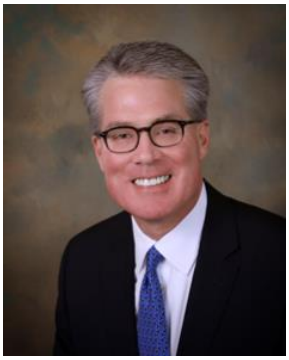
Alternative Resolutions

State Bar of Texas Alternative Dispute Resolution Section

Donald R. Philbin, Jr., Chair, ADR Section **Spring, 2015 - Vol. 24, No. 3**



Dear ADR Providers and Users:

CRITICIZING POPULAR THINGS IS POPULAR SOMETIMES

Mediation's popularity has steadily increased since the ADR Big Bang at the 1976 Pound Conference – formally known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Then U.S. Chief Justice Warren Burger encouraged the use of informal dispute resolution processes and Harvard Professor Frank Sander suggested a multi-door courthouse where future courts might screen incoming complaints and direct them to appropriate dispute resolution processes.[1]

What may have started as another docket control device became wildly popular. Recent empirical research showed that mediation and direct negotiation where clients are present were more procedurally attractive to users than judge or jury trials, both of which were more popular than binding and non-binding arbitration.[2] Among corporate users, mediation popularity has risen to 80% as arbitration popularity has softened. [3] And modern science has shown how neutrals predictably reduce the cognitive dissonance that results from directly negotiating with your litigation enemy.

Of course, the more popular something becomes the more criticism it can expect.[4] The March TEXAS BAR JOURNAL examining the Vanishing Jury Trial was at least implicitly critical of the role some authors perceive mediation plays in the reduction of jury trials. I agree that the reduction in jury trials in the aggregate has negative implications. There is perhaps nothing that adds more credibility to all forms of dispute resolution than the availability of a fair trial and a firm trial date. But at a granular case-by-case level, it's hard to find users who can afford and await the modern trial. Since all it takes to trigger a trial is for one party not to agree to settlement, it's hard to argue with the user preferences that underlie aggregate trial statistics.

With part of our mission being to educate the public about ADR, the Section is working on what we've dubbed the Science Project – rounding up the scientific research on why mediation is so effective and why it neutralizes predictable cognitive biases that often impede direct negotiations. At a macro level, countries rarely have the generals who are conducting the war also work on peace negotiations. It's hard to lay down weapons without heavily discounting the other side's intentions. Researchers quantified the effect of reactively devaluating an enemy's proposals – the same statement attributed to a foe is half as credible (44%) as the same proposal attributed to the home team (90%). Interestingly, though, neutral third-parties enjoy credibility much closer to the home team (80%).[5]

Inside This Issue

John DeGroote and Chandrika Shori introduce that project in "Because It Works: Communicating the Benefits of Mediation in Today's Disputes" in this newsletter. I hope you will help with this timely project, which complements a similar effort with "The Benefits of Arbitration in Texas" published earlier.

SECTION PUTS ITS MONEY WHERE ITS MOUTH IS ON ACCESS TO JUSTICE

Since interest rates fell to near-zero post-recession, IOLTA accounts have not funded Access to Justice in Texas like previous years even as need increased. ADR Section members and leadership donate *pro bono* mediations and other ADR proceedings routinely. In addition, the Section has again supported Access to Justice through this year's Champions of Justice Gala Benefiting Veterans.

OUTSTANDING SLATE OF OFFICERS TO LEAD SECTION FORWARD

Chair Ronnie Hornberger and his Nominating Committee proposed and the Council adopted one of the strongest slates of Council leaders I can recall. Not only are the incoming officers very strong – as has been our custom – all Council positions will be filled with strong neutrals and users who are committed to doing the work of the Section to strengthen ADR. The Nominating Committee report is included in this newsletter.

Since our beloved Judge Linda Thomas elected to pass on chairing the Section for health reasons, Erich Birch stepped up to assume that role without the traditional year as Chair-Elect. He will be our Chair next year and has already hit the ground running by planning strategic discussions for our Retreat that will be implemented during his term next year. Erich is a well-known neutral and attorney-user with an environmental focus based in Austin.

Lonnie Schooler of Jackson Walker in Houston will become Chair-Elect. Lonnie is a sought after arbitrator and arbitration law speaker at a variety of CLE events. John DeGroote of Dallas will become Treasurer. John is a mediator-arbitrator who brings a rich background as a heavy ADR user both in well-known law firms and very large companies where he served as litigation chief, general counsel, and company president. Trey Bergman of Houston will become Secretary. Trey is a well-known arbitrator, mediator, and adjunct law professor who has chaired the State Bar MCLE Committee and currently serves on the State Bar CLE Committee.

The incoming Council members are equally talented and hard working. David Harrell joins from Locke Lord in Houston, where he chairs the firm's International Arbitration Practice Group and the firm's Business Litigation and Dispute Resolution Practice Group. He brings additional perspective as not only a litigator but also from his experience chairing the State Bar's Business Law Section. A frequent speaker on making arbitration work for the end users, David is in tune with what litigators and in-house users want and expect from neutrals. Linda McClain of Navasota has agreed to serve another term and has helped with our outreach efforts for years.

Gene Roberts of Sam Houston State will also re-up. Gene is finishing his tour as president of the Texas Association of Mediators and has been instrumental in launching and writing our invaluable case update blog posts. Courtenay Bass of Dallas will also be joining the Council. Courtenay is a very well-known mediator and has wide-ranging perspective that will help the Council focus on projects that will help both neutrals and users. Gary McGowan of Houston will also join us. Gary is one of the best known and most highly ranked neutrals in the country. Law Dragon 500 named him one of the 500 best judges (both public and private) in the United States. Lisbeth Bulmash of Dallas will also serve in this outstanding class. Lisbeth has been an active neutral for years before moving to Texas and has helped the Council with CLE programs and other efforts.

A former chair, in seconding this nominating report, called the slate "very strong" and it certainly is. They are seasoned neutrals and users who will help guide and promote ADR in Texas for years. Since most of them had been involved with Section activities before nomination, we hope you will volunteer to

help the Section with future projects so we can continue to develop a strong list of future Council members. Please contact me or incoming Chair Erich Birch for opportunities.

PRESTIGIOUS EVANS AWARD GOES TO PAST CHAIR BILL LEMONS

Our highest honor is the Frank Evans Award. This year's recipient will be past chair Bill Lemons. A full report is included in this newsletter but I want to highlight Bill's service not only to the Section but ADR broadly. Bill has helped guide the Section and represented the cause before several Texas Legislatures long after his elected service. Recently, he was instrumental in writing "The Benefits of Arbitration in Texas" and is a constant advocate for ADR. Bill has served as president of the Association of Attorney-Mediators and other ADR groups.

As you can see, the Section continues to advance ADR in Texas and many substantive projects are underway to extend that legacy. We have a strong team that will make it happen. I hope you will join in as they do.

Best,

Don Philbin

[1] Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOT. J. 437 (2006); PON Staff, Reflections on Impact of Mediation 25 Years After the Pound Conference, Program on Negotiation at Harvard Law School (Aug. 4, 2002).
[2] Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014).
[3] Thomas J. Stipanowich and J. Ryan Lamar*e, Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 Harv. Negot. L. Rev. 1 (2014).
[4] Dean Burnett, *Criticising popular things: why is it so popular?*, THE GUARDIAN (12/24/2013).
[5] Donald R. Philbin, Jr., *Decisional Errors – On the Field, On the Bench, In Negotiations*, Harv. Negot. L. Rev. Online Edition (2009).

