Alternative Resolutions

State Bar of Texas | Alternative Dispute Resolution Section

Lionel M. Schooler, Chair, ADR Section

Summer 2016: Vol. 25, No. 3

Chair's Corner

This is my inaugural column as Chair of the Alternative Dispute Resolution Section. I hear it frequently said by persons assuming the helm of an organization like this one that they "have a hard act to follow." In my case, that is not merely a throwaway phrase: I am following in the footsteps of the latest group of outstanding Section leaders—Ronnie Hornberger, Hon. Alvin Zimmerman, Don Philbin and Erich Birch. Individually and collectively, they are a very hard act to follow and each, in his own way, has left big footprints for me to fill. I hope to do so. Luckily, I have the good fortune to take the reins at a time when the Section is functioning very well, and when I am very ably supported by a stellar Council.

Service to the Section. My first priority is for the Council to provide service to the Section. To further that goal, I am presently discussing with

Inside This Issue

Chair's Corner 1
Ethical Puzzler 4
Why Mediators Shouldn't Believe Everything They Think, Part 1, by Charles Penot 10
Mediation Facilities, Part 2: The One Question that Should Guide the Rest (and More), by John de Groote 19
Colloquy with . . . Chris Nolland, by Lynne Nash 23
The Proposed Texas Uniform Collaborative Law Act: An Executive Summary, by Lawrence Maxwell 30
Arbitration in the Supreme Court(s): An Update, by Lionel Schooler 43
Calendar of Events 49
Section Leadership 50
Article Submission Guidelines 52
Membership Application 54

the Council certain ideas to put into place, which will hopefully be formalized and announced soon.

In the meantime, ***I want to know what you think***. Please let me know your ideas/suggestions/criticisms (lschooler@jw.com). You can also communicate your thoughts to our Chief Editor, Kay Elliott (k4med8@swbell.net) or our Managing Editor, Jennifer Alvey (jalvey@jenniferalvey.com).

Newsletter Leadership. By the way, as Erich Birch indicated in his column in our last issue, Kay and Jennifer are spearheading our editorial restructuring of the Newsletter, and the Section is very blessed to have two such capable persons taking on these roles. If you have an idea for a substantive contribution to the Newsletter, please let one of them know.

ADR Handbook. Under the stewardship of Kay and Frank Elliott, the Section has striven for several years to create a Handbook compiling articles of interest pertaining to mediation and arbitration that will represent the pre-eminent desktop source for all practitioners, whether ADR professionals or advocates. Based upon the report that Kay made to the Council about this proposed statute at the Summer meeting on June 17, the Handbook is in the final stages of editing and proofreading. We anticipate it will be ready for marketing and distribution by September.

Pound Conference. As Erich announced in the last issue, the Section has been invited to participate in a very exciting world-wide project, the Global Pound Conference. (www.globalpoundconference.org). Austin has been selected as one of only 8 sites in the U.S. to host this conference, which is focusing upon improving access to justice, as well as the quality of justice in civil and commercial disputes. The purpose of the Conference is to shape the future of dispute resolution. Our very own Kim Kovach, the very first Chair of this Section, has been serving on the Planning Committee and is the coordinator for the Austin event. Because of Kim's and Erich's efforts, the Pound Conference will be held on Thursday, January 26, 2017, the day before our Annual CLE meeting on January 27 at the State Bar Center.

Contents of This Issue. This issue of the Newsletter is full of useful information for mediators and arbitrators, including the following:

Lead Article: "Why Mediators Shouldn't Believe Everything They Think, Part 1," by Charles Penot. Charles discusses the book *Thinking, Fast and Slow* by Thomas Kahnemann, a Nobel-winning psychologist, and the implications for mediators. Humans have 2 systems they use to confront problem-solving: System 1, which is quick, automatic and often undetected force that shapes our reasoning; and System 2, the logical, rigorous way of problem-

solving. While we all like to think "we" are our System 2, Kahneman (via Penot), shows that very often, System 1 rules the roost, without our awareness. Penot discusses the ways this happens, and gives some useful take-aways for mediators. Part 2 will focus on strategies for raising the awareness of System 1 thinking by both mediators and mediation participants.

Mediation Article: The next article is "Mediation Facilities, Part 2: The One Question that Should Guide the Rest," by the Section's Chair-Elect, John DeGroote. John discusses how mediators can provide better client service through anticipating their needs, before participants even have to ask.

Conversation with Chris Nolland:. A new feature in the Newsletter is the "Colloquy with . . . Chris Nolland." Kay Elliott and her student, Lynne Nash, will be conducting interviews of notables in the mediation community, commencing with Mr. Nolland's thoughts on settlement counsel: What his/her role is, and how Mr. Nolland became involved in performing this unique function.

Legislative Preview: "The Proposed Uniform Collaborative Law Act Summary," is penned by Lawrence Maxwell, a long-time ADR Professional from Dallas. Mr. Maxwell discusses what collaborative law is, and why it is important for Texas to adopt the uniform law that is being proposed. Mr. Maxwell made a presentation to the Council about this proposed statute at the June 17 meeting, and the Council thereafter approved a resolution for the Section to support Mr. Maxwell's efforts in having this proposed law enacted by the Legislature in its upcoming session.

Ethical Puzzler. As usual, we also have Suzanne Duvall's regular contribution to ADR ethics with her "Ethical Puzzler" column. I will let you migrate to her article to see the subject she takes on this issue.

Arbitration Article. Finally, and hopefully not least, there is "Arbitration in the Supreme Court(s)—An Update." The author (me) covers the recent arbitration decisions by the U.S. Supreme Court and the Texas Supreme Court in their most recent terms.

I look forward to serving you this coming year, and look forward to your suggestions and feedback.

Lionel M. Schooler, Chair
Jackson Walker L.L.P.

Ethical Puzzler

by Suzanne Duvall

Q:

You are an attorney representing one of the parties in a two-party lawsuit. The amount in controversy is several million dollars. You and the opposing attorney have agreed to go to mediation and have jointly selected Mr. Wonderful to serve as the mediator.

Prior to the mediation, both you and opposing counsel ask Mr. Wonderful what his fee is for a full-day mediation to which he replies to each of you, "Don't worry about it. Let's see if the case settles and then we'll talk about the fee." You proceed with the mediation without further discussion.

After a full day of difficult mediation, the case settles and all parties are pleased with the outcome. Several days later, both you and the opposing counsel EACH receives a bill from Mr. Wonderful for his services in the amount of $120,000.00–that's a total of $240,000.00 for a one-day mediation.

How do you respond (or react)? What, if any, are the ethical issues involved?

Alvin Zimmerman, Houston

I believe it is inappropriate for the mediator to charge a fee without having the parties agree to it in writing, in advance of the mediation, so that the service user would have an opportunity to decline the service when first learning of the fee. It would be inappropriate for the mediator to charge a fee that is unreasonable and gives the appearance of impropriety. For guidance in this area I looked to the Texas Mediators Credentialing Association ethical standards which state:

> 3. Mediation Costs. As early as practical, and before the mediation session begins, a mediator shall explain all fees and other expenses to be charged for the mediation. A mediator shall not charge a

> contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator shall consider performing mediation services at a reduced fee or without compensation.
>
> Comment (a). A mediator shall avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.
>
> Comment (b). If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator shall decline to serve so that the parties may obtain another mediator.

I would present this information to the mediator and suggest an appropriate fee that my client would be willing to pay. If this mediator was a member of the Texas Mediator Credentialing Association, I would advise my client that this Association provides a venue to consider grievances against mediators and if the matter was not satisfactorily resolved, my client could avail itself of this process as well as other legal remedies.

Bill Lemons, San Antonio

I do not see any ethical dilemma for Mr. Wonderful so long as both checks in the amount of $120,000.00 clear. The *Model Standards of Conduct for Mediators* (AAA, ABA, ACR - 2005) authorize the mediator to develop a fee structure "in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required, etc."

But my guess is that although pleased with the outcome of the mediation, neither party is going to voluntarily write a check that large. Well, we learned from *Levin Law Group, P.C. v. Sigmon,* 2010 WL 183525 (Tex.App. – Houston [14th Dist.] 2010, *pet. den.*) that under similar facts, there is no enforceable contract. There obviously was no meeting of the minds as to the essential terms of any fee arrangement. Not only can silence not provide assent, the parties did not even talk about the amount of the fee prior to the mediation.

Perhaps that is why the *Model Standards* also require that the mediator "shall provide . . . true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred . . ." And why the *Ethical Guidelines for Mediators* (approved by the Texas Supreme Court on June 13, 2005, which is also Standard of Practice 3 of the TMCA) mandate that "as early as practical, and before the

mediation session begins, a mediator shall explain all fees and other expenses to be charged for the mediation. A mediator shall not charge a contingent fee or a fee based upon the outcome of the mediation." And why most rules for court-annexed mediation, such as those for the U.S. District Court for the Western District of Texas, provide "the Mediator's daily fee and payment arrangements will be agreed upon prior to mediation."

In my own practice, I have noticed recently a trend where it may be that some lawyers are beginning to play a sort of contingent fee game. "Well, I forgot to bring your check. Can I mail it to you?" Or the last wiggle, late afternoon is "can you get them to reimburse your mediator's fee?" My response is to clearly delineate what the fee and expenses requirements are, and to insist on payment (that means actual receipt—not just to email me a copy of the check they want to bring me) at least 10 days before the mediation session. I tell all that absent timely payment, I feel free to release the date.

So would I allow these parties to pay me a total of $240,000.00? In a private, consensual mediation, you bet! But the facts indicate this is a two-party lawsuit. Under the *Ethical Guidelines,* in court-annexed

situations, I must avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee. What's worse, often, there is a requirement in local court rules that I report to the court not only whether the matter settled, but also the amount of my fee. So, under these facts, I most likely would not allow the parties to pay me this sum. I certainly would not, under any circumstances, sue to collect the fee.

Jeff Kilgore, Galveston

Under the TCPRC a mediator must provide his fee schedule to the parties before the mediation begins. The amount appears to be a contingent fee that is also not allowed, as a fee cannot be set upon the outcome.

A fee that large also would violate the Statute of Frauds and would have had to be in writing.

I think I would point these objections out to the mediator and if he has a published on a website I would send him his usual and ordinary fee and mark it paid in full.

Scott McClain, McAllen

The attorney's first response might be to tell Mr. Wonderful (in a concerned tone) that someone has stolen his letterhead and has played a terrible trick on him.

I am assuming Mr. Wonderful is an attorney. Although attorney-mediators often cannot find direct answers to ethical issues in the Disciplinary Rules of Professional Conduct, in this case, I believe the answer can be found there.

Rule 1.04(a) provides: A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

The factors to be considered in determining the reasonableness of a fee include the time and labor required, the fee customarily charged in the locality for similar legal services, and the time limitations imposed by the client or by the circumstances.

In the hypothetical, Mr. Wonderful conducted a one-day mediation with no apparent difficulty and charged a fee that was orders of magnitude greater than any customary mediation fee. No competent lawyer could form a reasonable belief that Mr. Wonderful's fee was reasonable.

There is also a distinct possibility that since the fee appears to be based on the amount in controversy and the success of the mediation, it could be

considered a contingent fee. The Disciplinary Rules require a contingent fee agreement to be in writing and to state the method by which the fee is to be determined. (1.04(d) TX. DISC. R. PROF. COND.) No written contingent fee agreement was presented in this mediation, further exposing Mr. Wonderful to disciplinary action.

