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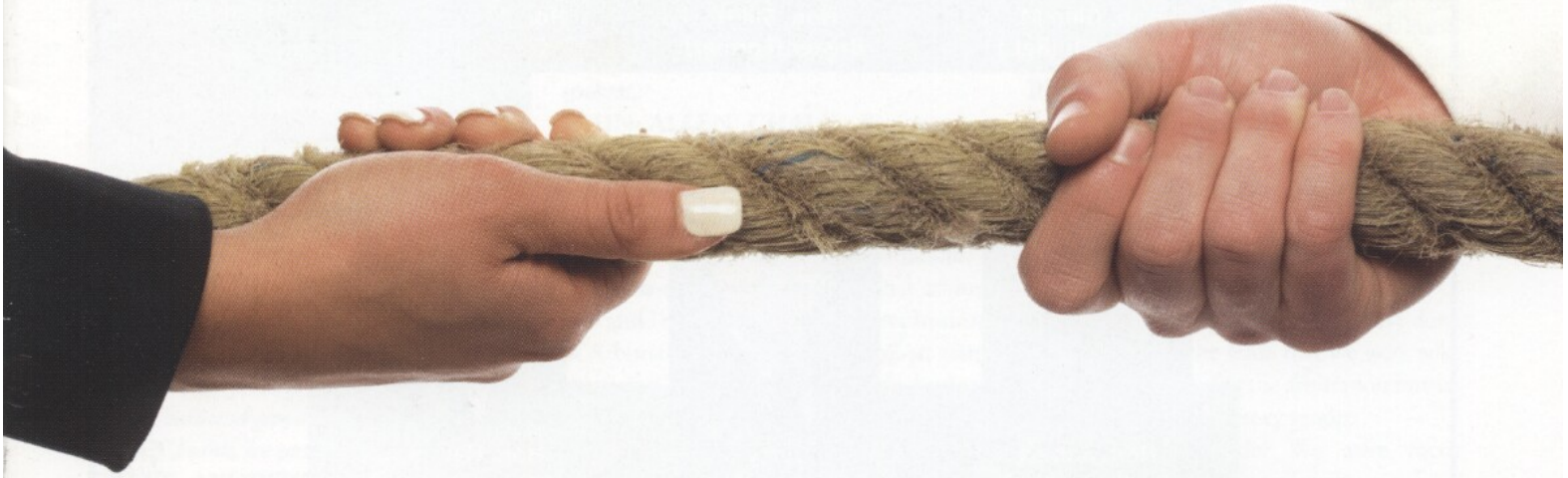
TEXAS LAWYER ROUNDTABLE SERIES

Arbitration: What Every Lawyer Needs to Know



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Arbitration is a well known technique for the resolution of disputes outside the courts, entirely distinct from the other forms of dispute resolution, such as negotiation, mediation, or determinations by experts, but there are insider nuances that may not be known by all attorneys. To get an inside look at the arbitration process, Texas Lawyer's business department held a roundtable with experienced arbitrators to discuss these inside tips and trends in the field. The following has been edited for length and style.

HEATHER D. NEVITT, moderator, attorney, editor of Texas Lawyer Books, Dallas: *Let's get started by having each one of you introduce yourself. Tell us what you do on a daily basis and give a little background about yourself. Frank, we can start with you.*

FRANK ANDREWS, arbitrator, Dallas: I was Judge 116th District Court here in Dallas, until I got a better deal to go work for the federal courts. And about three years ago I moved to the great city of Hunt, Texas, just west of Kerrville, where I continue to do special master work in the breast implant litigation. I also chair large asbestos settlement trusts. And I recently started arbitration practice; it's focused on nonsubscribers.

K.B. BATTAGLINI, shareholder, Greenberg Traurig, LLP, Houston: I have a business litigation and arbitration practice. And I'm also going to be a FINRA-trained arbitrator, what used to be called the NASD. So I sit occasionally in matters involving investor claims, suitability claims and things like that, but mostly, my practice is trial and arbitration. I've also written and have spoken and continue to speak on the subject of arbitration for the State Bar and for the University of Houston. And of particular interest to me is the history and enforceability of arbitration and arbitration agreements.

HARLAN A. MARTIN, mediator and arbitrator, JAMS, Dallas: I'm a former judge at the 192nd District Court in Dallas. I have for some time been associated with JAMS, a national firm which specializes in providing mediation and arbitration services. I have done that exclusively on a daily basis for some time now. And I, too, have had some experience in arbitration and mediation, like these other gentlemen have spoken.

JOHN ALLEN CHALK, Sr., partner, Whitaker, Chalk, Swindle & Sawyer, L.L.P., Fort Worth: Since 1992, I've acted as an arbitrator in commercial employment, insurance and all kinds of arbitrations. I have also done some international arbitration and I'm a fellow of the Charter Institute of Arbitrators in London. I'm still an active practicing lawyer, and it's mostly business and commercial litigation and transactions.

SUSAN SOUSSAN, arbitrator and mediator, Houston: My practice now is exclusively ADR, mediation and arbitration, and I do one or the other every day. I have a commercial litigation background. I was also a State District Judge in Houston, Texas, for a short period of time. I have participated in a hundred plus arbitrations and thousands of mediations. The arbitrations primarily involve complex litigation.

WILL PRYOR, arbitrator and mediator, Dallas: I refer to myself as the Susan Soussan of Dallas. I think you could hold Susan's record of experience next to mine and they would look a lot alike. I was a state district judge a long time ago briefly, but for many years I've been a full-time professional neutral mediator and arbitrator to the point where I told people all the time that it would be malpractice, per se, for me just to agree to represent someone.

NEVITT: *For the readers of* Texas Lawyer, *and for those that might not be real familiar with the arbitration process, are there various kinds of arbitration? If so, what are the different kinds?*

ANDREWS: We have mainly binding arbitration. You have nonbinding arbitration. You have baseball arbitration. You have very complex arbitrations that may go on over a period of years. I'm sure there are others.

SOUSSAN: Domestic, international.

CHALK: Neutral and nonneutral panels, all kinds of industry-specific arbitrations, insurance, employment, consumer, commercial.

PRYOR: Has anyone on the panel ever conducted a nonbinding arbitration?

SOUSSAN: Never.

PRYOR: Obviously, it's been referred to in our ADR statute and has been around since '87, and I continue to know that the concept exists, but I've never even heard of one.

MARTIN: Well, I think you may have done one yourself, in the sense that we were talking earlier about using the arbitration format as sort of a mock advisory group.

PRYOR: That's true. We were focus grouped. It was one of the most creative things I've ever seen done by lawyers in a large complex commercial case where a lot was at stake, but they brought a tremendous amount of resources creating two panels of arbitrators to listen to their arguments and give them, I guess, what turned out to be an advisory opinion. So, Harlan, you're right.

