State Bar of Texas ADR Section

Alternative Resolutions Newsletter

Winter 2002 Issue

CHAIR'S CORNER

by Wayne Fagan
Chair, ADR SECTION

"Post 9-11, Where Do We Go From Here?"

Dear friends and colleagues, on behalf of myself and the other members of our Section Council let me take this opportunity to wish all of you, and your families and friends all of the best during this holiday season and for the new year. Our friends in Mexico have a wonderful tradition. When they greet each other they give each other a hug or as they say in Mexico "un abrazo ". If they really want to make an impression they give each other a strong hug or "un fuerte abrazo". In these difficult times I think we should all adopt the Mexican tradition and give each other un fuerte abrazo. Since I will not have the occasion to see each of you before the new year please accept this fuerte abrazo from your Section Council.

Although my first Chair's Corner was written prior to the horrific events of 11 September 2001("9-11") they were not published in our Newsletter until after that tragic day. Prior to the publication of our October 2001 Newsletter, Robyn Pietsch, our wonderful Newsletter Editor, sent me an e-mail and asked if I wanted to make any changes to what I had written. I thanked Robyn for her offer but asked her to go ahead and publish what I had written because I wanted you to see what our original goals were for our Section for this year and so that I could then ask for your understanding and support of any adjustments we needed to make to those goals post 9-11. We held our first Section Council meeting post 9-11 in Austin on Saturday,17 November 2001, and discussed the events of 9-11 and whether or not our Section should respond to those events and if so how. A consensus quickly formed around the concept that faced with one of the greatest challenges of our lifetime, we in the ADR community did not want to sit this one out but instead wanted to become proactive. The next questions were what can we do and what impact would whatever we decided to do have on the goals set out in my first Chair's Corner. At that point Mike Schless and Ann MacNaughton presented to the Council the concept of a Pro Bono ADR project that they had been developing with others. Contained elsewhere in this Newsletter are further details on that project. The Council unanimously approved the Pro Bono project and decided that it should become one of the major initiatives of our Section for the remainder of this bar year and in the future. We thank Mike, Ann and Caliph Johnson for their leadership with this initiative.

Having decided to adopt the Pro Bono project as one of our major focuses for the balance of this bar year we then reviewed the original goals for the Section for the coming year, keeping in mind Judge Coselli's admonition that "we are all volunteers" and decided that we could best serve our membership and the consumers of ADR services in Texas by refocusing our objectives on the following actions:

1) We will put any further discussion of a journal on hold for now and focus instead on expanding the scope of the Newsletter to include the

following:(a) Chair's Corner;(b) Feature Article addressing an ADR topic not covered elsewhere as a regular feature of the Newsletter; (c) Subcommittee articles on ADR in the fields of :(i) Labor and Employment, (ii) Health Care,(iii)Appellate Law,(iv)Family Law, and (v) Commercial/Consumer Law;
(d) Ethical Puzzler;(e) Case Law Update;(f) Book Review;(g) Calendar of Events/Announcements; and(h)Council and Committee Updates.

2) We will focus on our Annual Seminar and mid-year meeting to be held in Fort Worth on 1-2 February 2002.I am pleased and honored to report that through the good offices of Suzanne Duval and Kay Elkins-Elliott, Ambassador Nancy Ely-Raphel has accepted our invitation to be our keynote speaker at the luncheon on Friday, 1 February 2002.Ambassador Ely-Raphel is currently serving in the U.S.State Department as Head of the Office to Monitor and Combat Trafficking in Persons. During her remarkable 30-year career, Ambassador Ely-Raphel, who is an attorney by training, has been a human rights emissary in South Africa, Somalia, Angola, Namibia, Vietnam, Eastern Europe, and the former Soviet Union. She was a principal member of the team led by then U.S. Assistant Secretary of State Richard Holbrooke that drafted and implemented the 1995 Dayton Peace Accord. Considering the events of 9-11 and the human rights abuses in Afghanistan, Ambassador Ely-Raphel's comments should be most enlightening. Please join me in attending our seminar and giving Ambassador Ely-Raphel a big Texas ADR community welcome. Further details and registration information on this conference can be found elsewhere in this Newsletter and on our website at http://www.texasadr.com/.

3) The Council voted to oppose the adoption of the Uniform Mediation Act ("UMA") in Texas and to undertake to be a resource of information nationally by offering to consult with other states that will be considering the adoption of the UMA. For further details as to the reasons for the Council action please see the article by Prof. Brian Shannon and myself that appears elsewhere in this Newsletter.

