adoption of the rule, the TEA clarifies that an objection must be based on a prior employment relationship with the school district or charter school. A former school board member, for instance, could serve as a non-attorney representative because the board member was a trustee and not an employee of the district. 38 Tex. Reg. 9555, Dec. 27, 2013.

Upon receipt of the authorization, the hearing officer shall promptly determine whether the non-attorney is qualified to represent the party. The hearing officer shall notify the parties in writing of his or her determination. The hearing officer's decision is final and is not subject to review or appeal.

If the hearing officer has reviewed the written authorization and determined that the non-attorney representative is qualified to represent the party in the hearing, then the non-attorney representative may engage in activities in a representative capacity, including filing pleadings and other documents on behalf of the party, presenting statements and arguments on behalf of the party, examining and cross-examining witnesses, offering and introducing evidence, and objecting to the introduction of evidence and testimony.

Practice Implications

Attorneys and parties involved in due process hearings should exercise caution when working with a non-attorney and should wait until notified by the hearing officer of the non-attorney's approval before treating the non-attorney as a representative. It is possible that parents or adult students will choose to be represented by a special education advocate with whom they have worked before and whom they know well. The parent may say "just send those documents to [non-attorney representative]" or "we will let [non-attorney representative] make that decision," but until the hearing officer has approved the non-attorney representative's participation, attorneys and parties should not assume that documents served on the non-attorney representative are served on the party or that the actions of the non-attorney representative are binding on the party.

Non-attorneys who hope to be approved as representatives at due process hearings should exercise caution in the period before their representation has been approved. They should not engage in activities that could constitute the practice of law until their participation has been approved by the hearing officer. For example, only parents or an adult student may file a petition with the TEA requesting a special education due process hearing. A non-attorney advocate would have no authority to initiate a case on behalf of a student because the non-attorney would not yet have been approved by the presiding hearing officer.

Special Education Mediator Assignments

The TEA added new rules regulating the assignment of mediators to special education disputes.

Background

Pursuant to requirements in the IDEA, the Texas Administrative Code lays out qualifications for special education mediators. The mediation must be conducted by "a qualified and impartial mediator who is trained in effective mediation techniques, and who is knowledgeable in laws and regulations relating to the provision of special education and related services." 19 Tex. Admin. Code § 89.1193(d). Further, the mediator may not be a TEA employee or an employee of the public education agency involved in the dispute. However, a mediator is not considered an employee of TEA solely because TEA pays her to serve as a mediator. The rules further state that a mediator must not have a personal or professional conflict of interest. 19 Tex. Admin. Code § 89.1193(e).

The TEA contracts with attorneys in private practice to serve as mediators. Many of these contract mediators are also special education due process hearing officers. During the rulemaking process, the TEA specifically rejected a public request to limit the attorneys it retains to solely either a mediator or hearing officer role. 38 Tex. Reg. 9558, Dec. 27, 2013. The TEA maintains a roster of the current mediators and their qualifications, which is available on the TEA's website.

Highlights of Regulatory Changes

19 Tex. Admin. Code § 89.1193(f)-(g) allow the parties to mutually agree on the assignment of a mediator from a roster of qualified mediators maintained by the TEA. If the parties do not agree on a mediator, then the TEA will select a mediator from its roster on a random basis. A media-

tor will not be allowed to mediate a dispute in which the mediator was previously or is currently involved as a hearing officer.

Practice Implications

Texas attorney-mediators are used to the notion that they only get one bite at the apple in a special education dispute. In other words, if an attorney serves as a mediator on a special education dispute, he knows that he cannot later serve as a hearing officer on the same dispute. This is because mediation ethical standards generally prohibit a mediator from serving in a judicial or quasi-judicial capacity on a dispute in which she has already served as a mediator.

Specifically, the Ethical Guidelines for Mediators adopted by the Alternative Dispute Resolution Section of the State Bar of Texas in 1994 and later widely adopted by other organizations, including the Texas Mediator Credentialing Association, state: "[a] person serving as a mediator generally shall not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation." The reasoning for this prohibition has to do, in part, with a policy interest in preventing the mediator from using confidential information learned during a mediation to make a decision in a judicial or quasi-judicial proceeding.

The new rule found in 19 Tex. Admin. Code § 89.1193(g) applies this same "one bite at the apple" notion slightly differently, by prohibiting the mediator from serving first as a hearing officer (a decision-maker in a quasi-judicial proceeding) and then as a mediator in the same dispute. Mediators who also serve as hearing officers should be aware of this rule and, if contacted to serve as a mediator on a dispute in which they have previously served as a hearing officer or are currently serving, should bring this conflict to the attention of the TEA immediately.

Because the TEA's roster of mediators includes many hearing officers, this new rule will necessitate the expansion of the roster to other mediators who do not serve as hearing officers. Mediators interested in being considered to become contract special education mediators with the TEA should look for an RFP from the TEA.

Confidentiality in Resolution Agreements

The IDEA lays out rules related to a resolution process that occurs when a parent requests a due process hearing. The TEA added a new provision to the regulations governing the resolution process. 19 Tex. Admin. Code § 89.1183(e) allows parties to enter into a confidentiality agreement as part of their resolution agreement.

Background

When a parent files a request for a due process hearing, IDEA requires that the public education agency convene a meeting, often referred to as a resolution session, within 15 calendar days of receiving notice of the request. The meeting must be held, unless the parties waive the meeting in writing or agree to pursue mediation instead. Resolution sessions are designed to give all parties an opportunity to resolve the issues without going into the formal hearing process.

If the parties to a resolution session reach agreement on some or all of the issues at hand, they must develop and sign a written agreement. The settlement agreement is enforceable in a state or federal district court.

Highlights of Regulatory Changes

The new rule changes existing rules relating to confidentiality of the discussions that occur at a resolution session. There is no requirement that the discussions during a resolution session remain confidential. However, the new rule allows parties to voluntarily enter into a confidentiality agreement as part of their resolution agreement. This confidentiality agreement is optional; the new rule does not require the participants in a resolution session to keep discussions confidential. Further, the rule does not require a confidentiality agreement as a condition of a parent's participation in the resolution session.

Practice Implications

Attorneys and advocates should consider whether signing a confidentiality agreement serves the best interests of their clients and weigh its use in bargaining for a satisfactory resolution. It may be helpful to keep in mind that even when such a confidentiality agreement is not signed, rele-

vant confidentiality provisions of the IDEA, along with the Federal Education Rights and Privacy Act (FERPA), still apply and that the Texas Rules of Evidence govern discovery and admission in any subsequent due process hearings. For example, Texas Rule of Evidence 408 on compromise and offers to compromise might prohibit the admission of certain information from a resolution session.

Conclusion

This article is a brief summary of some amendments and new regulations related to alternative dispute resolution in special education regulations at 19 Tex. Admin. Code §§ 89.1150 — 89.1195, effective as of December 31, 2013. Not all amendments and new regulations are reviewed here. The reader is encouraged to examine the rules in full for all changes. The full text of the regulations may be found on the TEA website and the Texas Secretary of State website.

