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January 2008

## Alternative Dispute Resolution

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### Recommended Citation

Pryor Will, *Alternative Dispute Resolution*, 61 SMU L. REV. 519 (2008)  
<https://scholar.smu.edu/smulr/vol61/iss3/2>

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# ALTERNATIVE DISPUTE RESOLUTION

*Will Pryor\**

**T**HIS is the first issue in the distinguished sixty-year history of the Annual Survey of Texas Law to include a chapter on Alternative Dispute Resolution (“ADR”). The wisdom of the editors will strike the growing population of “professional neutrals” across Texas as confirmation of the expanding influence of mediation, arbitration, collaboration, and other innovative alternatives to our civil justice system. Recognition of the trend in our society to look for more efficient, more practical, and more relevant processes to resolve disputes comes on the heels of celebration of the twentieth anniversary of passage of the Alternative Dispute Resolution Procedures Act<sup>1</sup> (“Act” or “ADR statute”) by the Texas Legislature in 1987. The Act precipitated the growth of ADR in Texas and caused Texas to become a leader in the then nascent ADR movement in the United States.

This article will address developments during the Survey period in mediation and arbitration, and will briefly summarize the status of the movement to promote “collaborative law” in our civil jurisprudence.

## I. MEDIATION

Although the ADR statute specifically identifies, and gives equal attention to, five procedures appropriate for court referral (Mediation, Mini-Trial, Moderated Settlement Conference, Summary Jury Trial, and Arbitration),<sup>2</sup> the use of mediation is the “elephant in the room” compared to the use of the other procedures. It is a safe estimate that tens of thousands of mediations occurred across Texas in the Survey period, but the number of arbitrations conducted was a small fraction of that number.<sup>3</sup> With respect to the “all others” category, examples are anecdotal

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1. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001-073 (Vernon 2005 & Supp. 2008).

2. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.023-027 (Vernon 2005 & Supp. 2008).

3. In the “early days” of mediation, before most lawyers had much experience with the use, and occasional abuse, of mediation, the process was more dynamic than it often seems today. Mediation was fresh, it was new, and settlement rates were high. Mediation has become so routine—many jurisdictions require it in virtually every case before to trial—that several trends have become apparent. One positive development is the fact that increasingly, disputes are being mediated “pre-suit.” This is a result of two factors. First, dispute resolution clauses that make mediation a condition precedent to one side suing or filing an arbitration claim against the other have become common. Second, institutional

and the numbers miniscule. But although much is said of mediation, and its role in civil litigation is now pervasive, little is written, at least by our courts. It is not an area of civil litigation about which there will likely ever be a significant amount of judicial oversight, attention, or comment.

This is as it should be. By its nature the mediation process is intended to be informal, lacking in any meaningful rules, and unstructured. Courts, for the most part, seem to recognize the prudence of avoiding sticking the judicial nose into the mediator's peace-tent. The process depends upon the protections of confidentiality and informality.

Over the maturing course of experience with court-referred mediation, there have been a few issues subject to judicial comment and participation, most notably whether a "good faith" obligation is required of mediation participants,<sup>4</sup> and the meaning and application of "confidentiality" and "privilege" in the ADR statute.<sup>5</sup> But these issues were not addressed in appellate decisions or by the Texas Legislature in the Survey period.<sup>6</sup>

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litigants, such as banks and insurance companies, often mediate pre-suit more often due to an overall generally positive experience with mediation in recent years. On a negative note, increasingly lawyers are caught up in the "routineness" of the process. Such lawyers, who do not take mediation seriously enough, often fail to provide the mediator with pre-mediation submissions, urging that the joint session of the parties be avoided altogether (which classically is the first step in the process); and insist that the mediation be scheduled for only a "half day" in circumstances in which most experienced neutrals would agree that a "full day" would have been more appropriate.

4. See *Decker v. Lindsay*, 824 S.W.2d 247, 251-52 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding that the Texas ADR statute allows a court to require the parties to mediate, but does not allow a court to order the parties to make good faith efforts to settle).

5. Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986) (providing an early but still helpful summary of the arguments for protecting the confidentiality of all mediation communication). Dean Ed Sherman, one of the authors of the ADR statute and a legend in Texas ADR lore, once described section 154.073 of the Texas statute as "perhaps the broadest ADR confidentiality provision in the country." Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 542 (1997). With certain narrow exceptions, "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding." TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon 2005). Any record of an ADR proceeding is confidential and neither the participants nor the neutral can be compelled to testify as to any aspect of the proceeding. § 154.073(b).

6. The National Conference of Commissioners on Uniform State Laws promulgated a Uniform Mediation Act in 2001 ("UMA"). UNIF. MEDIATION ACT §§ 1-17 (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>. The UMA has been adopted in nine states and the District of Columbia, and is presently under consideration in two states. It is unlikely that it will ever be adopted in Texas. The ADR community in Texas rose up in opposition to the UMA in 2002, primarily because of concerns that its confidentiality protections were weaker than those in the Texas ADR statute and due to the UMA's relative complexity. See Brian Shannon, *Twenty Years of Confidentiality Under the Texas ADR Act*, 16 ALTERNATIVE RESOLUTIONS, Summer/Fall 2007, at 30.

### A. ENFORCING (MEDIATED) SETTLEMENT AGREEMENTS

The El Paso Court of Appeals lifted the spirits of practicing mediators everywhere when it enforced a mostly hand-written, bare-bones mediated settlement agreement in *E.P. Towne Center Partners, L.P. v. Chopsticks, Inc.*<sup>7</sup> This commercial landlord-tenant dispute involved an alleged breach, by the former tenant, of an agreement achieved at a mediation of an underlying dispute (over whether the landlord had breached an exclusivity clause). The simple agreement, typical of mediated agreements, did not contain a lot of bells and whistles. The agreement called for the former tenant to make certain scheduled payments, for the parties to execute mutual releases, for confidentiality, and for dismissal of the lawsuit. The payment obligation was to be secured by an agreed judgment. The agreement did not address the result if one of the installment payments were returned by the bank due to insufficient funds. So, naturally, that is what happened.

In a decision which admittedly has more to do with contract law than the ADR statute, the court rejected the argument that the mediated agreement failed for lack of an “essential term” and found that the landlord was entitled to seek enforcement of the agreed judgment.<sup>8</sup>

The importance of the opinion may be that it is an example of one court confirming the validity of a mediated agreement, a simple agreement typical of the agreements routinely achieved, and reduced to writing, in the actual practice of mediation.<sup>9</sup>

## II. ARBITRATION

*“In considering referral to arbitration, the question is not which forum is quicker, cheaper, or more convenient, but which one the parties picked.”*<sup>10</sup>

For centuries arbitration was a creature of maritime and insurance disputes, working its way into more modern jurisprudence during the rise of organized labor and the implementation of collective bargaining agreements. The practice of inserting arbitration clauses into virtually every kind of contract involving virtually every kind of relationship began to

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7. 242 S.W.3d 117, 120-23 (Tex. App.—El Paso 2007, no pet.).

8. *Id.* at 123.

9. Counsel typically seeks to reduce mediated agreements to writing, signed by the parties, before the participants are dismissed so as to not run afoul of the requirements of Rule 11 of the Texas Rules of Civil Procedure and to avoid any chance of one of the parties having a change of heart. In practice, however, almost all mediated settlement agreements contemplate that the parties will execute more elaborate, and more detailed, settlement documents. Often the expression is something like: “Notwithstanding that the parties to this mediated agreement contemplate the execution of more elaborate settlement documents, the parties intend to be bound by this agreement.” No such provision was included in the agreement at issue in the opinion, and notwithstanding the apparent need for such documents, including the releases to be executed and an agreed form of judgment securing payment, no more elaborate documents were apparently ever executed. Had there been more elaborate documents, it seems likely that a “bell and whistle,” a detailed “notice and opportunity to cure” provision, would have been included, which would have spared the tenant the adverse ruling.

10. *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185, 187 (Tex. 2007) (emphasis added).

explode in the 1970's and 1980's. Product manufacturers, homebuilders, banks, insurers, employers, landlords, and in short, anyone with a concern that litigation was just too expensive and too inefficient, began to turn to arbitration as a means of controlling litigation costs and limiting exposure. With the stroke of a pen at the bottom of almost any type of contract, "plaintiff personal injury lawyers," "frivolous lawsuits," and "runaway juries" could be avoided in favor of a more appropriate and more business-friendly environment.

