ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

Vol. 18, No. 2
Spring 2009

CHAIR'S CORNER
By John K. Boyce, III, Chair, ADR Section

John K. Boyce, III

Your Council met Saturday, April 18, in San Antonio. Perhaps the most significant item of interest to the general membership was the issue of an electronic newsletter. After several months of study, we voted unanimously to move to an electronic newsletter format for the Winter 2009-2010 edition (which is still two issues away). The economics are compelling: we could save approximately $17,000/year in postage and printing costs. Several other sections (such as Real Estate, Probate, and Trust) have moved to this format and report both a high level of satisfaction from their members and a seamless transition. While many of us (particularly older) attorneys love the hard copy in hand, we think your dues can be better spent, for example, on programs to attract nationally recognized speakers and presenters.

Our Advanced Mediation Conference, held in January 2009, was such a program. Remember, it was an experiment that pioneered the concept of joint financial sponsorship between Texas BarCLE and third parties. It's really a new way to share risk. I am pleased to report that it was a resounding success. Attendance exceeded the Bar's expectations, even in these lean times, and the program received the highest evaluations of any CLE program in some time. Randy Lowry and Peter Robinson were charismatic. Their presentation was heavily interactive and experientially driven. This type of program will be a template for the future.

Also, as he informed the Council two years ago, Walter Wright, chair of our newsletter editorial board, who has made this newsletter the envy of sections, will step down in June. After a rigorous process, your Council selected Wendy Trachte-Huber, a former chair of this section, and Steve Huber, as new chairs of the newsletter editorial board. See the related article elsewhere in this newsletter.

In April, I testified on behalf of our bill (SB 1650) relating to interlocutory appeals under the Federal Arbitration Act. Remember, this bill is part of the Bar's legislative package. Senator Duncan agreed to sponsor the bill. The Senate voted favorably for the bill, and it was referred to the House Judiciary & Civil Jurisprudence Committee on April 20.

There are also several other bills, both in Congress and in the Texas Legislature, which we are following closely. Section members are serving as testifying resources and/or providing written statements. These bills could dramatically alter the scope of the Federal Arbitration Act and the Texas General Arbitration Act and upend precedent that has painstakingly evolved over eighty years. Very often, the hostility is generated from "horror" stories (many of which are anecdotal) from narrow areas in residential-construction or nursing-home arbitrations.

From the remarks of legislators, it is obvious there is a great gulf of a misunderstanding about arbitration. Your Council discussed ways to counter this threat; education will be key. We pointed out mechanisms, such as our Section's consumer due process protocol adopted two years ago, that could address some of the current objections. We are working with legislators to address these concerns.

We look forward seeing you in Dallas at our Section's annual meeting (1:30 P.M., Thurs-

continued on page 4

Inside This Issue:

SLATE OF OFFICERS AND COUNCIL MEMBERS APPROVED BY COUNCIL

By Cecilia H. Morgan*

At its regular quarterly meeting conducted in San Antonio on April 18, 2009, the ADR Section Council unanimously approved the slate of proposed officers and Council members submitted by the Nominating Committee, which was composed of Cecilia Morgan, John Boyce, John Allen Chalk, Susan Schultz, and Gina Giovannini. The following officers and new Council members were approved and constitute the slate for election at the ADR Section's annual meeting scheduled for 1:30 P.M. to 2:00 P.M. on Thursday, June 25, 2009, in Dallas, Texas:

1. Chair, John Allen Chalk (Fort Worth)
2. Chair Elect, Susan Schultz (Austin)
3. Treasurer, Regina Giovannini (Houston)
4. Secretary, Joe Cope (Abilene)
5. Immediate Past Chair, John K. Boyce III (San Antonio)

Council member nominees for three-year terms expiring June 2012:

1. Susan Perin (Houston)
2. Hon. Anne Ashby (ret.) (Dallas)
3. Don Philbin (San Antonio)

The ex-officio representative of the Dispute Resolution Center Director's Council nominated for a three-year term is Ed Reaves (Kerrville).

Council member nominee Raymond Kerr (Houston) is to serve a two-year term expiring June 2011. Council member nominee Patty Wenetschlaeger (Abilene) is to serve a one-year term expiring June 2010.

John Allen Chalk, Sr. has actively practiced law in Texas for thirty-five years and has extensive experience in commercial and employment law litigation. His practice is international in scope. He also has a significant health-care practice representing physicians and allied health professional provider organizations. John joined the Council in 2006 and has been instrumental in assisting the ADR Section in its arbitration roundtable project. This year he will also serve as President of the Tarrant County Bar Association.

Regina Giovannini, a full-time professional neutral, is a member of the American Arbitration Association's Commercial Arbitration Panel (large and complex cases). She was national president of the Association of Attorney-Mediators in 2000 and chairman of the Houston Bar Association Alternative Dispute Resolution Section in 1999. She is a prolific writer and speaker on ADR subjects. Regina, a graduate of Notre Dame Law School, is a former business litigator.

Susan B. Schultz is currently the Deputy Director of the Center for Public Policy Dispute Resolution at the University of Texas School of Law, an organization that promotes the appropriate use of alternative dispute resolution in Texas government. An attorney with eighteen years of experience in the field of regulatory and administrative law, Susan is a trained mediator and facilitator. She has assisted in ADR trainings, tracked and reported on legislation in the Texas legislature, and consulted with various state agencies to refine or implement ADR programs. She was first elected to the Council in 2005 and has been actively involved in all Section activities, including serving as Secretary for the Council for 2008-2009.

Joe L. Cope is the Executive Director of the Center for Conflict Resolution at Abilene Christian University. He has been involved in the Center since its inception in August of 2000. He also serves on the faculty of the ACU Conflict Resolution Department, which offers an online Master of Arts in Conflict Resolution and Reconciliation (36 hours) and a graduate certificate in Conflict Resolution (15 hours). The mission of the Center for Conflict Resolution is to equip, encourage, and support individuals as peacemakers in their personal relationships, families, churches, schools, professions, and communities. As a member of the Section Council, he has spearheaded the committee studying the updating of the Section's website and moving the Section's newsletter online.

John K. Boyce, III was elected to the Council in 2005 and currently serves as Chair. While on the Council, he has been instrumental in revising the *ADR Texas Style* pamphlet, a publication the ADR Section distributes to the public through the State Bar of Texas. John wrote the *Consumer Arbitration in Texas* pamphlet that sets out the State Bar of Texas Fair Practice Guidelines for Consumer Arbitration, and he has participated in the drafting of the *Agreement to Private Ad Hoc Arbitration*. He has been in practice for thirty years, concentrating in commercial transactions and litigation in state and federal trial and appellate courts. John has significant experience in commercial arbitration and mediation. He serves on the commercial panel (large and complex case subsection) and the securities panel of the American Arbitration Association, and is an arbitrator and mediator for the Institute of Conflict Prevention and Resolution (CPR Institute), the American Health Lawyers Association, as well as other national panels. John has been quite active as a resource for ADR issues before the Texas Legislature.

continued on page 3

SLATE OF OFFICERS AND COUNCIL MEMBERS APPROVED BY COUNCIL
continued from page 2

Susan Perin is a full-time mediator and arbitrator based in Houston. She has been mediating since 1991 and arbitrating since 1990 and serves on the American Arbitration Association Large Complex Case, Commercial, Employment, Construction and Consumer Panels. She is a frequent author and speaker on both mediation and arbitration. Her article, *"Volunteer Mediation: Using Your Professional Skills to Give Back"* was published in the Texas Bar Journal in July 2007. She graduated first in her class at South Texas College of Law in 1980.

Hon. Anne Ashby (ret.) is entering the ADR professional community after serving the citizens of Dallas County for twenty-two years as a distinguished jurist in the 134th Judicial District Court and County Court at Law Number Three. During her judicial career, she disposed of over 28,000 cases, including approximately 300 jury trials. She is a Fellow of the Dallas Bar Foundation and the Texas Bar Foundation. She is a lifetime member of the University of Texas Exes and an avid Longhorn fan. She graduated from the South Texas College of Law in 1979.

Don Philbin is a mediator and arbitrator based in San Antonio. He combines broad experience as a commercial litigator with extensive ADR training, including an LL.M. from the Straus Institute for Dispute Resolution at Pepperdine University School of Law. He is an arbitrator on several panels, including the CPR's Panel of Distinguished Neutrals. He has been a Credentialed Distinguished Mediator with the Texas Mediator Credentialing Association since 2007.

Ed Reaves is the Executive Director of the Hill County Alternative Dispute Resolution Center in Kerrville, Texas. He is a member of the Texas Association of Mediators and the Dispute Resolution Centers' Director's Council, and he is a Credentialed Distinguished Mediator with the Texas Mediator Credentialing Association. He is a graduate of the University of Texas School of Law.

Raymond Kerr is a mediator, arbitrator, and special master based in Houston. He brings forty years of law practice and seventeen years of mediation and arbitration experience to the Council. He is a former President of the Houston Bar Association (1987-88), a former Director of the State Bar of Texas (1989-92), and a former Director of the Association of Attorney-Mediators (1993-96). He is listed with the London Court of International Arbitration and the International Court of Arbitration. He is a 1964 graduate of the University of Texas School of Law.

Patty Wenetschlaeger is a practicing attorney and mediator, and she teaches advanced mediation online courses for Abilene Christian University's Master's Degree Program in Dispute Resolution. She holds her J.D. from Pepperdine University School of Law and her LL.M. from the Straus Institute for Dispute Resolution at Pepperdine University School of Law. As a practicing family law attorney, she works in both Abilene and in the DFW area. In 2005, 2006, 2008, and 2009, she was named a "Rising Star Super Lawyer" in Texas by her peers. She is a frequent conference speaker/communication skills trainer emphasizing the need for ADR by our society.

The ADR Section bids a fond farewell to four individuals whose tenure on the Council ends in June. Kris Donley (ex-officio public member from Austin), Lynne M. Gomez (Bellaire), Reed Leverton (El Paso), and Jay C. Zeleskey (Dallas), who all provided active service on the Council, will depart after serving three-year terms. Cecilia Morgan, now Immediate Past Chair, will leave the Council after serving as a Council member, Treasurer (2 terms), Chair-Elect, and Chair.

Please join us for the ADR Section annual meeting in Dallas on Thursday, June 25, 2009, commencing at 1:30 P.M. The State Bar of Texas annual meeting will take place at the Hilton Anatole in Dallas. The exact location of the ADR Section annual meeting will be specified in the materials participants receive at registration.

**** Cecilia H. Morgan** has been associated with JAMS since March, 1994 and has mediated, arbitrated and/or facilitated over 2000 cases. Cecilia is a Life Fellow for the State Bar of Texas and the Dallas Bar Association, has served as an officer and director at both the national and local levels of the Association of Attorney-Mediators, is a former national chair for the Legislation Committee of the American Bar Association Section of Dispute Resolution, is a Texas Mediator Credentialing Association Credentialed Distinguished Mediator and is Immediate Past Chair of the State Bar of Texas ADR Section Council.*

Dallas, Texas
State Bar of Texas Annual Meeting
2009

"NEW OPPORTUNITIES IN ADR" ANNUAL MEETING CLE

The annual meeting of the State Bar of Texas Alternative Dispute Resolution Section will occur Thursday, June 25, 2009, at 1:30 o'clock, P.M., during the SBOT Annual Meeting at the Hilton Anatole Hotel, Dallas, Texas. Immediately following the ADR Section Annual Meeting, the ADR Section will conduct its Annual Meeting CLE.

This year's Annual Meeting CLE features "New Opportunities in ADR" with John Allen Chalk, the in-coming Chair of the Section, as the program director. Other speakers include Sherrie R. Abney, John Charles Fleming, Kathleen D. Knight, Dr. Jerry Strader, John K. Boyce, III, Michael J. Schless, and Suzanne Mann Duvall. The ADR Section's Annual Meeting schedule includes the following.

Thursday, June 25, 2009

1:30-2:00 – ADR Section Meeting

2:00-2:15 – "New Opportunities in ADR" – John Allen Chalk, Fort Worth, Texas

2:15-2:35 – "Collaborative Law and ADR" – Sherrie R. Abney, Carrollton, Texas

2:35-2:55 – "ADR and the Texas Legislature" – John Charles Fleming, Austin, Texas

2:55-3:15 – "ADR in Healthcare: The New JACHO Conflict Resolution Standard" – Kathleen D. Knight, Fort Worth, Texas

3:15-3:45 - Break

3:45-4:05 – "Conflict Resolution Management – the AHLA Toolkit" – Dr. Jerry Strader, Abilene, Texas

4:05-4:25 – "Arbitration Case Law Update" – John K. Boyce, III, San Antonio, Texas

4:25-4:45 – "Mediator Credentialing in Texas" - Michael J. Schless, Austin, Texas

4:45-5:00 – "The Ethical Dispute Resolver" – Suzanne Mann Duvall, Dallas, Texas

Dallas, Texas
State Bar of Texas Annual Meeting
2009

Chair's Corner
continued from front page

day, June 25) at the Bar Annual Convention. Among other matters, we will elect new officers and Council members and will present an outstanding CLE program.

As this is my last column, I wish to raise a point of personal privilege. I thank you for the honor of serving as Chair this year. It ranks as among the most rewarding experiences of my professional life. I have had the privilege of working with some of the finest lawyers in Texas and the rest of the country. It is uplifting to work with lawyers on cutting-edge ideas, who take their professional obligations seriously, who practice with the highest ethical standards, and who see themselves fundamentally as public servants advancing not only the rule of law, but also mediation, arbitration, and other ADR processes. On top of all else, they are good people. I want to be numbered among them. The State Bar of Texas is quite capable, committed, and ready to serve. I am sure you are getting your money's worth. It all reminds me that the law can be a truly noble, a truly helping profession. Thank you again.

NEW CO-EDITORS FOR *ALTERNATIVE RESOLUTIONS*

By John Allen Chalk, Sr.*

I have both good news and bad news to report. The bad news is that Walter Wright is stepping down as the lead editor of *Alternative Resolutions*, our ADR Section newsletter. We are all deeply grateful to Walter for his service to the ADR community in Texas and beyond. The good news is that we have found two able replacements: Wendy Trachte-Huber and Stephen K. Huber. Steve and Wendy have for many years been co-habitants, co-parents, and co-authors. Now they can add co-editors to this list.

Steve and Wendy both have toiled in the ADR vineyards for many years, which experience will stand them in good stead in providing leadership for *Alternative Resolutions*. Both have worked for over a decade with Robyn Pietsch, the one indispensable person in the production of *Alternative Resolutions*, so the transition from Walter to the new editors should be seamless. Let me tell you a little bit about each of our new co-editors.

Wendy Trachte-Huber began her ADR career as the Director of the A.A. White Dispute Resolution Institute at the University of Houston. Next, she was a Regional Vice-President (Texas and surrounding states) for the American Arbitration Association (AAA), and National Vice-President for training. Wendy then was selected as the Claims Administrator for the Settlement Facility-Dow Corning Trust. As such, she was the CEO of an organization with some 250 employees, and responsible for approximately 325,000 claims and the eventual distribution of $2 billion to claimants.

Wendy currently is an independent educator, trainer, and consultant. She teaches ADR courses on a regular basis at the University of Houston Law School, Pepperdine University, and Lipscomb University. She has also taught ADR courses at Rice University and in the Executive MBA Program at the University of Houston. Wendy continues to mediate, provide training for business clients, and design dispute-resolution systems. Above all else, Wendy is a leader. She has served the following organizations as Chair or President: University of Houston Students' Association; Texas State Students Association; ADR Section, State Bar of Texas; Texas Association of Mediators; Houston Chapter, Society of Professionals in Dispute Resolution (SPIDR); Post Oak Garden Club; Bluebonnet Master Gardeners; and St. Mary's Episcopal Church (Senior Warden).

Steve Huber is a career academic, teaching primarily at the University of Houston Law Center where he is a Foundation Professor. Concurrently, he was for eight years a Visiting Professor of Political Science at Rice University. In addition, Steve has been a visiting professor of law at the University of Texas and the University of East Africa in Dar es Salaam, Tanzania. His major areas of teaching are Administrative Law, ADR, Contracts, Financial Institutions, and Professional Responsibility.

Prior to coming to the University of Houston, Steve spent three years in Washington D.C., where he was the Director of the Research and Demonstration Division at the national legal aid program – now known as the Legal Services Corporation. At UH, Steve was repeatedly elected by his colleagues to the Faculty Senate, and served a term as President of the University Faculty. At the UH Law Center, he took the leading role in the creation and growth of the LL.M. Program, serving for seven years as the Director of Graduate Legal Studies.

Steve has law degrees from the University of Chicago and Yale University. His professional affiliations include the American Law Institute (Life Member), and the Houston International Arbitration Club. Steve has authored six books and dozens of articles. Most of his more-recent writings address ADR topics, and many are co-authored by Wendy.

After many years of urban life in condominiums, Steve and Wendy have moved their center of operations to a six-acre "farmlet" in Bellville, a town of about 4,000 residents located 75 miles from downtown Houston. Thanks to Wendy's "green thumb," something is always blooming in the gardens. Steve and Wendy are the proud parents of two wonderful children. Jennifer is an attorney in Denver. Robert is an honors student who is completing eighth grade, and will start at Bellville High School in August 2009.

Wendy and Steve were unanimous choices of the ADR Section Council to replace Walter Wright. We thank Walter for his sacrificial and skilled work as Chair of the Newsletter Editorial Board. We welcome Wendy and Steve to their new roles with our section's newsletter.