4) We will continue our efforts to revise our website to make it more of a resource to our members and providing more transparency for the work of the Section Council by, among other things, proving a search engine and creating a members only section of the website which will contain (i)minutes of all Council meetings,(ii) current financial information on the Section,(iii) a listing of all Section members, and (iv) practice tools and information. If you have any further thoughts or suggestions as to what you would like to see on our website please send me an e-mail at mailto:wfagan@compuserve.com.

5) We will continue our efforts to develop ADR publications. In this regard, thanks to the great work of Kay Elkins-Elliott, Frank Elliott and all of the contributing authors I am pleased to report that a new edition of our very popular ADR Handbook should be published during this bar year. I am also pleased to report that our Section has entered into an agreement with Professors Rau, Sherman and Shannon for the Section, working with the authors, to assume publication of their book entitled "ADR and Arbitration Statutes-State and Federal-Annotated".

As these publications become available we will announce them in the Newsletter and on the Section website.

The events of 9-11 have presented us all with great challenges but at the same time great opportunities. Your Council has tried to respond to those challenges by adopting the foregoing program for our Section. With your help and support we are confident that we will succeed and in doing so we will serve both the ADR processes we all believe in so strongly and our communities. Thank you for your time; we will speak again soon.

ETHICAL PUZZLER

by Suzanne Mann Duvall

[This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, Texas Community Bank Building, 8235 Douglas Ave., #330 LB 61, Dallas, Texas 75225. Phone: 214.361.0802 FAX 214.368.7258]

At the end of a family law mediation a settlement document is typically generated and signed by the parties and counsel. This document summarizes the agreement and forms the basis for drafting the Decree of Divorce and/or other documents necessary to give effect to the agreement.

A typical settlement document is less than five pages in length, whereas a typical divorce decree exceeds forty pages. Frequently disputes arise over the drafting of a decree and are then presented to the court in the form of Motions for Judgment. In cases where the dispute cannot be resolved by reference to the settlement document, the courts are likely to send the parties back to mediation. To avoid that, some lawyers request that the settlement document include a provision that any drafting or other disputes arising out of the mediated settlement agreement be resolved in arbitration with the mediator serving as the arbitrator. This is because the mediator is the person most familiar with every word that was spoken and every issue that was discussed, and thus is the best person to resolve drafting and other disputes consistent with the letter and spirit of the settlement document.

Question: Is it unethical for a mediator to subsequently serve as an arbitrator for the purpose of resolving disputes arising out of the mediated settlement agreement in a family law case? In other types of cases?

Rhonda Hunter (Dallas) In family cases it is not ethical for a mediator to serve as arbitrator. Clients make statements to mediators, and attorneys allow them to be candid because the mediator is perceived as an impartial third party who will not sit in judgment of the parties. For a mediator to be effective, the mediator needs to understand how the client thinks, and the attorney allows a client more latitude in mediation for that purpose.

Patricia Palafox (El Paso) I do not believe it is unethical for a mediator to subsequently serve as an arbitrator in the fact situation outlined. However, it is important to differentiate between conflicts which arise in drafting language to carry out the provisions of the agreement and conflicts which arise over items which were never really discussed. For example, if there is an agreement on the days of visitation but pick up and return is never discussed, then it is fairly easy to render a decision as to when pick up and return should be based on the age of the child, whether the child is in school, the distance involved, and the like. However, if the issue of who should pay health insurance is never discussed

during the mediation, then the idea of leaving the decision to the mediator as arbitrator is a little more problematic.

It is always a concern in these “med-arb” situations as to whether the role of the mediator is compromised because the parties are unwilling to share or discuss information if it can be later used adversely against them by a mediator rendering a decision as an arbitrator. Some mediators hear evidence, render their decision, seal it, and then begin the mediation process. Thus, they cannot change their decision based on what they hear during mediation.

I certainly think the mediator can be helpful to the ultimate quick resolution of the case if they help parties who think they have an agreement, but who later confront an impasse due to drafting language or a failure to consider certain issues at the mediation which need to be worked out in order to effectuate the agreement. If the parties agree during the first mediation that they will abide by any arbitration award of the mediator regarding any future problems in finalizing the agreement, and if it clearly stated that this will apply to any and all issues, whether discussed or not at mediation, I do not see an ethical problem. I do see many practical problems as with any arbitration agreement, such as what evidence will be presented and what procedures will be used.

