Alternative Resolutions

State Bar of Texas
Alternative Dispute Resolution Section

Erich Birch, Chair, ADR Section — Summer, 2015 - Vol. 24, No. 4

Dear ADR Providers and Users:

Thank you for giving me the opportunity to serve as Chair of the State Bar's ADR Section for the 2015-2016 year! The ADR Section was formed twenty-three years ago and has been instrumental in the growth and development of alternate dispute resolution in Texas, and as you'll read below, the Section continues to be a guiding force in those efforts. It is a great time to be actively involved with the Section and I look forward to working on the goals set for this year.

One thing I am particularly looking forward to this year is working with the current slate of Council members and officers. The collective experience and credentials of the Council both in terms of substantive knowledge and ADR experience and recognition at the state, national, and international level is truly impressive. I am further impressed not only by the willingness of the members to give of their valuable time to support the ADR Section and advance ADR in Texas, but also by actively volunteering to participate on committees to get the work done. The officers this year include Chair-elect Lionel Schooler, Secretary Trey Bergrman, Treasurer John DeGroote, and Immediate Past Chair Don Philbin. The Council members are from across the state, and include Michael O'Reilly, Charles Joplin, Hunter McLean, Judge Guadalupe Rivera, Kyle Lewis, Tasha Willis, David Harrell, Linda McLain, Gene Roberts, Courtenay Bass, Lisbeth Bulmash, and Gary McGowan. In addition, the Council's special representatives include the Texas Mediator Credentialing Association representative Judge Alvin Zimmerman and the Dispute Resolution Center (DRC) Directors' Council representative Donna Phillips. Although I am inclined to gush on the credentials of my fellow Council members, I suggest instead that you view the Council on the ADR Section's attractive and useful website. Here's the link: **http://www.texasadr.org/Section/Officers.aspx** (note that it takes the State Bar some time to update the many changes for all the various Bar Sections after the Annual Meeting, so it might not yet be updated when this newsletter is published).

One reason that I so value the depth of the Council membership is the anticipated contributions each will make to the docket of projects planned for the year. Actually, one of the projects has been in the works for a while, and now it is time to simply harvest the fruit. This fall the updated ADR Handbook should be available to Section members and for purchase by non-members. You've heard from previous Chairs about the ongoing efforts of Judge Linda Thomas and Professor Kay Elliott to update the Handbook and the comprehensive list of topics to be covered by highly qualified authors. The original Handbook was published in 2003 and this updated version will no-doubt be a very valuable ADR resource not only in Texas but across the country.

Other projects are in the active growth stage. One of the more interesting projects is the Cross-Border Mediation effort that has been developing under the leadership of Professor Walter Wright and his work with the State of Tamaulipas, Mexico. This project is still in the early stages and its goal is to facilitate the resolution of disputes, most likely through video conference mediations, between persons residing in the state of Texas and those in Tamaulipas. Prof. Wright is already working with Texas State University and several Dispute Resolution Centers

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(DRC) on this effort. In recognition of the tremendous opportunity and the likely legal complications that will be involved in mediating across international borders the ADR Section has offered its support. Former Council member David Cavillo has monitored progress on behalf of the ADR Section over the past year, and he will assist in the Section's more active participation in the coming year. The ADR Section and Tamaulipas are also working on an agreement to formalize our roles and goals for this project.

Still other projects are in the seed planting stage, and the best example of this is the Section's effort to help establish a new DRC in south Texas. This effort is actually an off-shoot of the Cross-Border Mediation project, since it was recognized that geographically many of the disputes involving the State of Tamaulipas may involve people living in Texas near the border. Although there are close to 20 DRCs in Texas, there are none in the Valley. Since this project is aligned with the Cross-Boarder Mediation project, David Cavillo is also the Section's representative on this effort.

The Council is also working on improving the visibility and highlighting the value of Section membership. Trey Bergren is leading these efforts of the Marketing Committee, with one of its noteworthy goals being to provide ADR speakers as an outreach to other Sections for CLE programs. Also, at the ADR Section's Annual CLE this past January former Chair Kimberly Kovak presented some interesting ethical scenarios and suggested that the issues raised could not be readily resolved under current mediator ethical guidelines. She suggested that it might be time to review the guidelines, which were originally developed by this Section twenty years ago. In response, an Ethics Committee has been formed, consisting of Council members Lonnie Schooler, Courtney Bass, and Lisbeth Bulmash to take a look at the guidelines and to propose changes if needed. I'll keep you posted.

In addition to the projects mentioned above, the Section's Annual CLE conducted in partnership with TexasBarCLE is already shaping up to be a don't-miss affair. Gene Roberts, a member of the Council and currently Director of the Student Legal & Mediation Services at Sam Houston State University, is the Course Director. From what I've seen of the draft program, the Planning Committee has addressed some of the more controversial mediation and arbitration issues in the ADR world. Some of those heavy hitter Council members that I mentioned above will be on the program, along with some imported talent. For now I won't spill the beans as the Planning Committee works on speaker confirmations. The Annual CLE is scheduled to take place on January 22, 2016, and once again will be in Austin at the State Bar Center. The Committee is also working on an "ADR 101" component as an optional training opportunity, perhaps the day before. Last year this CLE was nearly sold out, so after the course brochures are sent out in a few months I'd recommend you book your reservation early.

And have you read the Section's blog? If not, you're missing out. Gene also volunteered to be the Section's official blog poster, and after only six months it has already received two "Top 10 Blog Posts" recognitions from Texas Bar Today. The blog is a great way of keeping up on the latest court decisions, articles, and other issues of interest impacting ADR. The blog is intended to be a useful tool for the members, and I encourage you to forward any ADR issues of interest to Gene, and of course we all benefit when insightful comments are posted by the members. I'm sure you can't wait to read the blog, so here's the link: **http://www.texasadr.org/ADRSectionBlog.aspx.**

One additional comment about the Annual CLE is that for the first time the Section's Annual Meeting will be held during the CLE. Over the years there has been debate about whether the Annual Meeting should be held in conjunction with the State Bar's Annual Meeting or whether it should be held at the Annual CLE, which has historically had the highest attendance by the Section members. The Council ultimately decided to recommend that the Annual Meeting be moved to the CLE in January and the membership voted to adopt that recommendation. One of the benefits of this move is a larger audience for presentation of the Justice Frank Evans Award. For example, the Section's Annual Meeting was lightly attended this year, and so there were few to see Bill Lemons receive the Award…well actually, in this case no one saw Bill receive the Award since he had already committed to conduct an arbitration in Europe at the time. Although he provided a very gracious acceptance letter we hope he can make the January CLE where we can properly present him with the Award, and then also make a presentation to the current year's winner.

Speaking of the Evans Award, with the decision to move the Annual Meeting up five months from June to January we find ourselves suddenly scrambling to meet several deadlines under the Section's Bylaws. Officer and new Council member nominations must be received and considered by the Council at its next meeting in September so as to provide adequate notice to the membership prior to the Annual Meeting. The Immediate Past Chair, Don Philbin, is the Chair of the Nominating Committee and any recommendations should be directed to him by August 15, 2015. Also, the same deadline soon approaches for submitting nominations for the 2015-2016 Evans Award. Elsewhere in this newsletter you will find additional information about making nominations, and I encourage you to submit names of possible recipients of the Award. To read more about the Evans Award and the criteria, click here: **http://www.texasadr.org/EvansAward.aspx.**

Before concluding these comments I would like to send my best wishes to Judge Linda Thomas, who served on the Council with me for several years. Judge Thomas was the Chair-elect last year and should be writing this letter today, but for personal reasons had to withdraw from the Council.

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We miss her. I would also like to thank recent previous ADR Chairs Joey Cope, Alvin Zimmerman, Ronnie Hornberger, and Don Philbin for setting such excellent examples of leadership during the years that I have been on the Council. I'd especially like to thank Don, my immediate predecessor, for a job well done last year and for leading a great retreat in the Spring where we set direction for the upcoming year.