Notice of Change of Annual Meeting to Coincide with Annual CLE

The largest gathering of ADR Section members is at the annual advanced CLE program offered in late January or early February every year. Our Annual Meeting has been held in conjunction with the Annual Meeting of the State Bar of Texas and fewer Section members are able to attend that meeting. So the Council proposes holding the Annual Meeting in conjunction with the CLE program. The membership will be asked to approve the following By-Law amendment to effectuate that change at the Annual Meeting on Thursday, June 18, 2015 at the Grand Hyatt San Antonio.

Article III.
OFFICERS

Section 1. Officers.

1.2. Each officer shall hold office for a term beginning June 1 following the annual meeting at which he or she is elected and ending on June 1 of the following year after his or her successor has been elected.

Article V.
NOMINATION AND ELECTION OF OFFICERS AND COUNCIL MEMBERS

Section 2. Nominations.

Not less than ninety (90) days prior to the next annual meeting, the Chair shall appoint a nominating committee, composed of the Immediate-Past Chair, who will serve as Chair of the nominating committee, and four members of the Council, one of whom may be an ex-officio member. This nominating committee, with the input and consultation with the Council, shall make and report its nominations to the Chair of the Section, and to the Council for its approval, for the offices of Chair-Elect, Secretary, Treasurer, and new members of the Council to succeed those whose terms will expire on June 1 following the annual meeting at which officers and members of the Council were elected. The report of the nominating committee, as approved by the Council, shall be submitted to the Chair of this Section in sufficient time to conform to the notice requirement of this Article, and shall be presented to the annual meeting by the Chair of the nominating committee. Other nominations may be made from the floor.

Section 5. Number and Term of Council Members.

General Council members' terms will be three years beginning on June 1 following the annual meeting at which they shall have been elected and ending on June 1 three (3) years later unless specifically elected to fill the unexpired term of another member. If elected to fill an unexpired term, the newly elected member's term shall expire on the date of the member whose term he/she is filling. The number of members of the Council may not exceed seventeen (17).

This nominating committee, with the input and consultation with the Council, shall make and report its nominations to the Chair of the Section, and to the Council for its approval, for the offices of Chair-Elect, Secretary, Treasurer, and new members of the Council to succeed those whose terms will expire on June 1 following the annual meeting at which new officers and members of the Council were elected.

Article VI.
MEETINGS

Section 1. Annual Meeting of Section.

The annual meeting of this Section will be held at any place and time chosen by the Council. The program and order of business for the annual meeting may be arranged by the Council.

Election Notice for Annual Meeting
Thursday, June 18, 2015
at the Grand Hyatt San Antonio

Nominating Committee Recommendations
Adopted by the ADR Council

Pursuant to its By-Laws, the ADR Section Council adopted the following report and recommendations of its Nominating Committee at its January 22, 2015 meeting.

The Nominations Committee of the ADR Section of the SBOT has met and, taking into consideration that Justice Linda B. Thomas will be unable to serve as incoming Chair of the Section, proposed the following nominations for Officers of the Section to begin their service June 2015.

Chair: Erich Birch of Austin
Chair Elect: Lonnie Schooler of Houston
Treasurer: John DeGroote of Dallas
Secretary: Trey Bergman of Houston

Likewise, the Nominations Committee has met and proposes the following nominations for new members of the Council:

2 year term:
David Harrell of Houston
Linda McClain of Navasota

3 year term:
Gene Roberts of Huntsville
Courtenay Bass of Dallas
Lisbeth Bulmash of Dallas
Gary McGowen of Houston

Respectfully submitted,

Ronald Hornberger, Immediate Past Chair
Nominations Committee Chair

Report of Evans Award Committee
State Bar ADR Section
January 22, 2015

The Evans Award Committee of the ADR Section of the SBOT has met and discussed several potential nominations for receipt of the Evans Award to be awarded at the Annual Meeting June, 2015. After considering the matter, your Committee submits to the Council the following name to be considered for receipt of the Evans Award for 2015 to be awarded at the Section's Annual Meeting in June 2015:

William H. Lemons
San Antonio, Texas

Bill is a former Chair of the State Bar's Alternative Dispute Resolution Section and has been very active in supporting and preserving the availability and use of alternative dispute resolution in Texas. He made himself available and has given testimony before the Texas Legislature as a witness on ADR matters pending before and proposed to the Legislature and has written and spoken on numerous occasions on the subjects of arbitration and mediation. In addition, Bill has served long and with dedication and distinction the Association of Attorney Mediators, having served as its President. Also, in December of 2013, he was inducted into the Texas Chapter of the National Academy of Distinguished Neutrals. Bill has a long and distinguished history of preserving and protecting and of spreading the word on the use of alternative dispute resolution in Texas and of serving the various institutions that represent the best of the discipline.

Your Committee respectfully submits for consideration and supports the nomination of Bill as recipient of the Evans Award for 2015 at the Section's Annual Meeting in June 2015.

Respectfully Submitted,

Ronald Hornberger, Immediate Past President
Evans Award Committee Chair

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.

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You are an attorney and a mediator. As an attorney, you represent clients on an hourly-fee basis who, for the most part, are fiscally conservative and "do not want to spend a bunch of money on a mediation that probably isn't going to go anywhere anyway."

You always recommend to such clients that there is a mediator in your community who has a strict policy of "no settlement – no fee." In other words, if he doesn't settle your case, you don't have to pay for the mediation. Almost without exception (and assuming concurrence by the opposing party/counsel), your clients chose the "no settlement – no fee" mediator.

As a mediator yourself, you would never adopt such a fee policy because of the applicable ethical guidelines that prohibit mediators charging contingent fees. However, lately you are beginning to wonder if the ethical guidelines should also apply to you when acting as the attorney in the selection of the "no settlement – no fee" mediator and in actually participating with your client in selecting that mediator and/or participating in a mediation under those circumstances.

How do you proceed in the future?

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Erich Birch, Austin

The lawyer might think about this puzzler as a two part question. First, does the mediator's contingent fee arrangement actually violate any ethical rule? Second, if so, then does the lawyer's participation in the mediation conflict with any ethical obligation of the lawyer?

Guideline 3 of the State Bar ADR Section's Ethical Guidelines for Mediators states that a mediator should not charge a contingent fee or a fee based upon the outcome of the mediation. However, the Ethical Guidelines plainly state they are not intended to be disciplinary rules or a code of conduct. The Texas Supreme Court has adopted the ADR Section's Ethical Guidelines, but also qualified the rules as being "aspirational." The Court said compliance with the rules will depend primarily upon voluntary compliance, reinforcement by peer pressure and public opinion, and enforcement by the courts through inherent powers and rules already in existence. The bottom line is that, although ethically frowned upon, for most mediators a contingent fee arrangement is not prohibited.

However, the landscape changes if the contingent fee mediator is also a Credentialed Mediator in Texas. The Texas Mediator Credentialing Association ("TMCA") also adopted the Texas Supreme Court's Ethical Guidelines (along with amendments made by the Supreme Court in 2011), but replaced the permissive language with mandatory requirements, and created the TMCA Standards of Practice and Code of Ethics

("Code"). So for a mediator credentialed by TMCA the rules are more than aspirational guidelines.

So the attorney in our puzzler should first check to see if the contingent fee mediator holds a TMCA Credential. If the mediator does not hold a credential, then although the contingent fee arrangement might still be troubling, the mediator has not violated any rule. Under this scenario the attorney should make the client aware of the ethical issues that arise in a contingent fee mediation. If after being fully informed the client nevertheless wishes to proceed under this arrangement, then with a clear ethical conscious the attorney may participate in the mediation. But during the course of the mediation the attorney should be extra attentive to settlement proposals presented by the mediator, since the game is being played on an ethical minefield.

