ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

Vol. 23, No. 1
Fall, 2013

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

Things are beginning to move in a new year that we all hope will result in some exciting changes for our Section.

Courtesy of Don Philbin, our Communications Chair and website guru (and his helpers), there are many new changes to our website "behind the password" that are being made. Soon, when you click on "Resources" you will see and be able to choose from a myriad of resources, all of which will be helpful to your research and to your practice as a user or provider of alternate dispute resolution services.

Work also has begun, under the leadership of my predecessor, Alvin Zimmerman, on a rather daunting task. Years ago the Section produced an ADR Handbook. By all accounts it was a wonderful resource. I say "by all accounts" because it sold out and I have yet to see a copy of it! The discussions progressed from "Gosh I wish we had some kind of handbook" to "We did produce one years ago" to "By golly why don't we update and produce a new one?" to the appointment of a group to manage and produce a new ADR Handbook. The discussions have resulted in a fine Committee led by Justice Linda Thomas (Ret.) and filled with able members who now are hard at work on this very exciting task. More on this as the project progresses.

You will receive "save the date" and other enticements concerning our upcoming January, 2014 CLE which will be in Dallas. Our course director. Linda Thomas, and her Committee, and the staff at the State Bar have worked diligently and creatively to put together what promises to be a wonderful and diverse CLE experience. Look for the promo materials and don't miss it!

Finally, something for everyone to watch. Now, mind you, this is coming to you from one who does not mediate in the Family Law arena; but, even I can see that this is one to watch. There is a very important case that recently was decided by the Court of Appeals, Fifth District, Dallas (*In the Interest of S.K.D. and J.E.D.*, August 27, 2013; Opinion and Order withdrawn, September 11, 2013) that speaks to the use and durability of Mediated Settlement Agreements in the Family Law context. [The opinion is reprinted in this issue of Alternative Resolutions at the end of the Chair's Corner.].

Inside This Issue:

In that case there was a post-divorce modification that was settled by an MSA. Apparently an Order was not entered. The case was dismissed for want of prosecution. After a series of other procedural steps, the father filed a Motion to Modify the Parent -Child Relationship. The mother claimed that the MSA should be honored and enforced. The Appeals Court ruled that the MSA provision in Section 153 of the Family Code applies only to Section 153 actions (that is, original suits) and not to actions brought under Section 156 (modification of parent-child relationship).

The implication of this ruling is that MSAs are irrevocable only in Section 153 actions. The question of why the original opinion was withdrawn is unknown as of the preparation of this letter as the Court has not entered its opinion and judgment. A Motion for Rehearing was filed and, as of this writing, there is a letter on the court's web site that indicates that the Appellant has died. Don't know quite what will happen next at this point, but, this is one for everyone to watch.

Don't forget to change your clocks, and don't forget to sign up for the ADR Section's January, 2014 CLE in Dallas! Also, don't miss the upcoming Texas Bar CLE "Handling Your First (or Next) Arbitration" to be held on December 6, 2013 at the Texas Law Center in Austin. The line up of topics and speakers is first rate and it promises to be an excellent course.

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Modification of Mediated Settlement Agreement; Attorney Fees

Editors Note: The *S.K.D.* decision has attracted some attention among Texas family lawyers., and is discussed in the Chair's Corner, immediately above. As the opinion is unpublished, the full text is set out below (including the names of the attorneys and judges).

Just as your editors were about to complete this issue of Alternative Resolutions, the Texas Supreme Court issued its decision in another Mediated Settlement Agreement case, In re Lee, — S,W.3d —, 2012 WL 5382067 (Tex. 2013). The majority and concurring opinions are found immediately after the *S.K.D.* decision. The dissenting opinion is discussed at some length in the opinion of the Court, but the dissent was not available on Westlaw as we went to press.

There will be further discussion of the enforcement of MSAs, *vel non*, in the next issue of Alternative Resolutions.

In re S.K.D., 2013 WL 4528508 (Tex.App.-Dallas) (8/27/2013)

Byron L. Woolley, William R. Wilson, for Katherine Anne Duncan.

Lisa G. Garza, Angel Berbarie, for John W. Duncan.

Before Justices BRIDGES, LANG, and RICHTER.

Opinion by Justice BRIDGES.

Katherine Duncan appeals the trial court's order modifying the parent-child relationship appointing John Duncan as joint managing conservator of S.K.D. and J.E.D. with the exclusive right to designate both children's residence and ordering Katherine to pay $800 per month in child support. In four issues, Katherine argues the trial court erred in not entering an order consistent with a mediated settlement agreement between the parties, failing to make specific findings regarding child support, awarding attorney's fees against Katherine, and not conducting a jury trial as requested. We affirm the trial court's order.

In May 2006, John and Katherine divorced. John and Katherine were named joint managing conservators of their two children, S.K.D. and J.E.D., with John having primary custody and the right to determine the residence of the children. The divorce decree further obligated Katherine to pay $100 per month in child support and required John to maintain health insurance for the children.

In June 2006, Katherine filed a petition to modify the parent-child relationship seeking to have herself appointed sole managing conservator with the exclusive right to designate the primary residency of the children. In November 2007, the trial court referred the case to mediation, and a mediated settlement agreement (MSA) was reached in March 2008.

Under the terms of the MSA, John and Katherine remained joint managing conservators of S.K.D. and J.E.D., but Katherine was given primary possession of S.K.D., their daughter, with the exclusive right to establish her residence. John retained primary possession of their son, J.E.D. The MSA further required John to pay $1,050 per month in child support and continue to provide health insurance for the children.

On November 11, 2008, Katherine filed an emergency petition to modify the parent-child relationship in which she sought modification of the divorce decree "and/or" the MSA. The same day, the trial court entered an order dismissing the case for want of prose-

cution. On November 18, 2008, John filed a motion to reinstate the case, but he non-suited the motion to reinstate on December 15, 2008. The next day, the trial court dismissed the case without prejudice.

On December 22, 2008, John filed a first amended counter-petition to modify the parent-child relationship in which he sought to be named sole managing conservator of S.K.D. and J.E.D. with the exclusive right to designate the children's primary residence, consent to their medical treatment, and manage certain financial matters. Further, the motion requested that Katherine's access to the children be restricted and that she be ordered to submit to a psychological evaluation and six months of drug testing.

In November 2009, the trial court conducted a trial before the court at which Katherine represented herself pro se. Nearly a year after trial, on November 1, 2010, the trial court entered an order containing the court's findings that the circumstances of the children, a conservator, or other party had materially and substantially changed and that the requested modification was in the best interest of S.K.D. and J.E.D.

The order provided that John and Katherine would remain joint managing conservators, but John was given the exclusive right, among other things, to designate the primary residence of S.K.D. and J.E.D. and to consent to psychological and psychiatric treatment. Katherine's possession of J.E.D. was roughly equal to John's but her access to S.K.D. was restricted to two hours of supervised access per week at Hannah's House Supervised Visitation and Exchange Center.

During the first six months following the entry of the order, Katherine was ordered to submit to random drug testing three times – at a time and location determined by John. Finally, the order awarded John $50,000 in attorney's fees against Katherine. This appeal followed.

In her first issue, Katherine argues the trial court erred by not entering an order in accordance with the parties' March 2008 MSA. Specifically, Katherine relies on section 153.0071 of the Family Code in arguing that a mediated settlement agreement in a suit affecting the parent-child relationship is "enforceable," and an "MSA cannot be repudiated to prevent judgment on the matter." Essentially, Katherine argues the MSA entitled her to an order in strict accordance with the terms of the MSA, and the trial court erred in failing to enter such an order. We disagree.

Section 153.0071 of the Family Code provides that, if an MSA meets the requirements of that section, "a party is entitled to judgment on the [MSA] notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." TEX. FAM.CODE ANN. § 153.0071(d), (e) (West 2008). Thus, Katherine's issue arises under chapter 153 of the Family Code, which governs the initial determination of conservatorship, possession, and access. *See id.* §§ 153.001–.611; *In re S.E.K.,* 294 S.W.3d 926, 928 (Tex.App.-Dallas 2009, pet. denied).

However, this is a proceeding to modify a child-custody determination under chapter 156 of the family code. *See* TEX. FAM.CODE ANN. § 156.001–.410; *In re S.E.K.,* 294 S.W.3d at 928. Chapters 153 and 156 are distinct statutory schemes that involve different issues. *In re V.L.K.,* 24 S.W.3d 338, 343 (Tex.2000); *In re S.E.K.,* 294 S.W.3d at 928. Chapter 156 modification cases raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases. *In re V.L.K.,* 24 S.W.3d at 343; *In re S.E.K.,* 294 S.W.3d at 928.

The legislature has determined the standard and burden of proof are different in original and modification suits. *In re V.L.K.,* 24 S .W.3d at 343; *In re S.E.K.,* 294 S.W.3d at 928. In a chapter 156 modification case, the controlling issues are whether modification is in the best interest of the child and whether the circumstances of the child or a conservator have materially and substantially changed. TEX. FAM.CODE ANN. § 156.001.

Here, the trial court found the circumstances of the children, a conservator, or other party had materially and substantially changed and that the requested modification was in the best interest of S.K.D. and J.E.D. Under these circumstances, we conclude the trial court in this chapter 156 modification proceeding was not bound to enter an order in strict compliance with an MSA reached under chapter 153. *See In re V.L.K.,* 24 S.W.3d at 343; *In re S.E.K.,* 294

S.W.3d at 928. We overrule Katherine's first issue.

In her second issue, Katherine argues the trial court erred in calculating the amount of child support awarded and failed to make specific findings as required by Family Code section 154.130. Section 154.130 requires the trial court, upon request, to state whether application of child support guidelines would be unjust or inappropriate and enter findings as to the obligor's net resources and the percentage applied to the obligor's net resources for child support. TEX. FAM.CODE ANN. § 154.130.
Here, contrary to Katherine's argument, the trial court's order states that, "In accordance with Texas Family Code section 154.130 the Court makes the following findings and conclusions" regarding its child support order. The order states the amount of child support ordered by the court is in accordance with the percentage guidelines, sets out Katherine's monthly net resources, specifies the amount of child support payments each month based on the percentage guidelines, and identifies the percentage applied as twenty-five percent. Thus, because the trial court's order actually contains the findings Katherine complains were lacking, we overrule her second issue.

In her third issue, Katherine argues the trial court erred in awarding attorney's fees against her, and the award was not supported by the evidence. The trial court has discretion to award attorney's fees in a suit affecting the parent-child relationship. *Bruni v. Bruni,* 924 S.W.2d 366, 368 (Tex.1996); *see also* TEX. FAM.CODE ANN. § 106.002(a) (West 2008). We review an award of fees under section 106.002 for an abuse of discretion. *See In re A.B.P.,* 291 S.W.3d 91, 95 (Tex.App.-Dallas 2009, no pet.).

An attorney's testimony about the reasonableness of his or her own fees is not like other expert witness testimony. *Garcia v. Gomez,* 319 S.W.3d 638, 641 (Tex. 2010). Although rooted in the attorney's experience and expertise, it also consists of the attorney's personal knowledge about the underlying work and its particular value to the client. *Id.* The attorney's testimony is not objectionable as merely conclusory because the opposing party, or that party's attorney, likewise has some knowledge of the time and effort involved and, if the matter is truly in dispute, the opposing party, or that party's attorney, may effectively question the attorney regarding the reasonableness of his fee. *Id*

Factors to consider in determining the reasonableness of attorney's fees are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex.1997). Evidence of each of the *Andersen* factors is not required to support an award of attorney's fees. *Arthur J. Gallagher & Co. v. Dieterich,* 270 S.W.3d 695, 706 (Tex.App.-Dallas 2008, no pet.).

Here, John's attorney testified regarding her qualifications and experience, her hourly rate, and the total amount of attorney's fees John incurred. She testified her own fee "with respect to getting ready for today's trial" was $44,371.68. She testified her additional fee, including the day of trial, was $6,000. Under these circumstances, we conclude the trial court did not abuse its discretion in awarding John $50,000 in attorney's fees under section 106.002 of the Family ***Code***. *See* TEX. FAM.CODE ANN. § 106.002(a). We overrule Katherine's third issue.

In her fourth issue, Katherine argues the trial court erred in failing to conduct a jury trial. Specifically, Katherine argues she paid the $30 jury fee and requested a jury trial in a January 2009 pleading. Thus, she argues, the trial court erred in failing to grant her request.

When a party has perfected its right to a jury trial in accordance with rule of civil procedure 216 but the trial court instead proceeds to trial without a jury, the party must, in order to preserve any error by the trial court in doing so, either object on the record to the trial court's action or indicate affirmatively in the record it intends to stand on its perfected right to a jury trial. *Sunwest Reliance Acquisitions Grp. v. Provident Nat'l Assurance Co.,* 875 S.W.2d 385, 387 (Tex.App.-Dallas 1993, no writ).

Here, Katherine represented herself pro se at a bench trial. She did not object to the absence of a jury or indicate she intended to stand on her right to a jury trial. Accordingly, we conclude Katherine waived her right to complain about the trial court's failure to conduct a jury trial. *See id.* We overrule Katherine's fourth issue.

We affirm the trial court's order.

In re Lee, --- S.W.3d ----, 2013 WL 5382067 (Tex. 2013)

Justice LEHRMANN announced the Court's decision and delivered the opinion of the Court with respect to Parts I, II, III, V, and VII, in which Justice JOHNSON, Justice WILLETT, Justice GUZMAN, and Justice BOYD joined, and delivered an opinion with respect to Parts IV and VI, in which Justice JOHNSON, Justice WILLETT, and Justice BOYD joined.

"If a mediated settlement agreement meets [certain requirements], a party is *entitled to judgment* on the mediated settlement agreement notwithstanding ... another rule of law." TEX. FAM.CODE § 153.0071 (e) (emphasis added). We are called upon today to determine whether a trial court abuses its discretion in refusing to enter judgment on a statutorily compliant mediated settlement agreement (MSA) based on an inquiry into whether the MSA was in a child's best interest. We hold that this language means what it says: a trial court may not deny a motion to enter judgment on a properly executed MSA on such grounds.

I. Background

Relator Stephanie Lee and Real Party in Interest Benjamin Redus are the parents and joint managing conservators of their minor daughter. Stephanie has the exclusive right to designate the child's primary residence under a 2007 order adjudicating parentage. Benjamin petitioned the court of continuing jurisdiction to modify that order, alleging that the circumstances had materially and substantially changed because Stephanie had relinquished primary care and possession of the child to him for at least six months. *See* TEX. FAM.CODE § 156.101. Benjamin sought the exclusive right to determine the child's primary residence and requested modification of the terms and conditions of Stephanie's access to and possession of the child, alleging that Stephanie's "poor parenting decisions" had placed the child in danger. He also sought an order requiring that Stephanie's periods of access be supervised on the basis that she "has a history or pattern of child neglect directed against" the child. Additionally, Benjamin sought an order enjoining Stephanie from allowing the child within twenty miles of Stephanie's husband, Scott Lee, a registered sex offender, and requiring Stephanie to provide Benjamin with information on her whereabouts during her periods of access so that Benjamin could verify her compliance with the twenty-mile restriction.

Before proceeding to trial, the parties attended mediation at which they were both represented by counsel. The mediation ended successfully with the parties executing a mediated settlement agreement modifying the 2007 order. The MSA gives Benjamin the exclusive right to establish the child's primary residence, and it gives Stephanie periodic access to and possession of the child. Among the terms and conditions of Stephanie's access and possession, the MSA contains the following restriction concerning Scott:

> At all times, Scott Lee is enjoined from being within 5 miles of [the child]. During [Stephanie]'s periods of possession with [the child,] Scott Lee shall notify [Benjamin] through Stephanie Lee by e-mail or other mail where he will be staying ... [a]nd the make and model of the vehicle he will be driving. This shall be done at least 5 days prior to any visits. [Benjamin] shall have the right to have an agent or himself monitor Mr. Lee's location by either calling or driving by the location at reasonable times.

The introductory paragraph of the MSA explains that "[t]he parties wish to avoid potentially protracted and costly litigation, and agree and stipulate that they have carefully considered the needs of the child ... and the best interest of the child." The MSA also contains the following language in boldfaced, capitalized, and underlined letters:

> ***THE PARTIES ALSO AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON BOTH OF THEM AND IS NOT SUBJECT TO REVOCATION BY EITHER OF THEM.***

The MSA was signed by both Stephanie and Benjamin, as well as their attorneys.

Benjamin appeared before an associate judge to present and prove up the MSA. During Benjamin's testimony in support of the MSA, the associate judge inquired about the injunction regarding Scott. Benjamin informed the judge that Scott was a registered sex offender, and he testified that Scott "violated conditions of his probation with [Benjamin's] daughter in the house" and that he "slept naked in bed with [Benjamin's] daughter between [Scott and Stephanie]." Stephanie did not attend the hearing and therefore was not able to respond to these allegations. Based on this testimony, the associate judge refused to enter judgment on the MSA.

Stephanie filed a motion to enter judgment on the MSA, and Benjamin filed a written objection withdrawing his consent to the MSA, arguing that it was not in the best interest of the child. At the hearing on Stephanie's motion, the district judge heard brief testimony on the MSA from Benjamin and Stephanie, including testimony regarding whether the MSA was in the child's best interest. Stephanie testified that she believed the MSA was in the child's best interest, and Benjamin also admitted on cross-examination that, at the time of execution, he thought the MSA was in the child's best interest. Both Stephanie and Benjamin testified that Benjamin was not a victim of family violence.

The judge also heard testimony on Scott's status as a registered sex offender. Stephanie testified that, in 2009, Scott was served with a violation of his deferred adjudication because of his contact with the child. Stephanie admitted that, although Scott was placed on additional probation conditions in 2011, she allowed Scott to have contact with the child and to reside in the same house with her and the child in violation of those conditions. Stephanie specifically denied that she ever allowed Scott to take care of the child without her supervision. Notably, although Benjamin testified that he knew about Scott's status as a registered sex offender, he did not repeat the allegation that Scott had slept naked with the child.

The district court concluded that entry of the MSA was not in the best interest of the child and denied Stephanie's motion to enter judgment. The court advised the parties that they were free to reach a new agreement on their own, but the court declined to send the parties back to mediation and instead set the case for trial.

Stephanie petitioned the court of appeals for a writ of mandamus ordering the trial court to enter judgment on the MSA. The court of appeals held "that the trial court [did] not commi a clear abuse of discretion in refusing to enter judgment on a mediated settlement agreement that is not in the child's best interest." Stephanie then timely petitioned this Court for a writ of mandamus.

II. The Need For Mediation in High–Conflict Custody Disputes

Encouragement of mediation as an alternative form of dispute resolution is critically important to the emotional and psychological well-being of children involved in high-conflict custody disputes. Indeed, the Texas Legislature has recognized that it is "the policy of this state to encourage the peaceable resolution of disputes, *with special consideration given*

to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM.CODE § 154.002 (emphasis added).

This policy is well-supported by, *inter alia,* literature discussing the enormous emotional and financial costs of high-conflict custody litigation, including its harmful effect on children. Children involved in these disputes—tellingly, referred to as "custody battles"—can face perpetual emotional turmoil, alienation from one or both parents, and increased risk of developing psychological problems. All the while, most of these families have two adequate parents who merely act out of fear of losing their child. For the children themselves, the conflict associated with the litigation itself is often much greater than the conflict that led to a divorce or custody dispute.