So I hope you will agree that we have an interesting year ahead. Also, I highly value advice and counsel, so as the year progresses I ask for your comments or ideas on ways that this Section can better serve its members.

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Texas Education Agency Soliciting Proposals for Special Education Mediators

The Texas Education Agency is soliciting proposals for special education mediators. A link to the Request for Qualifications (RFQ) has been posted on the Electronic State Business Daily (ESBD) and is linked below. Proposals are due no later than 2:00 PM on Wednesday, July 15, 2015. Please refer to the RFQ for detailed information and proposer qualifications.

http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=117570

We want your members who are attorney-mediators to be aware of the opportunity. Please consider forwarding this information to the members of the **ADR Section of the State Bar of Texas** to inform them of the RFQ.

It should be noted, however, that a mediator may not be a school district employee or accept any remuneration from any individual or entity in connection with any matter relating to or involving public education. Someone who works on such matters would no longer be able to do so if s/he was awarded a mediator contract.

Please contact Yvette Butler at TEAContracts@tea.texas.gov if you have any questions.

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Heartfelt Thanks from Bill Lemons, 2015 Frank G. Evans Award Recipient

Editor's Note: The Evans Award Committee of the ADR Section of the SBOT selected William H. Lemons as this year's recipient of the Frank G. Evans Award. Bill is a former Chair of the State Bar's Alternative Dispute Resolution Section and has been very active in supporting and preserving the availability and use of alternative dispute resolution in Texas. He made himself available and has given testimony before the Texas Legislature as a witness on ADR matters pending before and proposed to the Legislature and has written and spoken on numerous occasions on the subjects of arbitration and mediation. In addition, Bill has served long and with dedication and distinction the Association of Attorney Mediators, having served as its President. Also, in December of 2013, he was inducted into the Texas Chapter of the National Academy of Distinguished Neutrals. Bill has a long and distinguished history of preserving and protecting and of spreading the word on the use of alternative dispute resolution in Texas and of serving the various institutions that represent the best of the discipline.

I asked Alvin to convey to all of you, and particularly to Ronnie Hornberger, the Evans Award Committee and the ADR Council, my sincere appreciation for bestowing this high honor on me. I was flabbergasted when I learned that this might happen, then embarrassed to report that I could not be present at the annual meeting to personally receive this. I am today somewhere near Deggendorf, Germany, deep in the Bavarian Forest.

This tribute means much to me for many reasons. First, just the thought of being considered in the same company as the former Evans Award recipients is very flattering. They are pretty amazing people. Second, it is my pleasure to know Judge Evans. And he is pretty amazing. I was one of the early supporters of his Center for Conflict Resolution, and have been a fan of his for many years.

During my training in 1997 at the Attorney Mediators Institute, I learned the Steve Brutsche' philosophy that my client is the ADR process – not fees, attorneys or constituents. And I learned that if you care and nurture the ADR process, it will take care of you. That has certainly been true in my case.

To do what we do is a privilege. We must always be diligent to protect against harmful interests and to constantly take care of what we have been given. (Otherwise, I would have to go back to practicing law, and I really don't want to do that).

Again, thank you. I will be at the January CLE and have a chance to personally thank you.

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Call for Section Council and Officer Nominations

At its June 18, 2015 Annual Meeting, the Section membership and Council changed the Annual Meeting to coincide with the Section's Annual CLE in January. As a result, the nominating process is accelerated this year. Here are the approved by-law changes and a call for Council and Officer Nominations:

Article III.
OFFICERS

Section 1. Officers.

1.2. Each officer shall hold office for a term beginning June 1 following the annual meeting at which he or she is elected and ending on June 1 of the following year after his or her successor has been elected.

Article V.
NOMINATION AND ELECTION OF OFFICERS AND COUNCIL MEMBERS

Section 2. Nominations.

Not less than ninety (90) days prior to the next annual meeting, the Chair shall appoint a nominating committee, composed of the Immediate-Past Chair, who will serve as Chair of the nominating committee, and four members of the Council, one of whom may be an ex-officio member. This nominating committee, with the input and consultation with the Council, shall make and report its nominations to the Chair of the Section, and to the Council for its approval, for the offices of Chair-Elect, Secretary, Treasurer, and new members of the Council to succeed those whose terms will expire on June 1 following the annual meeting at which officers and members of the Council were elected. The report of the nominating committee, as approved by the Council, shall be submitted to the Chair of this Section in sufficient time to conform to the notice requirement of this Article, and shall be presented to the annual meeting by the Chair of the nominating committee. Other nominations may be made from the floor.

Section 5. Number and Term of Council Members.

General Council members' terms will be three years beginning on June 1 following the annual meeting at which they shall have been elected and ending on June 1 three (3) years later unless specifically elected to fill the unexpired term of another member. If elected to fill an unexpired term, the newly elected member's term shall expire on the date of the member whose term he/she is filling. The number of members of the Council may not exceed seventeen (17).

This nominating committee, with the input and consultation with the Council, shall make and report its nominations to the Chair of the Section, and to the Council for its approval, for the offices of Chair-Elect, Secretary, Treasurer, and new members of the Council to succeed those whose terms will expire on June 1 following the annual meeting at which new officers and members of the Council were elected.

Article VI.
MEETINGS

Section 1. Annual Meeting of Section.

The annual meeting of this Section will be held at any place and time chosen by the Council. The program and order of business for the annual meeting may be arranged by the Council.

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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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At the conclusion of a divorce mediation in which you are the mediator, the MSA is being drafted when the attorneys for both parties request that the following provision be included in the MSA, to wit: "The parties agree that neither of them will seek the entry of a final decree of divorce until the fees of both attorneys and the expert witnesses have been paid in full." What, if any, ethical issues are presented and how would you respond?

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Dawn Fowler, Dallas

I do not believe that there are any ethical issues for the mediator under the facts presented since both parties are represented by their own attorney. It has to be assumed that each attorney knows the law, is aware of their ethical obligations, knows more about the case and the interests of their client than the mediator, and has the approval/consent of their client to include this provision as part of the settlement.

Circumstances under which I believe the mediator would have ethical issues:

1. The provision was made in a proposal. This provision could later be determined by a court to be against public policy. Each attorney may have a conflict of interest with their client. The mediator should assist the parties in considering the benefits, risks, and alternatives available to them. The mediator may wish to pose some questions. The mediator may wish to encourage the attorneys to seek professional advice.

2. The mediator suggested the provision, or endorses it to the parties.

3. The mediator, rather than the attorneys, drafts this provision.

4. The mediator's fee is included in this provision.

Jennifer Ortiz, Houston

When I mediate, I frequently use the "NQR" Test, which is short for "Not Quite Right," especially when I encounter puzzlers such as the scenario presented. With my mediation experience in Employment Law issues, I would inquire with counsel whether this is something that is customary in divorce mediations or in family law issues. I am fortunate that I do not need to address the payment process for mediation service since my mediations are provided free for parties an EEOC dispute. Questions, questions, and more questions for counsel regarding whey they are interested in such an arrangement, trust issues or previous experience with parties and non-payment, and whether there was consideration for what would happen if something happened to either party before the decree was submitted and was held in limbo while payments were received. I would remind the parties that there have been situations which led to litigation even when mediation settlements were achieved and

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submitted timely to the court (recent ABA article on *Bock v. Hansen*, ABA Dispute Resolution Magazine, *A Mediator's Reflection on Bock v. Hansen: Just When You Thought You Were Finished*, by Charles Ferguson, p. 24, Spring, 2015) and that none of us are promised tomorrow.