The courts, reflecting the political winds of society and as a pragmatic method of dealing with burgeoning dockets, began to reconsider and reverse the concerns of earlier decades that arbitration threatened due process, that fine print arbitration clauses were void as adhesion contracts, or that arbitration rules were prejudicial or discriminatory in some other manner to segments of the population.

The Survey period appellate decisions reflect the current climate of acceptance and acquiescence by the courts. In a landslide, appellate decisions in Texas confirm arbitration awards rather than set them aside, and affirm trial court orders compelling arbitration.

#### A. WHEN MUST ARBITRATION BE COMPELLED BY A COURT?

Courts confront motions to compel arbitration whenever an aggrieved party files a lawsuit and the other party seeks to enforce a contractual obligation to and realize the perceived advantages of resolution of the dispute through arbitration. In the Survey period, we appropriately have decisions to note in the context of employment disputes, as well as consumer claims, two of the most popular areas of current arbitration practice.

##### 1. Employment

Employers in Texas and across the United States have moved aggressively in recent years to channel any and all disputes arising out of employment relationships, including federal, statutory claims for race, gender or other forms of discrimination, and ERISA matters, to arbitration.

An employee argued that her "economic duress" when signing her employment agreement should excuse her from having to arbitrate, rather than litigate, her claims in *In re RLS Legal Solutions, LLC*.<sup>11</sup> But the Texas Supreme Court found that such a defense must relate to the arbitration provision specifically, and not to the contract as a whole, and that the "plaintiff's only evidence is that she was under duress to sign an employment agreement containing an arbitration provision; there is no evidence that she was under duress specifically to agree to arbitration apart from the other provisions of the agreement."<sup>12</sup>

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11. 221 S.W.3d 629, 630 (Tex. 2007).

12. *Id.*

Employers have found that even in the at-will employment context, an arbitration clause in an employee handbook, with an acknowledgement of receipt signed by the employee, is valid and binding. In *D.R. Horton, Inc. v. Brooks*,<sup>13</sup> the Houston Fourteenth District Court of Appeals rejected the employee's arguments that, because her employment was at will, the arbitration agreement was illusory or that it was either procedurally or substantively unconscionable.<sup>14</sup> In doing so the court followed an unwavering string of Texas Supreme Court authority in recent years.<sup>15</sup>

## 2. Consumer

*In re U.S. Home Corp.*<sup>16</sup> is a somewhat tidy summary of the appellate view of arbitration clauses in Texas. Two couples, dissatisfied with the new homes they purchased, sought to avoid the arbitration clauses in their contracts by raising seven contractual defenses. The trial court agreed that five of the defenses were valid. The Texas Supreme Court disagreed and mandated that the dispute be arbitrated.<sup>17</sup>

The couples argued that the arbitration clauses were adhesion contracts and thus unconscionable; that the agreements were procured by fraud; that a failure of mutual consideration existed; that arbitration would be unduly burdensome and costly; that mediation was a condition precedent to arbitration; that certain individual defendants, U.S. Home Corp. ("U.S. Home") agents and employees, were not signatories; and that a pending appeal of a class certification order rendered an order compelling arbitration inappropriate.<sup>18</sup> The supreme court summarily considered each contractual argument and was summarily dismissive of each and every one.<sup>19</sup>

Again highlighting that these disputes are largely disputes over contract interpretation, the Texas Supreme Court demonstrated in *In re Bank One, N.A.* how far it is willing to go to determine that a mere reference to an arbitration clause may be sufficient to compel arbitration.<sup>20</sup> A customer sought to litigate with Bank One, N.A., but the Texas Supreme Court found that an arbitration agreement incorporated by reference on the account signature card signed by the customer's representative was sufficient to constitute a binding and enforceable agreement to arbitrate.<sup>21</sup>

A decision by the Houston Fourteenth District Court of Appeals followed the mainstream of Texas authorities, which rarely set aside any

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13. 207 S.W.3d 862 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

14. *Id.* at 867-70.

