# Alternative Resolutions

## State Bar of Texas
## Alternative Dispute Resolution Section

*Erich Birch, Chair, ADR Section* — Fall/Winter, 2015-2016 - Vol. 25, No. 1


As I look away from my web browser and reflect on the latest breaking news stories it occurs to me that the business of conflict is thriving. Just in the past few weeks we've experienced explosions in Paris, planes brought down, high profile shootings, campus unrest, climate demonstrations, refugee placement demands, indictments of police officers, etc., etc., etc. Each story was a direct result of a conflict in views and often the consequences were a serious life altering event for those involved. Although the occasional weather story or accident will get front page billings for a while, conflict gets our attention and seems to produce the stable of news stories. And of course these national headlines don't mention the countless local conflict stories involving accidents, family disagreements, construction disputes, contract breaches, neighborhood fights, etc., etc. And at the end of the day, our own list of personal conflicts doesn't even make the cut as being newsworthy (at least we hope not).

The legal profession deals in conflict, and our training and the practical experience of preparing a case provide us with insight on the sources and development of conflicts. As ADR practitioners we get an even better view of conflict as two sides present their often starkly different versions of the case history and the significance of key events. This experience confirms what the experts tell us, that when there is an actual or perceived threat to the interests, needs, or concerns of an individual or group the pressure builds and at some point the dam will likely break. And then we have news.

It appears that as long as there are people in the world there will be conflict, so the forecast is an abundance of work for our profession. But what is somewhat confusing is that notwithstanding all of the conflict, most people seem to want the exact opposite. We claim to want peace in our lives, and we are especially reminded of that during this time of year with all the mutual wishes of happiness and peace. Yet conflict abounds.

At this point it'd be great to provide the insightful silver-bullet zinger answer. But the actual result of my musings was the realization that I've got important work to do and need to step up my performance as a problem solver and peacemaker.

## Inside This Issue

CLICK ON TITLE TO JUMP TO ARTICLE

Like many in the ADR profession, I get great satisfaction when I help to solve a problem, resolve a dispute, and perhaps give some peace to the conflicted parties that entered the room. As I reflected on the news stories it dawned on me that every time I and every other ADR practitioner resolves a conflict that we just might have also avoided another headline.

In other news, this issue of the newsletter is being published a little later than in previous years. This is partly due to schedules that are way too full, but the positive spin is that the timing is perfect for promoting the Section's upcoming CLE and Annual Meeting in January! Remember there is a new 101 course on Thursday, January 21, and then the CLE and Annual Meeting are on Friday, January 22. The CLE is in Austin at the Texas Law Center, and here is the link to the conference brochure: **https://www.texasbarcle.com/materials/Programs/3254/Brochure.pdf.**

As always, we will present the Judge Frank Evans Award at the Annual Meeting, and actually this year there will be two Awards. John Allen Chalk of Fort Worth and Judge Alvin Zimmerman of Houston will both receive the Award this year. Both have substantially contributed to the development, practice, and availability of ADR in Texas, including having served on the ADR Section Council and as Section Chairs. Each has also been instrumental in the advancement of ADR in the Texas legislature and speaking on ADR topics nationally. My sincere congratulations to each of you.

And speaking of the Award's namesake, Judge Evans, we certainly hope and wish the best for you.

In the newsletter you'll also find the Nominating Committee's nominations for members of the Council and for the new slate of officers. As approved by the Section in its Bylaws amendments earlier this year, the Section will vote on the nominations at the Annual Meeting in January, but the changes to the Council are not effective until June 1. So I still have time to thank the members that will be rolling off the Council in 2016.

Finally, inside you are also being provided with a bit of a teaser on the ADR Handbook which is very near to its release date. In addition to the several fine articles from respected practitioners, there are also excerpts from several chapters of the new Handbook along with a brief author bio. Enjoy and we'll see you in January.

# SBOT ADR Section
# September 19, 2015
# Report of Nominating Committee

The SBOT ADR Section Nominating Committee met and nominated the following Section Officers to begin service in June of 2016:

Chair: Lonnie Schooler of Houston
Chair Elect: John DeGroote of Dallas
Treasurer: Trey Bergman of Houston
Secretary: Linda McClain of Navasota

Likewise, the Nominating Committee nominated the following members of the Council:

One Year (Unexpired) Terms (Classes of 2016 and 2017 consecutively):

- David Cavillo of Edinburg

Three Year Term:

- Guadalupe Rivera of El Paso
- Hunter McLean of Fort Worth
- Jeff Jury of Austin
- Phylis Speedlin of San Antonio

Respectfully submitted,

Don Philbin
Immediate Past Chair
Nominating Committee Chair

# SBOT ADR Section
# September 19, 2015
# Report of Frank G. Evans Award

The SBOT ADR Section Evans Award Committee met and discussed several potential recipients for the 2016 Frank G. Evans Award. After considering the matter, your Committee nominates the following people for the 2016 Evans Award to be awarded at the Section's Annual Meeting in January 2016:

**John Allen Chalk** of Fort Worth and **Alvin Zimmerman** of Houston

Both Chalk and Zimmerman have substantially contributed to the development, practice, and availability of ADR in Texas, including extended service on the ADR Section Council and as Section Chairs. Both have been instrumental in monitoring and focusing legislative efforts fostering ADR in Texas and speaking on ADR topics nationally.

Chalk is a long-time member of the College of Commercial Arbitrators, the Chartered Institute of Arbitrators, the Association of Attorney-Mediators, the Texas Attorney-Mediators Coalition and a panel member for the American Arbitration Association, the American Health Lawyers Association, CPR Institute, the London Court of International Arbitration and others. He is also a distinguished advocate who has served as president of the American Inns of Court chapter in Fort Worth and the Tarrant County Bar Association.

Zimmerman is one of the most active mediators in Harris County, Texas and 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 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.

Zimmerman was awarded the Frank G. Evans Mediator of the Year Award by the Center for Legal Responsibility at South Texas College of Law and was recognized as the outstanding adjunct professor by a local law school. He served on the board of a national bank and was counsel to and on the board of a New York Stock Exchange company. Zimmerman received the University of Houston Distinguished Alumni Award in April 2009.

### About the Frank G. Evans Award

The Evans Award is created and dedicated as a living tribute to Justice Frank G. Evans, who is considered the founder of the alternative dispute resolution movement in Texas.

The award is awarded annually to persons who have performed exceptional and outstanding efforts in promoting or furthering the use or research of alternative dispute resolution methods in Texas. The recipients should be persons who are recognized leaders in the field of ADR. Although the award is presented by the ADR Section of the

State Bar of Texas, the recipients do not have to be either a member of the State Bar, a member of the ADR Section, a lawyer, or a practicing third-party neutral.

Up to two awards may be awarded annually.

Respectfully Submitted,

Don Philbin
Immediate Past Chair
Evans Award Committee Chair

**Don Philbin** *is the current Past Chair of the ADR Section. He was named the 2014 "Lawyer of the Year" for Mediation in San Antonio by Best Lawyers®, was recognized as the 2011 Outstanding Lawyer in Mediation by the San Antonio Business Journal, is one of seven Texas mediators listed in The International Who's Who of Commercial Mediation, and is listed in Texas Super Lawyers. Don is an elected fellow of the International Academy of Mediators, the American Academy of Civil Trial Mediators, and the Texas Academy of Distinguished Neutrals.*

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**Online Brochure with Registration Form**
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# SUZANNE M. DUVALL NAMED TMCA OUTSTANDING CREDENTIALED MEDIATOR-2015

By Wayne Meachum

At its annual symposium in Austin, Texas, on October 17, 2015, the Texas Mediator Credentialing Association named Suzanne M. Duvall its Outstanding Credentialed Mediator of the Year.It is the first such award given by TMCA in its 14-year history. The award will become a regular part of the TMCA's yearly symposium and will honor outstanding credentialed mediators who have distinguished themselves in the mediation profession.

Suzanne Duvall is a Dallas-based mediator who is affiliated with Burdin Mediations and who mediates in Texas and across the country. She has been a full-time mediator for over 20 years and has mediated over 2500 cases in all areas of civil disputes. She is also an arbitrator and an experienced trainer in mediation.

Ms. Duvall has received numerous awards for her mediation skills, leadership and service to the mediation profession including the *Frank G. Evans Award* given by the State Bar of Texas ADR Section for outstanding leadership in the field of dispute resolution, the first ever American Arbitration Association *Brutsche Award for Professional Excellence in Dispute Resolution*, the Texas Association of Mediators *Susanne Adams Award for Outstanding Commitment and Dedication to the Mediation Profession*, and the *Association of Attorney Mediators Pro Bono Service Award*. She has also been selected "Super Lawyer" for 13 consecutive years, 2003 -2015, by Thomson Reuters and the publishers of *Texas Monthly* and has been named to Texas Best Lawyers 2009 – 2015 and Best Lawyers in America 2014 - 2015. Her website is at **www.SuzanneMDuvall.com.**

Suzanne's leadership and service in the ADR field has included positions with the State Bar of Texas (former Member Board of Directors, Past Chair – ADR Section, Vice-Chair Professionalism Committee), Dallas Bar Association (Past Chair – ADR Section), Texas Mediator Credentialing Association (Founding Member, Past President, Current Board Member), Association of Attorney-Mediators (Past National Chair), Texas Association of Mediators (Past President, Current Board Member), Life Fellow, Texas Bar Foundation, Fellow, Center for Public Policy Dispute Resolution, UT School of Law, Master, Annette Stewart American Inn of Court. In addition to all of her other activities, Suzanne is the editor of the "Ethical Puzzler" column in the State Bar ADR Section newsletter; a position she has held for the last 14 years.