What would happen in that instance where parties made payment but it was not documented as received if one of the attorneys was suddenly unavailable due to an emergency situation. I hope these questions would lead the attorneys to understand the importance of submitting the divorce decree. I would further explore the other avenues for counsel to obtain payment from parties, if this was their main concern and perhaps offer to help them negotiate a separate stand-alone agreement on payment for services, with penalties, deadlines, and of course, a mediation clause for any future disputes. Just for fun, I would offer to serve as the mediator if payment were made by both side well in advance.

Jennifer Tull, Austin

In a divorce, fees related to the litigation are part of the community estate, so it is appropriate for them to be considered as the estate is divided. I would have expected the attorneys, at some point either before or during the mediation, to have asked the clients to swear to the completeness of the information they had furnished about their estate. If the fees associated with the divorce had been omitted, then the sworn inventory of assets and liabilities should be amended to include the litigation expenses.

So who will pay the costs associated with litigation should have already been addressed, or there is not a complete agreement. The last-minute request of the attorneys is merely a statement about timing on an issue that should have already been decided if the MSA is being drafted. If both lawyers are asking that the term be included in the agreement, the mediator should put the term in the agreement. The ethical issues, if there are any, would exist between a lawyer and his or her client.

John Palmer, Waco

One of the cornerstones of mediation is finality or resolution of the dispute. I am concerned that the requested clause could complicate the finality of the decree based on the self-interests of the attorneys.

Because this is a divorce mediation, the mediator should assure that the parties and their attorneys have considered compliance with Section 6.601 of the Texas Family Code so that the parties are entitled to a judgment, notwithstanding Rule 11 of the Texas Rules of Civil Procedure. This section of the Family Code provides that the agreement is enforceable as long as the agreement is signed by the parties and their attorneys, if any, and there are boldfaced, capital, or underlined letters that state the "agreement is not subject to revocation".1

Additionally, the mediator should be mindful that the attorneys could quite possibly be breaching their ethical duties to their clients by inserting this clause. Texas Disciplinary Rules of Professional Conduct, Rule 1.01, Comment 6 states in part, "Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer...."

The language suggested by the attorneys is contrary to the goal of finality of the parties' dispute, possibly the attorney's ethical obligations

[1] If there are children involved, the mediator should also consider discussing with the attorneys, if appropriate, whether the parties desire to write a statement in the mediated settlement agreement that recites that no family violence has occurred, and the agreement is a parenting plan and in the children's best interest. *See* Tex. Fam. Code Section 153.0071 and *In Re Lee,* 411 S.W.3rd 445 (Tex. 2013).

and is contrary with the tenets of Texas Family Code provisions which assure finality. Basically, the clause is providing a condition precedent that could derail the entry of a final decree because the attorneys are placing their interests above that of the clients.

So, how does the mediator address these issues? First, the mediator should review the Texas Mediator Credentialing Association (TMCA) Standards of Practice and Code of Ethics. [2] TMCA Standards Rule 1 states that a mediator shall strive "to promote reconciliation, settlement, or understanding," and that "The primary responsibility for the resolution of a dispute rests with the parties." The mediator's obligation is "to assist the parties in reaching a voluntary settlement" and the mediator "may make suggestions" but "all settlement decisions are to be made voluntarily by the parties themselves." [3] The mediator must keep in mind that the mediator shall "not give legal or other professional advice to the parties." (TMCA R. 11). However, the mediator shall "encourage the parties to seek legal or other professional advice before, during, or after the mediation process." TMCA R. 11, Comment (a).

The mediator should inquire with each party, and each party's attorney, of the potential downside of the drafted language. The mediator should consider talking to each attorney, either with the client or in caucus, to discuss the attorney's duty to represent the client zealously and to not put his or her interest before the best interest of the client.[4] However, it is not within the purview of the mediator to make a legal determination of the drafted language. The mediator's obligation is to assure that parties have considered the issues raised by the language by careful inquiry and discussion and to allow the parties and their attorneys to reach a reasoned conclusion.

Christopher Nolland, Dallas

Although I typically do not handle domestic relations mediations, so I have not been confronted with these kinds of issues with any regularity, it seems to me that the ethical and professional issues presented primarily relate to the attorneys – not the mediator. Specifically, it seems that the attorneys' are holding their clients' divorce hostage until their attorneys' fees and expert witnesses have been paid in full. That seems problematic on a number of levels. First, it creates a conflict between the goals, desires, and interests of the clients and the financial interests of the lawyers. Second, it would seem that the clients should get the advice of an independent lawyer because of that conflict before they enter into the MSA with such language. Finally, it seems pretty inhumane and unfeeling to deny people who want to be divorced that relief because they may be struggling financially – which is often the case in divorce situations.

Again, this really is an ethical issue for lawyers and not the mediator, but as a mediator I would rather bluntly point out to the lawyers (and I recognize that doing so may really anger the lawyers) that they are putting themselves in an ethical predicament with potential professional, grieveable and other repercussions. I would also remind them of the very personal and human repercussions to their clients if they hold the divorce hostage to payment of attorneys' fees and expenses. I recognize that lawyers and experts should get paid for their work, but they should use this approach as a collection method. Further, if counsel are concerned about payment of their fees,

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[2] To locate the TMCA Standards, *see* TMCA website at www.txmca.org. The TMCA Standards are similar to the Texas Supreme Court Ethical Guidelines, found at Misc. Docket No. 11-9062, except that the TMCA uses mandatory "shall" language instead of the aspirational non-compulsory language promulgated by the Texas Supreme Court. Note: both the Texas Supreme Court Ethical Guidelines and TMCA Standards are based on ADR Section ethical guidelines promulgated in the 1990's.

[3] TMCA R. 1, Comment.

[4] *See* Texas Disciplinary Rules of Professional Conduct, Rule 1.01, Comment 6.

they should withdraw from the representation or continue with the representation and pursue collection as is appropriate.

While not necessarily obliged to do so because the parties and their counsel are in charge of the terms of the MSA, I may well advise counsel pursuing such an approach that I don't want to be involved in facilitating an MSA containing such terms in any way, shape of manner; even if that means shutting down the mediation process, returning the mediation fee, and/or burning my bridges with counsel. That by itself may underscore to counsel how strongly my view is regarding the inappropriateness of the approach they are taking.

Comment:

As is readily apparent, the opinions on this puzzler run the gammut from being serious ethical problems to being no ethical issue at all. This one is truly a puzzler. Each of the opinions provided by the contributing attorney-mediators is well-reasoned and supported by sound professional concerns and considerations.

As we all learned early-on in "mediator school," one of the best "tools" available to a mediator is reality testing. A situation such as the one presented in this puzzler is one in which that tool could well be applied and would likely produce some valuable results.

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 -2014 by Thomson Reuters and the publishers of Texas Monthly and been named to Texas Best Lawyers 2009 – 2015 and Best Lawyers in America 2014 - 2015. She holds the highest designation given by the Texas Mediator Credentialing Association that of TMCA Distinguished Mediator.

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How to Make Mediation Safer in Cases of High Conflict

by Kristen Blankley

Editor's Note: This article was previously printed in Mediate.com.

I would like to begin this article by thanking all of the mediators across Nebraska for their input on this important topic. I am heartened to know that this is a topic that has been thoughtfully considered by mediators in every corner of the state. This letter hopes to capture and continue that rich discussion.

Mediation is, by its very nature, a potentially volatile situation. While our perception of mediation might focus on the end goals of peacemaking and relationship building, we often forget that parties enter the mediation in various states of conflict. While conflict is neither good nor bad in the abstract, conflict certainly has the potential to escalate if not successfully managed.

Safety should be one of our primary concerns as a mediator, if not our utmost concern. When we think about safety, we should consider the safety of the parties and ourselves. Safety concerns may come to light in a variety of situations, from threats of violence to table thumping to displays of weapons in the mediation room. This letter considers a wide variety of safety tips broadly arranged into the categories of pre-mediation, mediation session, and post-mediation.