As mediation and alternate dispute resolution mature, we must be mindful of the differing roles we may be asked to take and whether these differing roles might lead to an alternative resolution to the dispute other than litigation. If the answer is that they will, and there is not a clear ethical problem in doing so, I think I would serve as an arbitrator. The issue of the finality of arbitration awards in the family law arena as opposed to other civil areas is outside the scope of my answer to this ethical puzzler.

R.B. Poole (Terrell) I do this with some level of regularity, but typically limit the scope to questions of interpretation of the Meditated Settlement Agreement and the determination of what closing documents are necessary to effect same. It has saved a good many deals and who would be better qualified to interpret the meaning! In looking at the statute, it calls for an arbitrator to be a disinterested party! I am, aware of no other ethical standards although integrity and honesty is certainly implied.

Michael Schless (Austin) The Texas Rules of Ethics for Mediations and Mediators proposed by the Supreme Court of Texas Advisory Committee on Court-annexed Mediation states, “The mediator shall not subsequently serve as an attorney, ad litem, arbitrator, or judge, or act in any decision-making capacity in a matter about which the mediator has received confidential information from one party outside the hearing of the other party or parties, without full disclosure to all parties and without their consent.” The State Bar of Texas Ethical Guidelines for Mediators state, “A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in the matters that are subject of the mediation.” The comment following that guideline says, ‘...an attorney-mediator who has served as mediator pending litigation should not subsequently serve in the same case...in any judicial or quasi-judicial capacity with binding decision-making

authority. Notwithstanding the foregoing, where an impasse has been declared…, the mediator, if requested and agreed to by all the parties, may serve as the arbitrator in a binding arbitration of the dispute...so long as the mediators believe that nothing learned during private conferences...will bias the mediator or will unfairly influence the mediator's decision while acting in his/her subsequent capacity.

Reading these provisions together, they seem to me to permit the mediator to subsequently serve as an arbitrator for the purpose of resolving subsequent disputes arising out of the mediated settlement agreement in a family law case, or in other types of cases, if two conditions are met::

1. The mediator did not receive confidential information from one party, or if he did,
    a. it is disclosed to the other parties (with the consent of the disclosing party) or
    b. the mediator is satisfied the confidential information will not bias or unfairly influence the arbitration decision, and
2. Service as the arbitrator is with the consent and agreement of all parties.

I am troubled by the language in the guidelines comment that would appear to limit the ability of the mediator to subsequently serve as an arbitrator to cases "where an impasse has been declared" in the mediation. So long as the two conditions are met, it would seem incongruous to say that if the mediation ends in impasse the mediator can become the binding arbiter of disputes regarding drafting of documents necessary to give effect to the agreement. Therefore, I do not view the language to prohibit or limit the conclusion stated above.

Thus, I conclude that the answer to the question asked is yes, it is ethical. Whether it is wise is left to the sound discretion of the mediator on a case by case basis.

COMMENT: Arbitration is a creature of contract. Chapter 154.027 (g) the Teas Civil Practices and Remedies Code states: "If the parties agree in advance, the award is binding and enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties further settlement negotiations."

From a reading of the statute, coupled with the Texas Rules of Ethics for Mediations and Mediators proposed by the Supreme Court of Texas Advisory Committee on Court-Annexed Mediation and the State Bar of Texas Ethical Guidelines for Mediators, it would appear that it is ethical for a mediator to subsequently serve as an arbitrator for the purpose of resolving subsequent disputes arising out of the Mediated Settlement Agreement *or for any other purpose for which the parties agree.*

Many Family Law practitioners include an arbitration agreement naming the mediator as arbitrator as part of the Mediated Settlement Agreement in order

to address any future disputes between the parties, whether or not these disputes arise out of the agreement. The rationale for doing so is that the mediator, having developed a relationship based on trust, knowledge and experience with the parties, would be the most logical person to make decisions having to do with the agreement itself and with the intent of the parties thereto.

It is imperative however, that the contract upon which the consent to submit the case to arbitration is based, is clear as to its scope, its nature (binding or non-binding arbitration) and its duration.

***Suzanne Mann Duvall**, former Chair of the State Bar of Texas Alternative Dispute Resolution Section, is an attorney and mediator in Dallas, Texas.*

CASE LAW & LEGISLATION UPDATE

This is a column designed to keep members of the Section informed about cases and legislation affecting ADR. John Fleming, Program Director at the Center for Public Policy Dispute Resolution at the University of Texas School of Law, administers this column. (If you are aware of any case law or legislation which affects ADR please fax a copy of the case or legislation and/or the relevant citations to John Fleming, at Fax No. (512) 232-1191, or by e-mail at jfleming@mail.law.utexas.edu, or contact John at (512) 471-3507.)

