ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By Joe L. Cope, Chair, ADR Section

"Is there a future in dispute resolution?"

That's the most frequent question I hear as I speak to local bar associations, conduct trainings, and teach graduate and law school courses in alternative dispute resolution. It takes on slightly different forms depending on the person asking the question. Yet the question is essentially the same.

I have heard many long-time mediators and arbitrators speak of the dwindling number of cases. I have heard new mediators and mediators-in-training express their doubts about ever being able to "break in" to the market. And I have heard these concerns both in and out of the great State of Texas.

I have also heard a variation of the question from our friends in litigation as they discuss the "vanishing jury trial."

To all my friends in dispute resolution, alternative or otherwise, please take notice. Many of our renowned leaders have properly stated, "Conflict is a 'growth industry.'" Look around you. You know it's true. We are not being overwhelmed with civility and peace. The world is still the same difficult, dispute-filled place it has always been.

Has alternative dispute resolution contributed to fewer jury trials and decreased use of litigation? I would certainly hope so. But the driving force in the reduction of demand for legal services and litigation is the fact that the world has moved. The economy has dictated much of the change. Many clients can no longer afford the legal process. Technology is delivering legal information to the masses at little or no cost. Legislation has limited the potential dollars available for recovery.

All of this has a trickle-down effect on ADR – both mediation and arbitration. Arbitration has become increasingly complex, adding time and expense to its processes. Fortunately, the arbitration community has begun to respond to these trends. Because mediators have focused primarily on court-annexed mediation, the changing legal environment has had a tremendous impact on it, as well.

But, are the glory days over? Has the ADR field become permeated with practitioners – a mirror of the difficulty facing the legal profession? Have arbitration and mediation reached their zenith?

Is there a future in dispute resolution?

Inside This Issue:

I believe there is.

The playing field is changing. The opportunities are just now beginning to unfold.

Every mediation training I'm aware of, regardless of court jurisdiction, requires a heavy concentration in facilitation and collaboration skills development. Despite the fact that lawyers and, occasionally, courts press for mediators to be evaluative, the statistics show that party satisfaction is substantially higher when the third-party neutral seeks mutual benefit and allows the parties control of the outcome. It is true that evaluative mediation can be efficient. However, its efficiency is often financed at the expense of consumer confidence in not only mediation, but the underlying court system.

We hear from the consumer – the clients – that they prefer a method of dispute resolution that is different from what they have experienced. So why don't we offer them what they want?

The great surge in dispute resolution and particularly in mediation was fueled by the emphasis placed on court-annexed mediation. We should be grateful for that boost. However, the sustainability of our profession will be due to our resourcefulness and ingenuity, not the number of cases ordered to mediation from our courts.

We know that the majority of disputes that surface in society never touch any part of the legal system. Yet, the parties involved feel the same frustration and desire resolution of their differences. How do we take our services to these individuals?

We know that businesses and non-profit organizations struggle with conflict – internal and external. How can we use our skills to address their needs?

We know that our communities struggle to deal with diversity and societal problems. Where can we employ our peacemaking talents to calm neighborhoods and council chambers?

My point is this: While our legal system needs an increasingly strong force of dispute resolution professionals to work with the courts and lawyers to find effective solutions, we are overlooking vast opportunities to extend the reach of our training, our abilities, and our basic motivation into the everyday lives of our fellow citizens.

I want to encourage you to join me and others in this great profession and do the following:

1. Promote the field. Take every opportunity to tell others about the benefits of working collaboratively. Highlight the advantages of utilizing the talents and skills of women and men who have purposefully honed their ability to bring others together.
2. Offer your services pro bono. Take conflict head-on. Volunteer to serve where you can be an impartial and neutral third party. Your reputation will grow and others will seek you out.
3. Recognize the unique openings for problem solvers. That's what you are – a problem solver. Consider reaching out as a consultant to business or non-profits. Don't confine those services to traditional dispute resolution. Take your skills to the boardroom. Help leaders negotiate the future of their organizations.
4. Encourage new dispute resolution professionals. Too often I hear that we do just the opposite. If this field is to grow stronger, it needs new blood. Do what you can to mentor and encourage those who follow.
5. Teach others to converse. Conversation on difficult topics is slowly disappearing. Bring civility back to civilization.

Be vigilant. Don't allow dispute resolution to become a casualty to those who don't understand it or who seek only to make a profit from it or to gain from its annihilation.

You are a part of one of the greatest movements of our time. I am proud to stand with you.

On a personal note in this, my last column as Section chair, I want to thank all of you for your kindness toward me this year and for your dedication to alternative dispute resolution. It's been a pleasure to serve.

Grace and peace,

Joe L. "Joey" Cope, Chair
State Bar of Texas Alternative Dispute Resolution Section
2011-2012.

ALTERNATIVE DISPUTE RESOLUTION SECTION'S ANNUAL CLE

"MEDIATING IN THE RED ZONE"

The Alternative Dispute Resolution Section of the State Bar sponsored its annual CLE event on Friday, January 30, 2012 at the Radisson Hotel in Austin, Texas. More than 100 attendees were treated to a full day of intensive interactive instruction and entertainment. The complete title of the program was "Getting to and Mediating in the Red Zone."

The program focused on migrating through the "Red Zone,"-- utilizing the football analogy of the difficulty of making a touchdown once a team has broached the red zone – from the 20-yard line to the goal line. Paralleling this area of the game of football to the closing activities of mediation to complete the task, the presenters compared and contrasted scoring a touchdown to reaching an agreement on the terms of settlement at the mediation.

The program began with an excellent presentation by Bud Silverberg (Dallas,Texas), on a retrospective of ethical issues for mediation, followed by Kim Kovach (Austin, Texas) discussing current ethical issues and emerging issues in mediation.

Former Judge Michael Schless (Austin, Texas) then updated the gathering regarding the status of the new proposed rule impacting ADR processes in the expedited trial process established as part of HB 274. The proposed rule would have removed a court's ability to refer a case to any ADR process in which the parties have agreed to the expedited process and where the amount in controversy (including attorneys fees and court costs) were $100,000 or less.

Due to input from the Association of Attorney-Mediators and a number of ADR professionals in the state, the Supreme Court rules committee agreed to continue to allow referrals to mediation upon the agreement of the parties.

Course instructors Tracy Allen (Detroit, Michigan) and Austin's own Eric Galton were introduced by this year's program director, Alvin Zimmerman (Houston, Texas). Tracy and Eric have presented together in numerous forums, including Pepperdine Law School where they are regular guest lecturers on the subject of ADR, as well as presenting on this subject both nationally and internationally.

Tracy and Eric provided very useful fact situations and an opportunity for audience participation in role-playing scenarios showcasing difficult problems with principles and strategies to unlock the problem. Their presentation proved to be an informative and entertaining training providing new tools for every mediator's tool box of settlement techniques.

On behalf of the ADR Section Council, we express our appreciation to all who attended, our fabulous speakers, and to the program planning committee.


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Civil Collaborative Law is on the Move: *But, It Needs Your Help*

By Lawrence R. Maxwell, Jr.* and Sherrie R. Abney**

"Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry.

If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time."

Derek Bok, former Dean of Harvard Law School and President of Harvard University

Over twenty years ago a Minnesota family attorney, Stu Webb, created the collaborative dispute resolution process. Collaborative Law continues to progress nicely in the family arena and is beginning to gain momentum in other areas of civil law. The process enables individuals, families, businesses and organizations to maintain control over their relationships with others by empowering the parties to avoid litigation and resolve their disputes *peaceably* which ultimately results in the preservation of time, money and important relationships.

If the process is truly beneficial, why don't more people use it? The answer is simple: the majority of users of legal services have no idea collaborative law exists. For the past seven years it has been the mission of the Global Collaborative Law Council to correct that problem by expanding the use of the collaborative dispute resolution process for resolving all types of civil disputes.

As we reflect on the progress of the civil collaborative movement, the writings of 19th century philosopher and writer Henry David Thoreau come to mind.