Before the Mediation Begins:

Know Your Surroundings

Before you mediate, be sure that you have become familiar with the location where you will be conducting the session. Do you know where all of the *doors* and *emergency exits* are located? Can you locate the *fire Alarm* or *telephone*? Will anyone be at that location if you are mediating at *night*? Will anyone be screening the parties for *weapons*? Is the *parking lot* well lit?

If you are mediating in your own location, you hopefully know all of this information already. If you are mediating on location for one of the parties or at a different neutral site, you may have to do some research, especially if you suspect some hostility. In some situations, mediating at a courthouse can be ideal, especially if you are concerned about the presence of a weapon or suspect the need for police back-up, if necessary.

Keep Important Numbers on Hand

Certainly, we all know that we can call *911* in an emergency. Other numbers can also be helpful, such as the *Department of Health and Human Services*.

Address Safety Issues with Parties in Initial Private Sessions

Conducting an *initial private session* of some sort with each party to a mediation can be helpful in a wide variety of mediation cases. During those sessions, you can talk to both parties about the relationship with the parties and whether the parties have any particular *safety concerns*, *button-pushing* triggers, or suspicion of *weapons* possession. In Nebraska, family mediators are required to screen for *domestic intimate partner abuse*, but an initial private session to discuss safety may be helpful in every case, no matter the

subject matter. If the preparation session indicates that safety measures must be taken, you can make process choices based on these concerns, such as mediating in caucus or asynchronously.

Prepare Yourself for the Individual Case

In addition to the initial private session, mediators can engage in other preparation to help you make these safety decisions. It might be helpful to review the *case file* on JUSTICE or other type of database to determine if any *protection orders* have been sought or ordered in the case. In some situations, you might want to conduct a *background check* on a party.

Understand Certain Human Behavior

Most of us have heard about *fight or flight* (or *freeze*), but we could learn more about our human reactions to difficult situations. Understanding these reactions may help us understand our own behavior as well as the behavior in the parties in the room.

<u>During the Mediation:</u>

Arrange Your Room

Consider how you arrange your mediation room in order to promote safety. Consider who should sit *closest to the door* in the event that you need to quickly exit the room. Think about the *seating arrangement* and how closely the parties are to one another and your proximity to both of them. In the unusual situation, you may need to remove all *scissors, pencils, letter openers*, and other ordinary objects that may be used as weapons.

Consider Modifications to Your "Usual" Procedures

You may want to discuss safety issues in your mediator's *opening statement*, such as telling the parties that the process is intended to be a safe space and that you can take precautions if a party no longer feels safe. If you usually invite *opening statements*, you may decide to eliminate them so as to not heighten emotions. Alternatively, opening statements could be given in *caucus*, instead.

Speaking of Caucuses

Separating the parties in terms of space or time may be a safer way of mediating a high conflict case. If parties do not feel comfortable meeting in the same room, then use separate caucus rooms for the entire mediation. If parties do not feel comfortable being in the same building at the same time, then you could consider an asynchronous mediation meeting with different parties on different days.

Take a Break

If things get heated during a session, changing something in the situation may help calm the temperature in the room. Your options are plentiful: *take a break, tell a joke, offer some snacks, call a bathroom break*. In an extreme situation, you may need to *close the session*. These techniques should help diffuse the situation and help you assess whether a safety threat is real.

Have Some Company

If you do not feel comfortable being alone with the parties, then make appropriate arrangements. In some situations, solo mediators may want to use a *co-mediation* model in order to assert additional authority in the room. At a minimum, you may want to ensure that other *office personnel* are in the building and able to check in on your room if tensions elevate. To achieve these ends, you may need to mediate *during business hours* and avoid nights and weekend mediations.

Stay Aware

When you suspect that safety may be a concern, you should stay alert. Consider trying to *widen your peripheral vision* in order to take in more of the room. Be sensitive to *sudden movements*, especially if you fear a weapon in the room. In addition, keep an eye on the non-aggressing party

to determine if that party is giving non-verbal cues that the aggressor party may be escalating.

Trust Your Gut

Many of us are mediators because we have a good way with people and can often *read their emotions*. If you think a party is merely joking or letting off steam, you very well might be right! Although we generally err in favor of more safety than less, we also do not want to go overboard. We also want to do our best not to escalate the situation ourselves.

Following the Mediation:

The moments following the close of a mediation may be one of the most critical times in the entire process. *Stagger the exit times* of the parties, if possible. One easy way to stagger the exit times is to break the parties into *caucus* rooms and dismiss the victim party first, while the aggressor party is still in the building. Have the parties leave through *different exits*, if possible, and *walk the parties to their car*, if appropriate. In extreme circumstances, you may need to call a *police escort* to ensure that both parties leave the mediation safely.

Kristen Blankley biography and additional articles:
http://www.mediate.com/people/personprofile.cfm?auid=1646

Kristen M. Blankley is an Assistant Professor at the University of Nebraska College of Law. Professor Blankley teaches and writes on a wide variety of mediation and arbitration topics, including ethics in dispute resolution. In addition, Professor Blankley sits on the boards of directors of her local community mediation center and statewide mediator association. She is also involved in the ABA Section Dispute Resolution, notably as the co-chair of the Ethics Subcommittee. She is also a practicing mediator and arbitrator.

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Mediate.com
Mediators & Everything Mediation

Checkmate: Early Moves Define Negotiation Outcomes

By Don Philbin

Chess grandmasters report that while a match may last hours, the board is set in the first few moves. Players send strategic signals early and then work for hours to implement their plan while taking account of but not being controlled by their opponent's moves. They relentlessly run *their* plan.

Effective negotiators also send strong strategic signals in their first few moves. Since litigators are used to weaving simple stories from complexity and constantly thread evidence through the ultimate questions for the fact finder, they are experts at strategic planning. Those skills are the grist of a successful negotiation.

The scientific method applied to natural science has helped us learn more about Saturn than our neighbor. But that's changed over the last 50 years and is accelerating rapidly with the advent of smart phones and big data. The old saw "follow the money" has become "follow the phone [to the money]" as our phones have become more powerful than the computers that put Apollo 11 on the moon.

Overnight, millions of people became part of the largest clinical trials in history through Apple HealthKit. For years, we've taken therapies tested on hundreds or maybe a thousand people. More than 10 times as many people signed up for the Asthma Health app in 72 hours (3,500) as had signed up for a conventional university health study (300). Big data will change medicine.

The real power lies in advanced analytics. Data is one thing. Drawing meaningful insights from it is another. Using learning algorithms and neutral networks, computer scientists, physicists, mathematicians, sociologists, psychologists, economists, and lawyers are pouring over data to draw insights and patterns. In the best-selling book BURST, Albert-Laszlo Barabasi claims "[t]heir conclusions are breathtaking; they provide convincing evidence that most of our actions are driven by laws, patterns, and mechanisms that in reproducibility and predictive power rival those encountered in the natural sciences."

Negotiations Follow Predictable Social Conventions

Since negotiation is a key strategic element of both transactions and litigation, the question is whether we can draw insights that help lawyers add value for their clients in real time.

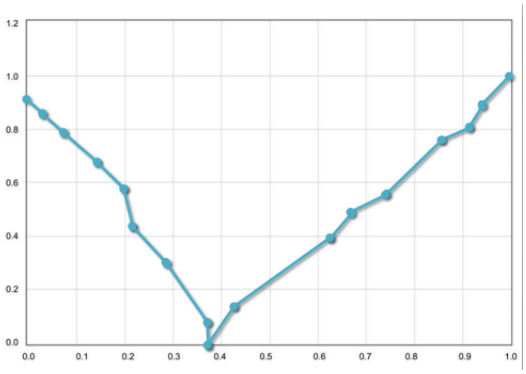
Most negotiation research has been antidotal because real participants didn't want to have a social scientist sitting in the corner coding variables for research. The result was antidotal maximums drawn from experience: The settlement lies at the mid-point between the first two *reasonable* offers. Since first numbers anchor negotiations, take a tough position by anchoring high or low. And even, late concessions take twice as long and concede half as much.