Comment

Regardless of the varying rationales presented by the respondents, the consensus is that the mediator's fee in this case is wrong, WRONG, **WRONG**!

In the specific situation set forth in the Puzzler, most of the respondents assumed that in a case involving disputed issues over monetary assets of the magnitude implied in the question, Mr. Wonderful would be an attorney and a mediator. Therefore, the respondents pointed out some of the more egregious violations of the Disciplinary Rules of Professional Conduct for attorneys.

However, as an interesting twist on that thought, the Professional Ethics Committee for the State Bar of Texas, Opinion No. 583, September 2008, stated that mediation does not constitute the practice of law but, instead, constitutes as action by an "adjudicatory official" which, further, is defined as a person who serves on a "Tribunal" which, in turn, is defined to include a "mediator engaged in resolving or recommending resolution of a particular dispute in controversy." Not to worry, though, because the opinion, although differing in all respects from the scenario-at-hand, nevertheless applies the Texas Rules of Professional Conduct in cases in which an attorney is serving in the capacity of a mediator.

Over and above the Texas Rules for Professional Conduct, and even if Mr. Wonderful were not an attorney and a mediator, his conduct still not only fails to pass the "smell test," but also violates various articles of the Texas Supreme Court's Ethical Guidelines, notably

- Article 2(b)–Mediator Conduct–"The interest of the parties should always be placed above the personal interests of the mediator"; and
- Article 3–Mediation Costs–"As early as practical and before the mediation session begins, a mediator should explain all fees

and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or a fee based on the outcome of the mediation.

And, although the Supreme Court Guidelines are aspirational, if Mr. Wonderful is credentialed by the Texas Mediator Credentialing Association, these guidelines are mandatory.

Kudos to all of the respondents for their well thought-out responses. There are no wrong answers. However, it is good to know that even in the case of such egregious behavior, each of our respondents found a practical solution and, in addition, Scott McClain found a humorous solution in the face of such adversity.

Finally, as farfetched as this (and many of our other Puzzlers) seem to be, they are all based on actual cases reported to me by one or more of the parties involved. You can't make this stuff up.

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, suzannemduvall@gmail.com, or 4080 Stanford Avenue, Dallas, Texas 75225, or fax to 214-368-7528.

Suzanne M. Duvall is an attorney-mediator in Dallas with over 800 hours of basic and advanced training in mediation, arbitration, and negotiation. She has mediated over 2,500 cases to resolution and serves as a faculty member, lecturer and trainer for numerous dispute resolution and educational organizations in Texas and nationwide. A former Chair of the ADR Section of the State Bar of Texas, Suzanne has received numerous awards for her mediation skills and service. She has also been selected "Super Lawyer" 2003–2015 by Thomson Reuters and the publishers of Texas Monthly, and been named to Texas Best Lawyers 2009–2016 and Best Lawyers in America 2014–2016. She is a TMCA Distinguished Mediator, the highest designation given by the Texas Mediator Credentialing Association.

Why Mediators Shouldn't Believe Everything They Think, Part 1

by Charles Penot

Your brain lies to you, and relatively often at that. Nearly all introductory college texts on psychology contain a section on visual illusions.[1] In those sections are hosts of images that your brain processes in certain ways, and that you see in ways that are inconsistent with reality.

What does this have to do with mediation? As Daniel Kahneman, the Nobel-Prize-winning psychologist, observes in his best-selling book, *Thinking, Fast and Slow*, "[n]ot all illusions are visual."[2] Just as the machinery of one's visual cortex effectively makes assumptions or estimates about what it is seeing in the real world, so too our cognitive machinery—the very way we think—can generate illusions about the world in which we live, the judgments we have to make, and even the nature of the choices with which we are faced. The importance of understanding these "cognitive illusions," as Kahneman calls them, should be clear.

In mediation, participants are faced with making judgments and choices under conditions of uncertainty, such as:

- How will the judge rule?
- What really happened that day at the worksite?
- What are my options?
- How do I feel about those options? and

---

[1] *See, e.g.*, PETER O. GRAY, PSYCHOLOGY 288 –91 (6th ed. 2011); *see also Optical Illusions*, BRAIN BASHERS, https://www.brainbashers.com/opticalillusions.asp (last visited July 5, 2015); David T. Landrigan, *Illusions Gallery*, UNIVERSITY OF MASSACHUSETTS LOWELL PSYCHOLOGY DEPARTMENT, http://dragon.uml.edu/psych/illusion.html (last visited July 5, 2015).

[2] DANIEL KAHNEMAN, THINKING, FAST AND SLOW 27 (2011).

- How should I choose among these options?

Are the participants in mediation thinking clearly about these matters?

Whether we act mediators, participants, or the advocates for participants in the mediation process, we should be concerned about what cognitive science has to say about how people make judgments and choices.

Whether we act mediators, participants, or the advocates for participants in the mediation process, we should be concerned about what cognitive science has to say about how people make judgments and choices.

Some of the most interesting research from cognitive science, social psychology, and behavioral economics over the past 50 years tells us that we are not always fully aware of the sources of our judgments, attitudes, beliefs, and choices. We often take cognitive shortcuts, utilizing heuristics (oversimplified, more easily answered questions),[3] to make some types of judgments and choices. While accurate at times, these heuristics can lead to significant errors in our thinking.

Thinking, Fast and Slow contains one of the most readable, thorough, and intriguing treatments of this science that can be found. I summarize Kahneman's work on the nature of our cognitive processes, and how and why they can lead us astray.[4] Along the way, I catalogue some of the more common and problematic cognitive biases that can present problems for participants in mediation. In Part 2, I'll discuss some suggestions about how one might try to deal with and, if possible, transcend these systematic errors in our thinking.

Our Cognitive Machinery: "System 1" and "System 2"

Cognitive scientists and psychologists describe 2 different systems of thought that operate in humans. One is a fast, automatic, largely unconscious processing of information; it has the feel of being

[3] Kahneman defines a heuristic as "a simple procedure that helps find adequate, though often imperfect, answers to difficult questions." *Id.* at 98.

[4] Kahneman's book runs some 482 pages with endnotes. The section I am summarizing in the first section of this paper runs some 105 pages in print. My treatment is necessarily a highly abbreviated capsule of Kahneman's work.

intuitive, as if there is no voluntary control involved. Kahneman calls this type of processing "System 1."

The other mode of thinking is slow, deliberate, orderly, and conscious. It is the type of thinking that we most easily identify with, or think of as "I" or "me." Kahneman calls this "System 2."[5]

Here's the rub: We identify most closely with System 2 because it is conscious, and we like to think that we are the author of our own thoughts, attitudes, beliefs, judgments, and choices. System 1, however, is operating beneath the surface, largely outside the glare of conscious awareness. Whenever we are awake, it is on, and it is constantly feeding input to System 2. We may not consciously be aware of that input as originating in the unconscious, automatic processing of System 1.

You may want to resist this description of how your mind works, because it seems so inconsistent with what you *think* you know to be going on in your consciousness. But therein lies the problem. Cognitive science tells us that there is a great deal of significant mental processing that happens outside of our conscious awareness.

The essential job of System 1, the skills for which have been honed over thousands of years of evolutionary history, is to survey and make sense of the environment to determine if it is safe or if danger is near ("approach or withdraw").

Some of the skills of System 1 are what we might call innate skills that are shared by other animals. For example, "detect that one object is more distant than another," or "orient to the source of a sudden sound").[6]

Others are learned over time as one is steeped in language and culture ("[c]omplete the phrase bread and . . ." "Answer 2 + 2 = ?").[7] Much information from our culture and own personal history is stored in memory effortlessly, without conscious control, and accessed by System 1 when needed to make sense of the current situation and make predictions about the likely future.

Mental Energy and Bad Thinking

But here is the problem: System 1 is subject to making systematic errors in certain types of situations. It tends to use heuristics, substituting easier

---

[5] Kahneman goes to great lengths to explain that although he speaks of Systems 1 and 2 as if they were agents, two little homunculi seated somewhere in our brains, nothing could be farther from the truth. Nevertheless, Kahneman finds it a useful literary and pedagogical device. Following his lead, I use the same terminology here.

[6] KAHNEMAN, supra note 2, at 21.

[7] Id.

questions for harder ones, which results in biases that might be avoided if System 2 were really running the show. System 1, for example, is not adept at following the formal rules of logic, checking arguments for logical validity, or thinking statistically.

Anything that System 2 does, in contrast, requires attention and focus. If one's attention is interrupted or divided, one will not perform as well on the task.[8] These types of effortful thinking draw on a limited budget of mental energy.

As we all surely know from experience, our attention is limited. Intense focus on a particular System 2 task can render us blind to things that would otherwise draw our attention as surprising and call for the attention of System 2.[9]

Lazy Thinking

Another important and problematic characteristic of System 2 is that it can be lazy. Many people will not invest more System 2 effort than is absolutely necessary to complete a task or mental operation.[10] Yet, there are certain mental tasks that only System 2 can perform, or perform well.

One of the primary functions of System 2 is to keep a watchful eye on the intuitions, hunches, and suggestions of System 1. If System 2 is unavailable to perform these mental operations, the intuitive and potentially biased insights and impulses of System 1 will prevail.

Why is System 2 lazy? It turns out that self-control and effortful, focused mental processing (*i.e.,* System 2 work) draw on the same limited budget of mental energy; both self-

---

[8]Kahneman gives the following examples of System 2 tasks: "Brace for the starter gun in a race. Focus attention on the clowns in the circus. Focus on the voice of a particular person in a crowded and noisy room. Look for a woman with white hair. Search memory to identify a surprising sound. Maintain a faster walking speed than is natural for you. Monitor the appropriateness of your behavior in a social situation. Count the occurrences of the letter *a* in a page of text. Tell someone your phone number. Park in a narrow space (for most people except garage attendants [long practice or expertise at a certain task can make it more automatic and less subject to conscious control]). Compare two washing machines for overall value. Fill out a tax form. Check the validity of a complex logical argument." *Id.* at 22.

[9]Space limitations preclude describing all of the psychology experiments that Kahneman cites to support his descriptions of the two-system theory. For example, to support the notion of that intense focus can render us blind to otherwise noteworthy happenings, Kahneman points to a well-known book by Christopher Chabris and Daniel Simons, *The Invisible Gorilla*. *See* Daniel J. Simons, *The Monkey Business Illusion*, YOUTUBE, https://www.youtube.com/watch?v=IGQmdoK_ZfY (last visited on July 5, 2015).

[10] Kahneman describes it this way: "A general 'law of least effort' applies to cognitive as well as physical exertion. The law asserts that if there are several ways of achieving the same goal, people will eventually gravitate to the least demanding course of action. . . . Laziness is built deep into our nature." KAHNEMAN, *supra* note 2, at 35.

control and System 2 thinking are forms of mental work. Persisting in focused, effortful thinking requires self-control. Moreover, focused, effortful thinking is generally not pleasurable in itself—except when operating in a state of *flow*, where one is so absorbed in one's work so as to lose any sense of effort, time, or limitations.

