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

John K. Boyce, III

I am returning from our Advanced Mediation Conference, which took place in Houston on Friday, January 30. It was a resounding success. The presenters are among the finest mediators in the United States. Randy Lowry, president of Lipscomb University, is the founder of the Straus Institute for Dispute Resolution at Pepperdine University. Peter Robinson is current managing director of the Straus Institute, which is consistently ranked as one of the top centers in the country. Both have worked together as a team for years.

The conference was all about experience. Randy and Peter were everything we had been led to expect—and more. They were charismatic, energetic men of integrity. They illustrated advanced techniques with real-life examples every bit as nuanced as the technique they demonstrated. I have never seen anything like it. The audience contributed its experience. The Council honored Randy and Peter with a dinner the previous evening.

The conference was unique for two additional reasons, both "firsts" for the Bar: one, its interactive format between presenters and participants—no talking heads, panels, or role playing; and, second, it was financially underwritten by three cosponsoring organizations: Texas BarCLE, our ADR Section, and the American Arbitration Association. At a time when live CLE attendance is down, registration for this conference exceeded predictions.

At lunch, Joe Cope gave an engaging presentation on the ethics of power in mediation. He ended with a great clip from the Bob Newhart Show to drive home his points.

Council met the previous afternoon for its quarterly meeting. Of the many items we discussed, there are two to bring to your attention.

As predicted in previous Chair's Corners, arbitration is already a hot topic at the Texas Legislature and Congress. Senator Royce West has filed Senate Bill 222, which would dramatically amend the Texas General Arbitration Act to do away with arbitration in consumer, employment, and franchise disputes (among other proposals). You can track the bill beginning at www.legis.state.tx.us/Home.aspx. (Click "MyTLO" and customize.) There are bills expected to be filed in Congress which would be even broader and deny pre-dispute arbitration in "cases of unequal bargaining power".

I cannot say what a threat this presents to the system of dispute resolution that has been in place for over eighty years. In response, the Council adopted a "White Paper" prepared by John Allen Chalk, Sr. *et al.*, which is an empirical study of arbitration. It is not a position statement; rather, it is an objective resource to be used in addressing the misunderstanding about arbitration's role in the dispute resolution spectrum. As you are aware, by law we as a Section cannot advocate for or against bills. We can, however, serve as a resource. This role can be every bit as valuable, not only because of our hands-on expertise but also because of our objectivity (i.e., we are not pushing an agenda). We encourage all members to serve as resources with their elected officials. I encourage you to use the "White Paper" which you will find on the Section's website (http://www.texasadr.org/index.html). You will be surprised how little

continued on page 26

Inside This Issue:

ARBITRATION EMPIRICAL STUDIES

By John Allen Chalk, Sr. *[1]

Arbitration has recently attracted both federal congressional and state legislative attention. Attacks by trial lawyers and others on consumer, employment, franchise, and other kinds of arbitration have recently increased. Both the Federal Arbitration Act ("FAA") and state arbitration statutes[2] are being re-examined for possible amendments to address alleged abuses of arbitration as a dispute-resolution method. Much of the congressional and legislative discussion builds on isolated "horror" anecdotes and unsubstantiated rumors regarding arbitration. But arbitration has also been studied empirically by a large number of dispute-resolution students and observers. Some of these objective studies are discussed and summarized in this article.

STUDY OF BINDING ARBITRATION PARTICIPANTS

A 2005 study for the U.S. Chamber Institute for Legal Reform[3] involved online interviews with 609 adult arbitration participants and a sub-sample national cross-section of 31,045 adult arbitration participants in binding arbitrations that reached a decision. The arbitrations in which those surveyed participated included the following kinds of disputes: contract (34%); personal injury (27%); divorce (4%); unpaid bills/loans (4%); child custody (3%); auto accident (3%); and other (25%). The participants surveyed found arbitration faster (74%), simpler (63%), and cheaper (51%) than going to court. Sixty-six percent (66%) said they would use arbitration again. Those surveyed found arbitration to be a fair process (75%) that resulted in a fair outcome (72%). Eighty-four percent (84%) of those surveyed were satisfied with the length of their arbitration.

ABA SURVEY OF SOLO AND SMALL FIRM ATTORNEYS

Members of the General Practice Solo and Small Firm Division of the American Bar Association ("ABA") were surveyed independently and the results published in 2006.[4] Eighty-six percent (86.2%) of the respondents believed their clients' interests were best served by alternative dispute resolution ("ADR") solutions. Approximately 6.3% of the respondents resolved more than five cases by arbitration in the previous year. Sixty-eight percent (68.6%) would use arbitration more often if arbitrators were required to follow the law, and 55.4% would use arbitration more often if the arbitrators were lawyers or judges.

ABA SECTION OF LITIGATION SURVEY

In August 2003, the ABA Section of Litigation published the results of a survey designed to determine what its approximately 7,000-member section thought about arbitration. Seventy-eight percent (78%) of respondents thought arbitration took less time than litigation. Fifty-six percent (56%) of respondents believed that arbitration was more cost-effective than litigation. When comparing arbitration to litigation as to fairness, validity, and client satisfaction with final arbitration awards: 28% of respondents thought arbitration quality better than litigation verdicts or judgments; 25% of respondents thought arbitration quality not as good as litigation verdicts or judgments; and 46% of respondents thought arbitration quality about the same as litigation verdicts or judgments.

FULBRIGHT & JAWORSKI'S LITIGATION TRENDS STUDY

The *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics*[5] reported Fulbright & Jaworski's findings from its 2008 study of employment and other kinds of arbitration. This study revealed that 75% of all respondents to its 2008 survey said their companies require arbitration of employment disputes. The survey showed that almost one-third of smaller company respondents spent $50,000 to $100,000 per employment dispute and a quarter of them spent more than $100,000 per employment dispute. The survey also showed that a quarter of the mid-sized company respondents spent $50,000 to $100,000 per employment dispute and 12% averaged $100,000 or more per employment dispute. Among the largest company respondents, 23% spent $50,000 to $100,000 per employment dispute and 19% spent $100,000 or more per employment dispute.

EMPLOYMENT ARBITRATION

Another study shows that by 1997, 19% of private-sector employers used employment arbitration, up from only 3.6% in 1991.[6] Between 1997 and 2001, the number of employees covered by employment arbitration plans administered by the American Arbitration Association ("AAA") grew from 3 to 6 million employees.[7]

A study published in 2003 compared two sets of employment cases: (1) 125 employment-discrimination cases filed between April 1, 1997 and July 31, 2001, in the Southern District of New York, that concluded in trial and (2) 186 securities-industry employment-arbitration cases administered by NASD and the New York Stock Exchange in which awards were issued between April 1, 1997 and July 31, 2001.[8] The authors of the study concluded:

> "[The] findings show that there is a statistically greater probability of a plaintiff winning a discrimination case before an arbitrator than in federal court. These results are sufficiently robust that adding statistical covariates are not likely to turn the estimates around in the other direction for this sample of cases."

continued on page 3

ARBITRATION EMPIRICAL STUDIES
continued from page 2

Claimants in this study prevailed in 46% of cases arbitrated versus only 34% of cases litigated. Claimants received median monetary awards of $100,000 in arbitration and $95,554 in federal-court litigation. Arbitrations in this study were 33% faster than federal-court litigation. Median time from filing to award in arbitrations was 16 months while federal-court litigation median time from filing to judgment was 25 months. During the April 1, 1997 through July 31, 2001 period for the court cases, approximately 3,000 discrimination cases were filed, but only 3.8% of them were concluded with a jury trial, demonstrating that the argument that litigation preserves an employee's right to jury trial is an invalid argument against arbitration.

The National Workrights Institute ("NWI") published a paper summarizing some of the empirical studies of employment arbitration.[9] Employee win rates in arbitration were reported as 73% (Bingham I), 66% (Maltby), 43% (Eisenberg), and 63% (Bingham II). This report also indicated that based on both the increased costs and risks of appeals from litigation, arbitration is more favorable for employees. The study concludes: "Research to date indicates that more employees are able to gain access to justice through arbitration than through litigation, and that they are more likely to win their cases in arbitration (if they use a qualified arbitration provider)."

CONSUMER ARBITRATION

Eight hundred (800) registered voters (who indicated they were likely to vote in the 2008 elections) across the U.S. were surveyed by telephone between December 17 and 20, 2007, regarding consumer disputes.[10] Eighty-two percent (82%) of those surveyed strongly preferred arbitration over litigation to resolve any serious dispute between a company and a consumer. Seventy-one percent (71%) believed arbitration agreements should not be removed from contracts consumers sign with companies providing goods and services. Forty percent (40%) of those surveyed believed it would be very difficult to resolve a serious consumer dispute with a company, and more than 50% believed that a dispute, if resolved, would not be resolved fairly to the consumer.

A database of approximately 34,000 California consumer arbitration cases that occurred from 2003 through the first quarter of 2007 was studied by Public Citizen, Navigant Consulting (for the U.S. Chamber Institute for Legal Reform), and others.[11] The Public Citizen study was highly critical of consumer arbitration. The Navigant study[12] was critical of the Public Citizen study and reported the following findings: consumers were successful in 32.1% of these arbitrations; in an additional 16.4% of these arbitrations, the initial claims against consumers were reduced in the arbitration awards; in the cases that went to final hearing, the claims against the consumers were reduced in 37.4% of the final hearing cases; in 33,935 of these cases where an arbitration fee was paid, the consumer paid no arbitration fee in 99.3% of the cases and in the other 0.7% of the cases the consumer paid a median fee of $75.00; in cases where the consumer did not appear, the actual damages awarded to the claimant were 22.6% less than damages sought by the claimant.

SUMMARY

The empirical studies do not support the current criticisms of arbitration. Arbitration has been a recognized and practiced method of dispute resolution for centuries. It was common-law, judicial hostility to arbitration in U.S. courts that prompted early state arbitration acts[13] and that ultimately led to the adoption of the FAA in 1925. Since 1925, the U.S. Supreme Court and state supreme courts have built an overwhelming arbitration jurisprudence favorable to and supportive of pre-dispute arbitration agreements under both federal and state arbitration acts. The allegation that consumers, employers, franchisees, and others are not being treated fairly by pre-dispute arbitration agreements is not supported by the empirical data hereinabove described.

ENDNOTES

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

[2] *See* TEX.CIV.PRAC.&REMEDIESCODE ch. 171 ("General Arbitration").

[3] *Arbitration: Simpler, Cheaper, and Faster Than Litigation*, Harris Interactive Survey (April 2005).

[4] Independent survey administered by Surveys and Ballots, Inc. and published by the National Arbitration Forum.

[5] *Fifth Annual Litigation Trends Survey Findings:Direction and Dynamics*, Fulbright & Jaworski, LLP (2008), *available at* www.fulbright.com/litigationtrends.

[6] Demaine and Hensler, *Volunteering to Arbitrate Through Predispute Arbitration Clauses:The Average Consumer's Experience*, 67 *Law and Contemporary Problems* 55 (Winter/Spring 2004).

[7] Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 *Dispute Resolution Journal* 8, 10 (2008).

[8] Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights*? 58 *Dispute Resolution Journal* 56 (November 2003, No. 4).

[9] *See* www.workrights.org/current/ed for copy of report with citations to its sources.

[10] Survey by Public Opinion Strategies and Benenson Strategy Group; *see Key Findings From a National Survey of Likely Voters* (U.S. Chamber Institute for Legal Reform) (April 2008).

[11] California Code of Civil Procedure 1281.96 requires private arbitration companies to collect and publish data pertaining to consumer arbitrations heard in California. Consumer arbitration as defined by California law involves "a consumer or employee who was required to accept an arbitration provision in a contract drafted by a non-consumer or its representative."

[12] *See* Navigant Consulting study at www.instituteforlegalreform.com/issues/docload.cfm?docID=1212.

[13] By 1933, twelve states had adopted state arbitration acts that enforced pre-dispute arbitration agreements.