Video Prepared For and Used at Mediation Not Confidential The Court implicitly ruled a videotape produced for the purpose of the mediation, was discoverable independent of the mediation. The Court also ruled the videotape was not protected by the attorney -client privilege. In re Learjet, Inc. 2001 Tex. App. Lexis 7690 (Tex. App., Texarkana, Nov. 15, 2001) [See article by Jeff Abrams on page 8.]

Ex parte Communication Between Arbitrator and Party Counsel Did Not Justify Vacation of Award. Ipco, the buyer, sued Chance, the seller, alleging both tort causes of action and contract claims. After the lawsuit was filed, the parties agreed to arbitration. After the arbitration hearing, the arbitrator made an ex parte phone call to the attorney for Ipco inquiring about certain factual matters. The arbitrator then rendered an award in favor of Chance, the seller, that Ipco recover nothing. Ipco challenged the confirmation of the award because it was obtained by "undue means" (See Texas Civil Practice and Remedies Code 171.014(a)(1)). The Court ruled that even though the ex parte communication was improper, the nature of the call did not rise to the level of undue means which would deny Ipco a fair hearing, and thus, the Court affirmed the trial court's confirmation of the arbitration award. IPCO-G.&C. JOINT VENTURE; IPCO, INC.,AND GREGORY & COOK, INC v. A.B. CHANCE COMPANY 2001 Tex. App. LEXIS 7917 (Tex. Civ. App., Houston, First, November 29, 2001)

Legislative Update. Although it seems like the Legislature adjourned sine die just yesterday, it is time to turn our attention to the 2003 Session. We do not know yet whether or not the Uniform Mediation Act will be ready to be introduced, but we do know that alternative dispute resolution will be near the top of the list of topics at least in some legislative committees. Each chamber of the Legislature recently gave interim study charges to its committees. These interim study charges are used to shape the content of new bills for the upcoming session. For those of us interested in ADR, the following interim study charges are of particular interest:

House Business & Industry Committee.

> "1. Review trends in the use of binding arbitration requirements in consumer agreements, with special attention to transactions in which the consumer has little or no bargaining power."

House Civil Practices Committee

> "2. Examine changes over the last decade to the civil justice system that affect the right of litigants (citizens or businesses) to receive appropriate review by a judicial body including arbitration, mediation, other types of dispute resolution."

There is a growing concern among consumer groups that the increased use of "pre-dispute" agreements to arbitrate are adversely affecting consumer rights. Several bills were introduced in the 2001 session which reflect this concern. Some of the bills would have prohibited the use of "predispute" agreements to arbitrate; others would have required specific disclosures to be made in the agreements; and others would have imposed detailed disclosure requirements on arbitrators and associations which administer arbitration such as the American Arbitration Association and JAMS. With the exception of, SB 322 which prohibits the use of "predispute" agreements to arbitrate in loan transactions funded with bonds issued under Texas Department of Housing and Community Affairs, these bills did not become law. Given the preemptive effect of the Federal Arbitration Act, there are limits to what a state legislature can do in this area, but it does appear that there is some room for states to act so long as the result is not to impose requirements on agreements to arbitrate which are not required in other contracts and so long as the result is not inconsistent with the federal policy favoring arbitration or so long as there is no conflict with the provisions of the Federal Arbitration Act.

In addition both the House Committee on Judicial Affairs and the Senate Jurisprudence Committee will be looking at court costs and court fees. Of course, our concern here will be to monitor anything having to do with Civil Practice and Remedies Code Chapter 152 which creates the court filing fee to fund community dispute resolution centers. Many of you may remember that the Section endorsed HB 1364 in the 2001 Session which would have increased the filing fee used to support the DRC's from $10 to $15 for district and county courts and which would have created an optional $5 fee for cases in justice of the peace courts. Although this bill passed the House, it died in the Senate Finance Committee along with numerous other bills which would have increased filing fees in civil cases to support other projects. At the time, many were saying the whole spectrum of filing fees would be reviewed during the interim.