Depleted Brains=Bad Thinking

When attempting to remain focused on effortful cognitive tasks, one can become ego depleted,[11] a state that arises after an effort or multiple efforts of self-control. One becomes tired and loses motivation to exert self-control when the next challenge is presented. When ego depleted, individuals are likely to default to System 1 thinking.[12]

This teaching has an unexpected corollary. If cognitive strain is induced in someone, that person is more likely to call on the attention and focus of System 2. So, for example, when students took a cognitive test[13] and the questions were presented in small, washed-out gray print, they performed *better* than those taking the test printed in a clear, larger font. Presumably, this is because the state of cognitive strain induced by the harder-to-read font caused those students to recruit their System 2 for the task, and thus were less likely to fall prey to the intuitive answers.[14]

How does this all play out in the real world of people making decisions? You can start with some basic physiology: Though only around 2% of the average body weight, the brain consumes almost 70% of the body's glucose.[15]

Then, consider a study Kahneman cites about the results of an unsettling study of 8 parole judges in Israel.[16] These judges spend entire days reviewing parole requests. They spend an average of only 6 minutes per case. The default result is denial of parole; only 35% of requests are granted.

---

[11] Kahneman discusses the interesting work of Roy Baumeister, whose own best-selling book *Willpower: Rediscovering the Greatest Human Strength* is worth a read on the subject of ego depletion. *See* ROY BAUMEISTER WILLPOWER: REDISCOVERING THE GREATEST HUMAN STRENGTH (2011).

[12] Kahneman, supra note 2, at 43.

[13] See infra p. 15, "The Shane Frederick Cognitive Reflection Test."

[14] *Id.* at 65.

[15] *Human Brain Statistics*, STATISTIC BRAIN RESEARCH INSTITUTE, http://www.statisticbrain.com/human-brain-statistics/ (last visited July 5, 2015).

[16] *Id.* at 43 –44.

The Shane Frederick Cognitive Reflection Test

Still not convinced by any of this nonsense about unconscious processes governing your decisions? Then test yourself. What are your answers to the following three questions, which you should answer as best you can:

1. A bat and ball cost $1.10.
   The bat costs one dollar more than the ball.
   How much does the ball cost?

2. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?

3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?

In each case, an intuitive answer comes readily to mind. This is System 1 at work. The intuitive answers are 10 cents, 100 minutes, and 24 days. And the intuitive answers are wrong; the correct answers are $1.05, 5 minutes, and 47 days.

Most people get most of the answers wrong. Those who got the answers wrong tended to think the questions were easier than those who got the answers right. Kahneman points out that "[m]ore than 50% of students at Harvard, MIT, and Princeton gave the intuitive—incorrect—answer [to the bat-and-ball question]."

In the study, researchers noted the time that the judges were fed breakfast, lunch, and dinner, as well as the precise time of each decision of the judges. The result was that just after each meal, when blood glucose levels were higher, the percentage of requests granted spiked at roughly 65%, with the results exhibiting a steady decline to nearly zero just before the next meal. As Kahneman and others have observed, "the idea

of mental energy is more than a mere metaphor."[17]

This is the "Law of Least Effort" clearly at work; and it should convince you that many of us have a lazy System 2. It is easy to fall prey to our quick-to-respond, intuitive System 1. It surely happens to participants in mediation and to mediators. Pay attention. Know that despite that admonition, you and others will fail to do so.

Psychologists have learned that our thoughts and behaviors can also be influenced by what they call "*priming*." Priming is the process by which some stimulus in our environment activates implicit memories and associations embedded in memory, which, in turn, influence our thoughts and behaviors *without our being consciously aware of them*.

The mechanism by which this occurs is known well by psychologists; it is the "association of ideas" and the process is known as "associative activation."[18]

Individuals retain ideas as nodes in a vast, intricate network known as associative memory. Each idea is linked not just with one other idea, but is connected to many other ideas, each of which is itself associated with yet many other ideas.

The types of links are numerous; Kahneman lists some of the more important ones:

- causes are linked to their effects (as virus to cold),
- things to their properties (as lime to green), and
- things to their categories (as apples to fruit).

But usually, we aren't aware of these links. Kahneman points out,

> "most of the work of associative thinking is silent, hidden from our conscious selves. The notion that we have limited access to the workings of our minds is difficult to accept because, naturally, it is alien to our experience, but it is true: *you know far less about yourself than you feel you do."*[19]

When associative activation is triggered, many things happen automatically and very quickly. Both associated ideas and emotions associated with those ideas get activated. These emotions can

---

[17] *Id.* at 43.

[18] *Id.* at 50–52.

[19] *Id.* at 51 (emphasis added).

sometimes evoke physical reactions, such as frowns, smiles, or expressions of fear or disgust.[20]

The experimental support for priming is strong. One study involved exposing one group of subjects, cleverly, to a group of words associated with being old, aging, or the elderly; the ostensible task was to unscramble words. The subjects were then told to go down the hall to another room for an additional aspect of the study.

The conclusion from these studies is inescapable, even if we do not like to admit it. Seemingly innocuous factors in our environment can and do influence our choices and actions in ways of which we may be entirely unconscious.

This was a ruse. The real experiment was to measure how much time it took the experimental subjects, all of whom were college-aged undergraduate students, to walk down a long hall to the other room. Those primed with "old" or "elderly" words walked much more slowly to the next room than the group of subjects who had not been primed by such concepts.[21]

Similarly, people reminded of money in various subtle ways—a mental state that many participants involved in mediation will occupy—were

- found to be more independent,
- demonstrated increased self-reliance,
- exhibited more selfish behaviors, and
- preferred being alone or keeping a further physical distance from others

than those who had not been money-primed.[22]

The conclusion from these studies is inescapable, even if we do not like to admit it. Seemingly innocuous factors in our environment can and do influence our choices and actions in

---

[20] "As cognitive scientists have emphasized in recent years, cognition is embodied; you think with your body, not only with your brain." *Id.*

[21] *Id.* at 53.

[22] *Id.* at 55–56.

ways of which we may be entirely unconscious.

In this first installment on the impact of cognitive biases on the mediation process, the focus has been on the 2 distinct systems of cognitive processing that have evolved in humans: :System 1, automatic, intuitive, unconscious, and fast; and System 2, conscious, deliberate, and slower. The two systems work well together most of the time. But what stood us in good stead on the wilds of the savanna as hunter-gathers may not always work as well in contemporary society. The result can be less than optimal decision-making.

In my second installment, I'll describe certain common heuristics that can adversely affect our decision-making .Also, I'll offer some prescriptions for transcending those limitations on our thought processes. Until then, remain open to the possibility that there may be more driving your choices than is readily apparent.

Charles Penot is a trial lawyer and attorney-mediator practicing in Dallas, Texas and New Orleans, Louisiana with The Middleberg Riddle Group. He can be reached at cpenot@midrid.com.

Mediation Facilities, Part II: The One Question that Should Guide the Rest (and More)

by John DeGroote

As I lay back in my dentist's chair a few years ago, I immediately noticed the ceiling. The exposed beams—and everything I could see while looking straight up—was *spotless.* The light fixtures were clean, the wiring was tucked away, and the soft lighting trained on the woodwork detail made it clear she had considered my perspective as she finished out her office.

With that experience in mind, I took another look at my own mediation center from the client's point of view. This perspective led to many of the tips found **Mediation Facilities, Part I: 3 Questions to Get Mediators Started**,[1] including how to manage pre-arrival expectations, how to ensure that first impressions put your mediation on the right path, and a few "must-haves" for any mediation center.

Be Guided by One Question

Beyond the basics, mediators can, and should, do more. If we want to make clients and counsel more comfortable and productive, our next steps should be guided by one question:

Should they have to ask?

Think for a moment about your last visit to a truly nice hotel. What set it apart? Sure there was a marble lobby and a shrimp buffet, but there was something else. The umbrella at the bell stand, the robe behind the door, and the sewing kit in the bathroom were there just in case you needed them—and you didn't have to ask.

Whether we like it or not, in mediation customer service goes beyond one's skill in the conference room. As a client, I once watched 6 lawyers try to

[1]John DeGroote, Mediation Facilities, Part I: 3 Questions to Get Mediators Started, *Alternative Resolutions* Spring 2016: Vol. 25, No. 2 (2016) 9.

share 4 outlets. I have seen attendees sheepishly ask to borrow paper, and I myself have looked for a shredder to rid myself of unnecessary litigation ballast.

There's no doubt that mediation attendees are stressed during mediation, and satisfying their needs in advance can reduce this stress. Neither clients nor counsel should ever have to ask for a power strip, a legal pad, a shredder, a flash drive, or anything else that mediators provide on a weekly basis.[2] With an eye toward customer service, these can be the easy points any mediation facility can make.

Food Choices

Mediation attendees are (i) in a strange place, (ii) meeting with people they (often) don't want to be around, (iii) with money, careers, ego, and more on the line. Whether it's a half day mediation with just coffee and cold drinks, or a full day mediation that might run late, mediators can set themselves apart:

- by what they serve;
- by how they serve it; and
- by letting clients and counsel know in advance what will be available when.

There isn't enough literature available on what food to serve at mediation,[3] but the food that mediators offer is a frequent topic of discussion among attendees. Separately, any parent knows the contrast between a child who has had a donut versus one who has just eaten a balanced meal. These 2 simple concepts, paired with the notion that attendees shouldn't have to ask, have led us to offer:

- fajitas from a well-known Mexican restaurant;
- an option to accommodate special dietary needs in advance;
- top-shelf coffee, decaf, tea, sodas, and juices;
- fresh fruit;
- low-glycemic and other snack options; and
- something (else) to eat when your mediation or the drafting of your Mediated Settlement Agreement slides past dinnertime.

Far from viewing food as a chore or an expense, our mediation center has openly embraced the food choices we have made, and we feature both prominently in our Mediation Agreement correspondence and collateral materials.