The Legislature has thus recognized that, because children suffer needlessly from traditional litigation, the amicable resolution of child-related disputes should be promoted forcefully. With the Legislature's stated policy in mind, we turn to the statute in question.

III. Statutory Interpretation

The sole issue before us today is whether a trial court presented with a request for entry of judgment on a validly executed MSA may deny a motion to enter judgment based on a best interest inquiry. While Texas trial courts have numerous tools at their disposal to safeguard children's welfare, the Legislature has clearly directed that, subject to a very narrow exception involving family violence, denial of a motion to enter judgment on an MSA based on a best interest determination, where that MSA meets the statutory requirements of section 153.0071(d) of the Texas Family Code, is not one of those tools. Accordingly, the trial court in this case abused its discretion by denying entry of judgment on the MSA and setting the matter for trial.

A. Standard of Review. We review questions of statutory construction de novo. Our fundamental objective in interpreting a statute is to determine and give effect to the Legislature's intent. In turn, the plain language of a statute is the surest guide to the Legislature's intent. Unambiguous text equals determinative text …. This text-based approach requires us to study the language of the specific section at issue, as well as the statute as a whole. When construing the statute as a whole, we are mindful that if a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both. However, in the event that any such conflict is irreconcilable, the more specific provision will generally prevail. Further, in the event of an irreconcilable conflict between two statutes, generally the statute latest in date of enactment prevails.

B. Section 153.0071. Consistent with the legislative policy discussed above regarding the encouragement of the peaceable resolution of disputes involving the parent-child relationship, the Legislature enacted section 153.0071, which provides in pertinent part as follows:

> (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.
>
> (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.
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> (c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.
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> (d) A mediated settlement agreement is binding on the parties if the agreement:
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> > (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;

(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(e–1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:

(1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and

(2) the agreement is not in the child's best interest.

Subsection (d) provides that an MSA is binding on the parties if it is signed by each party and by the parties' attorneys who are present at the mediation and states prominently and in emphasized type that it is not subject to revocation. Subsection (e) goes even further, providing that a party to an MSA is "entitled to judgment" on the MSA if it meets subsection (d)'s requirements. Finally, subsection (e–1), added in 2005, provides a narrow exception to subsection (e)'s mandate, allowing a court to decline to enter judgment on even a statutorily compliant MSA if a party to the agreement was a victim of family violence, the violence impaired the party's ability to make decisions, *and* the agreement is not in the best interest of the child.

C. The Parties' Arguments. Stephanie argues that the trial court abused its discretion by refusing to enter judgment on the MSA and setting the case for trial. She contends that, under § 153.0071, she was entitled to judgment on the MSA because it complied with the statutory requirements. She further argues that a court may refuse to enter judgment on a properly executed MSA only when the family violence exception is met and the court finds that the MSA is not in the child's best interest.. Because there was no family violence at issue in this case, she argues, this narrow exception does not apply.

In response, Benjamin first argues that the MSA does not meet the statutory requirements for a binding agreement because it was not signed by the Office of the Attorney General. Additionally, he argues that entry of judgment on an MSA that is not in the best interest of the child violates public policy and is unenforceable. His argument is based on the Family Code's mandate that "[t]he best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession ." *Id.* § 153.002. He argues that trial courts therefore have the discretion to void all or part of an MSA that is not in the child's best interest.

In response to our request that the Office of the Solicitor General provide the position of the State of Texas, the State submitted a brief in favor of the trial court's and court of appeals' disposition, arguing that the "overarching purpose of Texas Family Code chapter 153 is to ensure trial courts' ability to act in the best interests of minor children—even when their parents do not." The State urges that we must not look at section 153.0071 in isolation; rather, we must construe it within the broader context of the Legislature's concern for the best interest of children as expressed in the Family Code. The State argues that, in light of this overarching state policy, the trial court did not abuse its discretion by refusing to enter judgment on the MSA.

Finally, the State Bar of Texas Family Law Council (the Council) submitted an amicus curiae brief in support of Stephanie's petition. The Council argues that a strict interpretation of section 153.0071 fulfills the state policy favoring amicable resolution of disputes and suggests that holding as the courts below did could lead to a loss in confidence in mediation and an increase in litigation over the best interest of the child. The Council argues that rules of statutory construction make clear that the Legislature intended to remove the best interest determination in the context of an MSA, instead deferring to parents to determine the best interest of the child, except where family violence is involved. *See id.* § 153.0071(e–1).

The Council urges that to hold otherwise would "gut the legislative intent favoring alternative dispute resolution of family law matters by mediation," increasing both the cost of the proceedings and the stress on families forced to resolve "their disputes in

the adversarial venue of the courts, rather than the cooperative environment of mediation." The Council contends that "this result is certainly not in a child's best interest."

D. Analysis of Section 153.0071. Section 153.0071(e) unambiguously states that a party is "entitled to judgment" on an MSA that meets the statutory requirements "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." Subsection (e–1) provides a narrow exception, allowing a trial court to decline to enter judgment on an MSA when three requirements are all met: (1) a party to the agreement was a victim of family violence, *and* (2) the court finds the family violence impaired the party's ability to make decisions, *and* (3) the agreement is not in the child's best interest. *Id.* § 153.0071(e–1). By its plain language, section 153.0071 authorizes a court to refuse to enter judgment on a statutorily compliant MSA on best interest grounds *only* when the court also finds the family violence elements are met. Stated another way, "[t]he statute does not authorize the trial court to substitute its judgment for the mediated settlement agreement entered by the parties unless the requirements of subsection 153.0071(e–1) are met." *Barina v. Barina,* No. 03–08–00341–CV, 2008 WL 4951224, at *4 (Tex.App.-Austin Nov.21, 2008, no pet.) (mem.op.).

Subsection (e–1), enacted after subsection (e), makes it absolutely clear that the Legislature limited the consideration of best interest in the context of entry of judgment on an MSA to cases involving family violence. Allowing a court to decline to enter judgment on a valid MSA on best interest grounds without family violence findings would impermissibly render the family violence language in subsection (e–1) superfluous. *See In re Caballero,* 272 S.W.3d 595, 599 (Tex. 2008) (reaffirming rule that courts must give effect to all words in a statute without treating any statutory language as mere surplusage).

Section 153.0071(b), governing arbitration of child-related disputes, is also instructive. In stark contrast with subsection (e), subsection (b) explicitly gives trial courts authority to decline an arbitrator's award when it is not in the best interest of the child. *Compare* TEX. FAM.CODE § 153.0071(b), *with id.* § 153.0071(e). This distinction between arbitration and mediation makes sense because the two processes are very different. Mediation encourages parents to work together to settle their child-related disputes, and shields the child from many of the adverse effects of traditional litigation. On the other hand, arbitration simply moves the fight from the courtroom to the arbitration room. If the Legislature had intended to authorize courts to inquire into the child's best interest when determining whether to render judgment on validly executed MSAs, as it did in section 153.0071(b) with respect to judgments on arbitration awards, it certainly knew how to do so.

Benjamin argues that, despite section 153.0071's plain language, "[n]othing precludes the court from considering the best interests of the child, including a request for entry on a mediated settlement agreement." Benjamin and the State are correct that the Family Code provides that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." *Id.* § 153.002. However, section 153.0071(e) reflects the Legislature's determination that it is appropriate for parents to determine what is best for their children within the context of the parents' collaborative effort to reach and properly execute an MSA. This makes sense not only because parents are in a position to know what is best for their children, but also because successful mediation of child-custody disputes, conducted within statutory parameters, furthers a child's best interest by putting a halt to potentially lengthy and destructive custody litigation.

However, as discussed further below, a trial judge with cause to believe that a child's welfare is at risk due to suspected abuse or neglect is required to report such abuse or neglect to an appropriate agency, as is any other individual with this type of knowledge. *Id.* §§ 261.101–.103. In this sense, parents who enter into MSAs are no different from the myriad of parents in intact families who are presumed to act in their children's best interests every day. *See Troxel v. Granville,* 530 U.S. 57, 65 (2000) (observing that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court").

To the extent the two statutes do conflict, applicable

rules of construction require us to hold that section 153.0071 prevails. First, section 153.0071(e) mandates entry of judgment "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." TEX. FAM.CODE § 153.0071(e). The use of the word "notwithstanding" indicates that the Legislature intended section 153.0071 to be controlling.

Further, the specific statutory language of section 153.0071(e) trumps section 153.002's more general mandate. Finally, the MSA provision was added long after the general "best interest" provision and therefore prevails as the statute latest in date of enactment. Thus, it is clear that the MSA statute was enacted with the intent that, when parents have agreed that a particular arrangement is in their child's best interest and have reduced that agreement to a writing complying with section 153.0071, courts must defer to them and their agreement.

For these reasons, we hold that section 153.0071(e) encourages parents to peaceably resolve their child-related disputes through mediation by foreclosing a broad best interest inquiry with respect to entry of judgment on properly executed MSAs, ensuring that the time and money spent on mediation will not have been wasted and that the benefits of successful mediation will be realized. Allowing courts to conduct such an inquiry in contravention of the unambiguous statutory mandate in section 153.0071 has severe consequences that will inevitably harm children.

The decisions below ignore clearly expressed legislative intent, undermining the Legislature's goal of protecting children by eroding parents' incentive to work collaboratively for their children's welfare. This frustrates the policies underlying alternative dispute resolution in the custody context, which are firmly grounded in the protection of children.

IV. A Trial Court's Duty to Take Protective Action

The dissent is concerned that the statute, as written, would require trial courts to ignore evidence that the parents' agreed arrangement would endanger a child by subjecting the child to neglect or abuse. This case, however, does not present that issue. The trial court in this case refused to enter judgment on the parents' MSA because the court believed the agreed arrangement was not in the child's best interest, not because the court believed the arrangement would subject the child to neglect or abuse or would otherwise endanger the child. Thus, we need not, and should not, decide in this case the contours of a trial court's duties and discretion when faced with an MSA that would endanger a child, as that issue is not before us and any such opinion would be advisory.

Nevertheless, because endangerment appears to lie at the heart of the dissent's concern, we are compelled to note that section 153.0071 does not require a trial court to blindly leave a child whose welfare is at risk in harm's way. To the contrary, courts can never stand idly by while children are placed in situations that threaten their health and safety. However, this does not mean courts can refuse to abide by section 153.0071(e) by denying a motion to enter judgment on a properly executed MSA on best interest grounds. Trial courts have other statutorily endorsed methods by which to protect children from harm without eviscerating section 153.0071(e)'s mandatory language or reading language into the statute under the guise of "interpreting" it.

The Family Code provides trial courts with numerous mechanisms for protecting a child's physical and emotional welfare, both during and after the pendency of a suit affecting the parent-child relationship (SAPCR). For example, a trial court may find it necessary to involve a government agency like the Department of Family and Protective Services (DFPS), the agency charged with the duty to investigate and protect endangered children, before rendering final judgment. Specifically, a court "having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect ... *shall immediately* " notify DFPS or another appropriate agency. TEX. FAM.CODE § 261.101 (emphasis added); *see also id.* § 261.103.

Under these and related statutes, when a person has cause to believe that a child is being or may be harmed by abuse or neglect, a DFPS investigation will be triggered, regardless of whether a SAPCR is pending. *Id.* § 261.101; *id.* § 261.301(a) ("The investigation shall be conducted without regard to any pending suit affecting the parent-child relation-

ship."); *see also id.* § 153.0071(g) (stating that the applicability of the provisions for confidentiality of alternative dispute resolution procedures "does not affect the duty of a person to report abuse or neglect under Section 261.101"). In these and similar types of situations, a trial court may enter temporary orders, temporary restraining orders, and temporary injunctions to protect a child's safety and welfare, all upon proper motion, before rendering the final order.

The trial court may also appoint a representative for the child, such as an amicus attorney or an attorney ad litem.. Even after issuing a final order, a trial court may act to protect the safety and welfare of a child by issuing protective orders, by issuing temporary orders during an appeal, by ruling on motions to modify, or through habeas corpus proceedings, again upon proper motion.

While instigating any of the protective measures described above or elsewhere in the Family Code does not allow a trial court to conduct a broad best interest inquiry in ruling on a motion to enter judgment on an MSA under section 153.0071, it may warrant the trial court's exercise of discretion to continue the MSA hearing for a reasonable time. This allows the trial court, upon proper motion, to render any temporary orders that might be necessary and to determine whether further protective action should be taken. In the event the trial court involves DFPS, a continuance will provide the court with the benefit of the resulting investigation.

Finally, we note that the Legislature's choice to defer to the parties' best interest determination in the specific context of mediation recognizes that there are safeguards inherent in that particular form of dispute resolution compared to various other methods of amicably settling disputes. Under Texas law, "mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them." TEX. CIV. PRAC. & REM.CODE § 154.023(a). To qualify for appointment by the court as an impartial third party when a case is referred to an alternative dispute resolution procedure like mediation, a person must meet certain requirements for training in alternative dispute resolution techniques. *Id.* § 154.052(a). To qualify for appointment "in a dispute relating to the parent-child relationship," the person must complete additional training "in the fields of family dynamics, child development, and family law." *Id.* § 154.052(b). Significantly, all participants in the proceeding, "including the impartial third party," are subject to the mandatory DFPS reporting requirements discussed above. *Id.* § 154.053(d). Thus, the process itself is geared toward protecting children.

In sum, we hold today that a trial court may not deny a motion to enter judgment on a properly executed MSA under section 153.0071 based on a broad best interest inquiry. But we certainly do not hold that a child's welfare may be ignored. Rather, we recognize that section 261.101's mandatory duty to report abuse or neglect, the numerous other statutes authorizing protective action by the trial court, and the safeguards inherent in the mediation process fulfill the need to ensure that children are protected. And they do so without subjecting MSAs to an impermissible level of scrutiny that threatens to undermine the benefits of mediation.

The trial court's authority to continue an MSA hearing and to take protective action under the various statutes discussed above is triggered not by a determination that an MSA is not in a child's best interest, but by evidence that a child's welfare is in jeopardy. Thus, the mediation process and its benefits are preserved, and, most importantly, children are protected.

V. The MSA in This Case

The MSA in this case contains a broad range of provisions governing conservatorship of the child, responsibility for health insurance and medical expenses for the child, child support, possession of and access to the child, and allocation of other parental rights and duties. Included among these is the protective provision enjoining Scott from being within five miles of the child at all times, requiring Stephanie to provide Benjamin with information on Scott's whereabouts during her visits with the child, and allowing Benjamin to monitor compliance with the provision. Compliance with the MSA, then, means the child will have no contact with Scott.

As is relevant to section 153.0071, the MSA is

signed by the parties and their lawyers, and it displays in boldfaced, capitalized, and underlined letters that it is irrevocable; thus, it meets the statutory requirements described in that statute to make the agreement binding on Stephanie and Benjamin. Additionally, the parties admit that Benjamin was not a victim of family violence, and thus the exception in subsection (e–1) does not apply. The trial court nevertheless denied the motion to enter judgment on the MSA and set the matter for trial based on the court's conclusion that the MSA was not in the child's best interest. Because section 153.0071 did not permit the court to do so, the court's actions were an abuse of discretion.

VI. Additional Response to the Dissent

The dissent claims that the Court's holding compels trial courts to disregard the fundamental public policies of protecting children from harm and acting in their best interests. Nothing could be further from the truth. Rather, we are respecting the Legislature's well-supported policy determination, reflected in the plain language of the MSA statute, that courts should defer to the parties' determinations regarding the best interest of their children when those decisions are made in the context of a statutorily compliant MSA.

As discussed above, the harmful effects of litigation in family disputes are well-documented, leading the Legislature to vigorously promote the avoidance of such litigation. This is particularly so when the parties reach agreement pursuant to the mediation process, which is itself designed to ensure that children are protected. The dissent engages in a tortured reading of the MSA statute, flouts well-settled principles of statutory interpretation, and ignores the ramifications of discouraging mediation. And it does so unnecessarily, as our children's welfare can, and indeed must, be protected at the same time that the mediation process and its benefits are preserved.

The dissent dismisses our concern that allowing statutorily compliant MSAs to be set aside on best interest grounds will interfere with the state policy favoring peaceable resolution of family disputes and will discourage parties from engaging in mediation. We disagree, as (apparently) did the Legislature in failing to include a best interest determination as a prerequisite for or barrier to entry of judgment on an MSA. Why would parties spend considerable time, effort, and money to mediate their dispute in accordance with the statutory requirements when the trial court could very well decide to hold a full trial on the merits anyway? The dissent's claim that this will happen only in rare cases simply is not supportable.

To that end, a trial court's determination that an MSA is not in a child's best interest is not dependent upon, or equivalent to, a finding that the child has been harmed by abuse or neglect or is in danger of such harm. Rather, "best interest" is a term of art encompassing a much broader, facts-and-circumstances based evaluation that is accorded significant discretion. *See* *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex.1976) (identifying nine factors that may be considered in determining best interest).

Under the dissent's interpretation, the trial court would thus have significant leeway, in contravention of the statute's intent, to decide when entry of judgment on a statutorily compliant MSA is or is not appropriate. The possibility that this would lead to an increase in child-related litigation is very real, as parents would be encouraged to contest on best interest grounds the very agreements that they freely entered into through mediation. Even more concerning, parents would be discouraged from using the mediation process to begin with, out of concern that their agreements could be ignored and their efforts wasted.

Ultimately, the dissent's suggestion that enforcing section 153.0071 as written leads to an absurd result falls flat. If it were indeed the case that our interpretation would leave trial courts with no ability to protect a child from an MSA that put a child's welfare at risk, we would agree with that suggestion. But as discussed at length above, that simply is not the case, as trial courts have numerous tools at their disposal to protect children that operate in conjunction with, rather than in opposition to, the mandate in section 153.0071.

VII. Conclusion

Because the MSA in this case meets the Family Code's requirements for a binding agreement, and because neither party was a victim of family violence, we hold that the trial court abused its discretion by denying the motion to enter judgment on the MSA. Accordingly, we conditionally grant mandamus relief. We order the trial court to withdraw its orders denying entry of judgment on the MSA and setting the matter for trial. We are confident that the court will comply, and the writ will issue only if it does not.

Justice GREEN filed a dissenting opinion, in which Chief Justice JEFFERSON, Justice HECHT, and Justice DEVINE joined.

Justice GUZMAN, concurring.

I write separately because although I agree with Court that section 153.0071 precludes a broad best-interest inquiry, I also believe that it does not preclude an endangerment inquiry. The Court fails to address the endangerment inquiry, but I believe the issue is critical because the facts of this case potentially implicate the inquiry—discussion of which provides much-needed guidance to trial courts.

I agree with the Court that mandamus is appropriate because there is legally insufficient evidence of endangerment to support the trial court's decisions to set aside the MSA and place the matter on its trial docket. The trial court sustained a hearsay objection to the only statement at the hearing that could have demonstrated the mother might not comply with the MSA (a statement from the father that the mother informed him after signing the MSA that she did not have to inform him of her and her husband's whereabouts). Thus, this record is sparse and does not establish the threshold I believe must be met before a trial court may disregard legislative policy concerning the deference to which MSAs are entitled.

Accordingly, I believe the trial court abused its discretion and therefore join the Court's decision to conditionally grant mandamus relief as well as all but Parts IV and VI of the Court's opinion. If on remand the trial court considers evidence and finds that entry of judgment on the MSA could endanger the child, I am certain the trial court will take appropriate action.