MARTIN: I have been involved in sort of nonbinding arbitration before, but my part of it was to, in the first instance, suggest it, in the second instance it was to suggest the format as to how it might be submitted for summary disposition and have the parties agree it would be submitted to judge for

FRANK ANDREWS

received his BA from the University of Texas at Austin in 1971 and his J.D. from Southern Methodist University in 1974. Until 1986, Judge Andrews was a general practitioner in Dallas. He was Judge of the 116th Judicial District Court in Dallas from January 1, 1987 until his resignation on July 7, 1996. After resigning his position as Judge of the 116th District Court, Judge Andrews has worked for numerous Courts as a Special Master, including MDL 926 (the silicone gel breast implant litigation). Judge Andrews has conducted hundreds of mediations and presided over numerous arbitrations. Judge Andrews is the founder and president of Judicial Workplace Arbitrations, Inc., a statewide arbitration practice begun in 2003, which utilizes the services of Former, Senior and Retired District Judges with an emphasis on non-subscriber matters.

nonbinding opinion. He wrote a 154-page opinion, which was very helpful.

ANDREWS: Well, there's a flip side to that. Anybody ever done a binding mediation?

BATTAGLINI: Never heard of it.

ANDREWS: Well, I hadn't either. And I said, "What do y'all mean by binding mediation?" He said, "Well, when you get tired of listening to us, just rule on it."

MARTIN: Actually, there's a format for that. We used to call it "med-arb." I don't know if we still do that or not. I've only done a couple of those. And when the parties exhaust themselves and have agreed on everything they can agree on, there might be a few issues that need to be resolved. And assuming they've agreed in advance to have a mediator whose been dealing with them, not in a caucus circumstance, decide, I think it works pretty well.

CHALK: I've heard a lot of discussion about med-arb in the last six months, and I think there's more use of it occurring today than any time in the past, based on the experience I've had.

SOUSSAN: It's a very popular concept.

NEVITT: *It's a trend in the industry, possibly?*

SOUSSAN: I think so, but I know of mediators and arbitrators who have been doing med-arb successfully for years.

NEVITT: *What kind of a checklist do you have for attorneys drafting arbitration clauses? Do you have some do's and don'ts for them?*

SOUSSAN: One has to be careful in drafting an arbitration clause for various reasons. If an arbitration clause provides that AAA will administer the arbitration, then the rules of the AAA will also apply. If you tie yourself to the rules of AAA or JAMS or any other organization, those rules in the end may not be beneficial to your client. Serious consideration should be given to the naming of an arbitration administer and under which rules the arbitration will operate. There are a myriad of other drafting instructions that you should give your clients, but I bet you these guys know as much or more than I do.

CHALK: I draft a lot of arbitration clauses in my practice, and I have an annotated arbitration clause that I keep updating as new cases come out. There are an unlimited number of toxic arbitration clauses out there in contracts because transaction lawyers did them at the 11. 99 hour at the end of the whole negotiation. So drafting the clause may be the most important part of the whole arbitration process.

SOUSSAN: John, do you go more towards the broad?

CHALK: Well, I go more toward a detailed drafted clause, even though that has its drawbacks as well. And, of course, the providers the arbiter institutions we all know, still strongly urge that that clause be a very short, brief clause for prudent reasons. But at the same time, mine's a full, single-spaced page long, at this point, for most of the transactions I'm involved in.

BATTAGLINI: We've all seen agreements where the arbitration clause is very narrowly drawn or sparsely drawn, and all it says is any dispute will be submitted to arbitration. If that's all it says, you do a disservice to your client for several reasons because you're not informing your client of the impact of that statement, i.e. the waiver of jury trial, the potential costs depending upon who it's submitted to, or other issues regarding the fact that an arbitration is a relatively unstructured enterprise. So there's no indication in that expression, in that one sentence, what rules you're going to go by, whether or not evidence is going to be considered, who is going to be ruling on what. It's a tremendous problem if all you're dealing with is a single line like that, so I would defer to the idea of a broadly drawn more detailed expression of what the parties intend.

SOUSSAN: As well as the selection of arbitrators. What qualifications an arbitrator may need to have.

CHALK: Yes. Simple things like where is it going to occur? Then when you over draft, you have these impossible time deadlines that create, then, a loss of jurisdiction question for the arbitrator. So in the middle of the arbitration, you've got these impossible deadlines that have been set, "We're going to have a final hearing within three weeks and we're going to have an award within ten days after the final hearing," things like that. You see those kinds of mistakes also being made in an over drafting. So I think you can clearly under draft, but there are also traps if you over draft.

MARTIN: It's interesting to hear from a practitioner point of view in the sense of you're serving your clients by advising them and drafting their clause as far as generally

by just reading the clause. And since arbitration's a creature of contract, very faithful to the arbitration clause, what have the parties contracted for, what do they expect. It is very difficult, if I were to be dealing with a clause which said nothing more than we intend to arbitrate. I approach that as a submission question. And the selection of arbitrator question by then has already been resolved because I assume I'm selected. And then the pretrial conference is very extensive as to what happens next.

PRYOR: My message to lawyers would be, for God sake, find someone in your litigation section to help you. What John Allen mentioned is absolutely true. And that is, so many transaction documents are handled by transaction lawyers. And a dispute resolution clause is so often an afterthought. And so what ends up being in every kind of agreement is a cookie cutter clause that will then have to be applied years later to any kind of dispute under that contract, whether it's a suit where we're trying to collect some monies owed or whether we're betting the company on something. So, my message is use somebody in your firm who's a litigator, or if you're in a situation where you don't have a partner or someone in your firm who's experienced with arbitration proceeding, go out and retain an experienced arbitrator and counsel with them and pay them a little something to give you some advice.

CHALK: One of the big criticisms of arbitration, of course, is costliness. One of the principle contributors to costliness in arbitration is requiring a panel of three arbitrators to decide a $10,000 question, but you've got an arbitration clause that says we're going to have three. Fortunately lawyers are getting smarter about it as they draft, but there are still tons of these kinds of agreements around where each side picks a party appointed arbitrator, which used to create big problems until our code of ethics changed in 2004. Frankly, these days I'm drafting sole neutral, picked by the institution who's administering it. I always do an administered clause in my clauses. Let that institution pick it according to its rules, as long as I know what those rules are. And I do multimillion dollar disputes with sole neutrals.

SOUSSAN: The contract language in a recent arbitration in which I was the sole neutral was very specific as to exactly what I was to decide, whether or not the employee was terminated for cause. That was my sole issue. The contract provided the remedy if it was determined that the employee was terminated for cause. So clearly parties can design an arbitration clause to fit their particular needs. But, I highly recommend the drafting of such a clause not be given short shrift.

PRYOR: I think most of us as experienced arbitrators now provide a very valuable service to the participants in these things. And that is, at the outset when we are confronted so often with that simple two or three-line expression of dispute will be resolved by arbitration, we counsel those participants from the very first conversation, that you can create any kind of process here you want, the possibilities are infinite, you can have any rules that you want to agree to the extent that if the clause says dispute will be resolved according to the rules of the AAA, you can always agree around that. There is no part of an arbitration clause that the parties cannot agree around. If it says AAA, they can go to my friend Harlan Martin and JAMS or my friend Frank Andrews. There is no aspect of that clause. So just because you are confronted as a practitioner and your client has an arbitration clause, that doesn't mean that you're stuck. That can be the beginning of a negotiation which creates a process that makes sense for all the parties.

ANDREWS: Will, that's a really good point because I've run into so many practitioners that don't understand that if XYZ is designated that they can't go somewhere else and make up their own arbitration format.