15. *See id.* at 867 (citing *In re Dallas Peterbilt, Ltd., LLP*, 196 S.W.3d 161, 162 (Tex. 2006) and *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002)).

16. 236 S.W.3d 761 (Tex. 2007).

17. *Id.* at 765.

18. *Id.* at 764-65.

19. *See id.* at 764-65.

20. 216 S.W.3d 825, 826 (Tex. 2007).

21. *Id.*

challenged arbitration agreement. In *In re Jim Walter Homes*, home buyers argued that the arbitration clause did not apply to a claim for personal injuries.<sup>22</sup> Yet the court held that even tort claims fell with the scope of the broad arbitration clause, which required arbitration of “claims arising out of or relating to” their home purchase.<sup>23</sup>

## B. TRIAL COURT DISCRETION

So if the courts are going to routinely enforce arbitration clauses, do trial courts have any discretion in the timing of their orders compelling arbitration, either in delaying the order in general, or in ordering the parties to mediation in advance of ruling? The answer is a clear “no” on both issues in two cases.

In *In re The Shredder Co., L.L.C.*, an employer had filed a motion to compel arbitration, and the trial court took six months to rule on the motion.<sup>24</sup> The El Paso Court of Appeals held that the trial court had abused its discretion by failing to rule on the motion to compel.<sup>25</sup> “Even if a party contests the validity and scope of the arbitration agreement, a trial court abuses its discretion by delaying a ruling on whether the agreement is enforceable until after discovery is complete.”<sup>26</sup>

A somewhat similar issue arose in *In re Heritage Building Systems, Inc.* when a trial judge decided to refer a case to mediation before deciding the defendant’s motion to compel arbitration.<sup>27</sup> At the trial level, the plaintiff had argued that, notwithstanding the arbitration clause, Texas’s policy of encouraging settlement gave the trial judge the authority to send the parties to mediation before ruling on the motion to compel arbitration. The Beaumont Court of Appeals rejected this argument. As the court explained, “[t]he arbitrator may, or may not, choose to require mediation. However, the trial court’s ordering the parties to mediation undermines the expectation of the parties that their dispute will be resolved by proceedings directed by an arbitrator.”<sup>28</sup>

The message of Texas appellate decisions is clear: arbitration provisions are going to be enforced in almost any circumstance and, when requested, trial courts shall not delay the referral of the dispute. But another issue arises having to do with when parties to an arbitration agreement can compel “non-parties” to arbitrate.

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22. *In re Jim Walter Homes*, 207 S.W.3d 888, 893 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

23. *Id.* at 895.

24. *In re The Shredder Co., L.L.C.*, 225 S.W.3d 676, 678-79 (Tex. App.—El Paso 2006, no pet.).

25. *Id.* at 679.

26. *Id.*

27. *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539 (Tex. App.—Beaumont 2006, no pet.).

28. *Id.* at 543.

### C. WHICH PARTIES CAN BE COMPELLED TO ARBITRATE?

In a variety of contexts, a party to an arbitration agreement will sometimes seek to have a “non-party” or “non-signatory” made subject to the same proceeding. Conversely, there are cases in which non-parties and non-signatories seek the presumed advantages of arbitration in proceedings against parties. This latter scenario occurred in *In Re Merrill Lynch Trust Co., FSB*.<sup>29</sup> A Merrill Lynch customer sought to avoid the arbitration clause in his investment services contract with Merrill Lynch. Rather than name Merrill Lynch as defendant, the customer filed suit against the Merrill Lynch employee/advisor and two Merrill Lynch-related affiliated entities. Neither the advisor nor the related entities were technically parties or signatories to the contract containing the arbitration.