Justice GREEN filed a dissenting opinion, in which Chief Justice JEFFERSON, Justice HECHT, and Justice DEVINE joined.

[NOTE: As of early October, the dissenting opinion was not available on Westlaw.]

Justice Frank G. Evans Award
Selection Criteria Policies and Procedures

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

Recipients

2012 Lionel M. Schooler & John C. Fleming
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2006 Michael J. Schless
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2003 Honorable John Coselli
2002 Gary Condra
2001 John Palmer
2000 Suzanne Mann Duvall
1999 C. Bruce Stratton
1998 Professor Edward F. Sherman
1997 The Honorable Nancy Atlas, Judge, Southern District of Texas
1996 Bill Low, First Non-Attorney Recipient
1995 Professor Kimberlee Kovach

NOMINATION FORM

JUSTICE FRANK G. EVANS AWARD

Presented by the

Alternative Dispute Resolution Section - State Bar of Texas

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

Nominee (Print)_____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ FAX: _____ E-Mail: _____

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

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

_____

_____

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

_____

_____

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

_____

_____

5. List the number of years that the nominee has been a member of the ADR Section of the State Bar. Describe in detail the extent of involvement:

_____

_____

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

_____

_____

_____

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

_____

_____

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

_____

_____

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

_____

_____

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

_____

_____

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_____

Nominated by:_____

Signature: _____ Date: _____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ FAX:_____ E-Mail: _____

Signature: _____ Date: _____

Note: Nominations must be received by March 1, 2014. Submit nomination packet to Alvin Zimmerman: electronically to azimmerman@zimmerlaw.com, or mail to: Alvin Zimmerman, 3040 Post Oak Blvd., Suite 1300; Houston, Texas 77056-6560

Report to the ADR Section Council Texas Mediator Credentialing Association September 21, 2013

By Joey Cope

The Texas Mediator Credentialing Association is an initiative built on years of effort by various mediator groups, including the **Alternative Dispute Resolution Section of the State Bar of Texas**, the Center for Public Policy Dispute Resolution at the University of Texas School of Law, the Texas Association of Mediators, the Texas Mediation Trainers Roundtable, the College of Texas Mediators, the Texas Dispute Resolution Centers Director's Council, the Association of Attorney Mediators and numerous other mediation organizations and individuals throughout Texas who have donated time and energy to establish voluntary, statewide credentialing.

Members of these organizations, along with representatives of the public, the judiciary, and education, worked together over a 7-year period to develop the first statewide, voluntary, multi-disciplinary credentialing program in the country. This unique and innovative multi-tiered approach adopts standards of practice and a code of ethics for mediators, while at the same time educating the public on the benefits of mediation and the availability of a grievance process at no cost to the public or the consumer.

Membership.

As of September 19, 2013, the TMCA had 419 members distributed through the following membership tiers:

124 Credentialed Distinguished Mediators
85 Credentialed Advanced Mediators
96 Credentialed Mediators
114 Candidates for Credentialed Mediators

Annual dues for membership:

$150 Credentialed Distinguished Mediators
$125 Credentialed Advanced Mediators
$100 Credentialed Mediators
$50 Candidates for Credentialed Mediators

TMCA's 9th Annual Symposium

October 19, 2013 – 8 a.m. to 5 p.m.
Joe C. Thompson Conference Center
University of Texas, Austin

Featured speakers: C. Richard Barnes (former director of Federal Mediation and Conciliation Service) and Michael McMillion (FMCS Mediator) will be presenting "From Good to Great! Negotiating Skills in Mediation.

$120 for current credential holders
$150 for non-credential holders
(fee includes registration, online access to materials, breakfast, lunch, and snacks)

Registration forms at http://txmca.org

Joey Cope is a former Chair of the ADR Section, and currently (through December 2014) as the Representative of the Section to the TMCA Board of Directors.

Litigators Needed to Advise Transactional Lawyers on Litigation Prenups

By Donald R. Philbin, Jr.

Even before the U.S. and Texas Supreme Courts handed down *AT&T v. Conception*, 131 S.Ct. 1740 (2011), and *NAFTA Traders, Inc. v. Quinn*, 339 S.W.3d 84 (2011), dispute resolution options needed to be thin-sliced to effectuate the ends of a deal. What began with Chief Justice Warren Burger's call to the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* and Professor Frank Sander's "multi-door courthouse" keynote in 1976 ("Pound Conference") has developed into a wide range of dispute resolution options, each with strengths and weaknesses. Deal lawyers would benefit from the nuanced advice of trial lawyers as they tailor litigation prenups to specific transactions.

In *AT&T v. Conception*, the U.S. Supreme Court held that California state contract law, which deems class-action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act ("FAA") because the law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. After *Conception*, commentators began to wonder aloud if attorneys would be committing malpractice not to advise business clients to include class action arbitration waivers in all consumer contracts.

The Texas Supreme Court may have addressed the most frequent complaint about arbitration - the lack of meaningful judicial review after the U.S. Supreme Court's *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008) decision - by going a different direction under the Texas Arbitration Act ("TAA") in *NAFTA Traders*. In a survey of general counsel, preserving the right to appeal was the *only* factor cited by a majority as discouraging arbitration – notably, in large dollar cases.

While these cases highlight the need to periodically audit dispute resolution procedures, there are a number of factors impacting how these clauses are designed. The focus of this article is on empirical data collected since the Pound Conference that may help inform the choices embedded in such clauses.

Arbitration: A Short History

Commercial arbitration dates back to at least the 13th century and predated the American Revolution in New York and several other colonies. George Washington included an arbitration provision in his will and the Texas Constitution of 1845 recognized it. By 1927, the American Arbitration Association's ("AAA") Yearbook of Commercial Arbitration listed over 1,000 trade associations that had systems of arbitration. Arbitration is the preferred dispute resolution mechanism in international disputes primarily because non-resident parties distrust the legal systems of foreign countries, and the New York Convention actually makes arbitration awards more enforceable than the judgments of domestic courts across national borders.

Historically, Anglo-American courts refused to enforce arbitration agreements, jealously guarding their dispute resolution monopoly" In 1920, New York merchants and lawyers were successful, in enacting legislation requiring courts to defer to arbitration. Congress resolved inconsistent treatment of arbitration provisions across state lines in 1925 by adopting the New York approach in the FAA.

The FAA supplies the substantive rules for deciding whether to uphold an arbitration agreement, stay judicial proceedings, compel arbitration, and confirm, vacate or alter the award. The *principal purpose* of the FAA is to ensure that private arbitration agreements are enforced according to their terms.

By 1984, the U.S. Supreme Court had formally announced a "new arbitrability regime." Though the Court had already required fraudulent inducement

allegations to be directed to the arbitrator unless those allegations solely attacked the arbitration clause, rather than the larger contract containing it (*Prima Paint* "separability doctrine"), it wasn't until 1984 that the Court finished what Congress had started by preempting inconsistent state substantive law with what many had thought to be a procedural statute. The Court further held that Congress invoked the full preemptive power of the Commerce Clause, stated a "national policy favoring arbitration," and resolved "any doubts concerning the scope of arbitrable issues" in favor of arbitration.

This national policy favoring arbitration later extended into statutory claims, including Truth in Lending, Age Discrimination in Employment Act, securities, and anti-trust. It has also been held to cover fraudulent inducement, tortious interference and intentional infliction of emotional distress, defamation, the Texas Deceptive Trade Practices Act, breach of fiduciary duty and conversion, personal injury/wrongful death, and wrongful discharge (*Sabine Pilot*). Employment arbitration grew dramatically in the wake of the Court's 1991 *Gilmer* decision. The number of workers covered by nonunion arbitration procedures now exceeds those covered by union representation.

So, in a few short decades we have gone from a suspicion of arbitration as a method of weakening the protections afforded in the substantive law to a strong endorsement of the federal statutes favoring this method of resolving disputes. The result has been a "massive shift from in-court adjudication to arbitration" during a period that roughly parallels various critiques of discovery related costs. For instance, in 1989 Judge Frank Easterbrook suggested "abandoning notice pleading" in order to put some preliminary assessment of the merits ahead of the decision about discovery in *Discovery As Abuse* article, 69 B.U. L. Rev. 635 (1989). The Supreme Court cited that article in raising the pleading bar in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554 (2007).

Other recent efforts to address civil justice issues in litigation and arbitration have been convened under high sounding titles: *The Future of Civil Litigation* at the Sedona Conference; *American Justice as a Crossroads: A Public and Private Crisis* at Pepperdine Law; and the *2010 Civil Litigation Conference* convened by the Judicial Conference Advisory Committee on Civil Rules at Duke Law ("Duke Symposium"). A number of studies were prepared in the run up to these conferences by the American Bar Association Litigation Section (ABA Litigation), the Federal Judicial Center (FJC), the RAND Institute for Civil Justice, Lawyers for Civil Justice (LCJ), the National Employment Lawyers Association (NELA), the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS). With the exception of mediation, which has benefited from dissatisfaction with both litigation and arbitration, no method of resolving disputes has escaped criticism.

So arbitration is included in a wider variety of contracts than at any time, and, yet, it has never been subject to wider criticism. By the 21st century, arbitration had become a wide-ranging surrogate for trial in a public courtroom, and arbitration procedures had become more and more like the civil procedures they were designed to supplant — including pre-hearing discovery and motion practice. The fair-haired child of the post-Pound era had "grown into a troubled teenager." In fact, long-time arbitration guru Tom Stipanowich notes that "criticism of American arbitration is at a crescendo." That criticism comes from several quarters, but our focus here is on the commercial context.

Much of this criticism stems from standard arbitration procedures that have taken on the trappings of litigation - extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost. As one general counsel explained: "If you simply provide for arbitration under [standard rules] without specifying in more detail ... how discovery will be handled ... you will end up with a proceeding similar to litigation."

Professor Stipanowich notes that the latest edition of the American Institute of Architects construction forms eliminates binding arbitration as the default procedure, as have other form contracts. Parties now have to opt-in to arbitration with a check-box rather than it appearing as the default. And Stipanowich and others note that "'e-discovery' looms as the ultimate test for arbitration as an alternative to court." Of course, e-discovery hovers over litigation to such an extent that one distinguished Federal District Judge, Royal Furgeson, observed (in an e-mail to the

author) after *Twombly* and *Ashcroft v. Iqbal* that: Discovery has become such an over-riding issue with federal judges that it is having a spillover effect on the rest of the civil justice system, and especially on pleading. Both *Twombly* and *Iqbal* illustrate this. If trial lawyers and magistrate and district judges do not deal better with discovery, I predict that the appellate courts will eventually become so concerned that they will dictate additional changes to the civil justice system, perhaps even more problematic than *Twombly* and *Iqbal*. The time to act is now."

Modern Transformations

The 2011 RAND survey of general counsel found that arbitration is becoming increasingly like litigation. Douglas Shontz, Fred Kipperman & Vanessa Soma, *Business-to-Business Arbitration in the United States* (RAND 2011), In the international context, this is often called the Americanization of arbitration, allegedly importing "brass knuckle" techniques "that are so alarmingly familiar in American courts." That metamorphosis imbued arbitration with the "style, technique, and training" of these lawyers, who often made tactical use of discovery, choice of law, venue, and other variables. One commentator has tied American influence on international arbitration to the "meteoric rise of the American law firm in the global market place." Whatever its cause, this view was prominent enough by 2003 that the Ohio State Journal on Dispute Resolution published a symposium on *The Americanization of International Dispute Resolution,* 19 Ohio St. J. Disp. Resol.1 (2003).

Concepcion was decided in the consumer class action context where at least one third of major consumer transactions are covered by arbitration clauses. And while companies have in the past inserted unconscionable arbitration provisions into form contracts, they now seem to be rushing to make them fair in an effort to withstand scrutiny.

Pace Law Professor Jill Gross has asked her ADR class to bring their consumer or employment agreements to class to discuss the provisions. Historically, they had no problem locating unfair, unreasonable, or arguably unconscionable provisions in at least one of the agreements. "This year, for the first time," she reported, "no student in my class (31) could identify an arguably unconscionable provision in a pre-dispute arbitration clause." The clauses "contained 30 day opt-out provisions, references to due process protocols, mechanisms to choose consumer-friendly venues for arbitration hearings, and remedy-preserving terms."

Nebraska Professor Kristen Blankley reports similar findings, with the exception of a rise in class action waivers within the arbitration clause. The AT&T clause at issue in *Concepcion* provided for procedures to keep costs very low and even guaranteed claimants a $7,500 minimum recovery if the arbitrator's award was greater than AT&T's last written settlement offer. Gross attributes these changes to "judicial policing of the one-sided arbitration clause."

Faster, Simpler, and Cheaper?

Proponents have long claimed that arbitration is faster (74%), simpler (63%), and cheaper (51%) than litigation. Only eight percent reported that arbitration was more expensive than litigation in the Harris survey. In a 1998 survey, Lipsky and Seeber found that most respondents believed that businesses used arbitration clauses to save both time (68.7%) and money (68.6%). Indeed, the U.S. Supreme Court found that arbitration is cheaper than litigation by turning to Congressional declarations in the Patent and Trademark Office appropriations bill of 1982 (*Allied-Bruce*, 513 U.S. at 280):

"The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices; and, arbitrators are frequently better versed than judges and juries in the area of trade customs and the technologies involved in these disputes."

These observations may be showing their age given the changes in arbitration practice.

In their employment case study, Eisenberg and Hill found that the time to final hearing was about three times faster in arbitration than in court. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003-JAN. 2004, at 5. Lower pay employees average time to award on civil rights claims (262 days) was faster than higher pay employees (383 days) and both were significantly faster than time to trial in state (818 days) and federal (709 days) court. Non-civil rights cases were also disposed of three times more quickly in arbitration with lower pay employees (233 days) and higher pay employees (271 days) than they were in the state court basket of cases (723 days).

Colvin's more recent study found that arbitration was only twice as fast as litigation, because the mean time to disposition had increased to 362 days, but 59% settled pre-hearing at the 284 day mark. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIR. LEGAL STUD. 1, 8 (2011). The RAND survey of general counsel with significant litigation but less arbitration experience (25% had never attended an arbitration) found that arbitration is somewhat better than litigation in the business-to-business context (52%), saves money relative to litigation (60%), and saves time compared to litigation (59%).

Interestingly, the removal of an arbitration clause never (51%) or rarely (39%) affected the price charged to a customer. Nancy S. Kim & Chii-Dean Lin, *Arbitration's Summer Soldiers Marching Into Fall: Another Look at Eisenberg, Miller, and Sherwin's Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 34 VT. L. REV. 597, 611 (2010). And, though changes to an arbitration clause could be material under Section 2-207 of the Uniform Commercial Code, the Second Circuit held that "the inclusion of an arbitration provision in a contract did not constitute a material alteration."

If arbitration is in fact cheaper than litigation, one would expect the removal of such a clause to be material and result in a price adjustment. Claire A. Hill, *Bargaining in the Shadow of the Lawsuit, A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 207 (2009). All of which led Eisenberg to conclude that corporate defendants are "less concerned about, and in need of less protection from, litigation than the Supreme Court's *Twombly* and *Iqbal* decisions suggest."

RAND also identified a perception that arbitration is a more just process. Harris also found that arbitration participants were satisfied with the fairness of the process (75%) and outcome (72%). Harris Interactive Inc., ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION, conducted for the U.S. Chamber Institute for Legal Reform, April 2005 at p. 5. Lipsky and Seeber found that 60% believed arbitration provided a more satisfactory process than litigation.

But there are persistent questions about whether corporate users really buy into these broad perceptions. Eisenberg found much higher use of mandatory arbitration clauses in consumer contracts (77%) than in "material" contracts disclosed to the Securities and Exchange Commission (6%). And while mandatory arbitration was the dispute resolution mechanism of choice in employment matters generally (79-93%), arbitration clauses were less prevalent in individually negotiated CEO employment contracts (42%). Randall Thomas, Erin O'Hara, and Kenneth Martin, Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis, 63 Vand. L. Rev. 959, 968 (2010).

Eisenberg has repeatedly shown that firms inject arbitration clauses into their contracts with consumers and lower pay employees much more frequently than they do with their executives and other sophisticated businesses. For employees who earn under $60,000 per year, arbitration, not litigation, is their only realistic dispute resolution option due to employer imposed clauses. But that could be a benefit if arbitration were in fact procedurally less daunting than litigation, because lower pay employees may not have access to counsel. The ACTL and ABA litigation studies so conclude, and Eisenberg & Hill agree.

But if that were the case, employees would elect arbitration post-dispute and there would be no need for take-it-or-leave-it clauses pre-dispute. Eisenberg contends that the "systematic eschewing of arbitration clauses in business-to-business contracts also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses." Professor Carrington argued that the Su

preme Court has used procedural law to "weaken the ability of citizens to enforce substantive laws enacted to protect them from business misconduct."
The Supreme Court's decisions rewriting the Federal Rules of Civil Procedure, in disregard of the role of other branches of government and to protect business interests from the costs associated with effective private enforcement of public law, should not be viewed in isolation. While the Court was rewriting Rule 56 and then Rule 8 (texts that it had promulgated in 1938) to ease the concerns of business interests, it was pursuing the same political objective in its rewriting of the FAA. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 597 & 568 (2010). There are moves in Congress to reverse many of those decisions, and the new Consumer Financial Protection Bureau may attempt to ameliorate others.

Several studies have compared win rates and damage awards in arbitration and litigation. Since we can't run the same case through both the litigation and arbitration systems, these studies inherently compare apples with oranges and the relatively small data samples add wrinkles. Some studies suggest that employee win rates are higher in arbitration. Maltby reported that "employees prevailed in 63% of arbitrations compared to 15% of court cases." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 31 (1998).

Using 1,430 federal court, 160 state court, and 297 AAA arbitration matters alleging employment discrimination, Eisenberg and Hill found little evidence that arbitrated outcomes materially differ from trial outcomes for higher paid employees. But the data is not uniform and the results are not as strong for lower payed employees who were more likely to assert discrimination or other statutory causes of action rather than the breach of contract claims arising out of the executives' individually negotiated agreements. In civil rights claims, Eisenberg and Hill found higher pay employees prevailed in arbitration more often (40%) than lower pay employees (24%). Considering the sample size, those figures may be within the margin of error compared to composite employee success rates in state (44%) and federal (36%) discrimination litigation.

In non-civil rights claims, where the sample size was more statistically relevant, the lower pay employee win rate (39.9%) was at the state and federal discrimination win rate, while the higher pay employees bested those rates in arbitration (64.9%). In a 2011 published study of 3,945 AAA administered employment cases, Colvin found an employee win rate of 21.4%, which is below the earlier court win rate. And the court win rate probably falls when motions to dismiss and for summary judgment are factored into the results.

The dollar amount of the awards also reflected the pay and claim type differentials. Higher paid employees received higher arbitration awards on their non-civil rights claims ($211,720), presumably breach of contract, and lower paid employees obtained higher arbitration awards on their civil rights claims ($259,795). Average civil rights arbitration awards for lower ($259,795) and higher ($32,500) pay workers were lower than the basket of state ($478,488) and federal ($336,291) claim judgments the authors used for comparison. Non-civil rights claims inverted. Higher pay employees did better ($211,720) in this category than lower pay employees ($30,782), but both did worse than the state court basket ($462,307).