CHALK: In fact, post-dispute arbitration occurs very often with pre-dispute clauses for that very reason. And that is a valuable service that arbitrators render. I had a case recently where I was on a three-arbitrator panel on a $15,000 claim. The first time the arbitrators and the parties got together, I said, "Guys, this doesn't work. It doesn't make sense. I'm willing to step back. Mr. Arbitrator, are you willing to step back? Why don't we let Mr. Y be the sole neutral?" And they did. So that's a post-dispute arbitration in the midst of what otherwise would be viewed as a pre-dispute arbitration clause.

BATTAGLINI: As a practical matter, once

K.B. BATTAGLINI

is a shareholder in the Houston office of Greenberg Traurig, LLP and has represented clients in arbitrations and state and federal trials and appeals for 25 years. Areas of experience include energy and natural resources litigation, as well as securities and general commercial litigation and arbitration. K.B. has been appointed to the panel of arbitrators for the Financial Industry Regulatory Authority (FINRA) (formerly National Association of Securities Dealers) and authored "Arbitration in Texas: The Drift From Permissive to Compulsive," for the TADC Magazine. He also spoke at the this year's TexasBarCLE 24th Annual Advanced Personal Injury Law Course. K.B. received his J.D. from South Texas College of Law, and his B.A. from State University of New York College at Potsdam. While on active duty in the U.S. Army from 1975 through 1977, K. B. served on the staff and faculty of the U.S. Military Academy at West Point, New York. He is a Distinguished Honor Graduate of the Department of Defense Information School.

JOHN ALLEN CHALK,

a partner in the Fort Worth law firm of Whitaker, Chalk, Swindle & Sawyer, L.L.P., acts as an arbitrator, mediator, and a commercial litigator and transactions lawyer. Chalk is a member of arbitrator 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 Center for Public Resources), 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. He has served as an arbitrator and chair of arbitrator panels in more than 300 arbitrations. He also represents parties in arbitration. Chalk has presented numerous seminar papers including "How to Prepare and Present a Case in Arbitration," "Drafting Arbitration Clauses," "International Arbitration," "Drafting International Arbitration Clauses," and "Introduction to Arbitration."

the neutral is selected and the parties have their pre-hearing conference, which is the thing that gets it going, you end up in that conference essentially doing what Will talked about. You begin to create what this thing is going to look like. You set out your protocol or your procedure and the boundaries. That's the perfect opportunity to put in place the foundation for your arbitration. Not everyone takes advantage of that opportunity, but that's the perfect opportunity.

PRYOR: One of the reasons that a lot of our lawyer friends are frustrated or intimidated by arbitration proceedings is even with the increase in popularity in the last decade there are still so many lawyers who have never participated in one. And lawyers are accustomed to and are very comfortable with being handed a set of rules and told, "Okay, now go fight given this set of rules, these rules of evidence, these rules of procedure, and these rules of how we're going to conduct a trial." They're not used to and not comfortable with saying let's wipe the slate clean and let's create any kind of set of rules we can think of. I compare it to kids in a swimming pool on a summer afternoon. If you leave them out there for a while they're going to invent a game. They're just going to make stuff up, but they're going to love it and they're going to have a lot of fun. I wish lawyers would get to the point where they were comfortable in doing that and just wiping the slate clean and inventing a process that fits their dispute.

SOUSSAN: The contract language in a recent arbitration in which I was the sole neutral was very specific as to exactly what I was to decide, whether or not the employee was terminated for cause. That was my sole issue. The contract provided the remedy if it was determined that the employee was terminated for cause. So clearly parties can design an arbitration clause to fit their particular needs. But, I highly recommend the drafting of such a clause not be given short shrift.

ANDREWS: What I really enjoy is along about the second day of an arbitration with lawyers that have never arbitrated before and during a recess they say, "This is so much better than the courthouse. This is great."

NEVITT: *You bring up cost as an issue. Are there ways to help with the cost of discovery since we all know that it is always a huge cost?*

SOUSSAN: I am anxious to hear what the rest of the panel has to say because in the complex, large arbitrations I'm finding that the lawyers are doing almost as much discovery as they would if it were full blown litigation at the courthouse.

MARTIN: That is a problem. The arbitration itself is a creature of the parties' contract. And to the extent that the lawyers wish to agree that they need more and more, you would expect the arbitrators to be reluctant to interfere with that potential to agree. Although I personal believe that an arbitrator has a duty to manage the arbitration, has at least the ability to coach the attorneys as to how it might be that they could do with less and accomplish the same. Most arbitration administrator organizations have rules that are designed for different complexities of dispute. To the extent that it's a smaller dispute, well, they have rules that better fit the smaller dispute. To the extent that it is a more significant dispute, they have rules that better fit that type of dispute. But the bottom line is always the same. You might be in arbitration as a single arbitrator. There might be a modest amount of money in dispute and it might be getting very overblown. At that point in time you need to intercede and try to coach the attorneys and make suggestions. It might require revisiting the pre-hearing decisions. It might require revising scheduling orders. It might require several things. But I think that you owe them a service. In the end, they're going to have to explain to their clients how so much time, money and energy was spent when the dispute itself was beginning to pale in comparison.

CHALK: Well, the issue here begins with the fact that arbitration is a creature of contract. And it is the parties' process. I represent parties in arbitration quite often. And I resent arbitrators telling me how to put my case on. In addition to that, one of the very standard best ways to get an award vacated is to not give the party the fair opportunity to present and develop its case. And that militates against cost savings. And especially, it notates against cost savings where the practitioners are not arbitration savvy. On the other hand, I really understand and appreciate what Harlan has just said about the arbitrator has a responsibility to this process to try to control those costs, but that takes the wisdom of Solomon to do that.

SOUSSAN: But the minute you have an attorney telling you you're not being fair, you're not letting him put his case on, he has important evidence, and you're telling him you will not allow the evidence to be submitted, be careful. This is one of the four elements in the Federal Arbitration Act that will allow vacatur: keeping critical evidence out of the arbitration proceeding.

CHALK: And so I continue to struggle with it as an arbitrator. It is a major issue.

NEVITT: *And litigators in general. I mean, with E-discovery, it's a problem across the board.*

MARTIN: E-discovery is very much a problem.

CHALK: K. B., how do you see that whole issue of costliness based on extensive discovery on your arbitrations?

BATTAGLINI: I'm in an arbitration right now where I represent a Malaysian company. And I would say 90 percent of the witnesses reside in Malaysia. And yet, the arbitration clause says no depositions. It would make practical sense for us to go to Malaysia, take depositions, rather than have them all come to Houston to arbitrate the case. But unfortunately, we're dealing with language that prevents that. And the other side is resistant to a practical application or modification of the language.

MARTIN: But that's most often true in these international arbitrations, though. As a general rule, folks internationally don't embrace the discovery practice and deposition practice that the American lawyer does. So don't you see that more often? I've been in international arbitrations where there were no depositions. I've been in international arbitrations where you couldn't call the witness on direct. It was all on written submission. The only inquiry was the cross-examination. A very strange rule from a Texas lawyer's point of view, but it seems to have worked well in Europe and other international forums for a long time.

