Alternative Dispute Resolution in
Probate and Trust Disputes

A. HISTORICAL PRECEDENTS

Estate of Prasutagus, 1 Tac. Ch. XIV (60) is the first recorded British will contest. The will of the decedent, king of the Iceni, left half his estate outright to the Roman emperor (Claudius Nero) and half to his widow, Boudica, in trust for their two daughters. The Procurator Catus disputed the trust portion of the will and held that it escheated to the state. The widow objected. Making a common mistake of believing threats and abuse will terminate litigation, Catus had the widow scourged and the beneficiaries outraged in front of her. Boudica, now determined to right this situation regardless of the cost, announced that she would fight: "This is a woman's resolve; as for men, they may live and be slaves." She raised an army of Britons and burned down Camulodunum and annihilated the IX Legion under Petilius Cerialis, who escaped with a few cavalry. Having burned down the inheritance, the widow then burned Verulanum (St. Albans) and Londinium to the ground. Suetonius was not prepared to accept these tactical setbacks, and confronted the widow, backed by popular opinion and an army of 80,000, and massacred them all. Boudica took poison. The record does not disclose the fate of the beneficiaries, who in Celtic practice fought in the front row in such disputes. Experienced probate practitioners will doubtless recognize that not much has changed since this early effort at alternative dispute resolution.[1]

The Anglo-Saxons attempted a variety of other approaches to resolving such disputes. Believing that the *judicium Dei*, or "judgment of God," would either display itself to save the innocent or deter the guilty from prosecuting a faulty claim, disputes were resolved by ordeal. Fire ordeal involved the contestant holding a red-hot iron or walking barefoot and blindfolded over nine glowing plowshares, with divine intervention letting only the losing party blister. 4 Blackstone's Commentaries 343. The other alternative was to drop the contestants in deep cold

[1]Tacitus, The Annals, Chap. XIV, recounts the litigation in more detail. For a modern view, using the case as an example of early feminist assertiveness, see A. Fraser The Warrior Queens 43-76 (1988).

water: a guilty person would float without effort while the prevailing party would sink. Blackstone does not record how the prevailing litigant was revived. 4 Blackstone, *Id*. This practice discloses a nuance in the phrase "sink or swim" which has been lost over the last millennium. Again, experienced practitioners will recognize these methods as early models of the use of the fear of trial in causing litigants to settle on the moat edge or courthouse steps, respectively.

The Normans, disdainful then as now of Anglo-Saxon practice and language, brought alternative methods of dispute resolution with them. Rather than heat their plowshares, they beat them into swords. The Wager of Battel allowed the contestants literally to fight it out, with God again being expected to strengthen the arm of the righteous. Holdsworth, A History of English Law at 308-310 (1931). One can readily recognize the alternatives for settlements based on arguments about the strength and staying power of the other side as well as attempting to magnify the fears of parties who display anxiety about confrontation.

Quickly parties sought alternatives to this form of litigation by hiring surrogates to litigate such trials by Wager of Battel on their behalf. Land use lawyers can readily recognize in the bravado of their more macho colleagues the spirit of these early advocates. "Champions appeared in the earliest disputes over the ownership of land, for Domesday Book, which was completed in 1086, refers to a number of contested claims in Norfolk where a party put forward 'his man' to prove his claim by battle or ordeal." Russel, "Hired Champions" 3 American Journal of Legal History 242 (1959). Any careful observer of real property and probate litigation today can discern many of the same attitudes in timid clients who expect their counsel to kill or smash their opponents. Unfortunately, litigation seems to recruit many of the same personality types now as in the records of the Domesday Book, who undoubtedly reassured their clients that they would make mincemeat of the opponents. While George III abolished the Wager of Battel, some States adopted it with the common law prior to that time. Hence lawyers bored with video combat games should scrutinize the law of their State to see if they can sally forth as in days of yore.

While we have restrained most counsel from such traditional legal methods, clients still demand them and practitioners of dispute resolution must deal with such atavistic drives if they hope to resolve current disputes. As will be discussed below, the issues which frequently

prevent resolution of disputes in probate, and sometimes in disputes over home and hearth, differ from commercial disputes which often can be resolved by cost benefit factors after sufficient common understanding is reached on facts, law and the costs and risks of a litigated resolution.

To resolve probate disputes, one must understand the effect of the grieving process on the parties, the family dynamics and tensions among the parties, the need for a forum for expressing wrongs and resentments, the refusal of family members to accept termination of the family and their preference for continued conflict rather than abandonment, and the timing of settlements within these processes. Absent parties are often more important than named litigants in such matters. The decedent is often a significant player as survivors chained by a normal complement of guilt seek to redress the wrong to their departed loved one in their absence, just as the first spouse more directly goads his or her children to not let that gold digger get away with it again. In the *Matter of Agamemnon* Electra and Orestes are driven by filial duty to redress the insult to their father, with inheritance much less significant than justice. Litigation becomes Electra not because she has lost her inheritance but because she is loyal to her brother and deceased father.

It is a rude awakening for any rational litigator to present a perfectly reasonable financial compromise and have the parties continue to batter away, finding new pretexts to keep this surrogate for failed family relationship alive in the courtroom instead of their parent's living room. Freud and Jung have much more to do with resolving such disputes than Coke and Blackstone.

Consider a situation where a will is presented for probate along with a petition to compel arbitration of disputes involving the validity and terms of the document. The arbitration provision reads as follows:

> "that all disputes (if unhappily they should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chose by the disputants each having the choice of one, and the third by those two -- which three men thus chose shall, unfettered by law or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States."

Cited in Zack, "Arbitration: Step-Child of Wills and Estates," 11 The Arbitration Journal 179 (1956).

A century ago, before the passage of statutes authorizing arbitration and the development of case law supporting alternate dispute resolution, rejection of the petition to compel arbitration would have been likely. In *Carpenter v. Bailey*, 127 Cal. 582, 60 P.162 (CA, 1900) the court rejected an attempt by beneficiaries to arbitrate disputes regarding a will, citing jurisdictional grounds and the due process shortcomings of the arbitration agreement signed by the adult beneficiaries. "The matter of the probate of a will is a proceeding *in rem* binding on the whole world. A few individuals claiming to be the heirs cannot, by stipulation, determine such controversy. There are many other reasons why this submission cannot be sustained. The principal beneficiary under the will, being a minor, was not bound by it. The terms of the agreement itself are contradictory and absurd. Frank T. Baldwin is to arbitrate the matter, and to get his information as he pleases, neither party having a right to submit any evidence to him." 127 Cal at 585.

Any arbitration proceeding requires "some minimum levels of integrity," to assure the due process rights of the contestants. *Hines v. Anchor Motor Freight* (1976), 424 U.S. 554, 571. The Court in *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165 (CA 1981) rejected an arbitration contract under adhesion grounds and because of due process shortcomings. The Court held that an arbitrator could not be "someone so identified with the party as to be in fact, even though not in name, the party…such an agreement is illusory; for while in form it provides for arbitration, in substances it yields the power to an adverse party to decide disputes under the contract." 28 Cal. 3d at 824. The court held that even if the arbitrator could be deemed fair, if it proceeds "under rules which deny a party the fair opportunity to present his side of the dispute," the agreement should not be enforced. 28 Cal. 3d at 826.

