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Alternative Dispute Resolution Section

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CHAIR'S CORNER

by William H. Lemons, III, Chair, ADR Section

"PLEASE VOTE EARLY, AND OFTEN"

It's entirely appropriate in this election year that we have several things before us where the input and guidance from our membership would be most helpful. But first, let me talk about what has been going on.

The ADR Section Council, and many of the members of the section, played a very prominent role in the CLE program held at South Texas College of Law last month. Titled *Advocacy Skills for Resolving Disputes,* the program started with a discussion and statistical analysis of what is going on in the courthouse, given the almost twenty years of alternate dispute resolution activities that we now have behind us. The program culminated in a dialogue called *The Vanishing Civil Jury Trial,* where we attempted to put all this into perspective and talk about the good and the bad. All in all, it was fascinating.

My thanks to all of you who participated and so generously gave your time and shared your skills. This is the kind of program that we, as a section, are capable of presenting. Having both the collaboration with and the facilities of South Texas College of Law really made the program work. The only possible regret is that few outside the ADR community attended. To some extent, we ended up teaching each other what we know best. On the other hand, the ADR Section and its leadership played an important role in the tribute to Frank Evans – the dedication of the *Frank Evans Center for Conflict Resolution.* That alone was worth the price of admission.

Thanks to the efforts of Mike Schless, John Fleming and others, we also held another *Arbitration Roundtable* in Austin recently. In attendance were several of our Council members, many providers and end users of arbitration services, but also three staff persons from the Texas Senate. The ADR Section, through its arbitration taskforce, is very actively involved in collecting input and data, both good and bad, about arbitration, and is committed to being a resource to the Senate Jurisprudence Committee. The taskforce will now prepare a *Best Practices* guide or protocol to demonstrate fundamental fairness in arbitration, largely in the non-voluntary pre-dispute consumer context. The taskforce will also begin preparing an educational program to attempt to eliminate some of the misinformation that appears to be floating around in the consumer community about arbitration.

Last, but by no means least, the section (again, through Mike Schless) played a significant role recently in successfully lobbying the SBOT MCLE Committee to alter its existing accreditation standards to make it easier for ADR programs, speakers, and content to receive MCLE credit. Mike worked with Gayle Cipriano (Association of Attorney-Mediators), Linda Gibson (Texas Association of Mediators) and Trey Bergman (Houston Bar ADR Section) in achieving this. Also,

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In this Issue

Mediation Confidentiality and the Search for Truth

*By Charles McGarry**

I. The Rationale for Mediation Confidentiality

The advent of formal alternative dispute resolution techniques, along with the simultaneous crack-down on so-called "Rambo" litigation tactics, reflected a growing consensus that our justice system had grown too adversarial, and that changes were needed "to encourage the peaceable resolution of disputes."[1]

To avoid making mediation just another battleground, the process was made confidential. There are two underlying rationales. First, parties must be encouraged to speak freely in an ADR proceeding in order to promote a candid exchange that is considered desirable for settlement. A mediator cannot assist settlement talks without knowing all of the relevant facts and concerns.[2] Second, the independence of the third-party neutral would be undermined if he or she were required to testify at some future time about what was said at the ADR proceeding.[3]

II. Mediation Confidentiality Cannot be Absolute

Mediation confidentiality, however, is contrary to our long-standing legal tradition that all relevant evidence should be available in judicial proceedings, subject only to certain very limited exceptions. Exclusion of ADR communications from evidence could undermine the fairness and accuracy of the ultimate process for determining truth. [4] Moreover, absolute mediation confidentiality could undermine the integrity of our entire legal system by insulating from liability all forms of improper conduct such as fraud or third-party neutral malpractice. If one participant in a mediation were to kill the other in full view of the mediator, would the murderer go free, or be absolved of civil liability, simply because no one could testify as to what happened?

So where do we draw the line between confidentiality and truth? Professor Sherman argues that "Texas courts should be prepared to recognize exceptions in situations where the broad grant of confidentiality would be at cross purposes with the objectives of ADR, or would result in unintended results affecting significant public policy interests."[5] Fortunately, the Texas legislature has clearly anticipated this conflict, and has created a scheme of statutory exceptions to mediation confidentiality.

III. Statutory Exceptions to Confidentiality

Two separate sections of the Texas mediation statute address issues of confidentiality. Section 154.053 of the Texas Civil Practice and Remedied Code (the "Code") directs the mediator to maintain the confidentiality of all communications unless disclosure is authorized by the disclosing party.[6] It also contains general language that "all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential"[7] unless the parties agree otherwise. The only exception is an obligation to report the abuse or neglect of children, the elderly, and the disabled.[8]

Section 154.073 of the Code contains a blanket statement that "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an ADR procedure is confidential."[9] A second blanket rule makes any record made at an ADR procedure confidential, and prohibits participants or the mediator from being required to testify about confidential information "in any proceedings relating to or arising out of the matter is dispute."[10] There are four statutory exceptions to these general grants of confidentiality. The first prevents parties from taking evidence that would otherwise be discoverable and attempt to immunize it by disclosing it during ADR.[11] The second exempts settlement agreements entered by government bodies that would otherwise be subject to the Open Records law.[12] The third restates the obligation to report the abuse or neglect of children, the elderly, and the disabled.[13]

The fourth and last major exception to confidentiality permits a trial court to determine the issue of confidentiality whenever the ADR statute "conflicts with other legal requirements for disclosure of communications or materials . . . ." [14] The Dallas Court of Appeals has issued two major decisions construing this language.

IV. Avary v. Bank of America

Avary v. Bank of America, N.A.[15] involved a cause of action for negligence and breach of fiduciary duty by the minor heirs of an estate against the bank acting as the independent executor of their father's estate (the "Estate"). The claim arose out of the bank's alleged conduct during the mediation of a prior wrongful death and survival action suit. In that mediation, the parties were divided into three groups: the defendants; the plaintiff children (with their guardian and attorneys); and the remaining plaintiffs, which including the bank and the other heirs. The children alleged that the bank had turned down an offer of $450,000 to settle the Estate's survival action claim, then the bank's trust officer left the mediation and delegated the authority to settle the Estate's survival action to the lawyers for the other heirs. Those heirs then

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accepted a lump settlement of the Estate's survival action and their own client's wrongful death claim, and allocated only $75,000 to the survival action.

The trial court precluded any discovery or testimony from anyone about what had happened at the mediation, except that the bank's trust officer was allowed to testify because of the bank's fiduciary duty of disclosure to the plaintiffs. However, the trust officer was not present at the critical point of the mediation, and could not testify to how the settlement occurred. The trial court then granted summary judgment for the bank.

The court of appeals reversed on the ground that the trial court had failed to follow the statutory procedure for determining whether a given mediation communication should be confidential. The court held that the bank's fiduciary duty to disclose all relevant information to the plaintiff heirs was a conflicting legal requirement for disclosure under section 154.073(e), and that the statute required the trial court to conduct an in camera examination of two witnesses to determine the "facts, circumstances, and context" surrounding the witnesses' potential testimony, in deciding whether "all, some, or none" of their testimony should be disclosed.[16] One witness was the children's own lawyer, who also held a fiduciary duty to the children. The other witness was the lawyer for the other heirs who had settled the case. Although he did not owe a fiduciary duty to the children, the court held that it was sufficient if he had knowledge of facts relevant to the bank's fiduciary duty.

The supreme court denied the bank's petition for review. On remand, the trial court conducted an in camera examination of the lawyer who had settled the underlying case, and ordered him to testify. The trial court preserved the right of the witness to assert any relevant objection or privilege other than mediation confidentiality. The bank has sought a writ of mandamus from the supreme court, which remains pending.[17]

V. Alford v. Bryant

The Dallas Court of Appeals again addressed mediation confidentiality in Alford v. Bryant[18], a legal malpractice claim. The underlying case was a DTPA case against a roofing company for a defective roof. The case went to mediation after the plaintiff had incurred $12,000 in legal fees on a $5,000 claim. A settlement was entered in which the defendant agreed to make any repairs required by a neutral third party, and the issue of attorney's fees was to be tried to the court on affidavits. The plaintiff's lawyer submitted an affidavit on the amount of fees, but the settlement agreement provided no recovery of damages, and it precluded the submission of any evidence to show that the plaintiff had prevailed in any sense. Consequently, the trial court never knew that the neutral third party ordered the replacement of the entire roof, and there was no basis to recover attorney's fees.

The plaintiff's legal malpractice case alleged that the attorney was negligent in recommending a settlement that effectively made recovery of legal fees impossible, even though that was the largest part of the plaintiff's claim. The case was tried to the bench without a jury. Both the plaintiff and her attorney testified as to what occurred at the mediation without objection. When the attorney tried to call the mediator as a witness to support her side of the story, the trial court excluded the testimony. The trial court found the attorney negligent, and awarded as damages the attorney's fees that her client had paid to her in the DTPA case.

The court of appeals reversed and remanded for a new trial, holding that the trial court erred in excluding the mediator's testimony. The basis of the court's ruling was that mediation confidentiality was a privilege like any other, and that the plaintiff had waived mediation confidentiality by making offensive use of the privilege.[19] The offensive use doctrine prevents a plaintiff seeking affirmative relief from invoking a privilege to exclude "outcome determinative" evidence when disclosure of the privileged information is the "only means" to procure the evidence.[20]

The court held that the mediator's testimony was both outcome-determinative and non-cumulative of the parties' testimony, because the mediator's neutrality was needed to resolve the swearing match between the parties.[21] Forcing the mediator to testify, in the court's view, was the "principal means" to resolve the swearing match. The plaintiff's petition for review remains pending before the supreme court.[22]

VI. How the Supreme Court Should Resolve the Issue

Although both Avary and Alford order disclosure of mediation communications, the opinions are fundamentally inconsistent. Avary was a discovery case, and the court of appeals precisely followed the statutory procedure for determining the discoverability of mediation communications in the presence of a conflicting legal duty of disclosure. In contrast, requiring a mediator to testify at trial completely eviscerates the statutory requirement of an in camera review prior to discovery. No one would bother with such a cumbersome process just to take a mediator's deposition, if they could simply call the mediator at trial.

Moreover, testimony by the mediator is governed by section 154.053[23] of the Code, rather than section 154.073. Section 154.053 does not make exceptions for "conflicting requirements for disclosure."[24] This is consistent the second major rationale for mediation confidentiality, i.e., to avoid undermining the independence and neutrality of the mediator. Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one side or the other. There is reason to fear that this would destroy a mediator's efficacy as an impartial broker.[25] Requiring a mediator to testify merely resolve a swearing match between the parties would result in the mediator having to testify in every case, because the mediator is always neutral.

But perhaps the most fundamental error in Alford is its

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decision to treat mediation confidentiality as a privilege that belongs to the plaintiff and can be waived by the plaintiff. Confidentiality is not a privilege that belongs to a single party; it is a public policy designed to protect the integrity of the mediation process itself. A single party should not have the ability to waive a public policy that has been enacted for the good of the system, not for the benefit of a particular party. In this sense, mediation confidentiality is unlike any other privilege, such as work-product, attorney-client, or physician-patient, all of which are court-created privileges that are specifically conferred on individual parties.[26] The Supreme Court should hold that the trial court properly excluded the mediator's testimony in Alford under section 154.053.

In contrast, Avary was correctly decided, and poses no threat to the statutory scheme of confidentiality or the neutrality of the mediator. The legislature recognized that exceptions to confidentiality are going to be necessary. The Avary court enforced the statutory procedure for making this determination. A fiduciary duty is clearly a conflicting requirement for disclosure.

Other exceptions to confidentiality are appropriate as well. For example, section 154.073, if taken literally, would prevent disclosure of any written settlement agreement made during ADR, as the agreement is clearly a "record made at an alternative dispute resolution procedure."[27] However, such a strict interpretation would prevent parties from enforcing the settlement agreement, thereby creating a conflict with section 154.071(a) and undermining the very purpose of the ADR statute.

The "traditional rule" is that mediated settlement agreements must be enforced under the normal rules of contract law, including admission of all evidence necessary to support the contract or any contract defense.[28] If mediation participants can testify to fraud in a mediation as a defense to enforcement of a settlement agreement, why can't they testify to it, or to any other tort, as a cause of action?

Other recognized exceptions include (1) the need for trial courts to determine whether the parties had complied with its orders, such as an order to exchange documents, or to arrive with authority to settle; (2) discovery of agreements that affect the public health and welfare, which would constitute court records subject to disclosure under Rule 76a; and (3) the need to acquire proof of malpractice by a third-party neutral.[29]

The last example points to a constitutional limitation on mediation confidentiality. Texas clearly recognizes that mediators and other third-party neutrals may be held liable at common law for negligence.[30] This is implicit in the statute granting qualified immunity to volunteer mediators.[31] Disclosure of mediator misconduct is justified on the ground that the ADR process would be undermined if mediators were permitted to commit malpractice with impunity.[32] However, such a cause of action becomes impossible if evidence of the mediator's conduct is never admissible.

Thus, confidentiality may conflict with the Open Courts provision of the Texas Constitution.[33] The open courts doctrine "is premised upon the rationale that the legislature has no power to make a remedy by due course of law contingent upon an impossible condition."[34]

At least one court has held that ADR confidentiality violates the open courts provision when applied to appeals from tax appraisals, because it results in an open government function being conducted in secret.[35] The same result should obtain when ADR confidentiality serves to make proof of a cognizable cause of action impossible.

VII. Conclusion

Exceptions to confidentiality actually promote the integrity of the ADR process by preventing parties from using it to hide evidence of fraud or other wrongdoing. The open courts doctrine requires an exception whenever it is necessary to avoid making proof of such wrongdoing impossible. However, mediators should be afforded greater confidentiality under section 154.053 than participants are afforded under section 154.073. The only circumstances under which a mediator should ever testify are: (1) where all the parties to the mediation consent; (2) where there is a need to report the abuse or neglect of children, the elderly, or the disabled; (3) where the mediator is the only person with knowledge of wrongdoing, and the exclusion of that testimony would make proof of a recognized cause of action impossible, thereby violating the Open Court's provision; or (4) where the mediator is accused of wrongdoing.

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ENDNOTES

[1] See, e.g., Tex. Civ. Prac & Rem. Code Ann. §154.002.
2 See, Kirkpatrick, Should Mediators Have a Confidentiality Privilege?, 9 Mediation Q. 85, 94 (1985).
[3] Freedman & Prigoff, Confidentiality in Mediation: The Need for Protection, 2 Ohio St. J. on Disp. Resol. 37, 38 (1986).
[4] See Sherman, Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience, 38 S. Tex. L. Rev. 541 (1997).
[5] Id. at 573.
[6] Tex. Civ. Prac. & Rem. Code Ann. §154.053(b).
[7] Id. §154.053(c).
[8] Id. §154.053(d).
[9] Id. §154.073(a).
[10] Id. §154.073(b).
[11] Id. §154.073(c).
[12] Id. §154.073(d).
[13] Id. §154.053(f).
[14] Id. §154.073(e).

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[15] Avary v. Bank of America, N.A, 72 S.W.3d 779 (Tex. App. Dallas 2002, pet. denied).
[16] Tex. Civ. Prac & Rem. Code Ann. §154.073(e); Avary, 72 S.W.3d at 801-02.
[17] In re Bank of America, No. 04-0544.
[18] Alford v. Bryant, 137 S.W.3d 916 (Tex. App. – Dallas 2004, pet. filed).
[19] Id. at 922.
[20] Id. at 921.
[21] Id. at 922.
[22] Bryant v. Alford, No. 04-0760.
[23] Hur v. City Of Mesquite, 893 S.W.2d 227, 234 (Tex. App. – Amarillo 1995, writ denied).
[24] Tex. Civ. Prac. & Rem. Code Ann. §154.053(d).
[25] Freedman & Prigoff, supra note 3, at 38.
[26] *See* Tex. R. Evid. 511 ("A person upon whom these rules confer a privilege . . . .").
[27] Tex. Civ. Prac. & Rem. Code Ann. §154.073(b).
[28] See Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658-59 (Tex. 1996); Stevens v. Snyder, 874 S.W.2d 241 (Tex. App. – Dallas 1994, writ denied); see also Martin v. Black, 909 S.W.2d 192 (Tex. App. – Houston [14th Dist.] 1995, writ denied).
[29] Sherman, supra note 4, at 552-62.
[30] Id. at 558-59.
[31] Tex. Civ. Prac. & Rem. Code Ann. §154.055(a).
[32] Sherman, supra note 4, at 558-59.
[33] Tex. Const. art. I, §13.
[34] Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 355 (Tex. 1990).
[35] Hays Cty. Appraisal Dist. v. Mayo Kirby Springs, Inc., 903 S.W.2d 394, 397 (Tex. App. - Austin 1995, no writ).