BATTAGLINI: It may work well, but addressing the question of cost, in this instance, the one I was painting, it drives costs in the way that are unsuitable. It increases the costs unnecessarily. And that's why I'm uncomfortable with that particular result. And I see that more and more, where arbitration is unnecessarily more expensive because of the way the clause is written.

PRYOR: I've been on a couple of panels where we decided as a panel that there was too much contentiousness going on out there, and some of that was leading to what we perceived to be too much discovery. So in the spirit of trying to provide that wisdom and that guidance that Harlan was referring to, and manage the case as we have a duty to do in a couple of instances, we've decided that the technique to employ was to require of the participants a regular phone conference. And it depends on the circumstances, but, perhaps every other Friday morning at 8: 30 or once a month, because what that does is it requires the contestants to focus a little bit more on what they're up to. And they're getting a little more direction than they would have otherwise in kind of incremental steps. If they started in those two instances to get a sense of where this panel was going and what this panel would allow, wouldn't allow, and so forth, and I thought that was a case management tool that was very effective.

SOUSSAN: Another one I use in the same situation is to schedule an in-person hearing. Once counsel is before the panel in person the panel can express its concerns over the lack of professionalism among counsel. The attorneys then have an opportunity to fully vent their issues with opposing counsel and the panel makes a ruling at the end of the day. The in-person hearing may be expensive to the parties but I believe that it cuts down contentiousness as well.

NEVITT: *I must address the "split the baby" issue. There's a general perception that arbitrators split the baby, so to speak. What are you feelings on that?*

BATTAGLINI: Yes. And let me tell you why. Arbitration is necessarily an equitable proceeding. The arbitrator does equity. He or she doesn't have to concern him or herself with the law, okay. And in doing equity, you're trying to do the right thing. That often presents an opportunity for the arbitrator, not only to weigh things and to balance, but to arrive in the middle in revolving it. And that's why we see many times a split the baby approach.

SOUSSAN: Yes arbitration is an equitable proceeding; however, some lawyers suggest that because arbitration is a Court of Equity, the arbitrators do not have to follow the law. I won't ignore the law. I'll never split the baby. But I hear your argument. "This

HARLAN A. MARTIN

is a full-time mediator and arbitrator with JAMS in Dallas. Judge Martin has resolved thousands of disputes and significant multi-party litigation across the country. He mediates and arbitrates in a variety of areas including commercial disputes, intellectual property (patents, trademarks, and copyrights), shareholder suits, construction defects, environmental liability, insurance coverage, real property and eminent domain, oil and gas, anti-trust, securities fraud, legal and accounting professional liability, injury cases involving medical provider, products liability, air crash, vehicular collision, premises liability, and employment matters. He has also served as a court-appointed Special Master supervising discovery and pretrial matters in complicated civil litigation. Since leaving the bench, he has been one of the most active and sought after neutrals in Texas and throughout the U.S. He is a former District Judge of the 192nd Judicial District of Texas. He may be reached at hmartin@jamsadr.com.

WILL PRYOR

is a full-time professional neutral, providing services as a mediator and arbitrator in a wide range of business, employment, insurance, construction and intellectual property disputes. A graduate of Yale University and Harvard Law School, Pryor has mediated and arbitrated over 2,500 cases. Pryor is a former state district judge, and served as the First Assistant Attorney General of Texas. He is an adjunct instructor in ADR at the Dedman School of Law at SMU, and author of the forthcoming chapter on Alternative Dispute Resolution, in the annual *Survey of Texas Law* (2008), published by the SMU Law Review. Pryor has been recognized as a "Texas Super Lawyer" and "Best Lawyer in Dallas", each and every time those lists have been published. Pryor is married to Ellen Pryor, Mitchell Professor of Insurance & Commercial Law, University Distinguished Teaching Professor, and Associate Provost of SMU.

is a court of equity; you're supposed to do equity." Well, if you follow the law, let's say, and the Claimant will not recover because you are following the law, I would not go outside the law in order to allow for recovery. You would?

BATTAGLINI: No, I'm not saying I would. But in my experience, this is what I have discovered.

CHALK: In May of this year, the Texas Supreme Court reported an arbitration. And that arbitration award was rendered on December 24, 2002. This is what the arbitrator awarded over a $242,000 house: The home owners got $800,000, including restitution of the purchase price of their house, mental anguish of $200,000, exemplary damages of $200,000, and attorney's fees of $110,000. There's no way in hell that that's a "split the baby." And I don't ever do split the baby awards. I've been appointed in over 325 arbitrations. I can't remember a time that anything I did resembled split the baby.

SOUSSAN: But you hear it all the time.

ANDREWS: Well, I think the perception comes from the fact that typically both sides so overstate their claims that it ends up appearing to be that the baby was split, but justice was actually served.

MARTIN: There may be something to that, Frank. Everyone at this table has been involved in a lot of arbitrations. I don't ever recall an arbitration which a split the baby circumstance was even discussed by the arbitrators. Now, it is often true that the arbitrators may not have confidence in the claimant's damage model. It means that the claimant might seek a remedy that by reason of whatever circumstance. And I'm sure you've seen this many times, especially in New York law cases, where attorney fees probably just aren't available, but they're seeking them anyway. It may be true that there is an analysis of available remedy. It may be true there's an analysis of damage model. And those who actually prevail don't get anywhere near as much as they wish to have been awarded. That doesn't seem to be the case in your litigation. But that's not a split the baby circumstance. I really do believe that arbitrators try to focus on the issues. And they try to clearly decide who wins, who loses, but it's the what is won is sometimes —

NEVITT: *It can appear that way.*

PRYOR: I want to point out that this panel of six people is providing the lawyers of Texas with absolutely no guidance on this issue at all. Look what just happened: We are evenly split between three of us who seem somewhat passionate about the notion that we never split the baby, never happened, never will; and three of us who probably have a view that most arbitration panels do it constantly. And I'm in that group to the extent that I think there's often an overwhelming temptation, particularly on panels — we can talk about that as a separate issue later — to come up with some something that resembles a compromised solution. But they're not doing it for any of the cynical reasons that sometimes people assign. It's because most of us have a life experience, which is that when relationships fail — and just think of any relationship you want to, whether it's a marriage or a construction contract or employment relationship, whatever it is, that when a relationship fails, it almost never is entirely one side's fault. Now, sometimes it is. Absolutely it is. But more often, it's not. And so once you sit as a judge or an arbitrator and you listen to a few days of testimony and you see the strings of e-mails and the evidence of meetings, conversations, faxes and people's notes, gets layered into some kind of chronology, and you go back and you find out what happened in this relationship that caused it to come unglued. It typically starts with a breakdown in communication and a breakdown in trust between the parties. And so is that entirely one side's fault? Often, I say no. And so to follow up what Frank said, what panels especially tend to want to try to do is something that is fair. And to award one side everything they're asking for and to one to completely get hammered, wouldn't in those instances resemble a fair outcome.

SOUSSAN: Clearly each case is judged on its own merits. Often you will have a situation where both parties to a contract have breached the contract. In that regard, there may not be a true "winner" because you have to analyze damages to each party. But in my opinion that is not "splitting the baby." Nor would I, for example, in a product liability death case, award a claimant "some" money to be "fair" if the claimant did not meet his burden of proof on the defective product.