* ***John Allen Chalk, Sr.*** *is the Chair-Elect of the State Bar of Texas ADR Section and is a partner in Whitaker, Chalk, Swindle & Sawyer, LLP, 301 Commerce Street, 3500 D. R. Horton Tower, Fort Worth, Texas 76102-4186, jchalk@whitakerchalk.com.*

VADEN V. DISCOVER BANK: UNITED STATES SUPREME COURT RESOLVES JURISDICTIONAL ISSUES UNDER SECTION 4 OF THE FEDERAL ARBITRATION ACT

By Clayton L. Gaines*

The United States Supreme Court, in *Vaden v. Discover Bank*,[1] recently held that a federal trial court, if asked to compel arbitration pursuant to Section 4 of the Federal Arbitration Act ("FAA"),[2] may look through a petition to compel arbitration to determine whether it has jurisdiction over the petition. The Court also held that a federal court may not base its federal-question jurisdiction on the contents of a counterclaim when the whole controversy between the parties does not qualify for federal court adjudication.[3]

The respondent in this case, Discover Bank ("Discover"), a federally insured bank/credit card issuer, filed a complaint in Maryland state court to recover past-due charges from one of its credit cardholders, petitioner Betty Vaden ("Vaden"). Discover's pleading presented a claim arising solely under state law. Vaden answered and counterclaimed, alleging that Discover's finance charges, interest, and late fees violated state law. Because of the nature of Vaden's counterclaim, Discover claimed that federal law, specifically Section 27(a) of the Federal Deposit Insurance Act ("FDIA"),[4] preempted the state law upon which Vaden relied. Invoking an arbitration clause in its cardholder agreement with Vaden, Discover then filed a Section 4 petition in federal district court to compel arbitration of Vaden's counterclaims. The federal district court granted Discover's petition and ordered arbitration. Vaden then appealed, and the United States Court of Appeals for the Fourth Circuit vacated and remanded the case for the district court to determine whether it had subject-matter jurisdiction over Discover's Section 4 petition pursuant to 28 U.S.C. § 1331 ("Title 28"), which gives federal courts jurisdiction over cases "arising under" federal law. The Fourth Circuit instructed the district court to conduct this inquiry by "looking through" the Section 4 petition to the substantive controversy between the parties. With Vaden conceding that her state-law counterclaims were completely preempted by Section 27 of the FDIA, the district court expressly held that it had federal-question jurisdiction and again ordered arbitration. The Fourth Circuit then affirmed, recognizing that the United States Supreme Court had held, in the *Holmes Group* case, that federal-question jurisdiction depends on the contents of a well-pleaded complaint, and may not be predicated on counterclaims.[5] The Fourth Circuit concluded, however, that the complete preemption doctrine is paramount and thus overrides the well-pleaded complaint rule. Vaden petitioned the United States Supreme Court to review the case, and the Court granted certiorari.[6]

The Court considered two issues in this case. The first was whether a federal court can "look through" a Section 4 petition to compel arbitration to determine whether it is predicated on a controversy that "arises under" federal law. The second issue was whether a federal court can base its federal-question jurisdiction on the contents of a counterclaim when the whole controversy between the parties does not qualify for federal court adjudication. In order to address these issues, the Court examined provisions of the FAA as well as other jurisdictional doctrine.[7]

In order to determine whether a federal court can look through a Section 4 petition to compel arbitration to determine whether it is predicated on a controversy that "arises under" federal law, the United States Supreme Court explored the language of Section 4 itself. Section 4 articulates that petitions to compel arbitration may be brought before "any United States district court which, save for [the arbitration] agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties."[8] The text of Section 4 "bestow[s] no federal jurisdiction [in controversies touching arbitration] but rather requir[es] [for access to a federal forum] an independent jurisdictional basis" over the parties' dispute.[9]

Discover relied upon Title 28 in this case for its independent jurisdictional basis. Title 28 confers federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[10] Under the well-pleaded complaint rule, a suit "arises under" federal law for Title 28 purposes "only when the plaintiff's statement of [its] own cause of action shows that it is based upon [federal law]."[11]

The Court had held, in the *Holmes* Group case, that federal jurisdiction does not "arise under" an actual or anticipated

continued on page 7

VADEN V. DISCOVER BANK: UNITED STATES SUPREME COURT RESOLVES JURISDICTIONAL ISSUES UNDER SECTION 4 OF THE FEDERAL ARBITRATION

continued from page 6

counterclaim. Under the complete preemption doctrine, a *complaint* purporting to rest on state law can be re-characterized as one "arising under" federal law if the law governing the complaint is exclusively federal. Under the Court's analysis of Title 28, however, a state-law-based *counterclaim*, even if it relies exclusively on federal law, does not qualify a case for federal-question jurisdiction.[12]

After analyzing the language of the FAA and the jurisdictional tenets, the Court stated that, "[a] federal court may "look through" a Section 4 petition to determine whether it is predicated on an action that "arises under" federal law; in keeping with the well-pleaded complaint rule as amplified in *Holmes Group*, however, a federal court may not entertain a Section 4 petition based on the contents, actual or hypothetical, of a counterclaim."[13]

Section 4 further directs courts to determine whether they would have jurisdiction "save for [the arbitration] agreement." The phrase "save for [the arbitration] agreement" indicates that the district court should assume the absence of the agreement and determine whether it "would have jurisdiction under title 28" over "the controversy between the parties," which, if read straightforwardly, means the "underlying dispute" between the parties.[14] The Court also noted that it had previously stated, "to entertain a § 4 petition, a federal court must have jurisdiction over the underlying dispute."[15]

After it thoroughly dissected Section 4 of the FAA and other jurisdictional doctrine, the Court determined that a federal court should look through a Section 4 petition to compel arbitration to determine whether it is predicated on a controversy that "arises under" federal law.[16]

Having determined that a district court should "look through" a Section 4 petition, the Court next considered whether a district court "would have [federal-question] jurisdiction" over "a suit arising out of the controversy" between Discover and Vaden. Section 4 does not enlarge federal-court jurisdiction; rather, it confines federal courts to the jurisdiction they would have "save for [the arbitration] agreement."[17] Mindful of that limitation, the Court read Section 4 to provide that a party seeking to compel arbitration may gain such a court's assistance only if, "save for" the agreement, the entire, actual "controversy between the parties," as they have framed it, could be litigated in federal court. The actual controversy in this case was not amenable to federal-court adjudication. The "controversy between the parties" arose from Vaden's "alleged debt," a claim that plainly did not "arise under" federal law, nor did it qualify under any other head of federal-court jurisdiction.[18]

The text of Section 4 instructs federal courts to determine whether they would have jurisdiction over "a suit arising out of *the* controversy between the parties"; it does not give Section 4 petitioners license to re-characterize an existing controversy, or manufacture a new controversy, in an effort to obtain a federal court's aid in compelling arbitration.[19]

The Court found that the Fourth Circuit misconstrued *Holmes Group* when it concluded that jurisdiction was proper because Vaden's state-law counterclaims were completely preempted. Under the well-pleaded complaint rule, a completely pre-empted counterclaim remains a counterclaim, and thus does not allow a federal court to entertain a Section 4 petition.[20]

For the reasons stated above, the Court held that a federal court should "look through" a Section 4 petition to determine whether it is predicated on a controversy that "arises under" federal law, in keeping with the well-pleaded complaint rule. However, a federal court may not entertain a Section 4 petition based on the contents of a counterclaim when the whole controversy between the parties does not qualify for federal-court adjudication. The case was reversed and remanded for further proceedings.[21]

**** Clayton L. Gaines** is currently seeking his Master of Arts degree in Legal Studies at Texas State University. He plans to graduate in May 2010. In 2004, he earned his undergraduate degree in Criminal Justice from Sam Houston State University. He has served the past five years in the United States Army, and will earn a commission as a Second Lieutenant upon graduation.*

ENDNOTES

[1] Vaden v. Discover Bank, 129 S. Ct. 1262 (2009).
[2] 9 U.S.C. § 4.
[3] *Vaden*, 129 S. Ct. at 1268.
[4] Codified as 12 U.S.C. § 1831d(a).
[5] *Vaden*, 129 S. Ct. at 1269-70 (discussing the Fourth Circuit's opinion, which relied on Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826 (2002)).
[6] *Id.* at 1270.
[7] *Id.*
[8] 9 U.S.C. § 4.
[9] *Vaden*, 129 S. Ct. at 1271 (quoting Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008)).
[10] 28 U.S.C. § 1331.
[11] *Vaden*, 129 S. Ct. at 1272 (quoting *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908)).
[12] *Id.* (interpreting *Holmes Group*, 535 U.S. at 826).
[13] *Id.* at 1272-73.
[14] *Id.* at 1273.
[15] *Id.* at 1273-74 (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983)).
[16] *Id.*
[17] 9 U.S.C. § 4.
[18] *Vaden*, 129 S. Ct. at 1275-76.
[19] *Id.* at 1276.
[20] *Id.* at 1277-78.
[21] *Id.* at 1279.

FIFTH CIRCUIT COURT OF APPEALS REAFFIRMS THE PRINCIPLE OF GREAT DEFERENCE TO ARBITRATION AWARDS AND SPELLS OUT THE LIMITS OF PUBLIC POLICY INTERESTS TO OVERRIDE ARBITRATORS' DECISIONS

By Steven M. Fishburn*

A January 2009 Fifth Circuit Court of Appeals decision, *Continental Airlines, Inc. v. Air Line Pilots*[1] *Association*, reaffirmed the principle of great deference to arbitration awards. The court reversed a 2007 Southern District of Texas decision[2] setting aside a System Board of Adjustment (SBA)[3] decision reinstating a pilot who had been dismissed for refusing a no-notice alcohol test.[4] The court stated that the district court was without a statutory basis for its reversal and that its order could not be sustained on public policy grounds. The court then remanded the case to the district court with instructions to vacate part of the SBA's order and remand the matter to the SBA for further proceedings.[5]

Captain Ronald McWhirter, a Continental Airlines (Continental) pilot with a history of alcoholism, was discharged by Continental on February 23, 2005 for refusing to take a no-notice alcohol test on February 10, 2005.[6] Captain McWhirter had entered into a last chance agreement (LCA) in October 2000 after failing a similar no-notice alcohol test in September 2000. The LCA stipulated that he agreed to subject himself to testing for five years after he completed rehabilitation. He had been reinstated to flying status in 2001, but was on long-term disability for hypertension from about April 2004 until the time of the no-notice test in February 2005 that resulted in his discharge.[7] The Air Line Pilots Association (ALPA) filed a grievance on McWhirter's behalf, and a hearing was held by the SBA in January 2006, at which both Continental and ALPA presented evidence.[8] McWhirter claimed he had refused the 2005 no-notice test because he was frustrated with Continental for withholding the results of a January 2005 no-notice test after Continental had ordered the test because of an allegation that McWhirter had been seen drinking with another pilot. During the two-day SBA hearing, it came out that the results of the January 2005 test were negative, but were never communicated to McWhirter. After the hearing, the SBA concluded McWhirter had knowingly refused to take the no-notice test, but his refusal to take the test in February 2005, although not entirely rational, was an understandable response to Continental's not informing him of the results of the January 2005 test.[9] The SBA further ordered that McWhirter be reinstated contingent upon his participation for two years in Continental's Employee Assistance Program (EAP) and Peer Pilot Program. Further, the SBA ordered Continental to reinstate McWhirter to the status he held prior to discharge (i.e., non-flying under either long-term disability or Family Medical Leave Act).[10] Continental subsequently filed suit in district court seeking to vacate the SBA's order, with the result that the district court granted a Continental motion for summary judgment and reversed the SBA's order reinstating McWhirter. ALPA made a timely appeal to the Fifth Circuit Court of Appeals.[11]

The court quickly determined the dispute between Continental and ALPA, on behalf of McWhirter, could be categorized as a "minor dispute" under the Railway Labor Act (RLA).[12] Then, the court categorically stated, "[m]inor disputes must be resolved through compulsory and binding arbitration before the SBA"[13] and "[j]udicial review of [SBA] decisions arising from the terms of a [CBA] is narrowly limited, and courts should afford great deference to arbitration awards."[14] According to the court, the standard for review of arbitral decisions is "among the narrowest known to the law."[15] Of the three possible bases for a court not deferring to a decision of the SBA—"(1) the SBA failed to comply with the RLA, (2) there was evidence of fraud or corruption in the SBA, or (3) the order by the SBA did not 'confine itself to matters within the scope of the SBA's jurisdiction,"[16]—"only Continental's contention that the SBA failed to conform or confine itself to its jurisdiction [was] at issue"[17] in the instant case. Further commenting on the standard of review, the court said, "As long as the arbitrator is even arguably construing or applying the contract(s) and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[18] In the event of affirmative misconduct, a court should vacate or remand when appropriate, otherwise "[e]ven in the very rare instances when [SBA] procedural aberrations rise to the level of affirmative misconduct, as a rule the court must

not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result . . . ."[19]

continued on page 9

FIFTH CIRCUIT COURT OF APPEALS REAFFIRMS THE PRINCIPLE OF GREAT DEFERENCE TO ARBITRATION AWARDS AND SPELLS OUT THE LIMITS OF PUBLIC POLICY INTERESTS TO OVERRIDE ARBITRATORS' DECISIONS
continued from page 8

"To do so 'would improperly substitute a judicial determination for the {SBA's] decision that the parties bargained for."[20] Finally, the court said,

> It is clear from the foregoing that we must defer to the SBA's decisions if it may be supported by *any* analysis of the LCA (last chance agreement) and CBA (collective bargaining agreement), whether or not relied on by the SBA, that "arguably construes" those agreements. Even if the chain of reasoning is not correct, and the SBA's decision appears to us to be a serious error, we must defer as long as no step in the reasoning process ignores an unambiguous provision of the LCA and the CBA.[21]

The applicable law having been clarified, the court quickly and forcefully rebutted most of Continental's arguments: (1) Continental claimed the SBA exceeded its jurisdiction by considering McWhirter's non-medical explanation for his refusal to take the test.[22] The court responded that a provision of the CBA ("The Company shall consider such mitigating circumstances as the pilot may offer, and give those circumstances fair consideration"),[23] "combined with the SBA's jurisdiction over all disputes arising out of the CBA, entitle the SBA to consider whether Continental gave fair consideration to the non-medical mitigating circumstances that McWhirter offered"[24] (i.e., *supra*, that he refused out of frustration that Continental had not shared earlier test results with him). (2) Continental asserted the SBA had no power to order McWhirter's reinstatement based on his non-medical explanation,[25] but the court rebutted that argument, reasoning, "the fact that no express provision of the CBA or LCA forbids an order of reinstatement by the SBA—indeed, several sections contemplate it—means that we must defer to the SBA's interpretation of the 'justiciability' of the fair-consideration requirement and the proper remedy."[26]

Finally, Continental advanced an argument the court found persuasive: the SBA was without power to order McWhirter's continued participation in Continental's EAP.[27] According to the court, "our cases make clear that when a CBA or LCA is not unambiguous, any arguable construction by the SBA is owed deference."[28] However, the court concluded that "the SBA's requirement that McWhirter participate in the EAP program for two years cannot be the result of an arguable construction of the LCA and CBA."[29] More importantly, the court found that 49 C.F.R. § 40.297(a) "vests sole discretion in a Department of Transportation ("DOT") accredited Substance Abuse Professional ("SAP") to make treatment evaluations of, or recommendations for assistance about, an employee who has violated DOT drug and alcohol regulations."[30] So, to allow the SBA "to order McWhirter to participate in the EAP for two more years—forcing Continental to enroll McWhirter in the EAP for that duration regardless of the SAP's professional opinion—comes so close to directly contravening a controlling federal air-safety regulation that, if such a decision were not outside of the SBA's jurisdiction, it would be a violation of public policy."[31] The court held, "by vesting the EAP director with the discretion to prescribe McWhirter's course of treatment, the CBA and LCA cannot be construed to vest the power in the SBA. *United Paperworkers International Union v. Misco, Inc*, teaches that the proper remedy in this case is a vacatur of the EAP condition and remand for further proceedings, and this is what we order."[32]

The last issue the Fifth Circuit Court of Appeals weighed in on, with some evident discomfort, was whether reinstating McWhirter violated public policy, with McWhirter contending it did not and Continental contending that air traffic safety compelled reversal of the SBA's reinstatement of McWhirter.[33] The court was uncomfortable because it was conceivable that McWhirter could have been reinstated to flying status despite his history of alcohol-related troubles with a consequent risk to the public's safety. The court was mindful, however, of its decision in *Misco* that the reinstatement of a marijuana-smoking employee (caught in the parking lot of a safety-sensitive manufacturing firm) violated public policy had been reversed by the U.S. Supreme Court.[34] The court's frustration was evident when it said,

> Continental has cited no [pertinent] cases . . . , nor are we aware of any, in which we have set aside an arbitration award on the grounds of public policy implicated by reinstating a safety-sensitive employee who habitually abuses drugs or alcohol. As this saga demonstrates, we and other circuits have repeatedly attempted to protect what seems to us a common sense notion of public safety: DOT safety-sensitive employees who habitually abuse drugs or alcohol should not be reinstated by arbitrators. In measure equal to the vigor that courts of appeal have applied to reversing awards of reinstatement, the Supreme Court has reversed.[35]

Acquiescing to the direction of the Supreme Court, the court of appeals found it instructive that the Supreme Court said, when it reversed *Misco,* that an SBA arbitrator's decision could only be set aside if it violated "some explicit public policy that is well defined and dominant, and [that] is . . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[36] The Supreme Court further noted in its reversal of *Misco* that "[t]he issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases, and it was a matter for the arbitrator in the first instance to decide whether Cooper's alleged use of drugs on the job would actually pose a danger."[37]

According to the Fifth Circuit, important principles came from another Supreme Court decision, *Eastern Associated Coal*:[38] (1) "the public policy exception is narrow and must satisfy the principles set forth that require, at a minimum, reference to

continued on page 10

FIFTH CIRCUIT COURT OF APPEALS REAFFIRMS THE PRINCIPLE OF GREAT DEFERENCE TO ARBITRATION AWARDS AND SPELLS OUT THE LIMITS OF PUBLIC POLICY INTERESTS TO OVER-RIDE ARBITRATORS' DECISIONS

continued from page 9

applicable laws and legal precedents; and (2) "courts should be particularly chary when divining public policy from some laws, for example, those in which 'two political branches have created a detailed regulatory regime in a specific field.'"[39]

These precedents considered, the court concluded the appropriate course of action was to remand to the district court with instructions to vacate the part of the SBA's order that required McWhirter's participation in Continental's EAP, but acknowledging that the court perceived "no infirmity with the SBA's reinstatement order, which should be enforced after further SBA proceedings have concluded."[40]

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ENDNOTES

1 Cont'l Airlines, Inc. v. Air Line Pilots Ass'n, , 555 F.3d 399 (5th Cir. 2009).
2 Cont'l Airlines, Inc. v. Air Line Pilots Ass'n, 2007 U.S. Dist. LEXIS 77628 (S.D. Tex. Oct. 18, 2007).
3 The SBA is a creature of the Collective Bargaining Agreement (CBA) between Continental Airlines and the Air Line Pilots Association.
4 *Cont'l Airlines*, 555 F.3d at 403.
5 *Id.* at 403-04.
6 *Id.* at 404.
7 *Id.*
8 *Id.*
9 *Id.* at 404-05.
10 *Id.* at 405.
11 *Id.*
12 *Id.* (citing Mitchell v. Cont'l Airlines, Inc., 481 F.3d 225, 230-31 (5th Cir. 2007), which stated, "The RLA distinguishes disputes by whether they seek to create contractual rights or to enforce them. A major dispute concerns the formation of a CBA, which arises when a CBA is not in place or when a party seeks to change the terms of a CBA. 6 A minor dispute concerns grievances or the interpretation or application of agreements covering rates of pay, rules, or working conditions. 7 Pursuant to the RLA, minor disputes must be resolved through a compulsory, binding arbitration procedure before an adjustment board.").
13 *Id.* (citing *Mitchel*l, 481 F.3d at 231).
14 *Id.* (citing Resolution Performance Prods., LLC v. Paper Allied Indus. Chem. & Energy Workers Int'l Union, Local 4-1201, 480 F.3d 760, 764 (5th Cir. 2007), to the effect that "Judicial review of arbitration decisions arising from the terms of a CBA is 'narrowly limited,' and courts should afford 'great deference' to arbitration awards.' As long as the arbitrator's decision 'draws its essence from the collective bargaining agreement' and the arbitrator is not fashioning 'his own brand of industrial justice,' the award cannot be set aside." Additionally, "a court must affirm an arbitral award" as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority. Even where a court would have interpreted the contract differently, a court must still affirm the award.) However, under Beaird Industries, Inc. v. Local Union 2297 International Union, 404 F.3d 942 (5th Cir. 2005), an arbitrator "lacks authority to render a decision contrary to an unambiguous provision of the CBA". *Id.* at 946-47. *See also* Houston Lighting & Power Co. v. Int'l Bhd of Elec. Workers, Local Union No. 66, 71 F.3d 179, 182 (5th Cir. 1995) ("'The 'rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected.'") (quoting Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 604 (5th Cir. 1989)).
15 *Id.* (citing E. Air Lines, Inc. v. Transp. Workers Union, Local 533, 580 F.2d 169, 172 (5th Cir. 1978) "The Railway Labor Act allows only limited judicial review of arbitration decisions -- its range is 'among the narrowest known to the law.'" Diamond v. Terminal Ry. Alabama State Docks, 421 F.2d 228, 233 (5th Cir. 1970). A court may set aside an order of the Board only on one of three specific grounds: (1) failure of the Board to comply with the Act, (2) fraud or corruption, or (3) failure of the order to conform or confine itself to matters within the Board's jurisdiction. *Id* at 233 (citing 45 U.S.C.A. § 153 (q)). Absent one of these grounds, the award is binding upon the parties and the findings and order are conclusive in court. *Id.* "Unless we find the Board's interpretation to be 'wholly baseless and completely without reason,' its decision must stand." Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U.S. 257, 261 (1965).
16 *Id.* at 406.
17 *Id.*
18 *Id.* (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38).
19 *Id.* at 407 (quoting *Misco*, 484 U.S. at 40).
20 *Id.* (quoting *Misco*, 484 U.S. at 40 n. 10)
21 *Id.*
22 *Id.*
23 *Id.* at 409.
24 *Id.* at 409-10.
25 *Id.* at 407.
26 *Id.* at 411-12.
27 *Id.* at 407.
28 *Id.* at 412.
29 *Id.*
30 *Id.* at 413.
31 *Id.* at 414.
32 *Id.*
33 *Id.*
34 *Id.* at 416 (citing *Misco,* 768 F.2d at 742, *rev'd* 484 U.S. 29, 43 (1987)).
35 *Id.* at 418.
36 *Id.* at 416 (citing the U.S. Supreme Court at 484 U.S. 29, 43 (1987).
37 *Id.* at 417.
38 Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 67 (2000).
39 *Id.* at 417-18.
40 *Id.* at 421.