A Potential Threat to Texas ADR

by Wayne I. Fagan, Chair, State Bar of Texas ADR Section Council
and
Brian D. Shannon,
Associate Dean, & Charles Thornton Professor of Law,
Texas Tech University School of Law

In 1987 the Texas Legislature enacted the Texas Alternative Dispute Resolution Procedures Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001 - .073. One of the cornerstones of the enactment was the statute's broad confidentiality protection. Apart from certain narrow exceptions set forth in the act, § 154.073(a) provides that a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

The statute also makes records confidential. Furthermore, § 154.053(b) of the Texas ADR Act explicitly places a duty on the mediator to "at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute." Also, § 154.053(c) goes on to provide that "[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court." Dean Ed Sherman has described the Texas ADR Act's confidentiality statute as "perhaps the broadest ADR confidentiality provision in the country." Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience*, 38 S. TEX. L.J. 541, 542 (1997). Indeed, the statute was one of the first comprehensive ADR acts in the country, and has worked extremely well over the years as a means of offering the citizens of Texas alternative processes to resolving disputes. In turn, the confidentiality provisions have enhanced the public's willingness to participate fully in the processes.

The State Bar ADR Section Council is concerned that there is a threat looming to the Texas ADR Procedures Act. Over the last several years, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association's Dispute Resolution Section have been developing a draft Uniform Mediation Act (UMA). The draft UMA was approved by NCCUSL in August 2001, and will be considered by the ABA's House of Delegates in February 2002. The proposal could then be filed in the next session of the Texas Legislature in early 2003. Because the UMA offers a much more limited form of confidentiality protection than does the Texas ADR Act, the Council has serious concerns about the proposal and will oppose its enactment in Texas.

In our view the proposed UMA does a relatively poor job of protecting the confidentiality of the mediation process. The proposal attempts to safeguard

confidentiality through a complex and dizzying array of privileges and exceptions. A copy of the proposal is available at: http://www.law.upenn.edu/bll/ulc/mediat/UMA_Final_Styled_Draft-01.htm. We believe that the UMA has taken a backward approach to confidentiality. The UMA proposal has headed in the wrong direction by not beginning with a wide umbrella of confidentiality protection followed by appropriate exceptions. Whereas the Texas ADR Procedures Act's confidentiality provisions start with the general proposition that all ADR communications are confidential, save for several exceptions, the UMA focuses instead on privileges from discovery and admissibility in later proceedings. Moreover, earlier drafts included virtually nothing concerning confidentiality outside of later legal proceedings. Apparently in response to such criticisms, the final version of the proposal added a section which states, in part, "[M]ediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State." Beyond that, however, there is no general requirement of confidentiality, and the quoted approach is inconsistent with the push for uniformity.

The Council is of the view that the Texas ADR Procedures Act has well served the process and the public and we believe that it is in the highest standards of the Bar that we defend the process for the public, therefore, we have closely followed the work of the UMA Drafting Committee throughout the drafting process. In addition, the Council submitted comments to the Drafting Committee as did a number of the members of both the Section and the Council. Given our views, we also wrote to the Texas delegation of NCCUSL commissioners and to our ABA representatives urging them to vote either to return the proposal to the Drafting Committee or, in the alternative, to oppose adoption of the UMA. We repeatedly raised our general concern regarding the approach taken to confidentiality, along with a number of specific issues. Nonetheless, the process has moved inexorably forward.

We readily acknowledge that no statute is perfect. Indeed, the confidentiality provisions set forth in the Texas ADR Procedures Act perhaps leave some gaps in coverage and may need some minor tweaking and fine-tuning in future legislation. *See* Brian D. Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 TEX. TECH L. REV. 77 (2000). Moreover, a handful of the provisions in the UMA might merit serious consideration as possible amendments to the Texas Act. Nonetheless, the existing Texas provisions are far superior to the UMA's approach and offer a solid wall of protection to the sanctity of the mediation process. Accordingly, we believe that the UMA's confidentiality provisions would make a poor substitute for current Texas law, and actually provide much weaker confidentiality protection to Texas mediation and the consumer public than does current law. The Texas provisions remain a testament to the wisdom and foresight of the act's original drafters and should provide a framework for continuing the successful use of mediation as a worthwhile tool to assist in the resolution of Texas disputes and lawsuits.

Accordingly, if the UMA is ultimately submitted to the Texas legislature, the ADR Section will vigorously oppose it. Moreover, there will likely be substantial opposition from the rest of the Texas ADR community, as well. The Section Council will also undertake to be a resource of information nationally by offering to consult with other states that will be considering the adoption of the UMA. Each state must make its own decision, but we will be glad to share our concerns and reasons for opposition. Indeed, we are not alone in our opposition. We have been contacted by numerous ADR leaders from other states and organizations who much prefer a statutory approach such as that we have in Texas. Although we applaud the goal of uniformity, we cannot in good conscience support Texas taking a large step backward.

