TIFFANY & BOSCO P.A.

TB LAW

NEWSLETTER

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Solving conflict without a trial

Exploring the benefits, difficulties, and nuances of Alternative Dispute Resolution

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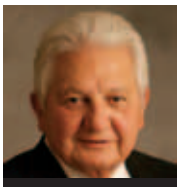
PROFESSIONAL AND PERSONAL ACHIEVEMENT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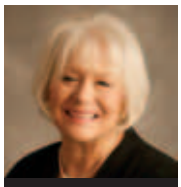
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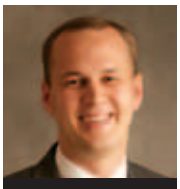
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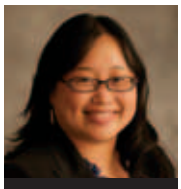
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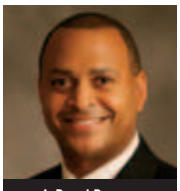
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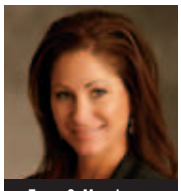
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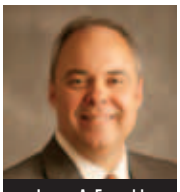
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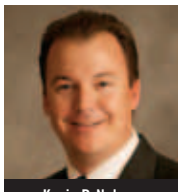
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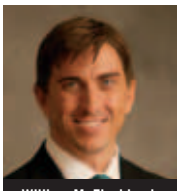
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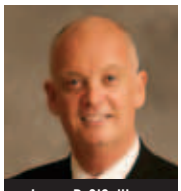
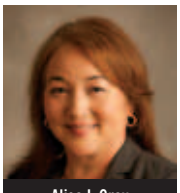

James P. O'Sullivan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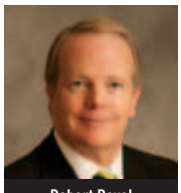
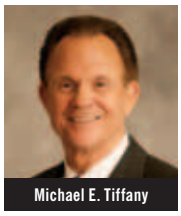

Robert Royal


Christopher R. Kaup


Michael E. Tiffany

MICHAEL A. BOSCO, JR. was honored with a Lifetime Achievement Award from USFN. The Award was granted to Mike with the respect, admiration, and fond regards of his peers and fellow USFN members. A long-time member of USFN, Mike also served as a director on the board for several years, and he and his son, Mark S. Bosco, were named Co-Members of the Year in 1995. "This award was given to Mr. Bosco in recognition and tribute for his 50 years of practice in the legal profession, representing clients in a professional, ethical and competent manner. Starting with only one banking client he now represents more than 50 banks and mortgage companies," said Alberta Hultman, Executive Director & CEO of USFN.

PAUL D. CARDON was chosen as a board member of the Young Lawyer's Division of the Maricopa County Bar Association.

J. DARYL DORSEY was appointed to the Board of Directors of Free Arts of Arizona.

JAMES A. FASSOLD and **ALISA J. GRAY** will present at the National College of Probate Judges' 2012 conference in Tucson in May, 2012. The topic for the presentation is wellness issues for the judiciary (time management, stress relief, etc.).

WILLIAM M. FISCHBACH III has been named Chairman of the Greater Phoenix Chamber of Commerce Valley Young Professionals (VYP) Board. The VYP's mission is to provide experiences for its members to build lasting relationships, engage in professional development opportunities, and become change-makers in the community. Will and his fellow board members will oversee VYP programming, including identifying relevant content, timely speakers, and new event venues.

ALISA J. GRAY recently participated on a panel for the State Bar of Arizona's celebration of Arizona's 100th Birthday. The panel discussed "100 things every AZ attorney should know." Alisa will also be on the faculty for a presentation at the State Bar of Arizona's annual conference entitled, "Beyond Burnout 2.0," to address techniques to avoid workplace burnout.

CHRISTOPHER R. KAUP has been elected President of the Arizona Chapter of the Turnaround Management Association (TMA). The TMA is an international organization of professionals, lenders, and investors who provide a broad range of services to financially distressed companies and creditors of those businesses.