"If you built castles in the sky; your work need not be lost;
that is where they should be.
Now, put the foundations under them."

Roger Fisher and William Ury (*Getting to Yes,*1981) leveled the construction site. Stu Webb came up with the plans (1990), and for the past several years collaborative professionals have been laying the foundation. However, the legal culture does not change overnight, and there are many tasks to accomplish in order to build a quality product that will be widely accepted by the legal profession and our client community.

It is encouraging to review a few highlights of the progress that has occurred over the past several years.

- 2000, the Massachusetts Collaboration Law Council was founded by Rita Pollak, David Hoffman and a group of like-minded lawyers in the Boston area.
- 2004, the Collaborative Council of the Redwood Empire was founded by Margaret "Peg" Anderson, Catherine Conner and a group of like-minded professionals in the San Francisco Bay area.

- 2004, the Texas Collaborative Law Council (now Global Collaborative Law Council) was founded by a group of Dallas attorneys committed to assisting clients in managing conflict and resolving disputes without litigation.

- 2005, GCLC developed Protocols of Practice and a Participation Agreement for Civil Collaborative Lawyers.

- Every year members of GCLC conduct trainings for lawyers and other professionals in civil collaborative law, nationally and internationally.

- 2005, Stu Webb and Canadian Marion Korn conduct the first Collaborative Law training in Australia. Today, practice groups are established in the Provinces of New South Wales, Queensland, Victoria, Western Australia and the Australian Capital Territory.

- 2005, Sherrie Abney authored the first book published on civil collaborative law: *Avoiding Litigation: A Guide to Civil Collaborative Law*.

- 2005, Robert Matlock, Sherrie Abney and Larry Maxwell were keynote speakers on collaborative law at a conference held at Oxford University by the ADR Group, the largest ADR organization in the United Kingdom.

- 2005, International Academy of Collaborative Professionals established a Civil Collaborative Practice Committee. Today, the organization counts over 5,000 members in all states in the U.S. and in twenty-five countries.

- 2006, the American Bar Association Section of Dispute Resolution created a Collaborative Law Committee. The ABA Collaborative Law Committee has developed a bold Mission Statement and created subcommittees and liaisons to expand the understanding and use of the Collaborative Law process nationally and internationally.

- 2007, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07477, which squarely supports Collaborative Law provided that the client has been informed about the benefits and risks of participating in the process and given his or her informed consent.

- 2008, at the 2nd European Collaborative Law Conference in Cork, Ireland, sponsored by the IACP, Mary McAleese, President of the Republic of Ireland, opened the Conference by stating that Ireland has endorsed Collaborative Law as its first choice for dispute resolution.

- 2009, the Uniform Law Commission, by a unanimous vote, approved the Uniform Collaborative Law Act, which as of this date has been enacted in three states (including Texas in matters arising under the Family Code), and has been introduced in several other states and the District of Columbia.

- 2009, in the Czech Republic, GCLC member Marie Brozova made a presentation on Collaborative Law to the International Conference of ADR.

- 2009, Kathy Bryan, President and CEO of the International Institute for Conflict Prevention & Resolution (CPR Institute) was keynote speaker at GCLC's 6th Annual Civil Collaborative Law Training.

- 2009, the Kampala Law Society sponsored a Collaborative Law Training for lawyers, judges and law students at Uganda Christian University.

- 2010, in New Delhi, India at a conference of the Indo-American Chamber of Commerce, Collaborative Law was included in a presentation on international dealings and ways to stay out of foreign courts.

- 2010, Southern Methodist University Dedman School of Law established a three hour course in civil collaborative law, taught by Sherrie Abney. Other law schools and universities are in the process of developing civil collaborative law courses.

- Sherrie Abney. Other law schools and universities are in the process of developing civil collaborative law courses.

- 2011, the first textbook on civil collaborative law was published, authored by Sherrie Abney: *Civil Collaborative Law: The Road Less Travelled.*

- 2011, Presentation by Sherrie Abney at the Universidad de Ciencias Economicas y Sociales (University of Economic and Social Sciences) in Buenos Aires, Argentina. Lawyers in Buenos Aires have begun plans to incorporate the collaborative dispute resolution process into their practices.

- 2011, New York State Bar Association published an outstanding article supporting the Uniform Collaborative Law Act.

- 2012, in January the first edition of *The World of Collaborative Practice: A Magazine Promoting Collaborative Dispute Resolution for the Full Range of Possibilities*, was published on-line by carl Michael Rossi and Gloria Vanderhorst.

- Several states and local bar associations in the U.S. have established Collaborative Law Sections, which regularly conduct CLE programs.

- In Canada, collaborative practice is getting explicit recognition as a preferred option. The Province of Alberta has enacted, and several other Provinces are proposing legislation requiring lawyers to advise clients about the benefits of collaborative law before commencing actions in family law. A similar provision in all civil matters will be the next step.
- Collaborative Law organizations are developing *pro bono* programs to train collaborative professionals to work with Community Dispute Resolution Centers.

- Initiatives are underway to implement collaborative law principles in prestigious international organizations such as the Society of Trust & Probate Practitioners (STEP) and the World Intellectual Property Organization (WIPO).

- The U.S. State Department hosts visitors each year from other countries to tour several cities to gain knowledge of our legal system. During the visitors annual visit to Dallas, members of GCLC make presentations on the collaborative process. After one visitor returned to Pakistan, he used his newly acquired collaborative skills to settle a long standing tribal dispute over land.

- Articles are being published regularly in publications of the legal profession, trade association journals and local and national media.

The outstanding work of a number of dedicated individuals is creating a solid foundation for civil collaborative law, but the work is not finished. Now, it is up to you to start building a unique edifice that will provide relief for clients that cannot be accomplished through adversarial processes.

Today, litigation is the *First Option* for resolving disputes. How do we make the collaborative process and other ADR processes the *First Option*? We must educate the public regarding the benefits of the collaborative process. We must talk about the process at every opportunity, with every individual and group, make presentations, write articles, post blogs. We must exhibit a conviction, commitment, and determination beyond lip service.

On a family trip to Morocco, a youth went to a construction site where a castle was being built for the King of Morocco. The boy and his father watched as a elderly craftsman sat cross legged and carved out very small pieces of colored mosaic tiles and put them on the wall, one by one. As the young boy watched he realized that it would take years to complete the castle and the craftsman would probably be dead before it was finished. His Dad said that the

meticulous, time consuming labor of the worker will result in something so magnificent that it will be special and unique. The workers who lay foundations do not get much credit for the building. But, buildings will not stand without solid foundations.
Derek Bok's prediction is coming true. Our society's greatest opportunities lie in tapping human inclinations towards collaboration and compromise. Many dedicated lawyers and other professionals around the world truly believe the collaborative process is good for their clients, and that belief gives us assurance that the future of Collaborative Law is bright.

**** Lawrence R. Maxwell, Jr.*** *is an attorney, mediator, arbitrator and practitioner of collaborative law in Dallas, Texas. He is a charter member and currently serves as co-chair of the Collaborative Law Committee of the ABA Section of Dispute Resolution, and was the Section's Advisor to the Uniform Law Commission Committee that drafted the Uniform Collaborative Law Act.*

Larry is a founding director and the Executive Director of the Global Collaborative Law Council, Inc. (formerly the Texas Collaborative Law Council, Inc.), and co-founder and a past Chair of the Dallas Bar Association's Alternative Dispute Resolution and Collaborative Law Sections, and co-founder and vice-chair of the State Bar of Texas Collaborative Law Section. He is a charter member and a past President of the Association of Attorney-Mediators. He has authored numerous articles and make presentations on collaborative law nationally and internationally. He may be reached at lmaxwell@adr-attorney.com

***** Sherrie R. Abney*** *is a collaborative lawyer, mediator, facilitator, arbitrator, collaborative trainer, and adjunct professor of law at Southern Methodist University Dedman School of Law. She was co-founder and first Chair of the Dallas Bar Association Collaborative Law Section, past Chair of the ADR Section of the Dallas Bar and former member of the State Bar of Texas ADR Section Advisory Council. As a founding director of the Global Collaborative Law Council, she has served as Vice President of Education and Training for the organization from 2004-2012, and serves on the Collaborative Law Committee of the DR Section of the American Bar Association.*

Sherrie has trained and presented in dispute resolution conferences and workshops in Cork, Ireland, Sydney, Australia, Oxford University, Kampala, Uganda, Buenos Aires, Argentina, Canada, and major cities around the U.S. She is the author of Avoiding Litigation, A Guide to Civil Collaborative Law, and a text entitled Civil Collaborative Law, the road less traveled as well as numerous articles on resolving civil disputes using collaborative skills. She may be reached at sherrie.abney@att.net

IS A MEDIATED SETTLEMENT INVOLVING A CHILD BINDING?