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"PLEASE VOTE EARLY, AND OFTEN"
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Mike Kopp and the *DRC Legislative Task Force* have hopefully been able to secure two legislators to be sponsors for the DRC "funding" bill in this legislative session. Senator Jeff Wentworth (through his Committee Director/General Counsel, M.L. Calcote) has been tremendously responsive, as has been Representative Ruben Hope.

Many of you are no doubt familiar with two recent cases, decided by the Dallas Court of Appeals, that have placed mediator/mediation confidentiality squarely back in the spotlight. One is Avary v. Bank of America, N.A., 72 S.W.3d 779 (Tex.App. – Dallas 2002, pet. denied)(now reincarnated in a mandamus proceeding before the Texas Supreme Court in the form of In re Bank of America, N.A., No. 04-0544). The other is Alford v. Bryant, 137 S.W.3d 916 (Tex.App. – Dallas 2004, pet. filed).

We are very fortunate because this issue of our newsletter features articles by the attorneys who represent both sides of the confidentiality issue in each of the two cases, plus an article by a law professor who filed an amicus brief in the Avary case. Talmage Boston, who represents the party *defending* mediation confidentiality in Avary, presents his views beginning at page 6. Charles McGarry, who has the dubious distinction of representing the party *opposing* mediation confidentiality in Avary yet also the party *defending* confidentiality in Alford, states his case(s) in the article beginning on page 2. John Mercy, whose client *opposes* mediation confidentiality in Alford, weighs in on these issues beginning on page 8. Professor Wayne Scott, who, on behalf of the Association of Attorney-Mediators, wrote an amicus brief *defending* mediation confidentiality in the Avary case, advocates a broad mediation privilege in his article that begins on page 10. These insightful articles will give all of you an appreciation of the complexity of the issues that our state's highest court has been asked to resolve.

Now, here is where we need your help. The Council of the ADR Section monitors matters such as these and, where appropriate, takes a position and makes sure the section is heard on important issues. Historically, the Council has only acted where a) the issues are important or striking to the point that they warrant the section taking action, and b) the members of the Council unanimously (or substantially so) agree on the need to take action as well as the course of action to take. Potential action might be to file, or assist in the filing of, an *amicus* brief in either or both cases.

In these cases, is the offensive use of the mediator privilege *offensive*? Are the confidentiality issues and/or rulings discussed in the articles of such importance and impact that action by the section is warranted? If so, what action should be taken? Are these rather *routine* and not *astonishing* decisions that are limited to the particular facts of each case and thus not earth-shaking? With the general public and perhaps the legislature already concerned over a perception of *secrecy* in ADR, would taking a position in favor of confidentiality in these case simply fan that fire? Please carefully consider these issues and then send me an email telling me what you think. I'm at whlemons@satexlaw.com or you can call me at (210) 224-5079.

I will close by asking you to vote in the State Bar referendum presently before us. Our leader, State Bar President Kelly Frels, recently experienced one of life's surprises while he and Carmela were attending the Southern Conference of Bar Presidents meeting in Biloxi. He suffered a mild stroke or perhaps strokes. Nonetheless, Kelly is doing well, has stabilized with no apparent paralysis, and is encouraged that his life will probably return to normal. Please think about Kelly and his wife, and vote in the referendum. Kelly Frels is truly an ally of our section, and we owe him that at least.

Maintaining the Mediation Privilege in Texas: Bank of America's Position in the Avary Case

By Talmage Boston*

The guts of Bank of America's (BOA's) position in seeking mandamus relief from the Texas Supreme Court is to enforce the mediation privilege created under the Texas ADR Statute (specifically, sections 154.053 and 154.073 of the Texas Civil Practice and Remedies Code), given the following pertinent facts and law:

1) The case is about the threatened collision between a Texas statute and a common law tort, and how the Texas Supreme Court should resolve the public policy dispute over whether the statute or the common law tort should have priority.

2) By his Order signed April 19, 2004, Judge Charles Stokes (Presiding Judge of the 68th District Court in Dallas) ordered that Douglas Noah, the attorney for the defendant in a prior mediation of a wrongful death case, should disclose certain settlement negotiation communications that took place at the mediation, which communications BOA believes are privileged.

3) The Texas legislature has imposed a clear directive under the Texas ADR Statute that mediation communications are to remain confidential. In fact, some commentators have concluded that the Texas ADR Statute provides the strongest mediation confidentiality protection available compared to what is provided under other states' ADR statutes.[1]

4) Several important policies support maintaining confidentiality in ADR:

(a) It encourages complete revelation by the parties, which is necessary for effective conciliation;
(b) It provides fairness by offering some protection for parties in the absence of traditional courtroom protections;
(c) It is a selling point for parties seeking privacy; and
(d) It reassures the parties that the mediator is impartial and will not testify against them in a subsequent proceeding.

A lack of confidentiality in communications would clearly undercut the effectiveness of mediations, because parties would become less forthcoming and open during settlement negotiations.

5) What BOA's Petition for Mandamus presents for the Texas Supreme Court is the opportunity to foreclose Avary's attempt to trump the clear legislative directive in Texas for maintaining confidentiality in mediation settlement negotiation communications by introducing the tort of improper settlement negotiations under the guise of a breach of fiduciary duty claim.

6) The Texas Supreme Court has significant recent experience in dealing with situations where certain plaintiffs attempted to override Texas statutes in their pursuit of common law tort claims.[2] In both recent cases, the Supreme Court determined that the legislative directive mandated by a statute forecloses overreaching tort claims that would effectively nullify the statute. That same public policy analysis favoring enforcement of a statute over the pursuit of a tort claim should cause BOA's Petition for Mandamus to be granted, and the trial court's order compelling Noah's testimony to be vacated.

7) In its 2002 Opinion, the Dallas Court of Appeals specifically addressed how the trial court should handle the discoverability issues related to Doug Noah's potential testimony on the subject of what was said and done at the mediation of the prior wrongful death case.[3] The Dallas Court of Appeals expressly held, under Section 154.073(e) of the Texas ADR Statute, that the trial court should conduct an in camera hearing to determine the "facts, circumstances, and context" surrounding Noah's potential testimony. Id. Furthermore, the Dallas Court of Appeals held that the trial court should:

(a) Determine whether Noah has knowledge of facts relevant to BOA's potential liability;

(b) Determine whether disclosure of any relevant testimony Noah might have is warranted under the facts, circumstances, and context as they relate to Noah, looking at the following factors:

(i) Determine whether Noah's knowedge was gained through an attorney-client communication with one of his clients or through his own work product;

(ii) Determine whether Noah and his clients relied on the attorney-client and work product privileges in analyzing their case and making decisions about settlement;

(iii) Determine whether Noah's knowledge pertained only to factual information; AND

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(iv) Determine whether Noah and his client expected that their communications at the wrongful death case mediation would remain confidential. Id.

8) Despite BOA's and Avary's not knowing Doug Noah's exact testimony presented to the trial court during the in camera hearing, enough can be surmised from the known circumstances of the mediation scenario in the prior wrongful death case to support BOA's Petition for Writ of Mandamus. BOA reasonably surmises about the substance of Noah's testimony at the in camera hearing that:

(a) Noah learned the contents of whatever offers he made at the mediation from information he received from his client, who was the wrongful death defendant representative present at the mediation, such that the offers were obviously covered by the attorney-client privilege. Presumably, such offers were made on assessments resulting from Noah's confidential work product;

(b) Upon receiving the attorney-client privileged settlement offer communication, Noah, in turn, may have communicated that offer to the mediator, which communication was privileged under Sections 154.053 and 154.073 of the Texas Civil Practice and Remedies Code;

(c) Upon communicating with Noah, Estes, in turn, as mediator, likely discussed his communications with Noah with BOA's attorneys, which communication from the mediator to the wrongful death case plaintiffs' attorneys was also privileged under Sections 154.053 and 154.073 of the Texas Civil Practice and Remedies Code;

(d) In making any settlement offers, Noah and his client relied on the attorney-client and work product privileges in analyzing their case and making decisions about settlement. BOA's attorney, in fact, asked this question of Noah on the record during the in camera hearing, and strongly suspects Noah answered it by saying that there was reliance on those privileges;

(e) The scope of Noah's knowledge and testimony at issue in this discovery battle, which was the subject of the in camera hearing, was mediation settlement negotiation communications, and therefore, was not knowledge that "pertained only to the factual information" in the wrongful death case;

(f) Noah and his client did expect that their "communications at mediation would remain confidential." BOA's attorney, in fact, asked this question of Noah on the record during the in camera hearing and strongly suspects Noah answered it by saying that they had every expectation of maintaining the confidentiality of their mediation settlement negotiation communications; and

(g) Presumably, Noah testified during the in camera hearing about his conversation in the mediator's hallway with BOA's attorneys, when the mediator was not present, during the mediation of the wrongful death case. In that conversation, however, there was no specific discussion about the amount of any settlement offers communicated, but only a disagreement about the propriety of Noah's clients making split offers, as opposed to a global offer.

9) Under the Dallas Court of Appeals' Opinion in 2002, the trial court had the responsibility to determine (a) whether any of Noah's testimony was relevant, and (b) whether the disclosure of that testimony is warranted under the "facts, circumstances, and context as they relate to Noah."

10) Even if Noah's testimony is relevant, there is no way that its disclosure can be warranted given that:

(a) Every component of Noah's relevant testimony is clearly covered by the mediator privilege[4] and/or the mediation privilege[5]

(b) There is no indication that Noah's client ever said or did anything to waive any privileges;

(c) There is no indication that either Noah or his client ever intended to make any communications outside the protection of the confidentiality accorded to all settlement discussions that took place at the mediation; and

(d) Neither Noah nor his client had any fiduciary relationships with any of the plaintiffs in the wrongful death case, and thus, have never had a duty to make disclosures to any of the plaintiffs (i.e., Avary, BOA, or anyone else in that lawsuit).

11) The Texas Supreme Court routinely grants mandamus relief and finds clear abuse of discretion due to the inappropriate disclosure of privileged materials. This case is no different. Here, the trial court inappropriately has directed the disclosure of privileged settlement negotiations at the prior mediation and has clearly abused its discretion in doing so.

12) Without Doug Noah's anticipated testimony, Avary has no evidence in support of her litigation premise that BOA improperly rejected an alleged settlement offer. If Noah is allowed to testify, he may well create a swearing match among the mediation participants as to who said what, and did what, about a possible settlement offer, with all of such potential conflicting testimony being offered by Avary in the context of the existence of the final settlement agreement that concluded the wrongful death case, which was signed by all the parties (including Avary) and their attorneys, and proved up without any objection (from Avary or anyone else) before two Collin County courts.

13) This is a case of first impression for the Texas Supreme Court, and it is presented at essentially the same

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YOU CAN'T HAVE YOUR CAKE . . .

*By John Mercy**

Two parties agree to mediate a DTPA claim. In a separate caucus during the mediation, the attorney for one of the parties advises her client concerning the other party's settlement proposal. She tells her client that the award of attorney's fees, if any, will be left to the trial judge. Her client then voluntarily signs a settlement at mediation. The trial court ultimately decides that neither party should pay the other's attorney's fees. The client then claims that she wasn't told that it was possible that she could get no attorney's fees. The client sues her attorney for malpractice in not advising her in the mediation caucus that she could get no attorney's fees.

At trial, the client testifies that she was not advised at any time by her attorney that she might get no attorney's fees. The attorney testifies that she advised her of exactly that possibility during the caucus. When the attorney attempts to call the mediator as a witness to "break the tie" in testimony, the client objects, claiming mediation confidentiality.

> Issue: Is this a question of mediation confidentiality or attorney-client privilege?
>
> Issue: Is one entitled to the offensive use of mediation confidentiality when a cause of action arises solely from the mediation process?

At the beginning of every mediation in Texas, the mediator assures the parties that the process is confidential and that nothing they say will be shared with the other side. This admonition is given so that the parties and their attorneys can discuss the case freely with the mediator, without fear that the other side will learn of the discussions. This admonition does not address whether conversations between an attorney and her client are confidential. Unfortunately, as courts recognize causes of action arising during the mediation process, the blanket notion of mediation confidentiality is no longer applicable.

The legislature provides two bases for confidentiality in the mediation process. Section 154.0053 of the Texas Civil Practice and Remedies Code (the "Code") is the most far-reaching. It provides that all matters, including the conduct and demeanor of the parties and their counsel during the settlement process are confidential and may never be disclosed to anyone. This is the blanket confidentiality that most people understand applies to the mediation process. Section 154.0073 of the Code likewise provides that any communication in the mediation is not subject to disclosure and may not be used as evidence against the participants in any judicial proceeding. It is clear that the legislature's intent in both these statutes is to protect communications from being revealed to the opposing parties. At the time that the legislature passed sections 154.0053 and 154.0073, no causes of action arising during the mediation itself had been recognized, and the legislature did not contemplate the effect of privilege or confidentiality in such a situation. When the concept of confidentiality only relates to actions on one side in the mediation, the confidentiality implications became less clear cut.

Courts have now begun to recognize causes of action arising from the mediation itself, i.e. breach of fiduciary duty, legal malpractice. Can communication, or lack thereof, which took place between a party and his own attorney be deemed confidential just because it took place at a mediation? Two Dallas court of appeals cases have attempted to address claims of confidentiality when what is sought to be protected are disclosures and actions of a party and its attorney or executor that took place during a mediation.[1] Each case presented a new and independent claim based on actions that occurred in the mediation itself. In neither case were the plaintiffs trying to offer into evidence anything that the opposing party in the mediation did or said. Neither were they trying to recover additional money from the opposing party in the mediation. The complaints related only to one side of the mediation and in no way could affect the final mediated resolution of the underlying case.

Avary presents a fairly straightforward question concerning confidentiality under section 154.073. Alford, on the other hand, presents complicated public policy problems. Alford is an offensive-use-of-privilege case. As set forth by the Alford court, a party cannot invoke the jurisdiction of the courts for affirmative relief, yet at the same time, on the basis of privilege (or confidentiality), deny evidence to the other party. This principle is based on the Texas Supreme Court's holding in Ginsberg v. Fifth Court of Appeals.[2] The appellate court held that in bringing a claim, a party must determine whether to claim privilege or abandon that claim. Ultimately, in Alford the court of appeals gave Bryant the choice of continuing to assert her privilege or abandoning her claim. It is a matter of basic fairness. Bryant should have to choose.

Alford is a classic example of the quagmire created by this situation. Bryant alleges that during mediation, Alford did not advise her as to the effect of the settlement. In order to defend against this type of allegation, not only was it necessary for Alford to testify concerning what she did or did not advise her client during the mediation, but also for the mediator to testify. It was clear that the only unbiased witness would be the mediator.[3] Once Bryant asserted the claim against Alford, she clearly had waived her claims of attorney-client privilege and confidentiality.

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YOU CAN'T HAVE YOUR CAKE . . .
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This situation points out the problem in recognizing claims that originate in the mediation process. The purpose of mediation is to resolve disputes between parties that are opposed to each other, not to create additional causes of action between parties and people on their side of the mediation. The purpose of mediation is to resolve disputes, not to create them. Thus, the courts will have to choose whether to allow causes of action arising from mediation; if so, then confidentiality at mediation is a thing of the past except possibly as between opposing parties.

The legislature's intent in fostering a confidential environment within which to mediate is not affected by disclosure in the situation presented by Alford. Parties will still be assured that their thoughts, actions, and conversations will not be disclosed to the other side. Parties will still be protected from actionable conduct that occurs between themselves and their representatives. And, finally, parties will be required to choose between asserting a claim and disclosure or confidentiality and foregoing their claims. It gets down to the question of whether it is more important to allow causes of action that arise in the mediation process or protect the confidentiality of that process. The rule should be what we tell our children: "You can't have your cake and eat it too."