COMMERCIAL/CONSUMER LAW SECTION

Beware What You Prepare For Mediation

by Jeffry S. Abrams

Lawyers and parties prepare differently for mediation. Some don't prepare at all. Others prepare elaborate presentations including exhibits, visual aids and even expert testimony. Openness and free disclosure can go a long way toward leading to a successful mediation. Perhaps the dog and pony show will lead to a better settlement. There is no harm done if the case doesn't settle because the communications in a mediation are confidential, right? Maybe not.

The decision in a recent mandamus proceeding illustrates the danger of preparing and presenting certain information in an unsuccessful mediation. In *In re Learjet, Inc*., No. 06-01-00152-CV (Tx. App. - Texarkana, decided 11/15/01), Learjet videotaped witness statements of three of its employees and played them for the parties during the mediation proceedings. No settlement was reached at the mediation. Raytheon asked the trial court to order production of the edited videotapes it had seen and the unedited core videotapes. The court ordered production.

In the mandamus proceeding, Learjet relied on the language in the ADR Act that "a communication relating to the subject matter of any civil...dispute made by a participant in an alternative dispute resolution procedure... is confidential, is not subject to disclosure, and may not be used as evidence against the participant...." Tex. Civ. Prac. & Rem. Code Ann. Section 154.073(a) (Vernon Supp. 2001). The appellate court, however, found that this provision does not provide blanket protections for all such material presented in the mediation, citing Tex. Civ. Prac. & Rem. Code Ann. Section 154.073(c) (Vernon Supp. 2001) which states: "An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure." While Learjet argued that the videotapes were not discoverable as they fell within the attorney-client privilege, the appellate court disagreed and denied Learjet's mandamus request, upholding the trial court's order requiring production of the videotapes.

This result is not that surprising. It comes from a pretty plain reading of the ADR Act. However, it does indicate that lawyers and parties may perceive the protections of the mediation process to be greater than they sometimes are. Prior to each mediation, an analysis should be made to consider what information should be presented in the mediation, whether such information may be admissible at trial if no settlement is reached and, even if potentially admissible, whether it is worth risking disclosure for purposes of increasing the chances of

reaching a desired result at the mediation. If this is not done, it could come back to haunt you.

Jeffry Abrams is a full-time attorney-mediator in Houston, Tx. He began his law practice in 1983 with a concentration on commercial litigation. He has been mediating since 1989 and has conducted almost 1700 mediations of almost every conceivable variety. He has also been involved in the mediation community, previously holding the positions of Chair of the Houston Bar Association ADR Section, President of the Houston Chapter of the Association of Attorney-Mediators and Board Member of the Harris County Dispute Resolution Center, among many other activities. Jeff also has an interest in international commercial mediation and has recently given presentations on the topic in Buenos Aires, Hong Kong and Washington, D.C.

ADR Section's New 9-11 Pro Bono Community ADR Project

by Ann MacNaughton

The State Bar of Texas ADR Section 9-11 Task Force is coordinating a new Pro Bono Community ADR Project, co-chaired by Council Members Ann MacNaughton and Michael Schless, to bring together resources, infrastructure, and public awareness for the delivery of *pro bono publico* ADR services in Texas.

Initially the project will focus on the delivery of ADR services to second-tier victims of the attacks in Washington DC and New York City, and related tragedies in Pennsylvania and other locations, on and subsequent to September 11, 2001, with initial pilot projects in Houston and San Antonio, and rapid expansion to other cities in Texas. "Second-tier victims" include, for example, individuals and families who experience conflict or disputes as a result of (1) activation of military reserve status or deployment of active-duty personnel; (2) loss of employment (e.g., airline employees); and (3) community hate crimes toward those who are (or are believed to be) Muslims, Arabs, or Middle Easterners.

Among other things, the Section's 9-11 Pro Bono Community ADR Project will: Facilitate community dialogue in Texas cities, to foster better understanding between races, ethnic, and religious groups in our communities in order to quell the alarming increase of hate crimes subsequent to 9-11; train volunteer mediators who wish to contribute services to militarily linked individuals and/or in the community conflict management programs; and (3) Deliver ADR services in situations that meet eligibility criteria for pro bono support through the 9-11 Pro Bono Community ADR Project.