The TMCA is a state-wide voluntary organization that provides credentialing for mediators who meet established requirements for training, experience and ethical practice. TMCA is the only mediation organization that has mandatory ethical guidelines and that is sanctioned by the Supreme Court of Texas. The organization has 392 credential holders across Texas.

***Suzanne Duvall and Wayne Meachum***

# WHAT IS A REASONED AWARD?

**BY LIONEL M. SCHOOLER**

Experienced Arbitrators and advocates frequently use boilerplate terms without pausing to decide what they actually mean. The undoubtedly unanticipated consequence of such casual usage of the term "reasoned award" was on full display on October 8, when the Houston First Court of Appeals issued its opinion in *Stage Stores, Inc. v. Gunnerson* (CITE), addressing a question of first impression: what is meant by the term "reasoned award" in an arbitration clause and, correspondingly, what must an Arbitrator do to fulfill the obligation to issue such an award? The Court's decision yielded three opinions, a majority, a concurrence and a dissent.

**Background**. The underlying case arose from an employment relationship. The Employee had signed an employment agreement ("Agreement") in connection with accepting employment as a Senior Vice President of the Employer. Among other clauses, the Agreement permitted the Employee to receive certain financial benefits upon termination if his departure were initiated by him "for good reason." In that regard, the Agreement required that in advance of such a termination, the Employee would be obligated to provide advance notice of the grounds supporting the "good reason," as well as to provide the Employer with an opportunity to cure.

The Employee resigned in 2012, stating that he was terminating the agreement for good reason. There was apparently no notice or opportunity to cure provided to the Employer. The Employer declined to pay the benefits the Employee thought he was owed. He therefore initiated an arbitration proceeding because of the refusal to pay benefits.

**The Arbitration**. The Agreement called for arbitration subject to the Federal Arbitration Act, adjudicated under the rules of the American Arbitration Association. The Agreement did not specify a form of award to be issued by the Arbitrator. Following the initial management conference, the Arbitrator issued a Scheduling Order noting that the parties had agreed that the award would be a "reasoned award." Unsurprisingly, given the frequency with which it is used, the term "reasoned award" stood alone, without elaboration.

During the Hearing, the Employer repeatedly challenged the Employee's lack of compliance with the notice and cure requirements, asserting that the Employee's failure to comply justified rejecting his claim.

The Arbitrator eventually issued an award mostly favorable to the Employee, allowing him to recover attorney's fees and costs, but barring his recovery of damages premised upon the present value of future stock options for failure of proof. In the award, the Arbitrator also noted the Employee's main argument, that the restructuring of the Employer's organization chart "materially reduced his status within the company," thereby providing the "good reason to resign."

**Challenge to the Award**. The Employer moved to vacate the award in the trial court. The trial court denied this, granted confirmation of the award, but denied the Employee's request for additional attorney's fees incurred in having the award confirmed.

The *Gunnerson* Court majority upheld vacatur of the award because it could not determine whether or not the award qualified as a "reasoned award."

The majority noted first that the Federal Arbitration Act, which governed this proceeding, provided in section 10 the exclusive grounds upon which to vacate an award. In that regard, the Court noted

that the Employer was asserting the right to relief based upon the fourth criterion for vacatur, FAA §10(a)(4), that the Arbitrator exceeded her powers, premising this challenge upon the award's allegedly being so deficient as to fail to satisfy the requirement in the Agreement that the award would be "reasoned." The Court characterized this challenge as satisfying the vacatur standard because the Arbitrator "so imperfectly executed her powers that a mutual, final and definite award upon the subject matter submitted was not made."

From that foundation, the *Gunnerson* Court majority then examined the bases upon which a matter may be returned to an Arbitrator on remand, concluding that such a step was appropriate under the FAA if the award contains a mistake on its face, is ambiguous or fails to adjudicate completely the matters raised.

It then reached the focal point of the appeal, whether the Arbitrator had in fact issued the "reasoned award" required by the parties. Perusing the Agreement, the majority determined that no standard was established as to the type of award to be rendered, but it then found that the parties had clearly agreed to issuance of a "reasoned award" as the result of the Initial Management Conference, a result conforming with the requirements of the AAA's applicable Rules.

The majority then noted that the parties had not defined what was meant by the term "reasoned ward," other than to say that it had to be something more than a "standard award" (that is, one that merely identified the prevailing party and the amount to be awarded). It also stated that the term "reasoned award" had not been defined by a Texas state court (although it acknowledged that the San Antonio Court of Appeals had recently stated that the phrase "includes a brief, written opinion addressing the issues before the panel." *SSP Holdings Ltd. Partnership v. Lopez*, 432 S.W.3d 487, 495 (Tex.App.—San Antonio 2014, pet. denied).

The majority then observed that the term had been evaluated and defined by two federal cases, *Cat Charter, L.L.C. v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011), and *Rain CII Carbon, L.L.C. v. ConocoPhillips Co.*, 674 F.3d 469, 473 (5th Cir. 2012). It derived from these two cases the following parameters: that a reasoned award should include a detailed listing ***or mention*** of expressions or statements offered to support the Arbitrator's decision, and that such an award would constitute something less than findings and conclusions but something more than a statement solely of the result.

Adopting this working definition, the majority noted that this was a definition of "form, not substance," such that the appropriate review in this case was to determine whether the award was in the "form of a reasoned award," irrespective of whether the substance of the award was correctly reasoned.

Turning to the award itself, the majority determined that the award was deficient because it had failed to ***mention*** or dispose of the Employer's challenge concerning compliance with the notice and cure provisions of the Agreement. It made this ruling even after acknowledging that the award was sufficiently "reasoned" as to the issue of "the Employee's diminished status" as qualifying his resignation as being for a "good reason," because the award "mentioned" diminished status.

Having identified a deficiency in the award, the majority next turned to the issue of the status of the award itself. The Court rejected the Employer's request that the entire award had to be vacated. Instead, it ruled that the trial court should remand the matter to the Arbitrator to allow him to issue a revised award addressing the deficiency in question, after which the matter would return to the trial court for confirmation or vacatur.

**Concurrence**. The concurrence acknowledged that in this case the Court majority was justified in remanding the case to the Arbitrator for completion of the award, but disagreed with the reasoning used. The concurrence stated that the award should be rejected in its entirety because it was not "reasoned," and he thus disagreed with the

majority's determination that the award could not properly be evaluated as to whether it was reasoned or not. The concurrence recognized that some awards satisfy the "reasoned" criterion even without mentioning all claims or defenses when they *implicitly* reject a key contention, and a definition of "reasoned" should not include the obligation to address every contention, no matter how minor or frivolous.

However, where as here the issue of the defense of failure to comply with the notice and cure requirements was squarely presented, the concurrence determined that the totality of the circumstances in this case dictated that the award was not "reasoned" as to at least one critical component of the case. He therefore supported remand of the case to the Arbitrator.

**Dissent**. The dissent complained that the majority's decision deviated from controlling federal precedent (which had affirmed an award as "reasoned"), that the award satisfied the standards for a "reasoned award," and that remand to the Arbitrator was therefore unnecessary. To the dissent, the core flaw with the majority and concurring opinions was their mistaking an "argument" (not needed to be addressed or mentioned in an award) and an "issue" which would require mention in the award.

In particular, the dissent focused upon the totality of the award. In doing so, the dissent contended that the notice and cure requirements were "defenses" to the Employee's claim, requirements that by necessity the Arbitrator had to have considered and rejected in disposing of the central issue in the case. The dissent explained that the Arbitrator had done this by stating in the award that the Employee had met his burden to demonstrate that his resignation was for "good reason."

The dissent distinguished this holding from the Employer's principal complaint, that the Arbitrator had failed to ***mention*** the "argument" about compliance with notice and cure requirements. She stated that the Employer's argument did not demonstrate a basis for holding that court intervention in this proceeding was justified Section 10(a)(4) of the FAA on the basis of the Arbitrator's "exceeding her powers" or "executing them imperfectly so that a final definite award was not made."

Since the dissent believed that the Arbitrator's award was not ambiguous or lacking in clarity, she concluded that there was no basis for remand to the Arbitrator. The dissent therefore would have affirmed confirmation of the award.

**Conclusion**. For advocates and practitioners, the lesson appears to be clear. To avoid this kind of confusion with awards, and thus avoid costly and time-consuming remands, define "reasoned award" at the outset so that the Arbitrator can thereafter clearly understand his or her obligation to comply with the parties' agreement.