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ENDNOTES

1. Avary v. Bank of Am., N.A., 72 S.W.3d 779 (Tex. App. – Dallas 2002, pet. denied.) (now reincarnated in a mandamus pending before the Texas Supreme Court, In Re: Bank of America, Inc., No. 04-0544); Alford v. Bryant, 137 S.W.3d 916 (Tex. App. – Dallas 2004, pet. filed).
2. 686 S.W.2d 105 (Tex. 1985, original proceeding).).
3. Some argue that the privilege concerning confidentiality belongs to the mediator. If this were true, what is the mediator's interest in confidentiality? Protection of the process? If this were true, then the legislature would not have allowed parties to waive confidentiality under section 154.0053 by agreement. *See* Tex. Civ. Prac. & Rem. Code § 154.0053(c).

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time as the Petition for Review filed August 25, 2004, in the case of Alford v. Bryant.[6] The Bryant case[7] also involves one party's effort to pierce the mediation privilege created under the Texas ADR Statute by pursuing a tort claim (legal malpractice in that case) in a subsequent lawsuit based on communications that took place at the earlier mediation of a lawsuit involving a construction defect. Though the Avary case and the Bryant case present questions of first impression for the Supreme Court, when courts in other states have addressed this conflict between a mediation confidentiality statute and a party's pursuit of evidence in support of his tort claim, invariably the courts have favored the enforcement of the statutes, and have not allowed the tort claims to be used as a basis for piercing statutory mediation privileges.

14)In attempting to pierce the mediation privilege, Avary argues that the Texas ADR Statute does not provide for blanket mediation confidentiality, but rather contains an exception to the privilege in Section 154.073(e) of the Texas Civil Practice and Remedies Code, in the situation where mediation confidentiality "conflicts with other legal requirements for disclosure of communications…." In evaluating this claim of an exception to mediation confidentiality, the court should recognize that Doug Noah's testimony does not fall within the Section 154.073(e) exception because Doug Noah is under no "legal requirement for disclosure of communications" to Rhonda Avary. Doug Noah had no fiduciary relationship with Avary. Doug Noah was not Avary's attorney. Thus, Doug Noah has no legal duty to make disclosures that violate the mediation privilege.

15) In this case, BOA, like every other participant in a Texas mediation, has an important interest in protecting and keeping mediation communications confidential as provided by Texas statute and public policy. The disclosure of the mediation's settlement negotiation communications via Noah's testimony will materially affect the right of BOA and every other participant at the mediation to maintain that confidentiality. Accordingly, BOA does not have an adequate remedy at law by appeal, and should receive the requested mandamus relief.

16) In recognition of the Supreme Court's new, broader standard for mandamus relief expressed in The Prudential Ins. Co. of America and Four Partners, L.L.C. d/b/a Prizm Partners,[8] AIU Ins. Co,[9] and Van Waters & Rogers, Inc., f/k/a Vopak USA Inc. & n/k/a Univar USA Inc., et al.,[10] it is clear that (a) the benefit of BOA's receiving mandamus relief exceeds any detriment for permitting early review of Avary's attempt to nullify the mediation privilege created under the Texas ADR Statute, and (b) causing BOA to wait until an appeal after final judgment in the present case, before addressing the critical discovery issues in this mandamus action, would have the effect of closing the gate after the horse ran off.

Hopefully, BOA's position will prove to be more persuasive than Avary's when the Supreme Court decides whether to grant the Petition for Writ of Mandamus.

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THE CONFIDENTIALITY OF MEDIATIONS IN TEXAS HAS BEEN QUESTIONED

By L. Wayne Scott*

I. The Scope of Confidentiality In Mediation Has Been Put In Question.

The Dallas Court of Appeals has cast the status of mediation confidentiality in doubt. In fact, two Dallas decisions may well destroy mediation practice in Texas, as it currently exists. Avary v. Bank of America, N. A.[1], now before the Supreme Court of Texas, deals with one the more difficult facets of the confidentiality of mediations: do the mediation-confidentiality statutes (either Section 154.053 or Section 154.073 of the Texas Civil Practice and Remedies Code) protect mediation communications when they form the basis of another, different, action, when proof is to be made by the parties, as opposed to the mediator? In Avary, the information sought to be disclosed related to a tort allegedly committed during the mediation (breach of fiduciary duty). The information sought was held by an objecting party, and not by the mediator. The case was remanded to the trial court for a determination of whether, in light of the "facts, circumstances, and context," disclosure was warranted. The trial court, on remand, did order disclosure. The court of appeals denied the subsequent request for a protective writ of mandamus. The party seeking to protect the information from disclosure is now seeking a writ of mandamus before the Texas Supreme Court. Avary was wrongly decided, and the writ of mandamus will, hopefully, be granted.

Significantly, the Avary decision has been cited as authority in a much more dangerous case, in which the Dallas Court of Appeals held that a **mediator** may be called to testify to disclosures allegedly made (or not made) by an attorney during a mediation. That case is Alford v. Bryant,[2] which involved attorney malpractice purportedly committed during the course of a mediation. At trial, the trial court refused to allow the mediator to testify. The Dallas Court of Appeals reversed and remanded, holding that the mediation privilege could not be used offensively. The Dallas court failed to consider the fact that the mediator had not made use of the information, and failed to recognize the mediator's own privilege not to testify. A petition for review of the Alford case is pending before the Supreme Court of Texas.

II The Issues Presented

The Broad Issue: The broad issue presented is whether communications made during a mediation are confidential, and not subject to disclosure at trial. The answer to this issue is that information given in a mediation is not subject to disclosure, unless otherwise discoverable, or unless the parties consent to the disclosure by a participant in the mediation, other than the mediator.

The Narrow Issues Presented: In both cases, the Supreme Court of Texas could determine whether there is any exception to the broad protection of communications in mediations. In Avary, the sub-issue is whether a party may offer evidence of an act or omission by another party or attorney that constitutes a separate tort. In Alford, the sub-issue is whether the mediator may be required to testify to a disclosure (or non-disclosure) made (or not made) during the course of a mediation. The question presented in Alford was thought to be sufficiently settled to be presented on the July 2003 Texas Bar Exam.[3] Of the issues presented, the latter is the most important, and must be answered with a resounding NO!

The proper holding in both cases is to preclude testimony relating to matters that occurred during the mediation. At a minimum, the courts must recognize that Sections 154.053 and 154.073 of the Texas Civil Practice and Remedies Code (the "Code") create a separate confidential right in the mediator (as opposed to the parties), which precludes the testimony of the mediator. The statutes could not be plainer. Subsections (b) and (c) of Section 154.053 provide:

> (b) Unless expressly authorized by the disclosing party, the impartial third party may **not** disclose to either party information given in confidence by the other [this allows a mediator to release information from one party to another during the course of the mediation] and **shall** at all times **maintain confidentiality** [this provides a continuing and absolute requirement of confidentiality] with respect to communications relating to the subject matter of the dispute. [Emphasis added; parenthetical statements are by the author.]
>
> (c) Unless the parties agree otherwise [this requires the concurrence of both parties], **all matters**, including the conduct and demeanor of the

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> parties and their counsel during the settlement process, are **confidential** and may **never** be disclosed to anyone, including the appointing court. [Emphasis added; parenthetical statements are by the author.]

Subsections (a) and (b) of Section 154.073 provide

> "(a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is **not** subject to disclosure, and **may not** be used as evidence against the participant in any judicial or administrative proceeding." [Emphasis added.]
>
> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants **or the third party facilitating** the procedure **may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information** or data relating to or arising out of the matter in dispute--. [Emphasis added.]

If one wanted to provide absolute immunity to a mediator, and to the participants in a mediation, one would copy the Texas ADR Statute. What wording would need to be added to, or taken away from, the Texas statutes? The intent to provide an absolute privilege is apparent from the plain face of the provisions of the statute.

It is generally agreed that the Texas ADR Statute contains the broadest provision of any statute to protect communications made during a mediation. Clearly, as currently practiced in Texas, the participants in a mediation, whether court ordered or conducted by consent, expect what is said and done in the mediation to be kept confidential, just as an attorney must keep confidential the communications of a client, and a penitent expects a clergyman to keep any communication confidential. As Brian D. Shannon wrote in Dancing with the One that "Brung Us" – Why the Texas ADR Community Has Declined To Embrace The UMA,[4] "One of the cornerstones of the enactment was the statute's broad confidentiality protection. * * * Hence, taken together these various provisions place limits on future testimony in later adjudications and require confidentiality outside of other legal proceedings."[5]

Stated another way, if the Texas statute does not protect statements made in the course of a mediation from disclosure, and does not protect a mediator from being called to testify, then no statute can do so.

It does not require citation of authority to state that the practice of mediation has transformed the litigation system in Texas and throughout the nation, significantly reducing the number of cases tried, and cleared the backlogs that previously existed on many trial courts' dockets. The Texas Legislature, as well as Congress, have declared that confidentiality is essential to mediation Certainly, mediators regularly assure the participants in the mediation process that their statements, with certain limits (for example, the duty to report child abuse), will be confidential, and not admissible in evidence.

It is absolutely essential to the continued success and viability of mediation in Texas that the mediator's promise of confidentiality be validated by court decision.

III. All Mediation Communications, With Limited Exceptions,[6] Are Privileged.

In both cases, the Dallas Court of Appeals erred in allowing testimony concerning anything occurring during the mediation that was not otherwise subject to discovery. There is no exception to the prohibition against disclosure of statements made in the course of a mediation proceeding, unless the parties directly, or by their conduct, agree thereto.

This result is compelled by both the confidentiality statutes and the Texas Supreme Court's decision in Thapar v. Zezulka,[7] where the Supreme Court of Texas expressly refused to follow Tarasoff v. Regents of University of California.[8] The Texas court declined to adopt a duty to warn, because the confidentiality statute governing mental-health professionals in Texas makes it unwise to recognize such a common-law duty. "The Legislature has chosen to closely guard a patient's communications with a mental-health professional."[9]

One need go no further than the statute to see that Texas is one of the states that confers a confidentiality privilege, or right, on the mediator, independent of any right to confidentiality that may be given to the parties. Subsections (b) and (c) of Section 154.053 and Subsections (a) and (b) of Section 154.073, which create separate confidential rights in the mediator (as opposed to the parties), would preclude such testimony. Additionally, the Texas statute allows the parties to waive their own confidentiality protection in the mediation. This dual approach to confidentiality, allowing the parties to testify if they choose to waive confidentially, but allowing the mediator to refuse to testify even if requested to by the parties (by asserting a separate right of confidentiality to protect the mediation process), has been incorporated into Section 4 (b) of the Uniform Mediation Act (UMA), although that act is not as strong as the Texas statute.

IV. The Out-of-State Authorities.

Most of the better-reasoned out-of-state authorities, dealing with statutes similar to Texas, recognize an absolute privilege for communications made in mediation, and strictly preclude the testimony of the mediator, unless a wrongdoing by the mediator is alleged.

The California Supreme Court, which decided Tarasoff, has adopted, in mediation cases, the position that the mediation process is confidential, and that the courts may not invade that confidentiality. In Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.,[10] that court held:

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> To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme, which includes sections 703.5, 1119, and 1121, unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception.

In a subsequent decision, Rojas v. Superior Court,[11] just released, the California Supreme Court has held that documents, prepared only for presentation in mediation, are protected under the California Statutes.

Cases in agreement with Foxgate include National Union Fire Ins. Co. of Pittsburgh, PA v. Price,[12] (stating that "[t]aken together, these sections express the legislature's intent to create a blanket prohibition against disclosing mediation communication, whether or not the communication concerns a settlement, unless the parties consent or an exception applies."); Fob v Motion Picture Indus Pension & Health Plans[13] (recognizing federal mediation privilege); Sheldon v Tpk Comm'n,[14] (recognizing federal mediation privilege); In re RDM Sports Group, Inc.[15] (recognizing Federal mediation privilege); In re Anonymous,[16] (federal mediation privilege did not violate due process rights, therefore, permission is denied to allow a mediator to testify). In Nielsen-Allen v. Industrial Maintenance Corp.,[17] the Court, citing Foxgate, stated:

> A majority of jurisdictions recognize and enforce such a privilege . . . . [There are] no exceptions to the confidentiality of mediation communications . . . . Neither a mediator nor a party may reveal communications made during mediation.

In Sonenstahl v. L.E.L.S.,[18] Inc., the Minnesota Court of Appeals faced a situation similar to the one in Avary. There, in a prior union negotiation, statements had been made by the union negotiator, which "'flagrantly misrepresented' the detectives' interests and 'continuously rejected' offers from the county regarding the parity issue."[19] The plaintiffs, members of the union, sought relief in a subsequent action, for the union's breach of the duty of fair representation. They sought to call the mediator to testify to the misrepresentations. The trial court, in quashing the subpoena for the mediator, observed that: "the proffered reasons for [the mediator's] testimony are insufficient to overcome the compelling need for a mediator to maintain the confidences of the parties and the appearance of impartiality."

The appellate court affirmed, and adopted the language of the trial judge, based on the subsequently adopted Minnesota mediation confidentiality statute, which appears to presage the approach adopted by the Texas Legislature:

> A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate.

V. The Prior Texas Court Of Appeals Decisions.

Up until now, the Supreme Court of Texas has not been called on to decide the scope of the mediation privilege. There are few court of appeals decisions on the subject, but the general consensus of the courts of appeals appears to recognize what Professor Brian D Shannon refers to as "a solid wall of protection to the sanctity of the mediation process . . . ."[21]

The first major decision, concerning confidentiality protections for mediation in Texas, occurred in federal court.[22] Applying Texas law, the court held, as "comity and the expectations of the Mediator and the parties at the time the mediation was conducted required [the court gives] due deference to the Texas law and rules,"[23] and refuses to compel the mediator to testify on the issue of whether the defendants, in the mediation, defrauded the plaintiff into signing the mediated settlement agreement.[24] This decision gives a full discussion of the Texas statute, but draws few conclusions.

The first Texas case on confidentiality under the Act was a criminal one, holding that, generally, a court cannot consider any evidence from a dispute resolution procedure, even in a criminal case.[25]

Next, in Allen v. Leal,[26] a federal civil rights action, the plaintiff repudiated the settlement agreement, alleging that the mediator had forced the settlement. The trial court released the parties, and the mediator, from the confidentiality requirements of Rule 201 of the Local Rules for the Southern District of Texas.[27]

In Zidell v. Zidell,[28] the appellate court upheld the trial court's exclusion of evidence, concerning statements made in the course of mediation, where no agreement was reached.

The Austin Court of Appeals, in Texas Parks and Wildlife Dept. v. Davis,[29] held that "communications and records made in an ADR procedure remain confidential; consequently, the manner in which the participants negotiate should not be disclosed to the trial court."[30]

A majority of the Beaumont Court, in In re Daley,[31] rejected an argument that this holding meant that "all communications, conversations, and records made in an ADR proceeding remain confidential."[32] The majority did not find that "whether Daley attended the mediation and whether he had the mediator's permission to leave when he did—concern the subject matter of the underlying suit or the manner in which the participants negotiated."[33]

Clearly, "the manner in which participants negotiate should not be disclosed to the trial court."[34]

In the context of a divorce mediation, the Fort Worth Court of Appeals, in Boyd v. Boyd,[35] held that, "[w]here a person is under a duty to disclose material information, refrains from doing so, and thereby leads another to contract in reliance on a mistaken understanding of the facts, the resulting contract is subject to rescission due to the intentional nondisclosure."[36] For this reason, the court

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concluded that the mediated settlement agreement was unenforceable, even though it complied with section 6.602 of the Texas Family Code.[37]

The Fort Worth Court of Appeals has also rejected a specific request for disclosure of mediation communications.[38] Clearly, "the manner in which participants negotiate should not be disclosed to the trial court."[39]

In In re Learjet Inc.,[40] videotapes made to present factual information to the opposing parties in a mediation proceeding, not to facilitate the rendition of legal advice, were found to be protected by Section 154.073(a), but were found to be admissible under Section 154.073 (c).[41]

VI. Answering The Issues Presented.

In neither Avary nor Alford is there a contention that the mediator committed any form of malpractice or wrongdoing. In neither case do the parties agree to waive the confidential nature of the privilege. In each case, one party is resisting such a disclosure. Nor is it contended in either case that there is a statutory exception to the confidentiality (except "need"), and there is no allegation of wrongdoing by the mediator. Rather, a participant's testimony is being sought to establish the breach of a fiduciary duty in Avary, and the mediator's testimony is being sought to establish malpractice by omission of one of the attorneys representing a party in the mediation in Alford.