As to the advisor defendant, the Texas Supreme Court held that the plaintiff’s claims were “in substance against Merrill Lynch,” because the advisor had been acting as agent of Merrill Lynch and within the scope of that relationship.<sup>30</sup> Yet the supreme court added that employees cannot always invoke their employer’s arbitration agreement. “When actions outside the course of employment cannot be attributed to an employer, the latter would have no need to invoke its arbitration protections. . . . [A]rbitrability turns on the substance of a claim, not artful pleading.”<sup>31</sup>

The supreme court then addressed the claims against the two affiliated entities. The supreme court held that these entities could not invoke an arbitration clause.<sup>32</sup> First, these companies had their own agreements with the plaintiff and these agreements did not include an arbitration clause.<sup>33</sup> Second, the supreme court found that no theory tied the affiliates to the Merrill Lynch arbitration agreement. In general, a “corporate relationship” is not sufficient to “bind a nonsignatory to an arbitration agreement.”<sup>34</sup> Thus, the claims against the affiliates could be litigated.<sup>35</sup>

The Merrill Lynch case involved non-parties and non-signatories who sought to be respondents to an arbitration proceeding rather than defendants in a lawsuit. A similar scenario was presented to the Texas Supreme Court in *Meyer v. WMCO-GP, L.L.C.*<sup>36</sup> Party A contracted to purchase Party B, a car dealership. The contract had an arbitration clause. When Ford Motor Company (Non-Party C) received notice of the proposed sale, it exercised its right of first refusal and assigned the right to Non-Party D; thus, Party B was required to sell its business to Non-Party D. Party A filed suit against Non-Parties C and D and Non-Parties C and D sought to compel arbitration relying on the clause in the contract between Party A and Party B.

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29. 235 S.W.3d 185 (Tex. 2007).

30. *Id.* at 189.

31. *Id.* at 190.

32. *Id.* at 191.

33. *Id.* at 191.

34. *Id.*

35. *Id.*

36. 211 S.W.3d 302 (Tex. 2006).



The trial court overruled the motion to compel. But the Texas Supreme Court reversed and ruled that, in some circumstances, a person can be equitably estopped from refusing arbitration.<sup>37</sup> This can happen when “a person seeks by his claim ‘to derive a direct benefit from the contract containing the arbitration provision.’”<sup>38</sup> In this case, Party A “is trying to have it both ways: it is asserting rights that it would not have but for the [purchase and sale agreement], but refusing to honor its agreement to arbitrate disputes over those rights.”<sup>39</sup> The supreme court thus held that Party A was equitably estopped from refusing arbitration.<sup>40</sup>

*In Re Kaplan Higher Education Corporation*<sup>41</sup> provides another example of a party seeking to avoid arbitration by naming only non-parties or non-signatories to the arbitration contract. Here forty-five students in a vocational college sued for fraudulent inducement. The students signed an enrollment agreement with the college, which included an arbitration clause. In the suit for fraudulent inducement, the students initially named multiple defendants and the defendants moved for arbitration. The students then dropped all but two defendants, both of which were non-signatories to the enrollment agreement. Yet, the Texas Supreme Court required arbitration, reasoning that the students’ fraudulent inducement claims did “arise out of and relate to their enrollment agreements.”<sup>42</sup>

A more common scenario occurs when a party to an arbitration seeks to cast the net of those who can be compelled to join in the proceeding as broadly as possible. This was the case in *In Re Ford Motor Co.*,<sup>43</sup> before the San Antonio Court of Appeals. The arbitration clause appeared in the auto sales contract between the seller—Gillespie Motor Co.—and the buyers—husband and wife. Tragically, the wife was later killed in a roll-over accident involving the purchased vehicle. When the decedant’s estate, as well as the children and the parents of the decedant, all “non-parties” and “non-signatories” to the sales contract, sought to litigate claims against Ford Motor Co. (“Ford”), Ford moved to compel arbitration. Because the claims were captioned “Breach of Warranty” and were alleged to arise “by and through the sale of the Ford Expedition,” the claims were essentially “based on a contract” through which the claimants sought to derive a “direct benefit.”<sup>44</sup> “[A] litigant who sues based on a contract subjects him or herself to the contract’s terms.”<sup>45</sup>

Viewed collectively, these opinions leave little doubt that the courts are taking and will continue to take an expansive view of who can be compelled to arbitrate, rather than litigate, disputes. Increasingly, non-parties

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37. *Id.* at 305.

38. *Id.*

39. *Id.* at 308.

40. *Id.*

41. 235 S.W.3d 206 (Tex. 2007).

42. *Id.* at 208-09.