Human Behavior Varies – Often Irrationally – But It Is Predictable Even When Irrational

It turns out that the negotiation of litigated cases is more nuanced than these one-sized general rules. The negotiation of litigated cases usually involves a dance that divides into roughly three phases. Some are tangos while others are waltzes, but effective negotiators engage in a pattern of reciprocating behavior that tests the strike price for a deal over multiple rounds. Short circuiting the negotiation dance often leaves money on the table. The nearby graphs show actual negotiations plotted with dollar moves coming together along the horizontal axis and time running from the start of the mediation down the vertical axis to a deal.

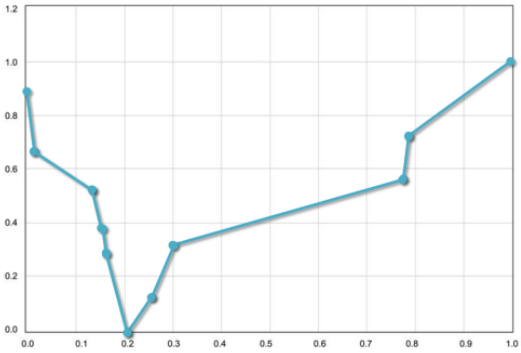
1. Opening

Whether begun in a joint session or out of the blocks in caucus, parties tend to share information early in the round in an attempt to persuade their counterparty, or at least justify their tough position. Informational asymmetries may be wider in early mediations than those occurring on the eve of trial after discovery. Damage calculations are often offered to support
early demands and offers during the opening phase of the mediation.



2. The Middle Muddle

The middle muddle usually coincides with lunch in a full-day mediation. There isn't as much information left to share. The other side probably already knows about the smoking gun that should have brought them around to our case evaluation. They also know how we are calculating damages, or the lack of them. Yet, the parties are still divided, but the ball is still moving. Neither party



wants to give-up until they see how sweet the deal will get. But it's not fun. To plumb the other side for their best number, we keep moving the target closer to them without going to their demand. Colloquially, we hang the meat low enough the dog *thinks* she can get it. A pattern of reciprocating movement ensues, even if we're not thrilled with it. Both sides move in rough proportion (not dollar equivalents) to the other begrudgingly.

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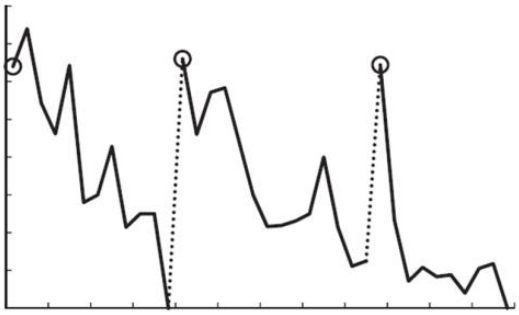
3. Impatience Grows as Glucose Drops En Route to Deal



Later in the afternoon, impatience grows as if the alcoholic needs a drink. As blood sugar drops, non-inert or status quo decisions become more difficult. What trial lawyers know as the breakfast theory – what the judge had for breakfast may impact decisions – has been proved out by empirical researchers. After looking for simple binary choices to quantify decisions, researchers settled on criminal parole outcomes because of their up or down nature. The prisoner's sentence could not be altered. The judge had two choices – parole or not. This chart depicts the parole grant rate by Israeli judges studied throughout a single day. All prisoners are *eligible* for parole, but the court has wide discretion in granting it.

Researchers studied the outcome of hundreds of cases. They found little correlation among behavioral factors, but did find a startling correlation between parole grants and the time of day a case came on for consideration. It turns out that the judge's eating habits and metabolism apparently had more to do with parole outcomes than prisoner performance.

So imagine you are handcuffed in the blocks with dozens of other prisoners awaiting the call of your case. You've really shown reform and have been the model prisoner. The prisoner to your right has not been bad, but has not gone out of his way to comply with the in-house rules. You anticipate that your case should be more favorably reviewed than your neighbor's – such overconfidence imbues the decisions of the most highly trained people, including lawyers.

But his case is called early in the morning. It looks close but he is paroled. Your hopes rise – if he made it, you surely will too. But the morning drags on as the judge listens to similar facts in dozens of cases. The judge appears to be getting weary of the same story as her attention wanders. You notice she seems to be granting fewer paroles as we get closer to the lunch break. As much as you want her to get to your case, you'd rather she eat a snack or at least drink some coffee before it does. Alas, it's 11:30 and the bailiff calls your case. The state doesn't contest your good behavior much, yet the judge seems to be fading. She is clearly ready for a break. Then it comes – denied! Oh no. Why couldn't your case have come up after lunch when grant rates return to morning levels? Could it be that random? In fact, it's predictable – not random at all.

Negotiators aren't much different. As the hours tick away, the negotiator often expresses frustration that the other side has taken too long to concede too little, but we still want to get this over with today (tonight). But we've been *reasonable*. *They* need to move. Buyer's remorse has set in – both sides have moved more than they wanted to already. But since everyone can see a deal by now, no one wants to pull the plug – yet. But both sides make smaller concessions in quicker succession to telegraph to each other that *you* must come to us. Closing is hard work that often requires a variety of mediator tools. But the board is set much earlier.

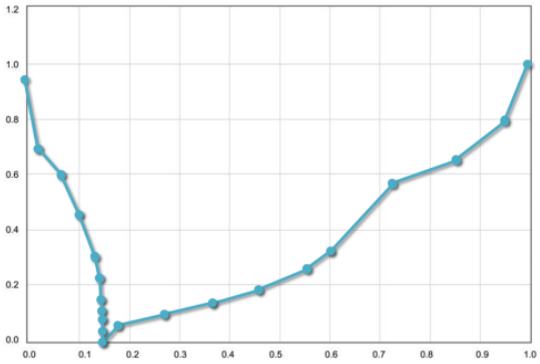
First Few Moves Set the Board – Like Chess

While much emphasis is placed on closing techniques – especially for mediators since our grades depend on a deal – the cake is baked much earlier in the round. No amount of frosting will help a cake that didn't properly bake earlier in the day. And the best closing technique is unlikely to settle a case that didn't start on the road to success – or get there in a couple of rounds.

Anchoring is Important

You've heard the research on anchors. Opening numbers are important. Studies show amateurs and experts being manipulated by changes in listing prices on real estate. Anchors work best when there are informational disparities. After discovery and expert reports, they hold less sway. But anchoring is part of the social convention of negotiation so it varies by venue. We're expected to put more spin on the numbers in certain venues and even within a particular geographic bar there are substantial variations by case type. The questions that weigh on everyone's mind is: "Will this thing settle? How much will they pay (or how little with they accept)?"

Patterns Emerge From Large Data Sets



It turns out that humans are predictable, really predictable. NSA wants our cell phone data because the phone companies can predict where we'll be tomorrow with 93% accuracy. Make a credit card charge outside of your established pattern and you'll get a text or call from the bank within seconds.

Lawyers in legal negotiations are also very predictable. Not only do their early moves telegraph where they are headed when matched to historical patterns, the pace of play is also predictable. PictureItSettled.com has spent years building a system of neural networks and learning algorithms that compares each move in a legal negotiation to more than 15,000 other cases (much larger data set than a clinical trial).

After a few moves the system can predict your opponent's next move within minutes and dollars. Armed with that information, you will know with high certainty where the other side is headed before they get there. Much less guess work. You can fine-tune your strategy to subtly affect the pace of concessions and the eventual outcome.

Of course, there is no cookie-cutter way to negotiate a case. But the larger the data set, the smaller the chances become that someone has an untried pattern that works. PictureItSettled.com has studied lawyer negotiating behavior and have drawn some critical, and often counter-intuitive, insights.