In conjunction with her employment law practice, **PAMELA L. KINGSLEY** is responsible for arranging Continuing Legal Education lunch programs for the State Bar's Employment and Labor Section (Maricopa County), and has been appointed the Chair of the Law & Legislative Action Committee for the Valley of the Sun Human Resource Association, a local affiliate chapter of the National Society for Human Resource Management, the world's largest professional membership organization of its kind.

MAY LU has been selected as a member of the Small Business Leadership Council (SBLC) of the Greater Phoenix Chamber of Commerce. The SBLC serves as an advisory board to the Chamber's Board of Directors and the Members Services Department on issues relating to small businesses.

TRACY S. MOREHOUSE presented at the Bar Leadership Institute's "Service as Leaders" program on February 17, 2012, held at the State Bar of Arizona. She presented on the topic of Serving on Boards, including the topics of ethics, director and officer liability and what every director/officer should know before serving on a board.

KEVIN P. NELSON was recently licensed to practice law in the Salt River Pima-Maricopa Tribal Court. He is also licensed to practice in the Navajo, Hopi, White Mountain Apache, and Fort McDowell Yavapai Community Tribal Courts.

JAMES P. O'SULLIVAN and **ROBERT ROYAL** will co-chair a Continuing Legal Education program for the State Bar of Arizona's CLE by the Sea program on July 18-21, 2012. The program is entitled "The Arizona Limited Liability Company: A study of where we have been and where we are going."

ROBERT A. ROYAL and **TRACY MOREHOUSE** recently had an article published in the State Bar of Arizona's monthly publication, Arizona Attorney. The article is entitled, "Fiduciary Duties in Arizona Limited Liability Companies."

MICHAEL E. TIFFANY has been named "Industry Leader of the Year" in the attorney category in AZRE Magazine's annual People to Know in Commercial Real Estate for 2011-2012. He was selected out of over 600 nominees, which included 70 attorneys competing for the honor.

ANNOUNCEMENTS

Firm Continues Charity, Phoenix Open Tradition

Tiffany & Bosco continued its proud tradition of participating at the "Greatest Show on Grass." The Thunderbirds once again hosted this great event at the TPC Scottsdale. The Tournament, known as the Waste Management Phoenix Open, was held from January 30 through February 5, 2012. The Phoenix Open began in 1932, making it one of the five oldest Tournaments on the PGA Tour.

This annual event always brings the largest crowds on the PGA Tour and this year was no exception. At the 2012 event, fans were fortunate to see players such as Phil Mickelson, Vijay Singh, Stewart Cink, Aaron Baddeley, and Rickie Fowler. In the end, Kyle Stanley took home the nearly $1.1 million first place check, part of the $6.1 million purse, scoring an overall 15 under par.

A major focus of this popular event is the charitable fundraising for The Thunderbirds Charities, an affiliate of The Thunderbirds. Once again, Tiffany & Bosco underwrote a two-story Skybox on the 18th hole to enjoy the event. With its contribution, Tiffany & Bosco helped make the 2012 Waste Management Phoenix Open another successful year for the Tournament. Tiffany & Bosco is honored to be a long-time supporter of this event and The Thunderbirds Charities.

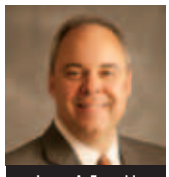
Shareholders Recognized As Leading Attorneys

Super Lawyers, which is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement, selected the following shareholders for 2012: **David L. Case** (Estate Planning & Probate, Business/Corporate and Tax); **Richard G. Himelrick** (Securities and Business Litigation); **Leonard J. Mark** (Family Law, Personal Injury and Medical Malpractice); **Tracy S. Morehouse** (Business Litigation, Commercial Litigation, and Appellate); **Robert A. Royal** (Business Litigation); and **Michael E. Tiffany** (Real Estate and Business/Corporate).

NEW FACES

NEW SHAREHOLDERS

JAMES A. FASSOLD joined Tiffany & Bosco, P.A. as a Shareholder in October 2011. Before joining Tiffany & Bosco, Jim was the managing partner of Gray & Fassold, P.C., a boutique probate litigation firm. Jim has vast experience in all types of probate matters, including probate and trust litigation; complex guardianships and conservatorships; elder law; financial exploitation; probate and trust administration; and appeals. He is licensed to practice in the State of Arizona, U.S. District Court for Arizona, and the Ninth Circuit Court of Appeals. Jim is a sought-after speaker on probate and trust matters, productivity, and work-life balance.