In the case of will or trust contests, the ability to conduct discovery (particularly in areas involving capacity or undue influence where a variety of collateral evidence must be adduced to support or attack capacity or freedom of will) is crucial. The circumscribed discovery procedures allowed in some arbitration agreements would prove inadequate to gather the necessary evidence.

Several recent cases have rejected arbitration agreements contained in trust instruments on the grounds that trusts are not contracts and therefore could not meet the requirements for arbitration under the applicable local statutes.

The Arizona court of appeals denied enforcement of an arbitration clause contained in inter vivos trusts in *Schoneberger v. Oelze*, 96 P. 3d 1078 (Az. App. 2004). The Court held that a trust agreement is not a contract, and hence code provisions dealing with enforcement of arbitration provisions in contracts did not apply to claims made by the beneficiaries against the trustees. The beneficiaries cited Restatement, Third, of Trusts §37 for the proposition that the settlor can create powers to which the trustee will be subjected. "A trustor's right to reserve power over trust administration matters is not, however, absolute and a trustor of an inter vivos trust may not unilaterally strip trust beneficiaries of their right to access the courts absent their agreement." 96 P.3d at 1083-1084. *See also In re Mary Calomiris*, 894 A.2d 408 (D.C.App. 2006) *and* M Bruyere and M. Marino, "Mandatory Arbitration Decisions" 42 Real Property Probate and Trust Law Journal 351 (2007).

George Washington's heirs never sought to enforce the arbitration provision cited above. However, if George had conditioned receipt of gifts under the instrument on the heirs' agreement to submit disputes to arbitration, it would have had a better chance of enforcement. Alternatively, the will or trust can treat the bringing of an action in court rather than a designated arbitration proceeding as a contest, triggering loss of benefits or a gift over to some contingent heirs. The courts have enforced conditions subsequent on beneficiaries and heirs so long as the conditions are not illegal or contrary to public policy. *See* Restatement (Second) of Property §§5.1, 5.2, 8.1-8.3. However, *see* the shifts in public policy objections reflected in Restatement (Third) of Trusts §29 and comments.

B. Due Process Issues

The question of due process guarantees is still a major issue, particularly in light of case law which upholds arbitration awards even if they are contrary to settled law. *Moncharsh v. Heily & Blasé*, 3 Cal. 4th 1, 832 p. 2D 899 (CA, 1992). In *Hollern v. Wachovia Securities, Inc.*, 458 F.3d 1169, (10th Cir., 2006) a successor trustee appealed an adverse arbitration award based

on an arbitration provision in the brokerage contract entered into by the prior trustee. The Court held that "Errors in an arbitration panel's interpretation of application of the law are generally not reversible. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.* , 430 F.3d 1269, 1274 (10th Cir. 2005). A judicially-created exception to this rule exists, however, where arbitrators act in manifest disregard of the law. *Id.*. Manifest disregard of the law has been defined as 'willful inattentiveness to the governing law.' *Id.*. To warrant setting aside an arbitration award based on manifest disregard of the law, 'the record must show the arbitrators knew the law and explicitly disregarded it.' *Id.*" 458 F.3d at 1176. Because the arbitration provision in the brokerage agreement did not require the arbitrator's award to include factual findings or legal reasoning and none were included, the bare award did not provide a basis for demonstrating manifest disregard. The Court upheld the attorney's fees award against the trust.

Requiring a statement of decision setting forth the legal and factual bases for the arbitrator's award may permit a review of such decisions for reversible legal error despite the deference given to arbitrators in many States.

The Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc*, 552 US 576, 128 S.Ct. 1396 (2008) held that the grounds stated in the Federal Arbitration Act for enforcement of an arbitration award are exclusive, and cannot be altered by the parties to seek a general review for the arbitrator's legal error. It held that the FAA sections 10 and 11 "address egregious departures from the parties' agreed-upon arbitration: 'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' 'exceed[ing] …powers,' 'evident material miscalculation,' 'evident material mistake,' 'award[a] upon a matter not submitted'…Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confided to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion **cannot authorize** contracting parties to supplement review for specific instance of outrageous conduct with review for **just any legal error. 'Fraud' and a mistake of law are not cut from the same cloth."** (emphasis added).552 US at 596. 128 S.Ct. at 1404-05. The case was remanded, however, to determine whether the matter should have been reviewed as an exercise of the trial court's power to manage its case under FRCP 16. The arbitration had been created by

the court after it had rendered its decision on a breach of contract action, with the parties asking that the question of damages be separately arbitrated. Since the arbitration was established by the court's order, the question arose in the course of the resulting appeals whether the trial court's case management powers might trump the FAA's review restrictions.

The Supreme Court held that the FAA should be interpreted in favor of "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] information arbitration merely a prelude to a more cumbersome and time-consuming judicial review process…'" 552 U.S. at 558, 128 S.Ct. at 1405.

Hence, in federal court the limited review of arbitration awards only for "manifest disregard" may be more restrictively read to include only the types of conduct contained in paragraphs 10 and 11 of the FAA.

The Supreme Court also ruled in *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009) that federal courts required an independent basis for jurisdiction to support a petition to compel arbitration Hence diversity or other jurisdiction had to be present.

In *Schatz v. Allen Matkins*, 45 Cal. 4th 557 (2009) the court held that an attorney arbitration provision in fee agreement entered prior to the dispute which required arbitration under its terms with no appeal, displaced mediation provision under California law which would ordinarily allow mediation of the dispute and a subsequent de novo review.

A June 16, 2009 decision of the Ninth Circuit Court of Appeals, No. 07-16421, CV 06-07034, *The Thomas Kinkade Co v. Hazelwood*, overturned a federal district court order refusing to enforce an arbitration award. The case involved claims that plaintiffs had been misled in investing in galleries for the "painter of light." The Ninth Circuit held that the district court "erred by failing to afford arbitration the deference required by federal law." Decision at 3. This reinforces both the value of arbitration provisions but also the risks that there may be no practicable remedy if the arbitrator strays from the facts or the law.

1. Agreements binding non-signers

The courts have given some deference to arbitration agreement executed by guardians or holders of durable health care powers. In *Hogan v. Country Villa Health Services*, 55 Cal. Rptr. 3d 450, 148 Cal. App. 4th 259 (Cal. App. 2007) the court upheld a mandatory arbitration provision with a nursing home which was entered by the holder of a durable power of attorney for health care, binding the heirs of the decedent.

In *Sanford v. Castleton Health Care Center, LLC*, 813 N.E,2w 411 (Ind. App. 2004) the court enforced an arbitration clause in a nursing home contract entered into by the executor in her capacity under a power of attorney, holding that she was bound as executor despite not having signed the contract in such capacity.