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Note: **The opinions expressed in this article are the authors' own and do not reflect the opinions of the authors' employers or the organizations to which the authors belong.**

Two Interesting Arbitration Cases

By Alvin Zimmerman

IQ Holdings, Inc. v. Villa D'Este Condominium Owner's Ass'n, Inc., ___ S.W.3d ___, 2014 WL 982844, Tex.App.-Hous. (1 Dist. 2014)

While the *IQ* decision did not present any new or different legal principle, it clarified established principles regarding med-arb. Gupta objected to the arbitrator's award that interpreted the binding mediated settlement agreement, which arose out of a dispute between an owner of a condominium unit (Gupta) who transferred the unit to a third party (IQ) without first offering it to the Villa d'Este Condominium Owners Association (COA). The binding mediated settlement agreement ("MSA") contained a "Covenant of Mutual and Peaceable Enjoyment." A disagreement arose involving what this phrase meant in drafting the final settlement.

The arbitrator conducted an evidentiary hearing and, with the contractual power to interpret the language of this phrase and to determine the intent of the parties, issued an Award that required the condo owner to sign a Termination, Release and Cancellation of Notice of *lis pendens* (which the condo owner refused to sign). The arbitrator also ruled that the parties did not intend that an expungement of the *lis pendens* was a part of the award, only a termination of the *lis pendens*.

The COA filed a summary judgment motion in the trial court to confirm the award that the condo owner breached the Rule 11/MSA, and seeking an award of attorneys' fees. The condo owner sought to vacate or modify the award on the grounds that the arbitrator exceeded her powers, and acted in manifest disregard of the law by imposing a prior restraint on speech and by failing to expunge the *lis pendens* because the MSA provided for the "Dismissal with prejudice and expungement of the *lis pendens* which the condo owner asserts entitles them to expungement under the Texas Property Code Sec. 12.0071.

The trial court confirmed the award and found that the breach caused the COA irreparable injury, ordered specific performance to compel the condo owner to comply with the award and denied the Association's request for attorney's fees.

Standard of Review of Arbitration Award

The appellate stated not only that the standard for review of a trial court's confirmation of an arbitration award is de novo. *Royce Homes, L.P. v Bates*, 315 S.W.3d 77, 85 (Tex. App.-Houston [1st Dist.] 2010, no pet.), but also that such a review is extraordinarily narrow, that every indulgence should be provided to every reasonable presumption to uphold the award, and none against it, presuming the award is valid and that an appellate court may not substitute it's judgment for the trial court merely because it may have reached a different result. Kosty v. S. Shore Harbour Crmty. Ass'n, Inc., 226 S.W.3d 459, 462, 463 (Tex. App.--Houston [1st Dist.] 2006, pet. denied).

Challenge to Award

The condo owner asserted that the arbitrator exceeded her authority or awarded on a matter not before her which included arguments of free speech and failure to expunge the *lis pendens*. The court addressed these issues by stating that under section 10(a)(4) of the FAA, it is not enough to reverse the award by merely showing the arbitrator committed an error or even a serious one.

The Mutual Covenant of Peaceable Enjoyment

The court overruled the condo owner's argument that said covenant interfered with their right of free speech and the court found that the arbitrator did not err by requiring the parties to execute the interpreted covenant created a restraint on speech not bargained for because each party contractually agreed to provide the arbitrator with the broad powers to interpret the BSA and their intent.

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Argument for Manifest Disregard of the Law

The court reaffirmed that the *Hall Street* decision foreclosed such a claim and that even gross mistake are not grounds for vacatur of an award under FAA.

Lis Pendens Expungment

Should the arbitrator have required expungement under the Texas Property Code? The court answers this question "no" and finds that because the arbitrator had the broad discretion of determining the intent of the parties, as the parties had contracted that right to the arbitrator, the court cannot disturb the award merely because the arbitrator did not determine that the use of expungement in the BSA did not include interpreting that to utilize the Texas Property Code's provision for expungement and thus expungement of the lis pendens was not part of the award.

Confirmation That No Attorneys Fees Are Awarded

The court holds that merely because the condo owner refused to execute the documents required for it to do in the award and the trial court's judgment, nevertheless the award of attorneys fees was found to be an error and reversed because this case is the same as *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225 (Tex App.--Houston [14th Dist.] 1993, writ dism'd), in which *Babcock* held that the parties' agreement that the award be final did not preclude their right to challenge the award under the FAA, and therefore there was no breach and the award of attorneys fees was improper.

Differences in FAA and TAA

Of particular interest in this case is that the court applied both the FAA and the TAA and noted the distinction between the two statutes: "the TAA, unlike the FAA, does not preclude parties form agreeing to limit the authority of an arbitrator so as to allow for judicial review (and vacatur) of an arbitration award for reversible error. See *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 97 (Tex. 1991).

II. 21st Financial Services, L.L.C. v. Manchester Financial Bank, --- F.3d ----, 2014 WL 1282763 (5th Cir. 2014)

The Fifth Circuit confirmed an arbitration award in favor of 21st Financial. The Bank argued two grounds for vacating the award:

> Bank did not receive adequate notice of the arbitration; and
>
> 21st did not engage in good-faith negotiations prior to compelling arbitration.

The facts are that one of the bank's organizers advised 21st that the CEO of the Bank issued two checks from Manchester Financial Group, L.P. ("MFG") to pay deposits for the Bank to 21st for computer services to the Bank. The underlying agreement, which included an arbitration clause, listed the Bank's address in La Jolla, California. 21st was advised that the Bank did not open because its principal investor decided not to proceed with his investment.

21st then sent two invoices to the CEO of the Bank who promised to pay one, but disputed the other. The attorney for other organizers of the Bank requested the refund of the monies already paid and 21st demanded arbitration addressed to the Bank's La Jolla address, The attorney for 21st was advised by an organizer of the Bank that no one represented the Bank because it was not formed. The attorney for a bank organizer stated that neither MFG nor the Bank was liable.

The AAA requested 21st to provide it with the mailing address of the Bank and both the Jolla and the San Diego addresses of an organizer was provided. Because the notice from AAA was returned, 21st advised AAA to use the San Diego address which it did and sent a "Notice of Appointment" of an arbitrator. An attorney for one of the organizers then advised AAA that no correspondence should be sent to MFG.

The attorney for 21st then requested AAA to send notices to an attorney for the Bank at the San Diego address and another to one of the organizers of the Bank at the San Diego address. Then AAA received a letter from Ms. Walden of MFG to substitute her and Mr. Gibbons for Mr. idball, an attorney who first received notice for the Bank. With

the agreement of 21st's attorney this substitution was made, but 21st's attorney also requested that one of the organizers remain on list to receive notices. Thereafter another attorney, Wynn, notified AAA that the proposed Bank had not come into existence and was not properly served.

21st's attorney and AAA served Gibbons and the Bank with pleadings and notices; no one appeared for the respondent at the arbitration. After 21st put on it's case, the arbitrators issued an award in favor of 21st that included damages, legal fees, costs, and post-judgment interest.

The district court found that although the notice was technically deficient, adequate notice was given and actual notice was received. On appeal, the 5th Circuit confirmed that that actual or constructive notice of the arbitration was all that is required under existing case law.