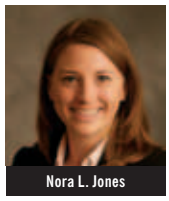
James A. Fassold

ALISA J. GRAY also joined Tiffany & Bosco, P.A. as a Shareholder in October 2011. Before joining Tiffany & Bosco, Alisa was a partner with Gray & Fassold, P.C., a boutique probate litigation firm. Alisa has almost 20 years of experience in all types of probate matters, including probate and trust litigation; complex guardianships and conservatorships; elder law; financial exploitation; probate and trust administration; and appeals. She is a judge pro tem and frequently serves as mediator and settlement conference judge. She has held several statewide positions with the State Bar of Arizona and Supreme Court of Arizona committees. She is licensed to practice in the State of Arizona and the U.S. District Court for Arizona. Alisa is a sought-after speaker on probate and trust matters, ethics, and work-life balance.

Alisa J. Gray

NEW ASSOCIATE

NORA L. JONES joined Tiffany & Bosco in August 2011. An Arizona native, Nora graduated *summa cum laude* from Barrett, the Honors College at Arizona State University with a degree in Political Science and a Certificate in Civic Education. Nora received her Juris Doctor from the James E. Rogers College of Law at the University of Arizona. During law school, Nora competed in and won the 2011 Richard Grand Damages Closing Argument Competition, an oral argument competition focusing on the presentation of personal injury damages evidence. Nora also served as a Note and Comment Editor for the Arizona Journal of International and Comparative Law and was an Ares Fellow. Additionally, Nora volunteered with the Volunteer Lawyers Program and Wills for Heroes, an organization providing essential legal documents to first-responders free of charge. While in law school, Nora interned with the Arizona Department of Juvenile Corrections and the City of Tempe Attorney's Office.



Nora L. Jones

ADR.

Resolving legal conflicts without a trial

ALTERNATIVE DISPUTE RESOLUTION ("ADR") is a process that exists outside of the traditional governmentally-sponsored judicial system. Although the purpose of ADR is the same—to resolve the controversy that exists between the parties—the methods employed to achieve this purpose differ. The two most commonly recognized and utilized ADR techniques are mediation and arbitration.

Mediation is a voluntary process (although it is not unusual for the court to order that a mediation be held) wherein the parties agree upon an acceptable mediator who assists the parties in discussing, exploring, and reaching a mutually acceptable resolution of the dispute. Mediation provides parties with greater opportunities to keep their destiny in their own hands by focusing on reasonable compromises agreeable to the parties to put an end to the issues that created the controversies in the first place. But if no mutually acceptable resolution is agreed to during the mediation, the controversy continues to a more traditional conclusion.

Arbitration, on the other hand, may or may not be a voluntary process in which one or more individuals are selected by the parties to take evidence, hear testimony, consider arguments, and ultimately render a decision, a result similar to a verdict in a judicial trial, but quicker and without a jury. Some arbitration awards are final and binding while others are appealable.

The following articles explore some of the benefits, difficulties, and nuances of ADR as it applies to certain aspects of specific areas of legal practice.

—Robert V. Kerrick and Dow Glenn Ostlund

PHOTO: DAVID VERNON/ISTOCKPHOTO

BANKRUPTCY

The United States Bankruptcy Court for the District of Arizona (the "Court"), in conjunction with Arizona State University's Sandra Day O'Connor College of Law, recently implemented a mediation pilot program to assist the Court with pending motions for relief from stay. The mediation program was purportedly started to assist the Court to resolve stay relief motions, particularly when disputes arise as to whether a bankruptcy debtor is being considered for a loan modification by the creditor.

Typically, a stay relief motion is not granted, especially at the preliminary hearing, when the debtor and creditor differ as to whether the debtor applied for or is being considered for a loan modification. Unsurprisingly, the creditor and debtor often disagree on this point and the stay remains in place. The pilot mediation program will allow creditors and debtors to work together to determine whether a loan modification is actually pending. Creditors are optimistic that, with the assistance of the mediation program, stay relief motions will be resolved earlier in the bankruptcy process. *—J. Daryl Dorsey*

BUSINESS LAW

Dispute resolution provisions in owner agreements and business sale agreements often require the parties to attempt to resolve the dispute before litigating. The reasons are simple: litigation is expensive and time-consuming, and these disputes are often the product of poor communication. As a result, these agreements should usually include a requirement that the parties first use reasonable efforts to resolve their dispute informally through personal meetings or telephone conferences. Frequently, discussing the basis for the dispute is sufficient to resolve it.