Some Courts have required that the rights to judicial trial could not be waived without express agreement by the objecting party. In *Morgan Stanley DW Inc. v. Halliday* 873 So.2d 400 (Fla. App. 2004) the court denied enforcement of an arbitration agreement entered by the trustees of a QTIP trust and an investment manager against a non-signing beneficiary The beneficiary was held not to be a third party beneficiary of the agreement. The Court on appeal affirmed, taking a strict view of the purpose of an arbitration agreement: "While it is true that the Trust assets are for the benefit of the Trust beneficiaries—as to which the Trustees here are themselves the remainder beneficiaries and will take the corpus when plaintiff passes away—that fact hardly yields the conclusion that the customer account agreement between the Trustees and Morgan Stanley was done primarily for plaintiff's benefit. More important, it does not indicate that the *arbitration clause* was done for her primary and direct benefit—as one would suppose would be the rule in order to make a non-signatory to an arbitration agreement bound by somebody else's manifestation of assent." 873 So.2d at 403. The Court concluded, "To find the requisite contract actually and expressly intended to benefit the third party, it is not sufficient to show only that one of the contracting parties unilaterally intended some benefit to the third party." *Ibid.*

One cannot metamorphose one's beneficiaries! "Maybe the attempt to metamorphose plaintiff into a 'third party beneficiary' of this arbitration agreement really masks an attempt to make the Trustees the agent for plaintiff when they entered into the customer account agreement. But only a moment's reflections should dispel that notion as well." 873 So.2d at 403.

The court rejected on policy grounds the waiver of the right to seek redress in the courts without express knowledge and consent: "As for the arbitration agreements, which involve a waiver of a person's right to access to the courts, binding a non-signatory to arbitrate under the theory of third party beneficiary is fraught with miscalculation and unfairness. For one thing, unless a manifestation of intent by the third party beneficiary to the arbitration clause is **clear and indisputable**, the non-party's right of access may not be lost by the unilateral decision of another without knowledge or consent." 873 So.2d at 404 (emphasis added).

The trial court noted that "Arbitration in this matter could result in extended litigation of the parties whereby the plaintiff would be litigating her claims in both arbitration and before this court, with the possibility of differing outcomes." 873 So.2d at 402.

Florida, like most States, has adopted the Uniform Prudent Investor Act §9, which makes agents of the trustee subject to the jurisdiction of the courts of the trust situs, F.S.A.§518.112(5). The court did not discuss the application of this section, or of the following section, §518.112(6) which provided that "In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary."

The same result obtained in *Besser v. Miller, Advest, Inc. and Carlsen*, 785 N.Y.S. 2d 625 (App. Div. 2004): "There is no evidence establishing that the parties to the brokerage agreement intended petitioner to be bound by the arbitration clause therein and no evidence that petitioner intended to be so bound."

In *Alfano v. BDO Seidman, LLP et al*, 925 A.2d 22 (N.J. Super. 2007) the court enforced an obligation to arbitrate a dispute involving Deutsche Bank, even though it had not signed an arbitration agreement with the plaintiff. Since the brokerage firm had acted as agent for the bank, it was able to obtain the benefits of the arbitration agreement.

In *French v. Wachovia Bank, N.A.*, 2007 WL 895820 (E.D. Wis. March 21, 2007), Wachovia had signed a client agreement in which it agreed to purchase John Hancock life insurance policies for the French Trust from Wachovia Insurance Services and other Wachovia affiliates. The client agreement required arbitration of disputes between Wachovia and the affiliates. The John Hancock policy was acquired to replace an existing life insurance policy in the trust. The beneficiaries sued, claiming breaches of fiduciary duty, including the purchase of the replacement policy from an affiliate. The Court held that since the beneficiaries had no signed the

agreement, they could not be forced to arbitrate their breach of trust claims against Wachovia. "Certainly, Wachovia Bank cannot now force the beneficiaries to arbitrate their claim against Wachovia Bank for impermissible self-dealing with its affiliates on the basis of an arbitration agreement between Wachovia Bank and its affiliates. If Wachovia Bank could bind the beneficiaries in such a way, a trustee could force beneficiaries to arbitrate their claims against their trustee without the beneficiaries ever expressly agreeing to do so. Accordingly, the Plaintiffs' claim that Wachovia Bank violated its fiduciary duties as trustee of the French Trust is not arbitrable." 2007 WL 895820 at *2. However, the second claim of the plaintiffs was against one of the affiliates, alleging misrepresentations which the affiliate allegedly provided to the settlor of the trust in the form of illustrations of the value of the policies. "This allegation, unlike count I, is not claiming that Wachovia Bank mismanaged the French Trust or violated its fiduciary duties as trustee. Rather, it is directed at the Wachovia Affiliates concerning their involvement in the purchase of the John Hancock policies. This allegation, therefore, is covered by the arbitration provision. That is to say, the Court is unable to determine with 'positive assurance that the arbitration clause is not susceptible of an interpretation that covers' Count II of the Complaint. *Mathews [v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 (7th Cir. 1995)]. " *Ibid.* at *2. Because one of the claims was subject to arbitration, the court stayed the proceeding pending arbitration.

The Seventh Circuit denied the attempt of the bank formerly known as Wachovia from staying litigation over the replacement of whole life policies in existing trusts in *French v. Wachovia Bank*, 574 F. 3d 830 (7th Cir. 2009).

Hence, by having arbitration provisions in agreements with one's own affiliates, it may be possible to force claimants into arbitration and stay their other claims pending resolution of the arbitration.

Many courts have upheld arbitration provisions against beneficiaries or heirs where they have accepted benefits from the agreement signed by a predecessor in interest and therefore are estopped to deny the enforcement of arbitration. "If a nonsignatory to a contract containing an arbitration provision has obtained or seeks to obtain the benefit of the contract, the nonsignatory may not avoid the application of the arbitration provision." *Edward D. Jones, Co., LIP v. Ventura* , 907 So.2d 1035, 1042 (Ala. 2005). The Court held that "Because Ventura is a third-party beneficiary of the accounts and because his claims arise out of the manner in which the

investment accounts were managed or should have been managed, he is seeking the benefits of the investment agreements entered into by Dutton." *Ibid.*

In *Larson v. Speetjens*, 2006 WL 2567873 (N.D. Cal. Sept. 5, 2006), *mod.* 2006 WL 3365589 (N.D. Cal. November 17, 2006) the court enforced an arbitration clause contained in attorney representation agreements, regarding a claim by fiduciaries that the attorneys had allegedly negligently failed timely to sue an investment advisor who had advised a trustee to purchase a $10 million insurance policy and place it in a life insurance trust.

The contract in question did not identify the client as a trustee. The trustee then sought to avoid arbitration, claiming that she had not signed the agreement. The Court held that "[A] party need not sign an arbitration agreement to be bound by it. It can agree to submit to arbitration by means other than personally signing the agreement. *International Paper*, 206 F.3d at 416. Thus, a nonsignatory of an arbitration agreement may be bound by it under ordinary contract and agency principles. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006). 'Among these principles are "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel."' *Id.* The rule is an outgrowth of the strong federal policy favoring arbitration. *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986). The determination whether a nonsignatory is bound by the arbitration contract is governed by the federal substantive law on arbitrability. *Id.* At 1187; *International Paper*, 206 F.3d at 417 n.4." 2006 WL 2567873, at *3.

The Court enforced the agreement because the trustee had accepted the benefits of the agreement, even if she had not signed in her capacity as trustee. "Plaintiffs seek to avoid the burdens of the Agreements – the arbitration requirement. Plaintiffs' entire case hinges of the attorney-client relationship created by the Agreements. Plaintiffs' claims are inextricably intertwined with the Agreements, as they are based on Defendants' alleged breach of their fiduciary duty that was created by the Agreements. They cannot seek to enforce the rights the attorney-client relationship provided them and avoid the requirement that any dispute arising out of the Agreements be arbitrated. See *NORCAL Mutual Inc. Co. v. Newton* (2000) 84 Cal.App.4th 64, 84 ('No person can be permitted to adopt that part of an entire transaction which is beneficial to him/her, and then reject its burdens.')…Plaintiffs' situation is analogous to those in which courts have found equitable estoppel." 2006 WL 2567873 at *7.