***Lionel Schooler*** *is a partner in the Houston office of Jackson Walker L.L.P. He currently serves as the Chair-Elect of the State Bar Alternative Dispute Resolution Section and as the Chair-Elect of the Houston Bar Association's Alternative Dispute Resolution Section. Mr. Schooler is a frequent writer and speaker on arbitration topics.*

# 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.*

**********

You are an experienced, seasoned mediator. A colleague has approached you for advice about becoming a mediator after having practiced law for 5 – 6 years. He/she relates to you that he/she has received a number of e-mail promotions, "snail-mail" bulletins, and seen several bar journal advertisements encouraging him to become a "certified" mediator in just five days by taking the "certified training" being offered by one or more mediation-training organizations promoting the services of their "certified" or "advanced certified" trainers.

As an experienced mediator, you are aware that, in Texas, there is no such thing as a "certified" mediator, "certified trainer" or "certified training" for one who wants to become a mediator. What will you advise your colleague?

**********

**Jeff Jury: (Austin)**

A wise group of mediators taught me to "live in the question." I would ask my colleague these questions, in this order:

1. Why do you want to become a mediator?
2. Why do you want to become a mediator now?

If the answer to the first question is something like "I'm tired of practicing law," or "it looks easier than working," then I would quote Dorothy Gale:

"If I ever go looking for my heart's desire again, I won't look any further than my own back yard. Because if it isn't there, I never really lost it to begin with."

At the appropriate point in the conversation, I would tell my colleague that mediation is not a place of retreat after the practice of law drags your spirit down. There is no yellow brick road leading to an emerald city. Like any other professional endeavor, becoming a mediator takes commitment, investment of resources, and business risk. Unlike many other fields, mediation is a profession where the barriers to entry are low, and the preparation is brief and inexpensive. Flipping the pancake again, like many other fields, the market for delivering mediation services for a fee is densely populated by capable, experienced practitioners.

If the answer to the second question is something other than "I really don't need to support myself and my family from the income I will make as a mediator, but I enjoy mediation as a process," I would tell my colleague that the mediation market is not only densely-populated, it is super-saturated in most areas. It is hard for all but a few to earn a sustainable living as a private mediator, and even mediators who are busy usually have worries about a week in which everything cancels – and therefore, no paydays – or the amount of time that his elapsed since the last call or online request to schedule. With the decline in jury trials, and the apparent downturn in the demand for legal services, it does not look like there is as much gold in "them thar hills."

After casting those wet blankets over my colleague, I would say that mediation is a profession that is rewarding beyond your imagination. I truly love and enjoy what I do. If good use of your time and money are not diminished by taking mediation training, then I would say do it as soon as you can. If you aren't careful, mediation training will make you a better lawyer, friend, family member, and citizen of the world. In these days, those are the best reasons for most people to take mediation training.

Hopefully, I would stay in the question about "certified" this and that, broaching that subject only in response to a specific comment or question. "What does it mean to be a certified mediator?" "What do you think that will mean for you?"

Saving my best *Wizard of Oz* reference for last, I would say that there is nothing Oz can pull out of his bag that will "certify" someone to be a mediator in Texas. Because I believe it is classless to say something that sounds like running down a colleague or competitor, I would say that, to my knowledge, "certification" is not a term used in the Texas market. If we have developed enough rapport, that will say everything I want to say. Pay no attention to that man behind the curtain…

**Melanie Grimes: (Dallas)**

First thing that would, indeed, come out of my mouth is that there is 'no such thing' as 'certified' *anything* when it comes to mediator qualifications in Texas. I hold the mediator training organizations that use this term responsible for implying that the trainings they are offering are above and beyond other such courses and, in turn, for implying that there is some special recognition due a mediator who took their particular course. It's just not so.

All Texas Mediator Trainer Roundtable-approved 40-hour Basic Mediation Training courses in Texas must follow the same standards. There is no 'certifying' going on behind the scenes that makes any distinction. What we do each have the opportunity to pursue as mediators that imparts both the credibility and professionalism that many of us seek, is to apply for and obtain credentialing through the Texas Mediator Credentialing Association (TMCA).

This is the state-wide, voluntary, multi-disciplinary mediator credentialing organization that gives us experienced mediators the chance to be set apart from mediators with much less experience. TMCA has four different credential levels, all the way from a Candidate for Credentialed Mediator, who only needs under her or his belt the Texas-based 40-Hour Basic Mediation Training, to the most experienced level, Credentialed Distinguished Mediator, which requires that one has also mediated 200+ cases and completed at least 40 hours of advanced mediation training.

Within a week of reaching the Credentialed Distinguished Mediator level, I had that designation on my website, letterhead and business card—now, *that's* certifiably good marketing…"

**Raymond Kerr: (Houston)**

I would immediately advise my colleague to completely disregard those advertisements claiming to "certify mediators" who take their training. The only legitimate agency in Texas that assigns credentials to mediators is the Texas Mediator Credentialing Association (TMCA), which awards different levels of credentials based on its criteria which include prior mediation experience, ongoing mediation practice, and regular mediation CLE. The TMCA does not certify mediators.

The only statutory training requirement in Texas is under the Alternative Dispute Resolution Act at Section 154.052 subparagraph (a) which provides as a prerequisite for court appointment that a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an Alternative Dispute Resolution System or other Dispute Resolution Organization approved by the Court

making the appointment. Subparagraph (c) of that Section does give the Court discretion under some circumstances to appoint a person as a mediator who does not qualify under subparagraph (a) above.

I would also advise my colleague to seek a 40-hour training from a local Dispute Resolution Center (DRC) through which a person completing the course can get pro bono appointments to gain experience, or to seek a 40-hour training from one of the well-recognized mediation entities such as the Association of Attorney Mediators (AAM).

## COMMENT

All of our contributors were "spot on" in their observations of the fact situation in this Ethical Puzzler.

Of late, there seems to be a plethora of advertisements both in print and on social media to the effect that, in only five short days you, too, can become a "certified mediator" by taking certain "certified training" taught by "certified" or "advanced certified" and/or "advanced certified family law" trainers. From a technical point of view, these advertisements are well done, well written, well presented and include photographs of "certified" or "advanced certified" and/or "advanced certified family law" trainers.

The problem is that, whether knowingly or unknowingly, the promoters of such training opportunities are promising something they cannot deliver *because*, as every mediator in Texas who has been trained by an organization that legitimately meets the guidelines of the Texas Mediator Trainers Roundtable (TMTR) knows, there is *no such thing* as a "certified mediation trainer" or a "certified mediator" in the State of Texas.

That "field was plowed" almost twenty years ago when the Supreme Court of Texas declined to act as a certifying authority for mediation practitioners. Instead, the Court adopted the Supreme Court Ethical Guidelines for Mediators and Mediations and suggested the establishment of a voluntary, self-regulating mediator credentialing organization. That organization is now known as the Texas Mediator Credentialing Association (TMCA). At the same time, the Court adopted the standards of the Texas Mediator Trainers Roundtable as the acceptable contents for the basic 40-hour mediator training required by Section 154.052 (a) and (b) of the Texas Alternative Dispute Resolution Act.

It is heartening to observe that I have not seen advertisements for "certified" training for the last few weeks immediately prior to the publishing hereof. However, no sooner did I breathe a sigh of relief than I was handed a business card identifying the cardholder as a "Certified Facilitative Mediator" through the "North Central Texas Regional Certification Agency."

Obviously, there is still work to be done.

***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 2,500 cases to resolution and serves as a faculty member, lecturer and trainer for numerous dispute resolution and educational organizations in Texas and nationwide. A former Chair of the ADR Section of the State Bar of Texas, Suzanne has received numerous awards for her mediation skills and service including the* Frank G. Evans Award *for outstanding leadership in the field of dispute resolution, the* Steve Brutsche Award for Professional Excellence in Dispute Resolution, *the* Suzanne Adams Award for Outstanding Commitment and Dedication to the Mediation Profession, *and the* Association of Attorney Mediators Pro Bono Service Award. *She has*

*also been selected* "Super Lawyer" *2003 -2015 by Thomson Reuters and the publishers of Texas Monthly and been named to* Texas Best Lawyers *2009 – 2016 and* Best Lawyers in America 2014 - *2016. She holds the highest designation given by the Texas Mediator Credentialing Association that of* TMCA Distinguished Mediator.

**SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS***

| Issue | Submission Date | Publication Date |
|---|---|---|
| **Spring** | **March 15, 2016** | **April 15, 2016** |
| **Summer** | **June 15, 2016** | **July 15, 2016** |
| **Fall** | **September 15, 2016** | **October 15, 2016** |
| **Winter** | **December 15, 2016** | **January 15, 2017** |

***SEND ARTICLES TO:***

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# NEUROSCIENCE AND NEGOTIATION[1]

*** Kay Elkins Elliott J.D.,LL.M.,M.A.**

Every day we are expected to make decisions that may have lasting effects: Do I negotiate with the customer that is obnoxious, demanding and unreasonable? Do I end a business relationship when the other party injures me financially? Do I negotiate with my life partner who has betrayed me about how much time I get to spend with our child? On a macro scale - should the USA negotiate with the Taliban when it is publicly dedicated to acts of terrorism against our country? Was Nelson Mandela right to negotiate with the apartheid regime of South Africa? Was Churchill wise to not negotiate with Hitler during World War II? When should we say no and fight? When should we say let's negotiate? Is there a paradigm for making wise decisions in these difficult settings? Should we ever bargain with the devil?