THE SAN ANTONIO COURT OF APPEALS:

A SUBSTANTIVELY UNCONSCIONABLE PROVISION IN AN ARBRITRATION AGREEMENT SHOULD HAVE BEEN SEVERED, ALLOWING COMPULSORY ARBITRATION TO GO FORWARD

By Steven M. Fishburn*

A case the San Antonio Court of Appeals decided in May 2008, *Security Service Federal Credit Union v. Sanders*[1], is a case of first impression in Texas on the issue of whether a limitation on a party's right to recover attorney fees and costs guaranteed under the Deceptive Trade Practices Act (DTPA) is substantively unconscionable as a matter of law.[2] The finding of substantive unconscionability notwithstanding, the court ultimately granted the petitioner's request to compel arbitration.[3]

The court of appeals considered the case in response to a petition for a writ of mandamus filed by Security Service Federal Credit Union (SSFCU). SSFCU challenged the refusal of the 37th District Court of Bexar County, Texas to compel arbitration, under the Federal Arbitration Act (FAA), of claims brought against the credit union by the Eric and Carrie Sanders, appellees.[4] The court "conditionally granted mandamus relief and dismiss[ed] the related appeal as moot."[5]

The Sanders were accountholders at SSFCU and sued the credit union for allegedly mishandling a number of their loan and deposit accounts.[6] After answering the Sanders' petition, SSFCU moved to compel arbitration under two arbitration agreements: one in the account agreement with the Sanderses, the other contained in fourteen sets of loan documents signed by the Sanders.[7] The Sanders "argued that both arbitration agreements were unenforceable because they were substantively and procedurally unconscionable under Texas contract law."[8]

Substantive Unconscionability

Addressing the Sanders' claim of substantive unconscionability,[9] the court of appeals found that the arbitration agreement in the member account terms and conditions was general, "governing all controversies that may arise between the parties; and the arbitration agreement in the loan documents is specific, governing controversies arising from the loans."[10] Ordinarily, this finding might have meant a quicker, more direct resolution of the case, but the court also found that the general arbitration agreement stated that the prevailing party could recover all costs and fees (including attorneys' costs and fees, administrative fees and costs, and arbitrator fees).[11] Further, the arbitration agreement contained in the loan documents provided that "all fees and expenses of the mediation and/or arbitration shall be borne by the parties equally. However, each party shall bear the expense of his own counsel."[12] According to the court, these provisions in the general agreement and the specific loan agreements conflicted with the provisions of the Texas Deceptive Trade Practices Act (DTPA), which "mandates that consumers can recover court costs and reasonable attorney's fees when they prevail in a DTPA action."[13] And, the court reasoned, "Generally the DTPA does not require consumers who are unsuccessful in bring DTPA claims to reimburse the attorney's fees and costs of the prevailing defendant (with an exception noted by the court for consumer actions found to be harassing, groundless, or brought in bad faith)."[14] Thus, the provision in the general arbitration agreement

> requires the arbitrator(s) to award to the prevailing party recovery of all costs and fees "including attorney's fees and costs . . . ." [T]his provision requires the arbitrator to assess attorney's fees and costs against consumers if they are unsuccessful in prosecuting a DTPA action, without the statutorily-required finding of groundlessness or its equivalent. The loan arbitration agreement . . . requires SSFCU and [the Sanders] to each bear the expense of their own counsel and to bear other costs equally. Under this provision, the [Sanders] would not be able to recover attorney's fees and costs as mandated by the DTPA, even if they prevailed on the DTPA claims in arbitration. Such a result is inconsistent with Texas public policy.[15]

The court concluded, "Given the public purpose served by the DTPA—encouraging individual consumers to prosecute consumer claims and making it economical for them to do so—we are of the opinion that the attorney's fees and costs provisions in both arbitration agreements are unconscionable when applied to DTPA claims."[16]

continued on page 5

THE SAN ANTONIO COURT OF APPEALS: A SUBSTANTIVELY UNCONSCIONABLE PROVISION IN AN ARBRITRATION AGREEMENT SHOULD HAVE BEEN SEVERED, ALLOWING COMPULSORY ARBITRATION TO GO FORWARD
continued from page 4

Even with this finding that the attorney's fees and costs provisions in both arbitration agreements were substantively unconscionable when applied to DTPA claims, the court nevertheless insisted the trial court should have compelled arbitration. As the court pointed out, "Under state-law contract principles a court is generally authorized to sever an illegal or an unenforceable provision from a contract and enforce the remainder of the contract."[17] And, "Severability is determined by the intent of the parties as evidenced by the language of the contract."[18] Having pointed to these severability principles, the court applied them, ruling the trial court did not err when it refused to compel arbitration regarding the loan arbitration agreements because those agreements expressly prohibited the severance of any provision deemed unenforceable.[19] "However, the general arbitration agreement, by contrast, expressly provides as follows: 'If any provision of this arbitration clause should be determined to be unenforceable, all other provision of this arbitration clause shall remain in full force and effect.'"[20] Based on this ability to have severed the unenforceable provision regarding attorney's fees and cost, the court of appeals concluded that the trial court erred when it did not sever the provision and compel arbitration.[21]

Procedural Unconscionability

The court of appeals made short work of the Sanders' arguments of procedural unconscionability, which the trial court had affirmed. According to the court of appeals, "procedural unconscionability is concerned with assent and focuses on the facts surrounding the bargaining process."[22] The trial court had concluded, "the general arbitration agreement was procedurally unconscionable and unenforceable because it was not signed by the [Sanders], was not shown to have been provided to them, and was buried in fine print." The court of appeals, disagreeing with all these trial court assertions, declared that neither Texas law nor the FAA requires an arbitration agreement to be signed as long as it is in writing and is agreed to by the parties.[23] Further, the court mentioned that SSFCU did provide copies for the record of the member agreement signed by the Sanderses in which they had agreed to be "bound by terms and conditions of any account that I have in the Credit Union now or in the future." The credit union having provided the member agreement, the burden shifted to the Sanders to submit evidence to rebut SSFCU's showing of a valid member agreement. The Sanders did not present any such evidence, so they neither rebutted SSFCU's showing nor demonstrated the procedural unconscionability of the general arbitration agreement, according to the court.[24] Similarly, the Sanders' contentions that the general arbitration agreement was unconscionable because it was "buried in fine print" were dismissed by the court. The court found the general arbitration agreement was "in a pamphlet in the same print size as the other account terms and conditions and under the heading, "ARBITRATION." And, "[b]elow this heading is a warning appearing in capital letters and advising members they are waiving their right to litigate in court, including their right to a jury trial."[25] On such a record, the court of appeals concluded the trial court erred in finding there was procedural unconscionability and should have compelled arbitration.

Returning to the major error of the trial court, in its conclusion the court of appeals stated that the trial court should have severed the attorney's fees and costs provision from the general arbitration agreement and compelled arbitration. Per the court of appeals, the trial court erred in not doing so and erroneously denied SSFCU the right to arbitrate.[26] Thus, SSFCU was entitled to the mandamus relief it sought. The court conditionally granted the writ of mandamus and dismissed the related appeal as moot.

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ENDNOTES

[1] Sec. Serv. Fed. Credit Union v. Sanders, 264 S.W.3d 292 (Tex. App.—San Antonio [4th Dist] 2008, no pet.).
[2] *Id.* at 298 n.7.
[3] *Id.* at 302.
[4] *Id.* at 295-96.
[5] *Id.* at 296.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 297.
[9] *Id.* (reasoning, "Under Texas contract law, courts may properly decline to enforce a contract, or a provision in a contract, on the ground that it is against public policy and therefore substantively unconscionable" and citing Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 562 (Tex. 2006); Crowell v. Housing Auth. of Dallas, 495 S.W.2d 887, 889 (Tex. 1973); TEX. BUS. & COM. CODE ANN. § 2.302 (Vernon 1994) for the principle that courts may refuse to enforce contractual provisions determined to be unconscionable as a matter of law).
[10] *Id.* at 296.
[11] *Id.* at 297.
[12] *Id.* at 297-98.
[13] *Id.* at 299 (citing TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 2008)).
[14] *Id.*
[15] *Id.*
[16] *Id.* at 300 (citing Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Ca. 2002)(holding that, "[w]hereas this clause may be illegal as applied to plaintiffs' statutory right under the CLRA, it is not substantively unconscionable when applied to non-statutory claims."), *aff'd in part and rev'd in part on other grounds*, 319 F.3d 1126 (9th Cir. 2003); *see also Hoover Slovacek,* 206 S.W.3d at 563

continued on page 8

HALL STREET APPLIED TO TEXAS GENERAL ARBITRATION ACT IN *QUINN V. NAFTA TRADERS, INC.*

By John Allen Chalk, Sr.*

The Dallas Court of Appeals has borrowed the reasoning of the U.S. Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.*[1] and decided that the Texas General Arbitration Act (the "TAA"),[2] like the Federal Arbitration Act (the "FAA"), does not permit expanded judicial review of an arbitration award.[3] The court took pains to make it clear that it was expressing no opinion on whether common-law grounds of vacatur, under the TAA case law, were still available or whether public-policy grounds for vacatur had been preempted by the TAA.[4]

Quinn was an employment dispute in which neither party questioned the application of the TAA. The arbitrator in *Quinn* found for the employee in the amount of $203,341, which included attorney's fees for the arbitration but none for the appellate attorney's fees.[5] The employee filed her motion for confirmation and a request for additional attorney's fees for the appellate work. The employer filed its motion to vacate, arguing that the parties agreed in the arbitration clause for an expanded scope of review of any arbitration award.[6] The court did not decide, but assumed without deciding, that the parties had contracted for expanded judicial review in the arbitration clause.[7]

The court recognized that expanded judicial review of arbitration clauses under the TAA has never been decided by the Texas Supreme Court.[8] But because of the "similarities between the TAA and FAA" especially regarding "enforcement, vacation, and modification of arbitration awards," the court decided to apply the U.S. Supreme Court's *Hall* opinion to *Quinn*.[9] This meant that Section 171.087 of the Texas Civil Practice and Remedies Code established the "exclusive" grounds for judicial vacation, modification, or correction of an arbitration award governed by the TAA.[10] Unless one of the statutory grounds for vacatur exists "the court, on application of a party, *shall* confirm the award."[11] This TAA provision "is not written as a default provision in the event the parties' contract is silent on this issue [of expanded judicial review]," the court observed.[12]

The court explained the "similarities" of the FAA and the TAA by recognizing that (1) both "provide an expedited process to enforce or change an arbitrator's award" and (2) both have "textual features," explained by the U.S. Supreme Court in *Hall*, that do not comport with expanded judicial review by contract of the parties.[13] The court also explained that the statutory grounds for vacatur in Section 171.088 of the Texas Civil Practice and Remedies Code were "extremely narrow" and contained no express authority for expanded judicial review.[14] The court saw these TAA vacatur grounds as "severe departures from an otherwise proper arbitration process" and of "a completely different character than ordinary legal error."[15]

As an alternative argument on appeal, the employer said the parties' arbitration clause created strict guidelines for what the arbitrator could and could not decide and, therefore, the arbitrator in this case exceeded his powers under Section 171.088 (a)(3)(A) of the Texas Civil Practice and Remedies Code. But the court disagreed that the five legal errors claimed by the employer proscribed the arbitrator's authority; instead, the court understood the employer was arguing that "the arbitrator decided the matters before him incorrectly" rather than that "the arbitrator decided a matter not before him [which Section 171.088 of the Texas Civil Practice and Remedies Code prohibits]."[16]

The trial court's grant of the employee's motion to confirm the arbitration award but no additional appellate attorney's fees was affirmed by the Dallas Court of Appeals. The trial court's denial of the employer's motion to vacate was also affirmed by the Dallas Court of Appeals. A petition for review was filed August 1, 2008 but, so far, no word from the Texas Supreme Court.

**** John Allen Chalk, Sr.**, a partner in the Fort Worth, Texas law firm of Whitaker, Chalk, Swindle & Sawyer, L.L.P., is Chair-Elect of the ADR Section of the State Bar of Texas and a member of arbitrator and mediator panels for the American Arbitration Association, International Centre for Dispute Resolution, American Health Lawyers ADR Service, International Institute for Conflict Prevention and Resolution (f/k/a CPR Institute for Dispute Resolution), and the National Arbitration Forum. He is a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators and a member of the London Court of International Arbitration.*

ENDNOTES

[1] 128 S. Ct. 1396 (2008).

[2] TEX. CIV. PRAC. & REM. CODE ch. 171.

[3] *See Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795 (Tex. App.--Dallas 2008, pet. filed).

[4] *Id. at 799*.

[5] The Dallas Court of Appeals has previously held that unless the arbitration agreement provides for appellate attorney's fees, they aren't available in motions to confirm or vacate arbitration awards. *See* Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 436 (Tex. App.--Dallas 2004, pet. denied) (cited in *Quinn*, 257 S.W.3d at 800).

continued on page 26

DISCRIMINATION ALLEGATIONS AND ARBITRATION: ELEVENTH CIRCUIT UPHOLDS EMPLOYER'S ARBITRATION POLICY

By Kevin Casey*

Here are the facts: In 2001, you applied for a job. The Application for Employment required newly hired employees to agree "to be bound by and accept as a condition of employment the terms of Open Door." Having no issue with that statement, you completed the application, applied, and were hired. During orientation you were provided with a pamphlet stating employees "agree to waive [their] right to a trial in a court of law, and [] agree instead to resolve all legal claims against [the company] through Open Door." The pamphlet also stated that the company too "waives its right to trial in a court of law and agrees to resolve such disputes through Open Door." The Open Door policy stated, in part:

> If your dispute involves a legally protected right, such as sexual harassment or discrimination based on age, sex, or race, and you have not been able to resolve the dispute through discussion with supervisors in your chain of command or through mediation, you may request arbitration. All arbitrations under Open Door are conducted by members of the American Arbitration Association (AAA).
>
> You should consult your Open Door facilitator to determine if your workplace dispute is appropriate for presentation to an arbitrator. If so, the facilitator will contact the AAA to initiate the process.

Approximately three and one-half years later, you were terminated because you allegedly threatened a supervisor. You believed you were terminated because of race and age, and in retaliation for prior complaints of race discrimination you made. You filed suit in the United States District Court for the Southern District of Georgia, alleging violations of both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA"). Your former employer then moved the district court to stay proceedings and compel arbitration pursuant to the Federal Arbitration Act ("FAA").