If informal negotiation is unsuccessful, the next step should be mediation. Unlike an arbitration in which a third party or a panel of third parties make a decision (usually binding) after listening to the parties' arguments, a mediator assists the parties to negotiate their own settlement by explaining to each party the relative strengths and weaknesses of their positions. Mediation also helps parties craft creative solutions to their disputes, solutions that are often not available in litigation. Only if mediation is unsuccessful should the parties be allowed to initiate litigation.

Lastly, as a means of encouraging the parties to be candid during their settlement negotiations, the agreement should prohibit these communications from being used as evidence in subsequent litigation. *—James P. O'Sullivan and May Lu*

CIVIL LITIGATION

The legal system is time-consuming and costly. Arbitration is, usually, faster and less expensive. Nonetheless, many attorneys, including the author of this section, prefer formal litigation to arbitration. This is not because we want to prolong the dispute to increase fees; rather, it is the product of the same desire that a Texas Hold 'em player has to look at his or her first two cards before wagering—the more information you can gather, the better chance you have of making the correct decision.

In formal litigation there are substantial rules concerning disclosure and discovery. An emphasis is placed on collecting information and narrowing the issues subject to dispute through motion practice. Arbitration, on the other hand, favors minimizing discovery and avoiding motion practice; the goal is to get the dispute resolved without too much fuss. This method works well for some. Consider an insurance company with hundreds of disputes. The lower cost of arbitration is preferable when the insurance company considers that the extreme resolutions (good and bad) will theoretically wash each other out over the long run. For individuals who are infrequently involved in litigation and who stand to be significantly harmed if the outcome of the dispute is negative, the extra time aimed at obtaining the "just" outcome may trump the desire for a quick and less costly resolution. *—Lance R. Broberg*

EMPLOYMENT

Every employer dreads opening a thick envelope from the U.S. Equal Opportunity Commission (the "EEOC") and finding the capitalized and bolded words "**NOTICE OF CHARGE OF DISCRIMINATION**" jumping off the page. Whether it starts by wondering what, who, and why, or despondently acknowledging, "I should have known this was coming," instead of automatically preparing for war, if it has the opportunity, the employer should give serious thought to sending back the "Agreement to Mediate" form, signed. The employer still needs to investigate the claim, consider talking with its attorney, and, if there is a problem, have it fixed. But in many circumstances, mediation may be the right choice.

To have a mediation, both parties must agree to it. About 78% of the charging parties who file with the EEOC in Phoenix request it and about 32% of the respondents accept. Most sessions are conducted within 70 days. Of those who mediate, about 78% succeed. But of real significance, almost 98% of the participants say they would use the process again.

Sometimes, you have no choice but to go to war. When you do have an option, recognize that combat is costly. It can far exceed your checks for fees, as it will affect your business in lost time and productivity, not to mention the inevitable emotional toll it will take on your staff. Mediation may provide a less costly and less combative forum to resolve a discrimination charge and a shrewd employer should consider the mediation route. *—Pamela L. Kingsley*

FAMILY LAW

Most family court trials result in decrees that give the parties a little of what they ask for, but not everything they want, and often not the one thing they really want. Trial is always a gamble. I have heard many a judge tell combatant litigants, "It's my job to rule on issues that affect your lives, children, and property, and you probably won't be happy with what I order. Wouldn't you rather make these decisions yourselves?" ADR in family court can provide parties that very opportunity.

Parties in family court are required to attempt in good faith to settle their case or agree on an ADR process. There are several ADR options, from private mediators with unlimited time to help parties sort through complex issues in a non-stressful environment to inexpensive conciliation services for cases that are not so complex and can be resolved in three hours or less.