The attorney's decision gets more complicated if the contingent fee mediator is credentialed. When the credentialed mediator initially proposes a contingent fee arrangement the attorney should simply ask the mediator how such an arrangement is possible under the TMCA Code. If the mediator recognizes the issue and proposes a more acceptable fee arrangement, the potential ethical breach will be avoided (although questions about the mediator's competence or ethics might be raised by the fact that the mediator even suggested a contingent fee arrangement).

However, a host of thorny issues arise, if, after being reminded of the Code's prohibition of contingent fee arrangements, the credentialed mediator is nevertheless comfortable with moving forward under this arrangement. The attorney should discuss the situation with the client, who hopefully will decide that using a mediator who is comfortable operating in violation of an ethical code is not a good idea. If so, then the parties can move on to another mediator candidate. The attorney might think about whether the credentialed mediator's behavior justifies filing of a grievance with the TMCA.

On the other hand, if, after being informed of the ethical concerns, the client nevertheless chooses to use the credentialed mediator under a contingent fee arrangement, then the attorney has a bit of a problem. The attorney might first think about the implications of representing a client who ignores both the ethical concerns with the mediator and the attorney's advice about using the mediator. During the mediation session if there are signs the mediator's conduct is being influenced by the contingent fee arrangement will the client again ignore the attorney's warnings and counsel? If a settlement is reached and then the client later regrets the decision, and decides the mediator compromised the negotiations because of the fee arrangement, and then concludes his own counsel should have protected him from this, will the attorney then become the target of a grievance? Perhaps it would be better to withdraw from the representation thereby conveying the seriousness of the ethical concerns to the client.

The attorney will get further insight by turning to the Disciplinary Rules. Rule 1.02(c) provides that a lawyer must not assist a client in engaging in conduct that the lawyer knows is criminal or fraudulent; however, violation of the TMCA Code is not a criminal act and the fact pattern here does not suggest that fraud is involved. However, Rule 1.02(c) also requires an attorney to discuss the legal consequences of any proposed course of conduct with the client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law. Perhaps the lawyer in this puzzler is surprised to find the client actually has a valid strategic reason for using this particular mediator and this compensation arrangement. Although determining the validity of a law might not arise in this puzzler scenario, the lawyer could nevertheless decide that representation at the mediation is in the client's best interest even though the lawyer believes the mediator is

violating the TMCA Code. The comments to Rule 1.02 indicate that a lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected. Maybe the lawyer should proceed with the contingent fee mediation, due to the client's expense concerns, even though a third person, the mediator, might compromise his or her own ethical commitments under the TMCA Code in the process.

Ultimately, if the client is intent on using the contingent fee credentialed mediator, then the attorney should turn to Rule 1.15 for guidance on whether withdrawal is the proper course. If the lawyer believes this decision of the client to be repugnant or imprudent or the lawyer fundamentally disagrees, then the lawyer may withdraw. This decision may also be in the client's best interest because, as suggested above, if the attorney does not withdraw and instead continues the representation the client might conclude that the ethical concerns with the mediator are overstated. In the client's words "why would my attorney participate in this mediation if it really is unethical?

This of course still leaves the attorney to ponder whether a grievance should be filed on the contingent fee credentialed mediator. Fortunately, that question was not asked in this particular ethical puzzler.

Fran Brochstein, Houston

I contacted several attorneys to get their input. The people I contacted had definite and varied opinions on this topic. My initial reaction was that it did not pass the "smell test" since the mediator had an "interest" in reaching a MSA since the mediator has a "dog in the fight." It might come across as not being neutral and impartial. As emphasized in the 40 hour mediation training, it's the appearance or potential that someone is not impartial and unbiased that matters.

However, it could be argued that this is just another marketing "gimmick" since the majority of cases settle at mediation.

It did bring up some interesting "what if" situations:

> What if the people did not settle at the mediation, but after the mediation ended agreed to everything discussed at the mediation? Would the mediator be entitled to payment?
>
> What if a partial MSA was reached? Would the mediator receive only a partial payment?
>
> What if one side was "weaker" than the other? Would the mediator put more pressure on the "weaker" party to settle?
>
> Would parties not settle so they did not have to pay the mediator after using his/her services for at least four hours?

And, looking at the puzzler in the opposite way…

> What if the mediator charged when people do not settle? Would that motivate people to settle their case?

H. Wayne Meachum, Dallas

I must admit that I am perplexed that this issue seems to present an ethical dilemma for some in the mediation community. To me, it is black and white. I fail to see any gray area.

One of the **basic tenants of mediation** is that a dispute is submitted to the mediation process in which a third-party *neutral* manages the process. The basic 40-hour mediation training consistently, unequivocally, and universally teaches prospective mediators that the mediator is *neutral*; that the mediator manages the *process* and has NO STAKE in the outcome of the mediation; that, if an agreement is reached, it is the *parties* who make the agreement and the mediator has *no personal interest* in whether the

parties reach an agreement or not. That characteristic of the mediator is **fundamental to the integrity** of the whole concept of mediation.

The conclusion is **inescapable** that any mediator who mediates on a contingency-fee basis has a *personal financial interest* in the outcome of the mediation. That mediator is no longer *neutral* and cannot help but participate in the process differently than a mediator who is truly a third-party neutral. Even if a contingency-fee mediator could be "neutral in his heart" (which is highly unlikely), the appearance of a lack of neutrality is always present. The prohibition of contingency-fee mediation is "codified" in Paragraph 3 of the Texas Supreme Court's Ethical Guidelines for Mediators and is made mandatory in the TMCA Standards of Practice.

Then, there is the issue of ethical guidelines. How could any ethical mediator take "refuge" in the fact that the ethical guidelines are "merely aspirational" instead of mandatory? Doesn't "aspirational" mean that one "aspires" to conduct that is ethical? And, in the case of contingent-fee mediations, it is not difficult to reach that level of ethical practice to which one presumably "aspires." Simply don't do, or participate in, contingency-fee mediations. And why would any lawyer or any attorney-mediator (for whom ethical behavior **is** mandatory, whether he/she "aspires" to ethical behavior or not) participate in, or acquiesce in a client's participation in, a mediation process that is unethical? Is convenience more important than ethical behavior? Is the amount of a mediation fee more important than ethical behavior? If the mediation fee is a problem, take the case to one of the many DRC's available in Texas or engage a *pro bono* mediator of which there are many in Texas.

When a lawyer takes a case on a contingency-fee basis, he/she has a *personal financial interest* in, and is "betting" his livelihood (income to cover his overhead, pay his staff, put money is his pocket) on, his ability to advocate well-enough for his client to win that case. When a mediator takes a case on a contingency-fee basis, that mediator has created that same *personal financial interest* in the outcome of the mediation and must rely on HIS efforts to settle the case **in order to get paid** instead of (1) being the third-party neutral he is required to be and (2) allowing the parties to reach a settlement that is reflective **solely** of the **interests of the parties** and **not** influenced in any way by the *personal financial interest* of the mediator. This should be of foremost concern to any attorney, and especially any attorney-mediator, representing a client in a mediation.

The heart of the mediation process is that the mediator **must** be completely **neutral**. Contingency-fee mediation is a dagger in the heart of the mediation process.

Frank Elliott & Kay Elliott, Fort Worth
Several questions are posed in this ethical puzzler:

(1) Is it ethical for an attorney-mediator to recommend a fellow mediator who has a "no settlement-no fee" policy?
(2) Is it ethical for an attorney mediator to participate as an attorney in a mediation convened by a "no settlement-no fee" mediator?
(3) If the answer to either or both of the above questions is no, what should an attorney do with regard to counseling and adequately representing a client ordered to mediation?