By Alvin L. Zimmerman and Gary J. Zimmerman***

Family lawyers have taken comfort in having in the Texas Family Code a provision that has been used for years to provide assurance that once parents mediated their Suit Affecting Parent Child Relationship (SAPCR) pursuant to section 153.0071, their agreement was binding and the parties could leave the mediation with a sense of accomplishment that what could have been an emotional and expensive contested matter had been amicably concluded. The only proviso was compliance with §153.0071, which provides:

Alternate Dispute Resolution Procedures

(a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or nonbinding.

(b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the seeking to avoid rendition of an order based on the arbitrator's award.

(c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.

(d) A mediated settlement agreement is binding on the parties if the agreement:

> (1) provides, in a prominently dis played statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:

> (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
>
> (2) the agreement is not in the child's best interest.

(f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the' court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall or-

der appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. This subsection does not apply to suits filed under Chapter 262.

(g) The provisions for confidentiality of alternative dispute resolution procedures under Chapter 154, Civil Practice and Remedies Code, apply equally to the work of a parenting coordinator, as defined by § 153.601, and to the parties and any other person who participates in the parenting coordination. This subsection does not affect the duty of a person to report abuse or neglect under § 261.101.

Recently, however, the apparent certainty provided by compliance with § 153.0071 has been called into question. In the case of *In re Stephanie Lee, Relator*, No. 1411-0714CV 9-13-2011) (arising out of a case in the 309th Harris County District Court, Cause No. 2005-41798), now pending in the Supreme Court of Texas (No. 11-0732), the trial court availed itself of the general antecedent Section of the Texas Family Code, § 153.002, which provides that "The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."

The trial court's decision was confirmed when the Court of Appeals denied the writ of mandamus and held:

"Moreover, this Court has examined and determined that entry of judgment on a mediated settlement agreement, even a completely compliant mediated settlement agreement, is not ministerial. See In re Kasschau, 11 S.W.3d at 311-12 (holding that the section 153.0071 statutory language "entitled to judgment" does not render the entry of judgment a ministerial duty). As in In re Kasschau, the issue presented here is not whether Redus may revoke his consent. Instead, the question is whether the trial court has a ministerial duty to enter the judgment on mediated settlement agreement even where, as here, there is no dispute (and the trial court found) that the mediated settlement agreement is not in the child's best interest. We hold that the trial court has not committed a clear abuse of discretion in refusing to enter judgment on a mediated settlement agreement that is not in the child's best interest."

What happened that caused such a serious deviation from the long-standing rule that as long as section 153.0071 is complied with, a mediated settlement is enforceable as a contract, and when conformed to an Order is enforceable as an order of the court?

On April 8, 2011, the real party in interest, Benjamin Redus ("Redus") filed an amended motion to modify Relator Stephanie Lee's ("Relator") conservatorship and periods of possession of the parties' child. On April 19, 2011, the parties signed a Mediated Settlement Agreement ("MSA") that resolved all of the issues regarding conservatorship and possession of the child, which was in conformity with the provisions of Section 153.0071, and enjoined Stephanie Lee's current husband, Scott Lee ("S. Lee"), from being within five miles of the child when Relator exercised her periods of possession with the child.

Why, you ask, should there be such a provision? The answer is that S. Lee is a registered sex offender who is on probation. [The authors have been advised by the Relator's appellate attorney that S. Lee received ten years of probation in March, 2011. He was not convicted and is no longer on probation. The allegation was that he inappropriately touched the chest of a 12 year old female.]

On May 9, 2011, the Associate Judge took judicial notice that S. Lee (Relator) and Redus had entered into and proved up the elements of an MSA; but the Court refused to enter judgment on the MSA upon learning that S. Lee was a registered sex offender. On July 12, 2011, S. Lee filed an unopposed motion to enter judgment on the MSA and on July 19, 2011, Redus filed an objection to S. Lee's motion to enter, arguing for the first time that the MSA was not in the child's best interest and withdrew his consent to the MSA and requested the Respondent to dismiss S. Lee's motion to enter judgment; or, alternatively, to order the parties to further mediation. On July 25, 2011, the Court took judicial notice of the MSA and heard additional evidence regarding Redus' concern for the child's best interest

under the MSA. During the testimony, Redus admitted that at no time before he signed the MSA was there any such family violence by S. Lee toward the child and Redus admitted that when the MSA was signed, he believed the MSA was in the child's best interest even though he knew S. Lee's status as a registered sex offender. At the conclusion of this hearing the Court ruled that the MSA wasn't in the child's best interest and refused to entered judgment.

Thereafter, the Fourteenth Court of Appeals denied mandamus, and on September 15, 2011 Relator filed its mandamus with the Supreme Court asserting relief from the lower court which held that an MSA, even though properly written, containing the proper irrevocable language in bold caps, underline wording, did not have to be answered by the Court if the Court believed that the facts presented at the motion for judgment on the MSA were not in the child's best interest, even though there was no act of violence pertaining to a member of the family; and, therefore, there was not a finding that the provisions of § 153.0071 were violated which would have justified the setting aside of the MSA. Here the trial court could only rely on the more general language of § 153.002 in denying that the MSA was enforceable.

With this background, our analysis now turns to two other points of interest. First, the critical evidence, when examined, rebuts Redus' contention that S. Lee abused this child (Redus' daughter). Second, per the terms of the MSA, S. Lee was enjoined from being within five miles of the child when the child was with her mother, who lived with S. Lee. There was no evidence that the child was a victim of family violence (inappropriate sexual contact), or that circumstances impaired Redus' "ability to make decisions" as required under § 153.0071. Therefore the facts do not justify a deviation from the only conditions to set aside an MSA recited in § 153.071 (e-1), quoted above.

Next, we review the applicable law to interpret a statute/code and the case law that has dealt with this area of the law. The earlier "best interest of the child: (§ 153.002) provision was incorporated into the Texas Family Code in 1995 (Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995). However, the mandatory enforcement of mediated settlement agreements provision as § 153,0071 (e-1) became effective in 2005 (Acts 2005, 79th Leg., ch.916, Wec.7, eff. June 18, 2005).

The Legislature passed the 2005 amendment to § 153.0071 (e-1) to set aside the rulings in Garcia-Udall v. Udall, 141 S.W.3d 323 (Tex. App. 2003-Dallas, no pet.) (setting aside an MSA which was considered under the code provision which preceded the 2005 amendment which would not have stare decisis affect due to a later change in the law), and In re Kasschau, 11 S.W.3d 305 (Tex.App.-Houston [14th Dist.] 1999, no pet.) in which the court held that illegal provisions in an MSA would not be enforced. Also, the Garcia-Udall court relied on Leonard v. Lane, 821 S.W.2d 275, 278 (Tex.App.-Houston [1st Dist.] 1991, writ denied) which relied upon the old Family Code provision of § 14.06 which also provided that the court did not have to enter an MSA unless it found the MSA was in the child's best interest. The appellate court in Garcia-Udall stated that the trial court did not have authority to enter orders that deviated from the MSA of the parties. Id. at 332.