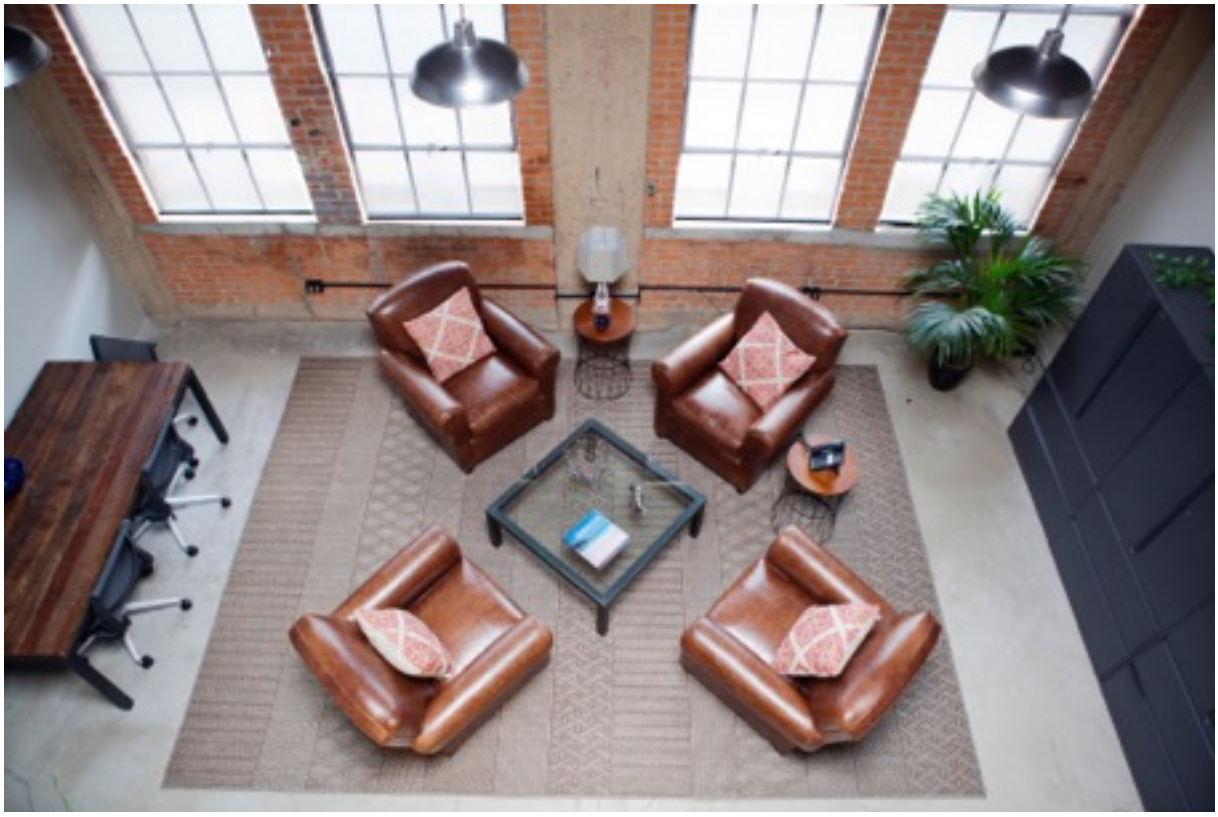
---

[2]Today's mediators should add to this list Apple TV-equipped televisions. The days of the projector and screen are almost at an end, and iPads and iPhones are giving mediation attendees a seamless, easy way to present material with little to no connection stress.

[3] *But see* Paula Young, *The Where of Mediation: Choosing the Right Location for a Facilitated Negotiation* (2007), Mediate.com at http://www.mediate.com/mobile/article.cfm?id=2385.

Caucus Rooms

As a veteran of hundreds of mediator caucus rooms, I can tell you they aren't fungible; there is a difference. I have been in conference rooms that were too hot, too crowded, and too small—and many that had no windows at all. Barbara Madonik tells us that "[c]aucus rooms provide a safe environment in which parties can find privacy."[4] This safe environment merits real attention. Madonik's list of things for mediators to consider for their conference rooms includes:



- windows;
- individual temperature controls;
- paper;
- colored markers;
- calculators; and
- tissues.[5]

In addition to these important points, our experience has added a few more, including:

---

[4] Barbara G. Madonik, *Managing the Mediation Environment* (undated), Mediate.com at http://www.mediate.com/articles/madonik.cfm.

[5] *Id.*

- Adequate room between the back of the chair and the wall (so no one feels trapped);
- Chairs that will still be comfortable after 8:00 p.m.;
- Natural light in every room;
- White noise makers; and
- Presentable space heaters and fans, for those who'd like more influence over their own environment.

Control

No doubt the world is changing, and perhaps trends set by outfits like airbnb and Regus signal the end of the dedicated mediation space. But before that happens, I am reminded of the story of a Dallas lawyer who was "just this close" to settling, when his mediator's access to the conference rooms he shared ended. Sure, the parties promised to close the gap sometime soon, but momentum was lost; the hope for settlement quickly dimmed.

Before we focus on the finer points of mediation facilities, like whiteboards and speakerphones and Kind bars, perhaps it needs to be said that we should start with the idea that mediator control of the mediation facility is key.As I close this article, I'm reminded that there are dozens of other tips to include, like conference tables that can be configured to taste, sound absorbing art, and more.

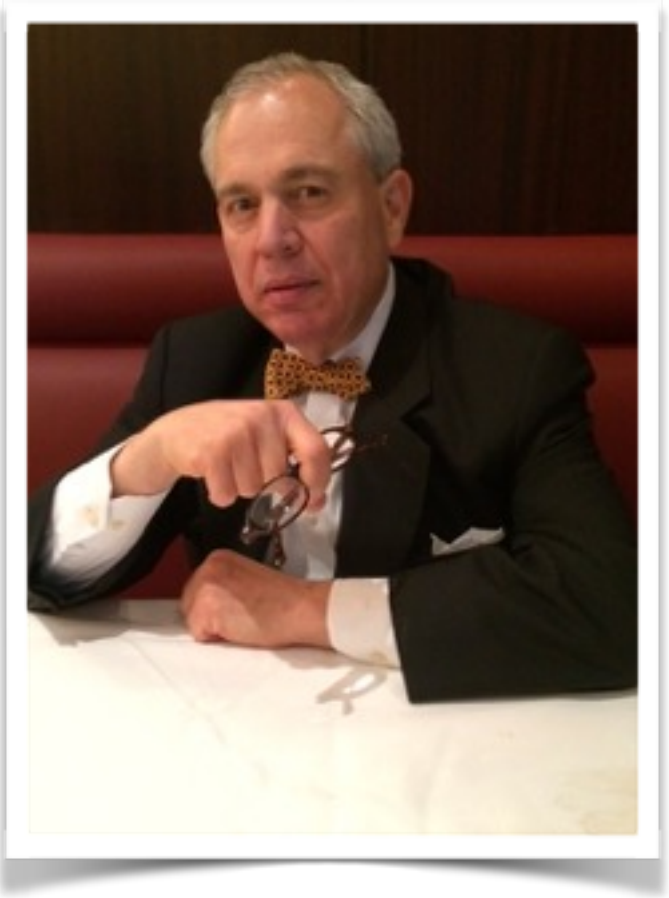
Instead, I'll close with the question that ties it all together: ***"Should they have to ask?"***

John DeGroote is a former global company general counsel, now serving as a Dallas-based mediator and arbitrator in significant business disputes. He can be reached at *john@degrootepartners.com*.

Colloquy with . . .

Chris Nolland

by Lynne Nash



Entering Chris Nolland's offices on the 55th floor of the Comerica building in Dallas was intimidating. Yet I forged ahead, prepared to ask questions and seek answers. What I received was a great lesson from an attorney and professor, albeit a condensed course.

One of Nolland's joys is teaching negotiation. He has shared his knowledge on the subject at SMU Dedman School of Law for 20 years.

In his early years, Chris practiced litigation in New York before moving to Texas. Now Chris is developing a new area of ADR, as well as preparing young lawyers for a career where negotiation skills are vital.

Thunder shook downtown Dallas as I left Nolland's offices. Spending an hour discussing the life and loves of a gentleman who is an innovator in his field was an electrifying experience. It was a lot like trying to bottle the sound of thunder.

What's a Settlement Counsel?

Chris is pioneering a new area of law practice—Settlement Counsel. When Settlement Counsel is engaged, they work as co-counsel in a non-neutral advocate role for one of the parties in conflict seeking settlement prior to trial. This differs from the more familiar role of mediator, who, when engaged, enters a conflict as a neutral party. In Chris' law practice, he offers services in both areas, yet is quick to

establish with attorneys and clients what the role differentiators are. When present as a mediator, he takes no side within the conflict. When engaged as Settlement Counsel, Chris has one job: find the best possible options to negotiate an optimal settlement between his client and the opposition party.

How Did You Decide To Do This?

It was the right time, right place, right case. Chris became involved with a major litigation case assisting McKool Smith in the mid-1990s.

In 1993, Chris had hung his own shingle. His goal: to be a full-time mediator. Quickly, Chris found that

When engaged as Settlement Counsel, Chris has one job: find the best possible options to negotiate an optimal settlement between his client and the opposition party.

"only so many mediations can be done effectively each week because if done right, they're exhausting." He also found he has "only so much of a patience bank to draw on to deal with unreasonable or difficult people." So his mediation practice was complemented with a continuation of front-line litigation work. To this day, Chris finds 10 days of mediation a month is about the right balance for him.

In the early 1990s, Chris was assisting McKool Smith, and was tasked with the responsibility to pursue and manage settlement matters, while the litigation team pursued the case in a traditional format. At the conclusion of this successful experience, Chris was asked to help on other cases. Mother Necessity asked, and Chris answered.

When Should a Litigator Think About Settlement Counsel?

Victor Vital, a partner at Barnes & Thornburg in Dallas, once said: "To be a good trial lawyer, one must give an honest, clear-eyed view of the case to the client, laying out all the risks, and assessing what the chances of winning or losing may be." A truly successful trial lawyer knows what their skills are and when it's time to bring in assistance.

This new type of attorney, Settlement Counsel, should be brought in to assist on settling the case. This bifurcation of responsibilities permits the trial attorney to fully focus on the trial presentation and, as Chris puts it, on "the stuff of litigation."

In his opinion, Settlement Counsel should be brought in at the beginning of a case. In Chris' experience, this allows him to:

1) get up to speed early;
2) keep his own calendar open and flexible to deal with developments arising on short notice in the case;
3) learn the case in real time; and
4) avoid a late entrance which may send the wrong signal to the other side."

Bringing in Settlement Counsel at the beginning of a case makes that dynamic simply a part of the "normal course of business," with everyone within the team being able "to focus on their core skills."

Who Hires You?

Throughout the years Chris has worked repeatedly with many firms on different major litigation matters. When asked who typically hires him, Chris said

> It depends. At times a client reaches out, other times it's a firm or a lawyer with whom I've done work for in the past. And, from time to time, it's a lawyer who has been on the opposite side on a prior case and experienced first-hand the value added by engaging dedicated Settlement Counsel.

Chris overwhelmingly agreed that Settlement Counsel work is a small specialty. However, he believes the field of Settlement Counsel is not dissimilar to where the field of mediation was 25 years ago. Just 15 years ago, when Chris told someone his practice was focused on serving as Settlement Counsel, the response

> The field of Settlement Counsel is not dissimilar to where the field of mediation was 25 years ago.

was often "what the [ ] is a settlement counsel?" But now, the response is more likely, "I've heard of that, but I've never used one. Tell me about it."

What's the Career Path to Settlement Counsel?

What does it take to develop a practice as Settlement Counsel? Is there a path? Can a person just hang a shingle? Is there business to be had?

There is no direct or clear path to developing a Settlement Counsel practice. Chris recommends gaining a firm foundation in litigation and in negotiation—each of which require disparate skills and mind-sets.

Chris believes there are 5 mandatory requirements to becoming successful as Settlement Counsel.

1 The person needs to have "front line, high level, sophisticated litigation experience." Without this, they "cannot understand the dynamics, process, and structure involved in moving such a case forward." Lacking litigation experience, a person "cannot know where, when, or how to apply the right kinds of pressure to advance settlement."

2 The person must have a "negotiation skill set." "Most litigators simply don't have a deep and refined negotiation skill set. Negotiation skills and ability must be learned through focused and dedicated study and practice." "Litigators usually don't have the time to do so. The negotiating they have done previously worked out 'okay' so they don't see the problem or the potential (or even the need) for improvement." A foundation in negotiation theory allows the individual to build a strong, comprehensive negotiation plan. "This plan establishes the clients BATNA (Best Alternative To a Negotiated Agreement) as well as determining pressure points for settlement."