43. 220 S.W.3d 21 (Tex. App.—San Antonio 2006, no pet.)

44. *Id.* at 24.

45. *Id.*

and non-signatories will be arbitrating disputes, whether as petitioners or respondents.

#### D. WHEN CAN ARBITRATION AWARDS BE SET ASIDE BY A COURT?

To logically conclude an overview of judicial interaction with arbitration issues, we move on to examine the standards of review and the circumstances in which the courts will set aside or vacate arbitration award. We have two notable opinions to examine. Both are opinions of the Fifth Circuit Court of Appeals, and technically involve the interpretation and application of the Federal Arbitration Act (“FAA”). However, both opinions are consistent with the reasoning and holdings of Texas appellate courts in recent years, and are likely to be deemed instructive and authoritative by Texas courts in the years to come. So, their review here seems appropriate.

In the context of commercial arbitration, it is not uncommon for complex contractual arrangements to include specific provisions pertaining to the scope of any contractual arbitration process, should such a proceeding become necessary. In *Apache Bohai Corp. LDC v. Texaco China BV*,<sup>46</sup> the Fifth Circuit addressed Apache Bohai Corp’s (“Apache”) request that it vacate a seventy-one million dollar arbitration award in favor of a Texaco entity. The arbitration agreement specifically directed that New York law apply and that the proceedings be conducted pursuant to American Arbitration Association procedures. In addition, the agreement included an “exculpatory clause” to the effect that, “notwithstanding any other provision,” under no circumstance could the parties ever be liable to each other for consequential losses or damages.<sup>47</sup> Apache, quite understandably, took exception to the arbitrator’s invalidation of the exculpatory clause under New York law, and his award of consequential damages.

The circuit court affirmed the arbitrator’s award.<sup>48</sup> In so doing, the court affirmed a long line of “standard of review” opinions. “[T]he review of the underlying award is ‘exceedingly deferential.’”<sup>49</sup> Awards are only to be vacated “for certain statutory grounds, including ‘where the arbitrators exceeded their powers,’ or under narrow common law exceptions, such as [a showing of] ‘manifest disregard for the law’ or [where the decision is] ‘contrary to public policy.’”<sup>50</sup> Importantly, “[a]n award may not be set aside for a mere mistake of fact or law.”<sup>51</sup>

One final brick in the wall of enforcement of arbitration agreements, and the preservation of the near inviolability of arbitration awards, was the *en banc* opinion of the Fifth Circuit in *Positive Software Solutions, Inc.*

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46. 480 F.3d 397 (5th Cir. 2007).

47. *Id.* at 401 n.1.

48. *Id.* at 400.

49. *Id.* at 401.

50. *Id.*

51. *Id.*

*v. New Century Mortgage Corp.*<sup>52</sup> At issue in the case was the standard of “evident partiality” found in the Federal Arbitration Act.<sup>53</sup> The appeal arose from an arbitration in which the arbitrator had failed to disclose that, in unrelated litigation seven years prior to the arbitration, both the arbitrator and his former firm, Arnold White & Durkee, had briefly been co-counsel for the same party, Intel Corp (“Intel”), along with one of the lawyers for New Century Mortgage Corp. (“New Century”) and her law firm, Susman Godfrey, L.L.P.

The district court vacated the award given this failure to disclose “‘a significant prior relationship with New Century’s counsel.’”<sup>54</sup> The Fifth Circuit noted that, although the arbitrator’s and counsel’s names, for a time, were on the same pleadings, there was no indication that they had jointly participated in any meetings, hearings, telephone calls, depositions, or trials. The circuit court noted, in addition, that the Intel representation involved six different lawsuits and at least thirty-four lawyers. In interpreting the standard of evident partiality, the court extensively explored the various plurality opinions from a 1968 U.S. Supreme Court decision addressing the standard.<sup>55</sup> The Fifth Circuit endorsed the more narrow and practical view of Justice White’s concurring opinion. In the Fifth Circuit’s view, “[w]hile supporting a policy of disclosure by arbitrators to enhance the selection process, Justice White also concluded, in a practical vein, that an arbitrator ‘cannot be expected to provide the parties with his complete and unexpurgated business biography’ . . . [Justice White’s opinion] fully envisions upholding awards when arbitrators fail to disclose insubstantial relationships.”<sup>56</sup>

According to the Fifth Circuit, given this more “practical” and narrow view of the standard, the Federal Arbitration Act does not mandate the “extreme remedy of vacatur” for “nondisclosure of a trivial past association.”<sup>57</sup> Rather, “[t]he draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship.”<sup>58</sup> This is a significant decision, outlining a high bar for establishing grounds for vacatur.