If anything, Alford demonstrates the danger of the Avary decision. Should Texas begin to adopt exceptions to the statutorily created mediation confidentiality privilege, then it will face a landslide of issues that will stall and confuse mediation practice in Texas.

If the courts of Texas are to recognize any exception to the confidentiality protection afforded by the Texas Legislature to the mediation process, they start down the proverbial "slippery slope."

The Association of Attorney-Mediators has presented an amicus brief in Avary, and is preparing one in Alford, urging the Supreme Court of Texas to follow the tenor of its holding in Thapar v. Zezulka, and the holdings of the California Supreme Court in Foxgate, thereby respecting the decision of the Texas Legislature to grant a blanket privilege to mediators, and a privilege to parties that they can agree to waive. This in no way precludes the discovery of evidence that would otherwise be discoverable. Rather, it protects a process whereby information is disclosed to dispose of a dispute, that would not otherwise be disclosed, were it not for the confidentiality of the mediation process, and the privilege granted to the mediator, not to be called to testify.

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ENDNOTES

1 72 S.W.3d 779, 782 (Tex. App.—Dallas 2002, pet. denied).
2 137 S.W.3d 916 (Tex. App. – Dallas 2004, pet. filed).
3 http://www.ble.state.tx.us/past_exams/7-2003%20p&e.pdf.
4 2003 J. Disp. Resol. 197 (2003).
5 Id. at 201-02.
6 Tex. Civ. Prac. & Rem. Code § 154.073(c): Exception to mediation confidentiality – if the information is otherwise discoverable. If the information is otherwise subject to discovery, it is clear that the information is not protected by the statutes. Thus, if a person says in the course of a personal-injury mediation, "I ran the stop sign," the party can be asked at a deposition, "Did you run the stop sign?" The statutes, however, without the consent of both parties, preclude the discovery inquiry of "Did you say in the mediation that you ran the stop sign?"
There are, of course, other statutory exceptions requiring the reporting of such things as child or elderly abuse, Id. § 154.073(f), but these are clearly defined and limited. Additionally, "Section 154.073(c) excludes from protection matters which are independently discoverable or admissible, while § 154.073(e) acknowledges that other unspecified legal requirements may compel disclosure to the court." Irene Stanley Said, The Mediator's Dilemma: The Legal Requirements Exception To Confidentiality Under the Texas ADR Statute, 36 S. Tex. L. Rev. 579, 586 (1995). Information outside of the subject matter of the mediation may be subject to disclosure through parties other than the mediator. In re Daley, 29 S.W.3d 915 (Tex.App.—Beaumont 2000), allowed a participant in the mediation to be deposed about whether he left the mediation. Finding that this related to something other than the subject of the mediation, the court allowed the testimony; "Rather than a blanket confidentiality rule for participants, the statute renders confidential "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an ADR procedure. We do not find the questions--whether Daley attended the mediation and whether he had the mediator's permission to leave when he did--concern the subject matter of the underlying suit or the manner in which the participants negotiated."
7 994 S.W.2d 506 (Tex. 1999).
8 551 P.2d 334 (Cal. 1976).
9 Thapar, 994 S.W.2d at 638.
10 25 P.3d 1117, 1126 (Calif. 2001).
11 ____ P. 3d ____, 2004 WL 1542239, 2004 WL 1542239 (Cal. 2004).
12 78 P.3d 1138, 1141 (Colo. Ct. App. 2003).
13 216 F.3d 1082 (9th Cir. 2000).
14 104 F.Supp.2d 511 (W.D. Pa. 2000).
15 277 B.R. 415 (Bkrtcy. N.D. Ga. 2002).
16 283 F.3d 627 (4th Cir. 2002).
17 2004 WL 502567 (V.I. Jan 28, 2004).
18 372 N.W.2d 1 (Minn. App.1985).
19 Id. at 6.
20 Id. (citing Minn. Stat. § 595.02, subd. 1(k)1984).
21 Brian D. Shannon, Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems, 32 Tex. Tech. L. Rev. 77, 108-09 (2000).
22 Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994).
23 Id. at 664.
24 Id. at 674-75.
25 Williams v. State, 770 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1989, no pet.).
26 27 F. Supp.2d 945 (S.D. Tex. 1998).
27 Id. at 947.
28 1997 WL 424429 (Tex. App.—Dallas July 30, 1997) (not designated for publication).
29 988 S.W.2d 370 (Tex. App.—Austin 1999).
30 Id. at 375.
31 29 S.W.3d 915 (Tex. App.—Beaumont 2000, orig. proceeding).
32 Id. at 918.
33 Id.
34 In re Acceptance Insurance Company, 33 S.W.3d 443, 452 (Tex. App.—Fort Worth, Original Mandamus Proceeding) (prohibiting questions about an insurance adjuster's conduct during a mediation, in particular whether the adjuster used a cell phone during the negotiation).
35 67 S.W.3d 398 (Tex. App.—Fort Worth 2002, no pet.).
36 Id. at 404.
37 Id. at 403.
38 In re Acceptance Ins. Co., 33 S.W.3d 443 (Tex. App.—Fort Worth, orig. proceeding).
39 Id. at 452. In this particular situation, the court prohibited questions about an insurance adjuster's conduct during a mediation, in particular whether the adjuster used a cell phone during the negotiation. Id.
40 59 S.W.3d 842 (Tex. App.—Texarkana 2001).
41 Id. at 844.

THE "MANAGERIAL" ARBITRATOR

*By Richard Chernick**

Although arbitration has been around in some form for centuries, it was not until the adoption of the United States Arbitration Act in 1925 that it became a permissible alternate to the courts. And it was not until the 1990s that it really came into its own. This growth is principally attributable to the Supreme Court's broad embrace of the commercial arbitration process and its rejection of legal doctrines that limited the scope and relative importance of arbitration.

Arbitration was transformed in the 1980s and 1990s by a series of United States Supreme Court decisions[1] that made it more accessible and its enforcement more predictable. The decisions, in turn, have encouraged businesses to consider arbitration of their disputes and have inspired providers to promote arbitration.

The importance of the courts in creating a hospitable environment for the growth of arbitration cannot be overemphasized. The key principles of these U.S. Supreme Court cases are that (1) arbitration is a preferred dispute resolution choice, (2) courts must err on the side of enforcing, rather than limiting, agreements to arbitrate, and (3) arbitration encourages parties to create their own unique processes, which courts will respect and enforce.

In this context, parties and counsel have come to appreciate the value of fashioning their own processes to suit individual cases, and they expect that courts will enforce those process choices (or, more usually, defer to the arbitrators and the parties in determining what the parties' agreements were and how they should be effectuated). The benefits to the parties are obvious, and the value in high-dollar cases—where much is at stake and the issues are complex—is inestimable in the hands of skillful lawyers and neutrals.

As counsel become more sophisticated at fashioning processes that suit their cases, the complexities of managing and conducting arbitrations increase, and the agreed-upon processes may begin to resemble court trials of complex cases. Legal issues and constructs (e.g., pleadings, discovery, requests for provisional relief, dispositive motions, motions in limine, applications of rules of evidence, enhanced review of awards) are more common, and ancillary and final reviews of arbitration orders and awards are more frequent.[2]

The parties usually wish to use the tools of the arbitral process to fashion a unique and tailored procedure for their particular case. Parties regard their opportunity to choose the arbitrator as their most important process choice because they know the process will not work if the arbitrator is not qualified to manage a complex and difficult dispute. Parties often choose a "managerial" arbitrator, one who is willing to collaborate with the parties and to assume the primary responsibility for managing the process chosen in order to achieve the parties' goal of an effective and efficient proceeding.

There are several pivotal issues in the arbitral process that provide the opportunity to achieve the parties' process objectives.

Arbitrability

Courts determine the existence of an agreement to arbitrate.[3] Issues such as the enforceability of an agreement to arbitrate and the interpretation of the agreement to arbitrate as to who and what are subject to arbitration are all for the court.[4] There is extensive case law addressing the nuances of these issues.[5]

The parties may give the arbitrator power to determine issues of arbitrability in their agreement to arbitrate, if they do so "clearly and unmistakably."[6] Alternately, if the clause only designates applicable rules of an institutional provider, but the rules grant the arbitrator that power, the grant may be enough.[7] A party also can be estopped from challenging an arbitrator's determination as to arbitrability if it sought such rulings in the arbitration.[8] The United States Supreme Court has recently clarified its view of what disputes are subject to determination by arbitrators rather than courts.[9]

Arbitrators are also in control of the determination whether conditions precedent to arbitration have occurred.[10] Under Howsam v. Dean Witter Reynolds, *Inc.*,[11] an arbitrator should decide this issue.

There is also a parallel trend to read broadly the parties' own definition of the scope of the arbitration – how one interprets the portion of the arbitration clause that defines disputes subject to arbitration. For example, the phase "all disputes arising under this agreement," once read narrowly, is now commonly interpreted to imply a broad-form arbitration agreement (i.e., encompassing not just contractual disputes arising in the relationship, but also related statutory and tort-based claims).[12]

All of this suggests that the arbitrator increasingly is empowered to define the scope of the arbitration and the parties' entitlement to arbitrate. This role is an essential aspect of the management of the arbitration process, and sophisticated parties usually prefer to have all such issues determined in the arbitration rather than by a court. Generally speaking, the more control the arbitrator has in

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defining the scope of the arbitration, the better the administration of large and complex cases. The "managerial" arbitrator has a stake in determining the parties' intent and in effectuating that intent. The arbitrator is also more likely to be practical in making determinations that accord with sensible structuring of the arbitration process and that err on the side of avoiding inefficient or multiple proceedings.

Institutional v. Non-Administered Arbitration

To the extent the arbitration clause does not specify to the contrary, the institution designated to administer the arbitration controls rule content and the arbitrator-selection process. If no institution is designated, all disputes about arbitrator selection and disqualification must go to court. Institutions also supply administrative procedures for certain decisions (e.g., arbitrator qualification, selection, and disqualification; venue). As noted above, most institutional rules also grant power to the arbitrator to determine his or her own jurisdiction.

Non-administered arbitrations are more flexible because of the absence of any procedure for determining any of these issues unless specified in the clause, but that flexibility creates risks where the parties are unable to cooperate. Lack of agreement on key issues usually means that the parties must seek a court determination of those issues.

Where the parties have not chosen an arbitral institution to administer the arbitration, the sole arbitrator or the chair of the panel becomes the administrator. This task is burdensome, but it also assures that the arbitrator will have control, not only over the process generally, but also over the day-to-day management of the case.

Arbitrator Selection

Parties usually decide on a format for the arbitration that is appropriate to their dispute: sole arbitrator, three neutral arbitrators, or party-appointed (non-neutral) arbitrators in a tripartite panel. This is not just a cost issue; the benefits of three neutral, highly qualified arbitrators cannot be overemphasized where the stakes are high and there will be no review of the award for correctness.

Parties strive to select arbitrators who are qualified and appropriate to their case. Information may be obtained about arbitrator-candidates directly from the provider and from counsel who have appeared before the candidates in similar cases. In major cases, counsel may decide to interview arbitrator-candidates (jointly and not *ex parte*). The interview permits counsel to assess the experience, value system, work ethic, and hearing skills of each candidate. Part of this inquiry should be directed to the candidate's knowledge and experience as to the substantive, technical, and legal issues presented. But the crucial qualities of a managerial arbitrator also should be assessed in determining each candidate's suitability to be sole arbitrator or chair of a tripartite panel.

It is reasonably easy to obtain references from the arbitration institution, the arbitrator, or counsel in prior "larger" cases. And while prior counsel's views about the arbitrator might be colored by the outcome, usually a discussion about management skills and diligence in conducting the proceeding will elicit reasonably balanced views. This information is crucial to the selection process of a sole arbitrator and the chair of a tripartite panel, and less important for side arbitrators (be they neutral or non-neutral).

Locale

The arbitration hearing's location usually will influence the list of arbitrators an institution will propose to the parties. Parties often look elsewhere, but absent agreement of the parties, the institutional provider will determine who is proposed for selection.

The physical location of the arbitration hearing also is relevant to such issues as neutrality, adequacy of facilities, and convenience to counsel and witnesses. The longer the hearing, the more important the location. Obviously, venue can be controlled through the clause-drafting process, but parties also may agree on hearing location after a dispute arises.

Large arbitrations require large quarters—a hearing room that will accommodate twenty or so people, a set-up that is conducive to a court reporter and "real time" technology, a screen to display exhibits electronically, video and teleconference facilities for depositions and witness testimony, innumerable outlets for laptop computers and internet connections, and war rooms for counsel to gather during breaks and store exhibits and other materials for the duration of the proceeding. These "trappings" may seem to relate merely to comfort, but they prove essential for long proceedings where effective presentation of evidence depends to some extent upon the attributes of the physical space.

Pleadings

Demands, answering statements, and counterclaims should be prepared with the nature of the process in mind. Virtually no pleadings are "required" in arbitration, but they often are the only statements of the case the arbitrator will see until hearing briefs are submitted shortly in advance of the evidentiary hearing. On the other hand, detailed and tedious "pleading"-style submissions usually are not helpful in gaining an understanding of the case.

The arbitrator needs to know what the case is about prior to the preliminary hearing (discussed below), either by reading the pleadings or a preliminary hearing statement. The pleadings are likely to go into a notebook or file to which the arbitrator will have ready access when ruling on motions and discovery disputes. A concise and non-mechanistic statement of the case is, therefore, helpful to the understanding of a party's positions in many different contexts.

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Preliminary Hearing

The preliminary hearing is the crucial step in structuring the arbitration process. The arbitrator will use the preliminary hearing to determine the parties' goals in the arbitration and to ascertain what process elements will help to achieve those goals. The essential principle that drives this process is that the arbitrator wants to help the parties achieve the "perfect" process for their case. Most of the issues to be addressed will not be covered by the arbitration clause, and most will not be covered by the applicable procedural rules. The arbitrator will encourage the parties to agree on these process points, but retains the authority to make decisions as to process where agreement is not achieved. This power, used wisely, can encourage agreement on most important issues.[13]

The list of issues that follows is intended to highlight the range of process issues in which the parties should be interested and that the arbitrator will want determined so that the case can proceed efficiently and effectively. Some of the more important issues are briefly elaborated below. All determinations made at the preliminary hearing(s) will be documented in a carefully drafted procedural order, which the arbitrator will prepare.[14]

- Arbitrability (see discussion above);
- Status of party-appointed arbitrators (neutral/non-neutral) (Appendix A, ¶ 3);
- Completion of disclosure process and confirmation of arbitrator's appointment;
- Applicable law and rules of procedure (Appendix A, ¶ 6);
- Structural issues: Consolidation;[15] bifurcation (liability and damages; attorneys' fees and costs; punitive damages; remedial phases (e.g., partnership dissolution);[16]
- Initial exchange of information (exhibits, known witnesses) (see discussion below);
- Discovery between parties (see discussion below);
- Third-party discovery (see discussion below);
- Scheduling of motions (e.g., provisional relief, dispositive motions) (see discussion below);
- Final exchange of witness identification for the hearing (see discussion below);
- Expert witness procedure (see discussion below);
- Exchange of documents intended to be offered at the hearing (see discussion below);
- Preparation of exhibit binders and objections to introduction of documentary evidence prior to commencement of hearing (Appendix A, ¶ 8(d));
- Scheduling the hearing(s) (see discussion below);
- Use of demonstrative evidence in opening statement;
- Briefs and motions in limine; post-hearing briefs (see discussion below);
- Scheduling argument;
- Need for court reporter and payment arrangements (Appendix A, ¶ 8(f));
- Remedies anticipated to be sought and need to bifurcate hearing to aid determination of remedial issues;
- Rules of evidence; exclusion of evidence ;
- Form of award (see discussion below); and
- Agreed appeal procedure (e.g., JAMS Optional Arbitration Appeal Procedure).