3 Chris says a person must "practice at it." Not just taking the same sub-optimal approach and getting the same sub-optimal results, but truly work at growing and improving negotiation skills. "Negotiation is like golf and sex: first, everybody thinks that if they just do more of it, they'll get better; and second, no one has complained too much (at least to their face) so they must be doing something right." "The practice of negotiation requires a person to focus on expanding his or her understanding of the theory, structure, and phases of the negotiation process, not simply practicing the same (often bad) habits over and over."

4 A person doing settlement work "must be patient." These individuals recognize that negotiation can't be rushed, and the best way to do it well is to understand the ebbs and flows of how people work, and the dynamics and pressures of litigation. "It's a dance." It's also a place where "litigation attributes—typically high pressure tactics, aggressiveness, and dominant behaviors—aren't likely to be terribly helpful." "Settlement

Counsel must be self-aware," and not rush to judgment about the case. The best approach to settlement is to exercise high levels of emotional intelligence (EQ) with the understanding of the case (IQ).

5 Settlement work requires "time, temperament, training, and preparation." For Nolland, preparation is key. Litigators ought to prepare for trial—not settlement. Settlement Counsel must focus on finding the points in the case where settlement is possible and exploiting those opportunities. This skill set is a major departure from the world of litigation. The settlement plan is developed separately, but in coordination with the goal of winning by litigation at trial. The settlement and negotiation plan developed by Settlement Counsel focuses on how far the opposing side can "voluntarily" be pushed.

What's It Like To Work with Settlement Counsel?

Litigators working with Chris have to give up some "control and be willing to defer on settlement matters. At times, they're required to pull back on their hyper-aggressiveness."

Chris admits aggressiveness is often an asset in the courtroom and in other litigation activities, but can be a liability in settlement work. When asked what he does when a litigator won't give up control or rein in hyper-aggressiveness in the settlement context, Nolland said he "talks to them." And if that doesn't work? "Use it to your advantage—play good cop, bad cop."

When acting as Settlement Counsel, Nolland says he works through virtually all of the potential negotiation and settlement strategies:

- "Analyze the case"—know what you're dealing with and who you're dealing with;
- Be the person who can "save face" for the attorney, or client, or the other side—at times, be the individual who makes the first overture, allowing the opposing litigator to not appear weak;
- "Use understatement"—be careful not to "overplay your cards." It's essential to know the case well enough that you aren't pushed or pulled into a situation which puts the client at a disadvantage; and
- "Keep reason in the room." Chris' mediation skills and people skills shine the brightest here. When he acts in the non-neutral role of Settlement Counselor, he still retains and uses some of the tactics he would utilize as a mediator.

In working with attorneys as co-counsel, Chris emphasizes that

utilizing Settlement Counsel "eliminates the elephant in the room"—attorney's fees. This allows the "litigation attorneys to remove the question of fee churning driving parties into the court room." At the end of the day, "the threat of trial is what motivates and compels settlement."

Yet, in thinking through an entire case, trial itself isn't the "dog." Because most major business disputes settle, Nolland maintains "negotiation isn't the tail of the dog—it's the dog itself! BATNA drives the *whole* of the dog—the tail is litigation and only wags if the case actually makes its way into a courtroom."

With fewer than 5% of cases going to trial, it is important to have a member of the team focusing solely on developing and implementing the optimal strategy to settle the case.

Credibility

When promoting his services as non-neutral Settlement Counsel, Chris points out he's been in over 2,000 mediations. "When using the well-known "10,000 hour rule" as a guide to develop a skill set—I believe there's rarely something I haven't seen."

Also, Chris asserts he knows how to "get around obstacles to settlement and use strategy to optimize results for the client" making the most of his negotiation skills, mediation skills, and thousands of hours of experience.

But most importantly, Chris focuses on the trust and credibility he's established with lawyers through the years. "I know how to play the game and the lawyers and mediators I deal with know I understand the game and its dynamics." He also knows how to utilize his "natural inclination" for how to get things settled.

When asked what parts of his job Chris finds to be most satisfying, he quickly answered "doing a good days work." As Settlement Counsel, Chris defines a good day's work as giving "good counsel" to clients, and "developing good options under the circumstances." Ultimately for Chris, this means he found options which were:

- within reason,
- timely, and
- "didn't miss out on an opportunity to settle because of a miscue, poor negotiation strategy, or other dynamics."

The Coach

Chris says he doesn't really have a hobby to speak of, even though he travels, enjoys movies, and tends to "read everything in sight" about history and human behavior. What he

truly enjoys doing in his free time is teaching both his law students and anyone else who will listen about money, management, personal development, and finding ways to structure their lives which provide for greater negotiating power. This is definitely the gift that keeps on giving.

When asked what field he would have enjoyed other than law, he quickly answered "investment banking combined with behavioral economics," because he loves "doing deals." If not that, then a "hot dog shop or deli guy…."

Chris was reluctant to name a favorite word. But when asked if he had a least favorite word, Chris said, "not a word per se, but rudeness. I am intolerant of disrespectful, demeaning, and hurtful behavior." Specifically, Chris elaborated on how angry he gets when he sees someone in a position of authority speak to someone of lesser 'rank' in a demeaning way. Again, Chris demonstrates the skill of seeing the people within the problem, instead of the problem of the people.

At the end of the day, Chris finds it personally satisfying when he has had the opportunity to "create better dynamics" in the negotiation process by "changing expectations in the process, giving good counsel to the client, and obtaining optimal results."

When asked, "If heaven exists, and you meet your maker face-to-face, what do you hope he says?" Chris replied simply, "You did okay."

Lynne Nash is a 3L at Texas A&M University School of Law. She holds an undergraduate degree from Texas A&M University in Speech Communication, and a Masters degree in Conflict Resolution and Restoration from Abilene Christian University. In law school, Lynne has competed negotiation, mediation, arbitration, and client counseling. Lynne's client counseling team competed at Nationals finishing in the top 6 in 2015. Lynne has interned for the U.S. Office of Special Counsel, for Judge Don Pierson, Judge Martin Hoffman, and Judge Bonnie Lee Goldstein. In September, Lynne was awarded the Jim Gibson scholarship by the Texas Mediator Credentialing Association (TMCA). Lynne is currently interning for U.S. Magistrate Judge Paul Stickney and will spend the remainder of the summer with the Office of the Attorney General of Texas in the Consumer Protection Division as a Fellow.

The Proposed Texas Uniform Collaborative Law Act: An Executive Summary

by Lawrence R. Maxwell, Jr.

You may have heard that the Uniform Law Commission has drafted a Uniform Collaborative Law Act (UCLA), but what does that mean for citizens of the State of Texas, lawyers, mediators and others who work in the ADR sphere?

This article will give an overview of the collaborative dispute resolution process, and show how the UCLA affords benefits and protections for those using the process for resolving disputes in all areas of civil law. The article will demonstrate the need for uniformity in the states, and highlight the benefits of the UCLA for pro bono and low-income clients, who are poorly served by the traditional approach of the adversarial legal system. The included chart analyzes the proposed Texas Uniform Collaborative Law Act section by section. The article concludes by encouraging support for the enactment of the UCLA in the 2017 Session of the Texas Legislature.

Collaborative Law in Texas So Far

The collaborative dispute resolution process (commonly known as Collaborative Law) is a part of the movement toward the delivery of so-called unbundled legal representation. It separates, by agreement, representation in settlement-oriented processes from representation in an adjudicatory processes. The organized bar has recognized unbundled legal services, like collaborative law, as useful options available to parties.

Parties are represented by counsel in the collaborative process. It is a voluntary, structured, non-adversarial approach to resolving disputes. In it, the parties and their counsel seek to negotiate a resolution of the dispute without having a ruling imposed upon them by a third party neutral. The process is based upon cooperation between the parties, teamwork, full disclosure, honesty and integrity, respect, civility, and parity of costs.

As is the case with mediation, collaborative law has its roots in the area of family law. In 2011, the 82nd Texas Legislative Session enacted the Collaborative Family Law Act, which became effective September 1, 2011. The Collaborative Family Law Act applies only to matters arising under Title 1 or Title 5 of the Texas Family Code.

Now, the collaborative law process is a rapidly developing procedure for managing conflicts and resolving civil disputes in all areas of law. The process is different from other dispute resolution processes, due to its non-adversarial nature and its ability to provide a prompt, cost-effective resolution for many parties.

The Future of Collaborative Law in Texas

Voluntary early settlement increases party satisfaction, reduces unnecessary expenditure of personal and business resources for dispute resolution, and promotes a more civil society. The future growth and development of Collaborative Law has significant benefits for parties and the legal profession.

The proposed Texas Uniform Collaborative Law Act (Texas UCLA) does *not* apply to family law matters governed by the Collaborative Family Law Act, and its enactment will have no effect whatsoever on the Collaborative Family Law Act. The Texas UCLA will amend the Texas Civil Practices and Remedies Code by adding a new Chapter 161, entitled Uniform Collaborative Law Act.

The Texas UCLA has no limitations on matters that can be submitted to the collaborative process and can be covered by the Act. Its enactment will expand the benefits and protections of a collaborative law statute to parties who wish to use the process for resolving disputes in all areas of law.

As of this date the Uniform Collaborative Law Act and/or court rules (which mirror the Act) have been enacted/adopted in 14 states and the District of Columbia.

The Need for Uniformity

Prior to 2009, a number of states had enacted statutes of varying length and complexity that recognize collaborative law. Courts in several states also had taken similar action through the enactment of court rules. Collaborative Law agreements are crossing state lines as more individuals and businesses are utilizing the collaborative process.

As the use of the process continues to grow, the Uniform Collaborative Law Act will:

- Provide uniformity from state to state, thus making the collaborative process more accessible;
- Assure that the process is voluntary;
- Assure that prospective parties are informed as to the material benefits and risks of the process;
- Protect against parties inadvertently or inappropriately entering into the process;

The Uniform Law Commission

The Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable. The signature product of the Commission, the Uniform Commercial Code, is a prime example of how the work of the Commission has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

In 2007, the Commission determined that uniformity would bring "clarity and stability" to the collaborative process, and set about the task of codifying the process. The purpose of the Uniform Collaborative Law Act is "to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties."

In July 2009, the Commission unanimously approved a Uniform Collaborative Law Act. In March 2010, the UCLA Drafting Committee reconvened and made several additions to the original Act, including the addition of court rules that mirror the Act. The drafting committee also added a provision giving states alternatives as to the scope of the Act:

(1) they could limit its application to matters arising under the family laws of a state; or (2) they could impose no limitation on matters that can be submitted to the collaborative process.

- Provide consistency from state to state regarding enforceability of collaborative law agreements;
- Provide automatic tolling and recommence running of applicable statutes of limitations;
- Establish when the collaborative process begins and concludes;
- Assure confidentiality of communications during the process;
- Provide a stay of court and other adversarial proceedings while parties are in the process;
- Make provision for obtaining emergency orders;
- Provide a privilege with appropriate limitations, should the process not result in settlement; and
- Eliminate choice of law determinations.

Benefits for Pro Bono and Low Income Clients

Pro bono legal service organizations frequently refuse to assist parties in contested disputes that may last for months or years, since volunteer attorneys often are unwilling to become involved for that length of time. Because the nature of the collaborative process allows cases of this nature to be resolved quickly, collaborative lawyers in Houston and Dallas have agreed to provide legal services for these contested disputes.