The trial court also found that good-faith negotiations occurred prior to the arbitration, so that asserted basis for vacatur was also rejected. This latter point arises out of an interpretation of a clause in the contract requiring good faith negotiations and to escalate the dispute to management if the dispute cannot be resolved at the operational level.

In rejecting the Bank's good-faith argument, the Fifth Circuit held that the burden of proof is on the Bank to show that the arbitration was strictly conditioned on the failure of senior management negotiations, and that no such senior management negotiations occurred. The contract did not expressly, plainly and unambiguously require senior management to engage in negotiations, but only for operational personnel to do so -- and that occurred.

The arbitrators, as well as the trial court and the appellate court, determined that what appeared to be a run-around by the Respondents as to who is authorized to accept notice will not defeat the arbitration from proceeding where there is shown that the Respondents did in fact receive notice, and that technical objections will not override the substantive facts that notice was given.

**** Alvin Zimmerman*** is a former chair of the ADR Council. The author can be contacted at: azimmerman@zimmerlaw.com

April 9, 2014

ADR Newsletter:
Call for New Editor-in-Chief
Submission Deadline: April 15, 2014

Dear ADR Section Member,

After many years of terrific service, our wonderfully talented editors-in-Chief of the ADR Newsletter, Stephen Huber and Wendy Trachte-Huber, are moving on to other things. The newsletter's quality has been recognized by its recent inclusion in HeinOnline, the largest searchable PDF collection of academic and practice-oriented materials, thanks to its current editors and immediate past chair Alvin Zimmerman.

While the departure of Stephen and Wendy marks the end of great legacy, it also creates an opportunity for new beginnings! Thus, the Alternative Dispute Resolution Council is searching for a qualified replacement who will take over the reign of our esteemed publication. All section members with an interest in becoming the new editor-in-Chief of the ADR Newsletter are invited to let the council know with a letter of interest.

Please submit your letter of interest via email to Don Philbin -- **don.philbin@att.net** -- no later than May 15, 2014.

Regards,

Ronald Hornberger, Chair
Alternative Dispute Resolution Section

SUBMISSION DATES FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

Issue	Submission Date	Publication Date
Summer	June 15, 2013	July 15, 2014
Fall	September 15, 2014	October 15, 2014
Winter	December 15, 2014	January 15, 2015
Spring	March 15, 2015	April 15, 2015

SEND ARTICLES TO:

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FINDING WOMEN AND MINORITY DISPUTE RESOLUTION PROFESSIONALS:

The Kaiser Permanente Approach

Editors' Note: Set out below is an Internet posting (an advertisement, if you prefer) by Kaiser Permanente Health Plan that seeks women and minorities to serve as arbitrators, followed by the qualifications for participating arbitrators. While few readers of Alternative Resolutions will seek to arbitrate disputes for Kaiser Permanente this approach should be of interest to organizations that seek to attract female and minority dispute resolution professionals.

SEEKING WOMEN & MINORITY ARBITRATORS OR KAISER PERMANENTE PANEL

The Office of the Independent Administrator (OIA) is seeking qualified individuals who want to join its pool of possible arbitrators. There is no fee to do so and the OIA receives no money from the neutral arbitrators.

The OIA administers the arbitration system between Kaiser Permanente Health Plan, Inc., and its six million members in California. We administer about 650 cases a year and have approximately 275 neutral arbitrators on the panel. The panels are divided by region; Northern California, Southern California, and San Diego. The parties select their neutral arbitrator by striking and ranking 12 randomly generated names supplied by the OIA, or by jointly selecting any neutral arbitrator upon whom they can agree. Neutrals set their own fees and are paid by the parties.

Among other requirements, neutral arbitrators must either be lawyers with either ten years of substantial litigation and/or arbitration experience; retired state or federal judges; or lawyers with specifically designed arbitration training. Medical malpractice experience is not required. You must agree to follow the OIA Rules and ensure that the deadlines set forth in the Rules are met.

If interested, please go to the OIA website at www.oia-kaiserarb.com. You may complete the application on line. You may also obtain copies by emailing oia@oia-kaiserarb.com or by calling 213-637-9847. Also see the links below for qualifications

Qualifications for Neutral Arbitrators for Kaiser Permanente's Mandatory Arbitration System

1. Neutral arbitrators shall be members of the State Bar of California, members of the state bar of another state with extensive practice in California during the past five years, or retired state or federal judges.

2. Neutral arbitrators are required to successfully complete an application provided by the Independent Administrator.

3. Neutral arbitrators shall

(a) have been admitted to practice for at least ten years, with substantial litigation and/or arbitration experience; AND

(b) have had at least three civil trials or arbitrations within the past five years in which they have served as either

(i) the lead attorney for one of the parties or

(ii) an arbitrator; OR

(c) have been a state or federal judge; OR

(d) have completed within the last five years a program designed specifically for the training of arbitrators.

4. Neutral arbitrators shall provide satisfactory evidence of ability to act as an Arbitrator based upon judicial, trial, or legal experience.

5. Neutral arbitrators shall not have served as party arbitrators on any matter involving Kaiser Permanente, or any affiliated organization or individual, within the last three years.

6. Neutral arbitrators shall not presently serve as attorney of record or an expert witness or a consultant for or against Kaiser Permanente, or any organization or individual affiliated with Kaiser Permanente, or have had any such matters at anytime within the past three years.

7. Neutral arbitrators shall not have received public discipline or censure from the state bar of California or any other state bar in the past five years. In the case of former judges, they shall not have received public discipline or censure from any government body that has authority to discipline judges in the past five years.

8. Neutral arbitrators shall follow applicable arbitration statutes, substantive law of the issues addressed, and procedures of the Independent Administrator.

9. Neutral arbitrators shall comply with the provisions of code of ethics selected by the Office of the Independent Administrator.

10. Neutral arbitrators shall administer Kaiser arbitrations in a fair and efficient manner.

ARBITRATORS AS GATEKEEPERS IN INTERNATIONAL INVESTMENT DISPUTE ARBITRATION INVOLVING A SOVEREIGN STATE: *BG Group PLC v. Republic of Argentina*

Lionel M. Schooler*

INTRODUCTION

The United States Supreme Court recently issued its decision in *BG Group PLC v. Republic of Argentina*, 2014 WL 838424. By a vote of 7-2 the Court, in an opinion by Justice Stephen Breyer, determined that in an arbitration involving an investment treaty dispute between a foreign investor and a sovereign nation, in the absence of a clause specifying the basis of and conditions required for consent to submit a dispute to an arbitral forum, an arbitration panel had the authority to determine whether arbitration could commence or be pre-empted by the alleged failure of the investor to comply with a requirement of the treaty; in this case, the requirement was an obligation to seek preliminary resolution of the dispute through litigation in the local courts of the sovereign nation (Argentina).

GENERAL MECHANISM FOR ARBITRATION OF INVESTMENT DISPUTES

The International Centre for Settlement of Investment Disputes (ICSID) Convention was established by the World Bank in 1966 to facilitate the settlement of investment disputes between Sovereign States and nationals of other States. Through the mechanism of the adoption of the Convention, sovereign nations could agree by treaty to utilize ICSID procedures and rules to resolve disputes between a sovereign nation and a foreign investor situated in another country which was a treaty signatory.