Discovery

Nothing drives the cost of litigation more than discovery. The most valuable role an arbitrator can play is to persuade the parties that discovery proportional to the complexity of the dispute will give counsel what they need without burdening parties with unnecessary expense or delay. Full and timely disclosure of documents and witnesses is the starting point. Close supervision of this process by the arbitrator will also send the message that gamesmanship will not be tolerated (and will hurt the credibility of the party which crosses that line). The power of the arbitrator to supervise discovery is expressly stated in most arbitration rules.[17] That power also may include the power to sanction, although the ultimate sanction for discovery abuse or refusal is the right of the arbitrator to apply evidentiary inferences for the incomplete production of evidence. In tripartite arbitrations, parties usually agree to submit all discovery disputes to the presiding arbitrator alone to insure efficient and timely resolution.[18]

Third-party discovery is more constrained and may not be permitted at all under the United States Arbitration Act ("FAA").[19] There are ways around this, including the taking of depositions to preserve the testimony of witnesses who are unavailable to attend the hearing[20] and the issuance of "hearing subpoenas" to third parties for the production of documents at a hearing specially set for that purpose in advance of the commencement of the evidentiary hearing proper.[21]

Part of the expense and delay of discovery is the result of formalistic and detailed requirements for motion practice. Arbitrators can cut through this morass by accepting conference calls on short notice to address narrow issues that do not require briefing or to deal with objections to key questions at depositions.

Arbitrators have considerable power in making discovery determinations and orders, and discovery rulings that may be incorrect are not a ground to vacate an award.[22]

Motion Practice

Parties usually prefer to go to court to address the need for provisional relief, but in some cases the arbitration is a better forum to resolve such issues if timing is not urgent.

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The need for such relief should be addressed during the preliminary hearing.

Dispositive motions and motions *in limine* should be used sparingly and almost never where there is not extensive discovery.[23] Institutionally, the use of dispositive motions is limited because of the rule that a refusal on the part of the arbitrator to hear relevant evidence is a ground for *vacatur* of the award.[24]

Scheduling the Hearing

Efficiency goes out the window when the hearing is not continuous. Particularly where there is a tripartite panel, calendar conflicts may, on occasion, necessitate delays of months in finding the few extra days needed to complete a hearing. The cost of demobilizing and repreparing for a hearing is considerable. The largest expense of civil litigation is the cost occasioned by continuances of trials after all preparation is completed.

A continuous hearing is not only more efficient for counsel, it is more conducive to a decision-making process that is based on actual recollection of testimony and argument. Hours may be varied to suit the parties. Some counsel prefer 8:00 a.m. to 1:00 p.m. or 12:00 Noon to 6:00 p.m. without a meal break in order to preserve one-half day in the office or for preparation. Others prefer a more traditional 9:00 or 9:30 a.m. to 5:00 or 5:30 p.m. schedule with a lunch hour. Whatever schedule works for the parties is likely to be acceptable to the arbitrator.[25]

The arbitrator has significant control over scheduling issues—setting, continuing, or refusing to postpone hearings.[26] Ideally, this power is used to urge the parties to agree on a time and duration for the hearing, but failing agreement, the arbitrator may order it.

Exhibits

The arbitrator should order early exchange, not just of documents for discovery, but also later exchange or designation of documents intended to be offered in the hearing.[27] This later exchange enables counsel to put together a single, non-duplicative, organized set of exhibits that are properly marked and in notebooks or other convenient organization, which makes them accessible to the arbitrator.[28]

Objections should be identified on the joint exhibit list, or in a separate writing required to be served a few days prior to the hearing. Exhibits as to which there is no foundational objection should be admitted without the need of any stipulation or authenticating testimony at the hearing. Relevance issues are usually addressed in argument.[29]

This allows counsel to refer to exhibits or to attach them (selectively) to the prehearing brief and identify them on demonstrative exhibits (see below). Documents in evidence need not be referred to specifically by witnesses if their significance is clear and they are otherwise called to the arbitrator's attention.

Witnesses

Witness exchanges similarly should be required in order to enable proper preparation for cross-examination. Be sure that witnesses who will testify other than in person are identified as to their mode of testimony.[30] This procedure enables early objections to, for example, telephonic testimony of an important witness, and it makes it possible to arrange for witnesses to have access to certain documents at the time of their testimony. The arbitrator may also order appropriate procedures for the cross-examination of witnesses by telephone, including procedures for having documents placed in front of the witness that are not disclosed prior to the examination.

Expert Testimony

The procedural order is likely to require the exchange of expert reports (if they are intended to be offered during the hearing) in advance of the hearing. If expert testimony is crucial, the arbitrator might propose stipulating to a disclosure and discovery process similar to that in the federal or state discovery rules so that the parties have the opportunity to control access to expert testimony and to be fully prepared to address all expert issues.

The arbitrator has the power to appoint a neutral expert or to establish other procedures for the taking of expert testimony. For example, competing experts can be ordered to meet and confer prior to their testimony and to create a list of agreed and disputed issues, if it will aid in the assessment of their testimony.

Demonstrative Exhibits

Anything that will help the arbitrator sort and understand the early testimony, before he or she is familiar with all the facts, is crucial. A timeline or chronology and organization chart of a corporate party is often helpful. On specific issues during the hearing, demonstrative exhibits can be employed to assist important witnesses in organizing or summarizing complex facts and in depicting important relationships between events. In discussing damages, demonstrative exhibits can be used to summarize and clarify damage theories and proof. Exhibit references should be included on all demonstrative exhibits in order to tie the assertions to the record so that the exhibits are useful to the arbitrator in writing the award. Demonstrative exhibits intended to be used during the opening statement should be ordered exchanged prior to opening statement.

Remedies

If remedies other than, or in addition to, compensatory damages are possible, it may be a good idea to bifurcate liability and damages in order to permit full exploration of available remedies after the initial liability determination has been made. This is particularly true in joint venture,

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partnership dissolution, and other proceedings where non-monetary remedies are important.

Fees and Costs

Many agreements provide for the shifting of fees and costs in favor of the prevailing party. This determination is often bifurcated from the main hearing and determined after the issuance of an interim award.[32] This procedure assures that a final award will not issue that inadvertently omits consideration of fees and costs. There is extensive law on the issue of arbitrators' power to award fees and costs.[33]

Briefing and Argument

Pre-hearing briefs are commonly filed and will usually have more influence on the decision-making process than post-hearing submissions. Post-hearing briefs are sometimes necessary in addition to final argument, particularly after lengthy hearings and where there is a transcript that counsel wish to use to present evidentiary support for legal positions. But post-hearing briefing always delays the prompt submission of the matter to the arbitrator for decision. It is sometimes preferable to have the matter submitted immediately after argument so that the deliberation may occur and the award can be prepared while the testimony is fresh in the arbitrator's mind. The arbitrator is the best judge of which process will be most conducive to effective decision making. The columns below suggest alternate sequencing of hearing, briefing and argument; other choices are also possible. Whatever approaching is taken, it ought to be agreed on early in the process so counsel will be able to adjust their presentation of evidence to suit the agreed format:

Alt. 1	Alt. 2	Alt. 3	Alt. 4
Pre-hearing brief	Pre-hearing brief	Pre-hearing brief	Hearing
Hearing	Hearing	Hearing	Post-hearing brief
Argument	Post-Hearing Brief	Tentative Award	Argument
Decision	Argument	Argument	Decision
	Decision	Decision	

Alternate 3 proposes issuance of a tentative award by the arbitrator prior to argument. Where the arbitrator is reasonably clear where the decision-making process is likely to lead, this is an effective way to focus counsel on the issues the arbitrator regards as important.

Award Formats

Where issues are bifurcated, the arbitrator may issue an interim award reflecting the determination of the issues heard in Phase I and then schedule a hearing on the bifurcated issue, such as the amount of attorneys' fees and costs or punitive damages. The interim award in such circumstances is not subject to confirmation or *vacatur*. The arbitrator also has the authority, in certain cases, to hear and determine part of the case and issue a partial final award, intending that award to be reviewed by a court and that the parties return to arbitration thereafter for further proceedings.[34] The sequencing of the case is in the arbitrator's control and is an essential tool where complex remedial relief is required.[35]

The arbitrator might also propose use of alternative formats for the award, such as high-low or baseball (parties each submit a proposed resolution; arbitrator must select one or the other). Such a choice should be embodied in an order so that the reviewing court will understand the arbitrator's authority. In appropriate cases, the parties might also consider med-arb or arb-med formats (arbitrator acts as mediator before or after the arbitration hearing; in the latter case, the award is sealed and only opened if the mediation is not successful).

Review of Awards

Arbitration awards are reviewed by courts on a limited basis under the FAA and the CAA.[36] Enhanced-judicial-review clauses in arbitration agreements typically require the arbitrator to render a reasoned award (with or without findings of fact and conclusions of law) and impose on the reviewing court the obligation to confirm the award only if it meets the parties' defined standard. Because such a provision alters the statutory review process and expands the court's duties, there is a split of authority whether a court is obligated to follow the parties' agreement. Federal circuits are split whether enhanced review is permissible under the Federal Arbitration Act.[37] Federal courts are also split as to whether parties may by agreement *limit* judicial review of an arbitration award.[38]

As an alternative review process, one might consider tripartite panels and internal review processes such as the JAMS Optional Appeal Procedure. They present no legal issues and may be more reliable than a clause that a court will need to interpret and apply, perhaps over objection of the winning side.

Conclusion

Where parties and arbitrators approach the design and effectuation of the arbitration proceeding as a partnership, and where all participants have an interest in achieving a process that is best suited to the particular case, and where the arbitrator is a skilled manager of the arbitration, even the most complex arbitration can present the opportunity for an effective exercise in quality decision-making.

In the end . . .

You get the process you deserve!

Richard Chernick is an arbitrator and mediator and is Managing Director of the JAMS Arbitration Practice. He is Chair of the Dispute Resolution Section of the ABA. He is a co-author of The Rutter Group's "California Practice Guide -- Alternative Dispute Resolution."

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ENDNOTES

[1] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996); Allied Bruce-Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Rodriguez de Quias v. Shearson/American Express, *Inc.*, 490 U.S. 477 (1989); Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983); Wilco v. Swan, 346 U.S. 427 (1953).

[2] *See* Revised Uniform Arbitration Act, *available at* http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm.

[3] 9 U.S.C. § 2.

[4] *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (1967) (severability of arbitration clause from agreement in which it is contained).

[5] *See, e.g.*, China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003) (issue of allegedly forged signature on agreement to arbitrate is for the court); Sandvik AB v. Advent International Corp., 220 F.3d 99 (3d Cir. 2000) (existence of authorization of agent to sign agreement to arbitrate for the court to determine); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir 1989) (district court properly dismissed claims in favor of arbitration).

[6] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

[7] *See* Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003); Shaw Group Inc. v. Triplefine Int'l. Corp., 322 F.3d 115, 121-22 (2d Cir. 2003); JAMS Comprehensive Arbitration Rules and Procedures, Rule 11(c); American Arbitration Association Commercial Arbitration Rules, Rule R-8(a).

[8] PowerAgent Inc. v. Elec. Data Sys. Corp., 358 F.3d 1187 (2004).

[9] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (whether parties waived the right to a class-wide arbitration); PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003) (whether contractual punitive damage waiver affected power of arbitrator to award treble damages under RICO); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) ("gateway issue" of applicability of six-year-ineligibility rule contained in NASD Code of Arbitration Procedure is a "procedural" question for the arbitrator, not an issue of "substantive arbitrability"); *see also* Revised Uniform Arbitration Act § 6(c), Comment 2. Theintricacies of these "threshold" issues are addressed at length in J. Lehrman, *On the Threshold of Arbitration*, Los Angeles Lawyer, Dec. 2003, at 20.

[10] HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41 (1st Cir. 2003) (refusing to compel arbitration until condition precedent met); *accord* Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1291 (11th Cir. 2002). *See generally* Revised Uniform Arbitration Act (hereinafter "RUAA") §§ 6(b), (c).

[11] 537 U.S. 79 (2002); *see* Int'l Ass'n of Bridge Structural Ornamental & Reinforcing Ironworkers, Shopman's Local 493 v. Efco Corp. & Construction Products, Inc., 359 F.3d 954 (8th Cir. 2004).

[12] *See* ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24 (2d Cir. 2002); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999).

[13] *See, e.g.*, Cal. Code Civ. Proc. § 1282.2(c); RUAA §§ 6, 8(b), 15(a), (b), (c); AAA Commercial Arbitration Rules R-7(a), 30(b), 31(b); JAMS Comprehensive Arbitration Rules and Procedures, Rules 11(a), 22(a).

[14] See Appendix A for a form of Procedural Order that the author uses.

[15] Shaw's Supermarkets, Inc. v. United Foods & Commercial Workers Union, 321 F.3d 251 (1st Cir. 2003) (arbitrator may consolidate related claims into one proceeding). *But see* RUAA § 10 (court may consolidate arbitrations, implying arbitrators do not have this authority).

[16] S*ee, e.g.*, Cal. Code Civ. Proc. § 1282.2(c); RUAA § 15; Appendix A, ¶ 8(b).

[17] *E.g.*, RUAA §§ 17 (c), (d); AAA Rule R-21; JAMS Rule 17(c).

[18] *See* Appendix A, ¶ 7(b).

[19] 9 U.S.C. § 7. *Compare* In re Security Life Ins. Co. of America, 228 F.3d 865, 870-71 (8th Cir. 2000) *with* COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269. 275-76 (4th Cir. 1999).

[20] *E..g*., Cal. Code Civ. Proc. § 1283.

[21] *See* Appendix A, ¶ 7(b).

[22] Prestige Ford v. Ford Dealers Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir. 2003), *cert. denied* 124 S. Ct. 281 (2003); Nationwide Mutual Ins. Co. v. Home Ins. Co., 278 F.3d 621, 625 (6th Cir. 2002).

[23] *See* Reed v. Mutual Serv. Corp., 106 Cal. App. 4th 1359, 1364-70 (2003) (NASD six-year limitations period applied to dismiss claim at preliminary conference); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096 (1995).

[24] RUAA § 23(a)(3); FAA § 10(a)(3).

[25] See Appendix A, ¶ 8(a).

[26] Cal. Code Civ. Proc. § 1282.2(a)(1); *Prestige Ford* , 324 F.3d at 395; JAMS Rule 19(a).

[27] *See* Appendix A, ¶ 7(d).

[28] *Id.* ¶ 8(d). In larger cases, it may be preferable to assign blocks of exhibit numbers and to allow separate claimant and respondent sets of exhibits to be prepared, rather than to require a joint exhibit list.

[29] *See* Appendix A, ¶ 8(d).

[30] *See* Appendix A, ¶ 7(e).

[31] *See* Ajida Technologies, Inc. v. Roos Instruments, Inc., 87 Cal. App. 4th 534 (2001) (arbitrators' power to fashion remedy consistent with parties' agreement); Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362 (1994) (arbitrator may grant a remedy, consistent with the parties' agreement, that a court could not grant). The AAA and JAMS rules are consistent wit this grant of authority. AAA Rule 43(a); JAMS Rule 24(c).

[32] *See* Appendix A,¶ 8(b).

[33] *See, e.g.*, W. Knight, et al., Cali*fornia Practice Guide – Alternative Dispute Resolution* ¶ 5:430 *et seq*. (2002).

[34] *See* Hightower v. Superior Court, 86 Cal. App. 4th 1415 (2001); Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 282-83 (2d Cir. 1986).

[35] *See* Appendix A, ¶¶ 8(b), (g).

[36] 9 U.S.C. §§ 9 – 11; Cal. Code Civ. Proc. § 1286. *See, e.g*., Moncharsh v. Heily & Blase, 3 Cal. 4th 1 (1992).

[37] *See, e.g.*, Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (no enhanced review by agreement; reviewing other circuit cases to the contrary).

[38] *See* Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003) (agreement unenforceable).

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Maintaining the Mediation Privilege in Texas: Bank of America's Position in the Avary Case
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ENDNOTES

**** Talmage Boston*** has been counsel for Bank of America in the Avary case since its inception. He was Chairman of the State Bar's Litigation Section in 2003-2004, is Board Certified in Civil Trial Law and Civil Appellate Law by the Texas Board of Legal Specialization, and is a shareholder in the Litigation Section at Winstead Sechrest & Minick, P.C.