MARTIN: Well, I don't think anyone here would do that. But if we all confront com-

parative responsibility, there's a lot questions and those have to be analyzed. They have to be decided. And it might well be that under the law a party is only entitled to a portion of their claim.

NEVITT: *What are the differences between arbitorial institution administrated arbitration and nonadministrated arbitration? Are there advantages, disadvantages, probably both?*

BATTAGLINI: Yes, there are different sponsoring organizations. Each one may have its own set of rules, not necessarily, but a lot of them do each have their own price structure or fee structure. And some provide extra services like having a pool of arbitrators available to select from or may offer a specialty like FINRA, for example. So it really depends on what you're involved in as to whether or not there's any structure to be applied from either an administrated or nonadministrated.

MARTIN: Has anyone in this room ever served in a nonadministered arbitration?

SOUSSAN: I have many times and I prefer it. My assistant communicates with the parties regarding scheduling and any issues they need to present to me. Of course she does not go into any detail. It has worked very smoothly without problem. The CPR panels in which I have participated are self-administered and have run smoothly. The key is to have a strong person as Chair of the panel.

MARTIN: Do you find it difficult?

CHALK: I find it very difficult and problematic.

MARTIN: But you have to be very careful that there is some group that can communicate with the parties to avoid ex parte communication. I find it beneficial simply because most of the sophisticated administrators of arbitration practice have all sorts of other helpful methodologies for dealing with issues that might come up, either at the front end or in the middle. And quite frankly, that's the safest approach from an arbitrator's point of view, less opportunity to be criticized, more opportunity to efficiently manage the process. And they're always so nice to remind you of what you need to do and when you need to do it.

CHALK: We have no studies, which I'm aware of, of administered versus nonadministered arbitrations. And even under the nonadministered category, there are all kinds of nonadministered arbitrations with a lot of substance and complexity. But in my experience, the horror stories that I know about arbitrations gone awry, I can't remember a single one of those horror stories that wasn't a nonadministered arbitration. So a nonadministered arbitration's a real problem. Let me tell you a couple of problems. One problem is when there is a need to challenge the neutrality and independence and impartiality of that arbitrator. You've got nowhere to go but back to the very person that you don't want to further pollute, especially if that person is uncooperative in the request that he or she step down. So that's a major problem. The second problem is if that arbitrator fails to do his or her job as an arbitrator, which does happen, there is, again, no one to whom you can go without maybe filing another lawsuit against the very arbitrator that's got a decision pending for you. A third problem is the handling of deposits and funds. And when one side chooses not to pay, which is a tactic used these days to prevent an arbitration from going forward, it's the arbitrator as the administrator of the funds who's got the problem of remaining impartial regarding that SOB who's not paying his deposits.

PRYOR: I think as a general proposition, I'd say that the simpler the dispute is, two parties, one or two-day hearing is what the parties anticipate. They probably are not going to have any discovery battles. I do a lot of those arbitration proceedings and I'm essentially the arbitrator and the case manager. For the most part, it works fine, but I am absolutely in the camp that believes that if the matter is going to have almost any complexity at all whether it's going to be some discovery issues, who are going to be parties and who aren't going to be parties, not to mention the other considerations that Harlan and John Allen said. I think the administration of that is fine. And I do get to participate. AAA, for whatever reason, is very gracious about this, but I am not on AAA's roster of neutrals. But I have, at any given time, four, five, six cases ongoing at any time where I am a participant on panels where they are the case managers. So I have in that context the luxury of experiencing what case management can do for the process and for me, and I'm somewhat a proponent of it in complex cases. We haven't talked about the cost. The cost goes up

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when you go into higher levels of case management and more involvement by teams of support. So that's a call that the lawyers have to make early on behalf of their client.

CHALK: I think it's important to point out, too, that like JAMS and AAA they have very experienced administration staffs. But if you get to CPR, old CPR, now called the International Institute for Dispute Prevention and Resolution they will help you get an arbitrator. But beyond that, you're all on your own.

SOUSSAN: I've never had any difficulty in coming up with names of potential arbitrators for a panel. Clearly you have to do some homework but it is not an insurmountable problem.

CHALK: No. But you do have those issues. And then American Health Lawyers Association that does their ADR service, they've got their own rules and code, and they will get you an arbitrator, but they won't even help you once you want to challenge that arbitrator midstream. And that sometimes occur.

SOUSSAN: CPR will. I serve on those panels all the time.

CHALK: But it's not a smooth process.

PRYOR: How it happened, I don't know, but I ended up as a party appointed arbitrator on one of their matters a year or two ago. And they had a rule which prevented anybody on the panel from having any input as to what the fees were going to be that they charged for our services. You had to sign an agreement that you would not seek to have any input into what your fees were going to be and that you would abide by whatever they settled.

MARTIN: But you scheduled in your time and expenses and whenever

PRYOR: Sure. I was fascinated to learn that over there in Paris, France, they thought very highly of my services and my colleagues on the panel to the point that when they sent the invoices out to the parties and the push-back was so immediate and swift that a conference call was immediately convened to all the lawyers and the panel. And we just all agreed that they would submit whatever it took — an agreed motion of withdrawal of the matter from the ICC, and then they would reconstitute us as a panel and we would go about charging them our normal fees. I was very excited there for a while.

MARTIN: I actually had a similar experience almost identical to yours. I've been on several of their matters. Actually, what they do is they charge the parties an ad valorem amount in controversy approach is pretty stiff. Especially because this was a pipeline advising case. And the administration fees were huge. And the arbitrators would then be paid out of that fund according to a sort of time and materials analysis. Then they required that the arbitrators write, what I call, rules of engagement as to how the matter's going to go forward. And all they do is give you outlines. And they also reserve the right to never publish your opinion unless they approve it. So that's very dicey. We made a similar agreement. Because we had gone forward in the arbitration, all the arbitrators lobbied the ICC for return of as much of that money as possible to the parties. They are very strict in their approach.

NEVITT: *Let's go to the topic of judicial immunity for arbitrators. Frank, do you want to comment on that?*

MARTIN: How could you not be in favor of that, Frank?

ANDREWS: I am. I think there should be some limited judicial immunity for arbitrators, and to some extent there is, but it's not by statute; it's just by case law. I mean, the arbitrator that went so far in the house case. I've been surprised by some of the Texas decisions on nondisclosure of relationships by arbitrators, and they have not set aside the arbitration. But there should be some type of judicial immunity so that you're not sitting there kind of concerned that you may be next.

SOUSSAN: You mean that you may be sued? Do you know of any case in which an arbitrator has been sued?

ANDREWS: I do.

PRYOR: Oh, sure.

CHALK: I do, too. But there are very darn few.

ANDREWS: There are very few, but I think you had a situation where you had an arbitrator that had a migraine headache and they ended up trying to set the award aside because he continued the arbitration with a migraine.

CHALK: Another big problem with your private arbitrations you've got to represent yourself.

SOUSSAN: Okay, now, hold on. You're talking about vacatur. Vacatur to me is different than being sued.

ANDREWS: Yeah, I am talking about vacatur.

MARTIN: The court sanctioned the party trying to vacate the arbitration work?

CHALK: $80,000.

ANDREWS: They did.

SOUSSAN: Oh, my. Vacatur is one topic that I'm particularly interested in, but I thought judicial immunity was different.