Unfortunately when it comes to providing justice for all, a large percentage of Texas citizens fall between the cracks. They have enough income to be disqualified from receiving pro bono services, yet they do not have the means to hire a lawyer at lawyer's regular rates. The Dallas Lawyer Referral Service and collaborative lawyers are developing a sliding scale program to satisfy this need. It is expected to be in place before the end of 2016. The Texas UCLA will provide statutory benefits and protections for collaborative lawyers representing pro bono and low income clients.

Collaborative Law Practice Beyond Family Law

Creative lawyers in Texas and across the country are applying the collaborative process to civil disputes beyond family law. It is difficult to name an area of the law that cannot

benefit from the collaborative process. Many hospitals have found that they are able to settle questions of medical error quickly, maintain a positive relationship with patients, and provide psychological relief for medical providers who know that patients and their families have been properly attended to after a medical event. Other areas which can benefit include

- breach of contract,
- business disputes,
- construction,
- discrimination,
- guardianship and elder law disputes,
- disputes in faith-based communities,
- intellectual property,
- LGBT disputes,
- partnership dissolution,
- personal injury,
- probate, and
- sexual harassment.

These types of disputes can be quickly and privately resolved while maintaining, rather than destroying, important relationships. The UCLA will guarantee confidentiality, provide structure, and assure that the process is voluntary.

Resolving International Disputes

Canada, Australia, Ireland, the United Kingdom, and countries in South America have embraced Collaborative Law, and many other countries have shown an interest in the collaborative process. The nature of Collaborative Law makes it ideal for resolving international disputes, since it allows the parties a great deal of flexibility when determining choice of law and scheduling.

Passage of the Texas UCLA will provide parties in Texas an additional resource for managing and resolving transnational disputes.

The Texas Uniform Collaborative Law Act

The Texas UCLA is essentially the original 2009 UCLA with certain modifications that:

- strengthen the confidentiality and privilege provisions (§§161.112 & 161.113);
- strengthen the enforceability of settlement agreements under the Act (§161.105);
- add a requirement to include the disqualification provision, which is an essential element of the collaborative process, in a collaborative law participation agreement (§161.101(a)(7)); and,
- add a provision to address applicable statutes of limitations (§161.102(j)).

For a detailed, section-by-section analysis of the UCLA, see the tables at the end of this article.

Support for Enactment of the Texas UCLA

The Texas UCLA has the full support of the Uniform Law Commission, the ADR and Collaborative Law Sections, and other Sections of the State Bar of Texas, and many members of the judiciary, legal educators, individuals, businesses, trade associations and non-profit organizations in Texas.

The future growth and development of Collaborative Law has significant benefits for both parties and the legal profession. Codifying the collaborative process will make it a more accessible dispute resolution option for parties who wish to resolve disputes promptly, economically, and in a non-adversarial manner.

Supporters of the Texas UCLA encourage its enactment in the 85th Session of the Texas Legislature in 2017.

Lawrence R. Maxwell, Jr., is an attorney, mediator, arbitrator and practitioner of collaborative law in Dallas. He was the ABA Section of Dispute Resolution Advisor to the Uniform Law Commission's drafting committee that drafted the original Uniform Collaborative Law Act, and was chair of the committee that drafted the Texas Uniform Collaborative Law Act. Larry was a co-founder and is a past chair of the State Bar of Texas Collaborative Law Section. He has authored numerous articles and has made presentations on collaborative law nationally and internationally. He may be reached at 214-739-8900, or lmaxwell@adr-attorney.com. *The author wishes to acknowledge the valuable contributions made by a number of Texas attorneys in drafting the original UCLA, the Texas Family Collaborative Law Act, and the Texas UCLA. Thank you: Peter K. Munson, Harry L. Tindall, Norma L. Trusch, Jack Emmott, Kevin R. Fuller, Kristen Algert, Thomas L. Ausley, Winifred "Winnie" Huff, Sherrie R. Abney, Anne Shuttee, Robert C. Prather, Jr., Harry L. Munsinger*, and *Gay Ellen Gayle Cox (1953-2013).*

Texas Uniform Collaborative Law Act
New Chapter in the Texas Civil Practices & Remedies Code
Section-by-Section Analysis

Section	Subchapter A: Application and Construction
161.001	Sets forth the ***policy of the State of Texas*** to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.
161.002	Provides that in the event the Chapter ***conflicts with another statute or rule*** that cannot be reconciled, the Act prevails, and that the Chapter does not apply to family law matters governed by the Collaborative Family Law Act.
161.003	Emphasizes the need to promote uniformity of the law among states that enact a collaborative law process act.
161.004	Provides that the Chapter partially modifies, limits and ***supersedes federal statutes regarding electronic signatures***.

Section	Subchapter B: General Provisions
161.051	Sets forth the title: Uniform Collaborative Law Act.
161.052	Sets forth ***definitions of key terms*** used in the Act, including Collaborative law communication, Collaborative law participation agreement, Collaborative law process, Party, Non-party and Prospective party, Law firm and Proceeding and Tribunal.

Section	Subchapter C: Collaborative Law Process
161.101	***Establishes minimum requirements for a collaborative law participation agreement***, which is the agreement that parties sign to initiate the collaborative law process. The agreement (1) must be in a record, (2) signed by the parties, (3) state the parties intention to resolve the matter through collaborative law, (4) describe the nature and scope of the matter, (5) identify the collaborative lawyers, (6) confirm the engagement of each collaborative lawyer, and (7) state that the collaborative lawyers are disqualified from representing their respective parties before a tribunal relating to the collaborative matter, except as otherwise provided in the chapter. The section further provides that the parties may include other provisions not inconsistent with the chapter.
161.102	***Specifies when and how the collaborative law process begins, and how the process is concluded or terminated***. The process begins when parties sign a participation agreement, and any party may unilaterally terminate the process at any time without specifying a reason. The process is concluded by a negotiated, signed agreement resolving all of the matter, or a portion of the matters and the parties' agreement that the remaining portions of the matters will not be resolved in the process. Several actions will terminate the process, such as a party giving notice that the process is terminated, beginning a proceeding, filing motions or pleadings, or requesting a hearing in an adjudicatory proceeding without the agreement of all parties, or the discharge or withdrawal of a collaborative lawyer. The section provides that under certain conditions the collaborative process may continue with a successor collaborative lawyer in the event of the withdrawal or discharge of a collaborative lawyer. The parties' participation agreement may provide additional methods of terminating the process. The section further provides that a tribunal may not order a party to participate in the process over that party's objection and contains a provision to address applicable statutes of limitations.

Section	Subchapter C: Collaborative Law Process
161.103	Creates a ***stay of proceedings before a tribunal*** (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law participation agreement with the tribunal. A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to insure confidentiality of the collaborative law process. Parties must notify a tribunal when the collaborative process concludes or terminates. Two years after the date of the stay, after giving the parties an opportunity to be heard, a tribunal may dismiss a proceeding based on delay or failure to prosecute.
161.104	Creates an ***exception to the stay of proceedings*** by authorizing a tribunal to issue emergency orders to protect the health, safety, welfare or interests of a party or non-party; which would include the financial or other interests of a party in any critical area in any civil dispute. However, the granting of such emergency orders must be agreed to by all parties; otherwise, the process is terminated.
161.105	***Makes a settlement under the Act enforceable*** in the same manner as a written settlement agreement under §154.071 of the Civ. Prac. & Rem. Code, provided that the settlement agreement is signed by each party and their collaborative lawyers and clearly states that it is not subject to revocation.

Section	Subchapter C: Collaborative Law Process
161.106	Sets forth the ***disqualification provision***, which is a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process conclude or terminate without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated, are disqualified from representing a party in a proceeding before a tribunal relating to the collaborative matter, except to seek emergency orders (§161.104) or to approve an agreement resulting from the collaborative law process (§161.105). The disqualification requirement is further modified regarding collaborative lawyers representing low-income parties (§161.107) and governmental entities as parties (§161.108).
161.107	Creates an ***exception to the disqualification for lawyers representing qualified, low income parties***, such as in a legal aid office, law school clinic; or, a law firm providing free legal services to low income parties. If the process terminates without settlement, a lawyer in such organizations or law firms with which the collaborative lawyer is associated may represent the low income party in an adjudicatory proceeding involving the matter in the collaborative law process, provided that the participation agreement so provides, and the representation is without fee, and the individual collaborative lawyer is appropriately isolated from any participation in the collaborative matter before a tribunal.
161.108	Creates a similar ***exception to the disqualification requirement for lawyers representing a party that is a government or governmental subdivision***, agency or instrumentality.
161.109	Sets forth another core element of collaborative law process. Parties in the process must, upon request of a party, make timely, full, candid, and ***informal disclosure of non-privileged information substantially related to the collaborative matter*** without formal discovery, and promptly update information that has materially changed. Parties are free to define the scope of disclosure in the collaborative process, provided that limits on disclosure do not violate another law, such as an Open Records Act.

Section	Subchapter C: Collaborative Law Process
161.110	Affirms that ***standards of professional responsibility*** of lawyers and child and adult abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.
161.111	Sets forth ***requirements that collaborative lawyers fully inform prospective parties*** regarding the specifics of the collaborative process prior to signing a participation agreement. A collaborative lawyer is required to discuss with a prospective client factors that the collaborative lawyer reasonably believes relate to the appropriateness of the prospective client's matter for the collaborative process, and provide sufficient information for the client to make an informed decision about the material benefits and risks of the process as compared to the benefit and risks of other reasonably available processes, such as litigation, arbitration, mediation or expert evaluation. A prospective party must be informed that the collaborative process is voluntary and any party can unilaterally terminate the process without cause, and of the other events that will terminate the process. A prospective party must be informed of the effect of the disqualification requirement in the event the matter is not settled.
161.112	Provides that collaborative law ***communications developed in the collaborative process are confidential*** to the extent agreed by the parties, or as provided by state law other than the Chapter. The section provides that the conduct and demeanor of participants in the process is confidential; and, if agreed by the participants, confidentiality may relate to communications occurring before a participation agreement is signed. The section provides for in camera inspection of communications, records or materials to determine disclosure issues which cannot be resolved by the participants. Should a party engage successor counsel in the process, the Section permits party and non-party participants to disclose confidential communications to such successor counsel, subject to the confidentiality terms in the participation agreement.

Section	Subchapter C: Collaborative Law Process
161.113	Creates a ***broad privilege*** prohibiting disclosure or the admission into evidence or testimony before a tribunal of communications developed in the process in legal proceedings. The privilege applies to party and non-party participants in the process and the collaborative lawyers. An oral communications or written material in the collaborative process is admissible or discoverable if it is admissible or discoverable independent of the collaborative law process, or obtained outside of the process. The section further provides for in camera inspection of communications and written material to determine disclosure or admissibility issues which cannot be resolved by the participants.
161.114	Sets forth a number of ***exceptions to the confidentiality and privilege*** based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records act, or to prove or disprove professional misconduct or malpractice or that a settlement agreement was procured by fraud or duress, or to challenge or defend the enforceability of a settlement agreement. The section provides that all participants may agree in advance in a signed record that all or part of the process is not privileged or confidential. The section further provides under certain circumstances, that there is no privilege or confidentiality if, after a hearing in camera a tribunal finds that the evidence is not otherwise available and the need for the evidence substantially outweighs the interest in protecting privilege or confidentiality.