[1] See, e.g., B. Shannon, Dancing with the One that "Brung Us" – Why the Texas ADR Community Has Declined to Embrace the UMA, 2003 J. Disp. Resol. 197 (2003); E. Sherman, Confidentiality in ADR Proceedings, 38 S. Tex. L. Rev. 541, 542 (1997).

[2] Hoffman-LaRoche Inc. v. Zeltwanger, 47 Tex. Sup. Ct. J. 981 (Aug. 27, 2004) [02-0120]; Thapar v. Zezulka, 994 S.W.2d 635 (Tex. 1999).

[3] Avary v. Bank of America, 72 S.W.3d 779, 800-801 (Tex. App. – Dallas 2002, pet. denied).

[4] Tex. Civ. Prac & Rem. Code § 154.053.

[5] Tex. Civ. Prac. & Rem. Code § 154.073.

[6] 137 S.W.3d 916 (Tex. App. - Dallas 2004, pet. pending).

[7] Cause No. 04-760 now pending before the Supreme Court of Texas.

[8] 47 Tex. Sup. Ct. J. 1104, (Sept. 3, 2004) [03-0819].

[9] 47 Tex. Sup. Ct. J. 1093, 1098 (Sept. 3, 2004) [02-0648].

[10] 47 Tex. Sup. Ct. J. 1172 (September 3, 2004) [03-0777].

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APPENDIX A

J A M S ARBITRATION No. 12200XXXXX

_____,
Claimant,

and

_____,
Respondent.

REPORT OF PRELIMINARY HEARING
AND SCHEDULING ORDER NO. 1

A preliminary hearing was conducted in this matter on _____, pursuant to written notice, and the following order is made respecting the conduct of this arbitration:

1. Parties and Counsel. The parties to this arbitration are identified in the caption and are represented as follows:

Name
Firm
Address
City
Telephone
Fax
Email
Counsel for Claimant

Name
Firm
Address
City
Telephone
Fax
Email
Counsel for Respondent

2. Arbitrators:

Richard Chernick
JAMS
350 South Figueroa Street, Suite 990
Los Angeles, CA 90071
213/620-1133 213/620-0100 (fax)
Chairman

_____
address
Los Angeles, CA 900xx
213/xxx-xxxx 213/xxx-xxxx (fax)
Appointed by Claimant

_____
address
Los Angeles, CA 900xx
213/xxx-xxxx 213/xxx-xxxx (fax)
Appointed by Respondent

3. Case Manager:

_____
JAMS
350 South Figueroa Street, Suite 990
Los Angeles, CA 90071
213/253-XXXX 213/620-0100 (fax)

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_____ and _____ are party-appointed non-neutral arbitrators as that term is used in the Revised Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA 2004) ("Code of Ethics"). They are free to engage in ex parte communications until the commencement of the arbitration hearing (¶ 8(a), *infra*), subject to Code of Ethics, Canon X(C)(4)(a), and not thereafter.

4. Agreement to Arbitrate. Arbitration clauses are contained in the _____ Agreement ("Agreement") dated _____, at ¶ X. Arbitration was ordered pursuant to Order dated _____ in L.A.S.C. Case No. BC_____ ("Order").

5. Pleadings and Arbitrability. The claims are stated in the Demand for Arbitration dated _____. The claims are arbitrable. The Response is dated _____. [Ref. Counter-claim if applicable]

6. Applicable Law and Rules. The substantive law of California and the California Arbitration Act together with the JAMS Comprehensive Rules ("Rules") shall apply in this proceeding.

7. Discovery and Exchange of Information.

(a) The Order prescribes certain discovery. The parties shall work out a discovery plan cooperatively. The arbitrators shall determine permissible discovery if the parties are unable to agree and shall supervise all discovery to the extent necessary and in accordance with the California Discovery Act.

(b) The parties shall meet and confer on all discovery disputes. Such disputes shall be resolved by the Chairman, provided that the moving party may require at the time the discovery motion is filed or the responding party may require at the time the opposition is filed that such dispute be resolved by the full panel.

(c) The parties may serve subpoenas for production of documents from third parties, which shall be returnable on _____, at 9:00 a.m. at the Los Angeles office of JAMS. That hearing shall be limited to the production of documents and the examination of custodians of such documents to determine compliance with the subpoenas and any objections thereto.

(d) The parties shall exchange all documentary evidence they intend to offer at the hearing (excepting only documents to be offered solely for impeachment), including reports of any experts intended to be offered during the Hearing, not later than _____. Supplemental documents may be designated and exchanged by _____. Documents not so exchanged shall not be admitted.

(e) Counsel shall identify all non-rebuttal percipient and expert witnesses expected to testify at the Hearing and indicate the manner in which each witness is expected to testify (in-person, telephonically or by affidavit or declaration), not later than _____ and may supplementally designate witnesses by _____. Witnesses not so identified shall not be permitted to testify at the hearing.

8. Hearing Procedure.

(a) The Phase I Hearing shall be conducted on _____, commencing at 9:30 a.m. in

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THE "MANAGERIAL" ARBITRATOR
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(b) the JAMS _____ office. The hearing hours generally shall be 9:30 a.m. to 5:00 p.m. but may be varied as necessary to accommodate counsel or witnesses.

(c) Bifurcation. The issues of the amount of punitive damages as well as the amount of costs and attorneys' fees to which any party may be entitled shall be bifurcated and determined subsequent to the Phase I Hearing. The entitlement to an award of punitive damages and fees and costs shall be determined as part of the Phase I hearing.

(d) Prehearing briefs and motions *in limine*, if any, may be filed not later than _____.

(e) Trial exhibits shall be pre-marked with consecutive Arabic numerals (without any indication of the party offering same) and a joint exhibit list shall be prepared not later than _____. The parties shall indicate any objection to the introduction of any exhibit. The joint exhibit list and objections shall be furnished to the arbitrators at the commencement of the hearing. Exhibits not objected to shall be deemed admitted at the commencement of the hearing. One set of exhibits shall be prepared for the arbitrators and one for the witnesses in addition to copies for counsel. All exhibits will be discarded 30 days after the issuance of the final award unless a party requests, in writing, that the exhibits be retained or returned.

(f) The parties are encouraged to execute a stipulation of undisputed facts and to submit that document to the arbitrator at the hearing. A disk formatted to Word shall accompany any such stipulation.

(g) If any party intends to utilize the services of a court reporter, notice thereof shall be given to the other side by _____. The parties are encouraged to agree on any division of cost with respect to the reporter they desire, and to agree as to whether such costs shall or shall not be an allocable cost of this proceeding.

(g) The award shall state the reasons on which the decision of the arbitrators is based. The award may be served by regular mail unless any party requests, in writing, service by certified mail in accordance with Cal. Code of Civil Procedure § 1283.6.

9. Miscellaneous.

(a) Documents shall be served on JAMS through the Case Manager, with a copy sent directly to each arbitrator, except the trial exhibits shall be submitted only to the arbitrators on the day of the hearing.

(b) All deadlines herein shall be strictly enforced. This Order shall continue in effect unless and until amended by subsequent order of the arbitrator.

DATED: _____

_____
Arbitrator

_____
Arbitrator

_____
Arbitrator

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THE "MANAGERIAL" ARBITRATOR
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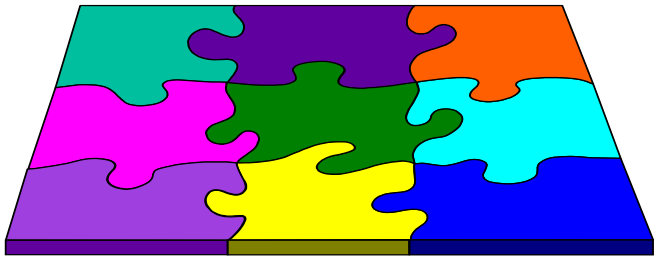
****Richard Chernick*** is an arbitrator and mediator and is Managing Director of the JAMS Arbitration Practice. He is Chair of the Dispute Resolution Section of the ABA. He is a co-author of The Rutter Group's "California Practice Guide -- Alternative Dispute Resolution."

ENDNOTES

[1]Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996); Allied Bruce-Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Rodriguez de Quias v. Shearson/American Express, *Inc.*, 490 U.S. 477 (1989); Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983); Wilco v. Swan, 346 U.S. 427 (1953).
[2]*See* Revised Uniform Arbitration Act, *available at* http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm.
[3]9 U.S.C. § 2.
[44]*See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (1967) (severability of arbitration clause from agreement in which it is contained).
[5]*See, e.g.*, China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003) (issue of allegedly forged signature on agreement to arbitrate is for the court); Sandvik AB v. Advent International Corp., 220 F.3d 99 (3d Cir. 2000) (existence of authorization of agent to sign agreement to arbitrate for the court to determine); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir 1989) (district court properly dismissed claims in favor of arbitration).
[6]First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
[7]*See* Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003); Shaw Group Inc. v. Triplefine Int'l. Corp., 322 F.3d 115, 121-22 (2d Cir. 2003); JAMS Comprehensive Arbitration Rules and Procedures, Rule 11(c); American Arbitration Association Commercial Arbitration Rules, Rule R-8(a).
[8]PowerAgent Inc. v. Elec. Data Sys. Corp., 358 F.3d 1187 (2004).
[9]Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (whether parties waived the right to a class-wide arbitration); PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003) (whether contractual punitive damage waiver affected power of arbitrator to award treble damages under RICO); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) ("gateway issue" of applicability of six-year-ineligibility rule contained in NASD Code of Arbitration Procedure is a "procedural" question for the arbitrator, not an issue of "substantive arbitrability"); *see also* Revised Uniform Arbitration Act § 6(c), Comment 2. The intricacies of these "threshold" issues are addressed at length in J. Lehrman, *On the Threshold of Arbitration*, Los Angeles Lawyer, Dec. 2003, at 20.
[10]HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41 (1st Cir. 2003) (refusing to compel arbitration until condition precedent met); *accord* Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1291 (11th Cir. 2002). *See generally* Revised Uniform Arbitration Act (hereinafter "RUAA") §§ 6(b), (c).
[11]537 U.S. 79 (2002); *see* Int'l Ass'n of Bridge Structural Ornamental & Reinforcing Ironworkers, Shopman's Local 493 v. Efco Corp. & Construction Products, Inc., 359 F.3d 954 (8th Cir. 2004).
[12]*See* ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24 (2d Cir. 2002); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999).
[13]*See, e.g*., Cal. Code Civ. Proc. § 1282.2(c); RUAA §§ 6, 8(b), 15(a), (b), (c); AAA Commercial Arbitration Rules R-7(a), 30(b), 31(b); JAMS Comprehensive Arbitration Rules and Procedures, Rules 11(a), 22(a).
[14]See Appendix A for a form of Procedural Order that the author uses.
[15]Shaw's Supermarkets, Inc. v. United Foods & Commercial Workers Union, 321 F.3d 251 (1st Cir. 2003) (arbitrator may consolidate related claims into one proceeding). *But see* RUAA § 10 (court may consolidate arbitrations, implying arbitrators do not have this authority).
[16]S*ee, e.g*., Cal. Code Civ. Proc. § 1282.2(c); RUAA § 15; Appendix A, ¶ 8(b).
[17]*E.g.*, RUAA §§ 17 (c), (d); AAA Rule R-21; JAMS Rule 17(c).
[18]*See* Appendix A, ¶ 7(b).
[19]9 U.S.C. § 7. *Compare* In re Security Life Ins. Co. of America, 228 F.3d 865, 870-71 (8th Cir. 2000) *with* COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269. 275-76 (4th Cir. 1999).
[20]*E..g*., Cal. Code Civ. Proc. § 1283.
[21]*See* Appendix A, ¶ 7(c).
[22]Prestige Ford v. Ford Dealers Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir. 2003), *cert. denied* 124 S. Ct. 281 (2003); Nationwide Mutual Ins. Co. v. Home Ins. Co., 278 F.3d 621, 625 (6th Cir. 2002).
[23]*See* Reed v. Mutual Serv. Corp., 106 Cal. App. 4th 1359, 1364-70 (2003) (NASD six-year limitations period applied to dismiss claim at preliminary conference); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096 (1995).
[24]RUAA § 23(a)(3); FAA § 10(a)(3).
[25]See Appendix A, ¶ 8(a).
[26]Cal. Code Civ. Proc. § 1282.2(a)(1); *Prestige Ford* , 324 F.3d at 395; JAMS Rule 19(a).
[27]*See* Appendix A, ¶ 7(d).
[28] *Id.* ¶ 8(d). In larger cases, it may be preferable to assign blocks of exhibit numbers and to allow separate claimant and respondent sets of exhibits to be prepared, rather than to require a joint exhibit list.
[29]*See* Appendix A, ¶ 8(d).
[30]*See* Appendix A, ¶ 7(e).
[31]*See* Ajida Technologies, Inc. v. Roos Instruments, Inc., 87 Cal. App. 4th 534 (2001) (arbitrators' power to fashion remedy consistent with parties' agreement); Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362 (1994) (arbitrator may grant a remedy, consistent with the parties' agreement, that a court could not grant). The AAA and JAMS rules are consistent wit this grant of authority. AAA Rule 43(a); JAMS Rule 24(c).
[32]*See* Appendix A,¶ 8(b).
[33]*See, e.g.*, W. Knight, et al., Cali*fornia Practice Guide – Alternative Dispute Resolution* ¶ 5:430 *et seq*. (2002).
[34]*See* Hightower v. Superior Court, 86 Cal. App. 4th 1415 (2001); Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 282-83 (2d Cir. 1986).
[35]*See* Appendix A, ¶¶ 8(b), (g).
[36]9 U.S.C. §§ 9 – 11; Cal. Code Civ. Proc. § 1286. *See, e.g*., Moncharsh v. Heily & Blase, 3 Cal. 4th 1 (1992).
[37]*See, e.g.*, Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (no enhanced review by agreement; reviewing other circuit cases to the contrary).
[38]*See* Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003) (agreement unenforceable).



ETHICAL PUZZLER

by Suzanne Mann Duvall

This column addresses hypothetical ethical 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, and office #214-361-0802 and fax #214-368-7258.

Ethical Puzzler Question

Back by popular demand (that has now become an annual event), this issue's Ethical Puzzler asks ADR professionals throughout the state to share their own ethical dilemmas and the ways in which they did (or did not) resolve them. Enjoy.

Donna Harris (Dallas): Wife and Wife's attorney and Husband and Husband's attorney appeared for mediation. Wife and Wife's attorney informed mediator that on that very morning, prior to coming to the mediation, Wife had paid $5,000.00 to her attorney by charging $5,000.00 on Husband's credit card (Wife was an authorized signer, but Husband was primarily responsible for the credit card account). Wife and Wife's attorney advised Mediator that Mediator was absolutely not authorized to inform Husband or Husband's attorney that Wife had paid her attorney with Husband's charge account. What to do?

(What I did, in effect, was to intimidate Wife and her attorney to fess up and let me tell the other side. I pointed out how miserable Wife and her life would be once Husband found out after the fact that he was stuck with $5,000.00 he was unaware of, especially when he found out it went to Wife's lawyer. As I've always heard the very wise John Withers, Sr. say, "A man would rather have an inch cut off his pecker than to pay his Wife's attorney's fees.")

"...it is the awareness that there may be a problem that makes us proficient at what we do."

Yvonne Becerra (Austin): In a post-divorce dispute I mediated, attorneys for the parties were actively engaged in the option-generation stage. One option raised by the ex-wife's attorney was that the ex-husband take out a loan with the ex-wife to pay-off the debt he owed her for equipment he bought for his business. A little troubling to me was that the ex-husband's attorney, already having made concessions without explaining the financial implication for the ex-husband, agreed to the idea without consulting his client. Adding to my concern was my observation that the ex-husband was not a fluent English speaker nor as educated or knowledgeable about financial matters as his wife. When the ex-husband's attorney agreed to the bank loan, the attorneys affirmed they were ready to put everything in writing and seemed to dismiss the need to explore the consequences of each option.

My dilemma as a mediator was three-fold: 1) how could I stay in my role as a mediator without advising the ex-husband to consider how the loan contract with the wife would affect his debt, 2) how to avoid causing the ex-husband's attorney from losing face by bringing up the interest rates on the loan given that he had agreed to it and 3) how to remain neutral. I resolved the matter by asking during the writing agreement stage, "How would you like to word the terms of the loan such as length of time and the interest rate?" The ex-husband promptly turned to his attorney and asked "what are interest rates," after which his attorney immediately called for a break to meet with his client. When they returned to the joint session, the ex-husband decided to counter-offer with an asset the wife accepted.