To your relief, the district court denied the employer's motion to compel arbitration. The court concluded, "the claims of retaliatory and discriminatory discharge brought by [you] are not the type of ongoing workplace disputes amenable to 'open door' resolution as contemplated by the Open Door policy." Additionally, the court interpreted the policy as allowing the employer unbridled discretion to grant or deny arbitration to employees. Because of this apparent lack of mutuality, the court held that the actual details of the policy were illusory and, therefore, inoperative.

Although your former employer has appealed, you feel confident you will be able to convince the court of appeals that your employer did not provide adequate consideration to make the arbitration contract legally enforceable, especially because, as you contend, the employer had the power to determine whether employees could arbitrate their disputes. Additionally, you maintain the agreement to arbitrate does not cover disputes arising in termination and post-termination contexts.

Here is the law: The United States Court of Appeals for the Eleventh Circuit held. otherwise. In *Lambert v. Austin Ind.*, the court first noted the validity of an arbitration agreement is generally governed by the Federal Arbitration Act. Under the FAA, a written agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." This statutory provision required the court to determine whether the employer's (Austin Ind.'s) Open Door policy was an enforceable contract under Georgia Law. To be enforceable, there must be (a) a definite offer and (b) complete acceptance (c) for consideration. Assuming these basic requirements are met, the employee's (Lambert's) claims must fall within the policy's scope?

Neither party disputed the existence of a "definite offer" and "complete acceptance." Austin made the offer; Lambert worked. In dispute was whether there was adequate consideration. For there to be consideration, an accepting party to a contract can either tender bargained-for performance or make a mutual promise. Lambert argued Austin offered an illusory promise with respect to the initiation of arbitration proceedings. An illusory promise exists when "words of promise…by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue." Lambert maintained that Austin's Open Door policy allowed the company facilitator to determine not only when, but also if, an employee can arbitrate his workplace disputes.

The court disagreed with Lambert's interpretation of the last two sentences (quoted above) as effectively allowing Austin to

continued on page 8

DISCRIMINATION ALLEGATIONS AND ARBITRATION: ELEVENTH CIRCUIT UPHOLDS EMPLOYER'S ARBITRATION POLICY
continued from page 7

unilaterally opt out of arbitration through the facilitator. The court noted, "nowhere in the Open Door policy does Austin suggest that employees cannot initiate the arbitration process on their own. Instead, the text…explicitly says otherwise…. Employees need not involve a facilitator if they wish to proceed without one." The court found that "the language suggesting that employees 'should' consult with a facilitator is phrased using permissive, rather than mandatory, language." Consequently, the facilitator was not a "gatekeeper" as alleged by Lambert, but rather an "advisor" to distressed employees. That said, the court held the Open Door policy valid and enforceable.

Lambert's second contention was that the agreement to arbitrate did not cover disputes arising in termination and post-termination contexts. Again, the court referred to the FAA and the text of Austin's policy. The FAA creates a presumption in favor of arbitrability. Consequently, parties must clearly express their intent to exclude categories of claims from any arbitration agreements. Austin's pamphlet included both of the following: the policy was "the exclusive means for resolving all workplace disputes," and, elsewhere, it was described as a policy establishing "a mandatory program for the resolution of disputes arising from or related to employment." The court reasoned that such "language suggests that employment-termination disputes do indeed fall under the scope of the Open Door arbitration agreement."

Having found Austin's arbitration agreement valid and enforceable, "resolution of Lambert's dispute is best left to Austin's arbitration policy." The Eleventh Circuit reversed the district court's order denying Austin's motion to compel arbitration.

(EDITOR'S NOTE: The Supreme Court of Texas considered a similar case and reached a comparable result in *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002)).

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ENDNOTES

1 42 U.S.C. §§ 2000e-2000e-17
2 29 U.S.C. §§ 621-634.
3 9 U.S.C. §§ 1-14.
4 Lambert v. Austin Ind., 544 F.3d 1192 (11th Cir. 2008).
5 *Id.* at 1195 (quoting 9 U.S.C. § 2).
6 *Id.*
7 *Id.*
8 *Id.* (citing Franklin v. UAP/GA. AG. CHEM, Inc., 514 S.E.2d 241 (Ga. 1999).
9 *Id.* at 1196 (citing Kemira, Inc. v. Williams Investigative & Sec. Servs., Inc., 450 S.E.2d 427, 431 (Ga. 1994).
10 *Id.*
11 *Id.*
12 *Id.* at 1197.
13 *Id.* (citing Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054 (11th Cir. 1998).
14 *Id.* at 1197-98.
15 *Id.* at 1198.
16 *Id.* at 1199.
17 *Id.*
18 *Id.*

THE SAN ANTONIO COURT OF APPEALS: A SUBSTANTIVELY UNCONSCIONABLE PROVISION IN AN ARBRITRATION AGREEMENT SHOULD HAVE BEEN SEVERED, ALLOWING COMPULSORY ARBITRATION TO GO FORWARD
continued from page 5

(provision in attorney-client contract held substantively unconscionable on public policy grounds); Crowell v. Housing Auth. of Dallas, 495 S.W.2d 887, 889 (Tex. 1973) (contract exempting housing authority from liability for negligence held unconscionable on public policy grounds).
17 *Sanders*, 264 S.W.3d at 300 (citing *Hoover Slovacek*, 206 S.W.3d at 565; Williams v. Williams, 569 S.W.2d 867, 871 (Tex. 1978) (supporting the concept that an illegal provision may be severed if it does not constitute the main purpose of the contract)).
18 *Id.* at 300 (citing In re Kasschau, 11 S.W.3d 305, 313 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding); Montgomery v. Browder, 930 S.W.2d 772, 778-79 (Tex. App.—Amarillo 1996, writ denied)).
19 *Id.* at 300.
20 *Id.* at 301.
21 *Id.* at 301 (citing Hadnot v. Bay, Ltd. 344 F.3d 474, 478 (5th Cir. 2003) (holding the severance of an illegal punitive damage restriction from an arbitration agreement was proper because it promoted public policy favoring arbitration)).
22 *Id.* (citing Pony Express Courier Corp. v Morris, 921 S.W.2d 817, 821 (Tex. App.—San Antonio 1996, no writ)).
23 *Id.* (citing In re AdvancePCS Health L.P., 172 S.W.3d 606, 606 (Tex. 2005) (enforcing arbitration provision referenced and agreed to in numerous enrollment forms)).
24 *Id.*
25 *Id.* at 301-02 (citing Autonation USA Corp. v. Leroy, 105 S.W.3d 190, 199 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (concluding arbitration agreement placed in the middle of several provisions was not procedurally unconscionable)).
26 *Id.* at 302 (citing In re AdvancePCS Health, 172 S.W.3d at 608)

ETHICS OPINION QUESTIONED

By Sherrie R. Abney *

The November 2008 issue of the *Texas Bar Journal* published Opinion No. 583 of the Professional Ethics Committee for the State Bar of Texas. The opinion, dated September 2008, addressed the following question: "May a lawyer enter into an arrangement to mediate a divorce settlement between parties who are not represented by legal counsel and prepare the divorce decree and other necessary documents to effectuate an agreed divorce if the mediation results in an agreement?" The conclusion of the Professional Ethics Committee for the State Bar of Texas (hereinafter, the "Committee") was, "No."

The opinion described a fact pattern in which a lawyer is employed to conduct mediation for parties to a divorce; the mediator informs the parties that the mediator does not represent either party; and it is understood that if agreement is reached, the mediator/lawyer will prepare the necessary legal documents. Each party will pay one-half of the cost, and neither party is represented by legal counsel.

The conclusion that this scenario is prohibited was reached in a rather circuitous manner by first stating that a mediator is an "adjudicatory official." The Preamble to the Texas Disciplinary Rules of Professional Conduct defines an adjudicatory official as, "a person who serves on a Tribunal," and continues by defining a Tribunal as "any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. Tribunal includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter . . . ."

Placing a mediator in the list of those who serve on tribunals would appear to cast mediators in a much different role than they actually perform. A mediator is a neutral with no power to impose a decision on the parties, and unlike other "adjudicatory officials," mediators cannot even make a recommendation to someone empowered to render a final decision. This would certainly distinguish a mediator from an "adjudicatory official."

The ethical opinion goes on to state that if the proposed arrangement of a mediator preparing legal documents for the parties was agreed to prior to beginning mediation, it is in violation of Rule 1.11(b), which states that, "a lawyer who is an adjudicatory official shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a pending matter in which that official is participating personally and substantially." Consequently, the Committee concluded that "a lawyer/mediator may not enter into an agreement with the parties to a divorce to provide both mediation and legal services with respect to the divorce."

The Committee considered the ability of the parties to agree to such an agreement under Rule 1.11(a), which provides, "A lawyer shall not represent anyone in connection with a matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official or law clerk to an adjudicatory official, unless all parties to the proceeding consent after disclosure." However, the Committee determined that the parties may not consent to receive these services because the services have not "*previously*" been provided but are agreed upon prior to the beginning of the mediation.

The Committee continued by stating, "the preparation of documents for both otherwise unrepresented parties in a divorce to effect an agreed settlement would constitute representation of both parties in the divorce litigation." The Committee reasoned that under Texas law, no matter how uncontested or amicable a divorce, it is still litigation. "Because a divorce in Texas necessarily involves litigation, a lawyer in the case of a divorce could not provide legal services to both parties as an 'intermediary' under Rule 1.07." Rule 1.07 states that "a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests."

The Committee has concluded that since a divorce is litigation, a lawyer can never act as an intermediary due to "representation" of parties in a divorce being governed by Rule 1.06(a) which states that "[A] lawyer shall not represent opposing parties to the same litigation."

The Committee sums up its decision by stating, "Hence, even if a lawyer/mediator did not propose to provide mediation in the case of a particular divorce, the lawyer/mediator could not in any circumstances act as a lawyer representing both parties to prepare documents to effectuate an agreed divorce."

This opinion is based on classifying mediators as *"adjudicatory officials"* which they definitely are not. The opinion also gives a fact pattern that clearly states that the parties have no counsel and are both unrepresented, but that preparation of the final documents then places the mediator/lawyer in the position of representing both parties. If the lawyer has not given any legal advice to either party and is only employed as a scrivener, how does this show bias to either party or imply representation of both parties?

The Committee states that "If a lawyer who is also a mediator chooses to act solely as a lawyer with respect to a particular divorce, the lawyer may represent only one of the two parties in preparing documents to implement an agreement for divorce." Apparently the Committee believes that when an attorney represents one party and the other party refuses to hire a

continued on page 27

THE REBIRTH OF COMMON SENSE: COLLABORATIVE LAW

By Sherrie R. Abney*

Many parties who formerly engaged in showdowns at the courthouse are finding the costs of full-blown litigation have become financially and emotionally prohibitive. This situation has resulted in a search for methods to resolve disputes more quickly and economically.

Collaborative Law, a new alternative dispute resolution procedure, first found success in family cases and is currently being applied in probate, medical error, employment, construction, and business disputes, to name a few. The process is not only useful in settling disputes; it may also be employed to prevent them. The collaborative procedure is not for everyone, but it can provide relief from the excessive burdens of litigation for the lawyers and parties who qualify to participate.

Litigation

All courts seek ways to end conflict, guarantee equal treatment, and promote healing. Nevertheless, one difficulty remains: parties in litigation rely on others to craft solutions for their problems. In litigation, neither the litigants nor their counsel are committed to seeking the best alternatives for all parties. This adversarial process inherently focuses on "blame" in order to "win." The end results find litigants giving control of their disputes to third parties and then being seldom, if ever, satisfied with the outcomes.

Litigation attorneys will tell you they settle most of their cases. They will also tell you settlement generally occurs on or near the day scheduled for trial, after months filled with written discovery, gathering and examining documents (most of which are irrelevant), depositions, expert reports, motions to compel, motions to enjoin, motions to enforce, mediation, and the exhaustion of the clients' patience and monetary resources. If a case does go to trial and the client "wins," there is often an appeal, and everyone gets to start over if the appeal is successful.

So what does it mean to win in litigation? Does winning mean getting money even if it destroys any chance of an important ongoing relationship? Is winning punishing the other side even if the final order does not correct the reason there was a loss or injury in the first place? Or is winning getting a piece of paper called a judgment when the defendant's assets are "judgment proof?"

Collaborative Concept

What if winning could be equated to satisfying the interests of all of the parties as much as possible? When dispute resolution focuses on the clients' "interests" instead of "winning," there is a greater opportunity for the parties to experience lasting satisfaction with the outcome. This result can be true for parties in the collaborative process because they are in control of all decisions related to the resolutions of their disputes. Until the parties' interests are addressed, no one really wins, and there is frequently no lasting resolution.

Collaborative Approach

The collaborative process is based on teamwork, full disclosure, honesty, respect, civility, healing, integrity, parity of costs, exploration of alternatives to determine a fair resolution, and parties maintaining control over the results. If this approach sounds like fantasy, hold on because it is only the beginning. In addition to disclosing all relevant information to the other side and considering their interests and concerns, the collaborative attorneys must withdraw from representation if the parties fail to settle. Simply put, collaborative lawyers cannot appear in an adversarial proceeding between parties to a collaborative case if the litigated subject matter is related to the subject matter of a prior dispute in the collaborative process.