Wise dispute resolution poses three challenges: avoiding predominately emotional decision making; taking the time to do a decision tree of alternatives; and assessing the ethical and moral issues involved in any situation. Neuroscientists and psychologists tell us that we all make these types of decisions using different parts of our brains: the intuitive, emotional brain and the rational, analytical brain.[1] Some writers call these structures the old brain (the so-called snake brain) and the newer brain. Others, such as Daniel Kahneman in the book **Thinking Fast and Slow,** refer to System 1 thinking (fast, intuitive) and System 2 thinking (slow, effortful, rational). In fact, cognitive scientists describe these two approaches as automatic, involuntary, largely conscious (fast thinking) and deliberate, orderly and unconscious cognition (slow thinking).

Negotiation theory is contradictory. There are at least four approaches into which negotiation theorists fall: The *competitives* (getting more than the other side); the *cooperatives* (separating the people from the problem and creating value by being soft on the people - a la Getting to Yes); the *moralists* (doing what is right because of the ethics gene); and the *game theorists* (The Prisoner's Dilemma). Perhaps this is due to the intellectually diverse underpinnings of the ADR movement which draws from anthropology, international relations, game theory, economics, neurobiology, legal theory, counseling, sociology and psychology. From psychology alone we already have thirty-five principles that influence how lawyers negotiate and the list continues to grow. We know too that all theories of economics, sociology, psychology and anthropology must be consistent with the most basic principle of biology - evolution - particularly evolution by natural selection. In the simplest iteration, natural selection means that traits which enhance future replicative success will tend to accumulate.[2] When we see species-typical patterns of behavior we are actually observing the physical and chemical information-processing pathways of the brain that have permitted survival.

One 1920's pioneer of the ADR movement, Mary Parker Follett, had an insight while sitting in the Harvard library. She wanted the window closed to prevent a draft on her papers but another student wanted it open for fresh air. The solution that emerged from their different desires was to open a window in the next room. From this deceptively simple insight she realized that there were three ways to respond to conflict: domination, compromise and *integration.* Opening the window halfway would not have given the other reader enough air and would still have created a draft. She, and the many other gurus that followed, came to believe that beyond mere zero-sum encounters, exemplified in the Thomas-Kilman Conflict Scale inventory by the three distributive conflict styles (competing, compromising and accommodating),

new solutions would emerge if the minds of the conflicted were directed to meeting their desires - thus producing constructive rather than destructive conflict resolution.[3] Ralph Kilman, CEO at Kilman Diagnostics, describes the trap for many people because they see the world only as a zero-sum encounter: in mathematical terms, competing is when I get 100% and you get zero, and accommodating is when the opposite occurs. Compromising, in its pure form, is when each person gets 50% of the pie. The total of what is achieved always equals 100%. The danger of always using only these 3 modes is that a person can only see her work or personal life as win-lose, zero sum encounters. The person fails to see the larger space that could be created by broadening the topic and thus expanding the size of the pie - the window in the other room. The preference for distributive conflict styles prevents *integration.* In another context we see that narrowing the issues is beneficial for trying a law suit– fewer points to prove – but broadening the issues provides more scope for trades. The litigator in negotiating a settlement might only use the parts of the brain best suited for math problems (where there is only one, right answer)and fail to utilize other parts of the brain better suited to creative tasks – where many good and optimal solutions may exist.

There are actually two quite distinct types of problems, according to Daniel Pink, the author of Drive: *algorithms and heuristics.* For algorithms we use rational, linear thinking. Heuristics require a different approach. Imagine being asked to create an ad campaign – you would have to access creative, innovative, intuitive neural pathways that are not suitable for solving an equation or understanding a balance sheet. Try this, if you doubt that your brain has many ways of doing the same task: put a coke bottle in front of you and draw it. Now turn it upside down and draw it. Which drawing is more accurate? Research shows the second drawing will be better – you are able to use your right brain more effectively when it is not monitored by your logical, left brain. Many artists are right brain dominant.

The Appreciative Inquiry approach, in which the decision makers' minds are directed to imagining what would be an excellent use of existing resources to meet future goals as yet undefined, has added a further dimension to constructive conflict.[4] Better solutions emerge when the **differences** of the parties are brought out and conflict is allowed to be clarified and aired - creating opportunities for solutions in which the interests may fit into each other.[5] In one counseling approach, Solution Focused Therapy, clients are encouraged to remember times when their behavior benefitted them and then seek to use that type of behavior more often. In this way new pathways in the brain are forged, through repetition of healthy responses, that permit the client to use hope and imagination to change their brains and be healthier. A similar approach can be used in negotiation and mediation.

The recent interest in looking at the molecular reality of these truths is the subject of this article. Neuroscience, while exciting, is still in its early stages of development. Neuroimaging holds the promise, however, of allowing unprecedented access to the mechanisms of the brain as it makes decisions. We are finally able to advance our understanding of just what is happening in the brain during negotiation and mediation, not by words but with *pictures*. A functional MRI can show the location, intensity, duration and strength of the response to stimuli. Other imaging technology for using the brain as a "witness" includes electroencephalography (EEG), transcranial magnetic stimulation (TMS) and positron emission tomography (PET Scan). But scientists know that this is still a new, baby science and the outcomes depend on what the experimenter does. At most, the technology can only confirm and strengthen what has already been developed on a functional level. Already there are many books written by good journalists reporting on the work of important neuroscientists as well as books by neuroscientists who have writing talent.[6] The mediator and mediation advocate can benefit from knowing more by being acquainted with the growing literature.

For this article, the debate about whether the brain and the mind are distinguishable is moot: we will just refer to decision neuroscience and not address whether the brain is doing the deciding, whether a mind outside the brain is doing that, or whether there is, as suggested by Richard Birke, a "Ghost in the Machine".[7] A more recent book is The Ghost In My Brian by Dr. Clark Elliott who chronicles his own harrowing journey after a concussion and his recovery through effective, scientific intervention.

There are many workshops and study groups being offered to mediators and negotiators in this and related fields. The author currently attends a monthly negotiation study group with a group of mediators dedicated to learning more about how persuasion and resolution of conflict occurs. A few years ago, in the summer of 2010, Pepperdine University School of Law presented Mindfulness for Conflict Resolvers: Lawyers, Mediators, Negotiators, Judges, Arbitrators & Managers, led by Len Riskin, Professor at the University of Florida College of Law, and Rachel Wohl, Director of the Maryland Supreme Court Mediation and Conflict Resolution Office. In June of that year a webinar on Contemplative Neuroscience with Richard Davidson from the University of Wisconsin was presented. On October 22, 2010, the University of California-Hastings College of Law sponsored a symposium on Emotions and Negotiation. Two leading authorities on non-verbal communication, Paul Ekman and Clark Freshman, presented the latest research findings on using emotional information to negotiate more effectively. A simple google search to update those types of opportunities is recommended for anyone wanting to improve their understanding of the mind-brain connection.

The majority of legal literature devoted to neuroscience can be found in the area of criminal responsibility. My 2015 Westlaw search for all law reviews and journal articles with the term "neuro" in the title resulted in 261 responses, of which 186 dealt exclusively with criminal responsibility and most of the rest with either childhood development or medicine. Only 33 articles contained the term "neuro" and had somewhere in the article the terms "mediation", "arbitration," "dispute resolution" or "conflict resolution". Obviously, very little attention has been paid to neuroscience and dispute resolution.

While the various disciplines noted above have all increased our understanding of negotiation, there are inherent limitations on each. Their principles do not help us as dispute resolvers who often encounter them not in isolation but in combination. While increasing one's emotional intelligence, self-awareness, communication skills and empathy may improve a negotiator's own creativity and listening skills, we still seek scientific information on how the other side (or one's own client) will make a decision when data is uncertain, risk is high and emotions run strong.