When a client is ordered to mediation by a court, the client's attorney is usually in a position to influence the selection of a mediator. In the case at hand, the attorney has developed a "conscience" about recommending a mediator who has a contingent fee business model. One possibility is for the attorney to only recommend fellow mediators who are in compliance with the ethical guidelines for mediators promulgated by

the Supreme Court of Texas. That practice is the gold standard and should, in this mediator's view, be followed in every case. To recommend a "no settlement-no fee" mediator is to be complicit in an unethical practice. There are analogies to other areas of law that will occur to most readers, including the obvious situation where a person aids another in breaking the law, or in abusing a moral or ethical norm.

In terms of not recommending an unethical mediator but participating in a mediation with such a mediator, the complicity is distinguishable but not without harm. The attorney may take one of three approached in terms of counseling and representing a client: Guide, guardian or governor. The guide helps the client in whatever course of action the client chooses, so long as it is not illegal. The guardian protects the client from harm to self, and the governor refuses to help the client "harm" a third party. When the attorney participates in an unethical practice by a mediator, the attorney assumes the permissive guide role. I personally believe this is not the only nor the wisest choice in this case.

Because I believe the answers to questions one and two are no, I have several suggestions to answer the third question. The attorney could recommend only ethical mediators and, if presented by the client with a mediator choice who does not follow the mediator ethical guidelines, the attorney might recommend a compromise: a mediation at a local dispute resolution center that charges an administrative fee only. The attorney might point out that this benefits the client in that if the case settled with the "no settlement-no fee" mediator, the client would pay a substantial mediation fee. Using the dispute center obviates that risk and also is in compliance with the court order.

The attorney might point out that if the client still insists on using an unethical mediator, on the premise that the client does not intend to participate in good faith, the attorney does not advise the client to pursue a course of action that is going to prevent a possible settlement beneficial to the client. Although good faith participation in mediation cannot be ordered by the court, the attorney owes a duty to the client to counsel on the wisdom of sabotaging a process that often produces settlements that are superior to court outcomes, according to the research on trial verdicts compared to last offer refused at mediation.

Comment:

Ethics or expediency? Principle or principal? These are the choices facing our hapless attorney-mediator in this Ethical Puzzler who finds herself on the horns of a dilemma when she tries to balance (1) the prohibition of contingency-fee mediation as spelled out in Paragraph 3 of the Texas Supreme Court's Ethical Guidelines for Mediators (and made mandatory by the TMCA Standards of Practice) and (2) the convenience and practicality of looking the other way in order to look good to her client.

The facts clearly state that, as a mediator, she knows that the Ethical Guidelines strictly prohibit a mediator charging a contingent fee and, indeed, would never engage in such unethical behavior when serving as a mediator. The issue here, however, is what becomes of her commitment to these ethical standards when she is not acting as the mediator but, instead, is the consumer of mediation services. It's like the old joke about the Ten Commandments, i.e., they are not the Ten "Suggestions." Do the Ethical Guidelines simply become the Ethical "Suggestions?" Do the values of our hapless attorney-mediator get shoved aside in favor of expediency? Are the principles she so ardently upholds as a mediator forgotten in favor of the principal ($$$) to be saved by her client in the event the case does not settle in mediation? Or, by ignoring ethics and principles, does she become complicit in an unethical practice? And, as a practical matter, what effect could that have on her own reputation as a mediator?

Webster's New Universal Unabridged Dictionary, 1996 Edition, defines ethics as, "the body moral principles or values governing a particular culture or group." The Texas Supreme Court's Ethical Guidelines for Mediators and the TMCA Standards of Practice are the moral principles and values which govern mediators in Texas. In this writer's view, these morals, principles and values should apply in whatever role an attorney-mediator is serving in the mediation process.

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

Because It Works:
Communicating the Benefits of Mediation in Today's Disputes

By John DeGroote and Chandrika Shori

Why do courts order mediation? And why do clients and the lawyers who serve them seek out mediation earlier and earlier in disputes, including many before they're even filed? Because it works. But in this the era of decreased court filings and the vanishing trial, do people really understand *why* it works, and how mediation fundamentally differs from opposing counsel trying to work it out?

Settlements achieved through mediation are by definition consensual, and it's hard to argue against results, achieved earlier in the process, that can involve alternatives no court can order. But some do:

> In sum, the undersigned judge does not belong to the school of "mediation romantics" who believe that mediation best resolves all disputes and leaves all the parties walking away with warm and fuzzy feelings towards one another. Accordingly, the undersigned judge will rule on each application for mediation based upon the ten factors discussed herein rather than routinely rubber-stamp orders approving each mediation request under the philosophy that this method is a panacea for resolving all disputes that erupt in this Court.[1]

Unfortunately, the *Smith* case doesn't stand alone--the debate surrounding Tex. R. Civ. P. 169 focused on the effectiveness of mediation, and some list pre-lawsuit mediation as a cause of the recent drop in court filings.[2]

Our Mission and Our Plan

The Mission of the ADR Section of the State Bar of Texas is "[t]o educate the public about ADR including being a resource to questions from practitioners and legislators about the proper role of alternative dispute resolution in our society." With this Mission in mind, our section has committed to educate our clients, our counsel, and our courts on *why* mediation works -- and why opposing counsel often can't "just work it out".

This Spring the ADR Section will further its Mission by following the example set by the ADR Section and the Texas Arbitration Council's recent pamphlet entitled "The Benefits of Arbitration in Texas." Over the next few months the ADR Section will finalize and publish a similar pamphlet on "Why Mediation Works," with particular emphasis on the cognitive biases we all face in negotiation, and how mediation serves to help us all recognize and control them.

In this forthcoming pamphlet and supporting materials, we'll take a closer look at some of the biases we all have -- the mental shortcuts and errors our brains take and make as we simplify the information we're presented in negotiation. Mediation can address each of these shortcomings as we settle our disputes, and we'll

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[1] *In re Smith*, 524 B.R. 689, 705 (Bankr. S.D. Tex. 2015)(Bohm, C.J.).

[2] Angela Morris, *Why are Filings Falling? Civil Lawsuits Down 17 Percent in 10 Years*, Texas Lawyer (March 9, 2015), http://www.texaslawyer.com/id=1202719819524/Why-Are-Filings-Falling-Civil-Lawsuits-Down-17-Percent-in-10-Years?slreturn=20150215014036.

take this opportunity to make it clear why, in materials available both in print and online.

10 Cognitive Biases that Mediation Can Neutralize

We all have a good idea about why mediation can work when a chat among opposing counsel won't, and much of mediation's success comes from its ability to respond to well-known cognitive biases that generate impasse every day. So that you, as a member of our Section, know in advance, the cognitive biases we'll explore are as follows:

1. Acceptance Time
2. Anchoring
3. Availability Heuristics
4. Competition Bias
5. Confirmation Bias
6. Over-Confidence Bias
7. Reactive Devaluation
8. Status Quo Bias
9. Sunk Cost Bias
10. Unique Position

Naturally, this list is subject to input, modification, and outright change until the moment our materials go to print, but we believe these 10 biases can highlight the difference between mediation and its alternatives.

Conclusion

There are those out there who will (correctly) note that "Acceptance Time" technically isn't a cognitive bias, and that there are 35, or 58, or 19, more biases we should talk about, and your feedback is always welcome. Consistent with the ADR Section's Mission, know that we seek to strike a balance between the educational and the exhaustive so that those who want to know what mediation is, and why it works, have an easy-to-understand resource with information they can access and use.

Naturally, if you have any thoughts on the ADR Section's educational efforts in this area or this project in particular, please feel free to reach out to either of us at cs@johndegroote.com or jd@johndegroote.com.

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Doing the Best Mediation You Can

By John Lande*
Dispute Resolution Magazine, Spring/Summer 2008, at 43.