Extreme Positions Sometimes Pay Off But Don't Work Most of the Time

The data indicate that taking an extreme position early in a negotiation sometimes pays off but much more often results in impasse or sudden drops to avoid impasse that end up conceding more than a strategic concession plan would have produced. Holding an extreme position too long and then conceding at the last minute can leave 15% or more on the table. That's $150,000 in a $1 million claim. This insight flies

in the face of the conventional wisdom and mythology of legal negotiation. The definition of an extreme negotiating position, however, varies by venue, claim type, and other variables.

John Travolta played a lawyer in the movie *A Civil Action* whose opening offer was so outside of the social convention for such negotiations in Boston in the early 1980s (over 35 times the eventual settlement) that it failed to even draw a response. The plaintiffs' lawyers and their financier had valued the case at $25 million. Had Travolta's character had the benefit of modern analytics combing data in similar cases from the Boston area, he would have known that a 2.5 multiple was more in line with convention for the venue and case type. Had he started around $62 million, there was a much better chance he could have landed a settlement in the $25 million range. Instead, his 35 multiple failed to draw a response and he and his partners lost their homes and went bankrupt pursuing the case for years to an $8 million settlement.

Mediators Reduce Cognitive Dissonance

Experimental psychology and more recent neural mapping with fMRI machines has shown why mediation is so effective in neutralizing predictable cognitive biases that often impede direct negotiations. At a macro level, countries rarely have the generals who are conducting the war also work on peace negotiations. It's hard to lay down weapons without heavily discounting the other side's intentions. Researchers quantified the effect of reactively devaluating an enemy's proposals – the same statement attributed to a foe is half as credible (44%) as the same proposal attributed to the home team (90%). Interestingly, though, neutral third-parties enjoy credibility much closer to the home team (80%).

The real lawyers in *A Civil Action* have told me that had a mediator been present at the settlement conference the outcome would have been different. I use the book on which the movie is based for law school decision analysis class and have interviewed the real lawyers in that case in putting together the materials. Extreme anchors rarely blow a round in one move, but the party making the extreme offer tends to make larger concessions afterward to avert an early impasse. So it is usually more prudent to start with an offer that is high (or low), but perceived as reasonable locally and concede less in subsequent rounds.

Variations by Venue and Case Type

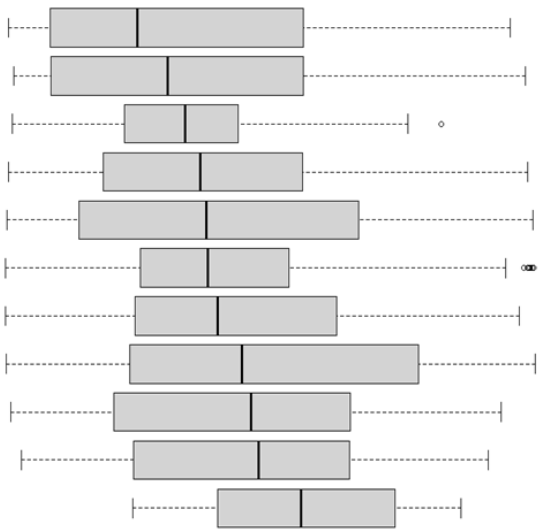
What's acceptable negotiating behavior varies. The employment bar might tolerate more extreme anchors than the construction bar in the same venue. Non-economic damages may move the line of scrimmage out across demographic markers.

Venue Matters

Our database has the tough negotiator and other seasoned professionals bargaining in different jurisdictions and venues. We learned that venue has a large influence on negotiation strategy and behavior (as it does on verdicts). Since it takes two to tango in negotiation, errant behavior often results in collapse of the round. What works in New Jersey may not play at all in Peoria. If aggressive first offers are the

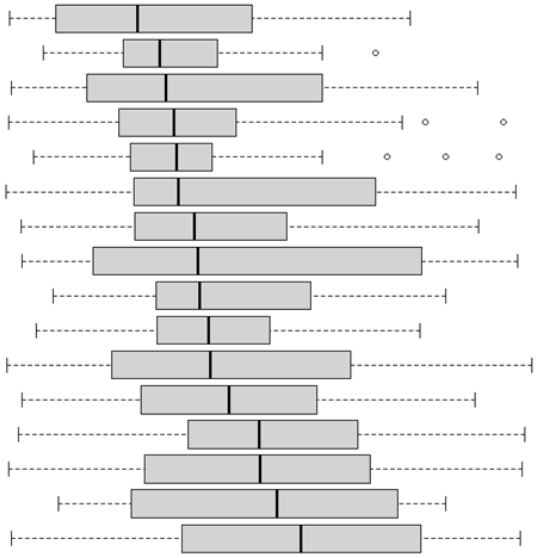
local custom and you don't make one, you may frustrate progress by trying to make up lost ground the rest of the day. Conversly, extreme offers that aren't customary can have the chilling effect of shutting down negotiations before you get a feel for how high or low the other side will move.

When we plot final settlement figures (dark center line) against opening demands and offers (high and low hashmarks), interesting patterns emerge. There are venues where the mid-point rule of thumb is closer to the mark. There are also places where one might compromise their position – and leave money on the table – by not dancing the local dance with more extreme anchors. If the expectation is that negotiators demand several times what they are actually willing to settle for – and you don't – it may be hard to make up that difference in subsequent rounds. Conversely, if you make an over-the-top demand in a jurisdiction that doesn't dance that way, you may find yourself looking at an empty room like Travolta's character. Open too low and you'll have a hard time making it up, but open too high and you'll poison the well and risk an early impasse. Local mediators often moderate expectations to local custom.



Claim Type Matters Too

Negotiating conventions vary by claim type too. Within the shaded boxes lie the majority of the offers and demands, but notice there are some fairly extreme moves across claim types. General rules break down in specific cases so we match behavioral patterns rather than imposing categorical rules. We look for an instance where a negotiator has acted like your counterparty, rather than misapplying general rules to specific facts.



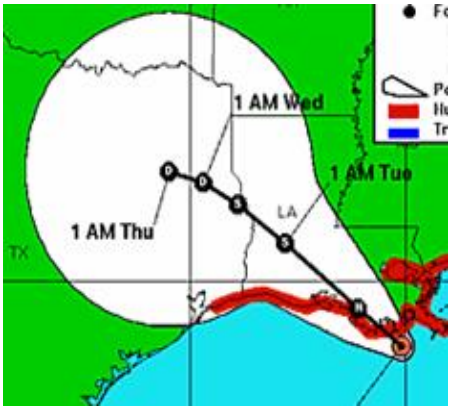
Predictive Analytics Offer Insight

Because software can model negotiations 50 rounds into the future (you rarely need them all), you can forecast in real time what the effect of a planned move will be on the round. Not only will the system model your adjusted course, it will anticipate the other side's reaction to it. Overdo it, and the odds of impasse increase. Fine-tune it, and you'll improve your position without unnecessarily increasing the risk of impasse. That means more deals on better terms.

Probabilistic Projections of the Negotiation Path

Hurricane forecasters combine historical data with current weather readings to forecast storm movements. They are really making a series of individual projections that are aggregated into cone-looking graphs. The forecasts get better with additional data and the cone narrows. A hurricane that once might have been projected to come in somewhere between Florida and Texas
later appears to be headed for western Louisiana. That's news we can use. Forecasters predicted landfall for Hurricane Katrina within 15 miles two days ahead of time.

Similarly, PictureItSettled.com uses probabilistic projections to project negotiation behavior. The system models where a round is likely to end up by combining historical data with the demands and offers from the current case. These models are graphed with probabilistic cones too. The darker colors represent the most likely settlement outcomes. Like hurricane projections, more information increases confidence in the projections and the cones narrow. What might start as a fairly wide spread, like the Florida to Texas hurricane cones above, narrows as additional bid data from the round is entered.