The system was established to provide a framework for foreign investors to launch arbitration proceedings directly against a host state in which they made their investments ensure appropriate dispute resolution protection to such investors.

INVESTMENT TREATY BETWEEN ARGENTINA AND UNITED KINGDOM

An investment treaty was signed between the nations of Argentina and the United Kingdom in 1990. This treaty contained a provision on dispute resolution (Article 8). It stated that either party to a dispute could submit the dispute to "the decision of the competent tribunal of the Contracting Party in whose territory the investment was made" (that is, a local court in Argentina). It further stated that "where after a period of eighteen (18) months" from the submission date of the dispute the competent tribunal (local Argentinian court) had not given its final decision, or where a decision by the tribunal had not concluded the dispute between the parties, then the parties could proceed directly to arbitration.

NATURE OF THE DISPUTE

BG Group, a British investment company, participated in 1992 in a consortium that purchased a majority interest in MetroGAS, an Argentine state-run entity that was a gas distribution company created by Argentine law, following Argentina's privatization of its state-owned gas utility. MetroGAS was then awarded a thirty-five year exclusive

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license to distribute natural gas in Buenos Aires. Simultaneously, Argentina adopted laws that provided for gas "tariffs" to be calculated in U.S. Dollars set at a sufficient level to assure a reasonable return to the ownership.

However, beginning in 2001, Argentina enacted new laws to address an economic crisis, one of which changed the basis for calculating the tariffs from Dollars to Pesos, at the rate of 1:1, almost three times the then-existing value of the Peso compared to the Dollar. This immediately transformed MetroGAS into a perpetually and irretrievably unprofitable operation.

Central to the issue presented to the Supreme Court in this case was the fact that, in 2002, the President of Argentina issued a decree staying for 180 days the execution of its courts' final judgments in suits claiming harm as a result of the new economic measures; The statute also established a "renegotiation process" for contracts like the one with MetroGAS, but simultaneously **barred** any firm from participating in that process if it was litigating against Argentina in court or in arbitration.

As was eventually established by BG Group without contest by Argentina, the impact of this decree was to nullify the ability of a local Argentine court to preside over the 18 -month process mentioned in the treaty, and instead to create what was characterized as an "absurd and unreasonable" process whereby BG Group in this legal environment would never be able to complete the 18-month process so as to be able to proceed to arbitration.

THE ARBITRATION PROCESS

BG Group interpreted the change in the exchange rate by Argentina to (overvalued) pesos to violate the Treaty. It therefore invoked Article 8 of the Treaty to initiate the arbitration process without resort to Argentina's local courts. In response to the initiation of this process, the parties appointed arbitrators, designated the *situs* of the arbitration to be Washington, D.C., and conducted hearings with the arbitrators between 2004 and 2006.

In addition to disputing BG Group's substantive claims before the arbitral forum, Argentina contended that the arbitration tribunal lacked "jurisdiction" to hear the dispute, because BG Group had failed to comply with the "first step" in the process, litigating the dispute first in Argentina's courts.

The arbitration panel issued a decision in late 2007. It first determined that it had jurisdiction to consider the merits of the dispute, construing Argentina's conduct creating an "absurd and unreasonable" process to have waived or excused BG Group's failure to comply with the local litigation requirement of Article 8. In that regard, it construed what Argentina had done as hindering recourse to the local judiciary to the point where the Treaty "implicitly excused compliance with the local litigation requirement." The panel went on to declare that Argentina's actions had denied BG Group "fair and equitable treatment," and it accordingly awarded BG Group $185 million in damages.

JUDICIAL REVIEW OF THE ARBITRATION AWARD

BG Group sought confirmation of the award pursuant to the New York Convention, 9 U.S.C. §§ 204 and 207, in the District Court for the District of Columbia. Argentina sought vacatur of the award in part on the basis of lack of jurisdiction (claiming that the panel had violated Section 10(a)(4) of the Federal Arbitration Act by "exceeding its powers"). The District Court confirmed the award, but the United States Court of Appeals for the District of Columbia Circuit reversed.

The D.C. Circuit held that the issue of jurisdiction, that is, the impact of the local litigation requirement, was a matter for courts to decide *de novo*, and further that the circumstances in question did not excuse BG Group's failure to comply with this requirement. It thus ruled that because BG Group had not done this, the arbitrators lacked authority to decide the dispute, and it vacated the award.

ISSUE BEFORE THE SUPREME COURT

Recognizing the significance of this case in international arbitration, including the large number of investment treaties that provide for arbitration as the means for dispute resolution, Justice Breyer (writing for the majority) framed the question before it as who -- court or arbitrator -- "bears primary responsibility for interpreting and applying Article 8's local court litigation provision."

DECISION BY THE SUPREME COURT: MAJORITY OPINION

Justice Breyer commenced his discussion of the determination of the issue presented by analogizing the task to ordinary contract interpretation. Under this rubric, Justice Breyer stated that the matter could properly be decided by the arbitrators. He then posited whether the inclusion of the language in question in a treaty made a critical difference, and stated it did not.

Bolstering these conclusions, Justice Breyer first noted that with an "ordinary contract," the parties determine whether a particular matter is primarily for arbitrators or courts to decide. Under applicable Supreme Court precedent, he stated that where the contract is silent, then courts determine the parties' intent. Thus, according to Justice Breyer, courts presume that the parties intend a court, not an arbitrator, to decide disputes over arbitrability. He cited to *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299-300 (2010); and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) as support for this proposition. Likewise, courts "presume" that parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration, "such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate."

Justice Breyer characterized the local litigation clause at issue as being of the "procedural variety," focusing particularly upon the language requiring submission of disputes to international arbitration at a certain point in time, that is, "*when* the contractual duty to arbitrate would arise, not *whether* there is a contractual duty to arbitrate at all."

Turning next to the question of the impact, if any, of having this "contractual language" in a treaty rather than an "ordinary contract," Justice Breyer stated that in this case, the treaty's words did not convey a different intent than what was determined above about the procedural nature of the "local litigation requirement." Justice Breyer did acknowledge that it might be possible for treaty signatories to agree to language suggesting the need for them to "consent" to arbitrate after a dispute had arisen, but he determined that aside from a "title" describing "consent," there was no agreement in this case that either party had to consent before submitting a dispute to arbitration. To demonstrate this point, Justice Breyer contrasted the language in the treaty at hand with a United States-Korea Free Trade Agreement of 2011, which included a section explicitly requiring the consent of each party to submit a dispute to arbitration ("no claim may be submitted to arbitration under this Section unless the claimant waives in writing any right to press his claim before an administrative tribunal or court").

Having determined that the arbitrators had authority to determine in the first instance whether the matter was properly submitted to arbitration, Justice Breyer proceeded to evaluate the propriety of the arbitrators' award. He stated that there was no basis to overturn the award based upon Argentina's challenge to it under FAA Section 10(a)(4), 9 U.S.C. §10(a)(4), because the arbitrators had not exceeded their powers in determining that on the facts of this case, the local litigation requirement was not jurisdictional nor required to be completed (or even commenced) as a precondition to arbitration.