It is well established law that "a specific statutory provision prevails as an exception over a conflicting general provision," and that a later promulgated statute overrides the ambiguity that would otherwise appear. Tex. Lottery Comm'n v. First State Bank of DeQueen, 325 S.W. 3d 367,628 (Tex. 2010), see Tex. Gov't Code Section 311.026 (b). Hand-in-hand with these rules of statutory interpretation is the common sense notion that a legislature will not do a wasted act by enacting ing a later family code provision which would essentially have no real effect. Applying these interpretation rules, one should not lose sight of the strong presumption that the Legislature weighed and balanced what this case presents -- the competing interests of the best interest of the child and the overriding importance of the mediation process in SAPCR cases, tempered only by the specific exceptions to the general enforceability of § 153.0071, unless the court specifically finds that sections (e-1) are involved, which were not found in the present case.

Thus it is submitted that, in keeping with the statutory construction above stated and coupled with the

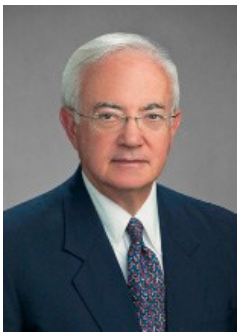
broader general public policy favoring mediated settlement agreements, Courts should desist from negating such a strong statutory mandate:

"It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures."

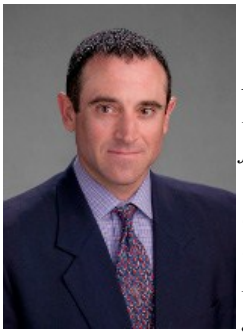
This is such an important decision that for the first time in approximately twenty years the Family Law Council of the State Bar of Texas filed an Amicus Curiae Brief asserting that the MSA should have been enforced. The Solicitor General of Texas filed a brief supporting Mr. Redus' position that the MSA should be set aside and that essentially the trial court at all times retains the power, under § 153.002 Tex. Fam. Code to set aside an MSA under § 153.0071 regardless of whether or not the only conditions in this Code provision to permit a trial court to disallow approval of the MSA.

Even a case which to a trial court may present challenging facts and to some judges tear at the court's equitable heart when there is not a factual threat to a child, such a case would not give a judge the right to overrule clear legislation on the point. See MCI Sales and Services, Inc. v. Hinton, 329 S.W. 3d 475, 500-01 (Tex. 2010) (judges must take statutes as they finds them, fairly interpreting all provisions, even though judges might disagree with the policies set forth in the legislation). Tex. Civ. Prac. & Rem. Code Ann. § 154.002. See also, Fairfield Insurance Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653, 655 (Tex. 2008) (state legislature determines public policy through the statutes it enacts).

Such disputes should be approached with a temperate heart with a strong preference that the Legislature generally should be the branch of government to change family code provisions unless constitutional rights are violated which was not the case in this mandamus action. That said, it appears that the issue before us is a public policy; one upon which the Legislature already has spoken, that § 153.0071 trumps § 153.002 unless an illegal act is involved – a factor not present in this case. See In re Kasschau, 11 S.W.3d 305 (Tex. App.-Houston [14th Dist.] 1999, no pet.).



***Alvin L. Zimmerman** *is an attorney/mediator at Zimmerman, Axelrad, Meyer, Stern & Wise, P.C. Considered one of the most active mediators in Harris County, Texas, Mr. Zimmerman has been named one of H Magazine's Best Lawyers in Houston. His broad-based legal experience includes presiding as a municipal court judge of the City of Houston, a state district judge of the 269 (Civil) and 309 (Family) District Courts, and serving as assistant attorney general for the State of Texas and briefing clerk for the Honorable Judge Ingraham, Federal District Judge for the Southern District of Texas. His mediation experience includes business, health law, construction, commercial, tort,employment, intellectual property (including patent, trademark, and copyright), probate, oil and gas and family law cases. His numerous awards include the Frank G. Evans Mediator of the Year Award by the Center for Legal Responsibility at South Texas College of Law. community and the profession; the University of Houston Distinguished Alumni Award in April 2009.*



****Gary J. Zimmerman** *is an attorney/mediator at Zimmerman, Axelrad, Meyer, Stern & Wise, P.C. His practice includes all aspects of family law, mediation, and civil litigation. Mr. Zimmerman served as a volunteer for the Child Advocates, Inc. and is fluent in Spanish. Mr. Zimmerman's speaking engagements include: "Joint Managing Conservatorship After the 2001 Legislative Session," University of Houston Family Law Practice Institute, Houston, Texas, 2001; "Joint Managing Conservatorship," University of Houston Family Law Practice Institute, Dallas, Texas, 2002; "Attorneys' Fees- Practical, Legal, and Ethical Considerations," University of Houston Litigation and Trial Tactics Seminar, 2002; "Premarital and Marital Agreements," University of Houston Law Foundation, Houston, Texas, 2003; and "Family Law for the Non-Family Law Attorney," In-house seminar/CLE, 2004.*

So You Want to Be a Mediator

*By Erin E. Lawler**

You have completed your basic mediation training. What you learned solidified your interest in pursuing a mediation career. Moreover, you received positive feedback from the trainers. You think you have what it takes, not just to be a mediator, but to be a good one. You frame your basic mediation certificate, print new business cards, and wait for the referrals to start streaming in.

But something is wrong. The phone isn't ringing. You are facing the first hurdle that all mediators must overcome: how to gain practical experience as a new mediator in a field that seems open only to veterans.

My experiences as a new mediator gave me some insight into what it takes to clear that first hurdle. Below is my advice on how to gain practical mediation experience, learn more about your craft, and create a place for yourself in the mediation community.

Keep building your skill set. Train in diverse styles of mediation and dispute-resolution. You will benefit from being open to mediating various subject matters and in various styles. In particular, participating in a family mediation training can be useful. Only mediators who have taken the family training will be qualified to mediate certain disputes involving parents and children; these disputes can provide you with valuable experience. Read as much as you can on mediation and negotiation. Read the classics, such as Fischer and Ury's *Getting to Yes* and stay current by reading articles online and in newsletters like this one.

If you attend a training or class, treat it as seriously as you would a job interview. Take advantage of chances to connect with others in your prospective field. Don't shy away from opportunities to participate in mediation role plays or other chances to demonstrate your knowledge and skills – but remember to be respectful. Events like these also provide a chance to demonstrate your professionalism and humility.

Join mediation associations. Find at least one state-wide mediation association and at least one local association near you and sign up. These associations often have networking events and informational speakers. They can give you opportunities to meet experienced mediators and to continue to learn about the profession. Treat meetings or conferences as opportunities to give as well as opportunities to learn. Volunteer for any position or task available within your association. The more willing you are to help, the more you will become a part of the mediation community.

Introduce yourself as a mediator. Don't be too shy to put your hand out and say, "Hello, I'm so-and-so, and I'm a mediator." This advice applies as much at Starbucks as it does at mediation events. If you want to be a mediator, then identify yourself as one.

I received my first offer to mediate when a professional acquaintance was asked to conduct a mediation, but found that he was too busy. We had only met once, but my acquaintance remembered that I had self-identified as a mediator, and he passed on my information to the case manager.

Observe skilled mediators. One of the best ways to learn the craft of mediation is to observe skilled professionals. Ask to observe mediations at your local dispute resolution center or contact a mediator that

you respect. If you are given the chance to observe a mediation, use it as an opportunity to learn. Pay close attention and ask questions of the mediator afterward to gain insight into the mediator's approach.

Work diligently toward your credentials. You can apply to be a candidate for credentials with the Texas Mediator Credentialing Association once you have completed your 40-hour basic training. From there, you are given four years to complete the required hours of mediation and continuing education to qualify as a credentialed mediator. Observing credentialed mediators is helpful here, too. You may count three observations of credentialed mediators toward your own mediation hours for credentialing. Keep track of all of your hours in a mediation log. Take case notes that you can refer to later, omitting identifying information of the parties.