SUPREME COURT OF TEXAS EVALUATES SUBSTANTIVE UNCONSCIONABILITY OF CLAUSES IN EMPLOYER'S ARBITRATION AGREEMENT WITH EMPLOYEE, THEN SEVERS THE CLAUSE IT FINDS UNCONSCIONABLE

By Walter A. Wright*

Introduction

A Supreme Court of Texas case, *In re Poly-America, L.P.*,[1] provided the state's highest court an opportunity to review an arbitration agreement between an employer and an employee. The agreement contained several clauses the employee believed substantively unconscionable, including a requirement for the employee to pay half of the arbitration costs up to a capped amount, limits on discovery, and the elimination of punitive damages and reinstatement remedies otherwise available under the Texas Workers' Compensation Act. The court found only the limitation on remedies unconscionable, severed the unconscionable provision from the remainder of the agreement, and granted a petition for mandamus requiring the parties to arbitrate their dispute.[2]

Factual Background

Johnny Luna (Luna) became an employee of Pol-Tex International, d/b/a Poly-America, L.P. (Poly-America) in 1998. When he began his employment, he signed an agreement to submit to arbitration all claims or disputes he might have with Poly-America. He signed an amended arbitration agreement that contained substantially the same provisions in 2002. Both agreements provided they were governed by the Federal Arbitration Act (FAA).[3] Hereafter in this article, the 1998 agreement and the 2002 amendment will be referred to as a single agreement.

Luna suffered a work-related injury in December 2002, which Poly-America's doctor diagnosed as an acute cervical spine flexion injury. Luna filed a workers' compensation claim and began receiving physical therapy. After a two-week absence from work, he returned to his job with a release for light duty. He continued to suffer pain, so he used vacation time to recover from his injury. Poly-America's doctor advised Luna he needed to return to work and get off worker's compensation if he wanted to keep his job.[4] Upon his return to work without restrictions on January 10, 2003, Luna observed Poly-America was already training another person for his position. According to Luna, his supervisor began to harass him. A month later, Luna advised his supervisor his neck still bothered him and he needed to revisit Poly-America's doctor. Poly-America fired Luna on his next scheduled day to work.[5]

Procedural History

Luna filed a lawsuit against Poly-America in a district court in Chambers County, Texas. The lawsuit asserted a claim for retaliatory discharge under Section 451.001 of the Texas Labor Code (the Workers' Compensation Act).[6] Alleging Poly-America acted with "malice, ill will, spite, or specific intent to cause injury,"[7] Luna requested punitive damages and reinstatement to his former job. Also alleging the provisions of the arbitration agreement were unconscionable, Luna requested a declaratory judgment that the arbitration agreement was unenforceable. Poly-America filed a motion to compel arbitration, which the trial court granted; at the same time, the trial court stayed Luna's wrongful-discharge case against Poly-America.[8]

The Houston Court of Appeals, First District, granted Luna's request for a writ of mandamus, holding the entire arbitration agreement substantively unconscionable because of the fee-splitting provisions and the limitations on remedies.[9] Faced with a total failure to achieve enforcement of the arbitration agreement at the intermediate appellate level, Poly-America sought review from the Supreme Court of Texas and a writ of mandamus requiring the parties to arbitrate their dispute.[10]

Texas Standards for Granting Mandamus Relief in Arbitration Cases

The supreme court first addressed Poly-America's assertion (and the assertion of Justice Brister, who strongly dissented from the majority's opinion on this point) that the Houston Court of Appeals should have summarily denied Luna's petition for mandamus relief. In support of its assertion, Poly-America (and Justice Brister) cited the supreme court's own 2006 opinion in *In re Palacios*,[11] which Poly-America (and Justice Brister) interpreted as allowing mandamus review for orders denying arbitration, but not orders compelling it.[12] According to Justice Brister, the *Palacios* decision followed the United States Supreme Court's decision in *Green Tree Financial Corp. v. Randolph*,[13] which held, "orders compelling arbitration 'would not be appealable' unless they included final dismissal of the case."[14] The district court in Chambers County

continued on page 12

SUPREME COURT OF TEXAS EVALUATES SUBSTANTIVE UNCONSCIONABILITY OF CLAUSES IN EMPLOYER'S ARBITRATION AGREEMENT WITH EMPLOYEE, THEN SEVERS THE CLAUSE IT FINDS UNCONSCIONABLE
continued from page 11

had stayed Luna's wrongful-termination case but had not dismissed it.

The majority reasoned that if mandamus review of orders granting arbitration "were categorically unavailable and unconscionability determinations the sole realm of arbitrators, as the dissenting Justice [Brister] proposes, development of the law as to this threshold issue would be substantially hindered if not precluded altogether."[15] While the majority stressed mandamus relief should be granted only in "exceptional cases,"[16] it considered it appropriate to address the mandamus arguments in this case.[17] Once it decided to consider Luna's mandamus arguments, the court announced a mandamus standard requiring "a demonstration that the trial court clearly abused its discretion by failing to correctly analyze or apply the law and a determination that the benefits of mandamus outweigh the detriments such that an appellate remedy is inadequate."[18]

Relationship between State Contract Law of Unconscionability and Federal Arbitration Act

Having determined it would not summarily order the parties to arbitrate their dispute without first considering the enforceability of the arbitration agreement, the court considered Poly-America's next argument: "the FAA's 'strong presumption' favoring arbitration applies in this case, and furthermore the FAA preempts all state public-policy grounds for finding the agreement to arbitrate unenforceable."[19] The court disagreed, reasoning that neither the presumption nor federal preemption applies to "a state court's assessment of whether parties have entered into a valid and enforceable agreement to arbitrate."[20] In reaching this conclusion, the court noted: (1) Section 2 of the FAA subjects the validity and enforceability of arbitration agreements to legal and equitable grounds for revoking a contract;[21] and (2) according to the United States Supreme Court, "'state law . . . is applicable [to the determination of the validity of an agreement to arbitrate] if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'"[22] The court cautioned, however, that agreements to arbitrate must not be subjected to special, more-restrictive rules regarding enforceability. A state court must apply its own contract law neutrally and consider whether "'generally applicable contract defenses . . . may be applied to invalidate arbitration agreements without contravening' the policies of the FAA."[23] The court then proceeded to consider whether the portions of the subject arbitration agreement to which Luna objected were generally unenforceable under Texas contract law.

General Standard of Unconscionability in Texas / Unconscionability of Arbitration Clauses Affecting Statutory Claims

The supreme court began its analysis of unconscionability by affirming, "[a]greements to arbitrate between employers and employees are generally enforceable under Texas law."[24] A contract clause is unenforceable, however, if "'the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.'"[25] Whether a contract is unconscionable at the time of its formation is a question of law.[26]

An agreement to arbitrate statutory claims, the court noted, "is valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the employee may 'effectively vindicate [the employee's] statutory rights.'"[27] When, however, an arbitration agreement requires a party to forgo a statute's substantive rights, the agreement is unenforceable.[28]

Purpose of Anti-Retaliation Provisions of the Texas Workers' Compensation Act

The Texas Legislature enacted the Texas Workers' Compensation Act (Act) to protect Texas workers, the court observed, and the Act's anti-retaliation provisions stipulate that an employer subscribing to the workers' compensation system may not "'discharge or in any other manner discriminate against an employee because the employee . . . has filed a workers' compensation claim in good faith.'"[29] Without the anti-retaliation provisions, "'the law would be completely useless and would not accomplish the purpose for which it was enacted . . . .'"[30] An employer who violates the anti-retaliation provisions of the Act is liable for the employee's "reasonable damages";[31] those damages include actual damages, exemplary damages, and reinstatement.[32] After briefly discussing several cases that had looked with disfavor on contracts waiving rights arising under the Act,[33] the court turned to the arbitration agreement Luna and Poly-America had signed.

Luna's Challenge to the Limitation of Remedies

The arbitration agreement between Poly-America and Luna prohibited the arbitrator from ordering reinstatement or awarding punitive damages. Luna argued these limitations on remedies prevented him from fully enforcing his rights under the Act and rendered the arbitration agreement unconscionable.[34] The court reasoned that permitting an employee like Luna to waive his statutory remedies "would undermine the deterrent purpose" of the Act. It found the anti-retaliation provisions of the Act constituted "a non-waivable legislative system for deterrence necessary to the nondiscriminatory and effective operation"[35] of the Act, and it agreed with Luna that the provisions eliminating these "key remedies" under the Act were unenforceable.[36]

Luna's Challenge to the Fee-Splitting Provisions

The arbitration agreement required Luna and Poly-America to pay equal portions of all arbitration-related costs, including the arbitrator's fees, costs of the hearing location, court-reporter fees, and any mediation fees. Luna's share of the costs was capped, however, "at an amount equal to 'the gross compensation earned by [Luna] in [Luna's] highest earning month in the twelve months prior to the time the arbitrator issues his award.'"[37]

continued on page 13

SUPREME COURT OF TEXAS EVALUATES SUBSTANTIVE UNCONSCIONABILITY OF CLAUSES IN EMPLOYER'S ARBITRATION AGREEMENT WITH EMPLOYEE, THEN SEVERS THE CLAUSE IT FINDS UNCONSCIONABLE

continued from page 12

At the initial hearing on the motion to compel arbitration, Luna had introduced his affidavit and the affidavit of an expert witness indicating his expected share of the arbitration expenses would be $3,300.00 (based on his highest monthly salary in the year preceding the termination of his employment with Poly-America). Luna had sworn such an amount was more than he could afford and that he had not been able to find an attorney to accept his case on a contingent-fee basis.[38] Poly-America had failed to controvert Luna's evidence, but it had presented legal arguments and "some evidence" the capped fee-splitting arrangement could benefit Luna.[39] In addition, Poly-America had argued it would be improper to conclude, on Luna's subjective testimony, that he could not afford likely arbitration costs, and that Luna should have compared his estimate of likely arbitration costs with the likely costs of litigation.[40] The trial court, notwithstanding Luna's uncontroverted affidavits, had granted Poly-America's motion to compel, but the Houston court of appeals had considered the trial court's action an abuse of discretion.[41]

The supreme court held it was proper for the trial and intermediate appellate courts to consider Luna's uncontroverted affidavits,[42] but those affidavits had not established the point they should have established, under the language of the arbitration agreement, to determine Luna's likely arbitration costs. The arbitration agreement capped Luna's costs at his gross compensation in his highest earning month *in the twelve months prior to the date of the arbitrator's award.* That compensation amount could not be established until the time an arbitrator actually issued an award, or shortly before. Therefore, Luna had not established (and could not have established), at the hearing on the motion to compel arbitration, an unconscionable effect of the fee-splitting provisions of the employment agreement.[43]

The supreme court did opine that "arbitration costs might be so high in a given case as to preclude access to the forum."[44] In such a case, the court reasoned, a provision requiring an employee to pay excessive costs would be unconscionable.[45] In Luna's case, the court noted the arbitration agreement permitted the arbitrator to modify an unconscionable term. At an appropriate time, the arbitrator could establish Luna's capped arbitration costs and determine whether those costs were unconscionable and the fee-splitting provisions of the arbitration agreement unenforceable. Given this reasoning, the court decided that any ruling, at this stage of the proceedings, on the unconscionability of the fee-splitting provisions would be premature.[46]

Luna's Challenge to the Discovery Limitations

The arbitration agreement contained several limitations on discovery, including (1) a single set of twenty-five interrogatories from each party, (2) a single set of twenty-five requests for production or inspection of documents or tangible things from each party, (3) a single, six-hour deposition for each party, (4) a prohibition on requests for admission, (5) a ban on inquiry into Poly-America's finances, and (6) a confidentiality provision requiring confidentiality of the parties and their attorneys regarding all aspects of the arbitration. Luna alleged limitations (3) through (6), inclusive, were unconscionable because they made it "virtually impossible" to prove his case against Poly-America.[47]

The supreme court agreed that limitations on discovery are unenforceable if they "unreasonably impede effective prosecution of [unwaivable substantive] rights . . . ."[48] The court reasoned, however, that reasonableness of discovery limitations depends on the facts of each case, and it could not determine, at this stage of the proceedings, the effect the limitations would have on Luna's ability to prevent his case effectively. As it had decided with respect to the fee-splitting provisions of the arbitration agreement, the court decided the determination of unconscionability was "best suited to the arbitrator as the case unfolds."[49]

Luna's Other Challenges to the Arbitration Agreement

Luna challenged three other provisions of the arbitration agreement as unconscionable: (1) a provision prohibiting the arbitrator from applying a "just cause" or "good cause" standard to Luna's employment or termination of employment, (2) a one-year statute of limitations for the filing of a claim, and (3) a provision requiring arbitration of any post-employment claims Luna might have against Poly-America.[50] The court summarily overruled each of these challenges, either because Luna misconstrued the operation of the provision (in the case of the "just cause" or "good cause" prohibition), or because the provision was moot in Luna's case (as to the one-year statute of limitations), or because the provision was inapplicable in this case and was not *per se* unconscionable (as to the provision requiring arbitration of post-employment claims).[51]

Severability of the Unconscionable Clause

The final issue the supreme court considered was whether the unconscionable remedies-limitation provision rendered the entire arbitration agreement unconscionable, or whether the unconscionable provision could be severed from the agreement and the remainder of it enforced.[52] The arbitration agreement contained the following severability clause:

> Should any term of this Agreement be declared illegal, unenforceable, or unconscionable, the remaining terms of the Agreement shall remain in full force and effect. To the extent possible, both [Luna] and [Poly-America] desire that the Arbitrator modify the term (s) declared to be illegal, unenforceable, or unconscionable in such a way as to retain the intended meaning of the term(s) as closely as possible.[53]

The supreme court believed the remedies-limitation provision could be "easily excised" from the arbitration agreement without defeating its underlying purpose (i.e., to submit the parties' disputes to an arbitral forum).[54] Therefore, the court severed the remedies-limitation provision and found the remainder of the agreement enforceable.[55]

continued on page 14

SUPREME COURT OF TEXAS EVALUATES SUBSTANTIVE UNCONSCIONABILITY OF CLAUSES IN EMPLOYER'S ARBITRATION AGREEMENT WITH EMPLOYEE, THEN SEVERS THE CLAUSE IT FINDS UNCONSCIONABLE

continued from page 13

Conclusion

The court conditionally granted Poly-America's application for a writ of mandamus. Thus, after approximately five years of litigating the enforceability of the arbitration agreement, the parties were ordered to seek resolution of their dispute through arbitration.

This case illustrates the strong support the Supreme Court of Texas generally shows for arbitration agreements. True, the court did not adopt, as Justice Brister urged in his dissent, a strict rule that orders granting mandamus may never be appealed unless they include final dismissal of the subject lawsuit. However, the court's single finding of unconscionablity in this case illustrates its general hesitance to intervene in mandamus actions and its willingness to let arbitrators decide issues of reasonableness on a case-by-case basis when arbitration provisions are not *per se* unconscionable. The court's decision to apply the severability clause in the arbitration agreement also illustrates the court's willingness to enforce an arbitration agreement if its underlying purpose may be achieved after an unconscionable provision is severed.

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ENDNOTES

[1] In re Poly-America, L.P., 262 S.W.3d 337 (Tex. 2008).
[2] *Id.* at 344 (summarizing the employee's objections to the arbitration agreement, the court's holding as to each objection, and the court's decision to sever the substantively unconscionable clause).
[3] *Id.* (citing 9 U.S.C. §§ 1-14).
[4] *Id.*
[5] *Id.* at 345.
[6] *Id.* (citing TEX. LAB. CODE ANN. § 451.001 (Vernon 2006)).
[7] *Id.*
[8] *Id.*
[9] *Id.* (referencing the intermediate appellate court's opinion, In re Luna, 175 S.W.3d 315 (Tex. App.—Houston [1st Dist] (2004), which the supreme court reversed here).
[10] *Id.*
[11] In re Palacios, 221 S.W.3d 564 (Tex. 2006).
[12] *In re Poly-America, L.P.*, 262 S.W.3d at 345. *But see id.* at 361 (Brister, J., dissenting).
[13] Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000).
[14] *In re Poly-America, L.P.,* 262 S.W.3d at 361 (Brister, J., dissenting).
[15] *Id.* at 346. To the majority's reasoning, Justice Brister replied, "It is certainly true that leaving matters like unconscionability to arbitrators will mean development of the law is 'substantially hindered,' but the same could be said of arbitration in *all* cases." *Id.* at 365.
[16] *Id.* at 345.
[17] *Id.* at 346.
[18] *Id.* at 346-47. The court also acknowledged that mandamus proceedings in this case, involving an interlocutory order compelling arbitration but not dismissing Luna's underlying cause of action, could deprive the parties of many perceived benefits of arbitration (i.e., low costs, expedited resolution). "[A]ccordingly, courts should be hesitant to intervene. With these standards in mind, we turn to the compel-and-stay order in this case." *Id.* at 347.
[19] *Id.*
[20] *Id.*
[21] *Id.* (citing 9 U.S.C. § 2).
[22] *Id.* (quoting Perry v. Thomas, 482 U.S. 483 (1987)).
[23] *Id.* at 347-48 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).
[24] *Id.* at 348.
[25] *Id.* (quoting In re FirstMerit Bank, 52 S.W.3d 749, 757 (Tex. 2001)).
[26] *Id.* at 349 (citing Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 562 (Tex. 2006)).
[27] *Id.* (quoting In re Halliburton, 80 S.W.3d 566, 572 (Tex. 2002).
[28] *Id.* (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
[29] *Id.* at 349-50 (quoting TEX. LAB. CODE ANN. § 451.001 (1) (Vernon 2006)).
[30] *Id.* at 350 (quoting Tex. Steel Co. v. Douglas, 533 S.W.2d 111, 115 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.)).
[31] *Id.* at 351 (citing TEX. LAB. CODE ANN. § 451.002 (a) (Vernon 2006)).
[32] *Id.* at 351-52 (citing TEX. LAB. CODE ANN. § 451.002 (b) (Vernon 2006); Cont'l Coffee Prods. V. Casarez, 937 S.W. 2d 444, 454 (Tex. 1996); Azar Nut Co. v. Caille, 734 S.W.2d 667, 669 (Tex. 1987); Carnation Co. v. Borner, 610 S.W.2d 450, 454-55 (Tex. 1980)).
[33] *E.g.*, James v. Vernon Calhoun Packing Co., 498 S.W.2d 160, 162 (Tex. 1973); Hazelwood v. Mandrell Indus. Co., 596 S.W.2d 204, 206 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); Petroleum Cas. Co. v. Smith, 274 S.W.2d 150, 151 (Tex. Civ. App.—San Antonio 1954, writ ref'd); Clevenger v. Burgess, 31 S.W.2d 675, 678 (Tex. Civ. App—Beaumont 1930, writ ref'd).
[34] *In re Poly-America, L.P.*, 262 S.W.3d at 352.
[35] *Id.*

continued on page 20

MANAGED DISPUTE RESOLUTION: DESIGNING A DISPUTE RESOLUTION PROCESS FOR EFFICIENCY AND AFFORDABILITY

By Frank G. Evans* and Bruce W. Wettman**

The Texas Civil Justice System

Texas has good reason to be proud of its traditional court system, which over the years has given us a high measure of efficiency and effectiveness. During the first half of the last century, Texas courts were able to keep pace with the demands of an ever-increasing population seeking fair, efficient, and affordable justice. During the past fifty years, however, new remedial laws passed by Congress and state legislatures, combined with the public's growing willingness to initiate litigation, created burgeoning civil caseloads for most of our state courts, particularly in the metropolitan areas. The increased litigation resulted in huge civil case backlogs in our state courts and many could no longer keep up with the public's increasing demand for prompt and affordable justice.