Hiring a lawyer who knows how to communicate professionally and prepare a case so that the client and the opposing party realize the benefits of settling is paramount. For some cases, like those involving child relocations, the mentally ill, and abusive relationships, ADR may not be an option. But having tried hundreds of cases and having settled that many more, I would rather see my clients participate in ADR and choose their own destiny rather than suffer the stress and expense of an unpredictable trial. *—Alexander Poulos*

INTELLECTUAL PROPERTY

ADR, particularly mediation, can be advantageous in a dispute involving software development. In the typical software development dispute, a business hires a software developer to develop custom software for use in its business. At some point, the software developer does not give the business the software it needs and a dispute results. Underlying this problem is often the ownership of the software being developed, more particularly, the ownership of the intellectual property in the software.

Before rushing to the courthouse, the business should try to resolve the dispute through mediation. A mediator skilled in intellectual property can help guide a resolution that makes sense to the business and is fair to the software developer. The mediator will need to look at the contract between the business and the software developer, the state of the custom software to date, and who should own what going forward. These issues can be technical in nature and hard to resolve. However, with the assistance of a skilled mediator to guide the process, the business can avoid court and get a resolution that is fair to both. *—Shahpar Shahpar*

PROBATE

Effective February 1, 2012, if you are litigating a case in probate court, you and your opponents must discuss ADR within 30 days from when your case "goes contested," and give the court a written report about that discussion within two weeks. This new probate rule is very similar to Rule 16(g) of the Arizona Rules of Civil Procedure. In the past, some brave (or stubborn) litigants actually questioned the probate court's authority to order them to participate in a mediation or settlement conference. Probate Rule 29 now makes it clear. The rule admonishes the parties, in two separate places, to participate in good faith. While the ability to enforce that aspirational rule may be dubious, the intention is clear—probate cases are going to mediation early and often.

Maricopa County has taken this directive to heart, which can result in an unsatisfactory case management plan. At the initial hearing, probate commissioners are requiring parties to engage in a settlement conference within 30 to 45 days of that hearing. Deciding who should be the grandmother's guardian may not require extensive discovery, but if there are allegations of financial exploitation of a vulnerable adult or breach of fiduciary duty, such a timeline may be challenging. However, in most probate cases, which often involve long-simmering family disputes, getting parties to the bargaining table sooner rather than later is usually the best option. *—James A. Fassold and Alisa J. Gray*

SECURITIES

If you have a dispute with your investment broker, your exclusive remedy almost always will be to arbitrate that dispute, rather than file a civil lawsuit. Most, if not all, investment contracts signed with your broker when first opening your account contain such mandatory arbitration clauses. Fortunately for you, the arbitration process will probably be conducted by the Financial Industry Regulatory Authority ("FINRA").

A FINRA arbitration is similar in many ways to a civil lawsuit: filings will be made, discovery will be had, and ultimately a hearing in which evidence and testimony are presented to a panel of qualified professionals will be used to determine a final award binding on all parties. A FINRA arbitration is more streamlined than a traditional civil lawsuit, often concluding within one year of the file date. Additionally, it costs between $50 and $1,800 to file a FINRA arbitration, which can result in lower fees than traditional litigation to resolve your dispute. Although not required, it is wise to hire a skilled attorney to represent you at your FINRA arbitration and help you navigate through the arbitration process. *—Todd T. Lenczycki*

For more information about alternative dispute resolution options for your specific legal situation, please contact the firm at (602) 255-6000 or general@tblaw.com.

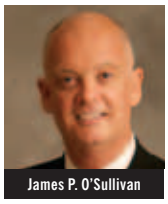
ILLUSTRATION: ALASHI/ISTOCKPHOTO

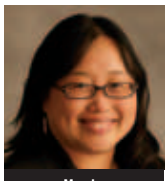
LEGAL REVIEW

Letters of Intent: Essential Terms

By JAMES P. O'SULLIVAN and MAY LU

It was only a few years ago that many "Baby Boomer" business owners were beginning to strategically position their businesses for eventual sale. Navigating recent difficulties due to the economic upheaval has left these business owners a bit older, hopefully wiser, and all the more eager for a targeted exit. Thoughtful early-stage guidance from counsel can help weed out unsuitable suitors and maximize the client's shot at a successful deal.


James P. O'Sullivan


May Lu

A very valuable tool "to know sooner than later" if there is going to be a deal, is a preliminary contract including both binding and nonbinding terms called a "letter of intent" ("LOI"). While negotiating the LOI, candor about important issues is key.