The elimination of formal discovery, which provides a goodly amount of income to litigation lawyers, added to the fact that the lawyers might be required to withdraw, has generated opposition to the collaborative process from litigation lawyers and their professional organizations. Their objections primarily concerned the effect the collaborative cases would have on their income. There has been a conspicuous absence of comments by the litigation community regarding the benefits of the collaborative process for clients.

The Process

The collaborative process is voluntary and cannot be court-ordered, so all parties and lawyers must agree to participate. Once the process has been agreed upon, the parties to the dispute and their collaboratively trained lawyers sign a participation agreement that sets out the guidelines they will follow during the process.

Because collaborative lawyers will never represent the collaborative parties in court, they are able to focus all of their skills on the parties' interests and resolution of the dispute, rather than dividing time and energy between settlement negotiations and preparation for trial. This concentrated effort allows disputes to settle months, sometimes years, in advance of settlements that occur on the courthouse steps.

The collaborative approach redefines good lawyering as analysis, clarification, and negotiation. Good lawyering becomes the

continued on page 11

THE REBIRTH OF COMMON SENSE: COLLABORATIVE LAW
continued from page 10

ability to utilize skills seldom seen in litigation. Collaborative lawyers do not rely on taking advantage of the other side's mistakes and oversights, nor can they seek to avoid revealing the entire truth of the matter in dispute. Power plays or similar tactics are all unacceptable in the collaborative approach.

The actual resolution of the dispute takes place in a series of face-to-face meetings of the parties and their lawyers. Meetings generally last two to three hours and follow an agenda the participants receive in advance of the meetings. No decisions are made regarding the actual dispute outside the presence of the parties.

Step One: Determine Parties' Interests and Goals

There are five steps to the collaborative process. The first step determines the interests and goals of all of the parties. The parties have an opportunity to state what they want and, perhaps more importantly, why they want it. Each party also has the opportunity to hear the goals and interests of the other parties from the mouths of the parties instead of having messages channeled through lawyers. Hearing firsthand saves time and eliminates misunderstandings, confusion, and any "spin" that frequently accompanies hearsay.

Since the parties are required to state the underlying basis of their concerns, they must consider their interests and goals more carefully, rather than simply making a demand that has no basis in anything remotely related to reality. Positional bargaining is the primary tool used for negotiations in litigation. The goals of positional bargaining are for the plaintiffs to get as much as possible, regardless of the merits of their claims, and for the defendants to pay nothing, or as little as possible, regardless of the merits of their defenses. In the collaborative process, the participants examine the facts of the dispute and use interest-based negotiation to work toward an equitable agreement for all of the parties.

Step Two: Gather Information

Determining interests and goals lets the parties have a better idea of the documents and other information that must be collected to intelligently approach resolution of the dispute. The second step of the collaborative process is the task of actually gathering the necessary information.

Parties and their lawyers agree to request the production of only those documents relevant to the dispute. Participants also agree to comply voluntarily with requests for information. Some disputes will require an expert opinion. In those instances, the parties may agree to jointly employ a single expert. The use of a single, objective, expert opinion will provide the parties with accurate, unbiased information and reduce the cost of the expert's fee.

Step Three: Generate Options

The focus of the face-to-face meetings is now ready to advance to the third step, which is the development of as many options as is reasonably possible. Brainstorming options will lead to out-of-the-box thinking that will result in opportunities for formulating creative solutions. The entire collaborative process is confidential, so parties are free to engage in speculation and conjecture without fear that their words will later be used against them.

As the parties explore possibilities, they should be encouraged to concentrate discussions on the future. When negligence is an issue, responsibility for damages must be discussed; however, the attorneys should direct the discussions to the actions of the responsible party and avoid judgmental personal attacks. Casting blame or finger pointing is, at its very best, nonproductive. Apology sometimes becomes a part of the collaborative process, but an apology should never be offered unless it is a sincere expression of regret.

Every option the participants suggest should be listed on a white board, overhead projector, or some type of media all of the participants can view in the face-to-face meetings. Some options may seem unrealistic or one-sided to one party but not to another; nevertheless, all options should be listed and none evaluated until the next step of the process. What may seem unrealistic at first glance may later be part of the solution.

Step Four: Evaluate Options

Once the parties are satisfied they have developed a comprehensive list of options, they will evaluate the options and discard any that are inappropriate. The parties may find that an option must be modified or combined with other options in order to achieve their goals. During this fourth step, it is hoped that each party will become comfortable with opposing counsel; however, it is very important that clients understand that although this is a collaborative approach, the parties must not rely on anyone but their own lawyer for legal advice.

Step Five: Negotiate a Resolution

The final step of the collaborative process is the negotiation of a resolution that takes each party's interests into consideration. Resolution is made possible by following the steps in the process and systematically working through the elements of the dispute. Options are discovered and solutions are explored that would never have been mentioned, much less considered, in the litigation process.

Parties should not expect the collaborative process to be a series of calm, subdued tea parties. The face-to-face meetings may involve lively discussions and arguments; however, the arguments will be based on the issues in dispute and will not consist of personal attacks and unreasonable demands. Collaborative lawyers have found the collaborative process is actually harder work than litigation because the lawyers are not free to stomp out of the room shouting, "I'll see you in court!" When the going gets tough, the collaborative lawyers must stay the course and work even harder to assist the parties in finding more and better options for resolution.

Retooling the Mind

Lawyers interested in the collaborative process must be trained and, to be effective, must experience what is referred to as a

continued on page 27

REFLECTIONS FROM THE EDGE

HELPING MEDIATION ADVOCATES BORROW THE MEDIATOR'S POWER

By **Kay Elliott* and Scott Magers****

Many mediators complain that attorneys don't come to mediation as prepared as they would if they were in trial or arbitration. What is perplexing, since so many cases settle in mediation, is why attorneys fail to take advantage of this opportunity to get an optimal settlement for their clients. Instead of just trying to "win" the mediation through distributive bargaining, why not go in with the idea of going beyond "winning" to a truly creative and value-increasing outcome? Perhaps this idea is just not in the minds of attorneys who either compromise their financial outcomes in order to settle, or roll the dice at the courthouse, knowing one will lose. Instead of preparing their clients for negotiation, some attorneys tell their clients to say nothing and let them do the talking, then expect the mediator to do most of the heavy lifting in terms of getting a good settlement. Recently, at the TMCA symposium in Austin, Scott Magers mentioned that he had written an article on how advocates should prepare themselves and their clients for mediation. The following is a joint venture between Scott Magers and Kay Elliott to adapt that previously presented paper to the mediator's tool box. Here are some of our ideas on how the mediator can help attorneys, when they are not as sophisticated at mediation advocacy as they are at trial advocacy, get better outcomes, have a more productive process, and display their prowess to clients. As a mediator, you already know most of these techniques, but your clients do not, so you can use this article to help your clients, or send it to attorneys with whom you will be working, or just use the article to implement these ideas at your future mediations. We hope the ideas prove practical and useful to you and to the clients and attorneys you will be serving in the future.

Law students at Texas Wesleyan School of Law are taught how to represent a client in mediation. One tool for that type of representation is the Representation Plan in which the attorney outlines the strategy for settlement, the most persuasive facts, the applicable law, and a negotiation plan. I (Kay Elliott) have never yet had a practicing attorney hand me one of these during a mediation. What I sometimes get is a settlement notebook. It is not difficult to turn a settlement notebook into a Representation Plan. I suggest that mediators help attorneys do exactly that - at least two days before the scheduled mediation. Then everyone enters the mediation process prepared. Just for a moment, let's take a look at what lawyers can gain from mediation to make that preparation justifiable. The most common reasons attorneys give me for their failure to prepare something to submit to me before mediation are that they didn't have time and the client would not have wanted to pay for such preparation. I have never heard those reasons given for not preparing for trial - yet 96% of all cases will never reach the courtroom.

Let's look first at some reasons to justify taking more time to prepare and also at how lawyers will be impacted by continuing to use mediation in litigation. Lawyers who work on a contingent fee will be most positively impacted. Since mediation and other ADR processes are faster than traditional lawyering processes, lawyers receive their compensation more quickly, helping cash-flow considerations. Further, ADR reduces the need for extensive, protracted, and expensive discovery and research to prepare for a full-scale trial. A representation plan can be based on some agreed facts, some facts stipulated just for the purpose of negotiation, and the results of the depositions or requests for disclosure completed prior to mediation and as part of limited discovery prior to the settlement conference. This means the investment in each case is lower and the net profit is higher. It also means not having to get heavily invested in a case that is a loser. Even when a settlement is not reached in mediation or another ADR process, the contingent-fee lawyer will learn more about the case, his client, and the other side, which should translate into settlement later at lower costs. And last, but not least, the client will understand the actual problems her case presents to the attorney, so that the attorney does not have the impossible task of explaining why trying a case is not a good process option to a stubborn client with unrealistic expectations and a naive belief in a just world.

What about the billable-hour attorney (often on the defense side)? The client who understands, early in litigation, the difficulties of his own case is often happier with the outcome. If this is a repeat client, the lawyer can make the convincing argument that settling early will save the client money, and that reasoning usually translates to repeat business from a grateful client. The attorney who risks a reduced fee by telling his client the truth has proved he has his client's best interests at heart. With the public perception of lawyers at a historic low, ADR can be a public-relations bonanza. It can also increase the collection of attorney fees, helping the lawyer to avoid accumulating a large, unpaid bill from an unsatisfied client who lost at trial. Most trial lawyers understand the facts of life with regard to accounts receivable. Collection procedures are expensive and time-consuming, and sometimes even lead to another dispute when the client claims the attorney committed malpractice.

continued on page 13

REFLECTIONS FROM THE EDGE: HELPING MEDIATION ADVOCATES BORROW THE MEDIATOR'S POWER
continued from page 12

There is another reality at play. Many cases are not ready for ADR until pre-trial work has sufficiently progressed. Participating in ADR is not always wise until the parties have a clear understanding of the case, its major ramifications, and the bargaining zone. Thus the lawyer will often charge fees even in those cases that go to ADR. Some lawyers have even received a bonus payment because a case settled early and was very advantageous to the client. Not all fees have to be contingent or based on billable hours. They can also be based, quite ethically, on the benefit obtained by the client. If the eventual outcome at mediation is demonstrably superior to a simple compromise, it is quite probable the client will be willing to pay a bonus fee. Steve Brutsché, an early mediator pioneer, argued that lawyers should consider having this in their fee arrangements with happy clients who were well-served by creative advocates.

Corporate attorneys have a great deal to gain from ADR and are often the most-skilled at representing clients in mediation. Because they are employees, they have a stake in the economic health of the company. ADR can reduce legal costs, increasing profits and also esprit de corps. By recommending the appropriate use of ADR, corporate attorneys augment their good standing as well and protect their employers from adverse publicity that can damage the reputation of the company and its products or services. Mediation agreements, not just the settlement discussions, can be made confidential, unlike a trial verdict that may hit the front page of the local newspaper.

PREPARING YOURSELF AND YOUR CLIENT FOR MEDIATION

As we all know, mediation is defined as a third-party neutral's intervention to facilitate the process of negotiation. It is also a process in which an impartial third party assists disputants in finding a mutually acceptable solution to their dispute. Mediation should be both voluntary (even when it is court-ordered) and confidential. This means that although the court can order parties to go to the table, it cannot order them to settle or bargain in good faith. The mediation process has stages: preparation phase, opening session, joint and/or separate sessions, and a settlement stage. The stages are designed to establish trust, explore issues and interests, and seek creative solutions. The mediator's role is to help the disputants, not to make judgments or decide who is right or wrong. The mediator may help the clients prepare adequately for the process by encouraging and even suggesting ways the advocates can be most effective in negotiating a settlement. This would include recommending a confidential settlement notebook or representation plan be prepared by each advocate and sent to the mediator at least two days prior to the scheduled mediation.

Because discussions during mediation are "not for the record," parties can be more open in discussing issues and considering options. The caucus is a strong positive aspect of reaching agreement, partially because that part of the process gives parties an extra layer of confidentiality. Another benefit is that at least one person in the settlement process—the mediator—will know more about the hidden agendas, interests, and preferences of all parties than any single party will know.

Inherent in the definition of mediation is the concept that mediation is a means of disputant empowerment. It is a means by which the parties have self-determination and are allowed and encouraged to take charge of their dispute and control the resolution of that dispute. This can only happen if clients are prepared by their advocates to participate actively in the settlement conversations. It has been shown that an agreement reached in mediation will more likely be acceptable to the parties if they have had a hand in shaping it, and the agreement will more likely be implemented without problems when the parties feel they have a proprietary interest in it.

COUNSEL'S PREPARATION

When interviewing a client, the lawyer can determine the client's concerns, hopes, expectations, attitudes, perceptions, beliefs, feelings, and values. This is the basis upon which interest-based bargaining will be conducted in many mediations. Only when these are explicit can a productive option-generating session be conducted. If this was not done at the initial intake process, counsel can begin the mediation preparation by talking to the client specifically about these important settlement facts. Clients also need to understand the strengths and the weaknesses of their cases, based on the litigation facts, their position, and the law. At the mediation, lawyers and their clients are given a rare opportunity to speak directly to the other side in a way that is designed to promote persuasion and the improvement of the often-troubled relationship the parties have. Clients who are coached and psychologically ready to say how they see the dispute and what they want to happen can be extremely helpful in getting other lawyers' clients to hear their concerns and begin to seek a peaceful resolution. This preparation might include delegating certain responsibilities to the client and other responsibilities to the attorney, particularly in the opening session. For example, it is obviously better for the attorney to convey what facts will be proved in the trial, the legal strengths of the case, the rationale for the demand that has been made in the pleading or is being made in the mediation, and the confidence she has in being successful at trial. It is obviously better for a client to speak about how the dispute has affected her health, business, family, reputation, etc., and what she really wants. This may be money, it may be an apology, it may be recognition for the harm that has occurred, it may be getting back her job or helping her company be more successful, or a combination of some or all of these. Whatever the true motivator for the position taken by the client, it needs to be conveyed sincerely and respectfully but forcefully to the real decision-maker at the mediation: the other party.