MARTIN: The AAA has this experience. All administrators of arbitration have this experience. People who self-administer, if they don't have it, they might soon have it, for all I know, but generally speaking, the scenario would be something along the lines of an arbitrator didn't get the award out timely. The award comes out. The side who does not prevail challenges the award, probably successfully. The side who won the award is now very upset that they have spent so much and have nothing to show for it and they might get a little upset. Then they might sue the individual arbitrator. If it's a deep pocket administrator, they'll probably sue the administrator.

SOUSSAN: Do you know of an instance like that?

MARTIN: Dozens.

CHALK: I do, too. Absolutely.

MARTIN: We keep track of them. I'm sure it happens several times a year in the United States. I never saw one where the arbitrator actually lost the ultimate litigation. But you got to defend it.

CHALK: Absolutely. To Frank's point, there are only two reported cases in Texas on arbitrator immunity, and both of those are no pet cases. And so we don't have a Supreme Court case yet on arbitrator immunity in Texas, even though I think both those cases — one very recent one, 2001 or 2002, Jim Juneau, a good friend of several of us here, fought that on his own, even though I think he was also helped by AAA. And that set the *Blue Cross Blue Shield v. Juneau* case, one of the two cases we've got in Texas, but both of those have stopped at the Court of Appeals opinions. So I think we've got arbitrator immunity and I think it's real solid in Texas, but we don't have it protected by statute.

SOUSSAN: Vacatur is important. Someone brought up disclosure. To me, disclosure is the most important rule to follow in an effort to attempt to avoid vacatur. I was on a panel where one arbitrator was co-counsel with counsel for one of the parties in another legal matter going on at the same time as the arbitration and failed to disclose same. The jury is still out on that one. Again, it is so important to disclose all relationships.

MARTIN: Well, if you don't want the case, you can always disclose, I've heard. I have a friend in California that would do that every time he didn't want a case. He never did want to sort of say, "Well, I don't think I can be fair." So regardless of what modest relationship he might have had with the parties or the other arbitrators and probably didn't know anything about the dispute, he would detail "I've heards," which would always get him ignored as a potential panel member.

PRYOR: Most of us, if not all of us, are experienced mediators as well as arbitrators and it's something we need to be increasingly thoughtful about as we cross these thresholds of having done 2,000 or 3,000 or more mediations. Unfortunately, the general practice out there these days is that most of us aren't disclosing conflicts or things that might create the appearance of a conflict as often as maybe we should. As someone who thrives in this practice in this community, there just aren't any law firms that I haven't done dozens and dozens of mediations for. And so when I'm asked to mediate a dispute, do I go to any lengths to disclose. My disclosures in the last couple of years now go on for several pages because I have, not only the problem of having arbitrated other matters in which firms were participants or advocate, but I lost my mind a couple years ago and ran for public office and raised a lot of money from lawyers and law firms in this community. So I have the added burden now of having to kind of do something byway of disclosing what my contributions to my political campaign were two years ago. But what I find is that the more forthcoming you are, the more times you point out that I stood on the sidelines of kids' soccer games with so and so in this law firm, and all of that stuff, the more at ease people seem to be with you as their neutral. There's sort of a spirit of, "Well, gosh, if he's willing to disclose all of that, we don't have a problem with it."

SOUSSAN: I sit on a panel right now where the other party picked arbitrator said, "Well, since new counsel has substituted in, I need to disclose that counsel for both parties were partners of mine in the past." No one objected.

ANDREWS: Have any of you had the experience of being a week into an arbitration and all of a sudden something comes up that if you had known about would have required disclosure?

SOUSSAN: Well, then you disclose.

ANDREWS: Yeah, but that's a terrible feeling. You spent a week here and when it happened to me, the parties said it's not a problem.

SOUSSAN: That has happened to me. And when it does, I make an immediate disclosure on the record.

MARTIN: That's happened to everyone. It's generally when a witness is called and maybe it was really on the list, but you didn't put the name and the face together. And then all of a sudden.

SOUSSAN: Yes. In one arbitration I had an eleventh hour panic because we were about to start a two or three-week arbitration in New York, when I saw a pleading with a lawyer's name that I had not seen before. That particular lawyer had been involved in one of my mediations that took months to resolve. I immediately emailed all involved and made the disclosure. Fortunately no one objected. The recent case law on failure to disclose and vacatur has made me oversensitive to the issue. So I will always err on the side of disclosure. If you don't disclose that in and of itself is evidence of partiality.

CHALK: That's another instance and a perfect example of the problem with a nonadministered arbitration. The problem in *Blue Cross Blue Shield v. Juneau* was that there was a verbal acknowledgement by an arbitrator, "I was in a big law firm with one of the counsel for the parties," on a telephone conference. "Does anybody have a problem?" No letter was written. It wasn't referred to the administrator. Everybody on the call said it was okay or didn't say anything. Later, when the award comes out and is not favorable to that side, then you hear, "We didn't agree that that arbitrator could continue to serve." So that whole issue of how you handle in-hearing or in-proceeding disclosures that have to be made after the initial ones, you get a chance to let the administrator handle that, as opposed to the arbitrator telling the party, "Okay, here's the deal and I'm sure you don't have a problem with it, do you?" "Oh, no, I surely don't, Mr. Arbitrator." Well, you know, that's coercion. And that's another issue with private arbitra-

tions and how those disclosures are handled in the midst of the proceeding.

MARTIN: I guess the worst nightmare would be to be in the middle of the arbitration and come to the conclusion that whatever has taken place thus far has so prejudiced you that you could no longer be fair. And then what do you do? And then how do you in the nonadministered way deal with what you would normally do.

CHALK: Exactly. You'd have an easy way to do it. I would go to my administrator and say, "Look, I can't serve any more," and then let the administrator decide how to handle that. But you can't do that with a private. Disclosures are critical. I tell you the problem with another issue that that raises is what kind of database does the arbitrator maintain as he or she gets into the hundreds of arbitrations to be able to know that the law firm, the lawyer, the disclosed witnesses, the parties, the panel members are people that you've had prior and the ABA, AAA code of ethics says relationships and goes on to just ridiculous lengths, frankly, the code does, about interests. I do my conflicts check in the law firm and I ask people do you have any interests in so and so. Well, they think I'm crazy. You know, interests? I mean, romantic?

NEVITT: *Sounds like you'd always have a lot of disclosures because as we all know, the legal community is pretty small. And the more you do arbitrations, the more disclosures you're going to have to do. It seems a bit overwhelming and a little scary, too.*

CHALK: The more you disclose the more confidence the parties have in you. I've served on a nonprofit hospital board, unfortunately, for a number of years. The hospital closed for some inevitable economic reasons. The bankruptcy ensued. I've now been sued as a director along with 43 other directors in the hospital. And I really faced a conundrum. I mean, a real serious issue for me is do I disclose that? So I've got a paragraph that long because there are that many parties involved. And I disclosed that and I thought, "Well, that's the end of my career as an arbitrator. And I've now been making that disclosure for two years and nobody's objected.

MARTIN: I think this goes back to what Will says. I think you impress people when you fairly and in a detailed way make disclosures. That in itself is currency and evidence of fairness.