Edward "Trey" Bergman, III (Houston): As mediators, we have all been asked questions in mediation at one time or another that should have raised our concern about an ethical dilemma. But as mediators, have we all thought to check whether those questions actually presented an ethical dilemma? Let's compare the following four questions side by side with our published "Ethical Guidelines for Mediators" and see.

Question One: You are in a private caucus with one of the parties and their attorney and you are asked, "Who is doing all the talking in the other room?" Can you answer the questions?
Answer: Guideline 8 ("Confidentiality") states "[a] mediator should not reveal information made available in the mediation process, which information is privileged and confidential."

If we answer this question, we have divulged a confidence. Although it might not seem like much of a disclosure to us as the mediator, it may prove to be of great concern to the participants in the mediation. It may also be used as a tactical advantage to the side asking the questions. Remember, we should never divulge any information of any type we learn in our role as the mediator, no matter how trivial it may seem to us at the time. We are not the judge of what information we can and can not disclose, until we are given specific permission to disclose.

Question Two: You are in a private caucus with one of the parties and their attorneys and you are asked, "What do you think the other side will take/pay to settle this case?" Can you answer that question?
Answer: Guideline 2 ("Mediator Conduct") states "[a] mediator should protect the integrity and confidentiality of the mediation process."

If we answer this question, we have substituted our judgment for that of the parties. As mediators, we serve as

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Ethical Puzzler
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neutral third persons who does not care how the case is settled, just that it is settled. We must suspend our judgment at all times as guardians of the process; allow it to run its course. No one, especially the mediator, knows what the parties will take/pay to settle a case. Give the parties enough time to make their own decision.

Question Three: You are told in a private caucus by one of the parties, "all I have to settle this case is $50,000.00. Spend it any way you want, just settle the case. Okay?" What would you do?

Answer: Guideline 9 ("Impartiality") provides that "[a] mediator should be impartial to all parties." The comment goes on to state "[I]mpartiality means freedom from favoritism or bias in word, action and appearance; it implies a commitment to aid all parties in reaching a settlement."

If we do as requested by this party, then we have taken on the role of negotiator for that one party and have lost our neutrality. Our job is not to negotiate a settlement for one side. Our job is to facilitate discussions between the parties and allow them to reach their own settlement. How do we know that the one side wouldn't actually pay $52,000.00 if that is what it took to settle the case? How do we know that the other side would not take $30,000.00 to settle the case? Don't risk an impasse by allowing yourself to be tricked into serving as one side's negotiator.

Question Four: You are told in the opening session with all parties and counsel present that the case is being mediated pursuant to a mandatory mediation clause in a contract. You are also told that if the case does not settle in mediation, then the contract requires the parties to go to binding arbitration. The parties have requested you to serve as the arbitrator if the case does not settle in mediation. Can you do that?

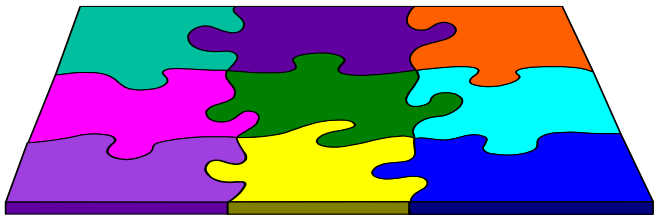
Answer: Guideline 23 ("No Judicial Action Taken") states "[a] persons serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation." However, the comment goes on to state "[n]ot withstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator if requested and agreed by all the parties, may serve as the arbitrator in a binding arbitration of the dispute…"

Fortunately the question is not "should you do that." That is an entire topic in itself to be handled in another Ethical Puzzler. The answer to "can you do that" is yes.

Anonymous Mediator(s) of the Dispute Resolution Center (Lubbock County):
After making progress in a mediation involving contract issues, the parties were getting close to a settlement. When the physician who was being sued discovered that the mediator had served for the opposing party for several other similar lawsuits, he became upset because he thought the mediator was not impartial. The physician threatened to sue the mediator for malpractice because the mediator did not disclose prior mediations for the plaintiff on similar issues. The mediation was terminated.
In a divorce mediation, the husband stated in caucus that his wife was "not smart enough to find assets" if he decided to conceal them. The mediator was not sure if this was meant solely as an insult to the wife's intelligence, or in fact, the husband was concealing assets. In general session, the wife had said that she thought her husband was hiding assets. The mediator asked how both parties could be sure all assets were disclosed and referred the parties back to their respective attorneys for counsel.

COMMENTS:

Four (or five) stellar, mediators, eight real-life ethical puzzlers – our cup runneth over! If you too have experienced ethical dilemmas in your practice, please share them with us – whether they be resolved or unresolved. After all it is not the *occurrence* of such dilemmas that is important, it is the *awareness* that there may be a problem that makes us proficient at what we do.



Mark Your Calendar!

State Bar of Texas
2005 Annual Meeting
June 23-25, 2005
Dallas Wyndham Anatole Hotel

Look for more information in upcoming newsletters!

Arbitration and Arbitration Awards with the Texas Residential Construction Commission

*By Kris Parker**

In order to provide more detailed information on how arbitration is working in Texas with respect to resolution of residential construction defect disputes, certain persons must file arbitration awards relating to residential construction with the Texas Residential Construction Commission (Commission).

Created by the Legislature in 2003, the Commission is responsible for keeping arbitration award summaries related to disputes between homeowners and builders that involve an alleged construction defect.

If an arbitration award is filed in a court of competent jurisdiction in Texas, the filing party shall, not later than the 30th day after the date the award is made, file with the Commission a summary of the arbitration award. This summary must include: 1) the name of the parties to the dispute; 2) the name of each party's attorney, if any; 3) the name of the arbitrator who conducted the arbitration; 4) the name of the arbitration services provider who administered the arbitration, if any; 5) the fee charged to conduct the arbitration; 6) a general statement of each issue in dispute; 7) the arbitrator's determination, including the party that prevailed in each issue in dispute and the amount of any monetary award; and 8) the date of the arbitrator's award.

If the award summary is not filed within the thirty-day period required, the person responsible for filing the award may be subject to a $100 late penalty assessed by the Commission. A person may also willingly file with the Commission arbitration awards that were not filed with a court.

In addition, a person may voluntarily choose to be certified as a residential construction arbitrator with the Commission. The Commission maintains a list of certified arbitrators for the public on its Web site at www.trcc.state.tx.us.

Individuals seeking to become certified as a residential construction arbitrator with the Commission shall: 1) provide evidence that the person has acquired a minimum of five (5) years of experience conducting arbitrations between homeowners and builders involving construction defects; 2) certify that the person is familiar with the statutory warranties and building and performance standards established in Property Code Chapter 430 and with the provisions of Property Code Chapter 27; 3) certify that the person has not had a professional license or certification suspended or revoked in any jurisdiction; and 4) submit a list that includes any person registered as a builder or certified as a third-party inspector with whom the applicant has a direct or indirect personal or business relationship that could reasonably be considered to create a conflict of interest for that person in serving as an arbitrator in a dispute involving the person listed as a party or a witness.

After the Commission receives a completed application on a Commission-prescribed form accompanied by a $50 fee and determines qualifications of the applicant, it will publish in the *Texas Register* notice of the application of each person seeking to become registered and accept public comment on each application for twenty-one (21) days after the date of publication of the notice. After the conclusion of the comment period, if the Commission finds it to be in the public interest, the Commission will register the arbitrator.

For forms to file arbitration awards, become a certified residential construction arbitrator, or for more information on the Commission, visit www.trcc.state.tx.us. Please feel free to contact Kris Parker, TRCC Director of Communications, at (512) 463-9934 with questions.

Kris Parker is Director of Communication for the Texas Residential Construction Commission.

A NEW WAY OF DOING BUSINESS: COLLABORATION

*By Lawrence R. Maxwell, Jr.**

I. Introduction

The collaborative process is a new and exciting tool in the ADR toolbox. The process is a structured, voluntary, non-adversarial approach to resolving disputes. The process is based on cooperation and team work, full disclosure, honesty and integrity, respect and civility, and parity of costs.

The collaborative process enables individuals, families, businesses and organizations to maintain control over their relationships with others by empowering them with the ability to resolve their disputes peaceably.

II. Why Collaboration? Are the learned lawyers trying to tell us something?

The idea of resolving disputes through negotiation and dialogue is certainly not new to lawyers:

> *"Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time."*
>
> **Abraham Lincoln**

But, lawyers will be lawyers.

> *"Lawyers are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."*
>
> **Justice Oliver Wendell Holmes**

As lawyers, we often assume a vested interest in our legal system, and we rebel to basic change more so than any other group of professionals.

> *"Lawyers' faces are turned to the past and precedents. The bar is apt to see grave dangers in the alteration of any of the so-called absolutes. That is natural, since none likes to have the rules changed - especially when the change requires re-education.***"**
>
> **Justice William O. Douglas**

Several years ago, Chief Justice Warren Burger, in his not-so-subtle criticism of our litigation system operated by lawyers and judges, reminded us that lawyers need to return to their role as healers of conflict:

> "*Our litigation system is too costly, too painful, too destructive, too inefficient for civilized people."*

Justice Sandra Day O Connor correctly sets forth the dispute resolution time line:

> *"The courts of this country should not be the place where the resolution of conflict begins. They should be places where disputes end, after alternate methods of resolving disputes have been considered and tried."*

Are these learned lawyers trying to tell us something? Lawyers, as leaders of thought and keepers of the rule of law, need to think and act creatively. Precedent is important, to be sure. But our vocation is more than tutoring clients in ways of using the law against other parties. Lawyers primary task should not be to protect their clients from other lawyers.

A dispute is a problem to be solved, not a battle to be won. Lawyers should not be hired to fight as at war. A lawyer's primary task should be to assist clients in meeting their goals and interests, resolving disputes ethically, with civility and professionalism, as quickly, peacefully, and economically as possible.

Use of the collaborative process as the first option for resolving disputes reverses the traditional dispute resolution time line. Litigation becomes the last option, rather than the first.

III. Essential Elements of the Collaborative Process

The essential elements of the collaborative process are:

A. Identification of the goals and interests of the parties;

B. Full and complete disclosure of relevant information;

C. Efficient communications;

D. Empowerment of parties to make decisions on a level playing field;

E. Confidentiality; and

F. Good-faith negotiations.

IV. How the Process Works

A. Written Agreement to Collaborate in Good Faith

The parties and their lawyers sign an agreement (Participation Agreement) to negotiate face-to-face in good faith to resolve their dispute without resort to a court-imposed resolution, to disclose all relevant information, and to engage neutral experts, as needed, for assistance in resolving issues. The written agreement must require that the lawyers withdraw if the collaborative process is terminated.

Good faith means an honest commitment not to take advantage of a party through technicalities of law and to

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A NEW WAY OF DOING BUSINESS: COLLABORATION

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remain faithful to one s obligations under the collaborative Participation Agreement.

The process is completely voluntary, and choosing the collaborative process for resolving a dispute is the client s prerogative. The process is not appropriate for resolving all disputes, nor are all lawyers appropriate for the process.

Once a client chooses to use the process, the collaborative lawyer diligently and zealously represents the client in pursuit of the client s stated interests and goals. The parties and lawyers understand the process involves vigorous good-faith negotiations in face-to-face meetings, and the negotiations are interest-based as opposed to position-based.

B. Confidentiality

All participants in the collaborative process agree to maintain the confidentiality of any oral or written communications relating to the subject matter of the dispute made by the parties, their lawyers, or other participants in the collaborative process, and all communications constitute compromise negotiations under Rules 408 of the Texas and Federal Rules of Evidence.

C. Suspension of Court Intervention

Court intervention is suspended during the collaborative process. No documents are filed that would initiate court intervention, except if necessary, to preserve causes of action, defenses, or to maintain some extraordinary relief. All participants should endeavor to reach agreement to eliminate the necessity for any such filings. No hearings are set, other than to submit agreed orders to the court.

D. Full Disclosure of the Good and the Not-So-Good

The collaborative process is not to be used as a subterfuge by clients with ulterior motives. A hallmark of the process is honest and voluntary full disclosure of relevant documents and information, which is the antithesis of litigation practice. Such communications are discoverable or admissible in an adversary proceeding only if they would have been discoverable or admissible independent of the collaborative process.

Further, the collaborative lawyer is not to take advantage of known mistakes, errors of fact or law, miscalculations or other inconsistencies. Such errors must be disclosed and corrected. Overcoming the win-lose, one-upmanship mentality of litigation requires the greatest paradigm shift for lawyers.

Collaborative lawyers must in good faith believe their clients are acting in a manner consistent with the objectives of the collaborative dispute resolution process; otherwise, the collaborative lawyer must terminate the process.

E. Face-to-Face Meetings

A hallmark of the process is face-to-face meetings of the parties and lawyers. Such meetings are the key to achieving a successful outcome. At the first meeting, the clients define their goals and interests, recognizing and acknowledging other parties interests and areas of common interest. A game plan is developed for gathering information, setting meeting agendas, and scheduling meetings.

F.Neutral Experts

In the next stage of the collaborative process, settlement options are developed and evaluated. At this stage, the parties may determine that experts, qualified by knowledge, skill, experience and training, would be helpful in evaluating information, formulating options, and evaluating options for resolution of the dispute.

Another hallmark of the collaborative process is that unless the parties agree otherwise, adversarial experts are not engaged to counter each other s position. Rather, only neutral experts are engaged. The cost savings to the parties can be enormous when the battle of the experts is avoided.

In choosing neutral experts, parties must have faith in the success of the collaborative process, because such experts work product, opinions, mental impressions and facts upon which they are based are available to all participants in the collaborative process, and are not discoverable or admissible in any adversarial proceedings resulting from the dispute addressed in the collaborative process.

This is as it should be. The collaborative process seeks to insulate and limit the role of the collaborative lawyers and participating experts in order to ensure that a party cannot attempt to use the collaborative process to gain tactical advantage in an adversarial proceeding if the collaborative process is not successful.

G. Consulting-Only Experts

Parties in the collaborative process may privately engage consulting-only experts, who must have no first-hand knowledge of the dispute, and no factual knowledge except for what the expert learns through the consultation with the party and the lawyer. The identity of the consulting-only expert must be disclosed to all parties; however, the work product of a privately engaged consulting-only expert, plus the communications between such expert and a client and lawyer, are privileged, provided that such work product or communications are not reviewed by a neutral, jointly retained expert. In such event, the attorney-client privilege is waived and the work product and communications of the consulting-only expert must be shared with all participants in the collaborative process. The consulting-only expert loses the status of a consulting-only expert and becomes a retained neutral expert whose work product must be disclosed to all parties.

H. Second Legal Opinion

Prior to or during the collaborative process, a party or group of parties may engage a lawyer, including a litigation lawyer, for the purpose of giving a second opinion on

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A NEW WAY OF DOING BUSINESS: COLLABORATION
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a specific issue or issues. The identity of such lawyer must be disclosed to all parties; however, the work product and opinions of such lawyer are attorney-client privileged and are not required to be disclosed to other participants in the collaborative process. Such a lawyer engaged to offer a second opinion, and any other lawyers associated with that lawyer, are not disqualified from testifying as a fact or expert witness, nor are they prohibited from representing the consulting party or parties in the dispute, or in any other adversarial proceeding among the parties, unless all parties agree that no lawyer rendering a second opinion may serve as litigation counsel.

If such second opinion is jointly sought by all parties in the collaborative process, the opinion is to be disclosed to all parties and the lawyer is to be considered a jointly retained neutral expert.

I. Termination of the Process

A client or collaborative lawyer may terminate the collaborative process at any time, in which event all lawyers in the collaborative process must withdraw from representation of their respective clients. Neither the collaborative lawyers, nor any lawyer associated in the practice of law with the collaborative lawyers, may serve as litigation lawyer in any adversarial proceeding regarding the subject matter of the collaborative process, or in any other adversarial proceeding among any of the parties in the collaborative process without the written permission of all parties to the dispute. The collaborative lawyers must assist their respective clients in a transition to litigation lawyers to avoid any prejudice to the clients, and the collaborative lawyers cease further work on their clients matters.