As a mediator who handles civil cases, what can you do to be most effective? What would lawyers and parties most appreciate in your work as a mediator? Conversely, what might you do that would "turn them off," impede the process, and reduce your chances of being selected again?

These were some of the questions considered by the Task Force on Improving Mediation Quality (Task Force) of the ABA Section of Dispute Resolution, which recently issued its final report.[1] In 2006, after the Section decided that a national credentialing program was not a feasible way to ensure mediation quality, it created the Task Force to investigate factors that promote high-quality mediation practice. The 17 Task Force members represented diverse geographic locations, mediation perspectives, and practice areas. They included lawyer and nonlawyer mediators, lawyers who represent clients in mediation, academics, and administrators of court-connected mediation programs.

The Task Force recognized that mediation norms vary widely by type of dispute, and thus it would not make sense to focus on all types of mediation. Rather, it focused on one area and anticipated that similar inquiries might be undertaken later for other areas. It focused only on private practice civil cases (such as commercial, tort, employment, and construction cases, but not family law or community disputes) where the parties are represented by counsel in mediation.

The Task Force conducted research on the views of lawyers, parties, and mediators by using focus groups, surveys, and interviews. It held focus groups in nine cities across the United States and Canada, including Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto, and Washington, D.C. At the end of some focus groups, participants completed surveys. More than 200 people participated in the focus groups, and 109 respondents completed the surveys. The Task Force also conducted individual telephone interviews with 13 parties in mediation.[2]

The participants were selected because of their mediation experience with large civil cases, so this was not a random sample of civil litigators, mediators, or parties.

The Task Force used the data to inform its recommendations, recognizing that the subjects' views are not necessarily the best indicator of mediation quality. The Task Force concluded that there is not a one-size-fits-all best practice regime that would improve the quality of civil mediation. Rather, it recommended that mediators and mediation participants tailor the procedures to fit each case.

What's a Mediator to Do?

The Task Force found that many mediation participants said they appreciate mediators who are not only skilled and knowledgeable, but who also have good intuition about meeting parties' emotional needs. They have been dissatisfied with some of their mediation experiences, and the Task Force was particularly interested in identifying strategies to satisfy mediation participants.

The Task Force findings focus on the following four aspects of mediation that the research subjects said are particularly important: (1) preparation for mediation by mediators and mediation participants, (2) case-by-case

customization of the mediation process, (3) careful consideration of any "analytical" assistance that mediators might provide, and (4) mediators' persistence and patience.

Preparation Before Mediation Sessions

The vast majority of the survey respondents said that preparation by the mediator and mediation participants is very important. Indeed, it helps to consider that "mediation" really begins during the preparation phase--not when everyone convenes at a mediation session. Some subjects emphasized that it is critical for a mediator to personally "be there" from the beginning.

Most of the respondents said that lawyers should send a mediation memo to mediators and that it is essential for mediators to read everything they receive (which may include additional documents such as pleadings, legal memos, or expert reports). They also generally said that mediators and lawyers should talk before the mediation session to discuss procedural and substantive issues, including the "real issues" and potential stumbling blocks. They overwhelmingly said that mediators should discuss who will attend the mediation session and confirm the participation of individuals with appropriate settlement authority. They also generally said that it is very helpful for mediators to encourage people to take a constructive approach in mediation.

These discussions can prompt the lawyers to prepare themselves and their clients, which can make a big difference in the success of mediation. The parties should have an appropriate understanding of the process, the issues, and their real interests. They should expect to hear things that they will disagree with, and they will probably be asked challenging questions. Parties should be open to reconsidering their positions based on the discussions in mediation.

The Task Force research suggests that mediators should use the preparation process to help identify the parties' goals. Not surprisingly, the vast majority of survey respondents said that in most cases, settling the case and minimizing the time, cost, and risk are important goals. Almost as many respondents said that satisfying the parties' underlying interests is also an important goal in most cases. Substantial proportions of respondents identified additional goals, such as giving parties a chance to tell their stories and feel heard, having parties reach closure, promoting communication between parties, and preserving relationships. So it would be a mistake for mediators to assume that "it's just about the money" or that the only goal is to settle the case. Instead, mediators should be attentive to the parties' goals, starting before the first mediation session.

Mediators and mediation participants should use their judgment in applying these principles in particular cases. For example, the amount at stake in some cases may not justify a large investment of time and cost for preparation. Moreover, in some practice settings, such as in certain court mediation programs, it is considered inappropriate for mediators to have ex parte discussions with the lawyers about substantive issues before a mediation session convenes.

Case-by-Case Customization of the Mediation Process

The Task Force study found that mediation participants generally said they wanted the mediation process to be tailored to their needs rather than a standardized "cookie cutter" procedure that is used in every case. For example, one lawyer said that his biggest frustration is when mediators use a "formulaic recipe" that does not fit the participants and their goals. Indeed, participants said that they appreciated getting coaching from mediators about the process, such as how to frame an argument or whether to discuss particular issues in caucus or joint session.

Mediators can play an important role in scheduling events related to mediations. Most of

the survey respondents preferred scheduling mediation sessions to occur after "critical" discovery is completed, but before discovery is fully completed. Mediators may coordinate scheduling of mediation with critical discovery or other events and arrange for the timing, process, and content of information exchanges before the mediations.

Survey respondents varied in their preferences about some aspects of the preparation process. Some said they prefer conference calls, while others preferred separate conversations between mediators and the lawyers. They also differed about whether, in addition to providing mediation memos to the mediator, each side should provide them to the other parties.

Moreover, opening statements may not be needed if there has been a lot of preparatory work before the mediation session and if it makes sense to go right into caucus after the mediator's opening statement.

Mediators would often benefit from eliciting participants' procedural preferences and following them if appropriate in a particular situation. Mediators who try to impose their process may damage their rapport with the participants and lose some of their confidence that may be needed to help resolve the substantive issues.

	mediation participants	mediators
ask pointed questions that raise issues	95%	96%
give analysis of case, including strengths and weaknesses	95%	66%
make prediction about likely court results	60%	36%
suggest possible ways to resolve issues	100%	96%
recommend a specific settlement	84%	38%
apply some pressure to accept a specific solution	74%	30%

T**able** 1. Percentage of Survey Respondents Who Believe that Certain Techniques Would be Helpful in Most Mediations

In customizing the process, mediators and lawyers may discuss whether each side should make opening statements at the beginning of a mediation session. Although many mediators and lawyers assume that each side should always give opening statements, a substantial minority of survey respondents said they believe that such opening statements are not helpful in most cases. Some expressed concern that if some participants are especially angry, inflammatory opening statements could be counterproductive.

Careful Consideration About Providing "Analytical" Assistance

The Task Force research suggests that many mediation participants want mediators to use various techniques to help analyze the case and promote settlement, though some survey respondents had reservations about certain techniques. Table 1 shows the percentages of the mediation participants and mediators who said that specific techniques would be helpful in most

mediations. Almost all of the mediators and participants said that mediators can be helpful by asking pointed questions and suggesting options to consider. Almost all of the mediation participants, but only two-thirds of the mediators, said that it is usually helpful for mediators to give their analysis of the case. By contrast, a substantial majority of participants and only about one-third of the mediators said that it is helpful in most cases for mediators to make predictions about likely court results, recommend a specific settlement, or apply some pressure. The interviews with parties found that many of them were uncomfortable with mediators giving their opinions or recommendations about specific settlement options.

These results suggest that mediators should be cautious about using the more controversial techniques, such as making predictions, recommendations, or applying pressure. Although many lawyers may want mediators to use these approaches, the Task Force research suggests that many parties and a substantial minority of lawyers do not want the mediators to do so. For example, one lawyer did not "get the point" of going to mediation if mediators don't give their opinions. By contrast, another thought that doing so can be "very, very dangerous."