Colvin later found the mean employment arbitration award to be $109,858, below the federal and California averages in his study. As with Eisenberg's studies, Colvin found that higher pay workers won higher awards ($165,671) more often (42.9%) than lower pay workers (22.7% and $19,069, respectively). Workers in Colvin's middle band ($100K - $250K), fell in between (31.4% and $64,895, respectively).

Delikat and Kleiner's study of securities industry employment outcomes showed that the median arbitration award ($100,000) was roughly comparable to the mean federal court trial judgments ($95,554). Outside of the employment context, there were no differences in awards between arbitration and litigation. Eisenberg and Hill concluded that "[a]rbitrator-juror comparisons in non-employment contexts provide no empirical evidence of systematic juror-arbitrator differences."

Anecdotally, we can easily recall cases that deviate from statistics showing similar results in arbitration

and litigation. For instance, in *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2007), the owner of a $243,000 home was awarded $800,000 in arbitration over serious structural and drainage issues. Indignant that an arbitrator could award more than three times the purchase price of the home, Perry Homes sought and obtained vacatur from the Texas Supreme Court on a waiver theory. A Tarrant County jury then awarded the homeowner $58 million. On the other hand, after Senator Al Franken passed an anti-arbitration amendment to the Department of Defense Appropriations Act of 2009 in honor of Jamie Leigh Jones and the Fifth Circuit exempted certain claims from the arbitration provision in her employment contract, Ms. Jones lost in a jury trial.

The statistical and anecdotal results highlight one reason general counsel tend to favor arbitration with its flaws: tighter standard deviations. The state court basket of cases and the lower pay employee civil rights recoveries had very high standard deviations - exactly what the general counsel in the RAND survey aimed to limit with the use of arbitration. RAND noted: "corporate counsel may essentially be weighing the benefits of confidentiality and experienced decisionmakers against the costs of a potentially smaller award - even if that cost is not real."

Whether in litigation or arbitration, there is a concern that repeat players not gain advantage relative to one-shot participants. These concerns are heightened in the employment context because employers are systematically more likely to be repeat players - individuals have few employers but employers have many employees.

Lisa Bingham began to identify a repeat player effect in a series of studies in the 1990s. Using relatively small AAA samples, she found some evidence that employers participating in multiple arbitrations either got good at it or arbitrators tried to curry favor with the repeat players through their awards. Other commentators criticized those studies noting that there were several reasons repeat play improves performance other than arbitrator bias. They divide into two groups.

The practice-makes-perfect group that includes more resources, greater expertise, better policies informed by lots of experience, and the adoption of internal grievance procedures to address claims before they escalate to filed matters. The other group suggests that arbitrators are either biased because they hope to be selected in future cases or that employers know more about the arbitrators through repeat play than do the one shot players.

These concerns are often ameliorated by strict disclosure requirements. Colvin sliced and diced the data several different ways, and others will take issue with his assumptions, to show that the employee win rate with repeat employers (17% and 12.0%) was roughly half what it was with single shot employers (32% and 23%). He further found that average damage awards dropped from $27,040 to $7,450 in cases with repeat play employers.

With dismissals and summary judgments trending up in federal practice, some wonder if there is a structural impediment to similar results in arbitration. The RAND survey noted that "arbitrators have low incentive to control the amount of discovery or time spent on pre-hearing disputes because they are paid by the hour." Other interviewees thought the parties might be "extending the process because arbitration awards generally cannot be appealed."

The tension, of course, is with due process and vacatur. As Stipanowich puts it, "since arbitrators are subject to vacatur for refusal to admit relevant and material evidence, some may draw the inference (not established by law) that a failure to grant court-like discovery is an inherent ground for vacatur." Though the FAA controls in most instances, the "finality" of arbitration awards varies considerably among jurisdictions. During a 2004 survey of federal and state vacatur opinions, Mills found that federal courts granted only six of sixty-one motions, but the courts of California, New York, and Connecticut vacated awards about one-third of the time. Lawrence R. Mills, et al., *Vacating Arbitration Awards*, Disp. Res. Mag., Summer 2005, at 23.

Texas, on the other hand, was in a group of nine states that granted only one vacatur during the nine months sampled. The most common successful ground for vacatur was "exceeded powers" (21%), and only two of 52 (3.8%) were granted for manifest disregard, which some now suggest is a subset of "exceeding powers" after *Hall Street* Of course, counsel can agree upon a discovery plan, often with the general counsel making cost / benefit tradeoffs

There is a persistent perception that arbitrators tend to "split the baby," trying to give each side a partial victory (and therefore partial defeat), rather than make a strong ruling for fear of alienating one of the parties. Richard A. Posner, J*udicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1260-61 (2005). Seventy-one percent of the general counsel recently surveyed by RAND held this view, though respondents who used arbitration clauses most frequently disagreed. And this may well be a case where cognitive shortcuts highlight the most memorable cases even if empirical research shows a different trend in larger data sets.

Keer and Naimark did find the mean arbitration award to be 50.53% of the amount demanded, but the results were bimodal - the largest percentage of awards clustered at the ends (barbell graph) because most arbitrators either granted or denied the requested relief in total. Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby": Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573 (2001). The AAA analyzed 111 of its awards in 2009 to see if it could confirm this broadly held perception. It found that:

- 7% awarded approximately half (41 - 60%) of what was claimed;
- 41% awarded more than 80% of the claimed amount; and
- 19% denied the claims completely.

One of the biggest reasons general counsel favored contractual arbitration in the RAND survey was confidentiality (59%). Not only does confidentiality reduce publicity over the dispute and its outcome, it reduces the risk of divulging trade secrets or other commercially sensitive information. Of course, parties desiring confidentiality must contract for it. One RAND respondent went so far as to say that "they accept the risk of spending potentially larger amounts of money on arbitrators and outside counsel to keep the details of a commercial dispute secret."

There are statutory and practical exceptions to confidentiality, however. California state law, for instance, requires organizations that provide arbitration services to report "the name of the employer; the name of the arbitrator; filing and disposition dates; amounts of claims; amounts awarded; and fees charged" for cases nationally. Colvin and others argue that more data ought to be available to help researchers and policy makers.

Even with confidentiality clauses, however, the record of individual arbitrations have been laid bare in vacatur attempts in court. Limiting bad publicity ties back into general counsels' concerns about predictability, and most view arbitration as more predictable - even if they unevenly seek that predictability. RAND notes that "predictability is an overarching concern of business - in terms of both the dispute's outcome and the indirect effects of potentially bad publicity."

Confidentiality comes with social costs - a loss of transparency and a reduction of common law precedent. University of Houston Law Professor Richard Alderman notes that courts have developed doctrines like the warranty of good and workmanlike performance. Today's mobile home contract, he observes, would contain an arbitration clause. Some arbitrator would apply existing law, perhaps in secret. But new doctrine would not be court pronounced like it was in *Melody Home Manufacturing Co. v. Barnes,* 741 S.W.2d 349 (Tex. 1987). Indeed, arbitrators might exceed their powers by relying on arbitral common law unless the contract permits them to do so.

But the vast majority of arbitration matters, like their court counterparts, would probably not contribute to common law development anyway. The most recent Fifth Circuit statistics show that only 400 of 3,210 opinions in 2010 were published (12%).

And that's the tip of the iceberg since so few trial court cases are appealed: "In 2006 the [federal] trial courts terminated 198,646 cases, but parties commenced only 32,201" appeals, of which 12,338 were decided on the merits (6.2%). David A. Hoffman, Alan J. Izenman, and Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 Wash. U. L. Rev. 681, 702 (2007-2008).

As the writers put it, "notwithstanding the tremendous mass of litigation oozing up from below, the courts of appeal reversed or remanded a mere 1,891 cases." If 1,891 of 198,646 (1%) district court termi-

nations are reversed or remanded, and only three percent of all district court orders were found to be fully reasoned, a number that would be lower in state trial courts where publication rates vary, one might fairly argue that common law is already being developed by exception rather than statistical pool. And a much smaller percentage of the publishable opinions garner publicity.

In fact, few of the U.S. Supreme Court's 80 or so opinions each term are widely reported, and two-thirds are decided by a 7-2 margin or better. Of course, the main concern is that egregious cases will be shielded from public view and that several of the one-percent or fewer matters that could set precedent are being quietly determined in a conference room.

Perhaps the biggest objection to arbitration is the lack of judicial review of awards. In the RAND survey, "preserving the right to appeal was the *only* factor cited by a majority of respondents as discouraging arbitration (63%). Professor Rau attributes the use of expanded review provisions to a "desire to ensure predictability in the application of legal standards, a desire to guard against a rogue tribunal, or against the distortions of judgment that can often result from the dynamics of tripartite arbitration." This is of particular concern in "bet-the-company" cases. Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 Am. Rev. Int'l Arb. 225, 245 (1997).

Until recently, the Fifth Circuit recognized manifest disregard as a non-statutory ground for vacatur. In *Hall Street Associates v. Mattel, Inc.*, the U.S. Supreme Court held that parties cannot by contract expand the grounds for review under the FAA. But *Hall Street* did not foreclose the possibility that parties may be able to utilize other means of obtaining expanded review (arbitral panels) or that state statutes or judicial decisions could not provide safe harbors for such activities.

While other circuits have since held that manifest disregard of the law is subsumed within §10(a)(4) of the FAA (vacatur available where arbitrators exceed their powers), a panel of the Fifth Circuit went the other way by holding that since manifest disregard of the law had been defined as a non-statutory ground in the Fifth Circuit it could not survive *Hall Street*. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009).

The Texas Supreme Court, however, recently joined three other states (California, Connecticut, and New Jersey) in interpreting state arbitration statutes (the TAA is based on the Uniform Arbitration Act) differently than the Supreme Court interpreted the FAA, even though the provisions are similar. In *NAFTA Traders, Inc. v. Quinn*, 339 S.W.3d 84 (2011), the Court acknowledged that while it must follow *Hall Street* in applying the FAA, it was free to reach its own judgment with regard to the TAA. In doing so, the Texas Supreme Court noted that arbitration is first a creature of contract. And if the parties contracted for judicial review for reversible error, that could not be inconsistent with the TAA.

In *Quinn*, the arbitrator had applied federal law to sex discrimination claims brought solely under the Texas Commission on Human Rights Act. Noting that the Supreme Court did not discuss FAA §10(a)(4), which like TAA § 171.088(a)(3)(A) provides for vacatur "where the arbitrators exceed their powers," the Texas Supreme Court held that when the parties agree that the arbitrator should not reach a decision based on reversible error, the arbitrator exceeds her powers by doing so. So it reversed a decision based on the TAA where the arbitration agreement clearly involved interstate commerce and held that its decision was not preempted because the "lesson of *Volt* is that the FAA does not preempt all state-law impediments to arbitration; it preempts state-law impediments to arbitration agreements."

So the biggest complaint about arbitration may have been cured in Texas when "an agreement specifically states that it is to be governed by the" TAA. Of course, there are potential downsides to such a provision, and it may be preempted. Several arbitration providers have also responded to this criticism by establishing appellate arbitration procedures and appellate tribunals for those seeking review. With such appellate procedures, parties trade some speed and finality for the protection of a second-look.

Drafting Considerations

Assuming there is no panacea but a variety of options with strengths and weaknesses, the challenge

becomes how to advise dealmakers when they are drafting litigation prenups in the rush to consummate a deal. And, of course, there are competing interests at play. One contract formation theory suggests that drafting is a simple matter of economics - "the more time the parties spend negotiating and drafting the contract, the lower the probability that a dispute over meaning will arise, because more of the possible contingencies will be covered by explicit contractual language." Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1608 (2005). While elegant theory, perhaps necessity is more often the cause: Whether a dispute arises depends largely on whether one or both parties becomes unhappy in a relationship, which often turns on the world changing in the way the parties did not expressly anticipate.

So, the idea that parties agree on what they can at contract formation and imperfect dispute resolution alternatives force them to work out later disputes seems logical: "Deliberate ambiguity may be a necessary condition of making the contract; the parties may be unable to agree on certain points yet be content to take their chances on being able to resolve them, with or without judicial intervention, should the need arise." Id. at 1583.

Forum Selection

Forum is the best determinant of claim value. "Forum is worth fighting over because outcome often turns on forum," according to Clermont and Eisenberg. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2003). The plaintiff obviously gets the first crack at forum selection. If that choice is upset by removal, however, plaintiff win rates are "very low, compared to state court cases and cases originating in federal court."

Win rates in original diversity cases (71%) were double win rates in removed diversity cases (34%). The effect is more pronounced in venue transfer cases. "Plaintiff's win rate in all federal civil cases drops from 58%, calculated for cases in which there is no transfer, to 29% in transferred cases." Empiricists prove what litigators instinctively know - forum matters. Kevin M. Clermont, *Litigation Realities Redux*, 84 Notre Dame L. Rev. 1919 (2009).

Venue in Texas is often tied to the place of performance or designated in "Major Transactions." As David Harrell notes, "if the arbitration is to occur in a particular county, there needs to be some other performance in that county." He goes on to note that this does not "restrict parties' ability to employ a forum selection clause to agree to the jurisdiction and venue of another state." U.S. courts have typically ruled that contracts of adhesion with consumers are not automatically unenforceable, but they will be scrutinized for compliance with existing contract law and with notions of fundamental fairness.

Choice of Law

Choice of law also matters to empiricists. There are states who have distinguished themselves in certain substantive areas: New York in financial transactions, Delaware in corporate governance, etc. But the practitioner knows how difficult it is to the get the forum state court to apply the law of another state, and that might lead some to include an arbitration provision. It turns out that choice of law is inversely correlated with the decision to incorporate an arbitration clause.

Eisenberg and Miller suggest that if the parties believe a particular "state's law is highly efficient, that might be viewed as reducing the costs of litigation and providing a reason not to include an arbitration clause." Among the material contracts they studied, New York (47%), Delaware (14%), and California (7%) had the highest choice of law concentrations. Not surprisingly, "New York law was overwhelmingly favored for financing contracts, but also preferred for most other types of contracts." New York law (45.69%) was chosen thirteen times more often than Texas law (3.35%).

And forum tended to follow choice of law, with New York (41%) and Delaware (11%) chosen as the forum in the 39% of those material contracts specifying a litigation forum. Since the Texas Supreme Court has held that a general choice-of-law provision does not preclude application of the FAA, it would be better practice to designate whether the FAA or TAA is the governing arbitration law, even though

parties may not generally confer jurisdiction by agreement.

If state law is perceived to be highly efficient, arbitration clause usage falls. Only 4% of the contracts that chose New York law also chose arbitration, while 24% of those selecting California law did the same. When the company had a Texas place of business, arbitration clauses were used in employment contracts (57.1%) and merger agreements (26.1%) at higher rates than when the same types of contracts involved a California place of business.

Contract subject matter also correlates with choice of law. Where arbitration clause usage is higher (settlements, employment contracts, and licensing agreements), choice of law concentrations were found to be low. Arbitration usage also correlates with the "supposed unpredictability and unfairness of adjudication."

Eisenberg and Miller plot the Chamber of Commerce rank of each state against arbitration clause usage. Low numerical ratings by the Chamber corresponded to favorably-ranked state liability systems. At the time of the study (2002 data), Texas had the second highest Chamber score (behind Louisiana and only slightly worse than California). Arbitration clause usage was lower than Louisiana, but also lower than California, which had a slightly better Chamber score. Of course, other factors could impact these results. Crowded dockets, for instance, may result in higher arbitration utilization.

States and countries compete to attract business with their laws, including their arbitration statutes. The New York precursor of the FAA was part of a concerted effort to make New York a financial center. "New York's highest court has held that awarding punitive damages in an arbitration proceeding violated public policy," but California and most other jurisdictions went the other way even before the Supreme Court held that the New York position was preempted by the FAA.

The English Arbitration Act of 1979 was overtly designed to make the U.K. a friendly forum to arbitration. During its parliamentary debate, Lord Cullen asserted, "that a new arbitration law might attract to England as much as £500 million per year of "invisible exports," in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.'" Many have fretted that some variant of the Arbitration Fairness Act, recently reintroduced by Senator Al Franken, would have the opposite effect in the United States.

Subject Specific

Not only does arbitration clause usage vary based on forum and law choices, it varies by dispute. Drahozol's review of arbitration literature led him to identify "several types of disputes for which parties might well prefer litigation to arbitration: high stakes ("bet-the-company") disputes, in which the parties may fear an aberrational arbitration award subject only to limited judicial review; disputes in which the parties anticipate needing emergency relief, which arbitration is ill-suited to provide; and disputes in areas with clear and well developed law and contract terms, because the industry expertise of arbitrators is of less value and the limited judicial review in arbitration is more problematic." Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 436 (2010). Although arbitration providers have made provisions for emergency relief, it is often carved out of arbitration agreements.

Jury and Class Waiver

Arbitration "super" clauses are often critiqued as nothing more than jury waivers shrouded in federal preemption. Particularly in national contracts, drafters will opt for the single standard of the FAA rather than perform a state-by-state jury waiver analysis. As a result, pre-dispute arbitration clauses have become common in consumer contracts, especially in the telecommunications and financial services industries.

Jury trials are also more frequently waived in consumer and employment disputes than in material business-to-business ("B2B") contracts. This is consistent with RAND's finding that the risk of "excessive or emotionally driven jury awards encourages including arbitration clauses in B2B con-

tracts (75%). Yet, by constitutional dictate, juries decide the most complex cases - whether someone shall live or die in a capital case.

Perhaps class waivers are even more important to contract drafters. Even before *Conception*, Sherwin noted that "every consumer contract with a mandatory arbitration clause also included a waiver of the right to participate in class-wide arbitration, and 60 percent of consumer contracts with mandatory arbitration clauses provided that in the event of class arbitration, the arbitration clause would no longer be effective." So the drafters only wanted arbitration if it precluded class relief.

This data lent support to the argument that a significant motive for mandatory arbitration clauses in consumer contracts is to prevent aggregation of consumers' claims. As Eisenberg concluded from another study, "Our data suggests that the frequent use of arbitration clauses in the same firms' consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution." Since arbitration "super-clauses" are protected by a strong federal policy, these waiver clauses seemed like calculated bets that paid off in *Conception*.

In *AT&T Mobility LLC v. Conception*, the Concepcions entered into a contract for the sale and servicing of cellular telephones with AT&T. That contract "provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." The Concepcions later filed a complaint in the Northern District of California alleging false advertising and fraud because AT&T charged sales tax on a "free" phone. That action was consolidated into a putative class action. AT&T moved to compel arbitration.

Relying on California's *Discover Bank* rule, the trial court found that "the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions." The Ninth Circuit also found the class waiver in the arbitration provision to be unconscionable under *Discover Bank*.

Finding, again, that the FAA was "designed to promote arbitration," embodied a "national policy favoring arbitration," and a "liberal federal policy favoring arbitration agreements," the Supreme Court found that *Discover Bank* interfered with the FAA. So the Court held that the FAA preempted it. In doing so, the Court found that "the times in which consumer contracts were anything but adhesion are long past." The dissent argued that *Discover Bank* "'applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers"' and, therefore, does not discriminate against arbitration or offend the FAA.

Subject Matter Complexity

Subject matter complexity in B2B contracts encourages general counsel to use arbitration (59%). But while Eisenberg and Miller found that the subject matter of the contract does correlate with *ex ante* use of arbitration clauses, that decision did not turn on contract complexity. Employment (37%) and licensing (33%) bested even international contract (20%) usage and use in settlement agreements (17%), and merger agreements (19%) topped the average (11%) in the material contracts they studied. In another study, almost 90% of international joint venture contracts included arbitration clauses. Over three-quarters of consumer agreements provided for mandatory arbitration but less than 10% of the firms' material non-consumer, non-employment contracts included arbitration clauses, according to another Eisenberg study.