The ADR Section's 9-11 Pro Bono Task Force is coordinating with municipalities and other governmental entities across the state; Dispute Resolution Centers across the state; religious leaders; other professional organizations (for example, ABA Enduring Lamp, "Legal Assistance to Military Personnel"); law schools; and services provider organizations. Please contact one of the listed 9-11 Pro Bono Project Coordinators to participate:

Cooperating organizations include, among a growing list of others:

American Bar Association Dispute Resolution Section; American Bar Association on International Law & Practice Cross-Cultural Negotiations, Dispute Resolution and Virtual Legal Communications Task Force; Association of Attorney Mediators; Communications Task Force; American Corporate Counsel Association, Houston Chapter—Pro Bono Committee; American Corporate Counsel Association, Dallas/Ft. Worth Chapter; Harris County Dispute Resolution Center; Houston Bar Association; Houston Volunteer Lawyers Program; San Antonio Bar Association ADR Section; San Antonio Bar Foundation; State Bar of Texas Administrative Law Section; State Bar of Texas Corporate Counsel Section; State Bar of Texas Consumer Law Section; Dispute Resolution Service of Tarrant County; Tarrant County Bar Association; Texas Accountants & Lawyers for the Arts; Texas Association of Mediators; Texas Wesleyan Law School; Thurgood Marshall School of Law at Texas Southern University; University of Houston Law Center;

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2002 CALENDAR OF EVENTS

40-Hour Basic Mediation Training ◆ Denton ◆ January 9-13, 2002 ◆ Texas Woman's University ◆ Contact Bonnie Louther or Kay Elkins Elliott at (940) 898-3466

State Bar of Texas ADR Section Meeting ◆ February 2, 2002 12:00—1:30 p.m. ◆ Texas Wesleyan School of Law (following "A Funny Thing Happened on the Way to the Courthouse") ◆
See page 13 for more details!

2002 State Bar of Texas Convention ◆ June 12-15, 2002 ◆ Dallas, Texas ◆ More details coming soon!

BOOK REVIEW

THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE

by Bernard Mayer, PhD

Jossey-Bass Publishers, 2000, 288 pages*Reviewed by Kathy Bivings-Norris**

Meyer's latest work is a futuristic, reflective basic primer on the field of Conflict Resolution and its various components. And a book worth reading! Rather than emphasizing the usual process, technique-oriented components of the field, Mayer devotes his energy to the philosophy and major assumptions underlying the practice of conflict resolution. "What makes a successful peacemaker or conflict resolver is not a set of processes, methodologies, or tactics; it is a way of thinking, a set of values, and array of analytical and interpersonal skills, and a clear focus." His intended audience includes the broad range of practitioners – mediators, facilitators, arbitrators, trainers, negotiators - and his examples reflect the breadth of his experience, from neighbor disputes to divorce to public policy issues to international peace-building efforts.

For those of you who want to know how the book ends, Mayer talks about why he is still in the conflict resolution profession twenty years after he began: his value system. "If the concepts we use to understand what we do are not grounded in our values or reflective of them, then their power will be curtailed." Developing better ways to resolve conflicts, doing something which has the possibility of changing the amount of violence and intolerance in the world and being involved in a field of work which allows for personal growth for the practitioner are the three values which keep him interested and continually improving in his chosen work. There is also an excellent compilation of references – other "must read" authors.

The first section of the book includes a discussion of the nature and causes of conflict. The core of conflict is driven by human needs which seem to be universal -- a part of the human condition. The expression of those needs and the choice of ways to meet them are driven by a multitude of forces summarized as communication, emotion, values, history and structure, all of which are greatly influenced by culture. An entertaining section explores eight major approaches to conflict avoidance, including "I refuse to tango", "There's no conflict; I have fixed everything!", "Let's you and them fight." Sound familiar? "Power and Conflict" and "Culture and Conflict" are included as chapters with some interesting insights. One of the slippery issues of culture is that "each culture contains many subcultures and each subculture many groups. Each has a different set of approaches to conflict, just as each of us as individuals do. Culture is also not static". Regarding power and conflict Mayer states,

"Understanding how to develop power quietly and to use it sparingly is one of the arts of effective conflict engagement."

The second section of the book explores the nuances of resolution which he defines much more broadly than reaching agreement about particular issues underlying a dispute. "Resolution occurs through a series of different activities, over time, and usually with many setbacks along the way. It is a process of letting go of conflict, of moving past it, and of gaining the energy, lessons and growth that a conflict has to offer." Beginning on page 108 a point/counterpoint narrative on major beliefs and critiques regarding the purposes of conflict resolution provides a summary of some of the major issues in the field. And if you continue reading, you will reach a section on "Constructive Attitudes About Impasse", the first of which is Impasse is OK – which is a novel statement from a conflict resolver! Then follows a chapter on mediation which should be required reading for all practitioners, clients, judges and lawyers. The chapter includes intriguing descriptions of the profession of mediation, what clients want from a mediator and the techniques of mediation practice. Absent space limitations, the entire chapter would be quoted here!