One part of preparation for successful settlement is to do role-reversal. Mediators can even use this technique in a caucus with each side just prior to the joint session when mediators and parties typically make their opening statements. Assume you are in the caucus room with corporate counsel and the CEO of I.S.T., Inc, defendant in an intellectual-property lawsuit. You might engage in this exercise:

continued on page 14

REFLECTIONS FROM THE EDGE: HELPING MEDIATION ADVOCATES BORROW THE MEDIATOR'S POWER
continued from page 13

> John and Joe, have you thought of what the plaintiffs really want in this case? If you were on the other side of this dispute, what concerns, hopes, and attitudes would be driving you to pursue this litigation? If you can step in their shoes for a minute, you will have a much better opportunity to create options that would met their interests and would also meet yours. It will also help you to create some trade-offs that would add value for both sides. Have you ever been the plaintiff in a similar case? Is it possible, for example, that they are concerned about recouping their research and development costs prior to the product being licensed to be sold by other companies? We could spend our time exploring how long it would be before they would be willing to license you to sell the product, whether they would grant you an exclusive license, and what the licensing agreement would look like. If you could achieve an outcome in mediation that is more beneficial than pursuing the legal remedies, particularly if the jury decides the plaintiffs have the intellectual-property ownership of this product, you should consider the benefits of that result. Even if you don't take that approach, you still need to get into their hides and see the case from their perspective because only then can you come up with possible solutions to the joint problem you share. Unless you create options that meet their true interests, they will not say yes to you, and you probably want to prevent this case going further due to potential legal costs, adverse publicity, and the inherent risks of losing in complex litigation.

THE REPRESENTATION PLAN

The consequences of inadequate preparation by advocates are clear and inevitable: the mediation will be prolonged, the risk of failure will be increased, and the opportunity for a result beyond a win-lose, zero-sum scenario will be lost. At a minimum, the mediator will be compelled to spend time "educating" the advocate and her client on how to participate productively, particularly if the client arrives with rigid, unrealistic expectations based on the extreme positions in the pleadings. The most-important task of the mediation advocate is to create and perfect a reasoned, tailored plan of representation specifically for the mediation. This plan includes the type of mediator the advocate and her client want to select, the information that should be included in the briefing paper, the goals and concerns that will be discussed in the pre-mediation conference, what the client and attorney will say in the opening session, and how each will participate in the joint and caucus sessions.[1] Use a checklist to help think through developing the plan and using it at mediation. Preferably, prepare a written representation plan that includes the following: 1) negotiation approach: creative problem-solving; 2) goals: to meet the parties' interests and to overcome barriers to settlement that have prevented an agreement in the past; 3) strategy: use the mediator's power and presence to gain power for the client; and 4) implementation: use the plan to implement different techniques and approaches at different key junctures of the process (pre-mediation conference, first joint session, early and late caucus sessions, final joint session, caucus with other attorney and mediator without clients). Advocates need to be sure the representation plan advances the client's underlying and true interests but also addresses the other party's needs and interests. This is quite different from adjudicative processes, where meeting the other party's interests would be irrelevant. Advocates must, therefore, be able to take off their "We are right and they are wrong!" hat and put on the creative hat that stands for "Help both of us by sharing enough information about what you want in order to create options that help both of us."

PREPARING THE CLIENT FOR MEDIATION

Attorneys should emphasize that the mediation process is a continuation of the negotiation process, necessitating a conciliatory tone and a direct presentation to the other party. Most clients expect the attorney to speak in a zealous, adversarial way to the other attorney and the other party. A mediation advocate, therefore, needs to help the client understand that this is an opportunity for collaborative, joint problem-solving *with the other side.* The best way to set up that scenario is to re-interview the client about interests, impediments, and options. The client should be asked to identify clearly what she wants to have happen at the end of the mediation. The client may not ever have thoroughly identified what her true, underlying interests and needs are. Ask your client to step into the other party's hide: What does he really need in this case? Can that be given without high cost, and would that set up a reciprocal obligation for the other party to give the client what she really needs?

This is an opportunity for advocates to probe and prod creative ways both parties can meet their real needs and perhaps even achieve mutual gain. It is important in this conversation to think outside the "legal box"—to be creative, innovative, and free-thinking.[2] Even if the previous demands have been made in monetary terms, this is the time to go beyond money to other types of options. In a surprisingly large number of cases, parties want something beyond money. The possibility of an exclusive licensing agreement on intellectual property, discussed above, is but one example.

In every case, there are strengths and weaknesses, and these must be discussed in a brutally frank way with the client: the probability of success in the courtroom, the most-likely monetary outcome, the cost to get there, and the cost on appeal, whoever wins at trial. This decision-tree approach is the only honest way for the client to see the case, not with rose-tinted glasses, but as an expensive and risky business venture. In a more-personal sense, the client must also be guided through an analysis of the personal costs to her and/or her company or family: the time, the publicity, the exposure to cross-examination, the loss of reputation or goodwill, the frustration of losing and perhaps having to appeal the decision, and the loss of a continuing relationship with the other party. For some clients, the chance to be vindicated in the courtroom or

continued on page 26

BETTER BUSINESS BUREAU SEARCHES FOR VOLUNTEER MEDIATORS IN CENTRAL AND SOUTH TEXAS

By Erin Jones*

The first thing that comes to mind when people think about Better Business Bureau (BBB) is a place to file a complaint against a business. However, BBB is much more than that. It is also a place to resolve a dispute. While these ideas may sound the same, they involve two very different services.

Since 1912, BBB offices across North America have been offering BBB dispute resolution services, one of the many things that separates us from other organizations. BBB's mission - *to be the leader in advancing marketplace trust* - means encouraging consumers and businesses to trust each other in their marketplace transactions. BBBs agree that mediation is one of the best tools for encouraging trust and satisfaction in the marketplace.

BBB handles disputes based on marketplace issues between consumers and businesses. BBB offers mediation for a broad range of common disputes such billing and collection, improper repairs, dissatisfaction with services, contract disputes, and more. Rather than simply "filing a complaint," BBB offers a user-friendly, non-intimidating forum for businesses and consumers to come together to resolve their issues. Mediation is offered to consumers after they have gone through an informal conciliation process involving written responses. If this dialogue does not result in a mutually satisfactory resolution, BBB suggests mediation as another way of resolving the issue without taking it to court.

BBB considers mediation to be the most successful form of dispute resolution. Compared to court, mediation is affordable, informal, incredibly time-efficient, and empowering. It provides both parties the chance to reiterate their side of the story and potentially walk away with a mutually satisfactory resolution, the best of both worlds. BBB's mediation program is highly successful, with a resolution rate close to 90% (the other 10% go on to BBB binding arbitration). This resolution rate proves that most disputes are a result of a simple miscommunication, and mediation restores the relationship and preserves good will.

BBB is eager to expand and improve its alternative dispute resolution programs, especially its mediation services. As we resolve more and more disputes through mediation, our need for volunteer mediators continues to grow. With more volunteer mediators, BBB can expand its dispute resolution programs and continue to support marketplace trust. Having almost 100 years of dispute resolution experience, BBB is a great place for seasoned mediators to log hours and for new mediators to sharpen their skills.

Mediating for BBB is easy. To get started, BBB simply needs to verify a mediator is qualified (basic mediation training) and receive an availability schedule. BBB's mediation process is simple. Trained BBB staff members encourage mediators to perfect their own styles during the mediation process. Though the bulk of mediations in our specific BBB district occur at the BBB's Austin office, mediations are also held in the Waco, San Antonio, and Corpus Christi areas.

We would like to hear from you! Learn more about mediating or arbitrating for BBB by contacting Tiffany Sedano, Alternative Dispute Resolution Coordinator, by email at tsedano@austin.bbb.org, by mail at 1005 La Posada, Austin, Texas 78752, or by phone at: (512)206-2841.

**** Erin Jones** is Senior Vice President of Communications for BBB, serving Central, Coastal, and Southwest Texas. Erin began her career at the San Diego BBB in 1996. She had just been named Director of Ethics and Communications when, in 2004, she was lured to load up the truck and move to Austin to become Vice President of Communications. As Senior Vice President of Communications, Erin's current responsibilities include overseeing all internal and external BBB communications to consumers, BBB Accredited Businesses, media and staff. Erin handles outreach, BBB's website, retention, media, membership marketing, advertising, and public relations. Erin recently became engaged to be married and likes to spend what little spare time she has with her fiancé and his young daughter.*

BOOK REVIEW:
LAURENCE J. BOULEE, MICHAEL T. COLATRELLA JR., AND ANTHONY P. PICCHIONI, *MEDIATION: SKILLS AND TECHNIQUES*

By Walter Clark Martin IV*

Often when one hears the word "mediation," the thought of pending litigation comes to mind. This thought, however, is incomplete. Disputes and conflicts are commonplace not only in the legal field, but also in businesses, families, and communities. *Mediation: Skills and Techniques* (hereinafter *Mediation*) addresses mediation in ways applicable to all problems that arise in today's society, not just litigated cases. The authors address not only the roles of the parties and the mediators, but also the methods one should integrate into practice if one wishes to become a successful mediator. Although *Mediation* addresses how to mediate many disputes properly, the text does not address all aspects of mediation skills, such as the impact of cultural factors and the role of children in mediation.

Although the legal community generally focuses on using mediation to reach a definitive agreement, the authors argue it is not mediation's primary objective.[1] Instead, the primary objective of mediation is to assist the parties in making practical decisions about their disputes. Essentially, mediation provides the opportunity for making better decisions involving issues such as "labor disputes, civil cases, community disputes, family matters, and public policy disputes." Moreover, the benefits derived from mediating disputes include "serving as a gateway to self-awareness, empowerment, forgiveness and reconciliation." The authors suggest that following the problem-solving process of mediation "naturally results in happier solutions, lower costs for the parties and the courts, and significant time savings." However, to reach these results and properly assist in mediating disputes, a mediator must understand the theory and procedure of mediation, apply appropriate mediation skills, and assess performance through self-evaluation.

Mediation's authors explain that while not everyone is born with innate mediation capabilities, mediation skills can be acquired. Regardless of one's experience level, *Mediation* presents information and ideas in a way that will educate beginners and serve as a helpful reference for those who already have experience in the field. *Mediation* educates and assists the reader by providing helpful examples, fact scenarios, case illustrations, and exercises throughout the chapters.

Mediation goes far beyond giving a simple overview of the mediation process. Instead, it focuses on the universal, or "core," skills and techniques of mediation, and addresses the cognitive learning approach to mediation by examining the scientific principles and theories underlying effective mediation skills and techniques. Moreover, the skills taught and described, referred to as the "mediator's toolbox of skills and techniques," are applicable, say the authors, to the facilitative, transformative, and evaluative models of mediation.

Upon introducing the reader to the subject of mediation, and after addressing important subjects regarding preparation for the mediation meeting, such as seating arrangements that will maximize a feeling of comfort instead of confrontation, the authors turn to the essential functions of the mediator and explain a five-stage process of mediation. The first stage is the mediator's opening, which explains the nature, steps, and style of the mediation, as well as the role of the parties. The second stage involves the parties' initial statements about the particular problem at hand. The third stage focuses on defining the problem and the concerns, needs, and desires of the parties. The fourth stage is problem solving and negotiation, and the fifth stage is the final decision and closure. The five stages are addressed with great specificity as to each stage's purpose, principles, scope, and elements. Moreover, the authors clarify any confusion and assist the reader by providing case illustrations, charts, and examples for each stage. One example many beginners may find helpful is the example of a mediator's opening statement on page seventy-two. With the opening-statement example, *Mediation* does an excellent job of addressing the opening statement, its sections, and its creation. After educating the reader on creating an opening statement, the text applies its principles to a sample opening statement and divides that statement into the sections previously discussed in the chapter, all in effort to show the reader how to apply what he or she has just read.

Although the authors provide much detail on the importance of the five mediation stages, they also explain that a mediator should be prepared to act from the first contact with a client through the conclusion of a mediation. The importance of controlling the process and building trust, or what the authors call "climate control," is of utmost importance. A few ways to create a climate of trust include educating the parties, creating a mutual understanding through proper communication, and being aware of the parties' emotional and mental states. Educating the parties encompasses explaining what the mediation entails, what the mediator's role is, and what style the mediator uses, thus giving the parties an expectation of what is to come. As for mutual understanding and communication, after briefly touching on the cultural communication differences, the text addresses the importance and impact of words, and the implications associated with non-verbal body language. While

continued on page 17

BOOK REVIEW:
LAURENCE J. BOULEE, MICHAEL T. COLATRELLA JR., AND ANTHONY P. PICCHIONI, *MEDIATION: SKILLS AND TECHNIQUES*
continued from page 16

what mediators say and how they say it is important, the authors suggest most mediators' time be spent listening to the parties, reframing statements, and asking questions, three subjects *Mediation* thoroughly addresses.