To meet this formidable challenge, national and state leaders from across the nation began looking for ways to improve traditional dispute resolution procedures and to consider how alternative dispute resolution methods might produce more-efficient and economically accessible civil justice systems. These investigative meetings initiated a nationwide search for better civil dispute resolution methods, which is sometimes referred to as the Alternative Dispute Resolution Movement.[1]

The Texas ADR Movement

Fortunately, Texas was at the forefront of this national effort. In the early 1980s, the Texas legislature, with the support of the Texas bar and judiciary, created a number of new courts to handle civil cases and enacted a new funding system that would give county governments the means to establish locally administered dispute resolution centers.[2] Over the next several decades, the community dispute resolution concept was expanded statewide to the point where there are now some twenty centers providing dispute resolution services to the public.

The Texas ADR Procedures Act

In 1987, the Texas legislature enacted the Texas Alternative Dispute Resolution Procedures Act, which established a state policy supporting the voluntary resolution of disputes and the early settlement of pending litigation.[3] This Act gave state courts the responsibility to carry out this policy and enabled each court, on its own motion or on the motion of a party, to refer an appropriate civil case to a non-judicial forum for a voluntary dispute resolution process. The list of processes includes, but is not limited to mediation, moderated settlement conference, mini-trial, summary jury trial, and non-binding arbitration.[4] The procedural aspects of this Act are quite flexible, giving any state court the authority to refer a civil case to any "nonjudicial and informally conducted forum" for the voluntary settlement of disputes through the intervention of an "impartial third party."5 Although most court orders designate one of the six processes listed in the Act (e.g., mediation), the Act gives the court (and the parties) the option of combining elements of different processes into a hybrid process or creating their own process.[6] Thus, the Act gives the parties considerable discretion in fashioning a dispute resolution process that will best suit their needs. For example, the parties may contractually agree, in advance of the issuance of an award in a *nonbinding* arbitration process, that the award will be *binding and enforceable in the same manner as any other contract obligation*.[7] Or, the parties may agree to submit the issues in dispute for a binding and enforceable arbitration award conducted under the provisions of the Texas General Arbitration Act or the Federal Arbitration Act.[8] Still another option available to the parties is to have the disputed issues determined by a retired or former judge conducting what amounts to a non-jury bench trial under the provisions of the Trial by Special Judge Act.[9]

During the years following the enactment of the Texas ADR Procedures Act, Texas courts and lawyers have made extensive use of alternative dispute resolution processes to resolve a wide variety of civil cases. As a result of this expanded use, ever-increasing numbers of legal, business, and social professionals are entering the commercial dispute resolution field, and this factor, among others, has enhanced public awareness about the effectiveness, cost, and availability of different dispute resolution processes.

Aspects of Alternative Dispute Resolution

A unique benefit of an alternative dispute resolution process is that the parties themselves, rather than a court or some administrative body, possess the power to decide the final outcome of the dispute. This gives the parties and their counsel the ability to conduct their own risk evaluations and, to a limited degree, to control the amount of time and cost that will be invested in the determination of the case. But because of the many variables and uncertainties involved in resolving any

continued on page 16

MANAGED DISPUTE RESOLUTION: DESIGNING A DISPUTE RESOLUTION PROCESS FOR EFFICIENCY AND AFFORDABILITY

continued from page 15

civil dispute, lawyers and their clients face substantial obstacles in trying to design a private dispute resolution process that is truly responsive, efficient and affordable.

Among the alternative dispute resolution processes most used in Texas, mediation and arbitration seem to be the two principal processes of choice. Both processes have received justifiable acclaim as cost-effective alternatives to traditional litigation. But despite the continuing popularity of these two processes, neither process has escaped recent criticism from practicing lawyers and their business clients.

In essence, the mediation process has been criticized as taking too much time and costing too much for a process that offers no assurance of a final determination. Some also have complained that the process is too easily abused by lawyers who seek only to use the process as an inexpensive discovery tool and who view the negotiation sessions simply as a means for extreme bargaining tactics and as a stage for posturing in front of their clients. Critics of arbitration complain, in similar manner, that the process frequently is just as expensive and no less time-consuming than traditional litigation, which offers the additional benefit of appellate review.

In recent years, a new alternative dispute resolution process called "collaborative law" has gained acceptance among a growing number of legal and other professionals, particularly those practicing in the family law field.[10] In this statutorily approved process, the parties and their lawyers agree to engage in good-faith settlement negotiations with the understanding that if the parties do not resolve the dispute by agreement, the collaborative lawyers are disqualified from further representation of their clients in the matter.[11] Although this process has reportedly produced a high percentage of settlements and is gaining the support of an increasing number of lawyers and other professionals, it has been the subject of some concern, largely because of potential ethical and logistical problems arising from the statutory disqualification requirement.[12] Concerns also have been expressed that the absolute disqualification requirement in the collaborative law process can leave a weaker or more trusting party at the mercy of an overbearing client or an unscrupulous lawyer.[13]

The Managed Process: Designing for Greater Efficiency

In an effort to meet the principal criticisms lodged against existing dispute resolution processes such as mediation, arbitration and collaborative law, there has been some encouraging experimentation with a "managed dispute resolution" process that combines some of the "best practice" concepts of those processes. In essence, the managed process is designed for lawyers and their clients who seek a responsible "no-nonsense" forum where discovery and settlement negotiations are conducted collaboratively in an efficient, mutually respectful, and affordable manner. Thus, the managed process gives lawyers and their clients the opportunity to "get down to business" and a way to avoid the frustration and expense of having to deal with overly contentious opponents who try to manipulate the process through aggressive posturing and the use of radical bargaining tactics.

Distinguishing Characteristics of the Managed Process

A chief characteristic of a managed dispute resolution process is that the parties themselves, with the guidance of their respective counsel, select the "Process Manager" who will exercise supervisory control over the entire process, including the exchange of documents and information, the retention of neutral experts if needed, and the conduct of settlement negotiations. This feature tends to distinguish the process from traditional facilitative processes such as mediation because the Process Manager assumes a much more proactive role throughout the dispute resolution process. As the overall manager of the entire process, the Process Manager assumes direct responsibility for the successful conduct of the process from start to finish, assuring not only that it is conducted fairly and impartially but that its procedures are efficient, cost-effective, and reasonably affordable.

An example of the managed process; The Estate of Sam Jones, Deceased

To better understand how the managed process is conducted, consider the hypothetical dispute involving the Estate of Sam Jones, deceased. Assume that Sam, a long-time farmer in Bastrop County, died last year at the age of 87 years. Sam, who was twice-married, was survived only by the three adult children of his first marriage and by an adult son of his second marriage. At the time of his death, Sam's younger son was living with him at the family homestead and working with him on the farm. The total net value of Sam's estate is estimated to be about $75,000, which is the approximate value of his farm and equipment.

The Dispute

Soon after Sam's death, a dispute arises between the children of Sam's first marriage and his second son who claims full title to the farm under an alleged "lost will." Both sides have extremely strong feelings about the conflict, and each side has retained an experienced local trial lawyer. Although the lawyers have never been involved with one another in the trial of a case, they respect one another's integrity and ability. Both lawyers sincerely want to help their clients resolve their dispute without incurring unnecessary attorneys' fees and litigation costs.

Initial Five-Way Meeting

After several telephone discussions between the lawyers and their clients, the parties agree to engage the services of an experienced lawyer-mediator, John Smith, to conduct a managed dispute resolution process. In his initial meeting with counsel and their clients, Smith explains the terms of the Managed Dispute Resolution Agreement and his function as the Process Manager. After further discussion, the parties execute the agreement and Smith works with them and their counsel to develop a Time/Cost Schedule for the exchange of information, the identification and evaluation of key issues and interests, and the conduct of preliminary settlement negotiations.

continued on page 17

MANAGED DISPUTE RESOLUTION: DESIGNING A DISPUTE RESOLUTION PROCESS FOR EFFICIENCY AND AFFORDABILITY
continued from page 16

During such discussions Smith emphasizes the importance of collaborative interaction among the lawyers and their clients and explains how such a cooperative effort can result in significant savings of time, cost, and stress. Based on experience gained in similar meetings, it is estimated that such a conference could be completed in about three hours.

The Second Meeting

During the several weeks following the initial meeting, Smith maintains telephone and email contract with the parties' counsel and is kept advised of their progress in the exchange of information. As soon as that task has been completed, Smith schedules a second meeting with counsel and the parties to isolate the principal issues in dispute and to help them engage in a confidential risk/cost analysis. In the course of this evaluative exercise, Smith helps the parties develop a mutually agreeable format and time schedule for the conduct of responsible settlement negotiations. The estimated time for the completion of the second meeting is about three hours.

A Final Outcome

During the third meeting with the parties and their counsel, the Project Manager ascertains whether the parties have reached a mutually acceptable settlement with respect to all issues in dispute. If a complete settlement has been reached, the parties and their counsel will simply reduce their agreement to writing and there may be no further need of the services of the Process Manager. If the parties have been able to resolve some but not all issues in dispute, the Process Manager will help them specify the unresolved issues for submission to binding arbitration as provided in the Managed Process Agreement. In either event, the parties can be assured of a final outcome of their dispute under the terms of their agreement. The estimated time required for this final meeting is about four hours, so that the total time attributable to the Process Manger's effort (excluding any time involved in the arbitration process) is about ten hours.

A Time/Cost Comparison

A question often asked about the managed dispute resolution process is whether its efficiency is worth the time and cost of conducting the process. This question is particularly relevant in a case, such as the one discussed above, where a relatively small sum of money is involved. But in most cases, particularly those that are hotly contested, there usually are expenditures of time and money that could have been avoided through a structured collaborative process. Moreover, even in cases where the lawyers and their clients are pre-committed to collaborative interaction, the services of a Process Manager can be invaluable in providing guidance and leadership in the efficient management of the process. In this regard, the Process Manager, as supervisor of the collaborative process, can help the lawyers and their clients avoid unnecessary time and cost through the efficient selection and use of third party neutrals such as mediators or financial advisors. In most cases, therefore, the use of an experienced Process Manager will result in overall time and cost savings, particularly when compared with those ordinarily incurred in traditional litigation or other adversarial procedures.

Special Cost Avoidance: E-Discovery

In the "paperless" world of today's adversarial proceedings, a new cost factor related to electronic or "e-discovery" threatens to eclipse all other traditional discovery costs. In essence, legal practitioners and business clients are being besieged by ever-increasing cost factors related to electronic communications that are driving litigation and arbitration costs beyond the clients' ability to pay.

How can lawyers and clients obtain needed documents and information and yet avoid excessive discovery costs? The answer may lie in the special role of a Process Manager. in a managed dispute resolution process. Because the Process Manager has direct responsibility for overall cost control, he or she can set the tone of the discovery process.
An experienced Process Manager, working with the guidance of a knowledgeable data specialist, can help the parties and their counsel develop a flexible discovery plan, which will be efficient, reasonably affordable, and consistent with state-of-the art discovery rules and practices.

Online Dispute Resolution

The managed dispute resolution process can also be used effectively in online dispute resolution (ODR) applications. Particularly in cases where it is inconvenient for all parties and their counsel to participate in face-to-face meetings, lawyers and their clients who are collaboratively committed can engage in a significant amount of logistical work through online communications. After the parties and their counsel have agreed in principle regarding the exchange of documents and other information, much of the logistical work, including the evaluative analysis of positions, can readily be accomplished online. Similarly, the parties can engage in meaningful settlement negotiations through a simple structured online exercise that in some cases will be more efficient and productive than in-person meetings. Obviously, the savings of time and costs of such an online process can be significant.[14]

Use Pursuant to Court Order

Another potential use of the managed dispute resolution process is in a court-ordered alternative dispute resolution process. In any pending litigation where the parties or the court consider the services of a Process Manager would be helpful, the court, either on its own motion, or on motion of the parties, can appoint a Process Manager to serve the designated function of an "impartial third party" under the applicable provisions of the Texas Alternative Dispute Resolution Procedures Act.[15] In this regard, the parties can enter into an agreed order for such an appointment, including an appointment in an appropriate case made pursuant to the Trial by Special Judge Act.[16]

Qualifications of the Process Manager

Important questions to be considered in deciding upon a man

continued on page 18

REFLECTIONS FROM THE EDGE

By Kimberlee K. Kovach (Special Guest Author)*

This issue will be a discussion of ethical problems originally posed to the ADR Symposium conducted by the Texas Wesleyan Law Review. Comments are made by our guest author, Kimberlee K. Kovach. The Symposium will be included online later this spring by going to www.law.txwes.edu, then clicking on the link to "Law Review," then selecting the "ADR Symposium link.

Overview

A principal difficulty that often arises with ethical situations in ADR processes is the lack of clear, currently available guidance. While certain ethical codes or standards exist for both arbitrators[1] and mediators,[2] no real guidance exists for those who represent clients in those proceedings. Questions also arise when lawyers serve as mediators and arbitrators. In some instances, the conduct of the lawyer representative, as permitted by the rules, directly conflicts with obligations of the mediator.[3]

While lawyers certainly have state mandates in the form of disciplinary rules, most of them derivatives of ABA Models,[4] these rules and standards have not considered the lawyer's role to go beyond that of adversarial representation. In essence, as I have elaborated upon elsewhere,[5] the current ethical standards for lawyers as representatives for clients remain in the "one size, shape, and color fits all" approach. This approach is unworkable, particularly as lawyers' work has evolved to encompass a variety of tasks and roles, many of which not only differ from, but frankly are contrary to, the adversarial paradigm. Finally, as the following two fact situations demonstrate, many dilemmas arise for which no definitive or clear-cut answer exists. As a consequence, even where specific guidance exists, often individuals, whether in the role or representative or neutral, will need to make case-by-case decisions.

Ethical Dilemma 1: The Mikado Club VIP

The phone inquiry asking if you would mediate a business dispute between a business owner and a non-paying client gave you only a hint of what was to follow. You entered the mediation room prepared for a run-of-the-mill discussion of contracts signed, services promised, expectations disappointed, and hurt and angry feelings on all sides. You heard all that and more.

It turns out that the business owner, Madame X, is the proprietor of MIKADO CLUB VIP, a high-class and very expensive escort service. Mr. George Fox is a long-standing client who has been patronizing MIKADO for many years. The current dispute arose over Mr. Fox's last assignation with Ashley – one of MIKADO'S most- sought-after "Models." Typically, Mr. Fox pays $5,000 for each 24-hour period spent with a woman hired from MIKADO. Often, Mr. Fox takes the Models out on the town to a play, opera, or lavish dinner before retiring to the Hayflower Hotel. On this particular occasion, Mr. Fox wanted to take Ashley to The Association of Carnivores' National Convention. Ashley, a passionate vegetarian, refused to go. Mr. Fox felt humiliated, and the evening went badly. Mr. Fox refused to pay the fee.

The parties' previously happy relationship is in tatters. They are both really angry. Furthermore, each is beginning to make ominous noises about "ruining" the other. You think violence might erupt. Certainly, reputations could be lost.

From what each has said privately, you know this situation could be easily settled with an apology and a perfunctory (and reduced) payment by Mr. Fox. You also know the case could be settled without any discussion of future escort activity—activity that is surely illegal, though you yourself don't find it unsavory. After all, Ashley is a consenting adult, and you are quite certain she takes home more after-tax income than you do.

As a mediator and also a licensed lawyer, what ethical standards will you need to consider? Have you already gone too far? What do you do? If you were not a lawyer, would your obligations be any different?

Analysis:

As the mediator, even though you may have a law degree, you do not assume a representative role for either party; hence most, if not all, of the disciplinary rules are inapplicable. Perhaps if either party had a law degree, it would trigger the reporting rule (Model Rule 8.3) should there be a clear indication—in other words, an admission—that the disputed matter, or prior activity related to it, was illegal. Yet, that is not the case here. While the problem as set forth certainly indicates a possibility of illegal conduct, it is not completely clear the real nature of the claim is illegal. If, however, it becomes clear during the mediation that the business dealings constitute criminal activity, then further analysis is necessary.

The lawyer disciplinary rules are only minimally applicable, and would essentially govern the conduct of the parties' lawyers. For example, the Model Rules of Professional Conduct provide that lawyers can reveal a confidence of a client for certain future crimes.[6] By analogy, one could say the lawyer-mediator could use that same permission. In a mediation, however, the parties are not clients of the mediator. Moreover, Model Rule 1.6 is merely permissive in terms of "may reveal." Because, in this case, the parties are not clients, and no specific discussion of future criminal activity has occurred, confidentiality should be maintained.

The mediator would then move to examine the codes and standards for mediators.

continued on page 25

MANAGED DISPUTE RESOLUTION: DESIGNING A DISPUTE RESOLUTION PROCESS FOR EFFICIENCY AND AFFORDABILITY

continued from page 17

aged dispute resolution process relate to the functions and qualifications of the Process Manager. In selecting a Process Manager, the parties and their counsel should give special consideration to experienced mediators, lawyers, retired judges, business representatives, and other professionals who have conducted similar processes in the course of their careers. If possible, the Process Manager should be an individual known and respected by all parties who will be able to inspire and maintain their trust and confidence during the course of the process. Ideally, the Process Manager will also have had extensive training and experience in litigation, arbitration, mediation, and other dispute resolution procedures, as well as a working knowledge of case evaluation procedures and mechanisms, and the use of online negotiation methods and technologies.