In *Johnson v. Clark*, ___F. Supp.2d ___, 2006 WL 3780511 (Dec. 20, 2006, M.D. Fla.) a beneficiary of a trust claimed that he was not bound by a mediation between the trustee of the testamentary trust and the executor of the will funding the trust since the beneficiary had not signed the mediation agreement. The mediation resolved claims of alleged misconduct by the executor and resulted in a court-approved settlement releasing the executor from all claims. The beneficiary had been notified of the settlement, objected to it, and filed an appeal.

The court rejected the beneficiary's arguments and dismissed the counterclaims under the doctrine of virtual representation. "The doctrine of virtual representation provides that 'a[a] person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party.' Restatement (Second) of Judgment §41 (1). Further it is well-settled that in cases involving claims by a trustee and individual beneficiaries, a trustee, in his representative capacity, acts on behalf of the trust representing the interests of the trust and its beneficiary; a beneficiary is therefore bound by a *judgment* properly obtained by a trustee acting in his representative capacity. *See* §737.402(t), Florida Statutes (2006); Restatement (Second) of Judgments §41 (1)(a) ('A person is represented by a party who is a the trustee of an estate or interest of which the person is a beneficiary….')." 2006 WL 3780511 at *5. The Court found that at the time of the mediation there were no conflicts between the trustee and the beneficiary.

The Court concluded that "in sum, the plain language of the Florida Virtual Representation Statute provides that the trustee of an express trust has the power to settle claims on behalf of the trust, Fla. Stat. §737.402(t), and that orders binding a trustee bind beneficiaries of a trust in proceedings reviewing the acts or accounts of a prior fiduciary, Fla. State. §731.303. To hold that a beneficiary who simply objects to and refuses to sign a settlement agreement is not bound by the order approving a trustee's settlement on behalf of the trust would contravene the plain language and purpose of the Virtual Representation Statute." 2006 WL 3780511 at *8.

The Court of Appeal in Ohio in *McKee v. Merrill, Lynch, Pierce, Fenner etc.*, 2004 WL 1631147 (Oh. App, 2004) held that the beneficiary was bound by the arbitration clause signed by her husband with respect to an IRA account, sweeping in other accounts held by the wife which did not have arbitration agreements signed by her. The court followed the benefit theory, holding that "where a non-signatory third party derives its interests from contracting parties who

agreed to arbitration under a medical malpractice liability insurance policy, they too are bound by an arbitration provision and have no greater right to a judicial interpretation of the agreement." 2004 WL 1631147 at *2. The Court, however, remanded for fact finding as to whether the provision contained elements of adhesion and unconscionability, making it unenforceable.

In re Prudential Securities, Inc., 159 S.W. 3d 279 (Tex. App. 2005) dealt with claims by a divorced wife, claiming both as to investments made for her and also under claims assigned to her by her former husband as part of the divorce settlement. The court concluded that "by alleging claims as Ned's assignee, Lynda seeks to enforce the contract and is subject to the arbitration clause. Although Lynda's original claims are grounded in legal theories distinct from the claims she brings as assignee under the contract Ned signed, they are **factually intertwined** and subject to the arbitration provision of the contract." 159 S.W. 3d at 284 (emphasis added)

2. Arbitration Provisions in Practice

The fiduciary or agent may have a variety of relationships with a beneficiary or heir, including acting as a fiduciary, providing banking services, selling them insurance or brokerage services, or providing investment services outside of the fiduciary estate. Many of these relationships may be subject to contracts with arbitration provisions. For example, in *Patnik v. Citicorp Bank Trust FSB*, 412 F. Supp.2d 753 (N.D. Ohio,2005), the Court faced a variety of broker agreements entered into by the beneficiary with Smith Barney, later acquired by Citicorp.

The claims of the plaintiff related to alleged investment violations and improprieties in both the securities accounts and in the trust which had provided her with the funds invested. The plaintiff apparently rested her case on the proposition that she had not signed any arbitration agreements, and failed to oppose various motions of Smith Barney and the trustee, including a motion to stay proceedings against the trust defendants and others pending arbitration of the claims relating to Smith Barney. The arbitration clauses were extremely broad, including "all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and [Smith Barney] and/or any of its present or former officers, directors, or employees concerning or arising from …any account maintained by me with [Smith Barney]." 412 F. Supp.2d at 759.

Citibank successfully argued that such provision included it under the provision including within its reach "'[Salomon] Smith Barney Inc. or its direct or indirect subsidiaries and affiliates or their successors or assigns.'" *Ibid.* at 760. The court stayed all proceedings against the other defendants pending arbitration. While it appears that the plaintiff did not aggressively protect her interests in opposing the various motions, the outcome speaks to the value for broad arbitration clauses in documents involving potential claimants.

Subsequent cases dealing with disputes governed by the law of other States have restricted the adhesion rule stated in *Discover*. In *Provencher v. Dell, Inc.*, 409 F. Supp.2d 1196, 2006 WL 9626 (C.D. CA. 2006), the court held that Texas law governed arbitration provisions and class action waivers and that such provisions were enforceable. Since the disputes were not over small amounts of money, and since there was no claim of a scheme of fraudulent avoidance of liability on the part of Dell, the clauses were held to be enforceable in light of the general policy of the courts of enforcing arbitration provisions. In *Lipuma v. American Express Co.*, 406 F. Supp.2d 1298 (S.D. Fla. Dec. 20, 2005), the Court, ruling under New York law, upheld a class action settlement. One of the reasons for finding the settlement fair and reasonable, however, was the claim of the defendant that class actions were barred by its account documents. While the Court noted *Discover* and other cases precluding enforcement of such clauses, it pointed out that "the New York courts have consistently upheld arbitration agreements in credit card and other consumer agreements." 406 F. Supp. 2d at 1321. Hence such provisions find support in a number of courts and the general federal policy favoring arbitration contained in the Federal Arbitration Act.

"In addition to providing that any Claim shall be resolved by arbitration upon the election of the cardmember or by American Express, the arbitration provision unambiguously states: "There shall be no right or authority for any Claims to be arbitrated on a class action basis or on bases involving Claims brought in a purported representative capacity on behalf of the general public, other Cardmembers or other persons similarly situated; provided however, that the claimant's individual Claim would be subject to this Arbitration Provision. (Id.).