Mediation also notes that a mediator must always consider the individual's emotional and mental state, such as whether a party is going through the grieving process, and if so, what stage. As with most mediations, intense emotions may be involved. The authors describe separate instances when a mediator should discourage, ignore, or acknowledge these intense emotions, should they surface. Specifically, *Mediation* gives suggestions and examples of how to neutralize intense emotions and improve the climate in mediation by (1) promoting optimism; (2) maintaining productive communication; (3) acknowledging concerns; (4) normalizing; (5) looking to the future; (6) mutualizing unhappiness; (7) reducing pressure to settle; and (8) using humor. *Mediation* does an excellent job of giving in-depth analysis with examples of each of these eight subcategories.

There is a difference, however, between intense emotion and conflict. Although one would imagine that conflict and intense emotion are synonymous, this assumption is untrue. Conflict is separate from intense emotion, and the authors suggest conflict can be healthy and often benefit the parties involved by causing improvements in relationships. Conflict, they argue, is the active ingredient of creativity and growth.

Mediation asserts that conflict gives parties the "opportunity for acquiring a greater understanding of the other person, the situation, and themselves." For example, a conflict "between spouses can draw a couple closer together and fuel personal growth." There are different kinds of conflict, however, and the authors describe different ways for a mediator to differentiate between productive and non-productive conflict, how to use productive conflict to the parties' advantage, and how to neutralize negative conflict, should it arise.

Even though the authors suggest early on that mediators should not assume the role of negotiators, they explain that "mediation is a form of assisted negotiation, and mediators have a responsibility to improve the quality of the negotiations in which they participate." One practice the authors suggest utilizing throughout the mediation process is getting the parties to assess their own BATNA, as well as the BATNA of the other party. BATNA is the "Best Alternative To a Negotiated Agreement." If parties are to make informed decisions whether to reject or accept settlement offers, they must know their BATNAs; otherwise, they are "negotiating in the dark."

Mediation explains that requiring parties to assess their own BATNAs will make them see the costs associated with continuing their disputes without resolutions, in addition to the costs associated with litigating the disputes, such as financial, time, emotional, and business costs.

Once the negotiation process begins, the authors adopt Gerald Williams' approach to mediation, an approach developed through the study of the legal field. This approach involves four stages: (1) Orientation and Positioning – where parties adopt a negotiation style and exchange opening offers and settlements; (2) Argumentation – where parties develop and implement appropriate negotiation strategies and tactics; (3) Emergence and Crisis – where parties have nearly exhausted their patience or resources for making further concessions or trades; and (4) Agreement or Final Breakdown – where the mediator works with the parties in bringing closure to the discussions, either through agreement or final breakdown of the negotiations. Once again, for clarification purposes, the authors do an excellent job breaking down each of the four stages into sub-issues with examples and explanations as to what a mediator will likely encounter during negotiations.

Mediation also addresses the subject of encouraging settlement and notes that a mediator should not coerce parties to resolve a dispute, but instead assist the parties in better understanding the dispute by using mediation methods to influence the parties' perspectives. The methods with which a mediator can engage the parties while encouraging settlement (which some readers will likely dispute) include (1) Providing Information – asserting objective truth about the situation; (2) Expressing Opinion – a personal evaluation without firm advice or recommendation; (3) Advising – making a suggestion or recommendation based on professional assessment or experience; (4) Being Judgmental – a more severe evaluation of the parties' statements or behavior; and (5) Acting as the Agent of Reality – encouraging the parties to face the realities of the situation when they are being unrealistic, uninformed, or intransigent. The authors inform the reader to be careful, as there are some dangers associated with using these techniques to encourage settlement, especially if the true motive for using the techniques is to improve one's own success rate or reputation.

For those just getting started in the mediation process, the authors include a final chapter specifically addressing how to become a mediator, where to get further education on the subject of mediation, and where potential public and private employment opportunities exist. Moreover, the chapter goes as far as to give advice on how to market one's own private mediation practice.

The ideas the authors present in *Mediation* are essential to a proficient study and practice in the field of mediation. Although the principles, practices, and procedures the authors advocate are not entirely new to the field of mediation, the way they present this information to the reader is unbelievably clear and thorough. The examples and samples provided throughout the chapters and in the appendix will assist all mediators, whether new to the field or seasoned practitioners. Most importantly, *Mediation* goes beyond establishing the procedure and elements of a proper mediation. The authors do an excellent job of not just explaining how and what to do in a mediation, but they also explain why. Many times the theory, or the "why," is more important than following instructions or procedure. *Mediation's* approach to the subject of mediation, and its ability to clearly explain the theory and principles behind the mediation process, make it an essential resource for all mediators to have in their libraries.

continued on page 20

BOOK REVIEW:

Linda Olden-Smith, *Playing the "Resolution" Card – Mediating Disputes with the Thought Resolution Protocol*™

By Justin A. Coquat*

INTRODUCTON

Playing the "Resolution" Card – Mediating Disputes with the Thought Resolution Protocol™ was first published by Truce Media in October 2008. This volume is 354 pages long and includes an interactive CD containing Thought Resolution Protocol™ flash cards.

As a voracious reader and aspiring legal scholar, I jumped at the invitation to write a review of *Playing the "Resolution" Card*, the latest dispute resolution work by professional mediator Linda Olden-Smith, founder and executive director of TRUCE Dispute Resolution Firm, LLC. I have previously read a number of articles, books, and textbooks on mediation and other forms of alternative dispute resolution, often finding them to be redundant, dry, or hyper-technical. I am in total agreement with the author that "the astute perspectives [contemporary books on mediation] present are often shared in a lofty and intellectual manner that inclines the reader to 'sit up straight, spit out the gum and pay attention.'" Olden-Smith's present work is an absolute exception in every respect. As she promises, *Playing the "Resolution" Card* presents its profound concepts in an insightfully, affable, engaging, and down-to-earth voice.

Playing the "Resolution" Card is part scholarly analysis of the thought process of disputing parties, part technical manual introducing the author's proprietary Thought Resolution Protocol™. The scholarly part presents a working model of thought that renders the concept of "thought" less abstract and more tangible. That is to say, this model distinguishes between the "thought" and the "thinker." Olden-Smith leads the reader to understand that by forcing the respective parties to isolate the thoughts emerging from their inner conscious from extraneous physical elements that impede objective consideration of that thought, an environment "furnishing significant, enduring substance to the aspired successful closure of the dispute that parties seek," is created. The technical part explains and demonstrates to the mediator a new protocol on how to identify and handle contentious thought considerations, held by the respective disputing parties, as they surface. This protocol presents the mediator with a more-viable means by which to consider "resolution" itself.

ORGANIZATION

Playing the "Resolution" Card is exceptionally well thought out and easy to follow, due in large part to the preface and introduction. Therein a road map is set out detailing the author's approach, purpose, and special terminology, and it includes a concise paragraph summary of each chapter.

The book is divided into three main parts – The Basics, The Thought Resolution Protocol™ and Into Action. Part One includes nine chapters that focus on the individual and integral points of thought consideration experienced by disputing parties and the recurring "conflict cues" expressed in the contentious expressions during party dialogue. Part Two includes ten chapters that fully lay out the Thought Resolution Protocol™, and Part Three is a single chapter of admonishment that encourages the student on how to best master the Thought Resolution Protocol™ for application in the mediation process.

Each chapter is further subdivided into manageable subchapters, bullet points, and elements. This makes dissection and study of Olden-Smith's Thought Resolution Protocol™ straightforward and clear.

PART ONE – THE BASICS

Like any good book aimed at teaching dispute resolution techniques, the author begins by examining conflict, its sources, its forms, and the various real-world contexts in which it can be found and analyzed. Unlike most such works, Olden-Smith invites the reader on a "scientific and rational mental journey…logically escort[ing] him to the realm of inner consciousness, independent of physical elements, yet explicitly and recognizably real." But the work, while academic, is not highbrow or hyper-technical in its presentation. In fact, the author is true in stating, "The stories relayed to exemplify the concepts shared in the book are told from the hip and in the true spirit of events." These anecdotes are immensely helpful in assisting the reader to place the elements and objective of the Thought Resolution Protocol™ into a familiar, real-world context. Proof that academic doesn't have to mean abstract.

Another useful and practical inclusion in the book is the clever use of pictures and diagrams to further elucidate technical points. Kudos to the author for that!

continued on page 19

BOOK REVIEW:
Linda Olden-Smith, *Playing the "Resolution" Card – Mediating Disputes with the Thought Resolution Protocol™*
continued from page 18

The topical considerations of Part One will be of interest to any mediator, even one who ultimately elects not to use the Thought Resolution Protocol™ model. The author likens the proper analysis of understanding interpersonal harmony to learning to make musical harmony on the piano. That is to say, it is a highly structured process that requires a great deal of study, concentrated effort and practice that will ultimately yield a uniform result each time, even as complexity and skill grow.

Olden-Smith starts out introducing the three major challenges facing the mediator: 1) When to intervene, 2) What that intervention should look like, and 3) What should result from the intervention. Next comes the presentation and definition of what she considers the central anchor for mediation practice: focus on the "real-time, live and active, immediate now consciousness awareness." The author then gets to the crux of Part One by discussing the concepts of resolution, using a television analogy to illustrate how thought considerations create pictures in the mind of disputing parties and how these pictures impact the parties' perspectives.

Additional useful topics address how the mediator can remain neutral and "invisible," how to analyze and address party personality and agenda, how to deal with "silent partners" outside of, but influencing, a party to the mediation and, finally, lying parties. Each of these topics is treated with useful, real-world examples and mock dialog to assist in training the mediator to apply the Thought Resolution Protocol™.

Part One concludes with a chapter called "Locating the Intervention Cues." Here mediators are challenged with knowing precisely when to intervene in dialogue, and how to stay on track when the controversy addressed morphs into further and more-complicated disagreement. "It breaks down, explains and provides samples of the various interference factors that serve as cues for intervention treatment." The text includes copious examples of intervention cues. The interactive CD serves as the primary aid in training the mediator to spot intervention cues using the Thought Resolution Protocol™ model.

PART TWO – THE THOUGHT RESOLUTION PROTOCOL™

The Thought Resolution Protocol™ is nothing short of ingenious. Olden-Smith possesses a genuine gift for recognizing and understanding the human thought process and then isolating objective thoughts from their subjective thinkers. She sees clearly that the sole job of the mediator is, "to seek out intervention cues that surface in the discussion and to intervene with the treatment of those cues."

According to the Thought Resolution Protocol™, there are four components to the mediator's intervention activity: Acknowledgement, Clarification, Exploration of the Possibilities to Move Forward and Recognition (A, C, E and R). Olden-Smith has developed a strategically structured set of tools used to illuminate precise consideration points in the party's inner consciousness regarding a specific conflict cue (see Part One) called intervention questions (IQs).

These IQs are specifically worded questions and are adjusted depending on whether the objective of the mediator's intervention is to acknowledge, clarify, explore or recognize a thought consideration that has been presented by one of the conflicted parties. The A, C and E intervention questions are directed in response to one party, while the R intervention questions are directed at the other party or both parties simultaneously. Again, which of the IQs are used at any given moment during a session's dialogue depends upon the particular communication dynamics the mediator desires to extract or promote among the parties. The text extends considerable treatment to each of the intervention questions, outlining their meaning, purpose and practical use; however, the complexity and length of each will not afford a thorough analysis in this review.

Suffice it to say, these IQs are what make the author's approach to mediation unique and effective. They are precise in their structure, and placement is not immediately evident without the practitioner's holistic knowledge of the protocol. In the author's own words, "This protocol requires discipline as well as precision focus and application. To achieve this discipline and precision the structure must be practiced…Consistency is vital to the effective employment of this protocol and the mediator should have a substantial repertoire prior to engaging this approach on his clients. Applying this approach requires dedicated and persistent practice."

CRITICISM

Playing the "Resolution" Card is not without its flaws. While the work is creatively written, its sentence structure is unique and at times difficult to follow. This is, in part, a result of numerous sentences that are exceedingly long; some sentences are over six lines in length. Also contributing to labored reading is the atypical use of certain descriptive words and phrases. There are "proprietary" phrases inserted into the text entirely devoid of notation or stylistic font signifying them as such. To be fair, Olden-Smith states at the very end of the book that the Thought Resolution Protocol™ "requires the mediator to learn a language structure that is foreign to the lay tongue." Finally, the second half of the work appears to have been edited carelessly or in great haste. Your reviewer found multiple instances of improper grammar usage and words either omitted or apparently left in excess from earlier edits. These shortcomings in no way detract from the value and usability of the book or the Thought Resolution Protocol™.

CONCLUSION

It is unfortunate we all must spend time dealing with conflict in one form or another. It is perhaps not so unfortunate we must struggle with these problems of conflict generally, as conflict is a natural result of disagreeing, which in turn arises naturally from our uniquely human capacity of free will and free thought. Still, the chance to acquire new and effective tools to resolve such conflict is always a welcome opportunity.