Carefully logging my progress toward credentialed status helped me stay motivated and reminded me constantly of what I was working toward. I also found that through participation in mediation events and observing credentialed mediators, my progress went faster than I had expected.

Become a volunteer mediator. A quick and effective way to get the hands-on experience you need is to mediate for free. Volunteer at your local dispute resolution center, at your county's "Settlement Week," or at a juvenile justice center. Look into whether your local legal aid clinic offers mediation services. Your local Better Business Bureau may use volunteer mediators. I have also heard of volunteer mediators offering their services during the divorce docket at county court. Family law, juvenile justice, and small claims cases are not the ostensible low-hanging fruit; they are a chance to gain experience while interacting with real parties who deserve quality mediation services.

Co-mediate as often as you can. Co-mediation can be the stepping stone between "no experience" and "experienced." The Ethical Guidelines for Mediators direct the mediator to "inform the participants of the mediator's qualifications and experience." A new mediator conducting a solo mediation may fear that a truthful disclosure of his or her lack of experience could send the parties out the door. Co-mediating with an experienced partner will help you avoid this situation.

The first time I co-mediated, I was partnered with a retired judge. He projected an aura of authority. The parties appeared at ease in his presence and did not object to my relative inexperience.

Be a good teammate. People who succeed in mediation tend to be good collaborators. They are thoughtful, modest, and easy-going. They don't mind sharing the spotlight and they give credit where credit is due. If you have the opportunity to co-mediate, be a good partner. Don't just perform well; be willing to stay late or reconvene on a later day if needed. Help clean up and destroy notes. Most importantly, give constructive, valuable feedback to the other mediator when asked.

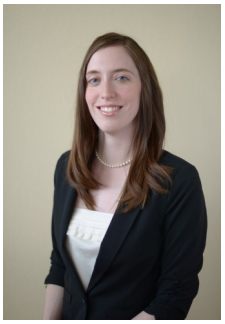
Mediation itself is built on collaboration; so are mediation trainings, conferences, and associations. If you want to participate in any of the above, be someone that other people want to work with.

Market yourself based on what makes you different. Many people want to be mediators. Even when applying for volunteer positions, you will be competing against judges, arbitrators, and trial attorneys, who bring years of experience to the table. Make sure that your application identifies the distinct skills and experience that you bring to mediation. Remember that mediators can benefit from wide-ranging life experiences, not just those that support a legal career.

Find where mediation complements your career. Mediation is rarely a career onto itself. Think hard about why you are drawn to mediation: what skills that you already possess do you exercise in mediation? What parts of the mediation process do you find rewarding? Next, identify where your skills and interests in mediation overlap with your existing career or the career that you would like to have someday.

Be gracious. Experienced mediators do not owe you their time or feedback. If they give it to you, thank them – in writing.

Stay positive. You will probably encounter obstacles on the road to gaining mediation experience. Don't let these obstacles discourage you. If an organization isn't taking volunteers right now, call again in a few months. In the meantime, follow the advice above. Keep building your skills and involving yourself in the mediation community. Read, observe, and learn. In the end, your success as a mediator will not depend on how many mediation hours you have logged, but on how committed you were to learning the craft and continually improving.



* ***Erin Lawler*** *is an attorney and a credentialed mediator through the Texas Mediator Credentialing Association. Ms. Lawler is also the Membership Coordinator of the Austin Association of Mediators. She works for the Texas Governor's Committee on People with Disabilities and serves as a member of the Disability Issues Committee of the State Bar of Texas. She is an honors graduate of Notre Dame Law School, and earned a Master's degree with honors from the London School of Economics, and graduated Phi Beta Kappa from the American University in Washington D.C.*

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Summer	June 15, 2012	July 15, 2012
Fall	September 15, 2012	October 15, 2012
Winter	December 15, 2012	January 15, 2013
Spring	March 15, 2013	April 15, 2013

SEND ARTICLES TO:

Prof. Stephen K. Huber
University of Houston Law Center
Houston, Texas 77204-6060
shuber@uh.edu

"Loser Pays" Rules May Exclude Mediation in Some Small Cases But Overall Impact Muted

By: Mike Schless and Don Philbin***

The "Loser Pays" Legislation that passed the 82nd Legislature and became effective September 1, 2011 did not contain the highly controversial loser pay provision of earlier drafts, but did direct the Texas Supreme Court to adopt rule revisions, one of which could impact ADR practice in smaller cases.

Among other things, HB 274 required the Supreme Court to adopt rules to promote the "prompt, efficient, and cost-effective resolution of civil actions" in which the amount in controversy, inclusive of attorney's fees does not exceed $100,000. TEX. GOV'T CODE §22.004(h).

The Supreme Court appointed a Task Force for Rules in Expedited Actions. The central issue in Task Force deliberations became whether the Expedited Rules would be mandatory, voluntary, or a hybrid.

The Texas Trial Lawyers Association (TTLA), the Texas Association of Defense Council (TADC), and the Texas Chapter of the American Board of Trial Lawyers (TEX-ABOTA) (an association of trial lawyers representing plaintiffs and defendants) aligned to recommend a purely voluntary rule. In doing so, they also recommended that the voluntary rule prohibit trial judges from ordering ADR procedures when the parties elect to proceed under the expedited process.

A dozen current and former leaders of Association of Attorney Mediators (AA-M), the State Bar of Texas ADR Section, and the Supreme Court Advisory Committee on Court-Annexed Mediation responded by urging that this language not be included in the rule.

The Task Force issued its Final Report on January 25, 2012. The report unanimously adopted the TTLA/TADC/TEX-ABOTA position with helpful changes after carefully considering various communications from ADR practitioners extolling the efficiencies of ADR procedures and emphasizing the State's longstanding public policy in favor of ADR initiatives and made helpful revisions as a result:

> Alternative Dispute Resolution. Unless the parties have agreed to engage in alternative dispute resolution or are required to do so by contract, the court must not – by order or local rule – require the parties to engage in alternative dispute resolution.

The submissions and Task Force deliberations were heard by the Supreme Court Rules Advisory Committee (SCAC) on January 27, 2012 at their meeting in Austin. Four representatives of the ADR-provider community attended that meeting. Most of the discussion continued to turn on the issue of whether the rule should be mandatory or voluntary.

A non-binding straw poll was taken, and by a margin of nearly two to one, the SCAC favored a voluntary rule.

So, assuming no change in the Task Force recommended language regarding ADR, and further assuming that the rule remains voluntary, there should be minimal impact on ADR users in Texas.

Users will still have a choice. If they wish to use an ADR process, they can simply opt out of the expedited trial procedure. Conversely, if they choose the expedited procedure, they can still avail themselves

of an ADR procedure if the other parties agree or if a contract requires it.

Even if the rule is mandatory, and both parties agree, there can still be an ADR procedure. If one party desires an ADR procedure, even though the other party does not, a party could potentially avoid the application of the mandatory rule by pleading out of it. There are several ways to do that under the current proposal.

First, the statute applies to district courts, county courts at law, and statutory probate courts. It says nothing about justice and small claims courts.

Second, the statute applies only to cases in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. With the addition of exemplary damages, penalties, interest, expenses, costs and attorney's fees, the actual damages would have to be fairly modest to come within the ambit of the rule. It would not take much of an effort to plead out of that range in good faith.

Third, even if a plaintiff pleads within the rule, a defendant wishing to avoid an expedited process may find a way to plead a counterclaim in good faith that pushes the controversy outside the $100,000 limit since the statute applies to all claims and attorney's fees.

Fourth, all three versions of the rule contain a provision that the "court must remove a suit from the expedited actions process on motion and a showing of good cause by any party."

The impact will likely be in cases where all parties plead within the rule and one party wants to use an ADR procedure but there is no agreement to do so. In such cases, Texas might have the anomalous situation in which a statute authorizes a judge to order an ADR procedure, but a Supreme Court rule prevents the judge from doing so.