Section	Subchapter C: Collaborative Law Process
161.115	Deals with ***enforcement of flawed settlement agreements***, i.e., agreements made in a collaborative process that fail to meet the mandatory requirements for a participation agreement as set forth in §.161.101; and/or situations where a collaborative lawyer has not fully complied with the informed consent requirements of §.161.011. This section provides that when the interests of justice so require, a tribunal is given discretion to enforce an agreement resulting from a flawed participation agreement, if the tribunal finds that the parties intended to enter into a participation agreement, and reasonably believed that they were participating in the collaborative process.

	Section 2
	Makes the Chapter applicable to a collaborative law participation agreement signed on or after the effective date of the Act.

Arbitration in the Supreme Court(s)– An Update

by Lionel M. Schooler

This Article discusses the latest developments in arbitration from the United States Supreme Court and the Texas Supreme Court.[1]

DirecTV v. Imburgia

The leading U.S. Supreme Court arbitration decision this past Term was *DirecTV v. Imburgia*.[2] The dispute in question required the Court once again to consider the issue of preemption of state law arbitration rules by the Federal Arbitration Act (FAA).[3] California courts had previously adopted a rule which deemed unenforceable any contract specifically barring class-wide arbitration. In the interim, the U.S. Supreme Court had decided *AT&T Mobility v. Concepcion*,[4] which held that California's law precluding this kind of restrictive arbitration clause was pre-empted by the FAA.

In this case, DirecTV had a contract with its customers that barred class-wide arbitration of disputes, but also stated that "*if the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire arbitration clause is unenforceable*."

A dispute arose between the well-known TV service provider DirecTV and its customers. The California Court of Appeal declined to enforce the arbitration clause.

The Court based its determination on the fact that the wording of the agreement referred directly to California state law, not to the actual legal doctrine applicable to disputes in California that might be covered by the FAA. It thus declined to enforce DirecTV's effort to bar class-wide

---

[1] This Article includes cases from the U.S. Supreme Court's 2015-16 Term, and the latest Annual Term of the Texas Supreme Court, beginning September 1, 2015.

[2] _____ U.S. _____, 136 S.Ct. 463 (2015).

[3] 9 U.S.C. §§ 1 *et seq*.

[4] 563 U.S. 333 (2011).

arbitration of California-based customer disputes directed at DirecTV.

The Supreme Court reversed by a vote of 6-3.[5] It held that the lower court's interpretation was preempted by the FAA. The *Imburgia* Court recognized that the parties were empowered to select California law, and that the lower court had properly articulated California law. However, to the Court the issue was not consistency with California law, but rather consistency with the FAA. It determined that the lower court's ruling had deviated from acceptable arbitration doctrine by re-classifying arbitration contracts outside of "equal footing with all other contracts," so as to interpret this contract differently solely because it involved arbitration. The Court also held that California law no longer retains independent force after being authoritatively invalidated by the Supreme Court in the *Concepcion* decision.

Royston, Rayzor, Vickery, & Williams, LLP v. Lopez

The Texas Supreme Court addressed three arbitration issues within the past Term.

In the first case, *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez,*[6] the Court confronted the issue of the enforceability of an arbitration clause contained in an attorney-client engagement letter.

The law firm and the client had signed an engagement letter which stated, in part, that disputes between them would be arbitrated, except for a claim by the law firm seeking recovery of fees and expenses. The client had sought representation in a divorce. The client and his counsel eventually participated in a mediation which resulted in settlement of the dispute.

The client later sued the law firm, claiming that he was wrongfully induced to accept an inadequate settlement. In response, the law firm moved to compel arbitration under the Texas Arbitration Act.[7] The trial court and the court of appeals declined to compel arbitration, ruling that the agreement was so one-sided as to be substantively unconscionable.

The Texas Supreme Court unanimously reversed. First, it stated that the client had the burden to demonstrate unconscionability. It ruled that the provision in the engagement letter, excluding fees and expenses from arbitrability, was not so one-sided as to be unconscionable. It also held that the Agreement was not unconscionable

---

[5] Justice Breyer wrote the majority opinion; the three dissenters were Justices Thomas, Ginsburg, and Sotomayor.

[6] 467 S.W.3d 494 (Tex. 2015).

[7] Chapter 171, Texas Civil Practice & Remedies Code.

as against public policy. It concluded by indicating that the Texas Arbitration Act embodies the Legislature's pronouncement supporting the enforceability of all arbitration agreements, including this one.[8]

Cardwell v. Whataburger Rests. LLC

In *Cardwell v. Whataburger Rests. LLC,*[9] the Texas Supreme Court considered the appropriate scope of appeal when reviewing the denial of a motion to compel arbitration. The plaintiff (employed as a dishwasher by the defendant) sued under the defendant's nonsubscriber plan over on-the-job injuries. The Employer moved to compel arbitration based upon a clause in its Handbook, which the plaintiff challenged principally on the basis of unconscionability.

The trial court denied the motion, adjudicating the matter almost entirely based upon its views about arbitration,[10] rather than on the basis of challenges to arbitration that had been raised by the employee. The Court of Appeals reversed, holding that the trial court had abused discretion, *but only as to the principal points considered by the trial court*.

The Texas Supreme Court reversed. Since the parties had briefed all issues to the court of appeals, not just the narrow question focused upon by the trial court, the Court found that the court of appeals had erred when it failed to consider other arguments submitted by the plaintiff challenging. Those arguments included ones on arbitrability that the trial court declined to consider. The Court thus returned the case to the court of appeals for further consideration.

Hoskins v. Hoskins

The most recent pronouncement from the Texas Supreme Court came on May 20, 2016 in *Hoskins v. Hoskins*.[11]

This case evolved as a trust dispute among family members. A settlement in bankruptcy court was reached as to most of the controversy, and the agreement signed by the parties required that any dispute arising

---

[8] In an interesting concurring opinion, Justice Guzman (for herself and Justices Lehrman and Devine) stated that while she agreed with the majority's decision, she also believed that the State Bar Disciplinary Rules need to delineate more specifically the ethical obligations of attorneys in requesting prospective clients to sign engagement letters containing an arbitration clause. *See* 467 S.W.3d at 506-07.

[9] 484 S.W.3d 426 (Tex. 2016).

[10] The trial court's order, quoted by the Supreme Court, stated in part: "This court is bound by precedent and can only suggest that Courts and Congress should reconsider depriving dishwashers of constitutional right to jury trial because of demonstrably dishonest argument that arbitration is more efficient and less expensive."

[11] _____ S.W.3d _____ (Tex. 2016); 2016 WL 2993929 (Tex. May 20, 2016).

thereafter had to first be submitted to mediation. Then, failing resolution, the dispute would go to binding arbitration pursuant to the TAA.

The dispute could not be informally resolved, and therefore proceeded to arbitration. Once the parties were in arbitration, the Respondents sought by motion to bar the Claimant's claims based on the statute of limitations, or lack of standing. With two minor exceptions, the arbitrator sustained this motion and dismissed such claims. The Claimant then supplemented his arbitration claims, challenging 2 additional transactions. No motions were filed challenging either of these new claims. The Arbitrator thereafter conducted a hearing and entered a final award that dismissed all of the Claimant's claims with prejudice and awarded Respondents attorney's fees and costs.

In response to the Respondents' motion to confirm the award, the Claimant moved to vacate the award based on:

- lack of authority (the bankruptcy court's order compelling arbitration was void);
- obtaining of the award by corruption, fraud, or other undue means;
- violation of Claimant's rights by the arbitrator's evident partiality;
- conducting the hearing contrary to statutory requirements;
- absence of an agreement to arbitrate;
- manifest disregard of the law by the arbitrator, who ignored a prior injunction entered by the bankruptcy court; this was coupled with
- deciding genuine fact issues in a summary judgment proceeding;
- dismissing claims against Clifton that were not pled or argued; and
- "disregarding established Texas law."

The trial court confirmed the award, specifically noting the statutory limitation on invoking vacatur of an arbitration award to the

circumstances listed in Section 171.088 of the Texas Arbitration Act.[12]

On appeal, the Claimant abandoned the majority of his statutory grounds for vacatur. Instead, he focused his arguments on the arbitrator's alleged "manifest disregard of the law." The court of appeals affirmed the trial court's ruling, holding that manifest disregard is not a valid ground to vacate an award under the TAA.[13]

The Texas Supreme Court affirmed.

The focal point of its analysis was the Petitioner's effort to challenge the arbitration award premised upon the arbitrator's "manifest disregard of the law."

The *Hoskins* Court first recognized that this case presented a statutory interpretation issue of first impression.[14] It found the statutory language to be plain: The trial court "*shall confirm*" an award unless vacatur is required under one of the enumerated grounds in *section 171.088*. *Id. § 171.087*. It held that the TAA leaves no room for courts to expand on those grounds.

In so holding, the *Hoskins* Court differentiated its ruling from the decision it rendered 5 years ago in *Nafta Traders v. Quinn*.[15] In that case, a contractual arbitration clause limited the arbitrator's authority and permitted review of an award where

(i) the award contained a reversible error of state or federal law, or

---

[12] (a) On application of a party, the court shall vacate an award if:
(1) the award was obtained by corruption, fraud, or other undue means;
(2) the rights of a party were prejudiced by: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption in an arbitrator; or (C) misconduct or willful misbehavior of an arbitrator;
(3) the arbitrators: (A) exceeded their powers; (B) refused to postpone the hearing after a showing of sufficient cause for the postponement; (C) refused to hear evidence material to the controversy; or (D) conducted the hearing, contrary to [various statutory provisions], in a manner that substantially prejudiced the rights of a party; or
(4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.

[13] *Hoskins v. Hoskins*, _____ S.W.3d _____, 2014 WL 5176384 (Tex. App.—San Antonio 2014), aff'd , 2016 WL 2993929 (May 20, 2016).

[14] As noted by the Court, there was a split amongst the courts of appeals on this issue. Compare *Cambridge Legacy Grp., Inc. v. Jain,* 407 S.W.3d 443, 448 (Tex. App.—Dallas 2013, pet. denied) (Limiting grounds for vacatur to those expressly identified in the TAA) with *Humitech Dev. Corp. v. Perlman,* 424 S.W.3d 782, 794 (Tex. App. —Dallas 2014, no pet.)*; Aspri Invs., LLC v. Afeef,* 2011 WL 3849487, at *7 (Tex. App.—San Antonio Aug. 31, 2011, pet. dism'd) (mem. op.); and *Pheng Invs., Inc. v. Rodriquez,* 196 S.W.3d 322, 329 (Tex. App.—Fort Worth 2006, no pet.).

[15] 339 S.W.3d 84 (Tex. 2011).

(ii) the award applied a cause of action or remedy not expressly provided for under existing state or federal law.[16]

The parties there had thus essentially agreed "to limit [the] arbitrator's power to that of a judge, whose decisions are reviewable on appeal." The *Nafta Traders* Court found no valid reason to foreclose the parties' agreed limitation on that power and held that the arbitration award in that case was subject to judicial review for reversible error. Essentially, the Court re-cast that basis for vacatur as within the TAA's statutorily enumerated prohibition against an arbitrator's "exceeding his or her powers."The *Hoskins* Court noted, by contrast, that no such restrictive contractual arbitration clause existed in this case. It likewise declined to re-characterizethe allegation against the arbitrator as one of "exceeding powers." It therefore held that in any arbitration conducted under the TAA, the "common law" vacatur test of "manifest disregard" was pre-empted. Finally, the Court declined the request by the Petitioner to have the opportunity to return to the Court of Appeals to invoke other challenges to confirmation of the award. The Court construed Petitioner's appellate strategy to have limited his arguments to common law grounds for vacatur, thereby foreclosing his opportunity at a "second bite at the apple."