Summary of the Managed Process

With careful planning and execution, the managed dispute resolution process should have the following advantages:

- The managed process will enable the parties and their counsel to maintain procedural control throughout the entire case subject only to the managerial functions specifically delegated to the Process Manager.
- The managed process gives the parties and their counsel a structured system and timeline for the conduct of meetings to exchange information; identify and specify issues in dispute, and to conduct an evaluative analysis of the probable outcome of the dispute.
- The managed process provides the parties with the opportunity to engage in responsible settlement negotiations under the guidance of an experienced settlement process manager.
- The managed process offers each party the opportunity to submit unresolved issues for binding determination by an arbitrator or other decision-maker of their choice, thus assuring a fair, efficient and expeditious final outcome that is firmly grounded on principles of law, justice, and equity.
- The managed process can be used effectively in special circumstances where courts or institutional agencies cannot function as effectively as privately selected dispute resolution managers. The process, however, is readily adaptable to situations in which some judicial oversight is desirable.

The managed dispute resolution process should not be considered a replacement for existing dispute resolution processes, but rather as one of several options for parties and their counsel who seek more efficient, responsible, and reasonably affordable ways to resolve their disputes.

For additional copies of this article or for sample drafts of an agreement and an agreed order for a managed dispute resolution process, see www.resolutionforum.org/mdr.

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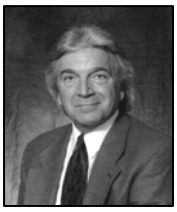

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The authors acknowledge the contributions of ***Will McMillan****,* ***Wes Suggs****, and* ***Ian Davidson****, research assistants at the Center for Conflict Resolution, in the preparation of this paper.*

ENDNOTES

[1] *See* Lisa Weatherford, *The History of the Texas ADR Act, Alternative Resolutions*, Summer/Fall 2007, at 3, n. 5.
[2] *Id.* at 8, n.9 (Texas Alternative Dispute Resolution Systems and Financing Act of 1983, 68th Leg., R.S. ch. 26, Sect.1, codified as Tex. Civ. Prac. & Rem. Code Ann. §§ 152.001-152.006 (Vernon 2005)).
[3] 70th Leg., R.S., ch.1121, Sect. 1, 1987 Tex. Gen. Laws 3841, codified as Tex. Civ. Prac. & Rem. Code Ann. §§ 154.001-154.073 (Vernon 2005).
[4] *Id.* §§ 154.002 (Policy), 154.021-022 (Referral), 154.023-027 (Processes).
[5] *Id.* § 154.021 (a)(3).
[6] *Id.*
[7] *Id.* § 154.027(b).
[8] *See* Alan Scott Rau & Edward F. Sherman, *Rau & Sherman's Texas ADR and Arbitration Statutes* 87-242 (1994) [hereinafter Rau & Sherman].
[9] Tex. Civ. Prac. & Rem. Code Ann. § 151.001-151.013 (1983).
[10] *See, e.g.,* Sherrie Abney, *The Rebirth of Common Sense: Collaborative Law, Alternative Resolutions,* Winter 2009, at 10; Sherrie Abney, *Step One in Collaborative Law, Alternative Resolution*, Winter 2008, at 18; Gregg Hoffman, *ADR and Family Law,* 14 *Dispute Resolution Magazine* 37-39 (Spring &Summer 2008).
[11] Tex. Fam. Code Ann. § 603.3 (Vernon 2005).
[12] *See*, Frank G. Evans, *The ADR Management Agreement: New Conflict Roles for Texas Lawyers and Mediators,* Hous. Law., Sept./Oct. 2007, at 10.
[13] John Lande, *Learning from "Cooperative" Negotiators in Wisconsin, Dispute Resolution Magazine,* Winter 2009, at 20, 22-23 (explaining why the "cooperative" dispute resolution process may offer greater flexibility than collaborative law procedures).
[14] *See* Frank G. Evans & Bruce Wayne Wettman, *Enhancing Worldwide Understanding Through ODR: Designing Effective Protocols for Online Communications,* 38 U. TOL. L. REV. 423 (2006).
[15] Tex. Prac. & Rem. Code Ann. § 154.051. Judge Clarence Guittard, former Chief Justice of the Fifth District Court of Appeals in Dallas, made the first notable appointment under this legislation. *See* State Bar of Texas, *Handbook of Alternative Dispute Resolution* 76 n. 6 (1st ed. 1987).
[16] *See* Rau & Sherman, *supra* note 8, at 61.

THE COLLABORATIVE LAW PROCESS AND MEDIATION: WHAT IS THE DIFFERENCE?

By Carie P. Mack*

"What is the big deal with the collaborative law process? We're going to settle at mediation anyway."

How many times have collaborative law attorneys heard the above statement from attorneys who are not trained in the process? Critics of collaborative law argue that the majority of cases settle before trial anyway, often at mediation, so why risk having to withdraw from the case if settlement is not reached? Why would any sane lawyer sign an agreement compelling withdrawal from representation if the case ends up in court?

For someone who has not been trained in the process, collaborative law may seem like a bunch of "touchy feely" nonsense with more risks than rewards. A collaborative lawyer will tell you the process not only works, but the results often far exceed what you would expect at your best mediation.

Texas has been a leader in alternative dispute resolution. The legislature blessed attorneys and their clients with the opportunity to use the mediation process in 1987 and more recently the collaborative law process in 2001. While the courts may require parties to attend mediation before trial, the collaborative law process remains voluntary and cannot be court-ordered. And while appointed mediators are required to undergo specific training and meet minimum qualifications pursuant to Texas Civil Practice and Remedies Code section 154.052, there are no requirements for collaborative law attorneys to be trained in order to represent a client in a collaborative law matter. Despite these differences, the dispute resolution skills of mediators and collaborative law attorneys remain the same – interest-based negotiation.

1. Focus on the Process

One of the primary differences between a collaborative law case and a litigated case that settles at mediation is the focus on the *process*. In a collaborative case, the parties are committed to settlement from the very beginning. Because they agree not to use the court system to resolve their dispute, the 500-pound gorilla—the threat of litigation—is removed. The collaborative law process provides a private and safe environment in which the parties are able to identify what they need to know in order to make an informed decision, utilize the expertise of neutral experts (in family law cases, a financial expert and a mental health expert with training as a parenting coordinator typically are included in the process), evaluate their options, and make an informed decision regarding the outcome of their disputes.

By contrast, mediation typically occurs after months of battle in the litigation process, after written discovery has been exchanged, depositions have been taken, a temporary-orders hearing has occurred, and possibly another hearing or two for good measure. By the time the parties approach the mediation process, they have been through the trenches and are hardened into their positions. The proverbial "damage has been done," and the mediator often spends the first several hours working with each party to break down the parties' positions to learn their true interests.

2. How the Collaborative Law Process Works

The collaborative law process follows a five-step process called the "Roadmap to Resolution." This Roadmap is discussed at the very first collaborative law meeting so the parties will know what to expect during the course of the process. At the beginning of each subsequent joint session, the attorneys will identify where the case is in the process to help the parties see the progress they are making and understand there is order in all the chaos. Because the parties are involved in the process every step of the way, it is very helpful for the lawyers to remind them of the steps in the process. By contrast, in litigation, the attorneys are typically doing the majority of the work on the case without the clients' involvement, consulting the clients only when decisions need to be made.

The five steps of the Roadmap are:

A. <u>Identify Interests</u>

Identifying interests requires the parties to assess their motivations behind their positions. Typically, the lawyer will work with his or her client before the first joint session to help the client begin to think in terms of interests. During the first joint session, both parties will take time to identify their interests. This is a critical point in the negotiation process. As the negotiations unfold, it is often helpful to refer back to the identified interests. Additionally, it is not at all uncommon for the spouses to find they share common interests.

Common examples of interests parties share during a divorce include minimizing the disruption on the lives of their children, wanting their children to have a positive relationship with both parents, wanting to have financial security and independence after the divorce, and not wanting to spend all their money on the divorce process itself.

continued on page 20

THE COLLABORATIVE LAW PROCESS AND MEDIATION: WHAT IS THE DIFFERENCE?
continued from page 19

B. Generate Options

This step is the brainstorming session where everyone tries to identify the universe of possibilities. During this step, it is not uncommon for the parties to make judgments about the options available. However, the parties should be dissuaded from evaluating the options at this stage. Everyone should be encouraged to come up with options, regardless of how outrageous some options may seem. By keeping an open mind, the parties may stumble across the perfect solution they might not otherwise have discovered.

C. Gather Information

After the parties have spent time identifying the universe of options, they are then sent on fact-finding missions to gather the information necessary to evaluate the options. For example, it may be necessary for one party to have his or her vehicle appraised for trade-in value and research other cars available for purchase or trade. Or, it may be necessary for one of the parents to contact the children's school and find out how the school schedules are determined so that the parties can plan for future years.

D. Evaluate Consequences

After the information has been gathered, the parties can begin to evaluate the outcome of their options. They will have the information to determine what happens to each party's financial future if each wants to keep the marital residence. At this stage, the parties are encouraged to consider the outcomes of their options and whether those outcomes are acceptable.

E. Make Choices

At this stage of the process, the parties will negotiate and will make choices that most align with their interests. After following the steps established by the Roadmap, the parties are able to make educated decisions.

3. Conclusion

Mediation is a marvelous process because it provides parties an opportunity to openly discuss their concerns in a private setting and gives them control over the outcome of their lawsuit. Unfortunately for some, mediation comes too late, after thousands of dollars have been spent, relationships have been damaged, and trust has been broken. The collaborative law process embraces all the goodness of mediation and implements the same principles from the beginning. By focusing on the process rather than the outcome, the collaborative law process has provided thousands of families in this state with the opportunity to restructure their families in a safe and secure environment without fear of losing control.

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SUPREME COURT OF TEXAS EVALUATES SUBSTANTIVE UNCONSCIONABILITY OF CLAUSES IN EMPLOYER'S ARBITRATION AGREEMENT WITH EMPLOYEE, THEN SEVERS THE CLAUSE IT FINDS UNCONSCIONABLE
continued from page 14

[36] *Id.*
[37] *Id.* at 353.
[38] *Id.* at 354-55.
[39] *Id.* at 355, 357.
[40] *Id.* at 353-54.
[41] *Id.* at 355.
[42] *Id.* at 354 (relying on John B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269 (Tex. 1992).
[43] *Id.* at 357.
[44] *Id.* at 355.
[45] *Id.* at 357.
[46] *Id.* at 355.
[47] *Id.* at 357.
[48] *Id.* at 358.
[49] *Id.*
[50] *Id.* at 358-59.
[51] *Id.*
[52] *Id.* at 359-60.
[53] *Id.* at 359.
[54] *Id.* at 360.
[55] *Id.* at 360-61.

THE EVOLUTION OF CIVIL COLLABORATIVE LAW

By Sherrie R. Abney*

The dispute resolution family has experienced a number of changes over the last century. Litigation, the great-grandfather of formal dispute resolution, has developed in Anglo-Saxon cultures over the past 1,000 years as many disputants' preferred procedure to resolve their problems, primarily because they perceive it as their only legal choice. Litigation has been tweaked by lawmakers and the courts over the centuries, but it is basically conducted in the same manner it was conducted before the Pilgrims landed at Plymouth Rock. The only other institutions that have survived with little change over the centuries are religions. Litigation may appear to have become as important as religion for some lawyers, since it has allowed them to earn extraordinary incomes and exercise enormous amounts of control over their clients' affairs; however, that situation is changing. The public has begun looking for alternative ways to achieve the resolution of disputes in order to give individuals and companies more control over the dispute resolution process as well as a greater voice in the final outcome of their disputes.

Arbitration

History reveals that arbitration, the grandfather of dispute resolution, is practically as old as litigation.[1] Although arbitration gives parties control over scheduling and the ability to choose the trier of fact, decisions regarding how cases are handled and the ultimate disposition of issues are still made by the parties' lawyers and third parties. Arbitration hearings are generally less formal than litigation, but the expense of formal discovery, hearings on motions, and experts' fees may be no less in arbitration than they are in litigation. Add to that the cost of the arbitrator, and arbitration may exceed the cost of litigation. Nevertheless, arbitration gives the parties more control than litigation.

Mediation

The next generation of dispute resolution was not born until the twentieth century. Family lawyers began attempting to alleviate the pain that parties and their children experienced during divorce by using third party neutrals called mediators to assist lawyers in resolving their clients' issues and working out a basis for both parties to maintain their relationships with their children. Mediation provides the parties opportunities to resolve matters off the record outside of the courtroom. Although mediation allows parties to avoid trial, it often does not occur until after litigation is initiated, and the parties have already become entrenched in positions that are generally based on emotions more than the facts of the case. Mediation usually is conducted in a single session that will last from four to eight or more hours. Ordinarily, there will be a brief opening session after which the parties will adjourn to separate rooms, and the mediator will go from one party to the other carrying offers back and forth. Rather than concentrating on the concerns of the parties, many mediators will use statutes and case law along with their opinions, which are based on the judge's past decisions in the court in which the parties' cases are pending, to pressure the parties into settling. Although this approach may settle some cases, the parties may be settling because they feel threatened rather than because they feel their concerns have been met. When parties settle for the wrong reasons, they do not feel they possess any ownership in the final order, and this feeling may eventually result in one or more trips back to the courthouse and the mediator.

Because the need to avoid litigation is not confined to family matters, it was not long before the value of the mediation process was recognized by the public. Although mediation originated in family law, it is now an accepted form of dispute resolution in all areas of civil law, as well as some criminal cases involving first offenders and crimes against property. Today, parties often ask their lawyers to submit their disputes to mediation. Many companies have added mediation clauses to the arbitration clauses in their contracts, so parties to the contracts will be obligated to submit their disputes to mediation prior to proceeding with arbitration or litigation. Mediation has been shown to be a tremendously improved tool for dispute resolution, but there are still difficulties that mediation has not cured.

Having been incorporated into the litigation process, mediation has quite naturally assumed many of the adversarial features found in positional bargaining. Lawyers are still concerned about preparing for trial in the event their clients do not settle. Litigation hangs like the sword of Damocles over the lawyers' heads, and they are unable to focus one hundred per cent of their skills on settlement. Mediation generally employs positional bargaining that seldom addresses the concerns of the parties, and the process often involves marathon sessions that are more successful in exhausting the parties into submission than they are in providing long-term solutions. Since courts began ordering cases to mediation, lawyers, who do not participate in good faith and only "show up to get their tickets punched on the way to the courthouse" are often ill-prepared and unfamiliar with their clients' files when they appear to mediate their clients' cases. Excessive amounts of time and money continue to be spent on discovery. Experts must be able to support the clients' positions and also appear superior to the other parties' experts. The blame game is still on, and

continued on page 22

THE EVOLUTION OF CIVIL COLLABORATIVE LAW

continued from page 21

lawyers have little opportunity for creative thinking due to their preoccupation with defending their clients and attacking the other parties in attempts to intimidate them into submission.

Collaborative Family Law

In the latter part of the 1980s, the most-recent generation of dispute resolution came into being. Family lawyer Stu Webb discovered it when he was searching for ways to overcome many of the drawbacks found in adversarial models of dispute resolution procedures. Mr. Webb's quest was two-fold: to bring about a peaceful and economical process for addressing his clients' disputes and to be able to take off the litigator's mask and be himself. After several years of experimentation, he came up with what he calls Collaborative Law. Collaborative Law makes use of interest-based negotiation, which allows the parties to determine what is important to them rather than rely on their lawyers to put a price tag on the value of their disputes.

The collaborative process overcame the adversarial aspects of the existing dispute resolution procedures; however, it also made some demands on participants that have proved to be difficult for some parties and lawyers to meet. Anyone who is not willing to proceed honestly and in good faith, fully disclose all relevant information, and seek solutions that will be beneficial to all parties to the dispute are not candidates for Collaborative Law and should not attempt to participate in the process. In addition, lawyers whose primary concern is exercising control over their clients should avoid the collaborative process because the process is client-driven and no final decisions are made outside the clients' presence. Nevertheless, those who are able to meet the requirements for collaborative participants will find the process offers advantages that cannot be found in any other dispute resolution procedure.

Civil Collaborative Law

During the twentieth century, the world saw marvelous improvements in medicine, communication, transportation, and quality of life. In the legal community, family law was able to find a sane, non-adversarial approach to dispute resolution. It is now the twenty-first century, and it is time for all areas of civil law to emerge from the dark ages and join the less-painful, more-efficient, client-centered dispute resolution evolution. The fundamental approach employed in family collaborative cases is easily adapted to civil and commercial disputes. The requirements of civil collaborative participants are similar to those in family collaborative disputes, and the advantages for clients and lawyers are grand in scale.

Participation in the Process

Not every party or lawyer is suited to participate in the collaborative process. Not every party or lawyer is suited to participate in the collaborative process. The repetition of the foregoing statement is not a typographical error; it is a fact that must be recognized and remembered. A litigation lawyer's client may have little or no need to directly participate in the day-to-day handling of a lawsuit. Parties in litigation are able to turn everything over to their lawyers and allow the lawyers to tell them what must be done. Their lawyers will determine what areas of the law will support their positions. The lawyers will determine whether experts are necessary, and if experts are necessary, the lawyers will determine which experts will be used. Lawyers will decide what information is necessary to argue their clients' positions, and what methods they will use to gather the information. Trial strategies will be determined by the lawyers, and often lawyers will conduct negotiations outside the presence of their clients.

The clients' role in the collaborative process is almost the exact opposite of the role they play in litigation. Collaborative clients must be able to participate in every stage of the collaborative process. While litigation is lawyer-driven, the collaborative process is client-driven. Lawyers are there to advise their clients and guide the parties through the steps of the process, but decisions are never made outside the presence of the parties or without their informed consent. If experts are needed, the parties take part in their selection. The parties, with the assistance of the collaborative lawyers, decide what information is necessary and how it will be obtained. It is the parties who negotiate and resolve their disputes, not the lawyers.

No parties should attempt to participate in the collaborative process unless they are prepared to accept responsibility for any part they have played in creating the dispute, participate in all face-to-face meetings, engage in full, voluntary disclosure of relevant information, express their interests and concerns to the other parties, listen to and take into consideration the interests and concerns of the other parties, and work toward solutions that do not take unfair advantage of any of the other parties. Unless parties assume the foregoing responsibilities, the chances of the collaborative process being successful are greatly diminished.

Many lawyers have received training in family collaborative law and hold themselves out as being collaborative lawyers, yet they continue to exhibit old habits that may be difficult to break. These lawyers will take over negotiations and attempt to explain their clients' "positions" rather than allow the parties to communicate with each other. Rather than allow the parties to reach solutions on their own, these lawyers will jump to conclusions and suggest solutions or give reasons why an option will not work prior to all of the information being gathered. Many lawyers are accustomed to taking charge, and they do not have the patience to sit back and allow the parties to proceed at their own speed.

Good collaborative lawyers listen more than they speak. They do what good mediators have learned. They "live in the question." They do not direct the parties, but they constantly ask questions regarding the parties' choices and decisions. They understand they are not in their clients' shoes and cannot possibility know for certain what is best for their clients, but they can help them explore options and discover what their clients

continued on page 23

THE EVOLUTION OF CIVIL COLLABORATIVE LAW

continued from page 22

believe will be the best solution for their situation. Instead of saying, "In six months, you will be sorry you did this," the collaborative lawyer will ask, "How do you think you will feel about this decision in six months?" "Do you think this agreement will hold up and keep working over the long term?" "Is there anything else we could do to ensure that this agreement will still be working six months from now?"