For the DRCs and others who mediate cases within the ambit of HB 274 in district and county courts, a mandatory rule could significantly impact the availability of mediation services when fewer than all of the parties want both an expedited trial process and an ADR process.

The issue is now in the hands of the Supreme Court.

**** Michael J, Schless*** *is a Martindale-Hubbell A-V rated attorney whose practice has focused exclusively on ADR since 1992. He has mediated or arbitrated over 1,750 cases involving a broad range of topics and degrees of difficulty. He is a Distinguished Credentialed Mediator by the Texas Mediator Credentialing Association. Mike was the co-founder of the Austin Bar Association's ADR Section and has served as a leader in every statewide ADR association in Texas. Mike is on the faculty of Switerland's University of St. Gallen's Executive Masters of European and International Business Law Program, and teaches mediation in that program annually in Luxembourg.*

***** Don Philbin*** *is an AV-rated attorney-mediator, negotiation consultant and trainer, and arbitrator. He has resolved disputes and crafted deals for more than two decades as a business and commercial litigator, general counsel, and president of communications and technology-related companies. Don holds a Masters of Law degree from Pepperdine's top-ranked Straus Institute for Dispute Resolution, where he is now an adjunct professor, has trained and published at Harvard's Program on Negotiation, is an elected Fellow of the International Academy of Mediators and the American College of Civil Trial Mediators, a member of the Texas Academy of Distinguished Neutrals, and was one of the first U.S. mediators certified under the international standards established by the International Mediation Institute. He has mediated hundreds of individual and class matters in a wide variety of substantive areas and serves as a neutral on several panels, including CPR's Panels of Distinguished Neutrals. Don has published widely in the field, is Chair of the ABA Dispute Resolution Section's Negotiation Committee, and a member of the ADR Section Council of the State Bar of Texas.*

ETHICAL PUZZLER

By Suzanne M. Duvall

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to214-368-7528.

As a "high profile" mediator, you have been hired by the parties in a multi-million dollar law suit to mediate their dispute.

Although both parties are represented by counsel, they have specifically told you that they do not want the attorneys to be present; nor do they want the attorneys advised that the mediation is going to take place, as both parties feel that thus far the attorneys have been the biggest obstacles to resolution.

After the successful mediation of the case, counsel for one of the parties angrily confronts you and accuses you of "mediating the case behind my back." What is your response? What, if any, ethical issues are involved? Please explain.

Courtenay Bass, (Dallas):

My first response is that the parties clearly need new attorneys—but I would keep that thought to myself. I would probably not find myself in this situation as I would have dealt with the matter prior to taking on the assignment of the mediation. The parties have the right to tell their lawyers not to attend the mediation. However, at that point, I am dealing with two pro se parties who may need legal advice at some point in the negotiations. I would encourage the parties to work with their counsel (perhaps with my assistance) so that even if counsel does not attend, they are available for consultation, if needed, during the mediation.

I would be reluctant to proceed without the knowledge of the attorneys. I would want a very strong Agreement to Mediation and an Unrepresented Party Addendum signed before proceeding—if I decided to proceed at all. I would add language that the parties acknowledge that they are unrepresented and have made an independent decision to not have their counsel present.

I would also probably add language that I was free to disclose the Agreement to Mediation and Unrepresented Party Addendum to their counsel if I received an inquiry. Since I am not representing a client, this would not appear to be a violation of the ethical rules. I make it a practice if anyone ever appears without their attorney to get the attorney's written permission to proceed prior to engaging the parties in any substantive negotiations. I do not want to draw a grievance or sanctions motion—no matter how ill advised it may be.

Finally, if I did proceed and then received the angry phone call, I would tell the attorney that I am sorry he/she is so upset, but due to the confidentiality provisions of the statute, I am not at liberty to discuss anything that went on in connection with the media-

tion without the permission of his/her client (and perhaps the other side).

Assuming I had received permission, I would offer to provide the attorney with a copy of the Agreement to Mediate which would state that it was the party's choice to proceed without counsel. I would tell him/her that is he/she has any specific questions, I will be glad to contact the parties to see if they will give me permission to discuss the same. Beyond that, I am sure he/she understands my obligations under the ADR statute to not discuss anything about the process. I would congratulate his/her client and counsel on getting the matter resolved.

This is probably overkill for the situation, but since most of my "clients" are attorneys, in this age of mass emailing, I would want to do all I could to try and defray any negative backlash from counsel.

Michael Curry, (Austin):

While I understand the allure of cutting greedy, contentious lawyers out of the picture, I would decline to mediate the case under those conditions. Part of it would be selfish—I don't want to sacrifice my professional standing with the legal community. Whether mediating in secret would be improper or not, it would be perceived as such by the lawyers even if, in truth, they brought the situation on themselves. I have never tried selling pencils on a street corner and I would rather keep it that way.

The Texas Ethical Guidelines for Mediators provide that a "mediator should not give legal or other professional advice to the parties." §11. The comments to that section provide that, where appropriate, the mediator should encourage the parties to seek "legal … advice before, during or after the mediation process" and that "a mediator should explain generally to *pro se* parties that there may be risks in proceeding without independent counsel."

The two parties could mediate without their attorneys but with their attorneys' knowledge. In that situation the parties will have the opportunity to receive the advice of their lawyers in preparation for the negotiations and can better arrange for a review of any tentative settlement if they so choose.

Not to get all Dr. Phil about it, the problem apparently isn't just contentious lawyers but also the clients' relationship with their lawyers. Encouraging the parties to discuss their request with their lawyers might help get everyone on the same page.

Thomas Noble, (Dallas):

My response would be, "You must be mistaken."

I would never mediate a case where the parties were represented by counsel without disclosure to their lawyers. If their lawyers agree that the parties will appear at the mediation without representation, I will try to work with that, but mediating with parties when I knew that their lawyers did not know they were working with me—no way!

If the parties are so unhappy with their lawyers, why didn't they fire them?

What are they going to do if both their lawyers withdraw after discovering this "secret mediation"? — which sounds both appropriate and probable?

Issues? How about, "Do Unto Others ...."? I have been a litigator for 32 years. I cannot think of any of my colleagues who would appreciate it if a mediator mediated one of his or her cases without his knowing about it.

What about Kant's categorical imperative — is this the kind of *system* we want?

Litigators are humans, too. We get emotionally invested with our clients. Many times we feel as though we have a duty to protect them from their spouses, and many times we feel like we have a duty to protect them from themselves. That may sound paternalistic to some, but isn't the fiduciary relationship paternalistic by definition?

In fact, if a mediator says that to me, I would never use him/her again, and I would encourage all of my friends to follow suit. Whether or not this scenario is

expressly contemplated by the current ethical guidelines for mediators, this mediator showed very poor judgment.

I do not believe in a strict construction of any set of ethical rules, because life is messy. I especially do not believe in a strict construction of the Texas Ethical Guidelines for Mediators because I know some of the people who drafted them. I know the Guidelines to be full of well meaning holes, and aspirational rather than mandatory.

In response to ethical fundamentalists, however, I would argue that this mediator violated Rule 7, which prohibits a mediator from convening a mediation "unless all parties and their representatives ordered by the court has appeared." What does "ordered by the court" mean?

The Preamble to the Guidelines specifically states that these rules apply to voluntary mediations. Is thee some way to reconcile the reference to a court order and the term "voluntary?"

Attorneys who enter the appearances for parties in litigation are representatives "ordered by the court: from the sense that there is a Texas Supreme Court order, otherwise known as the Texas Rules of Civil Procedure, which governs the conduct of such lawyers. Considering the duties they owe, do they not have the right to know that a mediation is going on? Could the court conduct a hearing without the lawyers? Isn't there a good reason for that? Like informed consent?

Then, there is also Rule 11, Comment (a), which requires a mediator to "encourage" parties "in appropriate circumstances" to seek legal advice "before, during and after the mediation process." Encourage? Hmm. How far does that go? Isn't a multi-million dollar lawsuit "appropriate" enough for some rather insistent "encouraging?"