The final chapter in Section 2 looks to the future and envisions the development of "an effective continuum of services" which would aid both practitioners and users of conflict resolution to apply the most appropriate process to a specific dispute. Mayer contends that this task of appropriately matching the process to the dispute provides one of the most important challenges for the field broadly defined as Conflict Resolution

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FAMILY LAW SECTION:
Rampant Federalism - ERISA

By Robert J. Matlock

The Feds have done it again! Not only have the Feds done it, they have now enlisted the assistance of our Texas courts!

An Old-Timer's Commiserations -

Over the past 20 years or so, federal statutes have added to the complexity, frustration and malpractice potential of family law. Those of us who recall an era when the Family Code was published as a small pamphlet have witnessed an ever increasing infringement of federal statutory mandates upon an area of law (i.e., divorce) that has traditionally been the exclusive domain of the state legislatures. The purpose of this article is to commiserate about the relentless intrusions conjured up by Washington bureaucrats and to warn family law practitioners of one potential trap that may swallow the unwary.

Federal History -

ERISA is the acronym for Employee Retirement Income Security Act of 1974, 29 USCA Sec. 1001. It is the statutory foundation upon which a multitude of employee benefits are based and, although the types of benefits have changed (pension plans, 401k's, employee stock ownership plans, etc.), the provisions of ERISA have remained basically intact.

Among the ground rules established by ERISA is the mandatory designation of an employee's spouse as the person who will receive the plan benefits upon the death of the employee. The mandatory spousal designation can only be circumvented via a written waiver signed by the spouse.

Texas History -

Seizing upon the opportunity to increase the size of the Family Code, the Texas legislature tackled the problems related to life insurance and employment plan beneficiary designations. The law makers began with several basic assumptions:

1) divorced persons are not inclined to be benevolent with respect to their former spouses,

2) divorced persons are so relieved to be finished with the divorce process that they are sloppy about tending to the details of their post-divorce lives, and

3) the legislature knew what divorced persons intended to do with their property interests and just needed a little help in accomplishing the task.

Family Code Sections 9.301 and 9.302 were the product of the legislature's toil. In effect, these sections disqualified a former spouse as a beneficiary under any employee benefit plan or life insurance policy unless the employee/insured reaffirmed the beneficiary designation in the divorce paperwork or after the divorce. Those provisions dove-tailed nicely with Section

69 of the Probate Code that deleted bequests to an ex-spouse within a Will signed prior to the testator/testatrix' divorce.

Enough History – Now To The Trap -

Sanderlin v. Sanderlin, 929 SW2d 121 (Tex. App. – San Antonio 1996, writ denied) addressed the issue of employee benefits and followed Section 9.302 by snubbing the claims of a former spouse under a beneficiary designation signed prior to the employee's divorce from the claimant.

Then the Supreme Supremes got into that fray through a Washington case known as ***Egelhoff v. Egelhoff***, 532 U.S. 141, 121 S. Ct. 1322, 149 L.Ed.2d 264 (2001). The U.S. Supreme Court stated that the provisions of ERISA trumped the Washington statute excluding the ex-wife as a beneficiary and required the plan administrator to distribute the deceased employee's benefits to the former spouse. Needless to say, the departed employee's family was miffed and the deceased was probably set to twirling in his grave when word of the ruling reached him.

Now the Houston Court Of Appeals has run head long into Section 9.302 in an apparent attempt to demolish it. In ***Heggy v. American Trading Employee Retirement Account***, 56 SW3d 280 (Tex. App. – Houston [14th Dist.] 2001) the justices analyzed the prior case law and buckled under to ERISA by ruling that the federal statute prevailed and required the distribution of employee benefits to the ex-wife of the deceased. Shortly after the publication of the opinion, another coffin began to rotate.

The Point Of This Story -

Whether a particular benefit plan is governed by ERISA determines what must be done after the divorce to effectuate the employee's desires for the plan assets in the event of his/her death.

It would be a good idea to add a paragraph to the standard "closing the file" letter warning the client about the rampant federalism and trampling of our state's rights.

But, that's just my opinion as an old commiserator.

Footnote*—See Barnett v. Barnett, Tx. 99-0313*

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