NEVITT: *One thing I was curious about is when is it appropriate to bifurcate arbitration?*

MARTIN: Some would say always. Oftentimes, claims for additional remedy, like attorney's fees, are dealt with later because you have a decision, and that decision might indicate that someone would be entitled to attorney's fees or not. If not, then why have you dealt with them; you may have wasted some time. If so, then, of course, you can deal with them later, and you can deal with them on a submission basis or on a continued hearing basis. That's the most common application. But there are cases in which they are more strident attempts to bifurcate the issues. So I guess it's sort of an analysis of case by case. I know some arbitrators that routinely bifurcate in a sense because they will reserve either attorney's fees, if the claim might have potential for attorney's fees, or they'll reserve a decision on the apportionment of costs. The real reason for doing it is an opportunity to issue an interlocutory award, so they can control the jurisdiction and give themselves as much time as they think they might need to issue the final award.

NEVITT: *Are the considerations any different because it's an arbitration, as opposed to a bench trial?*

MARTIN: No. I think if you're used to that analysis and a bench trial it should be about the same. Although, what was it I was looking at the other day? I can't recall. But there was an arbitration agreement in which there was a very discreet liability question. Now, beyond that question, there could have been just a quagmire of issues associated with liability and responses to potential damages. And I think it was bifurcated in order to avoid that discovery. Bifurcated to avoid that burden unless it became apparent or needed to.

ANDREWS: Yu couldn't do this from the bench — but what if you issued sort of an advisory award to let the parties know where you are at this point and let them have the opportunity to come back and tell you where you're right or where you're wrong? And they might just go and settle it.

MARTIN: I've done it myself where you resolve an issue even the damages associated with that issue. And then you might at the same time have reserved the question of attorney's fees. In one instance, it was fairness and I ordered them to offer nondiscriminatory contracts, et cetera. And they didn't do it. So then we had to do something about that. And of course, we've never entered a final award or anything, it was all interlocutory. But the most shocking thing in that instance was that they did not come to a contract. And so I wrote the contract, and it went to the Fifth Circuit. Fifth Circuit said, yeah, that's fine; judges shouldn't be doing that, but it's okay if arbitrators do it.

CHALK: That raises a very interesting

point. One of the main features of arbitration, in my experience, is the flexibility of it. I had an issue where I needed to go and render and make a number of decisions in succession before I even got to damages, and even to liability, frankly. And I have to be careful that I don't tell you too much here, but it's now a 14-page federal judge opinion critiqued my award and upheld all of it. But it was a case where there were a number of discreet steps that had to be done and the parties couldn't agree on these steps in order to get to a conclusion. And so we went to where the workmen were. It wasn't a construction case. And I would listen for 15 minutes on each side or 5 minutes or whatever it took, and then I'd make a decision. We were on the work site and I would direct the workers to go do this certain thing. And we did that for four days straight. Yet, it was a regulatory compliance where you had government officials doing things. And that's bifurcation in the extreme, but we got the thing resolved, ultimately, and even though we had to finally have a two-week hearing just on liability and damages. But the issue in that case — the piece of property — got totally fixed and released and in the proper hands, and then we decided who was at fault. That's something we can do in arbitration that would be very difficult to craft. I don't know how you'd craft that even in a bench trial.

MARTIN: Oh, you can't. I think that's why

the big projects, whether it's a nuclear power plant that they used to build or dams they still build or government buildings, that's why they embrace arbitration so they can access immediate resolution of these ongoing, interim, need to be resolved immediately disputes.

NEVITT: *All right. What about class action arbitration? Does that work?*

SOUSSAN: I was involved with a class action arbitration that lasted two or three years. It was a laborious task but it worked. It was a very difficult case because of the evolving law during the pendency of the arbitration. The 3,400 member class in this particular arbitration challenged the attorney's contingent fee contract insofar as what expenses could legally be taken out of their respective settlement. The first major decision was whether the panel could determine if a class action could even be brought since the contract was silent on the same. The United States Supreme Court's decision in *Green Tree v. Bazzle* supported the notion that arbitrators, not the Court, decide whether an arbitration clause permits class action if it is silent. After we determined a class action could be brought next came clause construction which required an evidentiary hearing and an interim award. Once this award is issued a party must get that award finalized or get it set aside. There is a 30-day waiting period, which can be extended by a court. Then you go on to the next phase to determine if the elements necessary for a class action are present. The panel looks to Rule 23 of the Federal Rules of Procedure for guidance. Another evidentiary hearing takes place. It was a very difficult and long process. I believe we'll see more class action arbitrations in the future.

MARTIN: I've got a simpler answer. You should only be arbitrating class actions after the class is certified. Actually, I think it works in certain circumstances. Frank, I know that you've had a lot of experience dealing with those cases. Did you arbitrate or just mediate all of the cases that came out of the class?

ANDREWS: Sort of a hybrid.

MARTIN: A hybrid. We've had experience as a company dealing with what we thought were 28,000 claims and ended up to be more than 28,000 claims, so we designed a system. And those were issues where the liability question was resolved. And the system was designed to facilitate either a very short form submission arbitration or what I would call sort of a streamlined approach to arbitration, that was, in fact, adopting our streamlined rules. And it was sort of column A or column B. And the claimants,

who are entitled to have their injury claims resolved, could choose one or the other. The promise was if they chose the short format, as it were, then it would be resolved much quicker, whereas the choice B was going to take a bit more time. Those kinds of class cases probably need very sophisticated administration.

ANDREWS: One of the things that I see a lot of is you'll have a mass torte and you'll have a number of settling defendants but they can't agree on how to divide this up between the numerous plaintiffs. They know how big the pie is, but everybody's arguing over who gets what size slice. And they'll pick one individual who just sits down and takes the documents, looks at what injuries are being claimed, and just grids it. And it saves a lot of time and a lot of money. Nobody ever gets as much as they think they should. They're all unhappy, but it's over.

MARTIN: But you're talking about an ultimate limited fund at that point. I don't know what your choice would be, other than to take some approach similar to that.

ANDREWS: I did it in latex glove and there was some settlements there. Francis McGovern's doing it in the Rhode Island fire case.

SOUSSAN: We did it in the breast implant cases. We came up with grids, but that is not arbitrating a class action.

ANDREWS: Yes and no. And I still do it in the breast implant cases. I'm the ultimate judge. And if you're unhappy with a claim —

MARTIN: Well, it is arbitration in the sense that someone is submitting for a decision, and the decision is the ultimate decision.

SOUSSAN: I really don't agree. It is more

of a special master position. You're looking at a certain pot of money and dividing it up. I was talking about class action in the true sense of the word, where you have to go through all the phases of determination and ultimately damages.

ANDREWS: I like Harlan's answer on that. I think it's the safe harbor if is certified.

CHALK: But I think from an administrative standpoint both AAA and JAMS have procedures for class action in place for that.

SOUSSAN: They did. That's right. But if the arbitrators decide on certification.

NEVITT: *And that's a big stumbling block is to get certified.*

MARTIN: It's almost the whole hole.

SOUSSAN: Indeed, it is.