J. Understandings Regarding the Uniqueness of the Process

By signing a Participation Agreement, parties understand that no attorney-client relationship exists between one party s lawyer and another party s lawyer, the lawyers are independent from each other and representing and advocating only their respective clients in the collaborative process, and no legal duty, by contract or otherwise, is owed to a party by another party s lawyer.

The parties further acknowledge that unless the process is terminated, they are giving up the right to conduct formal discovery and the right to have their dispute decided in an adversarial proceeding.

V. Conclusion: An Idea Whose Time Has Come

There is no guarantee that the collaborative process will successfully resolve a client s dispute. But, if we draw a practical dispute resolution time line, it seems that collaboration should be the logical first option and litigation the last option.

Victor Hugo said,

"Nothing is more powerful than an idea whose time has come."

The collaborative dispute resolution process is just such an idea. Granted, it will not be an easy task to change the legal culture. But, all it takes for a good idea to come into fruition is a handful of individuals that want to make a difference.

VI. Postscript

The collaborative process for resolving disputes is well established in the area of family law, in Texas and throughout the country.

In the summer of 2004, a handful of individuals in Dallas set upon a mission of expanding the collaborative process to all civil disputes**,** training lawyers in the process and educating the public as to the benefits of the process.

Texas Collaborative Law Council, Inc., a Texas non-profit corporation has been organized. The Council has established a website (www.collaborativelaw.us) to inform lawyers and the public about the process, is developing training programs for lawyers, and is drafting forms for use of the collaborative process to resolve disputes in several areas of law.

The Appendix to this paper includes a listing of areas of law in which the collaborative process may be efficiently used to resolve disputes. In August 2004, the Texas Collaborative Law Council provisionally adopted a Participation Agreement and Protocols of Practice for Collaborative Lawyers. You may obtain copies of these documents by contacting Stacey Langenbahn, Vice President of Texas Collaborative Law Council, Inc,. at stacey.langenbahn@lockerlee.com.

Lawrence R. Maxwell, Jr. is an attorney, mediator, arbitrator, and practitioner of the collaborative dispute-resolution process in Dallas. He is the President of the newly organized Texas Collaborative Law Council, Inc., a past president of the Association of Attorney-Mediators, and a past chair of the ADR Section of the Dallas Bar Association.

If we are to live together in peace, we must come to know each other better.

Lyndon Baines Johnson

APPENDIX
New Frontiers for Collaboration

The first option for resolving disputes in the following areas of law:

Probate:
- Will contests
- Disputed guardianships
- Breach of fiduciary duty

Real Estate:
- Sales contracts
- Lender issues
- Commercial Leases
- Condemnation
- Title insurance

Business and Commercial:
- Intellectual Property
- Securities & Antitrust
- Computer & Technology
- Consumer issues
- Liquidation of businesses
- Partnership dissolutions
- Banking & loan work-outs
- Bankruptcy & Receiverships

Professional malpractice:
- Lawyers
- Accountants
- Health care providers
- Architects & Engineers

Insurance:
- Personal injury
- Wrongful death
- Property damage
- Products liability
- Toxic torts
- Life, Health & Disability

Construction:
- Owners & Developers
- General & Sub-contractors
- Suppliers
- Architects & Engineers
- Sureties & Liability Insurance

Family Law:
- Divorce
- Child custody & support
- Spousal support & alimony
- Property division

Health Law:
- Hospital liability
- Heath care provider liability
- Partnership dissolutions

Elder Law:
- Care facilities
- Entitlements

Labor & Employment:
- Title VII
- Sports & Entertainment
- Non-compete covenants

Administrative & Public Law
- Federal, State & Municipal
- Quasi-governmental agencies

Other areas:
- Aviation Law
- Environment Law
- Natural Resources
- International Law

AMENDMENTS TO CLE ACCREDITATION STANDARDS FOR ADR

By Michael J. Schless

Organizations sponsoring continuing education programs on ADR and related topics have reported inconsistencies in the granting or withholding of CLE accreditation from the State Bar of Texas. After hearing several such reports, representatives of the State Bar of Texas ADR Section (the "Section") and the Texas Association of Mediators (TAM) appeared last Spring before the State Bar of Texas MCLE Committee and offered to be of assistance to the committee when questions arose regarding accreditation for ADR programs. On September 28, 2004, representatives of the Section, the Association of Attorney-Mediators (AA-M), the Houston Bar ADR Section, and TAM met with a subcommittee of the MCLE Committee. At that meeting, the representatives of the ADR community learned that a segment of the MCLE Committee had difficulty with the language in paragraph IA5 of the accreditation standards, which provides that in order for an ADR activity to be accredited, the activity must consist "of an organized program of *legal* education dealing with…alternative dispute resolution." Because a mediator is not practicing law while serving in that capacity, and because one need not be an attorney to be an ADR neutral, that segment of the MCLE Committee reasoned that programs focused on service as a neutral could not be *legal* education. They were also troubled by the fact that the definition of ADR in the accreditation standards did not include a specific reference to training in the skills needed to be an ADR neutral. The representatives of the ADR community expressed the view that the standards, as written, were sufficient to warrant accreditation of an ADR activity that otherwise met the criteria. However, they also recognized that if the standards could be amended to address the concerns of the MCLE Committee, perhaps the problem could be resolved. Language for some proposed amendments was developed at that meeting. The Section formally requested that the MCLE Committee consider and adopt the proposed amendments, and the other organizations wrote letters in support of the request. At the November 18, 2004 meeting of the full MCLE Committee, Mike Schless and Trey Bergman appeared on behalf of the Section, AA-M, the Houston Bar ADR Section, and TAM. Following a productive and informative discussion, the MCLE Committee voted to approve the proposed amendments, effective January 1, 2005. The former accreditation standards can be found on the State Bar's website, www.texasbar.com. The new standards, with the amendments highlighted, follow this article. The revised language is printed in bold italics. If applicants for CLE accreditation of ADR activities closely follow the language of these amended criteria, then it is reasonable to expect that accreditation will be more readily forthcoming.

ACCREDITATION STANDARDS FOR CLE ACTIVITIES (EFFECTIVE AS OF JANUARY 1, 2005)

Pursuant to the authority granted to the Committee on minimum Continuing Legal Education (hereinafter "the Committee") by the Supreme Court of Texas, these accreditation criteria are hereby adopted by the Committee to be used as guidance for determining whether CLE activities submitted for MCLE accreditation satisfy the general standards for accreditation specified in Section 4(A) of Article XII, State Bar Rules.

(Note: Endnote numbers correspond to the Definitions section, following)

I. A CLE activity shall be accredited for MCLE in Texas if it meets the criteria of either A. or B. below, and also each of the other criteria of C., D., and E. below:

A. The activity consists of an organized program of legal education dealing with:

1. substantive or procedural subjects of law;
2. legal skills and techniques;
3. legal ethics[1] and/or legal professional responsibility [2] ; ***or***
4. law office management[3]

B. The activity consists of an organized program dealing with alternative dispute resolution[4]

C. The activity may include coverage of technical, scientific or other bodies of knowledge that are directly related to any of the subjects listed in I.A. or I.B. above.

D. The instructors or lecturers are either qualified attorneys or judges, or they are experts in the subject area based on their education and background.

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AMENDMENTS TO CLE ACCREDITATION STANDARDS FOR ADR
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E. The activity is designed for and targeted to attorneys.

II. A CLE activity shall NOT be accredited for MCLE in Texas if it is:

A. A meeting of a bar association, committee, section or other entity composed of attorneys, that is designed primarily to be a general business meeting or work session as opposed to a CLE activity, or

B. An activity that is designed or intended to market a product or service to lawyers, or

C. An activity that is designed or intended primarily to attract clients.

DEFINITIONS

1. "Legal ethics" shall include programs that deal with usages and customs among members of the legal profession; involving their moral and professional duties toward one another, toward clients, and toward the courts.

2. "Legal professional responsibility" shall include programs that deal with maintaining the integrity and competence of the Bar so that legal services are delivered with the highest degree of professional conduct.

3. Examples of such programs shall include, but not be limited to, those involving disciplinary rules of professional conduct, rules of disciplinary procedure, the use and availability of alternative dispute resolution and pro-bono legal services.

4. "Law office management" shall include programs on topics that relate strictly to law offices and legal departments, to the development and training of lawyers in the actual practice of law, and to managing law firm activities and resources. The objective of all such programs shall be to assist the lawyer in providing high quality legal services to clients.

   Examples of such programs shall include, but not be limited to, those involving: (1) administrative and organizational structure and planning for law firms, (2) case management and docket control, (3) accounting systems and time and billing systems for lawyers, (4) client filing and monitoring systems, (5) utilizing technology, and (6) human resource management for law firms.

   "Law office management" shall NOT include programs involving: (1) individual money management or investing, (2) stress management or personal development, (3) techniques designed primarily to increase profits of a lawyer or firm, (4) time management and personal organizational skills, (5) training in the use of specific hardware, software or office equipment, and (6) general office management or supervisory skills.

4. "Alternative Dispute Resolution" or "ADR" shall include programs offering substantive training in the processes and ethical considerations attendant to the resolution of pending disputes by mediation, arbitration, moderated settlement conference, early neutral evaluation, mini-trial, summary jury trial or other related litigation dispute resolution procedures. ADR includes training in the skills of a mediator, arbitrator, or a neutral in a moderated settlement conference, early neutral evaluation, mini-trial, summary jury trial, or other related litigation dispute resolution procedure. The following elements and guidelines shall be considered in determining accreditation for an ADR, program (1) training in substantive legal knowledge/concepts (e.g., statutes, court process); (2) the activity consists of actual classroom participation; (3) procedural instruction; (4) instruction in the mediator's and/or parties' role and maintenance of decorum; (5) discussion and instruction in ethical considerations (e.g. confidentiality issues, conflicts, offers, etc.); and (6) instruction on client preparation. Observation of actual mediations outside the classroom will not be approved for credit. Other areas not specifically designated above will be considered for credit in accordance with existing MCLE standards and within the context of the entire program presented for accreditation.

It is the province of knowledge to speak and it is the privilege of wisdom to listen.

Oliver Wendell Holmes (1809—1894)

FRANK EVANS CENTER FOR CONFLICT RESOLUTION INAUGURATED AT THE FIFTH ANNUAL INSTITUTE FOR RESPONSIBLE DISPUTE RESOLUTION

By Walter A. Wright

Houston's South Texas College of Law ("STCL") hosted the Fifth Annual Institute for Responsible Dispute Resolution on October 14-15, 2004. Co-sponsored by the ADR Section, the Institute focused on "Advocacy Skills for Resolving Disputes."

The Institute's highlight was the inauguration of the Frank Evans Center for Conflict Resolution at STCL on the afternoon and evening of October 14. James Alfini, President and Dean of STCL, accompanied by Kelly Frells, President of the State Bar of Texas, welcomed several hundred guests who came to celebrate the center's official opening. The guests were treated to a film entitled "The History of ADR in Texas," which STCL had prepared especially for the occasion. The film sketched a broad outline of key events in the development of ADR in Texas, including Judge Evans's participation in and support of many of those events. With characteristic warmth and humility, Judge Evans thanked the guests for their attendance and invited them to tour the center and enjoy the reception that followed the inauguration.

An impressive list of over forty panelists spoke on a wide range of topics during the two days of the Institute. The topics included "Perspectives on Litigation and Texas ADR," "Nuts and Bolts of Arbitration for Lawyers," "Cross-Border Legal Conflict Resolution Planning," "The State of the Law," "The Online Parent Coaching Program in the Family Courts," "Introduction to Collaborative Law," "Ethical ADR Strategies for Attorney Advocates," "The Vanishing Trial," "Preparing for Mediation of Legal Conflicts," "Effective Attorney Advocacy in Arbitration," and "Anticipating the Future of ADR and the Law." Thomas R. Phillips, former Chief Justice of the Supreme Court of Texas, spoke at the Friday luncheon on the subject of "American Courts in the 21st Century." Without question, the Institute was one of the most substantive ADR events of 2004.

2004 CALENDAR OF EVENTS

Two-Day Arbitrator Training Houston; The Better Business Bureau of Metropolitan Houston, Inc. The State Bar of Texas approved for twelve hours of MCLE credit. The cost of the course for ADR Section members is $300, and group discounts are available. For class schedules and additional information, contact klawrence@bbbhou.org.

Mediator Ethics Houston; December 11, 2004; 3 hours; Worklife Institute; Contact Diana C. Dale 713-266-2456

Workplace Conflict Resolution (24 Hours); December 15-17, 2004; Worklife Institute; Contact Diana C. Dale 713-266-2456 website: www.worklifeinstitute.com

Basic 40-Hour Mediation Training; Houston; January 27, 28, 29 & February 3, 4, 5, 2005 (20 hours each week); Worklife Institute; Contact Diana C. Dale 713-266-2456; meets TMTR standards; 40 hours CLE/CEUs including 3 hours ethics; www.worklifeinstitute.com

Transformative Mediation Houston; January 20, 21, 22, 2005; Worklife Institute; Contact Diana C. Dale 713-266-2456; www.worklifeinstitute.com

40Hour Basic Mediation Training Houston, January 14-16 continuing January 21-23, 2005; University of Houston A.A. White Dispute Resolution Center; Contact Robyn Pietsch 713-743-2066

40Hour Basic Mediation Training Houston, March 14-18, 2005; University of Houston A.A. White Dispute Resolu-

HIGHLIGHTS OF THE 5TH ANNUAL INSTITUTE FOR RESPONSIBLE DISPUTE RESOLUTION

HIGHLIGHTS OF THE 5TH ANNUAL INSTITUTE FOR RESPONSIBLE DISPUTE RESOLUTION

ADR Section Calendar

2004-2005

As a member of the ADR Section, you are always cordially invited to attend any of the quarterly Council meetings. We ask that as many members as can try to attend the annual meeting each year that is held in conjunction with the State Bar Annual Meeting. Next year, it will be in Dallas. Please note our calendar:

Council Meetings

January 8, 2005
10:00—3:00 p.m. Texas Law Center – Austin

April 2, 2005
10:00—3:00 p.m. Location to be Determined – San Antonio

June 24, 2005
2:30—4:30 p.m. State Bar Annual Meeting, Dallas

General ADR Section Meeting

June 24, 2005
2:30—4:30 p.m. State Bar Annual Meeting, Dallas

SUBMISSION DATE FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Winter	January 15, 2005	February 15, 2005
Spring	March 15, 2005	April 15, 2005
Summer	June 15, 2005	July 30, 2005
Fall	September 15, 2005	October 15, 2004

SEE PUBLICATION POLICIES ON PAGE 23 AND SEND ARTICLES TO:

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"There is no way to peace; peace is the way."

A.J. Muste

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
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cmorgan320@sbcglobal.net

I am enclosing $25.00 for membership in the Alternative Dispute Resolution Section of the State Bar of Texas from June 2004 to June 2005. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need not return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____ Public Member_____ Attorney_____

Address_____ Bar Card Number_____

City_____ State_____ Zip_____

Business Telephone_____ Fax_____

E-Mail Address:_____

2003-2004 Section Committee Choice_____

ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. Articles must be submitted for publication no later than 6 weeks prior to publication. The deadline for each issue will be published in the preceding issue.
2. The article must address some aspect of alternative dispute resolution, negotiation, mediation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. If possible, the writer should submit article via e-mail or on a diskette (MS Word (preferably), or WordPerfect), double spaced typed hard copy, and some biographical information.
4. The length of the article is flexible: 1500-3500 words are recommended. Lengthy articles may be serialized upon author's approval.
5. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.
6. All quotations, titles, names and dates should be double checked for accuracy.

Selection of Article

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

2. In the event of a decision not to publish, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right to edit articles for spelling, grammar, punctuation and format without consulting the author.
2. Any changes which affect the content, intent or point of view of an article, shall be made only with approval of the author.

Future Publishing Right

Authors reserve all their rights with respect to their article in the newsletter, except that the State Bar of Texas Alternative Dispute Resolution Section obtains the rights to publish the article in the newsletter and in any State Bar 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 addresses 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."

ALTERNATIVE DISPUTE RESOLUTION SECTION

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