"The pertinent cardmember agreements provide that they are variously governed by either the laws of the State of Utah or of New York, and applicable federal law. Admittedly some arbitration agreements limiting class action rights in similar settings have not been enforced. See,

e.g., *Discover Bank v. Sup. Court* (Boehr), 113 P.3d 1100, 30 Cal.Rptr.3d 76 (2005); *Powertel v. Bexley*, 743 So.2d 570, 576 (Fla. 1st DCA 1999); *State v. Berger*, 211 W.Va. 549, 567 S.E.2d 265, 278 (2002); *Leonard v. Terminix Intern. Co. L.P.*, 854 So.2d 529, 538 (Ala.2002); all cited by intervenors in their Notice of Submission of Case Authority. [D.E. 391]. However, the New York courts have consistently upheld arbitration agreements in credit card and other consumer agreements. See, e.g., *Tsadilas v. Providian Nat'l Bank*, 13 A.D.3d 190, 786 N.Y.S.2d 478 (N.Y.A.D. 1 Dept.2004); *Johnson v. Chase Manhattan Bank USA, N.A.*, 2 Misc.3d 1003, 784 N.Y.S.2d 921, 2004 WL 413213 *4-8 (2004); *Ranieri v.Bell Atlantic Mobile, Inc.*, 304 A.D.2d 353, 759 N.Y.S.2d 448 (1st Dep't 2003); *Whalen v. American Express*, 01-602754 (N.Y.Sup.2002). Courts in Utah similarly favor agreements to arbitrate. See, e.g., *Central Fla. Investments, Inc. v. Parkwest Assocs.*, 40 P.3d 599 (Utah 2002); *Chandler v. Blue Cross Blue Shield*, 833 P.2d 356 (Utah 1992).

"Federal courts have also not hesitated to enforce arbitration agreements that precluded class action relief. See, e.g., *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir.2001); *Jenkins v. First American Cash Advance of Georgia, LLC, et al.*, 400 F.3d 868 (11th Cir.2005); *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385 (S.D.N.Y.2003). As the undersigned has previously acknowledged, the Federal Arbitration Act ("FAA") establishes a general federal policy favoring arbitration. *Sims v. Clarendon Nat'l Ins. Co.*, 336 F.Supp.2d 1311, 1316 (S.D.Fla.2004). Section 2 of the FAA provides as follows:

"'A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Thus, a number of federal courts have enforced arbitration provisions in credit card agreements under the FAA. See, e.g., *In re Currency Conversion Fee Litig.*, 265 F.Supp.2d 385, 400-416 (S.D.N.Y.2003); *Vigil v. Sears*

Nat'l Bank, 205 F.Supp.2d 566, 568 (E.D.La.2002); *Hale v. First USA Bank, N.A.*, 2001 WL 687371 *7-8 (S.D.N.Y.2001); *Bank One, N.A. v. Coates*, 125 F.Supp.2d 819, 831-33 (S.D.Miss.2001), aff'd, 34 Fed.Appx. 964 (5th Cir.2002)." 406 F. Supp. 2d at 1321.

Hence, it is important to consider whether such clauses should be placed in agreements with fiduciaries.

C. MODERN FORMS OF ALTERNATIVE DISPUTE RESOLUTION

Civility between litigation attorneys has fallen to such lows that Congress appears to be a haven of good will and cooperation in comparison. The federal district court in the Middle District of Florida found a unique dispute resolution methodology for one such intractable dispute whether a deposition should be taken in the office of the plaintiff or the defendant. The court resolved this enormous controversy by ruling that:

"If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of 'rock, paper, scissors.' The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition...." *Avista Management, Inc. v Wausau Underwriters Ins. Co.*, 2006 WL 1562246 (M.D. Fla, June 6, 2006). Specialists opined that most attorneys lead with the "paper" alternative, providing a clear defensive approach.

As recently as twenty years ago, use of ADR was not very prevalent in probate disputes, particularly in smaller jurisdictions and states guaranteeing a right to jury trial in will contests.[2] In the real estate context and financial services industry, ADR has been much more prevalent in light of arbitration provisions commonly found in construction contracts, investment advisory agreements, and insurance contracts.

[2]Campisi, "Alternatives to Litigation in Trust and Probate Proceedings," 42 The Arbitration Journal 30 (1987) reporting the result of a survey to members of the National College of Probate Judges.

1. Contractual Arbitration

Like motherhood, arbitration provisions are favored by most jurisdictions as the preferred method of resolving disputes quickly and with minimum use of that scarce resource, judges. The general allocation methods used in formal dispute resolution keep the costly public resource of judges fully occupied by forcing private litigants and their abundant cadre of privately compensated attorneys to cool their heels waiting for open courtrooms and hopefully using the time to reflect on the foolishness and expense and tedium of continued litigation.

For example, "The Federal Arbitration Act, 9 U.S.C. '1 *et seq*. ... was intended to 'revers[e] centuries of judicial hostility to arbitration agreements...by plac[ing] arbitration agreements "on the same footing as other contracts."' *** The Arbitration Act thus establishes a 'federal policy favoring arbitration'... requiring that 'we rigorously enforce agreements to arbitrate.'" *Shearson/American Exp. Inc. v. McMahon*, 482 U.S. 218, 226 (1987), enforcing an arbitration provision in a brokerage agreement, including RICO claims.

Most states have precedents similar to that of California in which the legislature or courts have expressed a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." *Erickson, Arbuthnot, McCarthy, Kearny & Walsh, Inc. v. 100 Oak Street*, 35 Cal.2d 312, 322, 673 P.2d 251 (1983). California has long facilitated enforcement of arbitration provisions by means of case law and legislative enactments for their enforcement:

> "The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing."

Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 159, 162 P. 631 (1916). *See* Cal. Code of Civ. Proc.§1280 et seq. For forms and a discussion of the precedents for such usage, see Nossaman and Wyatt, Trust Administration and Taxation (2d ed. 1987) §35.07[5] and Comment, "The Validity of Arbitration Provisions in Trust Instruments," 55 California Law Review 521 (1967).

Such contractual arbitration provisions are not without their critics, particularly in circumstances where professional arbitrators are used to resolve disputes in commercial documents, with plaintiffs complaining that such arbitrators necessarily suffer some bias in favor

of the corporations which will select them in future disputes, thus ensuring continued post-retirement income for such former judges. Reuben, "The Dark Side of ADR" 14 California Lawyer at 53 (Feb, 1994).[3] California procedure, Cal. Rules of Ct. rule 1606 requires disclosure of prior relationships with one of the parties. Failure to make a full disclosure of such relationships was held to be a basis for overturning the arbitration award. *Kaiser Foundation Hospitals v. Superior Court*, 19 Cal.App.4th 513 (1993).

Arbitration provisions contained in contracts have been interposed in various fiduciary and investment surcharge situations. The courts have taken a variety of positions: enforcing arbitration agreements against customers/beneficiaries, holding that such provisions have to be strictly scrutinized in light of the beneficiary's right to present claims to a court, determining whether fraud or adhesion rules barred enforcement of arbitration provisions, and in other cases severing arbitrations or staying the fiduciary claims until resolution of the arbitration between the fiduciary and the agent.

For the fiduciary or advisor, a stay of the court proceeding to permit arbitration may be a desired goal, forcing the claimant into a quick trial with limited ability for discovery and presentation of witnesses and evidence. To the extent that the arbitration result may resolve the investment claims, the arbitration award may relieve the advisor of liability and avoid an expensive trial in State or federal courts where beneficiaries and the fiduciary may be bringing related claims regarding bad investment results. Isee, e.g. *Merrill Lynch Trust Co. FSB v. Campbell*, 2009 WL 2913893 (Del. Ch., Sept. 2, 2009). The multiplication of adjudications and the attendant delay of conducting an initial arbitration may be a useful tool to help reach settlements with the unhappy beneficiaries or fiduciaries.