Lionel M. Schooler currently serves as Chair of the State Bar Alternative Dispute Resolution Section. He has served on the Section Council for 5 years, and is a previous recipient of the Section's Justice Frank Evans Award, recognizing his contributions to the practice of arbitration. Mr. Schooler is a partner in the law firm of Jackson Walker L.L.P. residing in its Houston office, where he focuses his practice on employment law, business litigation and federal appeals. He is a member of the Commercial and Employment Panels of the American Arbitration Association; he is also certified as a Fellow of the Chartered Institute of Arbitrators, and serves as well on the Advisory Board of the Institute for Transnational Arbitration. Mr. Schooler is a frequent speaker on developments in arbitration and on arbitrator ethics.

[16] *Nafta Traders*, 339 S.W.3d at 88.

ADR Section

2016 Calendar of Events

July

Advanced Family Mediation: Austin, July 12-15, 2016. Contact Austin Dispute Resolution Center, (512) 471-0033, www.austindrc.org.

August

Commercial Arbitration Training Domestic & International: Houston, ***August 17-20, 2016***. Contact A.A. White Dispute Resolution Center, http://www.law.uh.edu/blakely/aawhite/commercial-arbitration-training.asp

30 Hour Advanced Mediation Training, Houston**,** ***August 22-24, 2016.*** Contact Mediators of Texas: Institute of Mediation Training, www.mediatorsoftexas.com; 512-966-9222, info@motexas.com

September

40 Hour Basic Mediation Training: Houston, Sept. 9-11 & 16-18, 2016. Contact A.A. White Dispute Resolution Center, http://www.law.uh.edu/blakely/aawhite/40-hour-basic-mediation-training.asp

40 Hour Basic Mediation Training, Round Rock, ***September 13-17, 2016.*** Contact Mediators of Texas: Institute of Mediation Training, www.mediatorsoftexas.com**,** 512-966-9222, info@motexas.com

Basic Mediation, Dallas, Sept. 27-30, 2016. Contact Contact Conflict Happens, (214) 526-4525, www.conflicthappens.com or nkferrell@sbcglobal.net

October

20 Hour Child Protection Services Mediation Training, Round Rock, ***October 3-4, 2016***. Contact Mediators of Texas: Institute of Mediation Training, 512-966-9222, www.mediatorsoftexas.com, info@motexas.com

November

Family Mediation Training: Dallas, Nov. 7-9, 2016. Contact Conflict Happens, (214) 526-4525, www.conflicthappens.com or nkferrell@sbcglobal.net

December

30 Hour Advanced Mediation Training, Round Rock, ***December 5-7, 2016*****.** Contact Mediators of Texas: Institute of Mediation Training, www.mediatorsoftexas.com, 512-966-9222, info@motexas.com

Submit your training session details—name of training, date, location, contact information (telephone and/or email) & URL to Managing Editor Jennifer Alvey at jalvey@jenniferalvey.com.

Alternative Dispute Resolution Section Leadership

Chair
Lionel Mark Schooler,
Jackson Walker
Five Houston Center,
1401 McKinney St. Ste. 1900
Houston, Texas 77010-4037
Office: 713-752-4516
Fax: 713-308-4156
lschooler@jw.com

Chair-Elect
John DeGroote
John DeGroote Services, LLC
Hickory Street Annex
501 S. 2nd Avenue, Suite A-700
Dallas, Texas 75226
Office: 214-887-3484
john@degrootepartners.com

Treasurer
Trey Bergman
Bergman ADR Group
9 Greenway Plaza, Suite 3130
Houston, Texas 77046
Office: 713-977-1717
Fax: 713-977-4889
trey@BergmanADRGroup.com

Secretary
Linda McLain
PO Box 208
1903 Dove Crossing Ln
Ste C
Navasota, TX 77868-5881
Office: 936-825-6533

Immediate Past Chair
Erich Birch
Birch, Becker & Moorman, LLP
4601 Spicewood Springs Road,
Bldg. 4, Suite. 101
Austin, Texas 78759-7814
Office: 512-349-9300
Fax: 512-349-9303
ebirch@birchbecker.com

TMCA Liaison
Hon. Alvin L. Zimmerman
Zimmerman, Axelrad, Meyer,
Stern & Wise, P.C.
3040 Post Oak Blvd., Suite 1300
Houston, Texas 77056-6560
713-552-1234
Fax: 713-963-0859
azimmerman@zimmerlaw.com

Council 2016
Charles A. Joplin (Lubbock)
Hunter T. McLean(Ft. Worth)
Michael P. O'Reilly (Corpus Christi)
Justice Guadalupe Rivera, (Ret.) (El Paso)

Council 2017
David Harrell (Houston)
Kyle Lewis (Dumas)
Linda McClain (Navasota)
Tasha Willis (Houston)

Council 2018
Courtenay Bass (Dallas)
Lisbeth Bulmash (Dallas)
Gary McGowan (Houston)
Gene Roberts (Huntsville)

Board Advisor
Diane De Vasto
Potter Minton Law Firm
110 N. College
Tyler, Texas 75702
Office: 903-597-8311
Fax: 903-593-0846
dianedevasto@potterminton.com

Alternative Board Advisor

Richard Elliott
Law Office of Richard Elliott Fredericksburg,
Texas 78624-3128
Office: 830-997-7715
Fax: 830-997-7013 lonestarlawyer@austin.rr.com

Special Representative:

Donna Phillips - DRC's (Waco)Past Chairs
Donald R. Philbin, Jr. (San Antonio)
Ronald Hornberger (San Antonio)
Hon. Alvin Zimmerman (Houston)
Joe L. "Joey" Cope (Abilene)
Susan Schultz (Austin)
John Allen Chalk (Fort Worth)
John K. Boyce, III (San Antonio)
Cecilia H. Morgan (Dallas)
John Charles Fleming (Austin)
Michael Wilk (Houston)
William H. Lemons III (San Antonio)
Michael J. Schless (Austin)
Deborah H. McElvaney (Houston)
Wayne Fagan (San Antonio)
Caliph Johnson (Houston)
Gary D. Condra (Lubbock)
John A. Coselli, Jr., (Houston)
John P. Palmer (Waco)
Suzanne Mann Duvall (Dallas)
David Cohen (Austin)
E. Wendy Trachte-Huber (Bellville)
C. Bruce Stratton (Liberty)
Charles Guittard (Dallas)
Lanelle Montgomery (Austin)
Kimberlee K. Kovach (Austin)

Article Submission Guidelines

Deadlines. The deadlines for the submission of articles are March 15, June 15, September 15, and December 15. Publication is approximately 1 month later. Authors should anticipate that they will need to review edits the week prior to publication under tight deadlines.

Topics. Articles addressing some aspect of negotiation, mediation, and arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management are welcomed. Promotional pieces are not appropriate for the newsletter.

Article Length. Ideally, articles are 1,500-3,500 words. Shorter and longer articles may be acceptable, depending upon editorial needs. Lengthy articles may be serialized, with the author's approval.

Fact-checking and citation style. Authors are expected to verify names, dates, quotations, and citations. Citations (which should be relatively few) to supporting material can be in Bluebook format, though it's not required. Citations should be given as endnotes. Alternatively, authors can submit a short bibliography of leading sources.

Style Guide. *Alternative Resolutions* uses the Associated Press Stylebook for general questions of grammar, capitalization, spelling, and abbreviation.

Author Information. The author should provide a brief professional biography and a photo.**Re-publication.** The article may have been published previously provided that the author has the right to submit the article to *Alternative Resolutions* for publication.

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

Editing Policies

The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format. The editor has discretion to select accompanying graphics for the article.

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

Future Publishing Rights

Authors retain all their rights with respect to their articles published in the newsletter, except:

The Alternative Dispute Resolution Section of the State Bar of Texas (SBOT) reserves the right to publish articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

Please send article ideas or proposals to Kay Elkins Elliot at k4mede8@swbell.net.

GLOBAL COLLABORATIVE LAW COUNCIL
TEXAS A & M UNIVERSITY SCHOOL OF LAW
TARRANT COUNTY BAR ASSOCIATION
STATE BAR OF TEXAS AND TCBA COLLABORATIVE LAW SECTIONS
AND
TEXAS CENTER FOR LEGAL ETHICS

Present the

12th ANNUAL CIVIL COLLABORATIVE LAW CONFERENCE

September 15, 2016
TRAINING IN THE "BASICS OF COLLABORATIVE LAW"
7.00 hours of Texas CLE credit,
including 1.75 hours ethics, approved

Tarrant County Bar Association
1315 Calhoun Street, Fort Worth, TX 76102

September 16-17, 2016
ADVANCED COLLABORATIVE LAW CONFERENCE
15.50 hours of Texas CLE credit,
including 1.25 hours ethics, approved

Texas A & M University School of Law
1515 Commerce Street, Fort Worth, TX 76102

For further information:
www.collaborativelaw.us **- "Upcoming Events"**

Sherrie Abney 972-417-7198
Melanie Atha 205-716-5212
Anne Shuttee 214-237-2922
Luemara Wagner 512-536-0662

Return to Table of Contents

State Bar Of Texas
Alternative Disputeresolution Section
MEMBERSHIP APPLICATION FORM
(Bar Year Runs June 1, 2016–May 31, 2017)

Here's a challenge for all members of the ADR Section: **Pay it forward**. If you know a colleague or associate with an interest in mediation or ADR, invite him or her to join the ADR Section. Send them this link, http://www.texasadr.org/Portals/0/ADR%20Membership%20Application.pdf?ver=2016-03-02-150920-283, so that they can enjoy all the great benefits of section membership.

Benefits of Membership

- Section Newsletter, *Alternative Resolutions,* published quarterly.Regular features include the beloved Ethical Puzzler, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around Texas.
- Valuable information on the latest developments in ADR is provided to both ADR practitioners, and those who represent clients in mediation and arbitration processes.
- Affordable Continuing Legal Education opportunities at basic, intermediate, and advanced levels through conferences and interactive seminars.

All of this, and more, for the low cost of *only $30.00 per year*!

State Bar Of Texas Alternative Dispute Resolution Section
Membership Application

Join online! Go to http://www.texasadr.org/Portals/0/ADR%20Membership%20Application.pdf?ver=2016-03-02-150920-283

Name:_____ Bar Card Number:_____

Street Address: _____

City:_____ State:_____ Zip: _____

E-Mail Address:_____

Mobile: _____Business Phone:_____

Fax:_____

Enclosed is $30.00 for membership in the Alternative Dispute Resolution Section of the State Bar of Texas from June 2016 to May 2017.

Method of Payment: Check ____ Visa ____ MasterCard ____ AmEx_____

Name on card:_____ Account #:_____

Expiration:_____ Authorized signature: _____

(No need to return this form if you are paying your section dues at the same time you pay your other State Bar of Texas fees.)

Make checks payable to: **ADR Section, State Bar of Texas**.

Mail your application to: State Bar of Texas ADR Section, P.O. Box 12487, Austin, Texas 78711

Return to Table of Contents