### III. A NOTE ABOUT COLLABORATIVE LAW

Anything beyond academic theorizing about resolving disputes in a “collaborative process” appears to have surfaced in 1990, through a small

52. 476 F.3d 278 (5th Cir. 2007), *cert. denied*.

53. *See* 9 U.S.C. § 10(a)(2) (2006) (stating that “the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators”).

54. *Positive Software*, 476 F.3d at 280 (quoting *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F. supp. 2d 862, 865 (N.D. Tex. 2004)).

55. *See id.* at 281-32 (citing *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149-52 (1968)).

56. *Id.* at 281-82 (citing *Commonwealth*, 393 U.S. at 151 (White, J., concurring)).

57. *Id.* at 279, 281.

58. *Id.* at 286.

group of lawyers in Minnesota who created a collaborative “institute.”<sup>59</sup> In 2000, the concept was introduced in Texas by Dallas lawyers Larry Hance and John McShane, and in 2001 the Texas legislature amended the Texas Family Code to add collaborative law procedures.<sup>60</sup>

What is collaborative law? It is a dispute-resolution process in which the participants, including counsel, sign a “participation agreement,” in which they formally commit to cooperation in disclosure and discovery, and the lawyers promise to withdraw from representation if the dispute eventually must be litigated.<sup>61</sup> Perhaps the single greatest virtue of these commitments is that it creates a unique incentive for the lawyers to assist with compromise and resolution, as opposed to continued confrontation and litigation.

Though still in the background, and still virtually exclusively utilized in family law matters, the collaborative law movement in Texas is an area of ADR that seems bound to succeed and expand.<sup>62</sup> In 2005, and again in 2007, Texas collaborative lawyers pushed for passage of collaborative law provisions similar to those in the Texas Family Code into the Texas Civil Practice and Remedies Code, to make the process applicable in general civil matters.<sup>63</sup>

## CONCLUSION

The recent efforts of promoters of collaborative law, as well as the efforts of others to facilitate the expansion of mediation and arbitration, point to the irreproachable goal of those in our society to find “a better way.” For many, the courts, the legal profession, and the judiciary, as well as the constitutional, statutory, and common law rights that they were created to protect and enforce, are all parts of a system that has become increasingly irrelevant. For those to whom our current civil justice system now represents a grossly inefficient and costly mechanism for conflict resolution, the increasing use of mediation, arbitration, and collaboration for all types of disputes will be as beneficial to society as it is inevitable.

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59. See Lawrence R. Maxwell, Jr., *The Development of Collaborative Law*, ALTERNATIVE RESOLUTIONS, Summer/Fall 2007, at 22 (providing a very helpful history of the invention of collaborative law, as well as its development in Texas).

60. *Id.* at 23.

61. Robert P. Wildau, *Making Sense of Collaborative Law*, COLLABORATIVE INSTITUTE OF TEXAS, February 2003, [http://www.collablawtexas.com/article\\_making\\_sense\\_of\\_collaborative\\_law.cfm](http://www.collablawtexas.com/article_making_sense_of_collaborative_law.cfm) (last visited Aug. 18, 2008).

62. See National Conference of Commissioners on Uniform State Laws, February 2008 Interim Draft, COLLABORATIVE LAW ACT, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>. Assuming eventual passage of such a statute by the Commissioners, its consideration by all fifty state legislatures will ensue. Eventually, passage in some states is reasonably foreseeable.

63. See H.B. 205, 79th Leg., Reg. Sess. (Tex. 2005). In 2005, the ADR section of the State Bar of Texas supported the legislation, and included support among its 2007 legislative proposals. Maxwell, *supra* note 59, at 23.