Care must be taken to make sure that an arbitration provision includes all the parties to the dispute, that the signatory can bind heirs or beneficiaries, and that the choice of law provision does not leave openings for the arbitration agreement to be attacked.

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[3]There is also criticism of referral of discovery disputes to paid referees, causing such litigation to be extremely expensive and providing economic leverage for well-financed parties to batter their opponents. op. cit. at 56-57.

In some cases the trustee or advisor inserts mandatory arbitration clauses in its documents, seeking to force disputes with beneficiaries or customers into arbitration, because of the perceived efficiency and speed of arbitration, and the desire to avoid general jurisdiction courts. Limitation of discovery and restrictions on the ability to require the presence of witnesses in arbitration proceedings are wonderful for cost savings, but they may seriously compromise the ability of a claimant to present her case.

A Texas case, *Banc of America Investment Services, Inc. v. Lancaster*, 2007 WL 2460277 (Tex. App. Aug. 31, 2007) illustrates the difficulty of appealing an arbitration award. The Court noted that "Our review of the award itself, however, is exceedingly deferential. *See Glover v. IBP.,Inc.* 334 F.3d 471, 473 (5th Cir. 2003)." It explained:

"Our established rules of deference foreclose all but the most limited review. Arbitrators need not give reasons for their award. …Even when arbitrators do provide a rationale for their awards, courts may not review that reasoning….Uncertainty about arbitrators' reasoning cannot justify vacatur, for a court must resolve all doubts in favor of arbitration….Given these constraints, judicial review of an award's rationality must be confined to situations in which the party challenging the award can prove that clearly applicable law or the parties' contract indisputably dictates a contrary result." 2007 WL 2460277 at *4.

This deference to an arbitration award can be deadly to the advisor as well as to customers. In *Walnut Street Securities, Inc. v. Lisk*, 497 F. Supp.2d 714, (M.D. N.C. 2007) the court dealt with claims brought regarding an allegedly fraudulent investment sold to it by a relative of an associate of a broker-dealer. The associate "had set up a corporation purportedly owned by her and her daughter. The Respondents then purchased the securities from the daughter or persons hired by the corporation. The customers claimed negligent supervision of the associate and sought arbitration against the broker-dealer. The broker-dealer was held to have waived its right to object to arbitration, in part because it signed a Statement of Claim and participated in the arbitration. 497 F. Supp. 2d at 719. The Court on appeal held that "negligent supervision under the NASD may arise, even absent direct contact between the associated person and the 'customer,' should the evidence show that the associated person was sufficiently connected to the fraudulent scheme." *Ibid.* at 725 The Court concluded that "Liability of the member firm may be predicated on negligent supervision so long as the associated person is

sufficiently complicit in the fraud so as to be merely doing indirectly that which she would otherwise do directly." *Ibid*. The Court affirmed the award because it could not be stated that "the arbitrators' decision was either in manifest disregard of the law or failed to draw its essence from the NASD Code." *Ibid.* at 729.

In the case of an arbitration in favor of the broker-dealer on a duty to diversify claim, *Dolton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 925 A.2d 295, (D.C. 2007), the customer appealed but failed to obtain a transcript of the arbitration. The Court on appeal noted the limited grounds for appeal: "'[T]his court will not set aside an arbitration award for errors of either law or fact made by the arbitrator.' [*Shore v. Groom Law Group*, 877 A.2d 86, 91 (D.C. 2005)]…With rare exceptions, an award will not be disturbed unless the arbitration panel is found to have ruled on matters beyond the scope of its authority…or unless it appears that the panel "manifestly disregarded the law….."" 925 A.2d at 298. However, in the absence of a transcript, the upheld the award, noting that "we are stymied in our review of the trial court's decision by the failure of the Doltons to provide a transcript of the three-day arbitration hearing." *Ibid*.

Hence, if you are concerned that you may be at risk, it may be the better course to object early and often to arbitration and to preserve your rights by obtaining a transcript of the proceeding.

Arbitrations in investment disputes have come under criticism from plaintiffs on the grounds that the panels of arbitrators are staffed with persons who wish to make their careers in the field and hence are unwilling to make harsh decisions which will lead observant investment firms and professional to refuse to accept them in future arbitrations. See, E. O'Neal and D. Solin, "Mandatory Arbitration of Securities Disputes—A Statistical Analysis of How Claimants Fare." available at hhtp://www.smartinvestmentbook.com. The study suffers from a survivor bias, since it does not take into account cases which were settled prior to arbitration. If the statistics in the study are true, one can readily understand why trustees and investment professionals would prefer mandatory arbitration under NASD or AAA rules rather than litigating the claims in court.

One limitation on the use of arbitrations is the provision on delegation contained in the Uniform Prudent Investor Act. Section 9 (d) provides that "By accepting the delegation of a

trust function from the trustee of a trust tat is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State." That provision, in force in 42 States, raises a set of policy issues based on the need for trusts to have disputes resolved quickly and promptly in the State courts, and thus provides for jurisdiction over investment advisors who provide services to trustees. Where the advisor is performing the discretionary investment functions of the fiduciary, it is required to "exercise reasonable care to comply with the terms of the delegation." UPIA §9(b). Having the dispute bifurcated by an arbitration involving the agent, and a separate and perhaps subsequent trial of the conduct of the fiduciary in selecting and supervising the agent, is an impediment to the court's review of the fiduciary estate. Since discovery may be greatly circumscribed in an arbitration, and since it may not be possible to present all the factual evidence and personal testimony which would ordinarily be available in a court surcharge proceeding, the risk of inconsistent outcomes resulting from limited information may be present.

Particularly where the arbitrators are not required to state their factual finding and reasoning, or where there is no record of the proceedings, the result of mandatory arbitration may be to leave the court judging the conduct of the trustee or executor or conservator without the means to render a decision or may lead to inconsistent results. The clash of public policy issues between the policies embodied in the UPIA and those in the Federal Arbitration Act and related State arbitration acts has not yet been resolved.

2. Judge Pro Tem

California and other jurisdictions offer an alternative form of dispute resolution involving use of pro tem judges, attorneys appointed on a temporary basis to act as superior court judges. The use of such judges is sanctioned by a constitutional amendment, Cal. Constitution, Act. VI, §21, and implemented by court rules. Cal. Rules of Court Rules 244 and 532. Panels of experienced attorneys who have volunteered to act as pro tem judges are maintained by the superior court clerk, who offers them to litigants who would otherwise face substantial delays in obtaining a free trial court, uncertainties as to the time a trial might commence, and the luck of the draw which might result in suffering a former felony prosecutor handling a dispute over fiduciary investment or accounting rules. The procedure involves a savings over arbitration in that the pro tem judge is not compensated. It is more expensive than many forms of arbitration

because it is generally conducted in a courtroom setting with a court reporter and clerk and the full panoply of appeal rights.

These latter factors may be expensive, but they also offer some comfort to litigants who are concerned about the possibility of serious error occurring in an arbitration with only limited appeal rights. For example, many arbitration provisions offer only limited rights of judicial review. This was highlighted in the recent decision in *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 10 (1992) where the court denied appeal rights in an arbitration:

> "Because the decision to arbitrate grievance evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive <u>because the parties have agreed that it be so</u>. By ensuring the arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain."