Rise of Specialized (Often Business) Courts

Some states are developing specialized courts that deal with complex matters. Federal courts are also trying specialized courts, like H.R. 628 that allowed the Administrative Office to approve referral of patent disputes to certain judges in the Northern and Eastern Districts of Texas. As arbitration has become "arbigation," business courts illustrate the opposite trend - they provide an example of litigation become more like arbitration, what might be called the "arbitralization" of litigation. Business courts are typically divisions of larger courts, presided over by only a few specialist judges, with an emphasis on

aggressive case management and the use of alternative dispute resolution.

In 1997, an ad hoc committee of the ABA recommended that all states consider adopting some form of business court: "the movement toward specialized business courts" is "gaining strength," and "that there appears thus far to be no criticisms in jurisdictions where business courts have been established." Benjamin F. Tennille, Lee Applebaum & Anne Tucker Nees, Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases, 11 Pepp. Disp. Resol. L.J. 35, 38 (2010). The number of states with business or complex litigation courts went from one in 1992 to 19 in 2008. Studies of those courts have found that "creation of a business court tends to reduce how long it takes to resolve disputes."

Drahozol concludes that the "future of arbitration depends not only on arbitration but also on its competitors - the public courts, including business courts." Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 Cardozo J. Conflict Resol. 491, 507 (2009) While he would expect business courts to make litigation more attractive, the empirical evidence available at the time did not "show any significant move away from arbitration to business courts."

New York has created a commercial division to compete with Delaware Chancery Courts. "Chief Judge Judith Kaye explained that the purpose of the commercial division is to give the New York business community a level of judicial service 'commensurate with its status as the world financial capital.'" Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1486 (2009).

Gap Between Arbitration Expectations and Actual Experience

Markers favoring arbitration create high expectations, which are tough to meet. Professor Stipanowich has studied the criticisms of arbitration and authored the College of Commercial Arbitrators's Protocols for dealing with them. In two award winning articles, he explores what arbitration providers and users can do to bring arbitration back from the precipice. Several of the reasons he finds for the separation between expectations and experience can be closed with nuanced advice from litigators during deal formation. Stipanowich observes that most companies are reactive and *ad hoc* in dealing with conflict and, therefore, miss the opportunity to manage it before the contract is negotiated and drafted.

He further notes that "many transaction lawyers have little experience in mediation, arbitration, or other forms of dispute resolution" and that may factor into the drafting effort. Harrell observes that "parties rarely give sufficient consideration to how that arbitration will work. Their image of arbitration as a non-litigation panacea that will save time and money in the event of future disputes is often shattered when they realize that they put too little thought into how to shape resolution of those future disputes. That lack of planning often causes arbitration to cost more than, and take longer than, the default litigation would have required."

Of course, it's always hard to focus on how a divorce would be conducted in the middle of courtship. So parties intent on sealing a deal are reluctant to dwell on the subject of relational conflict. The easy answer, then, is plugging the standard clauses of various arbitration providers into the contract, which unsurprisingly adopt their procedural rules, and reduces the likelihood of friction with the other side during negotiation - but not later. But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, few readily available and reliable guideposts exist that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration.

Stipanowich notes that. in light of concerns about discovery and finality, providers are offering clauses for expedited case handling and appellate tribunal review. The problem is often magnified when a dispute arises under general clauses. According to the general counsel of FMC Technologies, "Arbitration is often unsatisfactory because litigators have been given the keys ... and they run it exactly like a piece

of litigation. It's the corporate counsel's fault for simply turning over the keys to a matter." Stipanowich claims that the most notable "trial-like approach in arbitration involves discovery."
The antidote then is to seek nuanced advice - often from litigators - that fits the forum to the fuss. Stipanowich calls it moving beyond "one-size-fits-all arbitration" to "fit the process to priorities": "no single set of commercial arbitration procedures can effectuate all of the goals that are important to business users in different kinds of cases." Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COMM. L.J. 383, 418-419 (2009). With increased frequency, a component of that advice is the inclusion of mediation in a step-clause (negotiation, mediation, and then binding arbitration).

Choice of Arbitration Provider

All arbitration providers are sensitive to these criticisms and are repeatedly holding training sessions for their arbitrators. They are also modifying rules and adding commentaries, like this one in the CPR Rules:

Arbitration is not for the litigator who will 'leave no stone unturned.' Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need.

It matters whether an arbitration is administered by a provider or self-administered by arbitrators selected from a panel. Both models include fees for the arbitrators. Administered cases also include administrative fees for the arbitral institution, which often scale based on the amount of the claim. Other models do not include up-front filing fees, but charge arbitrators a percentage of their hourly fee. The fees charged by some providers and arbitrators are a frequent source of criticism, especially relative to subsidized courts.

Colvin found the average fee resulting from AAA administered employment cases to be $11,070, though AAA shifts the bulk of those costs to employers using its services. Administrative fees in construction cases can run high and have been repeatedly tested by homeowners. And Drahozol found "dissatisfaction with the rules and costs of the AAA" among franchisors. Christopher R. Drahozal & Quintin R. Wittrock, *Is There a Flight From Arbitration?*, 37 HOFSTRA L. REV. 71, 71 (2009). Therefore, it matters which, if any, provider is selected and, like litigation, the individual arbitrators form the process.

Control Arbitrator Qualifications

A super-majority of RAND "respondents indicated that the ability to control the arbitrator's qualifications encouraged the use of contractual arbitration (69%). While that is consistent with the history of arbitration in the merchant context, some of the interviewees threaded this marker back through the jury waiver component: "companies do not want juries to try to interpret complex contracts in the course of reaching a verdict, so arbitrators with experience in contract law are better equipped to rule correctly."

Some interviewees said that "industry knowledge is a more important qualification because of the technical nature of disputes." Another study of FINRA arbitrations concludes that "arbitrators who represent brokerage firms or brokers in other arbitrations award significantly less compensation to investor-claimants than do other arbitrators." Yet, they found "no significant effect for attorney-arbitrators who represent investors or both investors and brokerage firms."

Active Management of Cases

In response to the criticisms above, arbitration providers are encouraging more comprehensive early status conferences with party representatives in attendance. There, if not before by agreement, choices are made between more process, and its expense, or more carefully tailored proceedings. As David Harrell notes, "discovery is the area in arbitration where parties can exercise the greatest cost savings." David E. Harrell, Jr., *Developing Alternative Dispute Resolution Programs*, STATE BAR OF TEXAS ADVANCED BUSINESS LAW SEMINAR at 10 Jul.

14, 2011). He goes on to offer some specific items that parties can limit or define in their arbitration agreements, or after the fact in status conference agreements, that are adapted here:

1. Mediation. Some providers will incorporate mediation into the process. Parties also write mediation into Step-Clauses that require that step prior to filing an arbitration demand.

2. Disclosure. Federal-type disclosures (parties, persons with knowledge, documents, damages).

3. Documents. Documents to be exchanged and timing for exchange. In some instances, parties must provide documents upon making a demand for arbitration and in responding to that demand.

4. Depositions. The number and length of depositions, types of depositions (individuals, third-parties, or corporate representatives), and the total time for depositions.

5. Written Discovery. Other forms of written discovery, such as interrogatories or requests for admissions.

6. Experts. The use of experts, including the time for designation and number of experts.

7. Timing. Specific deadlines to respond to the claimant's demand, engage in discovery, select a neutral or panel, file motions and have them heard, and hold hearings and issue awards.

8. Evidence. Since arbitration awards can be vacated for failure to hear evidence, its often futile to attempt to restrict or define the types of evidence admitted at an arbitration hearing.

9. Remedies. Is the arbitrator prohibited from issuing injunctive relief or allowed to make such an award? Does seeking injunctive relief in court waive arbitration? What about punitive damage and trebling awards? Would limiting the remedies otherwise available in court tip the unconscionability scales? What quality and level of evidence would be required? Can the panel award attorneys' fees?

10. Award Type. What type of award do the parties want? A simple award would resemble a final judgment while a reasoned award would require findings and conclusions.

11. Appellate Review. What, if any, appellate remedies are available? Judicial review under the TAA to the full extent of the court's power? Abuse of discretion? Appellate arbitral panel?

Providers are training arbitrators to streamline cases, much as the federal courts have done through the case management changes. Surveys show support for increased case management from an early stage.

Bench Trials

Several commentators have wondered why parties do not just waive a jury and proceed with a bench trial *in lieu* of litigating arbitration and then arbitrating or not. Harrell notes the advantages of selecting a forum and waiving a jury: it preserves an appeal, reduces costs, fixes venue, minimizes pre-dispute litigation, and preserves ancillary reliefCPR, a New York-based ADR think-tank that maintains a roster of neutrals but does not administer arbitrations, has published "The Model Civil Litigation Prenup" in an effort to allow streamlined bench trials. The Economical Litigation Agreement provides a nice list of drafting considerations, including discovery that scales with the size of the dispute, for any dispute resolution clause.

Mediation

Mediation has benefited from dissatisfaction with arbitration and litigation. Mediation provides a high degree of control to the parties and counsel over process and product, and that control translates into creative solutions that a court might not even be able to fashion as a remedy. Stipanowich calls "mediation the equivalent of a multi-functional Swiss-Army knife" among dispute resolution options. One general counsel, when asked why her company had turned from arbitration to mediation, responded: "Speed, cost, and control." Lament about the public and private dispute resolutions systems has translated into an "explosion of mediation." Survey "respondents strongly believed that mediation lowered

cost and time to resolution, and either increased the likelihood of a fair outcome or made no difference as to fairness." Lipsky and Seeber found that companies use mediation because it saves time (80.1%), money (89.1%), and preserves good relationships (58.7%).

And Professor Gross's class found that companies had required or strongly incentivized mediation prior to arbitration or litigation. As a result, many arbitration providers are enhancing their mediation panels and encouraging mediation during the pre-hearing conference.

Settlement Counsel

It's often tough to be the zealous advocate and be tasked with settlement. In fact, peace is rarely negotiated among the generals conducting the war. Some have advocated similarly separating duties in litigation or arbitration. By separating the functions, much like solicitors and barristers in the United Kingdom, one corporate representative noted that perhaps we "would reach a wiser decision if we had one lawyer develop the case for litigation and a different lawyer press on us the case for settlement."

Conclusion - Dispute Resolution is About Choice

Not that long ago, we had one choice in telephones - black - and one choice in service providers. The same was true of dispute resolution in the same era. Now there are lots of choices and users can thin-slice their options. Choosing arbitration is no longer the end of the inquiry. There are a variety of different providers, rules, panels, and options. Just as litigation has venue and law selection, jury waivers, and motions for summary adjudication, parties can tailor procedures to business goals and priorities - almost like choosing lunch items off of a menu. Contract drafters now have the option of how much discovery they want, how many arbitrators will hear the matter in the first instance, and how many, if any, will review that award and by what standard. Some of us prefer flip phones and others need smart phones. But then there's platform and apps. So, too, with dispute resolution system design. Why wouldn't the lawyers drafting the deals that might become tomorrow's disputes seek the advice of the pros who do that every day as they put their deals together?

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This article originally appeared in 56 The Advoc. (Texas) 36 (2011), and is reprinted with the express permission of the author and the State Bar of Texas.

Confidentiality In Mediation

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

Your co-editors are in the process of producing the third edition of our MEDIATION AND NEGOTIATION: REACHING AGREEMENT IN LAW AND BUSINESS for publication in 2015 by LexisNexis. As our title suggests, the book focuses on consensual processes that can terminate a dispute, but third party dispute resolution (courts and binding arbitration) are given consideration by way of considering that to which ADR is the alternative. Our emphasis on business disputes leads us to devote considerable attention to planning for prevent disputes, and limiting the impact of those disputes that do arise.

During the course of this endeavor, we have devoted many, many hours to reviewing recent developments in the ADR field. In this and ensuing issues of Alternative Resolutions, we will be presenting some of the interesting material we have come across. In this issue, we consider the costs and benefits of confidentiality in mediation and negotiation, in the context of situations where there are strong arguments against confidentiality. The Uniform Mediation Act (UMA) approach to confidentiality has been considered by several appellate courts.

Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent,* 2003 J. DISP. RESOL. 67 (2003)

This article examines. . . the prohibition in the Uniform Mediation Act (UMA) on mediator communication to judges about a party's good faith participation or "problem" behavior in mediation. UMA, § 7 (a), subject to narrow exceptions, § 7(b). Early drafts of the UMA contemplated exceptions to the mediation privilege, including claims that a party failed to negotiate in good faith. Good faith requirements strike at the heart of the mediation process by undermining the core mediation values of party self-determination, confidentiality, and third party neutrality

Furthermore, allowing or requiring a mediator to disclose specifics about what occurred during mediation elevates legal values over mediation values. When we refer to "legal values," we refer to those qualities of a lawyer and/or legal institutions which most in the profession would find desirable, useful and important to their role as lawyers and/or to the integrity of various legal institutions. These legal values include judicial control, efficiency of the process, a finding of "right" and "wrong", client advocacy, and defining client interests and needs in terms of legal remedies.

"Mediation values" refer to those qualities of the process of mediation and/or those characteristics of the third-party which participants in the process find desirable, useful and important to the ongoing viability and integrity of the process. Mediation values include confidentiality, mediator impartiality and party self-determination.

We conclude . . . that the UMA strikes the correct balance by rejecting arguments in favor of mediator reports to judges and others about the actions and statements of parties during the mediation for the purpose of assessing and sanctioning "bad faith" behavior. For the rare and extreme case, the UMA provides a mechanism to address egregious party behavior, such as lying and fraudulent inducements, causing another party to settle.

Commentary on *Rojas v. Superior Court*, 93 P.3d 260 (Cal. 2004).

In Rojas, the California Supreme Court unanimously reiterated its strong stance in favor of confidentiality of mediation communications. The owner of an apartment building sued the contractor for defective

construction. Owner collected considerable information about structural defects and conducting air tests within the building. Subsequently, the court entered a case management order (CMO) that called for mediation and provided for confidentiality of everything related to the process, pursuant to Evidence Code § 1119. The matter was settled in mediation, with the final agreement calling for as much confidentiality as allowed by law.

These developments were merely the prologue to the Rojas case, in which apartment tenants sued the owner and the contractor for their losses due to defective construction. The tenant group sought broad discovery regarding the owner-contractor proceeding, and mediation confidentiality was interposed as a defense to disclosure. In rejecting the discovery request of the tenants, even for data collected before suit was filed, the trial judge noted that information important for supporting the tenant's claims could be obtained only from the owner and contractor.

The court of appeals ruled for the tenants, holding that § 1119 did not protect "pure evidence," but only "the substance of mediation, i.e., the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand." The court relied on § 1120 (a), which provides that "[e]vidence otherwise admissible or subject to discovery outside of a mediation . . . shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation." The California Supreme Court rejected this approach, in an opinion strongly supportive of mediation confidentiality.

Sarah Williams, *Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct?,* 2005 J. of Dis. Resol. 209, argues that Rojas was wrongly decided. The various statutory arguments were not determinative, so the matter came down to a policy choice.

> Because of the possibility of injustice to a party such as the Rojas plaintiffs, and because this injustice should outweigh the importance of encouraging mediation, the Supreme Court should have upheld the appellate court's decision.

The amicus brief of the Southern California Mediator Association argued for limited disclosure, because otherwise, "the approach taken by defendants would make mediation a tool for burying unfavorable evidence." That, in turn, undermines the integrity of mediation, and discourages the use of mediation, at least prior to discovery, due to a fear that the other party could use mediation to shield evidence.

Laura A. Stoll, *"We Decline to Address": Resolving the Unanswered Questions Left by Rojas v. Superior Court to Encourage Mediation and Prevent the Improper Shielding of Evidence,* 53 UCLA L. Rev. 1549 (2006), supports the Rojas decision but expresses concern that the protection of materials "prepared for mediation" could be used to shield potentially damaging evidence. The author proposes that the "prepared for mediation" standard should be taken seriously, and the courts should require proof that material was, in fact, prepared exclusively for mediation, thereby excluding from protection materials created in the litigation context, even if used in mediation. Parties claiming protected status for mediation materials should be prohibited from using it in subsequent litigation.

State v. Williams, 877 A.2d 1258 (N.J.2005)

In this appeal, we must decide whether a mediator appointed by a court under Rule 1:40 may testify in a subsequent criminal proceeding regarding a participant's statements made during mediation. Defendant's brother-in-law phoned defendant and left several taunting messages, leading to a face-to-face argument that quickly escalated into a physical fight. Defendant claims that his brother-in-law hit him in the shoulder with a large construction shovel. The brother-in-law counters that defendant retrieved a machete from the trunk of his car and cut the brother-in-law's wrist and foot. Police later apprehended defendant in his apartment where they found a machete.

After his arrest, defendant filed a municipal court complaint against his brother-in-law, alleging that the phone messages constituted harassment. The municipal court, in accordance with Rule 1:40, appointed a mediator in an attempt to resolve the harassment dispute. The mediation was unsuccessful, and the mediator referred the matter back to municipal court.

A grand jury later indicted defendant for aggravated assault and two charges of possession of a weapon. Defendant asserted self-defense as his primary theory and proffered the mediator as a defense witness.

Questioned by the court outside of the jury's presence, the mediator indicated that the brother-in-law stated during the mediation session that he had wielded the shovel. The court, however, excluded that testimony under Rule 1:40-4(c), which prohibits a mediator from testifying in any subsequent proceeding. Defendant was convicted of assault and a weapons charge. The Appellate Division upheld the trial court's exclusion of the mediator's testimony and affirmed defendant's conviction. For the reasons set forth below, we . . . affirm.

At trial, Renee Oliver, who was testifying for the State, pointed out Hall, the mediator, who was seated in the audience section of the courtroom. Defense counsel … requested permission to call him as a defense witness. With the jury excused, the court interviewed Hall, who confirmed that he was the mediator who conducted the mediation between defendant and Bocoum more than a year earlier. He said that he attended the trial because defendant had stopped by his house and told him that the trial was scheduled to start. Although Hall denied being a "friend" of defendant, he indicated that he lived near defendant's mother, and as a pastor, he was obligated "to be friendly with everybody."

Defendant contends that the mediator's testimony may serve to exculpate him and that the trial court's refusal to allow the mediator to testify deprived him of his right to fully present a defense. Defendant explains that his defense depends on whether he can establish that he acted in self-defense. He maintains that "[t]he relevance and probative value of Pastor Hall's proffered was clear and substantial, as it would have established, from an unbiased witness, that Bocoum indeed wielded a shovel during the fight."

Defendant insists that his right to compulsory process was violated when he was unable to proffer the mediator's testimony as substantive evidence that Bocoum had the shovel and to boost defendant's own credibility as a prior consistent statement. Defendant further argues that the trial court's ruling interfered with his ability to impeach the credibility of the State's witnesses regarding their testimony that Bocoum did not charge at defendant with the shovel. Accordingly, defendant urges this Court to relax Rule 1:40-4(c) to allow the mediator to testify on remand.

The State opposes relaxation of Rule 1:40-4(c). Although the State acknowledges defendant's right to present a complete defense, it argues that that right is not unfettered and "trial courts may impose reasonable limits upon defense counsel." The State maintains that defendant has not presented compelling reasons for introducing Hall's testimony, and therefore, the trial court's decision was not erroneous.