In actual cases, there are many variables that affect the appropriateness of the particular techniques. Substantial majorities of participants and mediators said that all of the following factors might affect their judgment about the appropriateness of a mediator giving an assessment of the strengths and weaknesses of a case:

- whether the assessment is explicitly requested
- the extent of the mediator's knowledge and expertise
- the degree of confidence the mediator expresses in the assessment
- the degree of pressure the mediator exerts on people to accept the assessment
- whether the assessment is given in joint session or caucus
- how early or late in process the assessment is given
- whether the assessment is given before apparent impasse or only after impasse
- the nature of issues (e.g., legal, financial, emotional)
- whether all counsel seem competent
- whether the mediator seems impartial

These issues touch the still-controversial debate over the propriety and value of facilitative and evaluative mediation techniques. The Task Force expressly declined to take a position in this debate. The research findings suggest that mediators who contemplate using the techniques described above should consider these issues carefully.

Mediators' Persistence and Patience

Survey respondents overwhelmingly said they believe that it is important for mediators to be patient and persistent. Participants expressed dissatisfaction if mediators are merely "messengers" or "potted plants" or if they give up too easily when negotiations become difficult. These are situations when the antagonists need mediators the most, so it is precisely at these times when mediators should work the hardest to help people deal constructively with the challenges. If a mediation session ends without agreement but has some potential to reach one, the vast majority of participants think that the mediator should contact the lawyers after a week or two to ask whether they want additional help from the mediator--and some participants criticized mediators who did not do so. One person summed it up this way: "Never stop talking if there is any hope."

Continuing to Learn About Mediation

Mediation is a very difficult craft, and virtually all mediators would benefit from continuing to learn about it. Many mediators attend continuing education programs to learn about mediation theory and practice skills, legal issues, and new developments in the field. Mediators may benefit from additional ways to develop their professional skills such as routinely debriefing mediations by writing what went well, where the mediation seemed stuck, and how they might handle similar situations differently in future mediations. Mediators can also routinely ask lawyers and parties to complete confidential feedback forms after mediations. Similarly, some mediators informally solicit feedback from lawyers after mediations. Some mediators ask colleagues to observe their mediations and give feedback (with the consent of the participants). Mediators can also participate in "peer consultation groups" to use a structured process for learning from actual case experiences.[3] Mediators may also work to improve mediation quality generally in their area. The Task Force developed a tool kit to help practitioners adapt the Task Force process to address participants' needs in their particular area. The tool kit is available on the Task Force's website, which includes model forms.

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Notes

1. This article is adapted from the Task Force's Final Report, which is available at www.abanet.org/dch/committee.cfm?com=DR020600. The report includes detailed data of the findings summarized in this article. It also includes recommendations for possible follow-up initiatives, such as developing materials for mediators, lawyers, parties, and trainers; considering whether to undertake similar projects for other types of cases; and examining how mediators can use analytical techniques in ways that maintain a high quality of mediation practice.

2. Most of the Task Force data are from focus group discussions and surveys collected at the later set of focus groups. Almost half of the survey respondents said that their most common role in mediation was as a mediator, and about half said that their most common role was as a lawyer. About 3 percent said that their most common role was in another capacity, presumably as a party representative. Responses from those whose most common role was as a mediator were analyzed separately from the other respondents. In this article, the term "mediation participant" refers to lawyers and parties. Data from participants came primarily from lawyers. To get parties' perspectives, the Task Force interviewed 13 nonlawyer participants, and specific references to data from parties were derived from those interviews. "Respondents" refers to people who completed the survey, and "subjects" refers to everyone who provided data for the study.

3. For further discussion of these ideas, *see* John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 655-58 (2007).

HOW TO START AND GROW A QUALITY MEDIATION PRACTICE IN 25[1] EASY STEPS (MORE OR LESS) PLUS BONUS TIPS

By Christopher Nolland[2]

How does one develop a quality mediation practice? It looks hard to break into mediation because of the standard Catch-22 problem: lawyers do not want to use you as a mediator unless they know you are good and they cannot find out that you are an ADR master of the universe until they use you. Instead, they go with the name-brand mediators or those with whom they have had prior good experiences. Never fear, you can build a quality mediation practice; one which provides great services, which you will enjoy, and which is financially sound.

Creating a mediation practice is much different than starting a law practice. First, most mediators have practiced law for some time. Indeed, they are often highly experienced lawyers or former judges. In contrast, it is not unusual for lawyers starting their own practice to do so at a relatively young age. Second, the target "clients" for a mediation practice are primarily other lawyers; it is other lawyers (rather than their clients) who typically select the mediator. Third, mediation is much more hands-on than many other types of practice in the sense that very little of the work is delegable to other lawyers, paralegals, or staff, except for scheduling and purely administrative matters.

The first step to developing a quality mediation practice, really more of a prerequisite, is to make sure you have the proper experience base. While you need not necessarily be a trial lawyer (although that certainly helps), you must have a significant number of years of practice under your belt. First, you need exposure to many different substantive legal and business issues. Second, you will have developed a significant number of contacts and professional relationships. Third, you will have developed a (presumably good) reputation among your peers.[3] Finally, as a practical matter, it is unlikely that an inexperienced lawyer can command the respect of the lawyers and parties at the mediation. Why should they listen to the most unseasoned person in the room?

If you are fairly early in your legal career,[4] put your aspirations to develop a substantial mediation practice to the side for a few years. In the meantime, develop those skills and relationships which will serve you well as a mediator: attend mediation CLEs, join ADR sections of various bar associations, join ADR organizations, volunteer for settlement week and pro bono mediations, and look for the opportunity to attend mediations as a lawyer for one of the parties. While it will take a number of years before you have the gravitas which will allow you to develop a quality full-blown

1 Actually, there are only 22-24, if you consider overlaps and arguable duplicates, but I rounded up.

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3 If you have developed a crappy reputation, that is an issue beyond the scope of this article.

4 a/k/a: a) "green"; b) "snot-nosed kid"; c) "just fell off the turnip truck"; (d) "wet behind the ears."

mediation practice you can start laying the foundation early in your career.

When you are finally ready to launch your mediation practice in earnest, consider and implement the following steps. They will serve you well. They are NOT set forth in order of importance, overlap to some extent, and, perhaps, are both redundant and repetitive (as is this very sentence).

1. **Do not start your mediation practice until you are mentally ready and truly committed.** You need to have a passion for mediation. Although you won't be able to go full time quickly, you must have an overwhelming commitment and excitement for the mediation process. Without such passion you will start "phoning it in" and doom yourself (and your reputation as a mediator) to mediocrity. To be unduly blunt (one of my specialties), you will not develop a quality mediation practice if you think of it as "a nice easy gig for early semi-retirement."

2. **Market yourself and your mediation services to other lawyers**. Opportunities for court referred mediations are very limited, particularly in the early stages of your mediation practice. Courts generally allow or encourage counsel to agree on a mediator and have largely gotten out of the business of imposing a mediator on the parties. On those occasions where the court selects a mediator, it is usually one who is highly experienced and well known to the court.

3. **Every time you conduct a mediation, you are also marketing your mediation practice.** A successful mediation practice depends on repeat business. Successful mediations breed more mediations. **This is the most important lesson to learn**.