Perhaps you are wondering: What is the functional magnetic resonance imager (fMRI) that promises so much? Here is the description offered by one writer:

Employing powerful magnets that react to minute differences in levels of oxygenated and deoxygenated hemoglobin in the brain, the fMRI can create near-moving pictures that allow studying the location, intensity, and duration of brain activity under conditions similar to those found during negotiation and mediation. The data collected by a fMRI holds the potential to add significantly to the understanding of how to negotiate and mediate more effectively. The desire to obtain visual data about the brain has led the fMRI to quickly become the most prominent tool in cognitive neuroscience.[8]

For me, neuroscience is a fascinating but puzzling interest. Hopefully in the future I will be able to devote the time to become more knowledgeable about it. Recently I completed 30 hours of post graduate courses in counseling, several of which dealt with the structure and functions of the human brain. Currently I try to use my incomplete but helpful knowledge to improve the skills of my law students and my readers, as well as myself! For many other legal professionals, neuroscience is the

newest horizon. Several years ago, In June, 2010, a course in Neuro-Collaboration was offered by Pauline Tesler (Attorney) and Thomas Lewis (MD and Neuroscientist) at Pepperdine. One observation from that course crystallizes the intersection of Neuroscience and Law:

"Collaborative lawyers undertake a task and if they are to do well at it, their beliefs and behaviors must support the ends they pursue and the processes they offer, must match up with what their clients and colleagues reasonably expect, and with what is known about how human beings actually do behave during conflict and conflict resolution processes. This does not mean that a collaborative lawyer must be a neuro-scientist or a psychotherapist or communications specialist. But collaborative lawyers do have a responsibility to make their work congruent with how they and their clients are biologically wired to think, feel, and decide, if they are to deliver what they promise. [9]

Neuroscience and law owe a debt to economics and psychology. Recently, several lawyers have created case valuation software products that help negotiators and mediators reduce the twin demons of uncertainty and complexity. Litigators often put off all settlement negotiations until discovery is almost done and dispositive motions have been decided. One explanation for this is that they want to gather sufficient data - evidence, law, opinions, track records and more - to reduce uncertainty and to manage the complex data that they gather. The case valuation tools permit more certainty and reduce complexity which should promote utility maximization. That concept lies at the heart of nearly all approaches to dispute resolution. Dispute resolution is based on a model of decision making that stresses rational choice and accurate, expected value calculations. Litigation risk analysis is widely taught and used by negotiators and mediators - yet it is imperfect. We are not computers. Emotion continues to influence our decisions and our behavior.

Psychologists have poked holes in the notion of pure rationality in deciding whether and at what value to settle a lawsuit or any other dispute. Even though negotiators now know much more about the various cognitive errors humans make, thanks to the work of many brilliant cognitive and behavioral psychologists, the absence of knowledge about the interplay among psychological factors limits their ability to use those psychological explanations as a means of understanding decision-making behavior. It is hoped that neuroscience will provide answers where psychology and economics have not.

The hardest thing to teach legal negotiators is the importance of emotions in decision making. None of the technologies used by neuroscientists can take a picture of an emotion. Despite that limitation, enough studies now exist to begin to use the most relevant data to achieve better settlement of legal disputes. If it is true that the human brain is hardwired for empathy, as argued by Dr. Marco Iacaboni in his book, *Mirroring People*, then humans have a common emotional language. Dr. Paul Ekman spent many years photographing faces of people from many cultures, some very primitive. His research supports that fact. Further, he discovered that facial expressions are innate: babies born blind have the same facial expressions as sighted children. Some expressions, such as sadness, are only possible when the brain is experiencing that emotion - it cannot be faked. The idea that humans have neurons that enable them to read another's emotions suggests that negotiators benefit greatly by face-to-face contact and that negotiators should train themselves to detect lies, read each other accurately and watch for the micro-expression that is not congruent with the words spoken. Most humans do some of this without thinking, as described in Malcolm Gladwell's book *blink.* Neuroscience suggests that we learn more from watching the other negotiator's face, and other body language, than by hearing what she is saying. Obviously text negotiation, without non-verbal data, is inferior to face-to-face negotiation.

Neuroscience is raising many questions but has yet to provide many answers. There are studies that corroborate existing knowledge about accurate decision making, but there is still much work to be

done. The Nobel Prize for Neuroeconomics has yet to be created. There is a possibility now, with neural data, to establish independent evidence in favor of, or against, various models of behavior. Neural evidence builds on a rich base of knowledge from animal physiology and from human brain imaging work about the functional relevance of specific neuroanatomical area. This means that there is the potential for generating interesting new hypotheses about motivations from observed patterns of neural activities: Results can feed back into the neuroscience literature and further increase our general understanding of how the brain makes decisions and experiences their consequences.[10]

Practitioners, such as negotiators and mediators, want answers but scientists are cautious. As powerful and fascinating as the FMRI is, it cannot show an emotion. It cannot tell us what the magnetic signals photographed really mean: we don't yet know that the activation causes the action of decision-making, only that it is correlated with it. The cognitive psychologists realize that their valuable concepts do not map onto a certain, single area of the brain. We know that cognitive distortions exist, but we don't know why. The need for collaboration has never been MORE urgent. If negotiators, litigators, mediators, law professors, psychologists, and other professionals work with the neuroscientists in the hope of furthering joint findings that all can support and use, there will be breakthroughs that benefit all. As Richard Birke suggests, what is needed is for fMRI decision theorists to take up residence in law schools or law professor decision theorists to occupy medical school faculty positions. One example of such a collaboration was conducted by the Master Mediators Institute which brought a group of twenty mediators to the Cognitive Neuroscience Center at Duke University for an immersion course in neuroscience that began with dissecting a brain and included watching an fMRI test. Hopefully we will see much more crossover between and among lawyers, dispute resolvers and scientists.

Now let us look at the questions posed at the very beginning of this article: Should we ever bargain with the devil? Although Churchill said he never would, for three days during WWII, he and his war ministers secretly debated whether to pursue peace negotiations with Hitler. Nelson Mandela made a risky decision when he secretly initiated negotiations with the apartheid regime and did not tell even his own colleagues. Less than one month after the September 11, 2001 attacks resulted in the deaths of nearly 3000 innocent American civilians, Harvard Law School's Program on Negotiation held a public debate on whether President Bush should negotiate with the Taliban. Roger Fisher took the position that one should always try negotiation, even with the devil. The opposite view, depicted in the Faustian parable, holds that if you do you will be corrupted. Robert Mnookin argued that the very decision of whether to negotiate must be subjected to rigorous analysis, or wise decisions will not result.[11] Someday we may be able to take pictures of the brain that tell us what to do. I suspect not. Until that magical day here is the rational approach to decision-making that the Chair of the Program on Negotiation recommends:

> What are the interests at stake? In the Taliban debate, the U.S. interests were to protect American lives and deter future terroristic aggression.
>
> What are the alternatives to negotiation? Our BATNA was military force and we stood a good chance of prevailing. The Taliban's alternatives were worse.
>
> Are there likely potential negotiated outcomes that would meet the interests of both parties? Is there a reasonable prospect the resulting agreement would be honored? No was the answer reached in the Taliban analysis. Bin Laden was rumored to have more influence over the Taliban than they had over him.
>
> What are the costs to our side? Huge!

Is our BATNA-military force-legitimate and morally justifiable? Mnookin took the view that under international law, waging war was permissible.

The resulting conclusion? The wise decision is not to negotiate.[12]

Try using this analysis and some of these ideas and techniques in your future cases!

- **Kay Elliott reserves copyright.**

[1]My thanks go to Professor Richard Birke, of the Willamette University College of Law, whose writing inspired me to further study. See Birke, Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications, 25 Ohio State Journal of Dispute Resolution 483 (2009).
[2]Mnookin, Bargaining with the Devil, 16, 17 (Simon & Schuster 2010).
[3]Jones, On the Nature of Norms: Biology, Morality and the Disruption of Order, 98 Mich. L. Rev. 2072, 2074 (2004).
[4]Menkel-Meadow, Mothers and Fathers of Invention, 16 Ohio State Journal on Dispute Resolution 1 (2000).
[5]See Whitney and Trosten-Bloom, The Power of Appreciative Inquiry: A Practical Guide to Positive Change (Berrett-Koehler Publishers 2003).
[6] See Menkel-Meadow, supra n. 4.
[7] See, *e.g.,* Blink, by Malcolm Gladwell; Stumbling on Happiness, by Daniel Gilbert; The Synaptic Self, by Joseph LeDoux; the Emotional Brain, by Joseph LeDoux; How the Mind Works, by Joseph Pinker; Your Brain on Music, by Daniel Levitin; the Accidental Mind, by David J. Linden; Social Intelligence, by Daniel Goleman; and Emotions Revealed, by Paul Ekman.
[8] Birke, supra note 1, at 483.
[9] Birke, supra note 1, at 486, 487.
[10] See Tesler, Goodbye Homo Economicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice, in Neuro Collaboration, Straus Institute for Dispute Resolution June 10 B 12, 2010.
[11] William Harbaugh, et al., Neuroeconomics of Charitable Giving and Philanthropy, in Neuroeconomics: Decision Making and the Brain 308-318 (Paul W. Glincher et al. eds., 2008), quoted in Birke, supra note 1, at 530.
[12] Mnookin, supra note 2, at 6.
[13] See Mnookin, supra note 2, at 6-8

***Kay Elliott**, J.D., LL.M., M.A. has mediated and arbitrated over 2000 cases since she entered private practice as a conflict specialist and trainer in 1982. She has taught and coached law students at Texas Wesleyan School of Law, now Texas A&M University School of Law, in Ft. Worth Texas for 25 years. Her teams have won regional, national and international law competitions and her 2011 Negotiation Team represented the USA in the International Negotiation Competition that year in Denmark. This year she was a judge in the 2015 international law student negotiation competition at which 25 teams from 20 countries competed in English. She has produced books, articles and training courses on negotiation, mediation, settlement advocacy and persuasive communication to corporations, government agencies, lawyers, educators and mental health professionals worldwide. She has a private mediation practice in Texas .You can learn more at www.kayelliott.com and you can contact her directly at k4mede8@swbell.net. Or 214-546-3338.*

# 2016 TEXAS ADR Handbook
# New Necessity for All ADR Professionals

*The Texas ADR Handbook is a milestone update to the original Handbook published in 2003. The handbook will have over 30 chapters covering nearly every aspect of ADR and should be a useful tool for every ADR professional, and a handy resource for lawyers and their clients involved in an ADR proceeding. Following are several short summary excerpts from chapters in the books, along with brief bios of their authors."*

**Conflict Resolution in Healthcare:**
***Kathleen Clark and Ruth Rickard***

**Kathleen Clark bio:**
Kathleen Clark is founder and CEO of Servant Lawyership, a consulting, counseling, and coaching business that encourages and supports transparent communication among healthcare stakeholders after adverse medical events. Kathleen also publishes, speaks, and provides continuing education and professional development on many aspects of healthcare and the law, including language, communication, dialogue, collaborative law, patient safety, disclosure, and appreciative inquiry. Kathleen has convened and facilitated several dialogues on medical errors and alternatives to medical malpractice litigation, seeking to build collaborations and alliances across professions and stakeholders, including patients, physicians, defendants' and plaintiffs' attorneys, insurers, other health care providers, hospitals, risk managers, and other interested parties.