In conclusion, if there is not a rule for this, there ought to be. We do not want a system that allows mediations to occur without notice to the attorneys of record in pending litigation. Any mediator who risks his or her reputation for one mediation fee is surely penny-wise and pound-foolish.

Mike Schless, (Austin):

Behind my Back

A true friend stabs you in the front

-Oscar Wilde

Give that the duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation, TMCA Standards of Practice and Rules of Ethics, Rule 2, there is little that I can say to the angry counsel.

I cannot tell counsel that their won clients chose to exclude them because they were obstructionists, but I can say that I complied with the duty to advise the parties to seek appropriate legal advice and to warn of the risks in failing to do so. Id., Rule 11.

I cannot tell counsel that as much as I would have liked to have them present, the parties did not want counsel informed the mediation would take place, but I can remind them that the ethical rules require the interests of the parties shall always be placed above the personal interests of the mediator. Id., Rule 2, comment b.

I cannot tell counsel that it was the parties who chose to exclude counsel, but I can quote Rule 7 which begins, "*unless the parties agree otherwise*, the mediator shall not convene a mediation session unless all parties and their representatives ordered by the court have appeared …."

I could ask (insist?) that the settlement agreement include a paragraph that says, "the parties agree that prior to mediation they were advised by the mediator that he could not provide legal or other appropriate professional advice before and/or during the mediation, and before signing the settlement agreement; and that there may be significant risks in failing to do so."

In answering this question I have assumed that prior to agreeing to mediate, I (the mediator) first informed the parties that I could not provide legal or other professional advice; that they should feel free to obtain legal and other appropriate professional advice during the mediation and before signing the settlement agreement and that there may be significant risks in failing to do so. Furthermore, because I am a TMCA credential holder, I am applying the mandatory TMCA Standards of Practice and Code of Ethics Rules cited herein or from that source.

Comment: This, like all of the "Ethical Puzzlers" in this column, is based on an actual case, and it points out the sometimes blurred lines we as mediators are often called upon to face—as mediators bound by the Supreme Court and / or TMCA Rules of Ethics; as mediators who want to maintain their relationship's with their attorney clients, and in some cases as mediators who also have a legal or other professional practice with which we also strongly identify.

In the end, ethically speaking, Rule 2 protecting the confidentiality and integrity of the mediation process would definitely apply as would Rule 11 regarding giving legal or other professional advice, along with Rule 7 concerning convening the mediation. Practically speaking, ensuring that the parties sign an air tight Agreement to Mediate and Unrepresented Party Agreement prior to the mediation would seem to be a must: Beyond that…

What do you think? What would you do?

* ***Suzanne M. Duvall*** *is an attorney-mediator in Dallas. With over 800 hours of basic and advanced training in mediation, arbitration, and negotiation, she has mediated over 1,500 cases to resolution. She is a faculty member, lecturer, and trainer for numerous dispute resolution and educational organizations. She has received an Association of Attorney-Mediators Pro Bono Service Award, Louis Weber Outstanding Mediator of the Year Award, and the Susanne C. Adams and Frank G. Evans Awards for outstanding leadership in the field of ADR. Currently, she is President and a Credentialed Distinguished Mediator of the Texas Mediator Credentialing Association. She is a former Chair of the ADR Section of the State Bar of Texas.*

Supreme Court of Florida, In Re:

Amendments to Florida Rule of Civil Procedure 1.270, No. SC 10-2329 (November 3, 2011).

PARTY/REPRESENTATIVE APPEARNCE AT MEDIATION

PER CURIAM.

This matter is before the Court for consideration of proposed amendments to Florida Rule of Civil Procedure 1.720 (Mediation Procedures). The Committee on Alternative Dispute Resolution Rules and Policy (Committee) has filed a petition to amend rule 1.720. The amendments proposed by the Committee revise the requirements in rule 1.720 pertaining to the appearance of a party or a party's representative at a mediation conference. The proposals are in response to the Committee's charge to monitor court rules governing alternative dispute resolution procedures and to make recommendations as necessary to improve the use of mediation.

The Committee's proposals were approved by The Florida Bar's Civil Procedure Rules Committee. The Court published the proposed amendments for comment. Two comments were filed and the Committee filed a response. We adopt the amendments to rule 1.720 as proposed by the Committee, with a minor modification to new subdivision (e) (Certification of Authority). We modify new subdivision (e) to provide that the written notice be served on all parties participating in a mediation conference. Accordingly, Florida Rule of Civil Procedure 1.720 is hereby amended as set forth in the appendix to this opinion. New language is indicated by underscoring, and deletions are indicated by struck-through type. The Committee notes are offered for explanation only and are not adopted as an official part of the rule. The amendments shall become effective January 1, 2012. It is so ordered.

APPENDIX. RULE 1.720. MEDIATION PROCEDURES

(a) Interim or Emergency Relief. [Omitted]

(b) Appearance at Mediation; Sanctions for Failure to Appear. If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys' fees and other costs, against the party failing to appear. Otherwise, unless permitted by court order or stipulated by the parties or changed by order of the court in writing, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) The party or its representative having full authority to settle without further consultation; and

(2) The party's counsel of record, if any; and

(3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

(c) Party Representative Having Full Authority to Settle. A "party representative having full authority to settle" shall mean the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party. Nothing herein

shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.

(d) Appearance by Public Entity. If a party to mediation is a public entity required to operate in compliance with chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.

(e) Certification of Authority. Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, shall file with the court and serve all parties a written notice identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by subdivision (b).

(f) Sanctions for Failure to Appear. If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorneys' fees, and costs, against the party failing to appear. The failure to file a confirmation of authority required under subdivision (e) above, or failure of the persons actually identified in the confirmation to appear at the mediation conference, shall create a rebuttable presumption of a failure to appear.

[Provisions about appointment of mediator, compensation, and conduct of the mediation omitted.]

Committee Notes to 2011 Amendment. Mediated settlement conferences pursuant to this rule are meant to be conducted when the participants actually engaged in the settlement negotiations have full authority to settle the case without further consultation. New language in subdivision (c) now defines "a party representative with full authority to settle" in two parts. First, the party representative must be the final decision maker with respect to all issues presented by the case in question. Second, the party representative must have the legal capacity to execute a binding agreement on behalf of the settling party. These are objective standards. Whether or not these standards have been met can be determined without reference to any confidential mediation communications.

A decision by a party representative not to settle does not, in and of itself, signify the absence of full authority to settle. A party may delegate full authority to settle to more than one person, each of whom can serve as the final decision maker. A party may also designate multiple persons to serve together as the final decision maker, all of whom must appear at mediation.

New subdivision (e) provides a process for parties to identify party representative and representatives of insurance carriers who will be attending the mediation conference on behalf of parties and insurance carriers and to confirm their respective settlement authority by means of a direct representation to the court. If necessary, any verification of this representation would be upon motion by a party or inquiry by the court without involvement of the mediator and would not require disclosure of confidential mediation communications. Nothing in this rule shall be deemed to impose any duty or obligation on the mediator selected by the parties or appointed by the court to ensure compliance. The concept of self determination in mediation also contemplates the parties' free choice in structuring and organizing their mediation sessions, including those who are to participate. Accordingly, elements of this rule are subject to revision or qualification with the mutual consent of the parties.

From the Editors:

Since Florida is second only to Texas in leadership on ADR matters, we thought this Rule regarding appearance at mediation and authority to settle would be of interest to the readers of Alternative Resolutions.