Preservation of Ongoing Relationships

There are many aspects of the collaborative process that readily transfer to civil disputes. Families are not the only units that benefit from the preservation of ongoing relationships. Businesses have disputes with suppliers and customers. Many disputes have the potential to end relationships that are not only profitable but necessary for the businesses' survival. While litigation can permanently damage or destroy relationships, the collaborative process can redefine, clarify, and reestablish relationships, allowing the disputing entities to mend their fences and move forward. Companies must also deal with disputes with employees. These matters may be resolved in private meetings and assist employers in retaining valuable employees, as well as reduce the costs of training replacements. Fair dealing with employees is an excellent way to improve employee morale, which in turn increases productivity. The opportunity for improving and preserving relationships in business and commercial disputes is limitless.

Cost Containment

The ability to contain the costs of litigation is extremely important to both large and small businesses. Litigation is able to bankrupt small businesses, while large corporations pass on their attorneys' fees to consumers in the form of higher prices for their products and services. Everyone who has purchased any item, from floor wax to a new automobile, has paid attorneys' fees for the companies that manufacture and market these products– just as a part of each patient's medical bills goes to pay for their physician's malpractice insurance. Passing on litigation costs to consumers results in higher prices and reduces the entities' ability to be competitive in the marketplace. Realizing the need to cut litigation costs, a number of large corporations have opted to settle their disputes outside the courtroom. These companies have saved millions of dollars in litigation fees and managed to retain positive relationships with the other parties to disputes.

Where Does It Go From Here?

Collaborative Law will not make much sense to most lawyers trained in positional bargaining when they first hear about it. The idea of trust, voluntary disclosure, and candid conversations makes most litigators uncomfortable; however, on closer examination, many lawyers are beginning to appreciate the benefits of the process. Awareness regarding Collaborative Law is growing, and participation is not limited to a single area of the law, nor is it dependent on the number of years a lawyer has been in practice. Experienced practitioners as well as law students have come to realize that adversarial tactics can accomplish more harm than good for clients.

Opponents of the collaborative process first said that Collaborative Law was impossible. Next, they said it was possible but not practical. Today, more and more lawyers and parties are beginning to say, "I **know** this is really a good alternative to litigation."

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ENDNOTE

[1] Records of arbitration are found in early Egyptian and Greek history. http://www.australianarbitration.com/history-arbitration The modern history of International Arbitration began with the Jay Treaty between in the United States and Britain in 1794 http://www.icj-cij.org/court/index.php?p1=1&p2=1.

The moment we begin to fear the opinions of others and hesitate to tell the truth that is in us, and from motives of policy are silent when we should speak, the divine floods of light and life no longer flow into our souls.

Elizabeth Cady Stanton

Reflections From The Edge
Continued from page 24

With regard to the direction provided by the mediator's model standards, a number of provisions can be considered. For example, party self-determination,[7] which is a cornerstone of mediation,[8] can be interpreted to suggest that should the parties wish, the mediator should proceed. As experience has demonstrated, however, party self-determination can support a number of different process approaches, including changing mediator roles. In addition, the parties' self-determination may conflict with other provisions, such as quality of process or confidentiality. If the parties wish to proceed, and the mediator is not troubled by the subject matter and can provide a fair and impartial process,[9] it appears that no ethical barrier to conducting the mediation exists, and the mediation could go forward. One other Standard, that of Model Standard VI A 9, may be applicable – and would direct the mediator to postpone or terminate the process if the mediation were to be used for furthering criminal activity. Yet, that does not appear to be the case in this situation.

The mediator will likely also be concerned about confidentiality issues. Under the Texas Ethical Guidelines, those approved by the Texas Supreme Court[10] as well as those of the Texas Mediation Credentialing Association (TMCA), which are nearly identical,[11] the importance of confidentiality is noted. Mediators are not to reveal information disclosed, the only exception being "unless parties agree otherwise or as may be required by law."[12] No duty to report or reveal exists, and there is no evidence of an agreement by the parties to disclose. Hence, under these provisions, it appears the mediator is obligated to maintain confidentiality.

Another question could arise under provisions of the Uniform Mediation Act.[13] Specifically, the UMA provides that a privilege does not exist if the mediation communication is used to "conceal . . . ongoing criminal activity."[14] This exception however, is only with regard to the privilege from discovery or admissibility, and therefore would be operative only if a subsequent proceeding were initiated. In the stated problem, however, the ongoing nature of the activity is not known, and in fact it is noted will not be discussed during the mediation.

In essence, then, if the mediator wishes to do so, and if, as stated, the matter can be resolved efficiently without mention of future criminal activity, the mediation should proceed. The case can be approached in a businesslike manner, and the mediator can assist the parties in reaching a resolution and refrain from subsequent disclosure.

Ethical Dilemma 2: Al and Bob's "Antiquing" Fallout

Al sued Bob for funds owed when Bob, unbeknownst to Al, dissolved the business they co-owned and sold all of the remaining assets. Al and Bob owned an antique business together for over twelve years. Initially, Al contributed about seventy percent of the capital, while Bob was more involved in the day-to-day operations, although Al stopped his involvement about two years ago, claiming an inability to "get along with Bob." Now Al is seeking at least $250,000 from Bob, alleging Bob mismanaged much of the business, and specifically "undersold" the antiques in most instances. The court has referred the matter to mediation, naming you as mediator.

During the opening session, Bob provides Al, as well as you, a financial statement prepared by Ace Accounting, CPAs. It shows Bob's net worth to be just over $150,000, with his homestead (the primary asset) and a timeshare. Bob offers $25,000, saying the amount is very close to the limit of what he has available, and that prospects for future income are minimal.

Several hours later, in a private caucus, you learn, through a variety of statements made by Bob, that he has several hundred thousand dollars in the Cayman Islands. Moreover, most of the "antiques" were knock-offs made in China; the profit margins, therefore, were enormous. You also learn that Bob plans to retire to the Cayman Islands in the next couple of months. As Bob put it, "Al can't tell a real financial statement any better than he could recognize a real antique."

Do you disclose this information? If so, to whom? What are the considerations at issue here? Does it make a difference if your Agreement to Mediate promises the participants "strict" confidentiality?

Analysis:

This dilemma appears to be primarily concerned with the extent and limits of confidentiality. More specifically, confidentiality can be examined on at least three levels. The first concerns disclosing what is learned in caucus to the other party. The second concerns disclosure generally. The third concerns the use of the information as subsequent testimony in a court or other evidentiary proceeding. Although many, perhaps most, mediators (as well as lawyers) operate under the assumption of near-complete confidentiality in mediation, many exceptions exist.

The Model Standards state that mediators shall maintain the confidentiality "of all information",[15] yet the same section also provides that the parties themselves or law can override the mediator's duty.[16] As noted in the previous problem, the Ethical Guidelines in Texas contain a quite-similar provision. Mediators, however, must also look beyond ethical rules for guidance. While confidentiality is mentioned as a standard in many of the ethical principles and standards that have been enacted, the subject is also one of law. As a consequence, statutes and an abundance of case law have addressed the subject, resulting in variation in analysis and some divergent exceptions. Yet, at first glance, this case does not appear to fall within any clear or explicit exception.

While much of the analysis discusses confidentiality in more-general terms, some of the ethical provisions speak to the caucus specifically. The Model Standards expressly address the caucus, essentially prohibiting any disclosure unless consent of the discharging person is obtained.[17] The application of this standard, in this case, dictates that the mediator refrain from disclosing any information to Al. In Texas, however, it is not as clear. Comment (c) to Guideline 8 provides that the mediator should "not disclose to the other parties information given

continued on page 26

Reflections From The Edge
Continued from page 25

in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute." The significant terms are "relating to the subject matter of the dispute." Just as courts and others have been able to construe terms not within the subject matter,[18] it would be plausible to argue that the bank account and the fake merchandise are not technically within the subject matter of the dispute, particularly where management of the business could be considered the subject matter.

Another applicable guideline is Number Two of the Texas Supreme Court Guidelines. However, application of this rule results in an explicit conflict. Specifically, the guideline provides, "a mediator should protect the integrity and confidentiality of the mediation process." In this case, protecting integrity would necessitate a breach of confidentiality, while upholding confidentiality would likely result in a resolution based on fraud. Hence, confidentiality and integrity are at direct odds, apparently leaving the mediator in the less-than-desirable position of making a choice.

Discussions of situations similar to this case, both real and hypothetical, have resulted in a near-even split in what mediators would do with regard to continuation of the mediation. On one hand, many mediators state that since Al has a responsibility of due diligence regarding discovery, and apparently failed in that regard, the mediator cannot jeopardize neutrality and assist Al. Thus, many mediators would continue the mediation and facilitate whatever agreement the parties reached. On the other hand, a similar number of mediators have voiced a contrary opinion; they would terminate the mediation, basing their actions upon notions of fairness or moral obligation. These mediators would end the process. On the issue of confidentiality, however, most agree the information learned from Bob in a private caucus would not be disclosed, regardless of whether the process were continued or terminated.

While not technically falling within the scope of ethics, yet worthy of consideration, is the practical aspect of the enforceability of any settlement or agreement reached at this mediation. In most jurisdictions, including Texas, the final agreement is "enforceable as any other contract." As fraud is one of several contract defenses, it would seem Bob runs the risk, should Al discover this information, of the agreement being set aside. Most cases addressing this issue, however, result from an action to enforce the mediated agreement. If Bob pays the agreed-upon amount, no action will be brought. If, however, such an action is filed in court, then in all likelihood the mediator will be called to testify. When confronting such issues, on a case-by-case analysis, courts often have applied a balancing test, and they have reached different results. Courts have allowed, and even instructed, mediators—particularly where the evidence was deemed necessary—to provide an account of what happened during the mediation.

Another concern may arise if the engagement contract between the mediator and participants did, in fact, guarantee "strict" confidentiality. In such a case, theoretically a disclosure of the information to either Al or prior customers could potentially result in a breach of contract claim brought against the mediator by Bob. On the other hand, a lawsuit from Bob seems doubtful, as Bob would not want to continue to open the door to further disclosures. Also troubling is the apparent fraud that Bob, through the company, has perpetrated on the company's unsuspecting customers. Here again, the mediator has no affirmative duty to those consumers, and I doubt most mediators would disclose this information. In this case, assuming there were no specific statute, the mediator would be bound to maintain confidentiality in most jurisdictions, at least initially.

Finally, another issue arises if the mediator is inclined to follow the joint Model Standards. Specifically, Standard VI.4 directs mediators to "promote honesty and candor" among all participants. If the process is to be conducted in an honest fashion, then it would seem the mediator would have some obligation to urge Bob to disclose the information to Al. The standards, however, are silent with regard to any consequences should honesty not be forthcoming.

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continued on page 39

I like to believe that people in the long run are going to do more to promote peace than our governments. Indeed, I think that people want peace so much that one of these days governments had better get out of the way and let them have it.

Dwight D. Eisenhower

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS

By Luis E. Ore*

Introduction

Countries around the world are interested in hosting foreign-investment projects. Foreign investors may face a wide range of challenges in host countries, from cross-cultural situations to blocking coalitions that may prevent the implementation of foreign-investment projects. Local communities may fear exploitation of natural resources, changes in their lifestyles, or have concerns about the environmental impacts of foreign investment and development projects. A well-developed cross-cultural and consensus-building strategy can enable the successful implementation of foreign-investment projects. This article explores the challenges foreign investors face, including governmental decisions, culture, development, and environmental issues. This article also shares a strategic approach for foreign investors to make informed decisions and successfully implement investment projects.

Social and economic forces are challenging the way people do business around the world and interact with others. Globalization is making our world smaller, and cross-cultural situations are at the core. International trade and foreign investment constitute part of this fast-growing development of international relationships. Regardless of specific legal systems, law firms and international lawyers must help clients to find new markets and conduct cross-cultural negotiations, as many issues in international transactions contain cultural challenges.

Foreign Investors' Challenges: Government, Development, Culture and Environment

Governments around the world want to receive as much fresh capital and foreign investment as possible, in order to improve their economies and the living conditions of their citizens. As foreign investment increases in developing countries, economic development becomes more interrelated with environmental issues. Local, regional, and national governments, business people and investors, local communities and the population in general deal with the challenge of balancing environmental protection on one plate and economic activity and development on another. Of course, a legal framework is crucial to protect foreign investments. Beyond legal systems and right-based approaches to deal making and dispute resolution, however, foreign investors and professionals in charge of negotiating and designing deals, as well as professionals in charge of implementing investments and projects, often tend to overlook or generalize cultural factors. Overlooking or generalizing cultural factors when managing negotiations and relationships with potential local strategic partners or local communities and other stakeholders can risk an endeavor's success.

Besides governmental issues and regulation compliance surrounding all aspects of foreign investment, foreign investors have to deal with local parties, whether they are potential strategic partners or local communities where the projects and facilities will be placed. Simplistic approaches to dealing with cross-cultural differences can prevent parties from reaching shared understanding, creating value on the negotiating table, or generating lasting agreements.

When foreign business executives deal with foreign investment in a host country, they may encounter multiparty negotiations with diverse stakeholders. Of course, important negotiations will be done with the government, which investors hope will welcome the foreign investment. The relationship with the government is important because the government must demonstrate its commitment to respect the rule of law, democratic institutions, and international accords. The government also must grant permits and rights to initiate the investment project. Foreign investors may also deal with potential strategic partners who have the market know-how and networks that can facilitate the performance of the business. Foreign investors also may need to work with local communities and other stakeholders who can support or prevent implementation of any economic activity intended by the foreign investors.

Cross-cultural and multiparty negotiations in which several people with diverse cultural backgrounds are bargaining on behalf of themselves or others are more complex than two-party negotiations, but they also generate opportunities to create value. Foreign investors might face such cross-cultural and multiparty negotiation when attempting to implement projects or facilities in areas where local communities have interests and might want to voice their needs and concerns.

continued on page 28

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS
continued from page 27

Foreign Investors and Blocking Coalitions: A Central American Experience

Foreign investors might face difficult situations such as the one encountered by Stone Container,[1] an American-based foreign-investment company in Honduras, which reached an agreement with the Honduran government to develop an extensive forest-management program and harvest 320,000 hectares of pine forest for forty renewable years. After the agreement was publicly announced, local communities around the country, as well as environmental groups and activists, raised their voices and protested on the streets. Ultimately, the government cancelled the negotiations, and Stone Container's project was not implemented.

In this case, it is important to highlight the fact that coalitions were formed to oppose the foreign investment and gained national and international attention and support that influenced the government in such a way that it was practically forced to withdraw its support for the foreign investor. Sebenius (2006)[2] defines coalitions as "subsets of actors who coordinate their actions to achieve common desired goals." Susskind and colleagues (2005) explain that "Parties often seek to create 'winning coalitions' that maximize the chances of making an advantageous deal for coalition members. In other cases, they may seek 'blocking coalitions' to protect gains or interests that may be threatened by emerging deals." (p. 396).

Stone Container negotiated its foreign-investment project with the government with a high degree of secrecy, and the people of Honduras accused its government of corruption when the parties did not disclose the draft agreement. Apparently, the people did not trust their government's agencies or the agencies' established processes. The negotiation of this foreign-investment project between the government and Stone Container adopted an approach that Professor Susskind calls "Decide-Announce-Defend." The parties negotiated and made decisions about the investment privately, reached an agreement with the actors who granted the authorizations, made a public announcement, and defended it when they encountered opposition. This project could have benefited the Honduran economy and its population at large, but the negotiation process adopted to implement the project caused the formation of a blocking coalition that prevented the foreign investment's success.

The Introduction of Foreign-investment Projects

The Stone Container investment project showed that the way an investment project is introduced to local communities and other stakeholders can have an impact in its future development. The announcement of an investment project might bring excitement to local communities because of the potential for creating new jobs and development. The announced foreign-investment project can also result in a degree of uncertainty. Perhaps members of local communities will fear their lifestyle will be threatened. This fear can lead to anger and potential social conflicts.

Foreign investments might positively or negatively affect the local communities where the facilities or projects will be placed or established. Beyond recounting the definitions of cultural dimensions,[3] investors need to make sense of how cultural factors affect negotiations in order to understand the challenges they may face when evaluating the viability of an investment project and the strategy to apply to its negotiation and implementation.

Local Communities and Cross-Cultural Challenges

In general, when facing conflicting situations, most people face the dilemma of "fight or flight." Many people, when feeling threatened, will choose to fight for survival with an either/or mindset—a win/lose mindset—and the conflict can seriously escalate. Some cultural dimensions can explain the dynamics of how members of local communities can respond when facing foreign investment that causes them to feel threatened.

Local communities that belong to individualistic societies tend to fit into the universalist dimension approach to the application of norms. An individualistic society, or the individualistic dimension of a society, refers to

> . . . a social pattern that places the highest value on the interests of the individual. Individualists view themselves as independent and only loosely connected to the groups of which they are a part. When establishing the level of their commitment to others, individualists balance the advantages and disadvantages of cultivating and maintaining a relationship; the level of commitment generally corresponds to the level of perceived benefit. Personal preferences, needs, rights and goals are individualists' primary concerns, and they tend to place a high value on personal freedom and achievement. (Wright, 2009).

People aligned with these dimensions—individualist and universalist—tend to believe the rule of law is universally applicable to all as equals. Members of individualist societies also tend to have a small power-distance dimension and tend to be more egalitarian societies. Negotiators with an individualist orientation might believe that communities experiencing uncertainty, fear, or anger regarding a foreign-investment project will look to the court system to protect their rights. This might be considered a rights-based view of the potential conflict.

On the other hand, local communities that belong to collectivist societies tend to fit into the particularist dimension approach to the application of norms. A collectivist society, or the collectivist dimension of a society, refers to

> . . a social pattern that places the highest value on the interests of the group. Collectivists view themselves as interdependent and closely linked to one or more groups.

continued on page 29

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS
continued from page 28

> They often are willing to maintain a commitment to a group even when their obligations to the group are personally disadvantageous. Norms, obligations and duties to groups are collectivists' primary concerns, and they tend to place a high value on group harmony and solidarity. (Wright, 2009).

People aligned with these dimensions—collectivist and particularist—tend to believe the rule of law is applicable to particular individuals differently and that some people have more benefits than others based on predetermined conditions. Members of collectivist societies also tend to have a large power-distance dimension and tend to be more hierarchical societies. Negotiators with a collectivist or particularistic orientation may tend to distrust their courts and legal system. Therefore, when these local communities feel uncertainty, fear, or anger while facing foreign investment that might affect natural resources, their members tend to apply a power-based approach and participate in rallies and protests; they hope to attract the attention of political leaders and any other powerful group to protect their interests, needs, and concerns.

Foreign Investment and Government Intervention: Two Different Experiences in the Americas

A different approach was taken by the government of Costa Rica[4] while considering Stone Container's project there. Stone Container's project consisted of cultivating 24,000 hectares of gmelina-tree plantations for wood-chip production and exportation. The company investigated various locations for the plant and export facility. When the company found the proper location to construct a facility, environmentalist groups launched a media and legal campaign to prevent the construction due to their concerns for the potential damage to the environment. A new government came to power in Costa Rica, and facing this situation, named an inter-ministerial commission to analyze the investment and render a decision. The commission was supported by a technical-assistance group to facilitate cross-cultural negotiations. The commission encouraged stakeholders to provide feedback and requested written submissions of recommendations. The commission agreed to take into consideration the recommendations and the results of its own investigation. The commission made a decision, rendered a report, and approved the project, but requested relocation of the facility. In addition, joint working committees comprised of government representatives and stakeholders continued negotiating. At the end, stakeholders worked together, and the company pledged its commitment to principles of sustainable development.