Rule 1:40-4(c) governs the confidentiality of statements made in mediation: No disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding. *No mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter*. (Emphasis added.)

In this matter, the mediator's act of testifying constitutes an appearance as a witness. And, although defendant's municipal court proceeding dealt primarily with the allegedly harassing phone messages from Bocoum that precipitated the fight, the municipal action also is a "matter" that is "related" to defendant's "subsequent . . . trial" for assault and weapons charges. Therefore, under a plain reading of *Rule* 1:40-4(c), the trial court correctly prevented the jury from hearing the mediator's testimony.

Defendant asks this Court to relax the *Rule* 1:40-4(c) prohibition of mediator testimony under *Rule* 1:1-2, which provides that court rules "shall be construed to secure a just determination . . . [and] fairness in administration." Unless a rule specifically disallows relaxation, it "may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice." The CDR rules allow relaxation or modification if an "injustice or inequity would otherwise result." *Rule* 1:40-10.

Justice Clifford's dissent in *Stone v. Township of Old Bridge* captures the spirit that animates *Rule* 1:1-2: "Our Rules of procedure are not simply a minuet scored for lawyers to prance through on pain of los-

ing the dance contest should they trip." 543 A.2d 431 (1988). Case law and common sense, however, demonstrate that *Rule* 1:1-2 is the exception, rather than the norm.

Determining whether relaxation is appropriate in this appeal requires an examination and balancing of the interests that are at stake. The 14th Amendment guarantees every criminal defendant the right to a fair trial. At its core, that guarantee requires a fair opportunity to defend against the State's accusations. This right is effectuated largely through the several provisions of the Sixth Amendment, which entitles a defendant "to be confronted with the witnesses against him" and "to have compulsory process" to secure testimonial and other evidence. Our State Constitution, containing identical wording, affords those same rights. *N.J. Const.* art. I, ¶ 10.

The confrontation right assures a defendant the opportunity to cross-examine and impeach the State's witnesses. The right to confront and cross-examine accusing witnesses is among the minimum essentials of a fair trial. The right to compulsory process is grounded in similar sentiments: Few rights are more fundamental than that of an accused to present witnesses in his own defense. Together, the rights of confrontation and compulsory process guarantee a meaningful opportunity to present a complete defense. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on . . . credibility . . . when such evidence is central to the defendant's claim of innocence.

But the rights to confront State witnesses and to present favorable witnesses are not absolute, and may, in appropriate circumstances, bow to competing interests. Generally, courts conducting criminal trials may reject proffers of evidence helpful to the defense, if exclusion serves the interests of fairness and reliability. Because assertions of privilege often undermine the search for truth in the administration of justice, they are accepted only to the extent that they outweigh the public interest in the search for truth.

With that law as a backdrop, we now must determine whether the trial court's exclusion of the mediator's testimony under *Rule* 1:40-4(c) was constitutionally permissible. The recently enacted Uniform Mediation Act (UMA), N.J.S.A. 2A:23C, was not in effect when the trial court excluded mediator testimony in this matter. However, two *amici*, the Committee and the NJSBA, urge this Court to apply the principles expressed in the UMA when determining whether to allow mediator testimony in criminal matters, because the statute "is much more finely tuned and precise than Rule 1:40-4(c)." We agree that the UMA principles are an appropriate analytical framework for the determination whether defendant can overcome the mediator's privilege not to testify.

The UMA protects mediation confidentiality by empowering disputants, mediators, and nonparty participants to "refuse to disclose, and [to] prevent any other person from disclosing, a mediation communication." The privilege yields, however, if a court determines "that the mediation communication is sought or offered in" a criminal proceeding, "that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality," and "that the proponent of the evidence has shown that the evidence is not otherwise available." The burden is on defendant to satisfy these requirements, and he can only prevail if he meets each condition. .

The first requirement is clearly satisfied, because defendant is on trial for assault and weapons charges and seeks to introduce evidence of mediation statements into that trial. Therefore, we must assess whether the interest in maintaining mediation confidentiality is outweighed by the defendant's need for the mediator's testimony. Finally, we consider whether the substance of the testimony is available from other sources. Ultimately, we conclude that defendant has not met those requirements and, therefore, cannot defeat the privilege against mediator testimony.

We begin by considering the "interest in protecting confidentiality" and examining the social and legal significance of mediation. An integral part of the increasingly prevalent practice of alternative dispute resolution (ADR), mediation is designed to encourage parties to reach compromise and settlement. The rationale is simple: If settlement offers were to be treated as admissions of liability, many of them might never be made.

Successful mediation, with its emphasis on conciliation, depends on confidentiality, perhaps more than any other form of ADR. Confidentiality allows "the parties participating to feel that they may be open and honest among themselves." Without such assurances, disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken.

Indeed, mediation stands in stark contrast to formal adjudication, and even arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting. Mediation sessions, on the other hand, "are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts." Mediation communications, which would not even exist but for the settlement attempt, are made by parties without the expectation that they will later be bound by them. Ultimately, allowing participants to treat mediation as a fact-finding expedition would sabotage its effectiveness.

If mediation confidentiality is important, the appearance of mediator impartiality is imperative. A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues and encouraging parties to accommodate each others' interests. To perform that function, a mediator must be able "to instill the trust and confidence of the participants in the mediation process. That confidence is insured if the participants trust that information conveyed to the mediator will remain in confidence. Neutrality is the essence of the mediation process." Thus, courts should be especially wary of mediator testimony, because no matter how carefully presented, it will inevitably be characterized so as to favor one side or the other.

There is a growing body of evidence that mediation is particularly successful at facilitating settlement. A recent study of a court-mandated mediation program in New Jersey found that nearly 40 percent of matters diverted to mediation were resolved at the mediation or within three months afterward, most "with little or no discovery" and the concomitant expense to disputants. *Report of the Committee on the Presumptive Mediation Pilot Program* 1 (2005) [*Pilot Program Report*]. Further, although some litigants who settle an acrimonious lawsuit may feel as though they have achieved nothing more than an "equitable distribution of dissatisfaction," mediation's great strength is that disputants who settle in that forum are generally satisfied with the process and the result, *see Pilot Program Report, supra,* at 1 ("Both mediators' performance and the process itself were rated exceedingly high by both litigants and attorneys responding to post-mediation exit questionnaires.").

Defendant argues that the admission of the mediator's testimony would not "obliterate the whole dispute resolution process" because "the only prejudice posed by Pastor Hall's testimony . . . was inconvenience to the mediator and the municipal court. Such inconvenience was relatively insignificant." According to defendant, mediation participants cannot reasonably expect their assertions to be confidential, because *Rule* 1:40-4(c) allows the admission of statements of a mediation participant if that participant is not a party to the later proceeding where admission is sought. Defendant contends that, as a nonparty to this matter, Bocoum has no interest in defendant's prosecution and, therefore, no reason to complain about the manner in which his statements are used.

Defendant's position trivializes the harm that will result if parties are routinely able to obtain compulsory process over mediators. Simply because the mediator does not actually testify *against* the victim (who is, by definition, a nonparty to a State criminal prosecution) does not mean that the victim is unaffected by the prospect that his statements, made with assurances of confidentiality, will be used to exculpate the person who victimized him. In such circumstances, the victim could hardly be expected to trust that the mediator was impartial. . . .

Because there is a substantial interest in protecting mediation confidentiality, we must consider defendant's need for the mediator's testimony. To ascertain whether that testimony is "necessary to prove" self-defense, we assess its "nature and quality." The mediator's testimony in this matter does not exhibit the indicia of reliability and trustworthiness demanded of competent evidence. . . . Furthermore, the mediator's testimony does not corroborate defendant's version of what transpired during the fight. . . .

Finally, by asking the mediator to divulge the disputants' statements made during mediation, the defense induced the mediator's breach of confidentiality without first seeking the court's permission. Defendant now seeks to benefit from that breach. Condoning such behavior would encourage all similarly situated defendants to do likewise. As the trial court explained: "[B]ecause someone else has already violated the rule (i.e., defense counsel), that doesn't mean the court should now disregard the rule. That would be solicitation for rules not to be followed." Moreover, the defense failed to comply with evidence rules designed to ensure that only reliable impeachment evidence is put before the jury in a manner that is fair to both parties.

In sum, the mediator's testimony was not sufficiently probative to strengthen defendant's assertion of self-defense. In light of the importance of preserving the role of mediation as a forum for dispute resolution, we conclude that defendant's need for the mediator's testimony does not outweigh the interest in protecting mediation confidentiality. Apart from whether the need for the mediator's testimony outweighed the interest in confidentiality, we also consider whether defendant failed to demonstrate that evidence of Bocoum's use of the shovel was "not otherwise available." Both parties had access to, and presented at trial, substantial evidence from other sources bearing on the issue of self-defense. . . .

We note that defendant's own trial testimony recounted Bocoum's mediation statements about the shovel. Under the UMA, there is a serious question, however, whether defendant should have been allowed to testify at all regarding Bocoum's mediation communications. The UMA's confidentiality provision applies with equal force to a mediation participant, such as defendant, as it does to the mediator. *See N.J.S.A.* 2A:23C-4b. Nonetheless, the parties have not raised that issue before us, and we decline to address it further. . . .

LONG, J., Dissenting.

The majority has essentially applied the rule we enunciated in *State v. Garron,* 827 *A.*2d 243 (2003) that where evidence is relevant and necessary to the defense of a criminal case, and cannot be otherwise obtained, it will not be shielded by a privilege. That is the proper paradigm for this case. However, I disagree with the Court's conclusions regarding the "need" for the mediator's testimony and whether it was "otherwise available."

This case was a pitched credibility battle over whether defendant acted in self-defense when confronted by Bocoum, wielding a shovel against him. … Defendant, the most interested of all witnesses, testified that Bocoum admitted during mediation that he had a shovel. If Bocoum made that admission, it was in direct conflict with his trial testimony and dramatically undercut his credibility on the fundamental issue in the case: self-defense. I disagree with the majority's conclusion that defense evidence on the subject obviated the need for the mediator's testimony.

The mediator's position as the only objective witness placed him in an entirely distinct role from the other witnesses in the case. The evidence that the mediator could have given was therefore different in kind from that of defendant. Because the mediator was the only witness without a proverbial "ax to grind," his testimony was not "otherwise available," nor was it cumulative. Indeed, it could have turned the tide in this very close case. Therefore, it was essential both to the defense of the criminal charges against defendant and to the very fairness of the trial. That was a sufficient basis on which to breach the mediator's privilege.

Finally, I believe that this Court overstepped its bounds in declaring that the mediator's testimony "does not exhibit the indicia of reliability and trustworthiness demanded of competent evidence." In support of its conclusion, the majority has excerpted portions of the mediator's testimony that, to me, do not fully reflect the entire colloquy. The complete transcript of the mediator's testimony leaves a different impression than those excerpts. …

Simmons v. Ghaderi, 187 P.3d 934 (Cal. 2008)

CHIN, J.

Evidence Code §§ 1115 et seq., enacted in 1997, sets forth an extensive statutory scheme protecting the

confidentiality of mediation proceedings, with narrowly delineated exceptions. In this breach of contract action arising from a medical malpractice suit, plaintiffs sought to enforce an oral settlement agreement allegedly formed during mediation. During pretrial proceedings, the doctor stipulated to, and submitted evidence of, events which had occurred during mediation, arguing that no enforceable contract was formed during mediation. For the first time at trial, the doctor invoked the mediation confidentiality statutes to prevent plaintiffs from introducing evidence relating to the mediation proceedings. The trial court admitted the evidence.

A majority of the Court of Appeal held that, despite the statutory confidentiality protections, the doctor was judicially estopped from arguing that evidence of the settlement agreement is statutorily inadmissible; she "placed before the trial court the facts of the mediation and sought a legal determination as to their effect." We conclude that the Court of Appeal improperly relied on the doctrine of estoppel to create a judicial exception to the comprehensive statutory scheme of mediation confidentiality and that the evidence relating to the mediation proceedings should not have been admitted at trial.

California's Legislature has a strong policy favoring mediation as an alternative to litigation. Because mediation provides a simple, quick, and economical means of resolving disputes, and because it may also help reduce the court system's backlog of cases, it is in the public interest to encourage its use. The Legislature designed the mediation confidentiality statutes to promote a candid and informal exchange regarding events in the past.... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. Confidentiality is essential to effective mediation. …

With section 1124 the Legislature created a specific mechanism for the admission of evidence regarding oral settlement agreements made during mediation. … In the present case, an oral agreement may have been reached between defendant's insurer and plaintiffs during the mediation; however, the parties did not follow the statutory procedures that would have made this agreement admissible. Specifically, no form of recordation of the oral agreement exists, nor is there a written agreement signed by both parties. The agreement as memorialized by the mediator is similarly inadmissible, as there was no express agreement that it could be disclosed, and it was not signed by defendant or her attorneys. …

On limited occasions, courts have crafted exceptions to mediation confidentiality and compelled mediators to testify in civil actions. However, those instances are very limited. In *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, 74 Cal.Rptr.2d 464, the court compelled a mediator to testify because it found that a minor's due process right to confrontation of witnesses outweighed the statutory right to mediation confidentiality. In *Olam v. Congress Mortgage Co.* (N.D.Cal.1999) 68 F.Supp.2d 1110, the parties themselves expressly waived confidentiality. Because of this waiver, the court found that the policy driving mediation confidentiality had appreciably less force.

Except in cases of express waiver or where due process is implicated, we have held that mediation confidentiality is to be strictly enforced. In deciding whether a judicial exception was appropriate to carry out the Legislature's goals, we have observed that with the enactment of the mediation confidentiality statutes, the Legislature contemplated that some behavior during mediation would go unpunished. We have ruled held that evidence of a party's bad faith during the mediation may not be admitted or considered.

We recently reaffirmed that the mediation confidentiality statutes unqualifiedly bar disclosure of certain communications and writings produced in mediation absent an express statutory exception. In *Rojas v. Superior Court*, 93 P.3d 260 (Cal. 2004), the Court of Appeal concluded that, like work product, certain derivative materials exchanged during mediation were discoverable on a good cause showing. Rejecting this conclusion, we noted that section 2018 of the Code of Civil Procedure codified the good cause exception to the work product doctrine; the Legislature clearly knew how to enact a statutory good cause exception to the mediation confidentiality statutes, but it chose not to do so. Under the maxim of statutory construction, *expressio unius est exclusio alterius,* if exemptions are specified in a statute,

[courts] may not imply additional exemptions unless there is a clear legislative intent to the contrary. …

We must still determine whether the mediation confidentiality statutes themselves permit implied waiver. Section 1122, the section dealing expressly with waiver, states that a communication made during mediation is not inadmissible if "all persons who conduct or otherwise participate in the mediation *expressly agree* in writing, or orally to disclosure. Because the language of section 1122 unambiguously requires express waiver, judicial construction is not permitted unless the statutes cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature. Moreover, because the Legislature provided express exceptions to section 1119, ... we may not imply additional exemptions unless there is a clear legislative intent to the contrary.

Plaintiffs argue that allowing defendant to assert mediation confidentiality after litigating various pretrial motions would produce absurd results. Here, the clear language of the statutory scheme and other indications of legislative intent reflect that disallowing an implied waiver would not produce absurd consequences, but was rather an intended consequence. The language of the statutory scheme reflects that it was intended to be complete. …

Finally, the legislative history of the mediation confidentiality statutes as a whole reflects a desire that the statute be strictly followed in the interest of efficiency. By laying down clear rules, the Legislature intended to reduce litigation over the admissibility and disclosure of evidence regarding settlements and communications that occur during mediation. Allowing courts to craft judicial exceptions to the statutory rules would run counter to that intent.

Both the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice.

Here, the mediation confidentiality statutes made inadmissible all evidence of an oral contract between plaintiffs and defendant during mediation. Thus, there was no evidence to prove plaintiffs' breach of contract claim, and defendant was entitled to judgment as a matter of law. However, plaintiffs may still pursue their medical malpractice cause of action before the trial court.

Cassel v. Superior Court, 244 P.3d 1080 (Cal. 2011)

BAXTER, J.

In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. With specified statutory exceptions, neither "evidence of anything said," nor any "writing," is discoverable or admissible "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which ... testimony can be compelled to be given," if the statement was made, or the writing was prepared, "for the purpose of, in the course of, or pursuant to, a mediation...." Evid.Code, § 1119(a), (b). All communications, negotiations, or settlement discussions by and between participants in the course of a mediation shall remain confidential. We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected

The issue here is the effect of the mediation confidentiality statutes on private discussions between a mediating client and attorneys who represented him in the mediation. Petitioner Michael Cassel agreed in mediation to the settlement of business litigation to which he was a party. He then sued his attorneys for malpractice. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.

Prior to trial, the defendant moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement in the mediation. The trial court granted the motion, but the Court of Appeal vacated the trial court's order.

The appellate court majority reasoned that the mediation confidentiality statutes are intended to prevent the damaging use *against a mediation disputant* of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients. Thus, when a mediation disputant sues his own counsel for malpractice in connection with the mediation, the attorneys – already freed, by reason of the malpractice suit, from the attorney-client privilege – cannot use mediation confidentiality as a shield to exclude damaging evidence of their own entirely private conversations with the client. The dissenting justice urged that the majority had crafted an unwarranted judicial exception to the clear and absolute provisions of the mediation confidentiality statutes.

Though we understand the policy concerns advanced by the Court of Appeal majority, the plain language of the statutes compels us to agree with the dissent. The result reached by the majority below contravenes the Legislature's explicit command …. Confidentiality extends beyond utterances or writings "in the course of" a mediation, and thus is not confined to communications that occur *between mediation disputants* during the mediation proceeding itself. … We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice. ….

CHIN, J., concurring.

I concur in the result, but reluctantly. The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. … This is a high price to pay to preserve total confidentiality in the mediation process.

I greatly sympathize with the Court of Appeal majority's attempt to interpret the statutory language as not mandating confidentiality in this situation. But, for the reasons the present majority gives, I do not believe the attempt quite succeeds. Although we may sometimes depart from literal statutory language if a literal interpretation "would result in absurd consequences that the Legislature did not intend" I believe, just barely, that the result here does not so qualify.

Plausible policies support a literal interpretation. Unlike the attorney-client privilege – which the client alone holds and may waive – mediation confidentiality implicates interests beyond those of the client. Other participants in the mediation also have an interest in confidentiality. This interest may extend to private communications between the attorney and the client because those communications themselves will often disclose what others have said during the mediation. Additionally, as the majority notes, it might "not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves." …

This case does not present the question of what happens if every participant in the mediation *except the attorney* waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point.

Savage & Associates, P.C. v. K & L Gates LLP, 640 F.3d 53 (2d Cir. 2011)

POOLER, Circuit Judge.

[The confidentiality issue arose in the bankruptcy of Taligent.] The district court denied K & L Gates' motion to lift two protective orders prohibiting disclosure of communications made during a mediation …. The protective orders are silent as to when their confidentiality restrictions may be lifted; therefore, disclosure would have been warranted only if the party seeking disclosure had demonstrated:

> (1) a special need for the confidential material it sought;
>
> (2) resulting unfairness from a lack of discovery; and
>
> (3) that the need for the evidence out weighed the interest in maintaining confi dentiality.