The pro tem judge alternative thus provides a middle ground between cooling one's heels in the courtroom of the presiding judge and casting one's lot with an arbitrator who may not pay attention to the law or the facts.

The pro tem procedure also allows parties to present their case to an authority figure and obtain a ruling. Too often the arbitration process takes place in a law office conference room with shirt-sleeved arbitrators trying to make everyone comfortable. Particularly with traditional families or elderly people, a primary need is to tell their grievance to the authority figure and get a resolution. The Thane of the Anglo-Saxon community was the lord who sat in judgment on local disputes. Parties often suspect that their case has some flaws but they want the Thane or priest or judge to make that clear to them. Moreover, it is the need to express the grievance which is often as important as the resolution. We may have, as a society, lost the belief in the <u>judicium Dei</u>, but many people need some Judgment by a surrogate before they accept their fate.

The pro tem judge sitting in a courtroom wearing robes on the dias above the supplicant often does the trick while your feel-good arbitrator is just another lawyer.

In settlement conference contexts, it is often important to recognize this psychological need and accommodate it with robed conferences and a little thundering from the bench rather than in the comfort of chambers. Many lawyers are reluctant to let their clients espouse their

case precisely because they have it all bollixed up with irrelevant details. To the client, those details are a major source of frustration because the lawyer continually refuses to understand how important who was born second is, or why somebody is named after the decedent, or that another relative had blessed the event in question. Ask the settlement judge to robe up, sit as the Thane, and allow the parties to maunder through their grievances in all their detail. When they have exhausted their exposition, they often are ready for whatever decision comes, knowing it has now been fully explained.

3. Mandatory Arbitration Provisions and Mini-Trials

Some jurisdictions have enacted mandatory arbitration provisions either by statute or court order. Others have the mechanism of a mini-trial where an attorney or subject matter expert hears the evidence and renders an advisory or binding opinion. The "mini-trial" term has also been used to describe a binding arbitration proceeding in which strict rules on presentation of evidence and duration force counsel to move to the heart of the matter succinctly. *Lightwave Technologies, Inc. v. Corning Glass Works*, 725 F.Supp. 198 (S.D.N.Y) describes an innovative mini-trial process which failed because of lack of agreement of the parties, with the court describing the declining party as "a forceful, assertive, and in some ways truculent individual." 725 F.Supp. at 200. The Court held that the mini-trial process was sufficiently distinguishable from New York's statutory provisions for arbitration that the agreement of counsel to the procedure could not be enforced under those rules.

The mandatory provisions for California have been in force for almost 30 years. Cases involving less than $50,000 in dispute are referred to a panel of attorneys who sit as arbitrators, Cal. Rules of Court Rule 3.811. There are no court reporters, although witnesses are sworn to tell the truth. Evidence can be introduced by affidavit, if there is prior submission to the opposing side and no objection.

The decision of the arbitrator can be rejected within 10 days of its service. If a party does not improve his or her or its position in the following plenary trial, the costs of arbitration and other expenses can be imposed on the rejecting party.

The procedure compensates the arbitrators with a pittance, with many attorneys waiving the fees. In many counties, over three-quarters of the arbitrated cases are resolved on the arbitrator's decision.

Some litigants treat the process as an annoying delay and fail to press their cases, hoping to draw out significant information while withholding their own trial evidence to avoid educating the other side. However, the author's experience has been that most parties treat the process seriously and choose to accept the arbitrator's decision. There is the Arbitrator's Temptation which is to split the baby sufficiently to make it cost prohibitive to go to trial for the remaining portion. But even complete defense verdicts are often accepted, particularly with contingency counsel who need to demonstrate the likely result to clients who bear little marginal cost in going forward. In small cases, where little discovery and motion practice has been done, such arbitrations serve to educate both clients and counsel about the facts and law, leading to acceptance of decisions or settlements.

The other useful function of such proceedings is to provide courthouse steps to induce settlements. While hardly a good old fashioned Anglo Saxon Ordeal, the prospect of a trial and cross examination and the expense of participation forces parties whose attention has been distracted by the languorous pace of litigation to talk settlement. This is particularly true of attorneys who never want to show weakness by making the first settlement overture. The early imposition of mandatory settlement talks or mandatory arbitration provide cover for these closet pacifists.

4. Mediation/Conciliation

In mediations or conciliation proceedings an experienced neutral party attempts to assist the parties to communicate their concerns and difference in the hopes of finding common ground. No decision is rendered by the mediator who seeks to allow the parties to develop their own solutions.

This is particularly effective in probate or family disputes where personality or family issues predominate over the financial issues involved. Use of attorneys as mouthpieces is generally ineffective to diffuse emotions triggered by a death or a crisis in a closely held or family business. Many probate disputes involve the failure of the family members to have communicated their anger or resentments at the conduct of the deceased or their relatives. This lack of closure in psychological terms appears when the probate process provides a context for striking out at the guilty family member either for their misconduct or that of the deceased. The typical case involves a child who has been hurt by the preferential treatment of a sibling, the

rejection by a parent of the child's mother or father by a divorce or remarriage, the success of a sibling, or guilt over failing a parent which surfaces when the caretaking or successful child ends up with favored treatment in a will or is selected as fiduciary. If you failed to express your anger or your pain to the decedent during his or her life, a survivor may seek to assuage those emotions by smiting the other heirs or fiduciary. Similarly, if your sibling or first cousin or stepmother got favored treatment or straight hair or the cushy job in dad's company, you may want to unload now that the parent is no longer around to chastise you for throttling them.

The mediation provides a good forum for expressing those feelings. Sometimes that catharsis is all that is necessary.

Sometimes the problems deal with the fact that the death of a parent spells the death of the family unit. The anomie of modern society offers little succor to the child who faces instant maturity now that mom is gone and his or her siblings are estranged or too busy for family interchange. Fighting with one's close relatives is one of the staple pleasures of family life. Hence, the will contest or fight over furniture or fees offers a good analogue to pounding your brother in the hallway when you were young and happy. In a dysfunctional family, indeed such disputes may provide the survivors with the warm glow of fond family memories.

The mediation or conciliation offers a direct line to exposing such derivative conduct and offering an opportunity for the parties to find alternatives to family life by lawyers, or at least to separate out the litigation issues to be resolved first.

Most of the other forms of alternative dispute resolution provide opportunities for such venting or expression, as practitioners have discovered when the shouting starts in the deposition or you return from judge's chambers to find the bailiff nervously rubbing his gun while the relatives hurl invective in the courtroom or hallway. Where the parties are sufficiently calm to participate, mediation is the most efficient mode of meeting these predominantly psychological needs.

In this regard, it is important to recognize that the grieving process often dictates when settlement is possible. Grieving is a slow process with a number of distinct stages, including denial, anger and ultimately acceptance of the loss. Guilt plays a major role, since most humans have been inculcated with the guilt process of social control and most have ambivalent feelings as to their conduct toward the decedent or family. Often this is not a black and white situation--

flunking out, a felony or two to smirch the family eschuteon, a flagrant divorce--but often falls in the context of whether one spent enough time caring for aging parents, met the parents' expectations and so forth.

Lawyers are poorly equipped to deal with the eruption of guilt and emotions triggered in the grieving process. Less so is the court apparatus.