In this case, the Costa Rican government managed the process and worked as decision-maker but took into consideration the concerns of several stakeholders. It played a role that legitimized the process and facilitated the negotiations among the parties.

Other governments have been more proactive facing these sorts of potential differences. One example from Peru is the Office of Environmental Justice of the Environmental Protection Agency[5] that, with the help of the Consensus Building Institute (Macey, 2003), designed guidelines to be considered when environmental justice advocates deal with conflicting perceptions of environmental quality. In December 2007, the Peruvian government announced its intention to create an Environmental Ministry to improve the management of environmental issues and assured the international community of its commitment to fulfill environmental obligations. This decision was crucial, given that Peru signed a free trade agreement with United States and Canada, and it is negotiating free trade agreements with China, the European Union, and Asian-Pacific countries. This governmental initiative can result in an increase of foreign investment in Peru.

Foreign Investors, Strategic Processes, and Trust: Situational and Cultural Considerations

Governments can design processes to take care of the needs and concerns of all stakeholders when considering a foreign-investment project. But there is no reason why a private foreign-investment company cannot design a process to better face multiparty negotiations in a host country. One approach might be to design a consensus-building process, taking into consideration cross-cultural issues. A foreign investor can decide to engage stakeholders in a consensus-building process to make a decision whether to invest. The investors have to take into consideration cross-cultural issues when designing a process for multiparty negotiations. (Conoco's case in Ecuador[6] might be an example of the failure of a process and the importance of process design and cross-cultural considerations.)

From a cultural standpoint, in the case of Latin America, according to Hofstede's research, the average of the highest cultural dimension is Uncertainty Avoidance Index (UAI), which refers to the low level of tolerance for uncertainty among Latin Americans. As a result of this high uncertainty avoidance, Latin Americans are very uncertainty-averse and do not easily accept change. (Hofstede, 2008). However, the resistance can be founded not only on cultural factors, but also on situational factors. Latin America has been the object of diverse socio-economic movements. National governments and administrations have gone from right-wing to left-wing back and forth, from democracy to dictatorships and back. Alleged corruption has been a significant factor as well. Ultimately, the lack of political and economic consistency has left behind the vast majority of the population, including local communities. Local communities and their members might perceive that foreign investors only come to take the wealth of their land or damage it with their economic activities, leaving them worse off.

Whether it is a cultural or a situational factor, distrust seems to be pervasive in low-income local communities in Latin America, especially native communities in the Andean zone. Distrust of the local communities in foreign investors might be a common belief, a cultural tendency of uncertainty avoidance, or the result of situational factors. Distrust in negotiations regarding a foreign-investment project can prevent its imple-

continued on page 30

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS
continued from page 29

mentation. If the local communities distrust the foreign investors, the population might not want to deal with them or have the investment project implemented in their ancestral lands.

Fisher and Brown (1988) recommend crucial characteristics to enhance trustworthiness: "be predictable, be clear, take promise seriously, and be honest." (p.112) Foreign investors can apply these ideas to improve their trustworthiness when dealing with local communities. Susskind (1996) recommends, "act in a trustworthy fashion" and affirms that "(…) to inspire trust one must shape expectations; or, put it as simply as possible, we must "say what we mean and mean what we say." But even if the foreign investors behave in a trustworthy manner, levels of bias and cultural lenses of the local communities' members can prevent them from perceiving the foreign investors' behavior as trustworthy. The foreign investors have a chance to shape the local communities' expectations and perceptions by engaging the communities in direct, honest, and open talks to address the distrust issue. Foreign investors must be open to the possibility that the distrust is based on situational factors, cultural factors, and/or people's perceptions.

Foreign investors should open dialogue to permit members of local communities to voice their views of risk and find ways to satisfy their concerns. It is also possible that perception of incompatible intentions or conflicting interests will be voiced by the local communities as lack of trust in foreign investors or skepticism about their intentions. It might be that the interests, concerns, and fears of local communities have not surfaced. This is the reason why going "below the line"[7] or uncovering the underlying interests behind the positions of the parties is so crucial. Foreign investors should address the needs and concerns of the local communities if they want to overcome any sort of impasse or resistance, then obtain the support or consent of the local communities for the planned investment project.

It is also possible the local communities distrust the process or system they have in place to deal with their interests, needs, and concerns (i.e., legal procedures). How the projects are announced to the communities can affect their acceptance or resistance. New and reliable processes can serve to overcome the lack of trust that local communities might have in the ones already in place. Therefore, another way to build trust might be to design a process that takes into consideration the concerns of the local communities.

A Strategic Approach for Foreign Investors: Implementable Investment Projects

Preparations for negotiation and consensus-building forums need to foresee and address the potential challenges that can affect the design and implementation of negotiation processes with local communities. Foreign investors may wish to consider: (a) the principles of consensus building,[8] (b) the principles for project planners dealing with conflicting values suggested by Professor Susskind,[9] (c) the "Phenomenological Model of a Conflict Process" developed by Ledereach,[10] and (d) the cross-cultural dimensions that could significantly affect the negotiation process. They should follow an integrative, interest-based, and cross-cultural approach to multiparty negotiations for foreign investment.

After preparation sessions about the cultural tendencies of the members of the local communities where the foreign investors plan to develop a project, and after a negotiation-strategy planning session analyzing the seven elements[11] developed by Fisher and colleagues (1991), the foreign investor can begin a multilateral negotiation process. The foreign investor can designate a representative or may use a facilitator who can contribute to this multilateral and multiparty negotiation process. A facilitator is a professional with the capacity to manage settings and group dynamics to create proper conditions and the right environment to promote collaborative discussion and deliberations while assisting others achieve their purposes and reach their goals. Ideally, a facilitator is a process expert and uses joint problem-solving, negotiation, and consensus-building strategies, as well as dispute resolution and conflict management skills. (Isenhart & Spangle, 2000).

The following are the steps for negotiating a foreign-investment project successfully:

Getting In

Manage Reputation Upfront: Build Trust and Manage Connections

A foreign investor representative, or a facilitator hired by the foreign investor, should seek a trustworthy local community leader, show respect for his or her leadership status, and acknowledge the autonomy of the local community. Request an opportunity to meet him or her, then explain that a foreign investor is interested in developing a project in the area and the company would like to explore beneficial opportunities for both the local community and the company. It is crucial to create a safe environment for these talks, expressing upfront that the investor is aligned with the principles for project planners developed by Susskind and Field (1996) when dealing with conflicting values.

It is important to assure that any proposed development project will follow these principles, as this assurance will shape expectations and create hope. Foreign investors have to express a sincere interest in learning more about the local community and its people, its culture and history. These initial talks can begin shaping and building trust. The facilitator or company representative has to share the company's reasons why its project can bring benefits to the local community. Explain that the foreign investor would like to develop an investment project in the local area, but any decision made about investing and developing the project would have to take into consideration the needs and concerns of the local community. The company would like to learn about the interests, needs, and concerns the local community might have. This joint effort should also serve the purpose of identifying other community leaders and gathering information about who might represent other stake-

continued on page 31

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS
continued from page 30

holders or who should be represented in these exploratory conversations. The facilitator or investor representative should arrange to be introduced by this initial contact (a trustworthy leader of the community) to other leaders and representatives of the community. This identification process should take into consideration collectivist and individualist dimensions because it is crucial to identify who should be at the negotiating table and what the circles of influence might be. It is important to consider the relevance of power-distance dimensions at this stage and that this first-contacted leader might vouch for the goodwill and sincere intentions of the investing foreign company. This might also build up trust in the process.

Once the leaders and citizens of the community (who will represent several voices of the community) have been identified, and the initial trustworthy leader has introduced them to the facilitator or company representative, the facilitator or company representative should explain the reason of his or her presence. The purpose of this gathering is to prepare an assessment of the needs and concerns of the community and to determine what would be the best way to proceed with the potential investment opportunity. The facilitator can also serve as reality check and help the local communities assess their alternatives and the company's alternatives. Local community members might be informed about the legal procedures through which the company could obtain a governmental permit to initiate and develop its investment project without the approval of anyone else. Having reviewed the company's legal alternatives, the facilitator could explain the company's expressed concern about opinion in the local community, the community's needs and concerns, and its desires for the future. The facilitator could stress the company's desire for the local community's input and participation in the decision whether to proceed with the investment project.

The facilitator should create hope for the process and admit that a lot of learning will take place as this process moves forward and the company and community build a positive relationship. The facilitator has to express that that he or she "hope (s) that when a mistake or misunderstanding occurs, as some inevitably will, both sides will see it as a natural part of the learning process and redouble the efforts to reach an understanding of the other's point of view." (Malhotra, 2004, p.4) The facilitator must affirm the belief that this potential project can benefit the community and the belief that needs and concerns of everyone involved will have to be taken into account in any decision made about the investment project. The facilitator must share a sincere curiosity to learn about the stakeholders, as Malhotra affirms, "by taking the time to understand the other party's history, culture, and perspective, you send the message that you're committed to the negotiation and the relationship – an integral step in trust building." (Malhotra, 2004, p.4).

When listening for interests and interacting with others, there are cultural implications that need to be taken into consideration. According to professor Meierding (2007), diverse levels of understanding and reciprocity exist: meaning, credibility, and resentment. When people are interacting and listening for interests, foreign investors' representatives and facilitators need to be aware that the recipient of the message might not understand the message delivered (meaning), or might understand the message delivered but don't believe in its content (credibility), or might understand the message but dislike its sender (resentment).

Once the facilitator has gathered enough information about the issues and interests of the stakeholders, a draft agenda for a consensus-building forum can be developed, but this agenda should not be closed. It should be open to the possibility of including any other topic or issue that might have been missed. This point is important culturally because members of collectivist societies tend to approach negotiations with a polychronic dimension—holistic and circular thinking—and they may refrain from participating in a forum if they think their other concerns will not be included.

Getting Through

Stakeholders' Involvement

In general, people get upset when decisions that affect them are made without taking into consideration their concerns. Stakeholders will be better off if they negotiate a joint agreement or at least are consulted and are allowed to provide feedback about their concerns when others make decisions.

From a collectivist standpoint, relationships need to be built and nurtured when negotiating agreements. Foreign investors, who often come from individualist societies, need to understand that there might be other circles of influence that can work behind the scenes to build a winning or a blocking coalition in favor or against the investment project. Foreign investors need to identify the real decision maker(s) and the networks that can influence the decision-maker(s).

Joint assessment

Once the groups of stakeholders come together, they should think together to evaluate and improve the informal needs assessment previously discussed, perhaps including topics they missed in their initial assessment. Once the agenda is ready, people can engage in problem- solving and look for practical solutions to the issues at hand. This group problem-solving effort should follow some organizing framework and be facilitated by a professional facilitator who has cultural sensitivity and awareness. Before the parties make decisions about resolving the challenges at hand, credible information should be available to all the stakeholders. Stakeholders should start with an exchange of information upfront, even if the interpretation of facts and forecasts based on those facts are perceived differently. At this stage, stakeholders have to suspend judgment to be able to creatively approach the challenges. Stakeholders have to work together to determine what information they have and do not have, and reach consensus about what types of information they want to find. Therefore, before the stakeholders make decisions of any type, they can engage in a joint

continued on page 32

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS
continued from page 31

fact-finding process, a collaborative process to deal with technical difficulties, by which parties decide together what information they need and how information is going to be gathered, analyzed, and interpreted.

It is possible that after the information is gathered, even if the local community and other stakeholders and the foreign investors agree on the data, they may interpret it differently. Fear and risks divined from the data may generate fear and distrust. One cause of fear might be uncertainty about what will happen in the future if the investment project does not turn out as hoped. Fear and anger can cloud people's reasoning, but differences in beliefs about how future events will unfold can be bridged by contingent commitments, which are "deal structures that permit parties to 'bet' on their predictions by specifying different payoffs based on future events." (Bordone & Moffitt, 2006, p.3). The foreign investors can offer contingent commitments to ease the local communities' worst fears.

It is important to highlight that in cases in which the implementation of a foreign-investment project may affect a local community environmentally, it might be necessary to make the local community members more than just better off. As Professor Susskind might say, contingent commitments need to be so convincing that local communities will consider the prospective risks of establishing a foreign-invest project worth taking. (Susskind, 1996)[12]

Talking, Chatting and Working Arrangements: Joint Problem-Solving and Citizen Choice

The objective of joint problem-solving is to try to create agreements that leave everyone better off than they would have been had no agreement been reached. The problem-solving approach has to take into consideration additional cultural factors. Besides the "levels of understanding and reciprocity," other significant cultural factors must be taken into consideration when people from diverse cultural backgrounds negotiate. For example thought-processing styles can affect and actually frustrate a negotiation process. A monochronic person tends to have a linear thinking process, follow precise points of an agenda, and make commitments while proceeding through the items on the agenda. A monochronic sees time as money. A polychronic person tends to think more holistically, jumps from one idea to other, and then comes back to the initial one. A polychronic person considers all the options and items on the agenda as a total package. A polychronic person sees time as relationships.

Direct and indirect communication styles are also relevant factors. Some people can be indirect when talking about relevant issues and "beat around the bush," while others go straight to the point. The direct communicators criticize the indirect communicators for not being able to have a frank dialogue, while the indirect communicators criticize the direct communicators because of their lack of tact when talking about issues.

It is also worth considering that typical individualistic people tend to approach negotiations in a straightforward and competitive manner. Americans are well know for the expression, "Get down to business," while members of collectivist cultures tend to be less task-oriented and more relationship-oriented. For collectivists, the negotiating parties need to get to know each other and then they can talk about business.

Perception of time also affects the negotiation process. While some people want an itemized agenda clearly divided by units of time, others are unwilling to allocate in advance the amount of time needed to address a situation or concern. This can be compared to a children's game in which those lose their patience and their temper lose the game. If a negotiating party (i.e., individualist) loses its patience, it will lose the deal.

Another sensitive topic is the standard of fairness among different cultures. As Meierding (2007) affirms, there are different standards of fairness. There are the objective criteria under the legal framework, there is an equity theory that people should receive something based on their contribution to the creation of an idea or project, and there is a cultural-based theory, which uses cultural values to determine what is fair. For example, fairness can be based on seniority, status, gender, or necessity.

Once stakeholders and foreign investor have developed a draft agreement, groups of stakeholders should take a written version of the draft agreement back to the constituencies they represent for discussion and gain more feedback and insights from them. This stage can bring additional concerns of the local communities up to the surface, along with potential resistance or challenges to implementation. Some researchers suggest broadcasting a cable/TV session, but these problem-solving sessions could be recorded and made available to whoever might be interested.

Getting Locked

If during any stage of the multiparty negotiation process, stakeholders get stuck and locked in their interactions or run into an impasse, the facilitator should go back to the process, moving away from positions toward interests and rectifying any potential cultural misstep. Honoring and sharing appreciation for the culture and identities of all the parties is always rewarding.

Getting Out

Stakeholders groups and foreign investor representatives should try to foresee the obstacles that the implementation of the investment project might face. Parties should continue learning and developing relationships. Once the foreign-investment project has been approved, the communication channels should be kept open to gain feedback, to ensure that implementation is aligned with what was previously agreed, and to continue making joint decisions with local community members to address any concerns. As Susskind (1996) affirms, "if impacts or risks, such as mercury poisoning, are worse than expected, the citizens ought to be involved in formulating revised mitigation strategies." (p.175)

continued on page 33

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS

continued from page 32

There is a common tension between establishing foreign investments in developing countries and impacting the environments of local communities. But foreign investors and local communities can work together to reach mutually satisfactory agreements that take into consideration interests, needs, and concerns important for each stakeholder. Even if there are huge cultural differences among the potential negotiating parties, there is always a chance to bridge this gap. Because culture can be compared to an iceberg which has its values, beliefs, and worldviews influencing people's thinking and behavior under the water, a professional facilitator can dive in by respectfully and curiously probing and listening, while being aware of the different levels of understanding. Paying attention to cultural issues, respecting differences, learning about the local communities where the projects are to be established, honoring others' cultures, appreciating others' identities, acknowledging emotions, framing the foreign investment as a mutually beneficial opportunity, and engaging stakeholders in decision-making processes will build the trust required to have positive working relations among foreign investors and local communities. Countries will welcome more foreign investment and improve the conditions of their economies and the living conditions of their people.

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ENDNOTES

(EDITOR'S NOTE: The author of this article is not a U.S. attorney, and his endnotes do not appear in *Bluebook* format).

[1] Sebenius, J., & Riley, H. (1997). Stone Container in Honduras (A & B), *Harvard Business School Cases # 897-172 and 897-173.* This case study examines Stones Container's negotiations with the government of Honduras, which withdrew its support of the investor due to stakeholders' opposition.

[2] EDITOR'S NOTE: Some of the author's references are detailed in the "Resources" section following these Endnotes.

[3] Edward T. Hall, Geert Hofstede, and Alfons Trompenaars are some of the leading researchers who have studied cultural dimensions and differences in different settings. Some examples are: Hall's dimensions of Monochronic / Polychronic processing styles and High Context/Low Context communication styles, Hofstede's dimensions of High / Low Power Distance, individualism / Collectivisms and Uncertainty Avoidance, as well as Trompenaars's dimensions of Universalism / Particularism regarding the applications of rules in society. These authors have brought about a higher sense of awareness of cultural factors people must take into consideration when dealing with others. These cultural dimensions help negotiators understand the behavior and thinking of negotiating parties. However, cultural awareness is not enough; governments, business people, and local communities dealing with international business and foreign investment need to move from cultural awareness to cross-cultural competence and building cross-cultural negotiation capabilities that allow them to efficiently negotiate and reach their goals and objectives.

[4] Sebenius, J., & Riley, H. (1997). Stone Container in Costa Rica (A & B), *Harvard Business School Cases # 897-140 and 897-141*. Examines Stone Container's negotiations with the government of Costa Rica in a development project in which the government played an active role managing a process to bring the stakeholders together and reach a settlement.

[5] Macey, G. , & Susskind, L. (2003). *Using Dispute Resolution Techniques to Address Environmental Justice Concerns: Cases Studies.* Cambridge, MA: The Consensus Building Institute (CBI). CBI developed guidelines for The Office of Environmental Justice within the U.S. Environmental Protection Agency to use ADR and consensus-building processes to address people's environmental concerns.

[6] Salter, M. & Hall, S. (1994). Block 16: Conoco's "green" oils strategy (A, B, C, & D), *Harvard Business School Cases # 394-001, # 394-005, # 394-006, and # 394-007*. Examines Conoco's negotiations with Ecuadorian government in the development of a $600 million oilfield project that failed during its attempts to reach consensus with stakeholders.

[7] "Below the line" is a concept that means parties in conflict should look below the parties' positions to understand the interests, needs, and concerns and other motivations underlying the positional bargaining.