NEVITT: *We have about ten minutes left, so I want to go around the room and do a crystal ball type question in what you think are trends for arbitration. I know we mentioned class actions, but are there other trends?*

ANDREWS: We're seeing more and more use of arbitration. And as lawyers get more accustomed to using arbitration, they become more comfortable with it. It's also more comfortable for the arbitrators and the administrators when we have lawyers that are knowledgeable in the arbitration process and aren't either scared of it or just so unfamiliar with it that they don't know what's going to happen to them. There is definitely a growth in the industry.

BATTAGLINI: One of the things that I speak about regularly is the drift that has occurred from what used to be a tradition in Texas of permissive arbitration, where parties were free to contract and arbitrate, to a situation now compounded by many decisions by the Texas Supreme Court in the last ten years, compelling arbitration when the parties have not agreed to it under various estoppel theories. In many types of cases employees now can be compelled to arbitrate even if they never saw an arbitration agreement, merely by going to work and getting a paycheck. That has been held as a matter of law to have agreed to an arbitration agreement. Personal injury cases, the *Weekley Homes* case, November of 2005, is a prime example of a personal injury plaintiff being compelled to arbitrate, an asthmatic plaintiff suing for personal injury damages being compelled under a theory that she was attempting to benefit from a contract that she was not a party to. There have been many decisions that would indicate that the Supreme Court has greatly embraced this idea that there's a strong public policy favoring arbitration in the state. And with that stated or expressed policy now by the Supreme Court, any time there's a decision to be made whether or not a case is to be arbitrated, the courts will greatly favor arbitration to the exclusion of a consideration for the right to a jury trial. In other words, there may not be a true balance anymore. The scales may have tipped in favor of arbitration to the exclusion of a fair consideration of what that means in the broader scheme about our civil justice system in the state. So what I'm seeing is some push-back to that. There's a realization by practicing attorneys, that, wait a minute, are we going in the right direction, is this the way it's supposed to be? While we all appreciate that parties are free to contract to arbitrate, have we gone overboard with this and are we going down a dangerous path.

MARTIN: Without a doubt, the courts are embracing arbitration and they're liberally construing under what circumstance a party should do or could be compelled to arbitrate. I think that's just the case. One of the things I fear is that somehow others will try to co-op the arbitration process. Especially in consumer arbitration, debt collection, or possibly employment or other areas where parties might not really realize that their dispute is going to be resolved in arbitration. And when they talked to their lawyer about it, the lawyer may be in court, not realizing that the dispute is going to arbitration. It's incumbent upon all the arbitrators, those organizations that administer arbitration and we who are involved in arbitration, to have some sense and, better yet, rules of fairness which protect the parties in this circumstance. Arbitration can be costly. Consumer arbitration forced upon an individual who is not accustomed to paying lawyer fees, paying expensive discov-

ery cost fees, paying expensive arbitrators or panels of arbitrators, these people need to be protected. We see rules of fairness which impose an obligation to fee shift to the party imposing the arbitration obligation. We see rules which make it more difficult for a party to have the arbitration resolved in a summary matter for the same reason to make sure that the employee or the consumer isn't, by reason of more traditional views of procedure, denied any form, any meaningful form. So that will be a challenge to anyone involved in providing arbitration services in the future.

CHALK: We've really got to be careful as a trend not to throw the baby out with the bath water. Origination and goes way back, so it's not an unknown tool. And arbitration has got to be placed in a broader alternative dispute resolution context. And if we are going to continue to be a society maintained by law and by the rule of law, we're going to continue to respect the rule of law competent to that is the fact that we've got to resolve disputes. I really like arbitration because it lets parties decide how they want to resolve their dispute and it lets the parties be more involved. But there are many other alternatives to resolution methods that maybe even do that better in some cases. So right now there is a tremendous push-back against arbitration, or maybe I should say the overextension of the use of arbitration. It's in the U. S. Congress, both in the House and the Senate. We've had growing opposition to some kinds of arbitration for the last five Texas legislative sessions. So there is a lot of push-back against arbitration, but I think it's the overextension of it. And I'm really concerned about that reaction becoming an overreaction and really harming dispute resolution generally. I see arbitration as one of many tools in the ADR industry. But this is really the whole citizens' debate. And I'm concerned that arbitration gets viewed as some kind of esoteric methodology limited only to a very few, and so we let people who don't know anything about how we need to get disputes resolved more efficiently in this country decide how arbitration is going to be used. I'm really concerned about these next few legislative sessions, both in the U. S. Congress and in the Texas legislature.

SOUSSAN: The trend I see is a tightening of appellate review of an Arbitration award. The Federal Arbitration Act, Texas Arbitration Act, AAA and JAMS specify how an Award may be vacated. We are now seeing case law that says the provisions in the Federal Arbitration Act are the only provisions one can consider to vacate an award. So in other words, parties will not be able to successfully contract for additional judicial review of an arbitrator's award. In May of this year, the United States Supreme Court in *Hall Street* disallowed that extra "look-see" at the award. Courts are narrowing the review of an arbitration award. Even the common law standard of "manifest disregard of the law" is in jeopardy of continuing to be a consideration for vacatur. And in that regard, because it will be so difficult to vacate an arbitration award, it's incumbent upon all of us to pay attention to the law, to pay attention to the rules and be right when we make our decisions.

PRYOR: As a trained professional neutral, I'd like to state I feel very strongly both ways about all the comments of my colleagues here. This has been a really fascinating 20 or 30 years to be involved in ADR, specifically regarding arbitration. Because let's remember what got arbitration off the launch pad 20 or 30 years ago out of just the traditional centuries old context of maritime and insurance coverage and collective bargaining agreements and labor law and so forth, and into every kind of contract that we enter into in our lives, employment contracts, loan agreements and real estate transactions and so forth. What really got it fueled was a concern 20 and 30 years ago about our courts and about how backed up they were and about plaintiff's personal injury lawyers and frivolous lawsuits and runaway juries and that mantra. That obsessive desire for tort reform, just kind of possessed a lot of our politics over the 20 or 30-year period. And arbitration was perceived by institutional litigants, like insurance companies and banks and what have you, as a means to escape our courts, to get away from runaway juries and frivolous lawsuits. So you saw the big push coming as our courts begin to become more and more and more arbitration friendly. But look what's happening now. Now that tort reform is the law of the land and there are caps on damages of all sorts, the standards for bringing all kinds of lawsuits are a lot more difficult and a lot more challenging.

Some of the experiences folks have had with arbitration is that it is scary and it's intimidating. The company case that ends up in front of an arbitrator is not going to allow any discovery. And so if it's possible to have a pendulum swinging both ways at the same time, that's what we've got. But the trend over the last 10 or 20 years has been absolutely in favor of more and more and more arbitration. But the other direction of that pendulum has been participant's satisfaction with it has been in decline. That's going to turn around and there's going to be more and more and more arbitration. But I think the satisfaction the participants have with it as a general proposition is going to increase as lawyers become more familiar with it, more experienced with it, and they learn how to take advantage of some of the unique opportunities that it provides.

MARTIN: Somebody's going to lose in an arbitration. And so if you have more and more arbitrations, you're going to have more and more people losing. So I suspect that the dissatisfaction that's expressed with the courts when one loses is the same dissatisfaction that is expressed with arbitration when someone loses.

SOUSSAN: Couldn't agree more on that one. ❖