CONCURRING OPINION

Justice Sotomayor concurred in the decision that the local litigation requirement was a procedural precondition which the arbitrators could interpret, rather than a condition requiring a court to decide whether Argentina had consented to arbitrate. However, she also took the occasion to emphasize that the Court was well-advised to avoid discussing the issue of "consent" in the context of the case before it; she was particularly troubled by the notion that the presence of a "label mentioning consent" could have the effect of deciding whether the matter was jurisdictional or not.

DISSENTING OPINION

Chief Justice Roberts (for himself and Justice Kennedy) dissented. For him, the type of instrument involved, *i.e.*, a treaty rather than in an "ordinary contract," was crucial to determining the proper legal environment within which to interpret the wording of the instrument. He emphasized that this instrument was a bilateral investment treaty between two sovereign nations. He further pointed out that Article 8 of the Treaty contained language indicating that disputes could be resolved by arbitration "when the host country and an investor *have so agreed*."

Finally, he pointed out what he considered to be the fundamental flaw in construing the Treaty as establishing some

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kind of agreement to arbitrate. He emphasized that the Treaty by itself could not "constitute an agreement to arbitrate with an investor" because no investor had ever been a party to the Treaty. He concluded from this that *something else* had to happen to "create" an agreement to arbitrate and, in this case, that "something else" was an investor's submitting its dispute to the courts of the host country.

On this basis, he concluded that the local litigation requirement of the Treaty was a condition to formation of the Agreement, rather than a precondition to performing an existing agreement. He thus indicated that the arbitration panel exceeded its powers by resolving an issue that was not properly before it under either the Federal Arbitration Act or the New York Convention.

CONCLUSION

The BG Group decision should have significant and far-reaching consequences both for the drafting of instruments incident to foreign investment under the ICSID Convention, as well as for adjudication of disputes arising out of such transactions.

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Title IX Mediations: An Initial Review

Gene Roberts* & Kay Elkins Elliott**

A tidal shift in how educational institutions operate occurred when Richard Nixon, in 1972, signed into law what is now commonly referred to as Title IX. A part of federal educational reforms that year, the relevant provision of Title IX reads:

> No person in the United States shall, on the basis of sex, be excluded from participation, nor be denied the benefits of, or be subjected to, discrimination under any education program or activity receiving Federal financial assistance.

Most of us know Title IX because of the far-reaching impact that it has had on collegiate sports. But Title IX has a greater reach than sports. According to the U.S. Department of Justice:

Title IX applies to all aspects of education programs or activities operated by recipients of federal financial assistance. In addition to educational institutions such as colleges, universities, and elementary and secondary schools, Title IX also applies to any education or training program operated by a recipient of federal financial assistance."

The DOJ treats Title IX as a condition for receiving federal funding: if you are an educational institution that wants federal funding of any sort, you agree that you will not discriminate on the basis of sex.

The Federal office that is in charge of enforcing Title IX is the Department of Education's Office for Civil Rights. OCR has taken the position that Title IX prohibits sexual harassment of and sexual violence against students. Sexual harassment and sexual violence "interferes with students' right to receive an education free from discrimination…."

In short, sexual harassment of students, "which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX." Schools are required to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects. Schools are required to adopt and publish grievance procedures and provide training on how to identify and report sexual harassment.

So what does this have to do with mediation, or other forms of resolving conflict? OCR requires that schools have a grievance procedure to resolve sexual harassment complaints, including at least one Title IX compliance officer. In that same "Dear Colleague" letter, the OCR allows "voluntary informal mechanisms" as part of the grievance procedure, and the OCR specifically mentions mediation as a possible "voluntary informal mechanism."

OCR takes the position that a student who complains of harassment should not be "required" to work out the problem directly with the alleged perpetrator, nor should the voluntary informal mechanism take place without "appropriate involvement by the school. Such involvement is defined as participation by a trained counselor, mediator, teacher or administrator. The complainant must be notified of the right to end the informal process at any time. OCR also prohibits the mediation of sexual assault complaints, even on a voluntary basis.

To mediation professionals, most of OCR's guidance for mediating a Title IX matter should not come as a surprise. We know that mediation is a voluntary process. Informing the parties to a Title IX matter that mediation is voluntary and can be terminated at any time is quite consistent with the definition and practice of mediation. If mediation isn't voluntary in all respects — the institution of it, the settlement discussions, and the conclusion — then the process is something other than mediation.

The OCR prohibits mediation of sexual assault allegations, an understandable approach because of the allegations of a serious crime. While we don't believe that mediation is a one-size fits all panacea for all of the conflicts in society, we also do not believe that a blanket prohibition of mediation for certain cases is warranted. Having victims and offenders mediate is a common practice, including in the most terrible of crimes.

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Rajib Chandad, in an article published at 6 Harv. Negot. L. Rev. 265 (2001), sets up the proposition that mediation can be an appropriate tool to use in these matters. Particularly in university settings, mediating these types of matters can promote the university's interest in educating individuals, and, depending upon the style of mediation, can be transformative.

As Chandad explains, a mediation setting can help the parties understand the type of behavior that is unacceptable and enter into a voluntary agreement of how they will behave on a going-forward basis. That a voluntary agreement is reached, instead of one that is imposed by university judicial officials, may allow more buy- in and higher rates of compliance. The agreement itself is more likely to reflect an interest-based approach to problem solving, rather than a mere compromise of polarized positions.

On the other hand, one university is under OCR investigation for the way it handled a sexual assault complaint. OCR opened an investigation into the way that the University of Chicago handled a sexual assault claim in June, 2012, because the Dean of Students allegedly encouraged mediation to the sexual assault complainant, which is a violation of OCR directives and university policy. For now, one can debate the efficacies of a mediation ban in sexual assault cases, but schools receiving federal funding cannot offer or engage in mediation in these types of cases. So what are universities doing to promote mediation as part of their Title IX duties, particularly since OCR has expressly authorized the use of mediation in these types of situations?

We looked at "four-year" universities in Texas to see what public pronouncements they have for Title IX mediations. Under Title IX regulations, schools are supposed to implement notice provisions advising students and the public of the efforts that are undertaken to promote nondiscrimination in educational programs and activities, as well as designating a Title IX coordinator (including the coordinator's name, address, and telephone number).

The notice of nondiscrimination must be "widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons." OCR recommends that the notice be "prominently posted" on school websites and in locations throughout the school or campus that is "available and easily accessible on an ongoing basis."

For the initial phase of our research, and the subject of this paper, we looked at the websites of 79 Texas universities. All 79 universities had some mention of Title IX on their websites, but only 14 mentioned mediation as a part of the process to resolve Title IX complaints. And of the 14 universities, no consistent language nor policies exist between them.

By way of example, the University of North Texas' Sexual Harassment policy mentions mediation one time, where it states that "individuals who are involved in the complaint reporting, mediation and/or investigation process are obligated to maintain confidentiality of the proceedings…." The University of Texas System's policy on sexual harassment and misconduct has a section dedicated to informal resolution processes. Section 8 of the University of Texas' System's policy states:

Sec. 8 Informal Resolution Process.