K & L Gates failed to make the requisite showing, and accordingly, we conclude there was no error in the denial of the law firm's motion.

When Teligent, hired Alex Mandl as its CEO in 1996, the company extended Mandl a $15 million loan. The loan was to be due and payable immediately if Mandl resigned his employment without "good reason," but would be automatically forgiven if Teligent terminated Mandl's employment other than for "cause." Mandl retained the law firm K & L Gates LLP around April 2001 in connection with his potential departure from Teligent. At that time, $12 million was outstanding on the loan. K & L Gates drafted a severance agreement for Mandl that, according to the law firm, "reflect[ed] that Teligent had terminated Mandl other than for Cause effective as of April 27, 2001, thus triggering automatic loan forgiveness."

Less than a month after the parties ratified the severance agreement, Teligent filed for bankruptcy under Chapter 11. Savage & Associates was appointed by the bankruptcy court to be the Unsecured Claims Estate Representative. In discharging its duties pursuant to this role, Savage & Associates filed an adversary proceeding against Mandl to recover the balance of the loan. Mandl again retained K & L Gates to represent him in connection with this matter. The bankruptcy court held a one-day trial after which it concluded that Mandl had resigned before Teligent terminated his employment, and therefore, Mandl was liable for the balance of the loan. That finding was not appealed. Mandl retained Greenberg Traurig as new counsel.

Around the same time, Savage and Associates commenced a new lawsuit in the Eastern District of Virginia against Mandl, naming as defendants Mandl's wife, Susan Mandl, and ASM Investments, an entity associated with Mandl, and alleging that Mandl had fraudulently transferred certain property through ASM to his wife in order to shelter his assets from creditors. All parties to the action in Virginia participated in a voluntary mediation in attempt to resolve both the motions before the bankruptcy court as well as the Virginia Action. Greenberg Traurig invited K & L Gates to participate in the mediation, to address Mandl's claim that K & L Gates committed malpractice in the course of representing him during his termination from Teligent and in the resulting adversary proceeding. K & L Gates declined to participate.

In setting up a framework for the mediation, the parties agreed to be bound by the terms of the protective orders routinely employed by the Bankruptcy Court in the Southern District of New York in the context of court-ordered mediation. The Protective Orders imposed limitations, inter alia, on the disclosure of information relating to the mediation. However, the Protective Orders provided no guidance on when, or if, a party might be entitled to release confidential information connected to the mediation.

Although formal mediation did not result in a settlement, the parties thereafter reached an agreement. In exchange for dismissal of the action in Virginia, Mandl agreed to pay the estate $6 million and to commence a malpractice suit against K & L Gates. The terms of the agreement also required Mandl to remit to the estate 50% of the net value of any malpractice recovery. The bankruptcy court approved the settlement, which approval is not before us on appeal.

As required by the settlement, Mandl filed a malpractice action against K & L Gates in the Superior Court of the District of Columbia. K & L Gates then filed a motion with the bankruptcy court, seeking to lift the confidentiality provisions of the Protective Orders. The bankruptcy court denied K & L Gates's motion to lift the confidentiality provisions of the Protective Orders based on the court's conclusion that K & L Gates failed to demonstrate a compelling need for the discovery, failed to show that the information was not otherwise available, and failed to establish that the need for the evidence was outweighed by the public interest in maintaining confidentiality. There was no error in this conclusion.

Confidentiality is an important feature of the mediation and other ADR processes. Promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute, and protecting the integrity of alternative dispute resolution generally. A party seeking disclosure of confidential mediation communications must demonstrate:

(1) a special need for the confidential material,

(2) unfairness from lack of discovery, and

(3) that the need for the evidence outweighs the interest in maintaining confidentiality.

All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.

We draw this standard from the sources relied upon by the learned bankruptcy court, which include the Uniform Mediation Act ("UMA"), the Administrative Dispute Resolution Act of 1996 ("ADRA 1996"), 5 U.S.C. §§ 571 et seq., and the Administrative Dispute Resolution Act of 1998 ("ADRA 1998"), 28 U.S.C. §§ 651 et seq. Each of these recognizes the importance of maintaining the confidentiality of mediation communications and provides for disclosure in only limited circumstances. For example, ADRA 1996, which applies to federal administrative agency alternative dispute resolution, prohibits disclosure of confidential mediation communications unless the party seeking disclosure demonstrates exceptional circumstances, such as when nondisclosure would result in a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety.

Relatedly, under the UMA, the party seeking disclosure of confidential mediation communications must demonstrate that the evidence is not otherwise available and that the need for the communications substantially outweighs the interest in protecting confidentiality. UMA § 6(b).

The standards for disclosure under the UMA and the ADRAs are also consistent with the standard governing modification of protective orders entered under Federal Rule of Civil Procedure 26(c). As we explained in *FDIC v. Ernst & Ernst,* 677 F.2d 230, 232 (2d Cir.1982), once a protective order has been entered and relied upon, "it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification." In *SEC v. TheStreet.Com,* 273 F.3d 222, 229 (2d Cir.2001), we further refined this principle, explaining that there is a "strong presumption against the modification of a protective order," and orders should not be modified "absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need."

K & L Gates … failed to submit any evidence to support its argument that there was a special need for disclosure of any specific communication. There was, therefore, no error in the bankruptcy court's conclusion that K & L Gates failed to satisfy prong one of the standard governing disclosure of confidential mediation communications.

Likewise, the bankruptcy court committed no error in holding that K & L Gates failed to satisfy prong two of the test. As the bankruptcy court explained, the law firm failed to demonstrate a resulting unfairness from a lack of discovery, because the evidence sought by K & L Gates was available through other means, including through responses to interrogatories or depositions. Accordingly, the law firm failed to show that "extraordinary circumstances" warrant disclosure.

Finally, because K & L Gates failed to demonstrate a special need for the mediation communications, the law firm did not satisfy prong three of the test, which requires a party seeking disclosure of confidential

material to show that its need outweighs the important interest in protecting the confidentiality of the material. … Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether.

These concerns counsel in favor of a presumption against modification of the confidentiality provisions of protective orders entered in the context of mediation. Accordingly, we conclude that there was no error in the denial of K & L Gates's motion to lift the confidentiality provisions of the Protective Orders in this case.

***Horner v. Carter*, 981 N.E.2d 1210 (Ind. 2013)**

When the parties' marriage was dissolved in 2005, the trial court approved a settlement agreement reached by the parties following mediation. In 2011, the husband initiated the present proceeding, seeking … to terminate his liability for monthly housing payments to the wife after her remarriage. At the evidentiary hearing the trial court excluded from evidence the husband's testimony regarding statements he claimed to have made to the mediator during the mediation process ….

Indiana policy strongly favors the confidentiality of all matters that occur during mediation. In *Vernon v. Acton,* 732 N.E.2d 805, 810 (Ind. 2000), we held that the mediation confidentiality provisions of our ADR Rules "extend to and include oral settlement agreements undertaken or reached in mediation. Until reduced to writing and signed by the parties, mediation settlement agreements must be considered as compromise settlement negotiations."

Evidence of conduct or statements made in compromise negotiations or mediation is not admissible except when offered for a purpose other than "to prove liability for or invalidity of the claim or its amount." The admissibility provided for mediation evidence "offered for another purpose" pertains to the use of such evidence only in collateral matters unrelated to the dispute that is the subject of the mediation.

The Court of Appeals concluded that the husband's statements during the mediation could be admitted as extrinsic evidence to aid in the construction of an ambiguous agreement. We disagree. Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation. The benefits of compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue.

The decision of the Court of Appeals, which we have vacated, expressed approval of a different approach presented in the Uniform Mediation Act ("UMA"). For the purpose of preserving traditional contract defenses, the UMA would permit disclosure and discovery of conduct and statements during mediation if not otherwise available, and subject to a cautious balancing to ascertain whether the need for such evidence substantially outweighs the interest in protecting confidentiality. *See* Uniform Mediation Act § 6 (b). Indiana has not adopted the UMA, and we decline to follow its approach to mediation confidentiality at this time.

In the present case, the husband's purported oral statements made to the mediator during mediation clearly fall within the express inadmissibility of mediation evidence akin to the offer or acceptance of a compromise on a claim of disputed liability or validity. A.D.R. 2.11 (incorporating Evid. R. 408). Furthermore, applying *Vernon,* the husband's testimony, seeking to establish and enforce an oral agreement allegedly reached in mediation, must likewise be treated as confidential and inadmissible. The trial court was correct to exclude the husband's mediation statements from evidence on his petition to modify the parties' settlement agreement.

Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence: Evidentiary Privileges (2013)

§ 1.3.12 The Privilege for Mediation Proceedings

Although Rule 408 bars the admission of compromise statements at trial, it does not create a true privilege immunizing settlement statements from pre-

trial discovery. The proponent can defeat Rule 408 by developing an alternative theory of logical relevance. Some jurisdictions have gone to the length of creating full-fledged evidentiary privileges for such proceedings. Unlike Rule 408, these privileges cannot be surmounted simply by articulating an alternative theory of logical relevance. See e.g., North Carolina Statute §50-13.1; Maine Rule of Evidence 408 (b); California Evidence Code §§1116-11128. Although there is no comparable federal statute, out of comity some federal courts have applied these mediation privileges.

Generalization is dangerous, since the mediation privileges vary widely from state to state. However, in some respects, these provisions resemble true privileges. For example, while some jurisdictions allow the mediator himself or herself to assert the privilege, the tendency is to treat the parties to the mediation as holders of the privilege. Furthermore, a minority of the statutes purport to create absolute protection against the subsequent use of the statements. Moreover, like true privilege statutes, these provisions sometimes carve out special exceptions, permitting, for instance, the use of the statements to prove unrelated claims. The court may find that the statute creating the privilege precludes the court from creating uncodified exceptions.

Michael P. Dickey, ADR Gone Wild: Is it Time for a Federal Mediation Exclusionary Rule, Ohio State Journal on Dispute Resolution 25 Ohio St. J. on Disp. Resol. 713, 716-17 (2010)

This article proposes a partial reversal of the trend toward judicially-managed mediation, through the indirect method of adopting a proscription against using statements or conduct at mediation as a basis for most sanctions motions under the FRCP Rule 16. The evolution of federal mediation rules and statutes over the last two decades has led to the creation of widely divergent approaches to mediation confidentiality in the federal courts, with some courts adopting detailed rules and others relying on common law privilege principles, to the extent the courts preserve mediation confidentiality at all. The disparate treatment of mediation confidentiality, and its relationship to the courts' ability to monitor the parties' participation, has led perhaps inevitably to the explosion in motion practice related to mediation good faith.

[The author] recommends the adoption of a rule-based, limited federal mediation privilege as the most effective means of preventing the enforcement of mediation orders from developing into a burgeoning field of motion practice that thwarts the very docket management goal that led the federal courts to rely heavily on mediation in the first place. Such a rule would allow the district courts to monitor basic compliance with their orders referring cases to mediation, but [no more].

Note: To determine the "bite" of confidentiality rules, one has to look at the sanctions imposed for violations. *Hand v. Walnut Valley Sailing Club*, 475 Fed.Appx. 277 (10th Cir. 2012) is one of the few instances where a serious sanction was imposed – dismissal of Hand's law suit.

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The "In-Court Mediation Program"

Filings and Cases and Hearings, … Oh My!

By Marty Leewright

This article describes a successful pilot In-Court Mediation Program in a busy Texas Justice Court, but the same design could work in other courts. Over 400,000 civil cases were handled by 819 Texas Justice Courts in 254 Counties in 2011. Small Claims Courts were abolished in Texas by a Feb. 13, 2013 Texas Supreme Court Order which was effective August 31, 2013.

As with many courts, there is a court full of civil case filings, backlog, and they seem to be ever going and growing. So each month as Judge of the court, you try to make your way through the cases using the "traditional methods" of pre-trials, motions hearing and trials, and you find that although you are making your way, you are not making any real headway! You as judge want to run a much more efficient court, yet cases mount, and trials and hearings come later than sooner. Looking for an immediate, confidential, low-cost resolution to your court's civil docket and at no cost to the Court, the County, or the taxpayers?

When Justice Court and Small Claims Court Judge Ralph Swearingin took office in busy Precinct One of Tarrant County some seven years ago, he faced this very situation. Judge Swearingin, a veteran 30-year career law enforcement officer in Fort Worth, is also a graduate of Texas Wesleyan Law School where he also received training as a mediator. With goals of wanting to run a more efficient court, giving people their "day in court", and saving litigants time and money, he developed a pilot mediation program called "In-Court Pretrial Mediation" (ICPTM).

This program's design is quite simple and can be adapted to any court, regardless of the number or type of civil cases filed. This innovative program has been ongoing for more than six years with remarkable results, earning this Court the 2009 Texas Association of Counties- "Best Practices - Delivery of Service Award for Courtroom Innovation."

Beginnings

When first elected, and inheriting a multi-year backlog of cases, the Judge reviewed hundreds of case files and believed that many of them could be resolved without the use of a judge, via the process of mediation. So with the help of two attorney-mediator friends, he devised a voluntary program for litigants who choose to participate in this special mediation process, ICPTM, by simply paying an experienced and professional mediator a nominal $50 and participating in the mediation process right at the courthouse. Now, litigants in court for their first and very likely their last appearance are able to have their cases mediated and resolved that one day saving them time and money. To this, add having several mediators in court and setting multiple civil cases on that same day, and case disposition increases and court efficiency significantly improves.

No Need to Reinvent the Wheel

ICPTM is a template-ready program, complete with everything a court needs. All this has been designed: court form letters, proper notices to litigants, various mediator forms, and even a script to follow for the judge, all of which can be easily tailored by any court to fit its civil docket and unique needs and preferences.

How It Works

Once a defendant has filed an answer, the court sends out a Notice of Pre-Trial Mediation, which

instructs them among other things that they are to appear at ICPTM, informs them that this is a dispositive hearing and there can be adverse consequences for failure to appear and further, informs them about the voluntary program and its nominal cost. Currently, the Judge's court sets up to 55 cases for any one date, all conducted on Friday mornings. Under the program, most litigants are in court appearing for ICPTM within 60 days of the defendant having filed an answer to a suit.

Typically out of 55 cases noticed to attend, there are about 35-45 cases remaining, most of which have both parties appearing. Not every case so noticed appears, as some cases are settled before ICPTM, some parties fail to appear, and others are granted continuances and merely reset for another ICPTM date the following month. From these two-party appearance cases, which typically total 25-35, come those cases which are provided an opportunity to have their cases mediated and resolved that day. (The remaining, single-party appearance cases may be disposed of by dismissal, default of appearance, or continuance, etc.)

On ICPTM day, with litigants, attorneys, representatives and witnesses present, the courtroom is at standing-room only. Yet, following the judge's welcome, reading the judge's guidelines (script) which simply lays the foundation for efficient settlement by the parties themselves, the program moves swiftly. The judge explains this is confidential mediation by agreement and that the mediators do not give advice nor make decisions. Mediators are there to simply facilitate communication between the parties and help them reach a mutually satisfactory resolution.

Following the judges remarks, the cases are called individually to the bench where litigants are asked if it is a case they would like to mediate and to do so today. Typically, from the two-party cases, about 85% of those present are willing to mediate and approximately 85% of those, are settled through mediation. Those cases not successfully settled at mediation and those not willing to mediate, are given the earliest available trial date.

Parties agreeing to mediate are immediately assigned a mediator and taken to a private area to begin the mediation process. The mediator explains their role, basic ground rules, mediation process, expectations, and completes forms such as the written Agreement to Mediate. Through the mediator as a third-party neutral, the process leads parties to opening statements, ventilation, identifying and clarifying issues, obstacles and options or solutions, to efficiently facilitate a voluntary resolution by the parties and their attorneys (if any).

If the case settles, the mediator has the parties sign a Mediated Settlement Agreement (MSA) and a Court Order that disposes of the case is then signed by the Judge. Copies are made for the parties and the MSA is filed with the court. Again, if the case does not settle, the Judge sets the case for the earliest available trial date. Each mediator may settle up to five cases in a single day. Beginning around 8:30 a.m., the standing-room only courtroom, is typically emptied by noon. This process is expeditious, private, respectful and the MSA is binding when it is reduced to writing and signed by the parties.

Litigants are empowered, have their "day in court" and have a say in the ultimate outcome of their case, rather than a judge or jury "telling" them what the outcome will be. They also get to tell their story their own way, rather than just responding to questions framed by an attorney or the judge or having to deal with delay, objections, and confusing rules.

Why Use Mediation?

For starters it is expressed Policy of the State of Texas "to encourage the peaceable resolution of disputes" particularly through mediation (See, Ch. 154.002 Texas Civ. Practice & Remedies Code). This stated Policy has also been incorporated into the new Texas Rules of Practice for Justice Courts (See, Rule 503.5, Texas Rules of Civil Procedure.)

Further, consider the possibility that the courtroom is not always the best place for some disputes; they involve ongoing relationships, remedies are limited, time is short, the law can be procedurally complex and the amount in controversy in lower courts sometimes does not justify hiring an attorney. Often, the parties just want the opportunity to be heard. Mediation is the ideal vehicle for this and also includes a trained, experienced mediator to help guide them in

resolving their dispute to the satisfaction of everyone. Consider, too, that it educates our communities on better ways to resolve conflict.

In many cases part of the problem is poor or no communication (including language barriers) between the parties. A mediator supplies that part of the resolution because the process allows parties to communicate their position clearly through the mediator and/or their attorney. Emotions, their dislike of one another, information confusion, creative options, even venting, are addressed. In many cases, once the parties understand each other's positions, and can step into their opponent's shoes for a moment without agreeing to everything said, they are able to amicably and often creatively resolve the dispute to the satisfaction of both parties. The bottom line is, this process saves litigants time and money and helps a judge run a more efficient Court Docket.

The ICPTM program also provides cost-savings for a county, since less time is required to handle these cases, versus traditional civil trial cases. Compliance rates are higher and appeals are virtually eliminated when the parties reach their own resolution.

Results Speak Clearly

Following mediation, an ICPTM Satisfaction Survey is completed to evaluate four areas: 1) the overall mediation process, 2) whether the party would mediate again, 3) cost effectiveness, and 4) the individual mediator. In all four areas, more than 90% respond to the survey as "satisfied" or "very satisfied" whatever the outcome is.

The Program is a very practical application of the mediation process which works to resolve disputes speedily, eliminates the dreaded court backlog, reduces costs, and increases value to the taxpayers. It is a win-win proposition that also educates and improves community harmony.

Got Cases? You Can Do It!

As a complete packaged program, the In-Court Pre-Trial Mediation Program Forms are now available in West's Texas Forms, Civil Trial and Appellate Practice, Ch. 33, authored by Frank Elliott, Dean Emeritus and Professor of Law, Texas A&M University School of Law.

Judge Swearingin or any of the mediators in the Program, will be glad to assist any court interested in implementing the Program. If you are a judge and want to contact Judge Swearingin directly, call at:

(817) 884-1395.

To reach either of the other co-founders, contact Lancaster Smith Jr. J.D., at:

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New Texas Justice Court Rules Include "Mediation"

By Marty Leewright

Enormous Caseload

There has been a quiet evolution occurring in the lower courts in Texas that some may not be fully aware of. A new state law passed during a recent Texas legislative session abolished "Small Claims Courts" as we know them in Texas (effective August 31, 2013). They had existed since the Small Claims Court Act of 1953. It also completely overhauled the 500 series Texas Rules of Civil Procedure governing 819 Justice Courts in 254 counties of Texas; other sections of these Rules and of the Texas Property Code were repealed.