The intersection point of the two projections – plaintiffs coming from higher dollar figures at the right leftward and defendants moving toward the plaintiff from the left – projects the zone of possible agreement in both money and time.

Highly Accurate Projections

PictureItSettled.com has published case studies on the accuracy of its projections in specific negotiations. By the second of 17 rounds in an intellectual property case, our system projected the final settlement within 3.5% of the then $28.55 million spread. In another technology case, the projection was within 3% after round three. Those initial projections improved with additional information.

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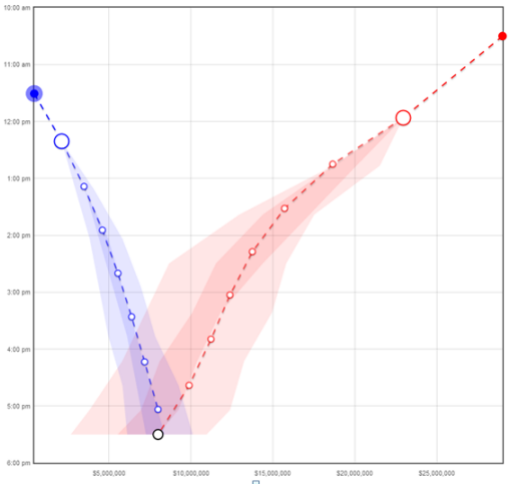
Insight Becomes Actionable



Accurate forecasts are insightful, but only helpful if you *act* on the information.
Once you know where the other side is headed, you can adjust the target settlement (dot at the bottom) to improve the round without increasing the risk of impasse. The system recalculates suggested offers that will get you to the adjusted target settlement incrementally, rather than with sudden moves. Since these moves are based on successful rounds, your odds improve.

If you get too aggressive, the model will show an increased risk of impasse. By continually adjusting expectations and strategy to the current forecast, you can test whether your trial alternatives are better than the projected deal. Even small percentage improvements usually yield much better settlements. Since the strategy is informed by successful and unsuccessful historical rounds, the improvement comes without out unnecessarily increasing the risk of impasse.

Conclusion

Big data and smart analytics will rapidly extend what experimental psychologists, behavioral economists, and other disciplines have learned about predictable if seemingly irrational human behavior.

Current technology allows us to play Battleship with sonar in negotiations. Knowing with some certainty where the other side is headed in time to improve your position through a research based, fine-tuned concession plan will improve your results. It's not a substitute for well-honed intuition developed through experience. It's an aid to test and calculate optimum positons. It's really nothing more than adding a scope to a gun so the human takes a better shot. A 5% improvement to a $10 million case is worth $500,000. That's worth some planning.

Don Philbin *is the current Past Chair of the ADR Section. He was named the 2014 "Lawyer of the Year" for Mediation in San Antonio by Best Lawyers®, was recognized as the 2011 Outstanding Lawyer in Mediation by the San Antonio Business Journal, is one of seven Texas mediators listed in The International Who's Who of Commercial Mediation, and is listed in Texas Super Lawyers. Don is an elected fellow of the International Academy of Mediators, the American Academy of Civil Trial Mediators, and the Texas Academy of Distinguished Neutrals.*

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The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)
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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

ARBITRATION, NURSING HOMES, AND THE "BUSINESS OF INSURANCE"

The Fredericksburg Care Company, L.P. v. Perez,
No. 13-0573, 2015 Tex. LEXIS 221
(Tex. Mar. 6, 2015)[2]

In a unanimous decision in *The Fredericksburg Care Company, L.P. v. Perez*, the Texas Supreme Court recently held that §74.451 of the Texas Medical Liability Act (TMLA) is preempted by the Federal Arbitration Act (FAA).[3] TMLA §74.451 regulates the form and content of agreements to arbitrate health care liability claims. The Court held that an arbitration agreement between a patient and a Texas nursing home health provider is enforceable regardless of whether the agreement complies with §74.451.[4] As such, the TMLA §74.451 is not protected from FAA preemption by the federal McCarran-Ferguson Act (MFA).5 Generally, when an arbitration agreement is contained within a contract affecting interstate commerce, any state laws limiting the right to arbitrate are preempted by the FAA unless the agreement falls within a federal statutory exemption from preemption.[6] The Court explained neither the statute in its entirety (TMLA) nor the specific statutory provision (§74.451) met the MFA exemption qualification.[7] Because this issue arose out of Defendant's interlocutory appeal to compel arbitration, the Texas Supreme Court remanded the case to the trial court to "proceed in a manner consistent with this opinion."[8]

Fredericksburg arose from a preadmission contract signed by Elisa Zapata, a patient and nursing home resident, and The Fredericksburg are Company, L.P. (Defendant). Zapata was under the care of the Defendant at the time of her death. When Zapata's beneficiaries (Plaintiffs) filed a negligence and wrongful death suit against Defendant, the Defendant moved to compel arbitration based on the arbitration clause contained in the preadmission agreement signed by Zapata.[9] The Plaintiffs opposed the motion to compel, arguing the arbitration clause was unenforceable because the clause's language failed to comply with §74.451 of the TMLA.[10] TMLA §74.451(a) requires any arbitration agreements entered into between patients or prospective patients and physicians or other health care providers to have a disclaimer notice in bold 10-point type that clearly and conspicuously states:

> **UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.**[11]

Although the Defendant admitted that the arbitration clause contained in the preadmission contract did not comply with §74.451, Defendant argued that the motion to compel

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should be granted because federal law, not state law, governed the enforceability of the arbitration clause since the patient-health provider transaction involved interstate commerce.[12] The Defendant further asserted that because the FAA does not require the §74.451 terms and form, the TMLA and the FAA directly conflicted with each other, and therefore, the FAA preempted §74.451.

The Plaintiffs contended that while the FAA would typically preempt §74.451, the TMLA was enacted to regulate the business of insurance, which falls within MFA's protection from FAA preemption. The MFA provides an exemption shield from federal preemption for state statutes which were enacted for the purpose of regulating the business of insurance.[13] Agreeing with the Plaintiffs, the trial court denied Defendant's motion to compel arbitration, and the court of appeals affirmed.[14]

The Texas Supreme Court granted the Defendant's petition for review in order to determine two issues: (1) whether the FAA directly preempts TMLA §74.451; and (2) whether the MFA applied, triggering an exemption from FAA preemption.[15] In determining the first issue, the Court quickly established that the FAA applied to the preadmission contact since it is a contract affecting the interstate commerce of health care service involving Medicare funding.[16] Next, the Court referred to its decision in *In re Nexion*,[17] which held the FAA preempted the specific provision of the Texas Arbitration Act (TAA) which required an attorney to sign a client's agreement to arbitrate a personal injury claim in order to be valid – something not required by the FAA. Considering similarities between the additional TAA requirement in *In re Nexion* and the additional requirement set out in §74.451, the Court concluded "the FAA preempts section 74.451 [of the TMLA] and that the parties [Plaintiffs and Defendant] will be compelled to arbitrate—despite the arbitration clause's deficiencies under section 74.451—unless the MFA exempts the Texas law from FAA preemption."[18]

The Court then applied the three-part test that federal courts routinely use to determine if the MFA provides an applicable exemption to shield a state law from preemption by a federal statute.[19] The MFA applies if: "(1) the federal statute does not specifically relate to the 'business of insurance,' (2) the state law was enacted for the 'purpose of regulating the business of insurance,' and (3) the federal statute operates to 'invalidate, impair, or supersede' the state law."[20] The Court found the first and third elements existed in this case.[21]