CALENDAR OF EVENTS 2012

40-Hour Basic Mediation Training * Houston * May 10-12 continuing May 17-19, 2012 * *Worklife Institute* * For more information contact Diana C. Dale or Elizabeth F. Burleigh * Phone: 713.266.2456 * Website: **http://www.worklifeinstitute.com**

Family Mediation Training * Denton * May 10-13, 2012 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: **http://www.twu.edu/ce/Mediation.asp**

Expert Mediation Training * Denton * May 18-19, 2012 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: **http://www.twu.edu/ce/Mediation.asp**

40-Hour Basic Mediation Training * Austin * May 21-25, 2012 * *The University of Texas in Austin School of Law, Center for Public Policy Dispute Resolution** Phone 512.471.3507 * email at cppdr@law.utexas.edu * Website: **http://www.utexas.edu/law/centers/cppdr**

40-Hour Basic Mediation Training * Lubbock, Texas * May 21-25, 2012 * *Office of Dispute Resolution of Lubbock County* * For more information Harrison W. Hill at (806)775.1720 * HHill@co.lubbock.tx.us * Website:**http://www.co.lubbock.tx.us/egov/docs/1291311234620.htm**

40-Hour Basic Mediation Training * Houston * June 8-10 continuing June 15-17, 2012 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or **www.law.uh.edu/blakely/aawhite**

Family Mediation Training * Denton * June 14-17, 2012 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: **http://www.twu.edu/ce/Mediation.asp**

Expert Mediation Training * Denton * June 20-21, 2012 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: **http://www.twu.edu/ce/Mediation.asp**

40-Hour Basic Mediation Training * Houston * June 27-30, 2012 * *Manousso Mediation & Alternative Dispute Resolution—Conflict Resolution Services and Training* * Phone 713.840.0828 * Website: **http://www.manousso.us**

Commercial Arbitration Training * Houston * August 15-18, 2012 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Houston * September 7-9 continuing September 14-16, 2012 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Ruidoso, New Mexico * September 10-14, 2012 * *Office of Dispute Resolution of Lubbock County* * For more information Harrison W. Hill at (806)775.1720 * HHill@co.lubbock.tx.us * Website:**http://www.co.lubbock.tx.us/egov/docs/1291311234620.htm**

2011-2012 Officers and Council Members

Officers

Joe L. "Joey" Cope, Chair
Duncum Center for Conflict Resolution
1541 N. Judge Ely Blvd.
ACU Box 27770
Abilene, Texas 79699-7770
Office: 325-674-2015
Fax: 325-674-2427
Email: copej@acu.edu

Hon. Alvin Zimmerman, Chair-Elect
Zimmerman, Axelrad, Meyer,
Stern & Wise, P.C.
3040 Post Oak Blvd., Suite 1300
Houston, Texas 77056-6560
Office: (713) 552-1234
Fax: (713) 963-0859
Email: azimmerman@zimmerlaw.com

Susan G. Perin, Treasurer
Attorney * Mediator *Arbitrator
3207 Mercer Street
Houston, Texas 77027
Office: 713-572-5000
Fax: 713-551-9301
Email: susan@susanperin.com

Ronald L. Hornberger, Secretary
Plunkett & Gibson, Inc.
70 NE Loop 410, Suite 1100
San Antonio, Texas 78216
Office: 210-734-7092
Fax: 210-734-0379
Email: hornbergerr@plunkett-gibson.com

Susan B. Schultz, Past Chair
The Center for Public Policy
Dispute Resolution
727 E. Dean Keeton
Austin, Texas 78705
Office: 512-471-3507
Fax: 512-232-1191
Email: sschultz@law.texas.edu

Consultants

Stephen K. Huber, Co-Chair
Newsletter Editorial Board
Post Office Box 867
Bellville, Texas 77418
(979) 865-0020
shuber@uh.edu

E. Wendy Trachte-Huber, Co-Chair
Newsletter Editorial Board
Post Office Box 867
Bellville, Texas 77418
(979) 865-0020
countrymediator@aol.com

Robyn G. Pietsch,
Newsletter Editor
1109 Ridgevalley Dr.
La Porte, Texas 77571-2895
(281) 638-4042
rappug55@gmail.com

Special Representatives

Cecilia Morgan
TMCA Liaison
JAMS
8401 N. Central Expressway
Suite 610
Dallas, Texas 75225
Office (214) 744-5267
FAX (214) 720-6010
Email: chm320@sbcglobal.net

Daren Brown, TYLA
701 S. Taylor, Suite 500
Amarillo, Texas 79101
Office: 806-468-3329
Email: daren.brown@sprouselaw.com

Council Members
Terms Expire June 2012

Hon. Anne Ashby
PMB 152
11700 Preston Road, Suite 660
Dallas, TX 75230
Office: 214-269-7634
Mobile: 214-384-0674
Fax: 214-889-9999
Email: aashby@anneashbylaw.com

Hon. Dwight E. Jefferson
Dwight E. Jefferson,
Attorney at Law, P.L.L.C.
405 Main Street, Suite 950
Houston, TX 77002
Office: 713-222-1222
Fax: 713-993-0533
Email: dj@jeffersonlawfirm.com

Donald R. Philbin, Jr.
P.O. Box 12286
San Antonio, Texas 78212
Office: 210-212-7100
Fax: 210-212-7118
Email: don.philbin@adrtoolbox.com

James Edward "Ed" Reaves, Jr.
Hill Country Dispute Resolution Center
327 Earl Garret, Suite 108
Kerrville, TX 78028
Office: 830-792-5000
Email: hcadrc@ktc.com

Council Members
Terms Expire June 2013

Hon. Robert A. "Bob" Gammage
P.O. Box 400
Llano, Texas 78643
Office: 512-657-3575
Email: bgllano@yahoo.com

Hon. Donna S. Rayes
81st Judicial District Court
P.O. Box 161
Jourdanton, Texas 78026
Office: 830-769-3572
Email: dcourt81_218@yahoo.com

William B. "Bill" Short
Coats Rose, P.C.
5420 LBJ Freeway, Suite 1300
Dallas, Texas 75240
Office: 972-982-8458
Email: wshort@CoatsRose.com

Patty Wenetschlaeger
Brewer Jackson, P.C.
5201 N. O'Connor Blvd., Fifth Floor
Irving, Texas 75039
Office: 972-870-9898
Email: pwenetschlae-
ger@brewerjackson.com

Term Expires 2014

Guy L. Hawkins
P.O. Box 2664
Lubbock, Texas 79408-2664
Office: 806-762-5289
Email: sofgl@yahoo.com

Robert C. Prather, Sr.
Snell Wylie & Tibbals
8150 N. Central Expressway, Suite 1800
Dallas, Texas 75206
Office: 214-691-2500
Fax: 214-691-2501
Email: rprather@snellwylie.com

Hon. Susan S. Soussan
1330 Post Oak Blvd., Suite 2880
Houston, Texas 77056
Office: 713-961-2880
Fax: 713-961-2886
Email: susan@soussan-adr.com

Hon. John J. Specia, Jr.
Plunkett & Gibson, Inc.
70 NE Loop 410, Suite 1100
San Antonio, Texas 78216
Office: 210-734-7092
Fax: 210-734-0379
Email: speciaj@plunkett-gibson.com

ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ **Section Newsletter, *Alternative Resolutions*** is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation
and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ **Valuable information** on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

✓ **Continuing Legal Education** is provided at affordable basic, intermediate, and advanced levels through announced conferences, interactive seminars.

✓ **Truly interdisciplinary** in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

✓ **Many benefits** are provided for the low cost of only $25.00 per year!

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
State Bar of Texas
ADR Section
P.O. Box 12487
Capitol Station
Austin, Texas 78711

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2011 to June 2012. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____

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2011-2012 Section Committee Choice_____

ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. Names, dates, quotations, and citations should be double-checked for accuracy.
5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. Check your mailing information, and change as appropriate.
8. The author should provide a brief professional biography and a photo (in jpeg format).
9. The article may have been published previously, provided that the author has the right to submit the article to Alternative Resolutions for publication.

Selection of Article

1. The editor reserves the right to accept or reject articles for publication.

2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.

2 Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

ALTERNATIVE RESOLUTIONS
POLICY FOR LISTING OF TRAINING PROGRAMS

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website address or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2012, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

http://www.texasadr.org