4. **Have appropriate facilities.** Comfortable, well-lit, and properly furnished conference rooms are a must. At a minimum, they should include the following:

   - A large conference room which will seat all parties for a joint or open session. A room that comfortably holds a dozen people seems to be the absolute minimum size;

   - Comfortable, well furnished, smaller conference rooms for break-out sessions, again with adequate seating. At a minimum, there should be room for six people in at least one other conference room and access to a couple of more conference rooms seating 4 - 6 people;

   - Make sure that all conference rooms have appropriate beverages and refreshments (sodas, juice, coffee, ice water). The participants will get cranky without some nourishment and many require a morning jolt of coffee. Additionally, you may simply come across as cheap[5] and generate a little bit of resentment if you skimp on beverages and refreshments;

   - While most people will have cell phones, signal coverage or conference calling can be an issue. Make sure there is a working telephone in every conference room so that the participants can conduct other business, make "authority"

[5] Being cheap is nearly a cardinal sin. Despite my wife (a/k/a "she who must be obeyed") regularly, and perhaps somewhat accurately, referring to me as the "cheap bastard," I try not to let it bleed into my professional life.

phone calls, and are not in limbo for the entire day;

- Make sure the conference rooms are adequately heated and cooled as is appropriate for the weather. Arrange for evening HVAC;

- Have available easels (and stands), computer projection equipment and screens, and other appropriate technology to allow the parties to make their presentations without lugging lots of equipment. A computer projector and screen make things much easier for those who want to give a PowerPoint presentation and the parties often just assume they will be available;

- Good WiFi availability is really a necessity. Most participants will bring their laptops and tablets and will need or at least appreciate a WiFi connection. You might even have a dedicated computer with internet access available for counsel and the parties so they can check email, retrieve documents, etc. I am not suggesting a full-blown "internet cafe," but a spare computer at a secretarial station or a work-room with an internet connection makes life easier and more productive for the participants. All of this technology should cost only a couple hundred bucks a month or less to set up. Don't cheap out!

5. **Have appropriate staffing at the mediation.** The parties should be met upon arrival by a receptionist who knows what to do with them and where to place them or, at the least, who to call. Your secretary or assistant (who may also be the receptionist) should know where to place the parties and get them settled. Your assistant should also be trained to handle and collect the final paperwork (mediation agreements, attendance rosters, etc.), collect the checks for the mediation fee,[6] and take care of any special requests of the parties. Your assistant or other staff members should periodically check on the parties to make sure everything is okay, that there is hot coffee, ice water, a proper supply of beverages, and to take care of copies, faxes, printing documents, etc. Your assistant should also arrange for lunch orders and delivery of those orders to the participants. See paragraph 7, below. Don't cheap out on staff.

6. **Have proper staffing to handle scheduling and other administrative tasks before the mediation**. VOICE MAIL IS INADEQUATE TO PROPERLY SCHEDULE MEDIATIONS. Although voice mail may work some of the time, most people want to speak to a live voice when scheduling mediations. They often want to know immediately if certain dates are available, especially if the mediation is time sensitive. If you rely upon voice mail and you are in mediation or out of the office for two or three days, you may not be able to return calls until after hours. You will inevitably play voice tag for several days. You will miss out on mediation opportunities.

   Having a staff person take care of your scheduling will also relieve some of the load from you and will permit your mediation marketing materials -- biography, fee schedule, etc. -- to be sent out immediately when people inquire about your services. Additionally, if you rely on voice mail, it may be difficult for outsiders to reach participants

[6] Have your staff collect the checks for the mediation fee; you don't want it to appear that you are more interested in the money than the mediation.

in the mediation. Finally, your assistant should leave in each conference room an "information sheet" with internal telephone numbers, fax numbers, WiFi passwords, and the like so the mediation participants have them readily available to provide contact information to their outside colleagues who may want to reach them during the day.

7. **Serve good lunches and snacks**. A nice lunch costs only a modest amount more than a cheap lunch. Make sure your lunches are nicer than the plain vanilla (or worse) sandwiches most people serve. **Do not send folks out to lunch**. It breaks the momentum and dynamic and you lose time waiting for them to return. Eat lunch with one of the parties. There is nothing like "breaking bread" (particularly when you supplied it and it's fairly nice) to help "bond." People also tend to relax a bit over meals and may make a "verbal leak" or two. A mid afternoon snack is also most appreciated by the participants. Even if they don't eat any of the snacks (cookies, desserts, fruit, etc.), they appreciate the gesture and you earn some goodwill. Don't cheap out.

8. **Don't set your mediation fees at either extreme of the range.** If you are too expensive, you will discourage people from coming to you because you are not yet a "known player." They will not know if you are adding any real value or whether you are worth a high end mediation fee. On the other hand, if your fee is too low thoughtful attorneys will not engage you for important and significant cases because they will realize that you likely will not do a good job because of an unduly low fee. If the fee is too low you will not have the incentive to properly prepare for the mediation, your heart will not be into it during the day, and you likely will not be able to spend the time necessary to follow up on the mediation afterwards. Low fees also often tend to be paired with inadequate facilities and staffing.

Initially, you should try to set your fees a bit lower than experienced and well known mediators, but not so low that you are perceived as offering "loss leaders." People realize that they get what they pay for. Go for the Goldielocks approach -- not too high and not too low -- "but just right." "Don't be cheap" applies to your fees as well.

9. **Don't quit your day job - do not expect to become a full time mediator anytime soon**.

- It won't happen except in very rare cases (a well-known retired judge or other special circumstances).
- The economics of not generating any income from your law practice or from mediation can be stressful and depressing, to say the least. Additionally, if your income drops, you will tend to skimp on facilities and staff to save money. In the long run this will hurt your mediation practice.
- You will be a bit out of the loop, sitting around and doing nothing. Because you have nothing to do, you will play on the Internet and could end up with carpal tunnel syndrome or addicted to some most unsavory web sites. It goes downhill from there. Not a pretty picture.
- People will think you are insane, and who wants to mediate with a lunatic?[7]
- Your spouse/companion will think you are nuts/having a mid-life crisis or are just plain lazy. Unless you have a truly unique relationship, your home life and

[7] There may be a number of attorneys or their clients who want just this sort of mediator. You are <u>not</u> doing well if you focus your marketing on this sub-group of the population.

sex life may deteriorate fairly rapidly (probably in conjunction with your income deterioration). It goes downhill from there. A second not so pretty picture.

- Being a full-time mediator is not as much fun as it seems. Much of the joy of mediation is the contrast it presents to your regular law practice. Eating steak or lobster every day, no matter how great it seems in the beginning, usually means franks and beans start looking pretty good.

- You will likely be a more effective mediator by keeping up on the substantive and procedural law. This will happen as a matter of course when you maintain an active law practice.

- The people who don't think you are nuts may think you are an idiot, and who wants an idiot for a mediator? Refer again to Footnote 7.

10. **Do not expect many mediation referrals from other mediators**. Most other mediators can accommodate scheduling or other conflicts. When they cannot, there are mediators whose skills and reputation they know and to whom they feel comfortable referring cases. Even if other mediators know you well from your law practice, they may not know whether you will be a good mediator.

11. **Get about 50 - 100 mediations under your belt as quickly as possible**. Most of your mediations will ultimately come from lawyers and others who have mediated with you. The more you mediate, the more people you meet. If you have done a good job, they will come back and refer others to you. If you haven't, they won't. Again, successful mediations breed more mediations.

12. **BE TENACIOUS. Make the extra effort.** Go above and beyond what is reasonably expected of you. Willingly and enthusiastically go late into the evening. Paraphrasing the words of Winston Churchill -- "Never give up. Never, never, never give up". Those who mediate with you will appreciate your tenacity and stamina as much or more than any other quality you have as a mediator. This is particularly true if they are requesting your help after the mediation.

13. **Do not charge for copies, faxes, or long distance phone calls from your office**. Try to build those into your fee structure. People hate being "nickeled and dimed" and will often remember the fact that they were charged for copies or faxes or long distance calls rather than your very reasonable mediation fee. Don't be cheap.