**Ruth Rickard bio:**
Ruth currently heads her own solo firm. In addition to advising clients on business issues, she handles matters requiring conflict resolution and encourages the use of collaborative methods, when possible and appropriate. She has a versatile background across a wide variety of subjects, e.g., partnership break up, probate-family issues, commercial contract/lease, and medical error. Ruth began in commercial litigation and later taught full-time at Texas Wesleyan University School of Law (now Texas A&M University School of Law) and at Appalachian School of Law in Virginia.

**Chapter Summary:**

Kathleen Clark and Ruth Rickard focus on conflict resolution in the healthcare setting. Particularly, the authors take a close look at non-adversarial responses to adverse medical events in both legal and medical contexts. Clark and Rickard emphasize the necessity of examining both contexts (legal and medical) to promote and sustain the valuable, growing synergy between law and healthcare, and to expand and enhance communication between all parties following an adverse medical event. The authors hope to open their reader's eyes to a new way of thinking about conflict resolution in healthcare and to help them move away from "traditional" lawyer practices and towards non-adversarial approaches—at the very least creating an awareness of dispute resolution possibilities in both law and healthcare using new thinking, language, and ideas.

The Chapter focuses on the use of the collaborative and collaborative-like processes in the medical context following an adverse medical event. Specifically, Joint face-to-face meetings, which is a hallmark of the process, is especially suited to resolving these cases as this is an opportunity for the parties to directly communicate with each other—speaking to one of the root causes of adverse medical events that result in patients and families seeking redress: the breakdown in communication between the patients and physician or other healthcare worker. The Chapter

also discusses components of the collaborative process to satisfy non-monetary needs and to reduce the costs of resolving adverse medical events. Specifically, the Chapter discusses early, open, low cost disclosure of known facts, joint meeting with relevant stakeholders present to encourage dialogue between the involved parties, and transparent, constructive discussion of settlement options.

**Construction ADR in Texas**
**William Andrews bio:**

Bill Andrews is one of the founding shareholders of Andrews Myers, P.C., a Houston based law firm with a large practice group devoted to construction law. He is a graduate of the University of Texas at Austin and received his law degree from the University of Houston Law Center. He represents parties in construction and design disputes, claims, litigation, arbitration, and mediations. He is also a mediator and arbitrator.

**Chapter Summary:**

Bill Andrews discusses how the major resurgence in the construction industry following the economic downturn presents a unique opportunity to expand the use of alternative dispute resolution procedures in the construction industry. Construction projects are often designed and built at a frenetic pace, creating the ideal environment for disputes and controversies to arise. Early and rapid resolution of these disputes and controversies are often *critical* to the success or failure of these projects. Andrews discuses how traditional "courthouse" methods of dispute resolution are not meeting the construction industry's needs as they do not work quickly enough to resolve disputes. Andrews presents alternative dispute resolution practices that should be utilized in the construction industry as they provide the necessary flexibility to quickly and effectively resolve disputes and controversies that arise—often saving a construction project altogether.

The focus of the Chapter is two-fold. Bill Andrews first discusses the current alternative dispute resolution methods that are available and utilized to address and resolve disputes and controversies that arise during the construction process. He then follows up with a survey of the traditional alternative dispute resolution methods that are designed to resolve post-project claims. Finally, Bill Andrews presents a brief summary of the history of construction alternative dispute resolution, nationally and specifically to Texas, including a discussion of the key industry documents that are the principal sources of construction alternative dispute resolution agreements.

**Collaborative Law: An Idea Whose Time Has Come**
***Lawrence Maxwell, Jr. & Sherrie R. Abney***

**Lawrence "Larry" Maxwell, Jr. bio:**
Lawrence R. Maxwell, Jr. is a collaborative lawyer, mediator, and arbitrator in Dallas, Texas. His legal career spans over five decades, including forty-years of trial and appellate practice. Over the years he has come to realize that in most situations, litigation should be the final option for resolving disputes, after other methods have been tried without success. Larry's practice is now limited to serving as a third-party neutral and counseling clients in the use of efficient and cost-saving ADR processes.

**Sherrie R. Abney bio:**

Sherrie R. Abney is a collaborative lawyer, mediator, facilitator, arbitrator, national and international collaborative trainer, and adjunct professor of law at Southern Methodist University Dedman School of Law. She is President of the Global Collaborative Law Council, Chair of the State Bar of Texas Collaborative Law Section, co-founder and first Chair of the Dallas Bar Association Collaborative Law Section, and author of Avoiding Litigation and a text book entitled Civil Collaborative Law as well as numerous articles on resolving civil disputes employing collaborative skills.

**Chapter Summary:**
Lawrence Maxwell, Jr. and Sherrie R. Abney put their spin on the Chapter Tom Arnold authored thirteen years ago, *Collaborative Dispute Resolution –An Idea Whose Time Has Come? —* But deleted the question mark.

The collaborative law Chapter begins by detailing the history of the development of the collaborative dispute resolution process starting with the birth of the process in 1990 and then highlighting significant events in Texas and worldwide that have given it momentum to become the revolutionary new process for resolving disputes—and not just in family law. The Chapter then discusses the statutory validation of the collaborative process through the Uniform Law Commission's unanimous approval of the Uniform Collaborative Law Act, which became available in October 2010 for introduction in state legislatures. To-date, a version of the Uniform Collaborative Law Act has been enacted in eleven states.

Ethical considerations in the collaborative law practice are then discussed through an overview of the Collaborative Law Committee of the American Bar Association Section of Dispute Resolution's discussion draft: *Summary of Rules Governing Collaborative Practice*, which reviewed the American Bar Association's Model Rules of Professional Conduct and state-ethics opinions. Next, an overview of what exactly collaborative law is and how it works is provided—including numerous examples of collaborative skills. Finally, the authors provide predictions as to the future and expansion of the collaborative-dispute resolution process into new legal spaces.

**In-Court Mediation**
***Marty B. Leewright bio*:**

Marty B. Leewright is a family, probate, criminal, and civil lawyer who is adept in courtroom litigation and settlement negotiation and mediation. Marty is also skilled in the art of negotiation and settlement. As a court-certified mediator and arbitrator, he represents numerous clients in mediation, depositions, and litigation. Marty also practices collaborative law as an alternative to traditional courtroom litigation for certain cases.

**Chapter Summary:**

A busy Tarrant County Courtroom is the birthplace of the award-winning In-Court Pretrial Mediation Program; a program that has become an excellent model and template for similar programs developing in other courtrooms throughout Texas. Judges each month in courts all across Texas try to work through their backlog of cases with the traditional methods of dispute resolution: pre-trials, motions, and hearings. These traditional methods of case disposition are not efficient or cost effective when considering the volume of cases on a docket, and are often not appropriate for every case. In this situation is where the In-Court Pretrial Mediation Program has value.

Marty Leewright discusses the In-Court Pretrial Mediation Program as an alternative to these traditional forms of dispute resolution for those cases that are not appropriate for traditional litigation—particularly those with a small amount in controversy—as it is an efficient, confidential, and low-cost solution for the resolution of many disputes. It is innovative and has received remarkable results, including the award of the Texas Association of County's Best Practices—Delivery of Service Award of Courtroom Innovation.

The Chapter is largely a discussion of how the In-Court Pretrial Mediation Program works and compares the benefits of holding mediations in-court versus privately. Finally, Marty Leewright provides sources for additional information on the In-Court Pretrial Mediation Program as well as direct contacts that can assist in implementing the In-Court Pretrial Mediation Program in additional courts.

**Arbitration**
***John Allen Chalk, Sr. bio:***

John Allen Chalk, Sr. has been an ADR professional (arbitrator and mediator) since 1992. He is a partner in the Fort Worth, Texas law firm of Whitaker Chalk Swindle & Schwartz PLLC. He is a Fellow of the College of Commercial Arbitrators, a 2015-16 Frank G. Evans Award recipient by the SBOT ADR Section, an Adjunct Professor of Arbitration at Pepperdine University School of Law, and a member of arbitrator panels maintained by the American Arbitration Association, the International Centre for Dispute Resolution, the American Health Lawyers Association, the International Institute for Conflict Prevention and Resolution (CPR), Resolute Systems, LLC, a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators, and the editor of "The Arbitration Newsletter."