1. CONFIDENTIALITY

At some point during the negotiation, each party will seek to identify—and hopefully resolve—problems by requesting documents and information. The LOI can include a confidentiality provision to protect sensitive information, commonly drafted to bind the parties even if the negotiations and the LOI terminate.

2. REPRESENTATIONS AND WARRANTIES

Purchase agreements often contain highly-negotiated representations and warranties of business conditions. Discussing these expected risk allocations upfront in the negotiation process may help identify difficult issues.

3. EXCLUSIVITY

If the negotiations are to be exclusive, the parties should consider the length of the exclusivity. A provision regarding the non-breaching party's remedies in the event of a breach of the exclusivity term should also be included.

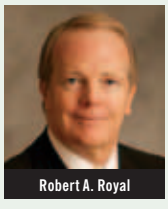
4. BINDING VS. NONBINDING TERMS

Every LOI should clearly specify which terms, if any, will be binding and which will be nonbinding. Failing to specify binding versus nonbinding provisions can lead to unnecessary and expensive litigation as one disappointed party seeks to enforce the LOI as a binding contract to buy or sell a business.

Contract Arbitration Provisions That Work

By ROBERT A. ROYAL

As a business litigator with my fair share of business arbitrations, I have admittedly been skeptical about their effectiveness compared to judicial proceedings. Most business agreements have general arbitration provisions that provide no specificity concerning a procedure. However, I recently sat on a panel of arbitration experts to give my litigator's point of view to members of the Arizona State Bar Association. As a result of this experience, I learned there may be methodologies for business lawyers to draft arbitration provisions to effectively utilize the procedure to solve business disputes.


Robert A. Royal

My concerns with the arbitration process are several. First, an arbitrator may be more easily swayed than jurors. An arbitrator, usually an attorney, is paid to review claims and defenses, hear evidence, and issue a ruling. A single person's life experiences, bias, and prejudice may influence a ruling, unlike a jury and their collective experiences.

Second, arbitrations may be as, or even more, costly than judicial proceedings. On many occasions, the same procedures that take place in litigation also take place in arbitration.

Third, arbitration is often trial by ambush. Due to less stringent disclosure requirements, the parties may not agree to exchange all information or any information at all.

Fourth, there is no control on the admission of evidence. In court, parties are protected from irrelevant, inflammatory evidence by long established and tested rules of evidence based on the fundamental notion of reliability.

In my view, the best way to utilize the arbitration procedure to solve business disputes is to tailor arbitration provisions to the amount of money in dispute and to control "litigating in arbitration." While arbitration was designed to be quick and inexpensive, arbitration has grown into an ineffective, time-consuming, and expensive process that includes discovery and motions in many cases. Consequently, a return to the goals of arbitration can be achieved based on dollar amounts in dispute.

For example, for cases involving $50,000 or less, claimants should clearly state their claims and all defendants should clearly respond with all defenses. The parties should exchange the relevant documents. All this should take place within 30 days. If the matter cannot be resolved, the matter should go to an arbitration hearing limited to one-half day within 60 days of the initial claim(s).

For claims between $50,000 and $250,000, the parties, in addition to the procedures outlined above, should be allowed to take two depositions each and go to a full-day hearing within 120 days.

As the claim amount increases, parties usually want the ability to conduct additional discovery, such as written discovery and issuing subpoenas. The introduction of a motion practice may be warranted at higher claim levels.

If arbitration provisions are properly tailored to the amount of money in dispute, the cost of arbitration can be better controlled, the parties can still have sufficient knowledge to evaluate, settle, or arbitrate the case, and the principles embodied in arbitration can be fulfilled.

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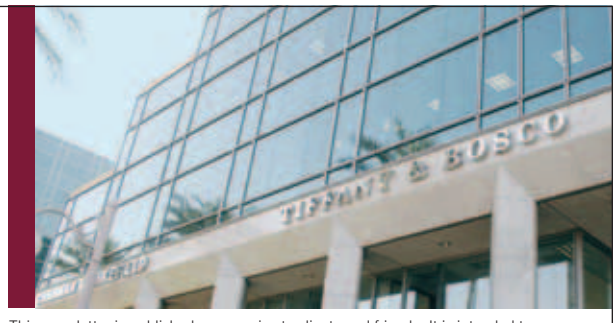

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