In order to determine whether the second element of this three-part test could be satisfied, the Court first considered the focus and scope of the MFA in regards to what types of statutes are typically found to qualify under the MFA exemption shield.[22] The Court also identified other examples of practices that are within the scope of the MFA, including "the fixing of [insurance] rates, selling and advertising of policies, and licensing of insurance companies and their agents."[23] After analyzing the scope of the MFA exemption, the Court next analyzed the Texas statute's "overall purpose, structural framework, and effect of the entire state law."[24] To do this, the Court considered both the TMLA in its entirety[25] and TMLA §74.451 in isolation.[26] Observing that the TMLA as a whole could not satisfy the second element of the three-part test, the Court next examined whether §74.451, in isolation, could qualify separately.[27] Ultimately the Court determined that, even in isolation, §74.451 of the TMLA did not sufficiently concern the business of regulating insurance. Therefore, the MFA did not exempt TMLA §74.451 from FAA preemption, and the trial court should have applied the FAA in compelling arbitration of the Plaintiffs' claims.[28]

OBSERVATIONS

1. Everyone involved in this case—parties, trial court, and court of appeals—agreed the FAA applied.[29]

2. The Court carefully explained the first step to analyzing an FAA preemption issue is to determine whether the FAA applies to the transaction or contract containing an arbitration agreement; absent language adopting the FAA, the FAA will not apply to arbitration agreements that do not affect interstate commerce, and thus, would not preempt state regulations that do not affect interstate commerce, if any.[30]

3. The Texas Supreme Court's holdings in *Fredericksburg* and *In re Nexion*, lead to the conclusion that state statutes adding additional elements—not required by the FAA— to be met in order for an arbitration agreement to be valid and enforceable will be preempted by the FAA, if the FAA is applicable.[31]

4. Drafters of arbitration agreements must consider a transaction or contract as a whole to determine whether the contract or transaction affects interstate commerce, making the FAA applicable to any agreement to arbitrate contained therein, unless the parties agree otherwise.

5. Health care providers should draft preadmission arbitration agreements carefully, even to the inclusion of the TMLA §74.451(a) language out of an overabundance of caution. But if so drafting, the provider must be vigilant in compliance with the terms of such an agreement.

6. Two arbitration-related questions are not addressed in *Fredericksburg*: (1) Is a patient nursing home preadmission agreement by nature an adhesive contract?; and (2) Is a patient-nursing home preadmission agreement a consumer contract? If either question is answered "yes," the arbitration clause drafter faces additional drafting issues.

[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Nicole Muñoz, a 2015 graduate of Texas A&M University School of Law, for her research and drafting assistance.

[2] *The Fredericksburg Care Co., L.P. v. Perez*, No. 13-0573, 2015 Tex. LEXIS 221 (Tex. Mar. 6, 2015). On March 24, 2015, the Plaintiffs filed a motion for rehearing on which the Texas Supreme Court has yet to rule.

[3] *Id.* at *33.

[4] *See Fredericksburg*, 2015 Tex. LEXIS 221 at *33.

[5] 15 U.S.C. §§1011-1015 (2015).

[6] *Id.* at *6; *see also* 9 U.S.C. §2 (2015).

[7] *See Fredericksburg*, 2015 Tex. LEXIS 221 at *33.

[8] *Id.* at *33-34.

[9] *Id.* at *2.

[10] TEX. CIV. PRAC. & REM. CODE §74.451(a) (2015).

[11] *Id.*

[12] *Fredericksburg*, 2015 LEXIS 221 at *5. The Texas Supreme Court previously held that "Medicare paymentsmade to a health care provider on a patient's behalf was 'sufficient to establish interstate commerce and the FAA'sapplication' to a case." *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam). It isundisputed that the Defendant received such payments on behalf of Elisa Zapata. F*redericksburg*, 2015 LEXIS 221at *5.

[13] 15 U.S.C. § 1012(b) (2015).

[14] *Fredericksburg*, 2015 LEXIS 221 at *3-4.

[15] The Court devotes eight (8) pages of Justice Green's opinion to a thorough analysis of what constitutes the "business of insurance" that has only been summarized in this newsletter. *See Fredericksburg*, 2015 LEXIS 221 at *6-34.

[16] *Id.* at *5 (citing *In re L&L Kempwood Assocs. L.P.*, 9 S.W.3d 152, 127 (Tex. 1999) (recognizing that the FAA "extends to any contract affecting commerce, as far as the *Commerce Clause of the United States Constitution* will reach")).

[17] *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam).

[18] *Fredericksburg*, 2015 LEXIS 221 at *6.

[19] *Id.* at *7-8. Federal case law applies to interpret federal preemption law. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 401 (Tex. 1979).

[20] *Fredericksburg*, 2015 LEXIS 221 at *7-8.

[21] *Id.* at *8.

[22] *Id.* at *12-13.

[23] *Id.* at *16-17. The Court also identified several other examples, including writing of insurance contracts and the actual performance of those contracts.

[24] *Id.* at *13.

[25] *See* TEX. CIV. PRAC. & REM. CODE §§74.001-74.452. The Texas Medical Liability Act is comprised of Chapter 26 of the Texas Civil Practices and Remedies Code.

[26] *Fredericksburg*, 2015 LEXIS 221 at *12.

[27] *Id.* at *25 ("it is possible that a law, in its entirety, would fail to qualify for the MFA's exemption from preemption, but a specific statutory provision could qualify…").

[28] *Id.* at *33-34.

[29] *Id.* at *5.

[30] *Id.* ("We note, however, that if the FAA does not apply, then section 74.451 is not preempted and it is unnecessary to address whether the MFA provides an exemption from FAA preemption.").

[31] *Id.* at *5-6; *see also In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam).

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2015 CALENDAR OF EVENTS

JULY

40-Hour Basic Mediation Training ***Austin * July 15-17 continuing July 20-21, 2015 * *Austin Texas Mediators* * **www.austintexasmediators.com or 512-966-9222

Advanced Family Mediation Training * Austin * July 21-24, 2015 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

40-Hour Basic Mediation Training * Dallas ***** July 21-24, 2015* *Conflict Happens* * 214.526.4525 * **www.conflicthappens.com * nkferrell@sbcglobal.net**

Yes! And...Applied Improv for Mediators * Austin * July 31, 2015 * Center for Public Policy Dispute Resolution - The University of Texas School of Law, Austin * **vread@law.utexas.edu** * 512-471-3507

AUGUST

Basic Mediation Training * Houston * August 12-15, 2015 Manousso Mediation and Arbitration, LLC * Dr. Barbara Sunderland Manousso * **mediation@manousso.us** * 713 840 0828

Basic Mediation Training * Austin * August 19, 20, 21, 26, 27, 2015 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

Commercial Arbitration Training * Houston ***** August 19-22, 2015 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

SEPTEMBER

40-Hour Basic Mediation Training * Houston ***** September 11-13 continuing ***** September 18-20, 2015 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

Family Mediation Training * Dallas ***** September 21-23, 2015* *Conflict Happens* * 214.526.4525 * **www.conflicthappens.com** nkferrell@sbcglobal.net

OCTOBER

Basic Mediation Training * Austin * October 7-9, continuing 14-15, 2015 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

Texas Mediator Credentialing Association Seminar * Austin * October 17, 2015 * University of Texas, Thompson Conference Center * **http://www.txmca.org**

NOVEMBER

40-Hour Basic Mediation Training * San Marcos ***** November 11-21, 2015* *Central Texas DRC* * 512-878-03821 * **www.centexdrc.org** * director@hcdrc.corg

Basic Mediation Training * Dallas ***** November 17-20, 2015* *Conflict Happens* * 214.526.4525 * **www.conflicthappens.com** nkferrell@sbcglobal.net

To include your training email Robyn Pietsch at rappug55@gmail.com.
Include name of training, date, location, contact information (telephone and/or email) and Internet address

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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 2015 to June 2016. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____

Public Member _____ **Attorney**_____

Bar Card Number _____

Address_____

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

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

E-Mail Address:_____

2015-2016 Section Committee Choice_____

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, and 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 verify 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, 2015, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

http://www.texasadr.org

Views expressed in Alternative Resolutions are those of the authors and do not necessarily reflect the views of the editors, the

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