**Chapter Summary:**

Arbitration as a dispute-resolution method has been practiced at least as early as the Phoenician merchants and Phillip II of Macedon and is used expansively today to resolve disputes in numerous fields as is evidenced by the many separate kinds of arbitration rules created and published by the American Arbitration Association.

The Chapter begins with a discussion of how arbitration is a "matter of contract" and should be construed as such by courts when compelling arbitration of a dispute. Chalk explains the court's role when compelling arbitration based on a contracted-for arbitration agreement, and how this role is often exceeded or confused. The Chapter then provides an overview of the multiple facets and distinctions that can be present in arbitration provisions, all of which are a part of the "creature" of the contract. The Chapter also provides a helpful history of domestic arbitration in the United States, its statutory underpinnings, as well as the domestic arbitral institutions operating within the United States. Chalk also provides information on international commercial arbitration, including a discussion on the prominent treaties that encourage and govern international arbitration, as well as information on the international arbitral institutions available to facilitate or administer international arbitration. Chalk examines the process, role of the mediator, and relative costs and benefits associated with administered and non-administered arbitration. The Chapter breaks down the arbitration process, the arbitration clause, and delves into the advantages and disadvantages of arbitration as an alternative dispute resolution method in various situations. Finally, the Chapter reviews motions and actions to compel arbitrations, class arbitration and consolidated arbitration, the damages available in arbitration, and standards of review for arbitration appeals.

**Employment Conflict Management Systems: Mediation and Ombuds**
***Walter Krudop, JimYoung, and John Zinsser***

**Walter Krudop bio:**

Walter Krudop is an Advanced Credentialed Mediator with the Texas Mediator Credential Association for civil, family, community, and Child Protective Services cases and is a trainer in conflict resolution and mediation. He is the current commissioner and president of the board of directors at the North Hays County Emergency Service District #1. Krudop is also the current president for the Central Texas Dispute Resolution Center, a post he has held since 2010. He also served as an Ombudsman for Shell Oil Company from 1997-2001.

**Jim Young bio:**

Jim Young is a qualified arbitrator and mediator and an avid proponent of alternative dispute resolution procedures in lieu of litigation. Mr. Young currently serves as an adjunct professor of law at Texas A&M University School of Law and as an adjunct professor in the undergraduate paralegal studies program at Texas Wesleyan University. He is an assistant coach of the undergraduate Mock Trial and Mediation Program at the University of Texas at Dallas.

**John Zinsser bio:**

John Zinsser holds a Master's degree in Conflict Resolution from Antioch University and is a Cum Laude graduate of Kenyon College where he majored in Sociology. For nearly 25 years John Zinsser has supported Fortune 500 and global companies, governments, and academic institutions to consider, implement, assess and improve conflict management capacity, especially through organizational ombuds programs. Zinsser designed and teaches both ombuds courses offered at Columbia University's Master of Science in Negotiation and Conflict Resolution.

**Chapter Summary:**

Employment conflicts impose significant costs on an employing organization. Increased turnover, reductions in productivity, loss of managerial time and focus, incivility, and reduced creativity and innovation are just some of the recognized costs generated by conflict in the workplace. The cost of litigation cannot be ignored either. Thus, managing conflict can have a preventative impact. Systematic application of ADR processes, in principle and in action, is a superior approach to handling conflict arising in the context of employment. ADR techniques are naturally well suited to consideration of all factors that are relevant to a given situation, not just the legal ones. Notably, relationship and reputation preservation, which are critical organizational concerns, are often best served via use of alternative dispute resolution mechanisms. The employees involved, the other employees who are not involved but are affected, and the employing organization all reap the benefits associated with prompt, effective, and cost-efficient resolution of workplace problems. Catching and effectively addressing employee conflict in the early stages substantially mitigates the harm done to the people and the organization and limits losses of all types, reducing resource diversion and increasing humanistic gains.

This Chapter addresses conflict-management systems and processes intended to handle most forms of employment conflict, whether in the private or public sector. The focus is, therefore, inward on the internal and systematic application of ADR processes, rather than outward or external application.

This Chapter focuses particularly on the use of mediation and organizational ombuds programs, the two ADR techniques most commonly and successfully used to manage conflict within organizations. Other forms of ADR used by some organizations, such as peer review and mandatory arbitration, are also noted. Specifically, the authors focus on the processes that are in favor and expanding to resolve disputes in the employment context.

**Enforcement of Settlement Agreements**
**Frank W. Elliott bio:**

Frank Elliott has taught and written about evidence and Texas civil procedure for 57 years, including 47 at law schools—19 at the University of Texas School of Law, 3 at Texas Tech School of Law, 23 at Texas Wesleyan School of law, and 2 at Texas A&M University School of Law. He served as Dean at Texas Tech and Texas Wesleyan and has been a Briefing Attorney for the Supreme Court of Texas, Assistant Attorney General of Texas, and Parliamentarian of the Texas Senate. Elliott is a life member of the American Law Institute, a Life Fellow of the American and Texas Bar Foundations, is the namesake of the Elliott Inn of Phi Delta Phi, and appears in the New Mexico Military Institute Alumni Hall of Fame.

**Chapter Summary:**

Although mediation can add value to many disputes in many ways, Frank Elliott, in the Enforcement of Settlement Agreements Chapter, discusses how this value can disappear if the settlement agreement is not enforceable. Specifically, Elliott explains that although the Texas Civil Practice and Remedies Code underlines the public policy favoring the settlement of disputes, the implementation of the policy comes from the *courts*.

Elliott begins the Chapter by providing the reader with Section 154.071 of the Texas Civil Practice and Remedies Code as well as Rule 11 of the Texas Rules of Civil Procedure, both of which Texas courts use to enforce settlement agreements. Next, the Chapter outlines early enforcement cases that make it clear that a settlement agreement cannot be repudiated because of decision regret, as it is not a *consent* judgment but a judgment on an agreement under Section 154.071 of the Civil Practice and Remedies Code. The Chapter then reviews the Supreme Court case *Padilla v. LaFrance* as well as cases that have interpreted *Padilla*, which distinguished consent judgment cases with a judgment on a Rule 11 agreement. The Chapter also provides an overview of settlement agreements in family cases, which provide special provisions for mediations specific to issues that arise in family law cases. The Chapter also discusses *In re Lee*, the leading case interpreting the special family law mediation provisions and the enforcement of settlement agreements in family law cases. In sum, this Chapter provides the reader with a succinct overview of court enforcement of settlement agreements under Rule 11 and Section 154.071, as well as the special considerations for the enforcement of settlement agreements in family law cases.

**Victim Offender Mediation**
**Marilyn Armour bio:**

Dr. Marilyn Armour is a Professor, University Distinguished Teaching Professor, and Director of the Institute for Restorative Justice and Restorative Dialogue (IRJRD). She has conducted studies on the effectiveness of restorative justice interventions for violent crime, in the prison system, in schools, for domestic violence and community restoration as well as the mechanisms of action in the interventions that lead to change. Dr. Armour's research also emphasizes the experiences and healing of family members of homicide victims specific to meaning-making in the aftermath of tragedy, the impact of the offender's sentence on survivor well-being, the remaining family members after domestic fatalities, and the process of meaning-making for Holocaust survivors during and after the war.

**Chapter Summary:**

Restorative justice is a victim-centered response to crime that gives the individuals most directly affected by a criminal act the opportunity to be directly involved in responding to the harm caused by crime. Instead of asking (1) what laws have been broken? (2) who did it?; and (3) what do they deserve, restorative justice asks (1) who has been hurt?; (2) what are their needs?; and (3) whose obligations are these?

Victim offender mediation (VOM) is the oldest, most widely developed, and empirically grounded expression of restorative justice dialogue. It provides interested victims the opportunity to meet with the juvenile or adult offender, in a safe and structured setting, with the goal of holding the offender directly accountable for their behavior while providing important assistance and compensation to the victim. VOM usually involves a victim and an offender in direct mediation facilitated by one or sometimes two mediator/facilitators. A 2000 survey of VOM programs in the U.S. found that support persons, including parents in juvenile cases, were present in nearly nine out of ten cases.

This Chapter discusses the emergence of VOM in the early 1970s and 1980s as well as the development of its use. The Chapter provides a brief overview of the growth in legislation for VOM on a state-by-state basis, with twenty-nine states currently having VOM statutory authority. The Chapter also discusses the current status of VOM implementation; with nearly 300 identified programs throughout the United States, as well as the roadblocks VOM is experiencing in its pursuit of greater expansion. Also included in the Chapter is a detailed explanation of the preparation and process required for VOM, the mediator's role in VOM, as well as current research and effectiveness of VOM. Finally, the Chapter ends with a short discussion of concerns with VOM as well as ongoing research.