Traditionally, delay and expense have served to meet the needs of the grieving party. The wait for court dates, depositions and the appearance of attorneys' bills allow parties to move far enough along in the grieving process to become rational about alternatives.

Forcing parties into mediation too early is often a total waste of time. They simply are not psychologically able to deal with financial or other issues when they have not yet reached a point of acceptance in the grieving process.

One always knows that the emotional issues have run their track when the feuding family members start whispering questions whether your lawyer costs as much as ours. This is extremely helpful, but often frustrated by the probate compensation process which allows one side to believe they have free attorneys.

The process of transference of anger allows the family to coalesce once more as a family united against those damned attorneys. It also provides an excuse for prior excesses--why did we let the attorneys do this, if only I had known that's what those sharks were doing....

The mediator should recognize this need to slander counsel and shift blame to them as a useful fiction for allowing forgiveness without admission of guilt.

5. Expert Opinions and Summary Fact Trials

Another alternative is to structure a proceeding where the parties can present their case in summary form for an advisory opinion to either an expert in the area of dispute or a judge pro tem. Parties and their counsel often are blinded by partisanship and their need to reinforce their own fears by taking an unrealistic view of their case. Providing an opportunity to have the matter submitted to an expert in accounting or concrete reinforcement or trust investments or to see how a mini jury or experienced litigator reacts to your clients or your story can be a useful tactic to promote settlement.

It is surprising how often parties get to the verge of trial before fully preparing their experts or analyzing their cases, both in terms of law and jury appeal. There is much more

entertainment value in depositions and hammering the rascals over discovery sins than in researching the technical aspects of one's case. Again, the lure of the old Norman dispute resolution practice continues to blind parties to the dull merits of the case.

6. Settlement Conference

Courts have developed a variety of formats for settlement conferences. Early assignment cases have a great utility in circumstances where the facts are largely understood and issues of law or personalities predominate. The early assignment process also forces parties to analyze the factual and legal contentions and to learn, often to their surprise, the viewpoint of the other side.

The key technique is to force the parties into the settlement process and begin evaluating the factual and legal elements of their claims as a means of resolving the dispute. Too often litigation plans consist of reacting to the other side or shambling through a routine patterns of document discovery, fact witness depositions, (un)dispositive motions, and then full attention only as deadlines for experts and trial force the case to the front of the litigator's desk. Early assignment to ADR provides guidance to the parties on the crucial disputes and uncertainties barring settlement, and forces them to take steps to resolve those factual or legal issues in a timely fashion. The process should isolate these issues, force the parties to investigate the facts or seek resolution or clarification of the legal questions, and then return reasonably quickly to re-evaluate their positions. If witness credibility or expert opinions are crucial, schedule a mini-trial or mock jury panel. If legal issues have not been clarified, force the parties to brief the issues and get an advisory or binding decision. Since parties often lack the desire or ability to follow a logical litigation plan, the ADR process should impose such a plan and track the results. Retaining control of the process forces the parties to return to the settlement table after attacking such issues to see if the matter can now be resolved or to determine what issues still impede settlement.

Composition of settlement panels is subject to much variation. In the San Francisco Bay area, the seven counties had a complete range of alternatives, from trial judge assignments on his or her own case, special settlement judges in federal and state courts, two-attorney settlement panels in several counties, and two attorneys and a settlement judge in one county. Each offers advantages in terms of the ability to satisfy the needs of clients. Where authority figures are required to daunt parties into settlement or to provide ex cathedra opinions, the presence of a

judge is essential. Having two experienced practitioners attack a problem provides a pragmatic approach and the opportunity to good guy/bad guy the parties. Giving the settlement panel the power to compel attendance of the parties and to delay setting of the case for trial provides the moxie to force settlements in the absence of a judge.

7. Selection of Forms of ADR

Arbitration offers the opportunity to guarantee a finder of fact who is experienced or expert in the area of the dispute. This is particularly relevant in bullpen court assignment jurisdictions, rather than single case assignment jurisdictions. If you face the risk of getting a former family law lawyer to judge a case dealing with the hardening of gears in transmissions for electrical power generating windmills, you may wish to pay the expense of an expert.

Several examples may illustrate the alternatives. Case one involves a dispute over breaches of trust and allocations of overhead in a retirement community involving a corporate trustee holding common areas and beneficiaries which are federal housing cooperatives or condominium associations. Disclosure and breach of trust issues dealing with witness credibility dictated an experienced trial judge. Complex accounting questions pointed to an expert. The trustee was reluctant to accept arbitration, because of a disagreement about the applicable legal principles. After years of litigation, summary judgment resolved the disputed legal issues leaving the fiduciary and accounting questions. Retired judges with accounting experience were canvassed and the parties selected a retired trial and appellate judge who was appointed a judge pro tem.

The trial was held at the retirement community with a clerk and court reporter. As indicated above, this made the proceeding as expensive as an ordinary trial, but assured the parties that they would be able to take an appeal if something untoward occurred. As discussed above, ordinarily arbitration agreements do not always allow meaningful appeals, either because of binding arbitration provisions or the lack of a record to provide a basis for a successful argument for trial error. The trial judge resolved a variety of breach of trust, accounting and constructive defect issues. At the conclusion of the trial, several pure accounting questions had surfaced, which were not easily resolved. The court then appointed an accounting firm as a master to perform various audit tests and then adopted the findings of the master.

The second phase of the litigation arose when compliance with the first judgment was not forthcoming. The remaining issues were purely accounting and audit questions. Using the expense of the prior proceeding--and the filing of an action for breach of trust--agreement was reached for arbitration. In this phase an accounting firm was selected as arbitrator. To eliminate the expense of preparing a record, the agreement was made binding, with appeal only for certain due process or conflict violations as provided in the California Code of Civil Procedure. To minimize the expense and bombast, no attorneys were allowed to make presentations to the arbitrator. Each side had their CPA's act as their advocates. Access to accounting and bookkeeping records was the subject of stipulated production.

Case two involves a dispute over allocation of community property claims of a decedent's widow which were used to fund a trust in favor of a disinherited grandchild. The grandchild sued the trustee and counsel arguing that they had breached their fiduciary duty and defrauded the beneficiary in reaching a settled accounting of her claims. The issues involved credibility questions but mainly issues of community property law and complex income and estate tax questions. Plaintiff had lost most of the inheritance and had little funding for her litigation. Hence she was amenable to a quick binding arbitration proceeding. The defendants were anxious to have a trier who was competent in the tax questions. The solution was selection of a retired judge with substantial tax litigation experience. The trial was held after normal discovery, but in an informal setting with no court reporter. The informal setting and pre-marking of exhibits allowed a large number of fact and expert witnesses to be examined in seven trial days. The verdict for the defendants was not subsequently challenged.

Case three involves disputes in a construction contract over engineering requirements for a large commercial structure. The lessee raised questions about the adequacy of piling used in a multi-story parking structure. Pursuant to the lease terms, the matter was litigated before an architect as arbitrator, with no right of appeal. Presentation was limited to experts and the parties themselves. The contract provisions were deemed simple enough for resolution by the architect. The decision was accepted without further challenge after a two-day presentation. In this procedure the tentative decision was subject to questions and objections by the parties.

All three of the proceedings led to decisions accepted by the parties.