[8] Principles and phases of consensus building: convening, assigning roles and responsibilities, facilitating problem solving, reaching agreement, holding people to their commitments. (Susskind & Cruikshank 2006, pp. 20-22)

1. In any group or organizational effort to make decision, it is crucial to clarify the responsibilities the people involved have to others they are presumed to speak for, or otherwise represent.
2. Once a group gets together, it should not start work until its members clarify what their mission is, decide what their agenda will (and will not) include, and settle upon the ground rules that will guide their conversation.
3. Before a group tries to make decisions on anything, the participants should engage in joint fact-finding.
4. Groups should try to generate agreements that leave everyone better off than they would have been if no agreement had been reached.
5. It is important to hold people working in groups responsible for taking a written version of a draft agreement back to the people or groups whom they represent.

continued on page 34

CROSS-CULTURAL NEGOTIATION AND CONSENSUS-BUILDING STRATEGIES FOR FOREIGN-INVESTMENT PROJECTS: BEYOND LEGAL SYSTEMS
continued from page 33

6. Groups should always think ahead about things that can go wrong as they try to implement whatever decision or agreements they reach.

[9] The principles for project planners dealing with conflicting values were suggested by Susskind and Field (1996):

1. Fairness in process and substance matters, especially when there have been past inequities.
2. Discussion around the design and implementation of controversial developments requires meaningful input from all stakeholders.
3. A community must be left substantially better off if it is expected to "host" a development
4. Decision-makers (including citizens, as stated in principle 2.) should have access to the best technical advice available, but technicians should not make what are essentially political decisions.

[10] Lederach developed a "Phenomenological Model of a Conflict Process" to analyze and guide conflict management in different cultural settings. Here is used based on the work done by Augsburger, D. (1992).

[11] Fisher and colleagues (1991) in their work developed an approach to negotiations analysis and strategic planning using seven elements: communication, relationships, interests, options, legitimacy, alternatives, and commitments.

[12] "In the case of communities anxious about risky facilities (such as mines), unless the residents stand to become better off than they will be without such facility, why should they agree to accept the risk involved? Even a contingent promise to clean up, pay medical expenses, or cover the loss of property values won't be enough, especially if the community is relatively well off. Even if the community is not well off, recent emphasis on environmental justice suggests that poor and minority communities, just like everybody else, do not want to bear undue and unfair risk. The only way to site such facilities successfully is to promise the community something valuable – something that they define as 'worth the risk.' (…) However, the concept is straightforward: Contingent commitments need to be sufficient to convince an angry public that prospective risks are worth taking" (Susskind & Field, 1996, p.151).

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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, or fax it to 214-368-7258

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You are the President of the Mediator Credentialing Organization of Texas, an organization that purports to credential mediators by setting high standards for training, continuing education, adherence to Rules of Ethics, and establishing a grievance procedure. You have just received the letter below, quoted in italics, and have been instructed by the Board of Directors to respond to the writer. What is your response?

(NOTE: The Rule 11 referred to is essentially identical to the State Bar of Texas ADR Section's Ethical Guidelines Rule 11 and the Supreme Court's Ethical Guidelines Rule 11, except that the language in the credentialing Rule 11 is mandatory "shall" instead of "should").

****

Dear President of Mediator Credentialing Organization in Texas:

I am an attorney and have been licensed to practice law in Texas for more than thirty years.

In the early nineties, I attended and completed the 40-hour mediation training course and have been mediating since that time. I became a full-time mediator ten years ago and have mediated over 3,800 cases using the evaluative format.

I recently attended and completed the 30-hour Advanced Family Mediation Course. At that course, we discussed the attempt being made to have mediators credentialed. However, when reviewing the Ethical Rules for Mediators, I find I am unable to satisfy the requirements for credentialing due to Rule 11. As you know, Rule 11 disallows a mediator from giving legal or other professional advice to the parties, a practice that I use in my evaluative mediations.

If there is truly an attempt being made to have mediators credentialed, why do the ethical rules exclude those of us using the evaluative format? If the Rule were amended to add "unless all parties' attorneys are present and agree otherwise" all mediators would seem to be included regardless of the format they choose to use. Please reply.

Signed,

"Would Like to be Credentialed"

Michael K. Clann (Houston): Dear "Would Like to be Credentialed," The last paragraph of your inquiry suggests that most, if not all, of your mediations are conducted with attorneys present. If the participants are not represented by counsel, I would suggest a great deal of caution. Completely aside from ethical considerations, if you were to offer legal or professional advice under such circumstances, your E & O exposure would be greatly increased.

Where a participant is represented by counsel, however, I see no inconsistency between being an evaluative mediator and compliance with Rule 11. Not only can an evaluative strategy be effectively implemented by the artful use of questions (thus avoiding the trap of rendering advice), but it also is the most effective method to instill a heightened awareness of the risks and burdens associated with going forward with a dispute. A statement that disagrees with a participant's preconceived beliefs or desires is almost always resisted. On the other hand, the right questions invite thoughts that tend to erode preconceived notions.

Lastly, if a participant is represented by counsel, the appropriate party to give the client advice is the client's lawyer. Acknowledgement of and respect for that relationship can often make the difference in gaining the cooperation of counsel in persuading a recalcitrant client to do what is in his or her best interests.

Yours truly,
Michael K. Clann

Mike Patterson (Tyler): Dear "Would Like to be Credentialed," It is important to remember one of the key principles of mediation is self-determination. The parties must be allowed to make voluntary and unforced decisions. Just as important is the impartiality of the mediator. When a mediator gives legal advice or other professional advice, those principles become challenged.

The prohibition against giving legal advice does not mean you cannot use the evaluative style. You can still employ that method. You can still discuss relevant legal issues and strengths and weaknesses. There are limits, however, and an unfettered evaluative method that involves giving legal advice not only impairs self-determination and impartiality, but raises issues concerning the unauthorized practice of law and the establishment of an attorney-client relationship with a party.

continued on page 36

Ethical Puzzler
continued from page 35

There is a well written article, "Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law," (*Dispute Resolution Magazine* at 20 (Winter 2000)), by David Hoffman and Natasha Affolder, that sets out some of the dangers of giving legal advice. Some states have enacted legislation barring mediators from giving legal advice in mediation. This is not something we want to encourage. If you have a multi-jurisdictional practice, you may be accused of violating UPL laws in states in which you are not licensed. Do you want the AG's Office or local district attorneys deciding whether you were violating certain statutes, or would you rather let mediation associations make those decisions? When we don't regulate ourselves, others will.

Giving legal advice as a mediator may also establish an attorney-client relationship where the party believes the mediator has legal expertise in an area and seeks and receives advice on how to proceed. You can just as easily make your point without giving legal advice and exposing yourself to this liability.

Your proposal—to change the ethical rule to allow mediators to give legal or professional advice if the attorneys agree to so—does not do away with these problems. The prohibition against giving legal advice is a benefit not only to the parties to mediation, but also to mediators.

Yours truly,
Mike Patterson

Don Philbin (San Antonio): Dear "Would Like to be Credentialed," Thank you for your credentialing inquiry, and for candidly raising a potential conflict between your own successful practice and the aspirations of our Rule 11.

The debate over what constitutes mediation – and the (unauthorized) practice of law – has consumed more that a few trees since Professor Len Riskin concluded there was no widely accepted classification of mediation conduct and proposed a two-dimensional grid as a framework for discussing the range of practices called "mediation." The fact that one continuum ran from "facilitative" to "evaluative" sparked considerable debate. Purists saw no place for evaluation in mediation. According to the purists, such a practice was not mediation all, was perhaps unethical, and might constitute the unauthorized practice of law in some situations. They sought uniform codes and professional rules implementing those positions. Some lined up on the other side, and some sought to keep non-lawyer professionals out of mediation with UPL complaints. With this hindsight its hard not to see a turf war permeating a welcome debate.

Our concern is with user satisfaction. Parties in conflict have a wide variety of options. They can ignore a problem, and many will simply go away. They can seek legislative or appellate paradigm shifts that have broad future implications. But statistics tell us that most filed lawsuits never reach a jury trial and that most mediated cases settle. The cornerstone of mediation is party consent. The parties select their own method of dispute resolution and decide whether they will ultimately settle. And with full information, few will settle unless they perceive settlement to be more attractive that their alternative – court, legislation, etc.

The rub lies in how an ADR provider helps the user answer that question, "What if . . . ?" Trying to lead a party through a hard-headed analysis of its options is different than declaring an outcome in a manner resembling arbitration. Non-coercive suggestions exploring the strengths and weaknesses of a case are permitted under Rule 11. As you correctly note, "professional advice" is prohibited under Rule 11. Helping parties work a puzzle with varying levels of information preserves neutrality. Flatly declaring that one side has the better case risks losing the other side. The mediator may go from "honest broker" to "dumb arbitrator" in seconds. Whether that violates a rule or not, it does nothing for helping parties tap down their conflict, and settlement necessarily requires consent.

Riskin's problem continues – it's hard to short-hand mediation practice with labels. Even when mediators self-declare their style ("evaluative," facilitative," "transformative," etc.), they are inconsistent. What you describe as evaluative mediation may be rigorous (and neutral) "what-if" testing that preserves party self-determination. May I suggest some additional reading that will help both of us determine whether this is the right organization for you based upon your actual practices? Patrick McDermott wrote a leading text on ADR in the workplace while he was a Capital Cities/ABC. Now professor McDermott reviews this debate in an aptly titled piece, "*What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARVARD NEGOTIATION LAW REVIEW 75 (2004). Sections I and II (and their footnotes) capture the essence of the debate. Don't miss Kimberlee Kovach's *Evaluative Mediation is an Oxymoron and the Risks of Riskin's Grid.*

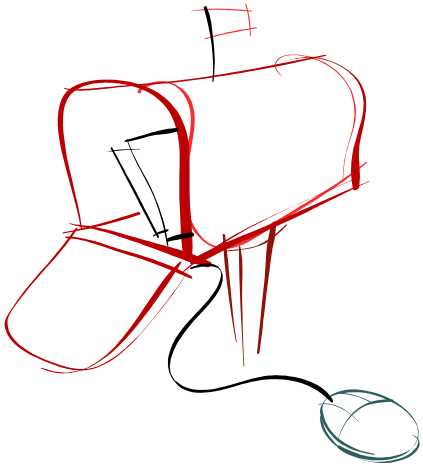
I will touch base with you in two weeks to see how you feel about holding our credentials and following the rules that accompany them.

Sincerely,
Don Philbin

John Palmer (Waco): The rule at issue, Texas Mediator Credentialing Association (TMCA) Standards of Practice and Code of Ethics Rule 11, provides, "A mediator shall not give legal or other professional advice to the parties." (The Texas Supreme Court Ethical Guidelines [based on ADR Section guidelines] use "should" instead of "shall"). The basis of a mediator's craft is to abide by Rule 1, which states in part, "Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties in conflict and strives to promote reconciliation, settlement, or understanding. A mediator shall not render a decision on the issues in dispute." (TMCA R. 1. Tex. Sup. Ct. Ethical Guidelines R.1 uses "should" instead of "shall").

I suggest that instead of being evaluative, the mediator should revisit the Rules and think about alternative paths to get *the*

continued on page 38



ADR on the Web

By Mary Thompson*

PERFECTAPOLOGY.COM

http://www.perfectapology.com

The offer of an effective apology can be a powerful factor in the resolution of a dispute. Many of us have recently had a chance to reflect on the role of apology by hearing Nina Meierding's presentations on apology at the annual conferences of both the Association for Conflict Resolution and the Texas Association of Mediators. Perfectapology.com provides an opportunity to look in more depth at the various types, techniques and implications of saying you're sorry.

According to the site, the perfect apology is a matter of both science and art. The "scienc" part relates to having the proper structure:

- A detailed account of the situation
- Taking responsibility for the situation
- Recognition of your role in the event
- A statement of regret
- Asking for forgiveness
- A promise that it won't happen again
- A form of restitution whenever possible

This may account for why "I'm sorry you got so upset" just doesn't make up for your co-worker mistakenly forwarding your assessment of your boss's new haircut to the whole senior management team. Or why "I'm sorry you didn't see my client's car run the red light" may actually prolong the personal injury mediation for another 3 hours.

The "art" of the apology relates to how the apology is communicated and to matching the apology to the needs of the audience: level of formality, timing, nature of the relationship.

Sections of the website address creative apologies, regret vs. remorse, posts of real apologies from readers, and famous apologies. The section entitled "All About Business" offers particular relevance for mediators. This section contains

- A "perfect apology" letter from Jet Blue Airlines
- A brief discussion of the legal implications of apologies in various states
- A summary of research by University of Illinois law professor Jennifer Robbennolt indicating that offering no apology is more likely to settle a lawsuit than offering an incomplete apology
- An overview of the "Full Disclosure/Early Offer" movement used in medical error cases

Perfectapology.com reflects our field's current focus on forgiveness, reconciliation and relationship transformation. We know that an apology can be a crucial component in settlement. Yet insincere, incomplete or poorly-timed apologies often backfire. This website provides information to enhance a mediator's ability to surface the need for, help to frame, and help facilitate the offer of effective apologies.

***Mary Thompson,** *Corder/Thompson & Associates, is a mediator, facilitator and trainer in Austin. If you are interested in writing a review of an ADR-related web site for Alternative Resolutions, contact Mary at emmond@aol.com*

SUBMISSION DATES FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

Issue	Submission Date	Publication Date
Summer	June 30, 2009	August 30, 2009
Fall	October 15, 2009	November 15, 2009
Winter	December 15, 2009	February 15, 2010
Spring	March 15, 2010	May 15, 2010

SEE PUBLICATION POLICIES ON PAGE 44 AND SEND ARTICLES TO:

ROBYN G. PIETSCH
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Phone: 713.743.2066 FAX:713.743.2097 or rpietsch@central.uh.edu

Ethical Puzzler
continued from page 36

parties and/or parties' attorneys to evaluate their cases. Although it sounds trite, the mediator should live in the question, and ask the parties to look at the issues from all aspects possible. Not only should the parties look outside the box, they should look outside the room where the box is to find creative ways for the parties to find possible avenues to resolve their case. If the parties and the neutral want the neutral to serve in an evaluative fashion, I would politely request that the neutral refer to the process by another name, as the process is not a true mediation.

Finally, voluntary credentialing is important for the mediation process. We have a golden opportunity to regulate without governmental regulation. The TMCA provides a grievance procedure based on a voluntary Code of Ethics. The ADR Section Council helped create this organization, which consists of board members who are members of the leading mediation organization throughout the State of Texas. Membership in your ADR organization of choice and the TMCA will help keep the mediation profession among the self-regulated.

COMMENT: Mediation should not be confused with arbitration or any other form of alternative dispute resolution. By statutory definition of the Texas Alternative Resolution Procedures Act (Texas Civil Practices and Remedies Code, Sec. 154.001-154.073) and by definition of the Supreme Court Guidelines for Mediators (as well as the Ethical Guidelines/ Riles of the ADR Section of the State Bar of Texas and the TMCA), mediation is widely accepted as a private process in which an impartial third person, the mediator, encourages and facilitates communication between parties to a conflict and strives to promote reconciliation, settlement or understanding between or among them. All Texas-wide ethical codes/ guidelines acknowledge that a mediator should not render a decision on the issues in dispute, as the process is one of self-determination with the primary responsibility for resolution resting with the parties.

The mediator, therefore, must refrain from directly informing the parties about the probable outcome of the lawsuit. However, as our writers have thoroughly pointed out, this does not eliminate the ability of the mediator to use a more-evaluative style of mediation or risk analysis *so long as he/she stays within the ethical constraints of the statute and the various ethical standards*. Perhaps a good motto for mediators preferring the evaluative style would be "ask, don't tell," and under no circumstances give legal (or other professional) advice during the course of the mediation.

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

Reflections From The Edge
continued from page 26

ENDNOTES

[1] Likely the most common for arbitrators is the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004), available at http://www.abanet.org/dispute/commercialdispute.

[2] For example, at the national level, three organizations—the American Bar Association Section of Dispute Resolution, the American Arbitration Association, and the Association for Conflict Resolution—have enacted model standards for mediators. The current version, Model Standards of Conduct for Mediators, revised original standards enacted in 1994, and can be found at http://www.abanet.org/dispute/documents/model-standard-conduct-april 2007.pdf. These revised standards will be referred to as the Model Standards. Numerous other codes exist, ranging from statewide mandates to program specific guidelines and rules.

[3] A primary example is the direct conflict between an ABA opinion (see ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-439, Lawyers Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation, April 12, 2006, which construed the Comments to Rule 4.1 to permit deception in mediation) and the Mediator Model Standards, which urge a mediator to "promote honesty and candor" among all participants. Model Standards, Standard VI.4. Also see Kimberlee K. Kovach, Ethics Opinion a Step Back in Time, Complicate Responsibility of Mediators, at ABA Section of Dispute Resolution, e-newsletter, August 2006.

[4] Texas, along with most states, enacted codes based upon those set forth by the American Bar Association, the Model Rules of Professional Conduct, found at http://www.abanet.org/cpr/mrpc/home.html.

[5] See Kimberlee K. Kovach, *The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way,* 49 S. TEX. L. REV 789 (2008); Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399 (2003).

[6] See Model Rule 1.6.

[7] Model Standard I provides that a mediator "shall conduct a mediation based on the principle of party self-determination."

[8] James J. Alfini, *Mediation as a Calling: Addressing The Disconnect Between Mediation Ethics and The Practices of Lawyer Mediators* 49 S. TEX. L. REV. (2008); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775 (1999); Nancy A. Welsh, *The Thinning Vision of Self Determination Court-Connected Mediation: The Inevitable Price of Institutionalization*?, 6 HARV. NEGOT. L. REV. 1 (2001).

[9] Model Standard VI, Quality of Process, specifically calls for the process to be conduction with "procedural fairness . . . mutual respect. Standard II, Impartiality, dictates that a mediator conduct the process free from "favoritism, bias or prejudice".

[10] Supreme Court of Texas, Misc. No 05-9017.

[11] The substance of these guidelines is identical but for a couple of exceptions, the primary one being the change from "should" in the Texas Supreme Court guidelines to "shall" in the TMCA guidelines. See Preface to TMCA Ethical Guidelines.

[12] Ethical Guidelines for Mediators, 8.

[13] I realize, however, it is unlikely the Act will be enacted in Texas. See Brian D. Shannon, *Dancing with the One that "Brung Us" – Why the Texas ADR Community has Declined to Embrace the UMA,* 2003 J. DISP. RESOL. 197. *But see* Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99.

[14] UMA Section 6 (a) (4).

[15] Model Standard V.

[16] See Model Standard V.A.

[17] Standard VB.

[18] Certainly, if the settlement amount is not a material fact for purposes of negotiation (see comments to Rule 4.1), then hidden assets could be viewed as not the subject matter. Likewise, additional information concerning the failure of a lawyer to join another defendant was termed "nothing to do with the negotiations" in the case, as a way to get around confidentiality. *See In re Waller*, 573 A.2d 780 (Ct App. D.C. 1990).

[19] *Supra* note 10.

[20] Tex. Civ. Prac. & Rem. Code 154.071.

[21] See e.g., *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110, 1128-29 (N.D. Cal. 1999). For a more in-depth analysis of the need for evidence in these types of cases, see Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality* 35 U.C. DAVIS L. REV. 33 (2001); Peter Robinson, *Centuries of Contract Common Law Can't Be Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened,* 2003 J. Disp. Resol. 135.

It isn't enough to talk about peace, one must believe it. And it isn't enough to to believe in it, one must work for it.

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

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3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
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5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
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ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

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

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

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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.

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

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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."

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