8.1 When an individual does not wish to file a formal complaint, the informal resolution process provides assistance to the individual to resolve possible sexual harassment or sexual misconduct. Such assistance includes developing strategies for the individual to effectively inform the offending party that his or her behavior is unwelcome and should cease, action by an appropriate U. T. System official to stop the unwelcome conduct, or mediation. The U. T. System may also take more formal action to ensure an environment free of sexual harassment and sexual misconduct.

8.2 To utilize the informal resolution process, an individual should contact the Director of Employee Services or the Equal Employment Opportunity (EEO) Officer in the Office of Employee Services.

McMurray University, in its Student Handbook (not on its Title IX webpage), provides a detailed procedure if "any member" of the university community believes they have been the victim of harassment. That person is to bring the matter to the attention of the "University Mediation Officer"—a person designated by the administration to handle complaints of discrimination and sexual harassment.

The policy requires the Mediation Officer to "initiate whatever steps he or she deems appropriate to affect an informal resolution of the complaint acceptable to both parties." If the complainant is not satisfied with the

"resolution proposed by the Mediation Officer" the complainant may file a request with that officer to have the Grievance Review Committee to review the action.

We point out these universities merely as examples of what exists in the world of Title IX mediation and don't pass judgment on them. Other universities who approach the subject, in Texas and outside of the state, have differing approaches to the issue. Some barely mention mediation while others have a detailed process in place.

What does this all mean? In addition to the ubiquitous conclusion that "more research is needed", mediation in Title IX situations seems to be a process that is underused. Mediation is a choice that is available to Title IX participants, but given our recent experience, it is not one that is widely known to complainants, respondents, or investigators.

Would Title IX mediations be useful for educational institutions? Would they be successful? There's no reason that they couldn't be, so long as they are conducted by trained mediators. And mediation ought to be viewed as a favored tool to schools for all of the same reasons that mediation is a favored tool to litigants. Mediation can be scheduled quickly, early in the process, and if not successful, then the Title IX investigation can proceed in due course.

Additionally, mediation offers alternatives that a traditional Title IX investigation cannot: the ability of the parties to discuss with each other (either in joint sessions or in caucus) a difficult subject, the ability to voluntarily take responsibility for actions (if warranted), and the ability to fashion remedies that are meaningful to the parties that aren't available in a traditional adjudicatory procedure (e.g., suspension or expulsion). And isn't this, in part, what a university setting is supposed to do, to educate people about their actions and choices and how to handle them responsibly?

The next generation of Title IX is here. It protects every person – men and women, students and employees, boys and girls-from sex-based harassment. In a 2010 nationwide survey of elementary schools, 48% of all teachers reported hearing students make sexist remarks at their school. Stories appear in the media of a female child being expelled for not wanting to dress as a girl. One-third of students have heard kids at school say that girls should not wear certain clothes because they are girls and that boys should not do certain things because they are boys.

Mediation can be an important tool in changing the culture: not only as a way to address sexual harassment and bullying based on sex but also as an example of parties working together with trained facilitators to resolve problems at the source level in ways that are more likely to promote social harmony and lasting positive change.

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He is a frequent speaker to professionals in the human resources, education, and conflict resolution fields. He has served as an external examiner for a university's dispute resolution program and was a board member for the Dallas County Dispute Resolution Center. Gene's current research interest is the use of mediation in Title IX procedures.

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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 a nationally recognized mediator and arbitrator specializing in the resolution of large commercial disputes. As a prerequisite to arbitration, you have been appointed to mediate a dispute involving an alleged default on a multi-million dollar loan for a commercial development in a neighboring state.

The lender, Donald (Don, for short) Corleone, is an extremely wealthy, powerful and, some say, ruthless individual. The borrower, Carlos Demenimus, is a young, aspiring developer who has staked everything he owns on the success of the development currently threatened by the allegedly-defaulted loan.

Don Corleone and Carlos Demenimus are family. Carlos is married to Don's daughter, Talia. Currently, Carlos and Talia are in the throes of a very contentious and bitter divorce.

Very early in the mediation process, it becomes apparent to you that the real issue driving the dispute is not the allegedly-defaulted loan. Don is confident that, based on the terms of the loan documents, he would prevail in any subsequent arbitration, that the loan would be declared to be in default and Carlos would, thereby, be financially and professionally ruined.

However, Don made it known to you that he was willing to forgive-in-full the outstanding balance on the loan on one condition, *and one condition only*; that Carlos relinquish all parental rights to his and Talia's only child, a two-year old daughter, that the child's surname be changed to Corleone, that Carlos have no future contact with anyone in the Corleone family and that he agree to a divorce on terms proposed by Don and Talia. Failing that, Don assured everyone present that the consequences for Carlos would be harsh.

As a commercial mediator and arbitrator, you know virtually nothing about family law; especially the family law of a neighboring state. What are the ethical issues facing you and how would you proceed?

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David Cohen, (San Antonio):

This ethical puzzler appears to present an intriguing fact pattern but perhaps not so much from the mediator's perspective. From the standpoint of a judge or one of the parties' lawyers, this puzzler might present a complex set of issues: What is in the best interest of the child? May parties, in effect, trade a child in order to resolve a business deal? Would it be moral or ethical to do so? Is Don Corleone engaging in, essentially, black-mail? Did he, perhaps, create the default in the first place in order to obtain leverage on his soon-to-be ex-son-in-law?

These speculations may present difficult or troubling questions, but for me, as the mediator, they do not necessarily arise. Assuming that Don Corleone's and his daughter's stated interests are aligned, my ethical task is to determine what the son-in-law Carlos wishes and to proceed from there.

We're told that everything Carlos owns is at stake. So, obviously, resolving the alleged loan default is very important to him. We're also told that he and Talia are engaged in a bitter divorce. But we're not told anything about the reason(s) for the divorce, or its bitterness, matters that are not relevant for my purposes except to the extent that they may bear on the central issue: What are Carlos' interests with his and Talia's little daughter? Does he want nothing to do with her, being a philanderer, a wife-beater, and absent Dad hence bringing out the loving grand-father

in Don Corleone? Or does he want sole custody because Talia is a drunk and lousy mother? Or does he want to share custody and find a way to get along with Talia and help raise their daughter once their bitter divorce is finalized? We know nothing about these issues. Clearly, the mediator needs to know what Carlos wants here, in addition to wanting to resolve the loan default issue.

Does Carlos want to resolve his financial problem on the loan dispute by simply accepting Don Corleone's stated conditions? If so, and regardless of his status as a good or bad Dad or Talia's status as a good or bad Mom, regardless of the reasons for the divorce, the mediation will be very short. For it is not up to me to decide whether Carlos' decision here is in the child's best interest, or selfish, or, indeed, even wise. If he doesn't wish to have anything to do with his daughter, it's not up to the mediator to go behind that decision and substitute his views for those of the parties. Presumably, the conditions attached by Don Corleone will be codified in an agreed order, signed by the judge, and that will end the matter.