Playing the "Resolution" Card and learning to mediate disputes with the Thought Resolution Protocol™ is certainly

continued on page 20

BOOK REVIEW:
LAURENCE J. BOULEE, MICHAEL T. COLATRELLA JR., AND ANTHONY P. PICCHIONI, *MEDIATION: SKILLS AND TECHNIQUES*
CONTINUED FROM PAGE 17

**** Walter Clark Martin IV** is a 25-year-old native Texan from Houston who works for Shaw Pipeline Services, a third-party off-shore pipeline inspection company. He received a Bachelor of Public Administration degree and Master's degree in Legal Studies from Texas State University-San Marcos. He is currently a first-semester 2L at South Texas College of Law and hopes to become an asset to the legal community.*

ENDNOTES

[1] Laurence J. Boulle, Michael T. Colatrella Jr. & Anthony P. Picchioni, *Mediation: Skills and Techniques* 1 (2008).
[2] *Id.*
[3] *Id.* at 6.
[4] *Id.* at 2.
[5] *Id.*
[6] *Id.* at 10-11.
[7] *Id.* at 9.
[8] *Id.* at 11.
[9] *Id.* at 11-13.
[10] *Id.* at 61-63.
[11] *Id.* at 63.
[12] *Id.* at 84.
[13] *Id.* at 94.
[14] *Id.* at 101.
[15] *Id.* at 23.
[16] *Id.* at 47.
[17] *Id.* at 115.
[18] *Id.* at 49.
[19] *Id.* at 52-55.
[20] *Id.* at 141.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 177.
[24] *Id.* at 188.
[25] *Id.*
[26] *Id.* at 194-95.
[27] *Id* at 198.
[28] *Id.* at 230.

BOOK REVIEW:
Linda Olden-Smith, *Playing the "Resolution" Card – Mediating Disputes with the Thought Resolution Protocol™*
continued from page 19

worth consideration for any serious mediator. It is well worth the time it takes to read and reflect on the technique. Olden-Smith correctly writes, "The mediator's responsibility in the Thought Resolution Protocol™ approach consists of two focused activities: 1) Locating the intervention cues and 2) Applying the intervention treatment. The two activities are the sum of the mediator's duties. The parties are responsible for all the rest."

If committed to reading *Playing the "Resolution" Card* front to back, and practicing with the Thought Resolution Protocol™ CD flashcards, mediators will likely find a valuable tool has been added to their canon of dispute resolution tools. Even if electing not to incorporate the protocol in practice, mediators will acquire a deeper understanding of inner conscious thought processes and what it takes to assist disputing parties to communicate independently with one another and derive their own satisfactory resolution to their dispute.

**** Justin A. Coquat** is an attorney and adjunct professor in the Legal Studies Program at Texas State University. He also is a mediator and has trained students under the Texas 40-hour course.*

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

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ETHICAL PUZZLER

by Suzanne Mann Duvall*

This column addresses hypothetical problems mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to 214.368.7258

From the outset of the mediation, it is apparent that everyone involved in the process, except one, has an instant connection because of commonality of gender, age, or some other characteristic. It is equally apparent that the "odd man out" is very uncomfortable. What do you do to achieve a balance or perception of neutrality? What if you, the mediator, are the "odd man out?"

Alvin Zimmerman (Houston): This fact situation may be dealt with in two parts, both similar in nature. It is incumbent upon the mediator to endeavor to normalize the apparent discomfort experienced by the "odd man out." Direct discussion by the mediator to indicate transparency and openness with the issue in order cause all involved to commit to understanding the issue exists, whether fact-based or not, and to set it aside. In order to diffuse the issue, sometimes humor or a personal story of a similar feeling provides the proper key to unlock the hang-up, or prejudice of the "odd man out" perceives. I have also used the "setting on the side" technique. By this I mean, after confronting the issue openly, you literally obtain a commitment for the person to "set on the side" this feeling so that it will not interfere with the process and the positive experience we all desire to obtain from the mediation.

In the case in which the mediator's personal perception of his / her role is the "odd man out," I would also recommend a similar fix – transparency and recognition of the issue and your personal commitment to all parties that you will set it aside. There are occasions that the mediator's mere recognition that he/she possesses the issue may be enough, and disclosure is not necessary. What we do is certainly touch-feely; therefore, what works in one case may not in another.

One of the best uses of humor and self-recognition of being the "odd man out" would be when President Reagan, while in a debate with his opponent said, "I will not use my opponent's youth as a reason to vote for me" – when the real issue was the public's concern of President Reagan's elderness.

Tracy Watson (Austin): If this is in a scenario where the "odd man out" is alone on one side of the issue, it would need a different approach than if he were a part of a larger group (probably less of an issue). It also depends on whether the mediation is intended to begin in a caucus or single session. The puzzle description does not identify the type of mediation or the "commonalities" of the larger group. It can make a difference whether the situation is women vs. one man (or vice-versa), neighborhood activists vs. a developer, young people vs. a septuagenarian, gay vs. straight. Is it a family affair or a business deal? Mediator advance preparation should attempt to identify and analyze these at the outset, if known.

Personally preferring "single session" mediations for a variety of reasons, I would begin the session asking for initial statements. If "Bill" (the reticent one by himself) shows his discomfort at this point, I might ask for "clarification for my benefit" of the positions of both sides to attempt to draw him out. During the session, I would focus on *factual points* in a balanced manner between the parties, making sure Bill is focused upon equally in both time and personal attention from me. If he is alone on his "side," care must be taken to assure that he feels like he is getting a fair share of the participation. If I can establish a "link" with him that allows him to feel more comfortable with the issues and talking to me, rather than the personalities or commonality of the other participants, progress can be made.

If Bill continues to feel pressured or uncomfortable and is still not participating productively, I might break into caucus to "discuss separately some of the points made in the opening statements" with each side. While doing just that with Bill, I might also mention that he appears to be uncomfortable in the process and try to identify why and what might alleviate that to the extent he can become a more comfortable participant. A slippery slope begins here, I would not go over it. I can't agree with him that "they" are teamed up against him, and I can't promise "special help" or any other bias. What I can do is assure him that *I* will treat him with dignity, respect, and openness and that the important aspects of the mediation surround the real, fact-based, and objective issues that need to be resolved.

I would then return to joint session, do what I promised, and see how it goes. More often than not, Bill will feel less "alone" and more comfortable knowing that someone has at least recognized him as an individual.

continued on page 22

ETHICAL PUZZLER
continued from page 21

Toylaine Spencer (Austin): No one likes being the "odd man out." If it was apparent that one person in my mediation was significantly different than the others, I would begin by explaining the process, as usual, and how it often brings people together. I would try to make the "odd man out" feel more comfortable by relating to him in a manner that does not alienate the others. Even though it is not usually the norm to "befriend" a party, I would try to maintain neutrality while taking steps to ensure everyone feels welcome. Letting the "odd man out" know that the mediator understands there is an issue may help the situation.

Blatantly pointing out the differences of the parties during the process may not be the best choice, as those differences may be the very reasons the parties are in the mediation. Carefully bringing up topics that might include differences might urge the parties to address the issues on their own.

If I were the "odd man out" as the mediator, I would not be too concerned, as this often is the case. I have found it to be advantageous to be somewhat disconnected from the parties. On the other hand, I have also found myself using a little lighthearted humor to maneuver around any differences.

One of the hardest issues to handle would be if the "odd man out" and the mediator shared the same difference and it was painfully obvious. Then, you would definitely need to ask before the onset of the mediation if any of the parties has any hesitation about participation.

Erich M. Birch (Austin): Under the first scenario, I would (1) Explain the process of mediation, with the goal being to make the odd person out feel more comfortable with the knowledge that the process should keep him / her from being railroaded by those with commonality. (2) Go a little out of the way to make the odd person out feel comfortable with the mediator, with the goal being to make this person feel either: a) that the mediator recognizes the situation and will manage these issues, or, b) at least the odd person has a friend in the mediator. (3) Confront the situation in subtle ways by initiating a discussion where some of the obvious differences are raised. For example, in an age situation, point out that different people have different ways of viewing problems. Ask "old Mr. Smith" what year he entered the work force (or age of his children, or anything else that gives an indicator that he is older than the others), and then ask some of the "young whippersnappers" when they started work. Give some examples of how different age groups do things differently, in effect acknowledging the differences amongst the participants. (4) Confront the situation directly. Acknowledge that most of the people in the room have the common train, but not everyone. However, this may not be appropriate in every situation; for gender or age situations, it may be more acceptable to point out the obvious other than, for example, race. This could also be dictated by the personalities of the individuals in the room; it may be less appropriate in a group of highly intense, stressed people.

Under the second scenario: (1) As an initial matter, I don't think the differences of the mediator are as relevant. As a minority, in most all of my mediations and arbitrations I have found myself to be different than everyone else in the room, and cannot recall where it has ever been a significant issue. (2) Based on the trait, simply confront the situation. For example, "Wow, I seem to have seen a few more winters than all of you folks!" Beware, however, that such an approach may simply add more tension. (3) Address the situation in subtle ways as the occasion arises. For example, if a discussion about technology comes up, note that technology for the mediator (if he /she is older or younger) is different than others in the room (who may be older or younger). The same could work for ethnicity or culture observations.

Susan Jenson (Arlington): *The Mediator as the "Odd Man Out."* The mediator in the case with the "odd man out" must be especially cautious to maintain the perception of neutrality, all the while keeping in mind that the mediation should promote reconciliation or understanding between the parties. The environment most conducive for settlement will occur in these circumstances where communications are productive and frank without resentful or suspicious overtones.

Although the mediator is uncomfortable when the "odd man out," this situation is easier situation to work through than when one of the parties is the "odd man out." Using phrases such as "Would someone tell me?" or "Let me see if I understand…" and openly admitting that you, as a mediator, are feeling somewhat left out and are requesting help from both parties can usually bridge the gap. Continuing throughout the process to ask intelligently, yet empathically, for clarification brings the mediator into the process.

"A Party Being the Odd Man Out." The circumstance with the party being the "odd man out" requires very delicate treatment so as to avoid upsetting the neutrality applecart. This may be a good case for co-mediation. It could be productive and helpful to the process to have one mediator from each "camp" in order to create a feeling that the "odd man out" has a voice. Of course, this idea presupposes that the mediator has been provided with enough information prior to the session concerning the parties that there is advance recognition of the "odd man out" status. Furthermore, a co-mediator can be ever-vigilant to the words the mediator chooses and how the parties receive those words.

Here are some of the things the mediator might do to create the environment of neutrality:

1. Suspicions can arise if either side believes the other has had an opportunity, ex-parte, to persuade the mediator. You might be asked by a party, "How long has the other side been here?" Or you might have a negative reaction to your staff member's statement, "The other side is already here." To avoid this idea taking hold, have your staff ready for the arrival of the participants considerably earlier than their anticipated start time. Do not take either party to a conference room until the other side has arrived, but once the last party has arrived immediately take all sides

continued on page 23

ETHICAL PUZZLER
continued from page 22

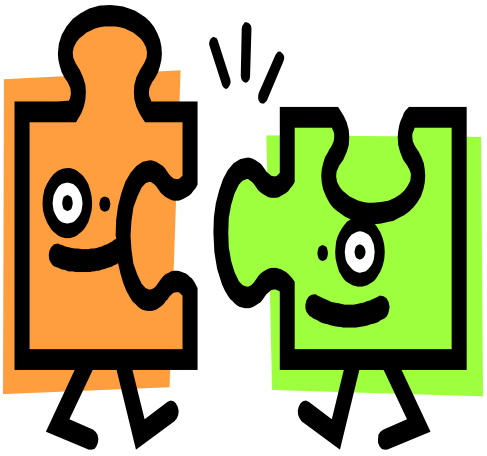
directly to the joint session room. You should have one or more staff members assist you in the transition from one reception area to a joint conference room until after the joint session.

2. At the joint session, it is especially important for the mediator to establish the authority in the room. Use the discussion for the ground rules to assert yourself, not as the "judge" but as the "controller of the process." The more you are perceived to control the process, the less power one of the parties will attribute to the other side to manipulate the process.
3. The mediator should be especially guarded against providing any personal information that would be interpreted by one side as identifying the mediator more closely with the other side while in joint session. Self-evaluation to gain the confidence of a party is a tool to be used gingerly and only in caucus.
4. The joint conference room should not be uses as a caucus room for any party. This is the "holy of holies" of neutral territory. The rest of your facility is also neutral territory, except for each caucus room. Explain in the joint session that the caucus rooms are specifically reserved for private and confidential meetings by and among each side.
5. Directing focus on the present and future is of paramount importance to avoid having the parties dwell on their differences. Directing focus on others who are not participants in the mediation but who are affected by the outcome of the dispute is appropriate and useful.
6. If the "odd man out" is reluctant to speak due to an overpowering opponent, don't come to the silent party's rescue. Do encourage participation by pointing out that the process is set up to have each side state its position to the other. In order for the process to work properly, participation by both sides is necessary. Otherwise, allow the silent party's attorney to be the advocate of the party's position. If the party is not represented, continue to remind the parties that the process requires participation, but don't openly show sympathy to the party feeling uneasy (or jubilant) in the joint session.
7. If the "odd man out" status is a product of culture, it should be understood that culture will shape impressions and expectations in the process. Taking time to learn about the culture before the mediation would be useful to avoid an act or omission offensive to the culture presented and to avoid destroying credibility and neutrality in the eyes of the party representing the culture.