**Online Dispute Resolution**
***Benjamin G. Davis & Graham Ross***

**Benjamin G. Davis bio:**
Benjamin Davis has been a professor at The University of Toledo College of Law since 2003, is a graduate of Harvard College (BA), and Harvard Law School and Harvard Business School (JD-MBA), where he was Articles Editor of the Harvard International Law Journal. In 1986, he became the American Legal Counsel at the International Court of Arbitration of the International Chamber of Commerce where he supervised directly or indirectly over 5000 international commercial arbitration and mediation cases, made filings before courts around the world on behalf of the ICC, assisted with the drafting of arbitration laws in countries such as India and Sri Lanka, and led conferences in Eastern and Western Europe, North America, and Asia. He is the creator of fast-track international commercial arbitration and the creator of the International Competitions for Online Dispute Resolution (ICODR) by which students from around the world competed in online negotiation, mediation, arbitration and litigation.

**Graham Ross bio:**
Graham Ross is a UK lawyer and mediator with over 30 years experience in IT and the law. He is a member of the 12 strong ODR Advisory Group appointed by the UK Civil Justice Council to advise on the role of ODR in a modernized civil justice system and the Head of the European Advisory Board for a Silicon Valley spin-off from eBay and PayPal called Modria Inc., one of the leaders in applying online technology to all forms of resolving complaints and disputes. Graham co-founded the first ODR service in the UK, WeCanSettle, and designed the blind bidding software at the heart of the system. Graham subsequently founded TheMediationRoom.com, for whom he designed their online mediation platform.

**Chapter Summary:**

Online Dispute Resolution ("ODR", sometimes referred to as Technology Mediated Dispute Resolution) continues in its 15th or 25th year (depending on how one counts) to progress as a field. As evidenced by the presentations at the 12th Annual World Online Dispute Resolution Forum in Montreal in 2013, hosted by the Cyberjustice Laboratory of the University of Montreal, and the upcoming 13th World Online Dispute Resolution Forum to be held in Silicon Valley, hosted by University of California–Hastings and Stanford Law School, people in the field from around the world continue to (1) discuss how appropriate technology can be part of dispute resolution, as well as (2) put in place technology solutions for dispute resolution. ODR is a vibrant space at this time as individuals and entities examine how technology can be of assistance to dispute resolution.

The authors introduce ODR as the use of technology spaces in some manner in the process of resolving disputes—a broad definition. With this definition, the authors explain that almost all individuals have used some form of ODR—email based customer service, a companies web presence to address claims, as well as a simple email or telephone call, are all forms of ODR. As technology expands, so does the potential for the use of new forms of ODR. The Chapter begins with a discussion of existing and emerging technology that are being used to resolve disputes, as well as an overview of some of the ODR developments that are occurring internationally.
As the authors suggest, the goal of ODR is to provide justice in a manner that is meaningful and respectful of judicial norms and forms while making use of technology's potentialities. The focus of the Chapter is how technology can play a role in dispute system design and in changing the manner in which individuals interact with dispute resolution, as well as how technology can be harnessed to provide meaningful conflict resolution. The authors discuss what aspects of the offline space can be reinvented, reinterpreted, or discarded in the online space and what aspect

should be retained to create the most beneficial and effective dispute resolution system. To help understand what is possible in ODR, the authors included a sample "role play" case that includes all of the classic steps of mediation, but held completely online. As the authors explain, the promise of ODR is not to argue in favor of face-to-face or against face-to-face dispute resolution, but to ask what face to face mans—in ODR only physical constraints are left to the side by the use of the virtual space. In sum, ODR carries with it a number of opportunities that may force a deeper interrogation by all the private participants as well as public authorities about the manner to conduct alternative dispute resolution and court and administrative proceedings.

**Mediating Family Feuds and Other Tales from the Chronicles of Probate Law**
**John Dowdy bio:**

John Dowdy, Jr. began the private practice of law in 1968 following graduation from Baylor Law School. In 1992, John decided to enter the field of alternative dispute resolution (ADR) and has advanced training in ADR, including twenty-four hours in family dynamics with Settlement Consultants, Inc., and arbitrator training with Professional Attorney-Mediators in Dallas. His ADR practice has grown to the extent that it has replaced his trail practice almost entirely. In addition to the law and ADR practices, John is a senior lecturer in business law in the College of Business Administration at the University of Texas at Arlington, where he has been teaching since 1974.

**Chapter Summary:**

The mediation of probate disputes is a niche area of dispute resolution that has evolved since the enactment of Chapter 154 of the Texas Civil Practice and Remedies Code (the ADR statute). Dowdy authored this chapter from the standpoint of his own experience in mediating probate disputes, with the purpose of equipping both the attorney–mediator and the attorney–advocate to make full use of the mediation process to the extent that settlement possibilities will be maximized. The focus of the Chapter is exclusively limited to Dowdy's immense experience mediating probate disputes.

The Chapter begins with a discussion on what a "probate dispute" is and who the typical parties to the dispute are. The Chapter also explores the unique characteristics that exist in probate cases that are not found in other types of civil cases. For example, probate disputes often involve emotional issues and the parties are almost exclusively unsophisticated and unaccustomed to the legal system. Dowdy also discusses various traps and blind spots of probate mediation for the unwary trial lawyer, the unique, but common occurrence of non-party participation in the resolution of probate disputes, as well the multi-sided nature of probate mediation. The Chapter also provides words of caution concerning the mediation process of probate disputes generally, specifically how they may be different from other types of mediation disputes.

The Chapter discusses what attorney-mediators should do to prepare for probate dispute mediation, including the necessity of the pre-mediation submission as well as "bad" practices to avoid while at the mediation session. Finally, the Chapter discusses the mediation session itself, focusing on the productivity of the mediation session, the format of the mediation session, what to do if there is impasse, and the reduction of the final agreement to an integrated settlement agreement.

# 2016 CALENDAR OF EVENTS

**JANUARY**

**ADR Mentoring Luncheon** 2016 * Austin * January 21, 2016 * *State Bar of Texas Alternative Dispute Resolution Section* ***To Register: http://www.texasbarcle.com/materials/Programs/3254/Brochure.pdf**

**Alternative Dispute Resolution Course *** *State Bar of Texas Alternative Dispute Resolution Section* * **To Register: http://www.texasbarcle.com/materials/Programs/3254/Brochure.pdf**

**40-Hour Basic Mediation Training** * Austin * January 11-15, 2016 * *Center for Public Policy Dispute Resolution* - The University of Texas School of Law, Austin * 512-471-3507

**Basic Mediation Training** *Round Rock * January 25-29, 2016 * *Austin Texas Mediators* * **www. mediatorsoftexas.com** or 512-966-9222

**FEBRUARY**

**Basic Mediation Training** *Rio Grande Valley * February 1-5, 2016 * *Austin Texas Mediators* * **www. mediatorsoftexas.com** or 512-966-9222

**40 Hour Basic Mediation Training * Austin** * February 10, 11, 12, 17, 18, 2016 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

**Advanced Mediation Training** *Round Rock * February 18-20, 2016 * *Austin Texas Mediators* * **www. mediatorsoftexas.com** or 512-966-9222

**Negotiation 101: Skills Development** * Austin * February 19, 2016 * *Center for Public Policy Dispute Resolution* - The University of Texas School of Law, Austin * **http://www.utexas.edu/law/cppdr/training/calendar.php** * 512-471-3507

**Professional Development Conference** *Houston * Norris Conference Center – Houston CityCentre * February 25-26, 2016 * *Texas Association of Mediators* * **www. txmediator.org**

**Basic Mediator Training: Texas Specific Short Course** * San Marcos * February 27, 2016* *Central Texas DRC* * 512-878-0382 * **www.centexdrc2.org** *

**MARCH**

**30-Hour Family Mediation Training** * Houston * March 4-6, 2016 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

**40-Hour Basic Mediation Training** * Dallas * March 29-April 1, 2016* *Conflict Happens* * 214.526.4525 * **www.conflicthappens.com * nkferrell@sbcglobal.net**

**APRIL**

**40 Hour Basic Mediation Training * Austin** * February 10, 11, 12, 17, 18, 2016 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

**Calming Conflict: Managing Responses to Conflict** * Austin April 22, 2016 * *Center for Public Policy Dispute Resolution* - The University of Texas School of Law, Austin * 512-471-3507

**MAY**

**40 Hour Basic Mediation Training** * San Marcos * May 11-21, 2016 * *Central Texas DRC* * 512-878-0382 * **www.centexdrc2.org** *

**JUNE**

**40 Hour Basic Mediation Training * Austin** * June 8, 9, 10, 14, 15, 2016 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

**Family Mediation Training** * Dallas * June 13, 2016* *Conflict Happens* * 214.526.4525 * **www.conflicthappens.com * nkferrell@sbcglobal.net**

***To include your training email Robyn Pietsch at rappug55@gmail.com.***
***Include name of training, date, location, contact information (telephone and/or email) and Internet address***

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# 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 2015 to June 2016. 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**_____

**Public Member** _____ **Attorney**_____

**Bar Card Number** _____

**Address**_____

**City**_____ **State**_____ **Zip**_____

**Business Telephone**_____ **Fax**_____ **Cell**_____

**E-Mail Address:**_____

**2015-2016 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, and 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 verify 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, 2015, 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