If, however, Carlos wishes to resolve his loan dispute but, at the same time -- retain contact with his daughter, shared or sole custody, the mediation may be a long one. All sorts of issues may have to be addressed, including the possible illegality of Don Corleone's conduct, the cause(s) of the divorce, and the merits of the loan dispute. As a commercial mediator and arbitrator, I can assist the parties primarily with respect to the last issue. (But even there, I will have to assume that Carlos' counsel will have thoroughly examined the merits of Don Corleone's business behavior with respect to the loan and will advise his client and me accordingly.)

And, as I know nothing about family law, let alone in a neighboring state, ethically, I will need to associate with a colleague specializing in family law/child custody issues with respect to the cause(s) of the divorce and Don Corleone's somewhat unusual business proposition to gain control of his grand-daughter and her name. The parties will, therefore, need to agree to this added cost of the mediation. (I am assuming that the parties will have retained able family law attorneys; however, as they will, in all likelihood, disagree on the appropriate outcome for their respective clients and make their pitches to me accordingly, assuming Carlos wishes to retain custody and resolve his loan dispute, a family law mediator will need to assist me.)

Despite its possible complexity, however, the mediation should not present any further ethical issues for the mediator once Carlos' interests are disclosed to me and provision is made for a family law mediator specialist should the facts require one. The only caveat, of course, is that I do not become aware of conduct reasonably disclosing child abuse. If I learn of such conduct, regardless of any set of facts, I may have an ethical and legal duty to report it to the appropriate authority despite the confidentiality requirements attached to the mediation process

Dr. Nancy K. Ferrell, (Dallas):

Since in the case description it says, "you have been appointed," I assume this is court ordered mediation. Therefore, the first thing I would want to find out is the mediator ethics and/or legal issues dealing with "trading" consideration in one case for agreements in another case in the state.

Secondly, (if there were not any legal or ethical issues) I would ask Don for permission to share his proposal with Carlos. If Carlos agreed to the option proposed by Don, then it is a matter of working out the details of the agreement with the parties and attorneys involved in the commercial and family disputes.

However, if Carlos did not see this as a reasonable option, I would determine if Carlos saw any opening to join the resolution of the commercial dispute and his family dispute, given the reality that the family dispute seemed to be driving the commercial dispute. If Carlos agreed, l would inform the parties of my limited ability to deal with issues related to family mediation and invite a mediator with that experience to join as a co-mediator.

Third, I would discuss the option of having the parties and lawyers involved in the family issue to join the mediation of the commercial dispute. I would not have them together, but basically with everyone's permission and knowledge, conduct two separate but simultaneous mediations dealing with both issues: the commercial and the family recognizing that interests and options would overlap.

If there were ethical and/or legal issues with trading consideration in one case to resolve another, I would inform Don and determine if he was open to any other options in the resolution of the commercial dispute. If his only consideration involved the trade-offs described, I would deter-

mine the case was not appropriate for mediation. If the parties were convened I would certainly meet with Carlos and take any potential resolutions to Don for consideration before calling an impasse.

Michael C. Neel, (Houston):

Since Don has made his position clear to everyone, the condition to settlement is not a confidential communication to be withheld from Carlos at this time. If it was this would be more difficult.

I would immediately inform all parties that parental rights are a significant issue in the case and that I am not a family law mediator. As a result I have no choice but to either disqualify myself and withdraw as mediator, or in the alternative recess the mediation long enough to engage a family mediator from the neighboring state to serve as a co mediator in the case.

It could be even more complicated if we knew anything about family law in the other state and if there might be a duty to disclose the matter to the court, etc., but I would want to rely on the co mediator to make that determination.

If the parties should refuse to agree to the co mediator, I would withdraw as mediator, and might declare an impasse in order to let the arbitrator(s) resolve the case. I doubt the arbitrator(s) would allow parental rights to be an issue in the arbitration.

I assume Carlos might agree to Don's condition, but he could easily do that after I withdraw. I would not want to be a non-family mediator and allow such an agreement to come out of my mediation.

C. Bruce Stratton, (Liberty):

Texas Association of Mediators shall be referred to as "TAM" while their Ethical Guidelines for Mediators is referred to as "Guidelines". Texas Mediator Credentialing Association shall be referred to as "TMCA" and its Standards of Practice & Code of Ethics shall be referred to as "Standards".

The Supreme Court of Texas shall be referred to as "Supreme Court" and its Ethical Guidelines for Mediators shall also be referred to as "Guidelines"

I first make some observations about the published fact situation. Although one could assume that the son-in-law, Carlos Demenimus, has an attorney during the mediation, it is not stated as such. There is no indication that his divorce attorney is present. There is no conclusive statement that the daughter and wife, Talia, is privy to the communication made to the mediator or even present at the mediation since it only involves an alleged loan default. Therefore she may be unaware of the threats made by her father, Don Corleone. The only indicator is Corleone's condition that Demenimus "agree to a divorce proposed by Don and Talia" and the statement that "Don assured everyone present that the consequences for Carlos would be harsh." The mediator has no viable knowledge of family law especially of the neighboring state and we can assume unschooled as to family law settlements. Last, the loan could well be a community debt.

Based on the terms, conditions and tone of the information conveyed to the mediator by Don Corleone and directed toward his son in law, Carlos Demenimus, the emphasis of this mediation has more to do with family relationships than it does with the alleged loan default. My take is that Corleone is **"unwilling or unable to participate meaningfully in the mediation process"** concerning the loan default making the fact situation **"inappropriate for mediation"**. He is using the financial threat of the loan default in an effort to effect a life changing decision on matters outside the mediation. A divorce generally assumes a continued relationship with a child and the other spouse at least until the child is eighteen and graduated with a high school equivalent diploma. Here that relationship is endangered by the financial threat on issues not even before the mediator.

Such circumstances should be addressed by the parties face to face and is designed for negotiation, not mediation, certainly not in the current mediation. In fact, if it is a consideration it should be in the divorce proceeding which is in progress. Therefore the mediation should be terminated. Rule 13, Termination of Mediation Session - TAM Guidelines, TMCA Standards and Supreme Court Guidelines states: ***"A mediator should postpone, recess or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process."*** [Emphasis added] The circumstances presented by Corleone are outside the role that the mediator should ethically assume in resolving the issues entrusted to him. I would not even sug-

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gest this type of financial blackmail be mediated with a mediator schooled in family law including that of the neighboring state. First and foremost, I think the threat is contradictory to the intent and aspirations of the Texas Family Code and probably that of the neighboring state.

Having said the above there are some considerations which I feel should take place. First, I feel the position of Corleone should be disclosed to Demenimus. He has a right to understand and consider the substantial "risks, and the alternatives" that are being injected into the mediation and its potential impact on his family relationship. Rule 10, Disclosure and Exchange of Information - TAM Guidelines, TMCA Standards and Supreme Court Guidelines. ***"A mediator should encourage the disclosure of information and should assist the parties in considering the . . . risks, and the alternatives available to them."*** What he does with it remains to be seen, but he should know why the mediation is being terminated. Even if he by some wild imagination should be receptive to the proposal, it is beyond the role of the mediator to proceed. But Demenimus is entitled to know what is opposing him on the other side and is directly related to the alleged loan default. Another factor is that the wife maybe unaware of the tactics undertaken by her father. She could be opposed to it or be the motivating force behind it. Whatever, this is not a message to die with the mediator.