Conflicts of Interest and Impartiality. Conflicts of interest also arise in the "odd man out" session. When does a mediator's cultural or other attribute (e.g., gender, age, religion) give rise to the mediator's alignment with one party over the other so as to necessitate disclosure of possible conflict or impartiality, or of withdrawal by the mediator? Special treatment is required when the attributes are not as obvious as gender and the "odd man out" has no idea of the extent to which he really is the "odd man out." The mediator then has an obligation to withdraw from the process should the mediator not have freedom from favoritism or bias in word, action, and appearance. Regardless of a party's silence on the topic, if the mediator self-assesses positive for bias, the mediator should not serve. But, do the similar experiences of the other parties and the mediator and the sharing of less-than-moderate opinions and views (on alcohol, for example) create a "relationship" between them that should be disclosed as a possible conflict to the "odd man out"? The answer to this question will depend on the level of the mediator's skill to assume a truly impersonal role and to constantly keep in-check the human tendency to sympathize with the party in word, action, or appearance. Perhaps the mediator would find it helpful to ask himself or herself, "If I were the "odd man out" today in this mediation, would I want to be the mediator?"

COMMENT: On the surface, this would seem to be an easy "fix." However, as our participants have indicated, that which may appear simple is not necessarily easy. The key is to promote an atmosphere of comfort, trust, and collaboration while maintaining neutrality.

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



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Chair's Corner
continued from front page

even knowledgeable legislators understand about the process. Sections members are welcome to testify (usually on short notice beginning in March or April) before the Texas Legislature. Please inform any members of the Council of your interest and availability.

As he did last session in SB 1167, Senator Duncan has agreed to carry our bill, which is a technical fix of the Texas General Arbitration Act. It would expressly grant Texas appellate courts jurisdiction to hear certain interlocutory appeals arising under the Federal Arbitration Act. The State Bar *has* included this proposal as a part of its package, and we are free to work actively for its adoption.

You may have heard of a State Bar of Texas Court Administration Task Force that issued its omnibus recommendations covering a spectrum of proposals. These are *not* the Bar's legislative proposals, but only ideas of the Task Force. Legislators are free to sponsor portions of it. In it were proposals which, in our view, adversely impact on arbitration.

The second item of immediate interest to all Section members is the idea of going to an electronic newsletter format. At Council meeting, Joe Cope presented a report on its feasibility. The economics, alone, are quite compelling: approximately $17,000/year in savings. Quality and format would not change. Other sections have been using the electronic format for a number of years. We put the item on April's agenda for a vote. We want to hear from you.

As a reminder, our next Council quarterly meetings are: 10:15 A.M., Saturday, April 18 (San Antonio), and 5:00 P.M., Thursday, June 25 (Dallas at the Annual Meeting). Our section's annual meeting is 1:30 to 2:00 P.M. on June 25.

We are here to serve you.

REFLECTIONS FROM THE EDGE: HELPING MEDIATION ADVOCATES BORROW THE MEDIATOR'S POWER
continued from page 14

to establish a precedent is more important than the risk of trial. In other cases, the client can be helped to see that she would be better off taking $10,000 less in settlement than her best alternative to a negotiated agreement if settlement means preserving a continuing relationship with the other party. The lawyer cannot make that decision, only the client can. This type of pre-mediation preparation should always occur before—days before, not after—the client and attorney arrive at actual mediation. These are but a few of the ways that mediators, clients, and attorneys can enhance the effectiveness and results of mediation.

ENDNOTES

[1] *See, e.g.,* HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM– SOLVING PROCESS 154 (NITA 2004).
[2] *Id.* at 233.

* *Kay Elliott, J.D., LL.M., M.A., has arbitrated and mediated over 1700 cases since 1982, specializing in employment, family, and business matters. She served for three years as an Administrative Law Hearing Officer for the EEOC. She has taught ADR, Mediation, Family Mediation, Settlement Advocacy, and Negotiation at Texas Wesleyan University School of Law for 13 years, and during that time has coached national championship teams in Negotiation and in International On-Line Negotiation, and regional championship teams in Client Counseling and Representation in Mediation. She has coordinated the Certificate in Conflict Resolution program for Texas Woman's University for 9 years, teaching courses on Arbitration, Conflict Resolution, Mediation, Family Mediation, and Negotiation. She is a Life Fellow of the Texas Bar Foundation, president of ACR, Dallas , Council Member of the Texas Mediation Trainers Round Table, a former Council Member of the ADR Section of the State Bar of Texas, a Credentialed Distinguished Mediator, and serves on the Board of the Texas Mediator Credentialing Association. She was co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003).*

** *Brigadier General (Ret.) M. Scott Magers retired from the U.S. Army as the Assistant Judge Advocate General for Civil Law and Litigation. Since 1996, he has mediated nearly 2,000 cases in San Antonio.*

HALL STREET* APPLIED TO TEXAS GENERAL ARBITRATION ACT IN *QUINN V. NAFTA TRADERS, INC.
continued from page 6

[6] See the arbitration agreement language urged by the employer as constituting a contract for expanded judicial review. *Quinn*, 257 S.W.3d at 797. The employer alleged five errors of law in its motion for vacatur and cited the parties' arbitration agreement as authority for an expanded scope of judicial review for these legal errors. *Id.* at 797-98.
[7] *Id.* at 798 n.1.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* (emphasis added). "Under the TAA, a court *must* confirm an arbitrator's award on application unless an opposing party establishes a statutory ground under the [TAA] for vacating, modifying, or correcting the award." *Id.* at 798 (emphasis added).
[12] *Id.* at 799.
[13] *Id.* (citing *Hall*, 128 S. Ct. at 1402, 1404).
[14] *Quinn*, 257 S.W.3d at 798-99.
[15] *Id.*
[16] *Id.* at 799.

ETHICS OPINION QUESTIONED
continued from page 9

lawyer, the attorney may negotiate a settlement agreement with the pro se party and draft the final documents despite the fact that the lawyer will certainly draft the documents to the advantage of his or her client. However, this same lawyer may not choose to act as a neutral to mediate and a neutral scrivener to prepare documents with two unrepresented parties who have requested his or her services.

This opinion has resulted in declaring that 1) mediation is not the practice of law; yet it implies that mediators are adjudicatory officials capable of rendering legal decisions; 2) divorcing parties are going to be involved in litigation whether or not they wish to be; and 3) even with full disclosure, parties are not allowed to choose the legal services they desire. At first blush, there is yet another conclusion: this opinion appears to have been prepared strictly for the self-interest of the legal profession.

The disciplinary rules' definition of a Tribunal should be amended to delete mediators from the list of adjudicatory officials. Further, if two parties are able to agree regarding how they wish to end a marital relationship, it is unconscionable to attempt to force the parties to hire separate litigation lawyers. This is a totally unnecessary financial burden.

If a mediator/lawyer is hired to mediate the divorce and the parties reach agreement, there should be no reason that the parties should not be able to hire that same mediator/lawyer to act as a scrivener and draft the final documents provided that the parties have full disclosure and are advised that they should each have independent counsel review the documents to advise them of their individual rights and responsibilities under the agreement before the final decree is submitted to the court. This ethical opinion was based on a false premise embedded in the disciplinary rules, and in the opinion of this author, the opinion is adverse to public policy.

* ***Sherrie R. Abney*** *is a collaborative lawyer, mediator, arbitrator, and collaborative trainer. She has served as chair of the Dallas Bar Association's ADR and Collaborative Law Sections and is a founding director of the Texas Collaborative Law Council. Sherrie is member and past secretary of AAM, presenter and trainer for the International Academy of Collaborative Professionals, and a member of the Civil Committee of the Dispute Resolution Section of the ABA. In 2008, she began a three-year term on the ADR Section's Council..*

THE REBIRTH OF COMMON SENSE: COLLABORATIVE LAW
continued from page 11

"paradigm shift." Making the paradigm shift requires a 180-degree shift in thinking from litigation to collaboration.

One example of a shift in the lawyers' behavior is the lack of primary reliance on the law to dictate the outcome of the dispute. Clients are privately advised of their legal rights, but discussions about the law are replaced with discussions regarding the interests and goals of the parties in the face-to-face meetings. Constant references to the law only serve to stifle or limit creative thinking. Parties may resolve their problems in any manner they agree upon, so long as their solutions are not illegal or against public policy.

Some parties and counsel find it difficult, if not impossible, to agree to voluntary disclosure of all relevant information. Some attorneys protest that their clients will object to their withdrawal if the case does not settle. (It is doubtful these lawyers have ever inquired whether their clients would object.) People with these attitudes probably do not belong in the collaborative process.

The collaborative process is a many-faceted opportunity to avoid and to settle disputes. By using the process in drafting agreements, parties are able to anticipate and prevent many pitfalls that could later result in expensive conflicts.

Areas of the law that can benefit by early use of the process to negotiate legal documents include, but are not limited to, construction contracts, partnership agreements, pre- and post-nuptial agreements, buy-sell agreements, estate planning documents, and employment contracts. Parties having disputes in practically any area of the law who are willing to go forward honestly and in good faith can take advantage of the collaborative opportunity to settle their disputes privately and remain in charge of scheduling and costs.

While litigation destroys ongoing relationships, the collaborative process can be a bridge to a redefined relationship between the parties and, in addition, act as a model to resolve future disputes. Disputes belong to clients, not their lawyers; consequently, clients should have the opportunity to choose how they want to resolve their issues. Who have you talked to about collaborative law today?

Information regarding Collaborative Law may be found at www.collaborativelaw.us and www.adr-attorneys.com .

**** Sherrie R. Abney*** *is a sole practitioner in Carrollton, Texas. Her practice consists of real estate transactions, mediations, arbitrations, and collaborative cases. A significant amount of her time is spent writing books and articles as well as developing materials and training for the collaborative process.*

CALENDAR OF EVENTS

Basic Mediation Training * Tyler * March 2-6, 2009 * Dispute Resolution Center of Lubbock County * For more information please contact Jessica Bruton or Crystal Stone at 866.329.3522 or 806.775.1720 Website: drc@co.lubbock.tx.us

Mediating the Difficult Case With Difficult Parties * Dallas * March 10, 2009 * Contact Cris Gilbert at DMS at 214-754-0022 or visit www.dms-adr.org

40-Hour Basic Mediation * Houston ***** UH Law Center AA White Dispute Resolution Center ***** March 16-20, 2009 * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

Advanced Family Mediation Training * Houston * March 11- 14, 2009 * *Worklife Institute* * 1900 St. James Place, Suite 880 * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

Basic Mediation Training * Austin * March 25, 26, 27, 31 & April 1, 2009 * For more information visit www.corderthompson.com or call 512.458.4427

Mediating the Debtor/Creditor Cases * Dallas * April 14, 2009 * Contact Cris Gilbert at DMS at 214-754-0022 or visit www.dms-adr.org

Facilitating Powerful Coalitions * McKinney Roughs State Park, Austin * April 14-16, 2009 * A hands-on program for NGO's, * sponsored by the Center for Public Policy Dispute Resolution, CDR Associates and Consensus Building Institute

Basic 40-Hour Mediation Training * Houston * April 16-18, continuing April 23-25, 2009 ***** *Worklife Institute* * 1900 St. James Place, Suite 880 * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

Basic 40-Hour Mediation Training * Dallas * May 14, 15, 16, 21, 22, 2009 * Contact Cris Gilbert at DMS at 214-754-0022 or visit www.dms-adr.org

Group Facilitation Skills Training * Austin * May 19, 20, 21, 2009 * For more information visit www.corderthompson.com or call 512.458.4427

40-Hour Basic Mediation Training * Austin * June 1-5, 2009 * Center for Public Policy Dispute Resolution—University of Texas School of Law, Austin. For more information visit www.utexas.edu/law/cppdr

Basic Mediation Training * Austin * June 3, 4, 5, 9, & 10, 2009 * For more information visit www.corderthompson.com or call 512.458.4427

Basic 40-Hour Mediation Training * Houston * June 11-13, continuing June 18-20, 2009 ***** *Worklife Institute* * 1900 St. James Place, Suite 880 * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

Managing the Difficult Group Conversation * Austin * June 26, 2009 * Center for Public Policy Dispute Resolution—University of Texas School of Law, Austin. For more information visit www.utexas.edu/law/cppdr

40-Hour Basic Mediation * Houston ***** UH Law Center AA White Dispute Resolution Center ***** May 29, 30, 31 continuing June 5, 6, 7, 2009 * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2009 to June 2010. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

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ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. An author who wishes an article to appear in a specific issue of the newsletter should submit the article by the deadline set in the preceding issue of the newsletter.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. All quotations, titles, names, and dates should be double-checked for accuracy.
5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. If possible, the writer should submit an article via e-mail attachment addressed to Walter Wright at ww05@txstate.edu or Robyn Pietsch at rpietsch@central.uh.edu. If the author does not have access to e-mail, the author may send a diskette containing the article to Walter Wright, c/o Department of Political Science, Texas State University, 601 University Drive, San Marcos, Texas 78666.
8. Each author should send his or her photo (in jpeg format) with the article.
9. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.
2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

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

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

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

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

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

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

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2009, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

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