These changes affect more than 400,000 civil cases annually (2011 figure, according to Chief Justice Nathan Hecht). Claims of no more than $10,000 are handled in these lower courts each year and also include landlord tenant "Eviction" cases, "Repair and Remedy" cases and "Debt Claim" cases. A "Small Claims Case" is also specifically defined in the new Rules. TX Rule of Civ. Pro. 500.3 (a).

Well over one million total cases are handled in these lower courts annually, if you include several other types of cases, Towing, Driver's License Suspensions, Texas Transportation Code Citations, Truancy, Parks and Wildlife Citations, Disposition of Stolen Property and several other types of cases. More Texas citizens have contact with these courts than any other.

Jurisdictional Limit Will Increase

It is not a matter of if jurisdictional limits will increase in these important lower courts, but when. When the jurisdictional limit increases to $20,000 or perhaps $25,000, the number of cases in these lower Texas courts will also increase substantially. The new Civil Procedure Rules will make that more likely, once they are fully assimilated. Texas Statutory County Courts jurisdiction was just doubled from $100,000 to $200,000. Small Claims and Justice Courts began in the 1950s with jurisdiction of $500, later increasing to $1,000, $1,500, $2,500, $5,000 and for many years now $10,000.

Burgeoning Judiciary Budget: "Judicial Overhaul Bill"

Judges in these lower Texas courts are now referred to throughout in the new rules as "Judges" of the Justice Court, rather than J.P.'s or Justices of the Peace. One who is perceptive can see what direction things are moving. This restructuring of the lower courts originated from a 2007-2008 Texas Supreme Court Task Force Report recommending that the Texas Civil Court System should be a three-tier system. The concern was, in a period of economic decline, the burgeoning cost of the judiciary budget. The Task Force envisioned a more simplified Texas civil court system of only the District Courts, County Courts at Law, and Justice courts.

Governor Perry signed 132-page House Bill 79 on July 19, 2011. This "judicial overhaul bill" directed these courts to transfer pending "Small Claims Court" dockets to Justice Courts on August 31, 2013. The entire Texas Rules of Civil Procedure, Texas Rules of Evidence, Texas Civil Practice and Remedies Code Chapter 15 Subchapter E, along with the specific new Justice Court Rules, are required to be provided to the public at all times by the hundreds of Justice Courts. There is also a new "Civil Information Sheet" which must be filled out

and filed with any Petition, just as now in the Statutory County and District Courts. (When the Supreme Court began looking at streamlining the operation and administration of the state's judicial branch, they realized they had very little statistical data.)

Texas, like most other states, was facing serious budgetary and financial challenges. The caption to H.B. 79 states the bill is related "to fiscal and other matters necessary for implementation of the judiciary budget." Governor Perry called a special session in Summer 2011 so the Legislature could finalize the state's budget and legislators were allowed to introduce bills to meet that goal. Administrative Director of the Texas Office of Court Administration Carl Reynolds stated at the time that H.B. 79 "charts a course for simplifying the overly complicated court system in Texas." Other courts, County Courts at Law, District Courts, Appellate Courts, as well as administration of Texas courts, have also been affected by the detailed judicial overhaul bill.

The Bill called for the Supreme Court to promulgate new lower court rules. The Texas Supreme Court then appointed a 16-member statewide Task Force to handle transition of the lower courts and recommend "Rules in Small Claims Cases and Justice Court Proceedings", Chaired by Justice Court Judge Russell Casey of Tarrant County. The Task Force made final recommendations to the Court on March 31, 2012. The Court published the rules for public comment before final adoption. They were formally adopted by the Supreme Court on February 13, 2013 to be effective August 31, 2013.

Fair, Expeditious, Inexpensive Resolution

There will no longer be confusion about what is in Small Claims Court and what is in Justice Court, each with separate rules. There will only be one lower court now and one set of rules. The Texas legislation contains a clear mandate for how "new" Justice Courts are to be run.

"The hearing is informal, with the sole objective being to dispense speedy justice between the parties." The rules may not be "so complex that a reasonable person without legal training would have difficulty understanding or applying the rules." The statute further stated that the rules should "ensure the fair, expeditious, and inexpensive resolution of small claims cases." Further, that the rules of the Supreme Court may not "require that a party in a case be represented by an attorney."

Enter Mediation

Mediation is included in the rewritten court rules for all 819 Texas Justice Courts. It is incorporated into the pretrial rules. Rule 503.4, the Pretrial Conference rule, lists "mediation or other alternative dispute resolution services" as an appropriate issue. Rule 503.5 is entitled "ALTERNATIVE DISPUTE RESOLUTION". It reads:

"State Policy. The policy of this state is to encourage the peaceable resolution of disputes through alternative dispute resolution, including mediation, and the early settlement of pending litigation through voluntary settlement procedures. For that purpose the judge may order any justice court case to mediation or another appropriate and generally accepted alternative dispute resolution process."

Mediation in Eviction cases are excepted – "if it would delay trail." Id.

One may ask what kinds of Justice Court cases are appropriate for Mediation? Many kinds of civil cases are appropriate. They can be either by a Pro Se or represented by an attorney. Contract Disputes, Vendor Disputes, Landlord-Tenant, Property Damage, Employer-Employee, Creditor Claim Cases, suits involving an ongoing relationship, the list is almost endless. It is unlikely that Eviction cases would be mediated. Because Eviction has a specific statutory and expedited procedure. The sole issue in such a case is to determined possession. However, it is not outside the realm of possibility that an Eviction case could be mediated.

As many Texans are painfully aware, litigation is very expensive and time consuming. Mediation is a much quicker and less expensive way to resolve a dispute and is a time-tested and near perfect process for the lower courts.

Justice Court Mediation Program

What is a Justice Court "Mediation Program"? It is likely coming to a Justice Court near you. It is a voluntary program of mediation by consent of the parties to a lawsuit filed in a Justice Court. The Court simply provides information and an avenue for Mediation, which is stated Policy of the State of Texas supported by the Texas Supreme Court. Such court mediation programs already exist.

For example, in Justice Court, Precinct 1 of Tarrant County, Texas, Judge Ralph Swearingin has designed an In-Court Mediation program which has resulted in approximately 85% of all litigants participating in mediation and of those participants an 85% settlement rate. 35-45 lawsuits are mediated in one morning by multiple trained and experienced mediators. Far less than legal fees, parties pay a nominal $50 per side for a fair, expeditious, and inexpensive resolution. Sound familiar?

What is the cost to courts? There is an actual cost savings to the judiciary budget. Sound familiar? More cases, can be resolved much more quickly. A Justice Court Mediation Program will actually save money for Texas taxpayers and most litigants and it "charts a course for simplifying the overly complicated court system in Texas." It is a win-win.

Marty B. Leewright, M.A. J.D., is a Mediator, Mediation Trainer, and a "mediation advocate" for parties in the Mediation process. In the late 1990s as Legal Advisor he designed a Mediation Program for the 27,500 students at the University of North Texas and 6,500 faculty and staff, which resulted in a Texas university ADR policy and the Mediation Program was copied by other higher education institutions. Marty served on the Texas Supreme Court Task Force which rewrote the procedural Rules for 819 Justice Courts. He is a mediator in the In-Court Mediation Program in Tarrant County mentioned in the article. Marty is founder and head of TJC, Resources, LLC, and TexasJusticeCourts.com.

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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An attorney friend sends you an e-mail with the notation "it seems there should be something unethical or illegal about this."

The "this" to which she refers is a series of e-mails reading as follows:

(1) From Chief Legal Officer of Large Texas Corporation to group of lawyer colleagues:

> *"An out-of-town friend needs a collection's law firm in your city to collect a $20k business debt. If you know of someone suitable, please let me know."*

(2) From Lawyer Colleague to Chief Legal Officer:

"I refer all of my collection clients to Total Mediation Services in your city. They have a free 14-day free demand letter service on selected accounts. I have known Joe Blow for several years and they are very good." Contact Joe Blow, C.C. M., Certified Mediator, Total Mediation Services, Inc., Your City, Texas, telephone (456) 123-87890.

As a well respected mediator, how do you respond to your friend's query as to the legality and/ethical issues with Mr. Blow's services?

****

Elaine Block (Houston) I don't think there is anything unethical or illegal about a mediator performing legal services but I do find it troubling that Joe Blow performs his collection work under the Certified Mediator or Total Mediation Services mantle. Joe Blow needs to have a Blow Legal Services title for his collection work because it seems misleading, at best, that she should perform collection work as a "mediator." This is not the type of work that mediators perform.

Don Philbin, (San Antonio) I routinely delete emails seeking help collecting a debt "in your city." But no one deletes Suzanne Duvall's emails, because she doesn't send (or receive) them, which raises the question of how she obtained these emails.

While mediation may not be the practice of law, Total Mediation Services may be practicing law with it's "free 14-day demand letter service." A demand letter usually states an intention to file suit unless debt of paid within the specified period (usually 30 days or more to trigger attorney's fees). Joe Blow's demand letter, being merely a free service, may not bind Blow to sure the debtors unless the potential clients became actual clients and engage Blow to represent them beyond rhe initial 14-day period.

Unless he states the nature of his representation and actually intends to fle suit, Blow's statements may rise above negotiation puffery and be misleading. That could raise issues for him under the Fair Debt Collection Practices Act, Texas Disciplinary Rules 4.01, and Nodule Rule 7.2 of Professional Conduct (assuming that Joe is an attorney in addition to being a mediator.)

There might also be an issue with Lawyer Colleague's assertion that, I refer **all** of my collection clients to Total Mediation Services." The fact that Lawyer Colleague refers **all** of his clients to Blow suggests there might be an exclusivity agreement, which might be barred by the Module Rules of Professional Conduct, but not expressly by the Texas Disciplinary Rules or Occupational Code. Even if the Model Rule applies, Lawyer Colleague would seemingly sail into its safe harbor if he genuinely believes that Total Mediation Services is the best.

Will Pryor, (Dallas) The practice of mediation is highly unregulated. This is as it should be. But we must recognize that there are corners cut, and some edginess to what providers of :neutral: services may be doing from time to time.

Question 1 (Degree of difficulty: easy) Can "Total Mediation Services" mediate the dispute with full disclosure and accept a percentage of the amount collected as payment for their fee? No. Even with full disclosure, a neutral provider cannot have an interest in the outcome of the dispute.

Question 2 (Degree of difficulty: medium) In my view there is nothing inherently unethical, or illegal, about a debt-collection service calling themselves "Total Mediation Services." They should call themselves "Smith & Jones: the Resolution Specialists," or "We Solve Problems Firm." It is not the name of the firm that is the problem. The problem arises if their communications with debtors do not make it cleat that they are representing and are advocates for the interests of the creditor. But as long as their representation is fully disclosed, and they do not attempt to render "neutral" services, they are ok.

Question 3 (Degree of difficulty: hard) Can "Total Mediation Services" have a contractual relationship with a creditor, in which the creditor agrees to put a "Total Mediation Services" clause in all it's loan documents, and still provide "neutral" mediation services? There are dozens of for-profit service providers doing this very thing, and I believe it is problematic. How does the provider maintain that its services are truly neutral, when the success of the program will be measured by a "client" based on overall, satisfactory outcomes?

Michael Schless, (Austin) How do TMS and Blow's services give me legal/ethical heartburn? Let me count the ways.

First, what is being sought is "a collections law firm," but what is being recommended is what purports to be a mediation service. It sounds lie Blow is trying to be a little of both but his clients would be better served if he was a lot of nether.

For example, if Blow is not a lawyer, his writing a demand letter on behalf od a third party (even if the letter itself is free) as part of a total package of services for which a fee is being charges would likely constitute the unauthorized practice of law.

Regardless of whether Blow is an attorney, if the 14 day demand letter is an attempt by TMS to represent the creditor in the same collection matter in which TMS will undertake to serve as mediator, there would be blatant disregard for mediator neutrality and impartiality as required by every applicable ethical code for mediators, parenthetically, I wonder why that service is available only on :selected accounts," and by what criteria is a given account "selected."

Furthermore, my heartburn may be redoubled depending on the meaning of "C.C.M.," designation used by Blow. If C.C.M. means a certified case manager (healthcare) *or* certified construction manager (construction), I would simply be curious how that would be relevant to TMS's services. I certainly hope C.C. M. in this context does *not* mean Candidate for Credentialed Mediator as that term is used by the Texas Mediator Credentialing Association. The primary reason is that Blow's activities do not conform to the TMCA standards of practice of code of ethics.

Another reason is that anyone with a TMCA *credential* would or should know that *"Certified Mediator"* is not a meaningful term in the Texas mediation community. Someone who has completed a statutory 40-hour mediation training program may have been given a piece of paper called a "certificate" indicating completion of the course, but the term "Certified Mediator" is not a part of the Texas mediation lexicology as it is in a state like Florida.

To paraphrase Lauren Bacall, I would put my lips together and "blow" the whistle on Total Mediation Services.

COMMENT: Many attorneys serve as mediators and many mediators serve as attorneys. Ethically, however, they can't be both at the same time.

A mediator is prohibited from giving legal or other professional advice while serving as a neutral third party mediator. An attorney must diligently represent the interest of his/her client: the very anti-thesis of a third party neutral. And, of course, as pointed out by Mike Schless there is always the question of the unauthorized practice of law...

These issues are merely the tip of the iceberg that is this seemingly simple query. Unfortunately more and more of these "mediation services" firms are cropping up all over the state. Some have been addressed by the State Bar of Texas. Unfortunately unless the "C.C.M." is actually a Credentialed Mediator through the Texas Mediator Credentialing Association, however, there are few, if any, avenues for grievance against the "Mediator."

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

SUBMISSION DATES FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

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

SEND ARTICLES TO:

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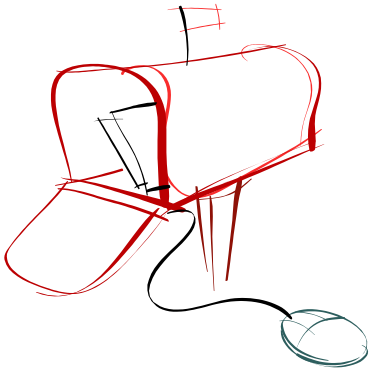

ADR ON THE WEB

Mediation Videos

By Mary Thompson

Mediation is a behind-closed-doors profession. Although we talk about practice issues, we seldom have a chance to observe each other at work. Listed here are three web-based resources showing simulated and actual mediations.

International Mediation Institute
http://imimediation.org/mediation-videos

Resolution Through Mediation: Solving a Complex International Business Problem was a collaboration between The International Institute for Conflict Prevention and Resolution and the International Trademark Association. German mediator, Peter Müller, mediates a simulated case involving accusations of unfair trade practices and trademark infringements between a U.S. distributer and Russian manufacturer of vodka. The mediator uses a mutual gains approach to address both the legal issues and the business interests of both parties. The video also demonstrates the use of joint and individual sessions, open-ended questions, and reality testing. A study guide is also available.

Maryland Mediation and Conflict Resolution Office
http://www.courts.state.md.us/macro/publicationsmedia.html

MACRO has produced a series of videos to portray the diversity of types of cases and of mediator styles.

How Shall We Mediate Thee: Several Mediators Handling the Same Dispute shows a simulated workplace mediation, organized by stages of the mediation process. For each stage, small clips of eight mediators demonstrate a variety of strategies for working with the parties. Samples of facilitative, narrative and transformative styles are apparent, though not specifically identified in the videos.

Also available are three approximately one-hour "**Mediation Role Play Segments**." These are extended role plays, each featuring one of the original eight mediators, again conducting the same workplace scenario. Although these "segments" go into more depth, they can be tedious and less engaging than the shorter clips in *How Shall We Mediate Thee*.

Resolutionary People shows five brief scenarios featuring real mediators (and in two cases, co-mediators), and real disputants, in actual disputes. The videos cover five types of cases: family business, workplace, elementary school, civil litigation and neighborhood. For each of the five cases, the mediator speaks about his or her experience, and brief clips of the actual mediations are shown. Although the video shows very little of the actual sessions, the shots of real mediations, and the variety of subjects make this a brief, but compelling overview of the profession.

Virtual Mediation Lab
http://www.virtualmediationlab.com/videos-2/

Virtual Mediation Lab is a recent program sponsored by the Association for Conflict Resolution – Hawaii. The project is designed to help mediators develop their skills and to promote the use of online mediation. The videos show the mediators and disputants on separate screens and at remote locations. In most, the participants are in different countries. Some are conducted, with translators, in two languages. The videos demonstrate online and mobile mediations,

different types of cases, different languages, and different mediation styles.

Under the title "**Watch Different Methods in Action,**" three videos are listed that show narrative, transformative and facilitative mediations, each using the same simulated workplace scenario. Each simulation is followed by a de-brief among the mediator and disputants about the session, the style used, and the mediator's view of using online mediation. The narrative mediation de-brief, includes an interesting exchange between New Zealand mediator Barbara McCulloch, and the Scottish and Canadian mediators playing the parts of the disputants. The Scottish (transformative) mediator offers feedback regarding the differences between transformative and narrative approaches.

Summary

In terms of cringe-worthy mediator behavior, it's all here: condescension, too much structure, too little structure, poor listening, and judgmental questions. But competence, patience, neutrality and interesting strategies are on display as well. Much what you see on the videos, you would never think of doing, or perhaps never want to do. Some of it you might actually want to try. But more than serving as a resource for skills development, these videos are a fascinating look into a very diverse universe of mediation practice that we seldom get to see.

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

CALENDAR OF EVENTS 2013-2014

40-Hour Basic Mediation Training * Houston * October 17-19 continuing 24-26, 2013 * *Worklife Institute* * E-Mail: efburleigh@gmail.com * Phone: 713-266-2456 * **www.worklifeinstitute.com**

40-Hour Basic Mediation Training * Dallas * October 21-24, 2013 * *Professional Services & Education* * E-Mail: nkferrell@sbcglobal.net * Phone: 214-526-4525 * **www.conflicthappens.com**

Advanced Family Mediation Training * Kerrville * October 23-25, 2013 * *Hill Country Dispute Resolution Center* * Phone 830.792.5000 or 888.292-1502 * **http://www.hillcountrydrc.org** or E-Mail hcadrc@ktc.com

Basic Mediation Training * Austin * October 30, 31 November 1, continuing November 5-6, 2013 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

Advanced Family & Divorce Mediation Training * Houston * November 1-3, 2013 * *Manousso Mediation & Alternative Dispute Resolution—Conflict Resolution Services and Training* * Phone 713.840.0828 * **http://www.manousso.us**

Mediation Dynamics - 30-Hour Family Mediation Training * Mansfield * November 9-10, continuing November 16-17, 2013 * *Mediation Dynamics* * E-Mail: email@MediationDynamics.com * Phone: 817-926-5555 * **www.mediationdynamics.com**

Group Facilitation Skills * Austin * November 18-20, 2013 * *Corder/Thompson* * For more information visit www.corderthompson.com or call 512.458.4427

Dispute Resolution Seminar—Family Arbitration * Houston * December 6, 2013 * *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 * January 6-10, 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**

Commercial Arbitration Training (Domestic & International) * Houston * January 8-12, 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**

Basic Mediation Training * Austin * February 19-21 continuing February 25-26, 2014 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

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

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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

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