There are other consideration why disclosure is appropriate by the mediator to Demenimus. There is no indication that Demenimus is represented by an attorney concerning the loan default. Comment (a) to Rule 11, Professional Advice, TAM Guidelines, TMCA Standards and Supreme Court Guidelines says: ***"In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process."*** Comment (b) to each of the foregoing says: ***"A mediator should explain generally to pro se parties that there may be risks in proceeding without independent counsel or other professional advisors."*** If he is pro se, he should be encouraged to hire an attorney to represent him in the alleged loan default as well as in the financial blackmail threat to his family relationship and to bring his divorce attorney on board as to the latest developments.

Comment

As is apparent from the responses submitted by the four experienced mediators, this case is fraught with ethical "mine-fields" for any mediator and could "blow-up" at any time. The facts of the case, both known and (especially) unknown, complicated by the relationships of the parties, the absence of (at least) one essential party (Talia), the expressed "drop-dead" attitude of Don Corleone, and the attempt at coupling two separate and totally-different cases, apparently leaves little choice for an ethical mediator to do anything except refuse to proceed with the mediation.

****

* ***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 2,500 cases to resolution and serves as a faculty member, lecturer, and trainer for numerous dispute resolution and educational organizations in Texas and nationwide. A former* ***Chair of the ADR Section of the State Bar of Texas****, Suzanne has received numerous awards for her mediation skills and service including the* **Frank G. Evans Award** *for outstanding leadership in the field of dispute resolution, the* **Steve Brutsche Award for Professional Excellence in Dispute Resolution**, *the* **Suzanne Adams Award for Outstanding Commitment and Dedication to the Mediation Profession**, *and the* **Association of Attorney-Mediators Pro Bono Service Award**. *She has also been selected* ***"Super Lawyer" 2003—2013*** *by Thomson Reuters and the publishers of Texas Monthly and named to* ***Texas Best Lawyers 2001-2013*** *and* ***Best Lawyers in America 2014****. She holds the highest designation given by the Texas Mediator Credentialing Association that of Distinguished Mediator.*

ADR SECTION WEBSITE: AN INTRODUCTION

By Don Philbin

Colleagues,

Check-out the new mobile friendly website at **TexasADR.org**!

Besides the colorful graphics and new logo depicting a neutral helping parties resolve a dispute, you'll find a wealth of helpful content for **neutrals** and the **users** of ADR services.

Under the **Resources** tab, you'll find **clauses and forms** that will help busy ADR users customize dispute resolution processes before disputes arise and neutrals resolve them if conflict occurs.

You'll also find information on ADR statutes in Texas and other states. Secondary sources like **journals and publications** in the field are just a mouse click away. Need to brush up your skills? There is a list of **trainings** and **university programs**, and a **calendar** with current offerings under the Resources tab.

Whether you're considering various arbitration rules as you draft a contract that includes a dispute resolution provision or need quick access to the rules that govern a dispute, the **Rules** tab lists links that quickly access the current form of **General** and **Specialized** rules. **Fast-track** mediation rules may bring a quick conclusion to what could become a protracted battle. Specialty **construction** or **patent** rules may better fit those specialized disputes. There are dozens of options and we've brought them together in a single site.

The reimagined website also makes past issues of the Section's newsletter, **Alternative Resolutions**, easily accessible. There you'll find practice specific articles by some of the best practitioners. Since we switched to electronic distribution of the newsletter, star editors Wendy and Steve Huber have filled more pages with high quality articles that are now archived for easy retrieval. Because of its quality and past chair Alvin Zimmerman's dedicated effort, the newsletter is now available at HeinOnline.org, the world's largest image-based research database.

Chair Ronnie Hornberger just hosted the Section Council's first retreat. Your Council will continue to make the website and its other offerings relevant and helpful to neutrals and the users of ADR services. You can learn more about the Section and its Council at the **Section** tab. There you'll get a primer on **ADR in Texas**, the pioneers who brought ADR to prominence in Texas as **section chairs** or **Evans Award** recipients, our by-laws, and how to contact members of the **Council**.

Your Council left its first retreat with a laundry list of things to achieve in the coming year. But we don't have a corner on ideas. Please take a few minutes to review the site and let us know what would be **helpful to you**. We've given ourselves a **May 15 deadline** to go through the site and make suggestions so an intern can help us make it more of a resource to neutrals and users this summer.

You are part of one of the oldest and largest groups of ADR providers and users in the country. ADR has deep roots in Texas. We appreciate your help in leveraging that rich history into helpful content delivered with zip and efficiency whether you're sitting at a desktop computer in your office or pulling arbitration rules on a mobile device in the heat of battle.

CALENDAR OF EVENTS 2014

Elder Mediation Training * Houston ***** May 1-2, 2014 * *Manousso Mediation & Alternative Dispute Resolution—Conflict Resolution Services and Training* * Phone 713.840.0828 * **http://www.manousso.us**

Advanced Mediation Training * Dallas * May 8, 10, 11, 15, 17 & 18, 2014 * *El Centro College* * (214) 860-2393 * **www.elcentrocollege.edu** or email preyes@dcccd.edu

Basic Mediation Training * Austin * May 14-16 continuing May 20-21, 2014 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

Basic Mediation Training * Ft. Worth ***** May 16-18, continuing May 30-31 June 1, 2014 * *Mediation Dynamics* * E-Mail: email@MediationDynamics.com * Phone: 817-926-5555 * **www.mediationdynamics.com**

40-Hour Basic Mediation Training * Houston ***** June 6-8, continuing June 13-15, 2014 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Dallas ***** June 16-19, 2014 * *Professional Services & Education* * E-Mail: nkferrell@sbcglobal.net * Phone: 214-526-4525 * **www.conflicthappens.com**

Advanced Family Mediation Training * Austin * July 22-25, 2014 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

Family Mediation Training * Dallas ***** August 4-6, 2014 * *Professional Services & Education* * E-Mail: nkferrell@sbcglobal.net * Phone: 214-526-4525 * **www.conflicthappens.com**

Basic Mediation Training * Austin * August 13-15 continuing May 19-20, 2014 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

Commercial Arbitration Training * Houston ***** August 20-24, 2014 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Houston ***** September 12-14, continuing June 19-21, 2014 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

Group Facilitation Skills * Austin * November 5-7, 2014 * *Corder/Thompson* * For more information visit **www.corderthompson.com** or call 512.458.4427

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
State Bar of Texas
ADR Section
P.O. Box 12487
Capitol Station
Austin, Texas 78711

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2013 to June 2014. 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_____

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2014-2015 Section Committee Choice_____

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ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. Names, dates, quotations, and citations should be double-checked for accuracy.
5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. Check your mailing information, and change as appropriate.
8. The author should provide a brief professional biography and a photo (in jpeg format).
9. The article may have been published previously, provided that the author has the right to submit the article to Alternative Resolutions for publication.

Selection of Article

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

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

Preparation for Publishing

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

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

Future Publishing Right

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

ALTERNATIVE RESOLUTIONS
POLICY FOR LISTING OF TRAINING PROGRAMS

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

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

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

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

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

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

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

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

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2012, Mediate With Us, Inc.,. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

http://www.texasadr.org

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