14. **Compliment the attorneys on their good work and do it in front of their clients**. The attorneys appreciate this very much and would much rather go back to a mediator who compliments them (or even better, comments to their client) on their great negotiation and lawyering abilities as opposed to a mediator who suggests that (on a good day) the lawyers merely were not a significant impediment to the success of the mediation and the only reason the case settled was the greatness (in his/her own mind) of the mediator. In short, stay modest and give credit to the lawyers who had the judgment, foresight, and wisdom to choose you as the mediator. Stated another way, it doesn't hurt to suck up to the lawyers in front of their clients if it is at all warranted.

15. **Err on the side of being aggressive rather than passive**. One of the most common and extreme negative comments we hear about some mediators is that they

are "just message carriers"[8]. While you certainly do not want to embarrass the lawyer by suggesting that their legal or factual analysis is inept or inane (especially in front of their client), both the lawyers and the client usually appreciate you being aggressive with them as long as they know that you are being similarly aggressive with the other side.

16. **Ask for, read, and understand the materials the parties send to you prior to the mediation**. The parties will have confidence in you if you are up-to-speed on the facts and legal issues. On the other hand, they will lose confidence in you if you are clearly not prepared and have not read the information and materials they provided for you. It doesn't hurt to have lots of highlighting and sticky tabs on the parties' submissions so they can see you actually read their materials. If you have the chance, call the attorneys to talk about the case a few days prior to the mediation.

17. **Join professional mediation associations and bar sections.** Although you are not likely to get mediation business as a direct result of your participation in these organizations, the more active you are the more your name will be bandied about as a "known mediator" by practicing lawyers and judges. Even where a judge is disinclined to appoint a specific mediator, it is not unusual for the judges and counsel to discuss possible mediator choices at a hearing or motion. Get involved in ADR professional associations and in the ADR sections of the ABA and your state and local bar associations. If possible, see if you can get on a panel or present a speech to lawyers and/or judges. Don't necessarily focus on mediation groups (they are not your target audience). A presentation to the Corporate Counsel section, the Franchise section, the Bankruptcy section, the Litigation section, the Intellectual Property section, the Business Law section, or other non-ADR sections or groups will generate activity for you.

18. **Exploit your areas of substantive expertise.** If you have particular subject matter expertise (intellectual property, patent, trademark, personal injury, bankruptcy, franchise, insurance, family law, environmental, etc.), exploit that expertise. Let colleagues who practice in the area know of your availability. One of the most fertile grounds is former adversaries who have firsthand experience with your skills, knowledge, and tenacity.

19. **Enjoy yourself during the mediation.** If you enjoy what you are doing, you will be better at it. If people see that you enjoy what you do, they will assume you are good at it[9]. This will inspire confidence and make a successful mediation more likely. Successful mediations breed more mediations.

20. **Keep a sense of humor during the mediation.** Occasionally (or more often), the parties or the lawyers are disagreeable, out of sorts, or just plain "difficult" people[10]. By maintaining a sense of humor, you help the parties keep a little bit of perspective. It is hard[11] for counsel or the parties to continue to be unreasonable jerks if the mediator keeps an atmosphere of good humor. Indeed, if the participants like you they may stretch that extra bit necessary to make settlement happen. Again, successful mediations breed more mediations.

[8] Actually, we have all heard worse but this is the most common printable complaint.

[9] I will skip the potential off-color analogies here.

[10] Other potential descriptive expletives are omitted. Please feel free to interlineate your favorites in the margin.

[11] Although not impossible it seems.

21. **Project optimism**. Optimism tends to generate optimism. The parties and counsel may think you are aware of a dynamic or development in the other room to which they are not privy. Optimism is infectious. Pessimism leads to failure.

22. **You cannot be a long-term effective mediator unless the economics work**. Unless you are independently wealthy you need to make a living. Pricing your mediations too low will eventually lead you to become less enthusiastic and likely to abandon the mediation arena. Indeed, if you sell your services too cheaply or "give it away," counsel and their clients will have a tendency to think they are doing you a favor by asking you to mediate for them. To the contrary, if you are a good mediator you are doing them a favor by offering them your services at reasonable rates -- rates fair both to them and to you.[12]

23. A thought worth repeating (again and again). **Successful mediations breed more mediations**. Focus on the result as well as the process. A "wonderful" process which repeatedly ends with no settlement will not earn you a stellar reputation. On the other hand, good results will do so as long as the attorneys and parties feel they were treated fairly -- although not necessarily "touchy-feely." See paragraph 15, above.

24. **Continue to hone your mediation skills**. Attend ADR continuing legal education. Speak to other mediators about their successful mediation techniques and approaches, breaking impasses, and even marketing issues. Quality mediators will share all of this knowledge. They realize that there is plenty of room for more good mediators and really enjoy seeing a "newbie" succeed. Once you become a "name" mediator, you should help those who follow in your footsteps.

25. **Persevere**. It will take time to build your mediation practice. It is hard to make your name stand out among all of the mediators with considerably more experience and higher profiles. However, if you have a modicum of talent, make the effort to learn new skills, and have the desire and willingness to make the extra effort and go the extra mile, your mediation practice will thrive beyond your expectations. At some juncture you will hit a "tipping point" where it seems like you are suddenly being inundated with new cases. Indeed, because you are not a "known quantity," lawyers will often give you a try on the hope that you are the next (as yet undiscovered) "superstar," still full of enthusiasm and not jaundiced by hundreds of mediations. In short, you may well have a bit of an advantage over the "old hands."

SPECIAL BONUS TIPS!: TWO DIFFERENCES BETWEEN A REALLY GOOD MEDIATOR AND A TRULY SUPERB MEDIATOR.

Anyone but a truly horrible mediator should settle 50-60% of their cases. After all, most cases settle. Either the parties or the court believed that the timing was right for settlement when they scheduled the mediation. Often all a case needs is to have the lines of communication opened up. No offense, but if you are not settling at mediation at least 50% of the cases that come to you, you may want to reassess whether mediation is your forté and possibly even rethink your entire approach to life and your place in the universe.

[12] This may seem like a repeat of Paragraph 8 above. However, there are (I think) subtle differences and nuances. More importantly, I needed another numbered paragraph to get to the promised 25.

A pretty good/decent mediator will settle at mediation 65-70% of the cases that they mediate, hopefully improving as they gain experience. A somewhat gifted mediator will settle another 10% or so of cases at mediation. The latter are fine mediators, but they have not reached their potential to be a truly superb mediator. Two things can bring them to the next level.

First, to be truly superb you must have a passion for the mediation process, the participants, and your role. Optimally, this will be an innate characteristic but it must be nurtured, developed, and maintained. Psych yourself up for each mediation in advance. Never just phone it in. Look in the mirror and literally tell yourself that you have the opportunity to help people change their lives for the better. Recall the enthusiasm and near-sensual delight[13] of your first successful mediation. Get into the moment. Without true passion or if you allow your initial passion to be diluted or wither away, you will never be a truly superb mediator.

Second, even with the requisite passion and other great skills, the difference between a very fine mediator and a truly superb mediator is active and effective follow-up. I do not mean simply responding to counsel when they call you with a glitch in the settlement or the normal follow-up mentioned previously in this article. Rather, I mean keeping an active tickler system of those cases that did not settle and pro-actively calling counsel to find out the status of the case and whether there has been any change in the landscape. You need to be the one who initiates the contact.

There are many things you can do after the initial mediation session to get settlement back on track. It is not unknown for a mediator to invite counsel for both parties to lunch. On occasion, with permission of counsel, I have taken the principals of the parties to lunch without counsel. Of course, that lunch session is still under the mediation protection rubric. On more than a few occasions, when a case is going to trial I have gone down to the courthouse to take one last shot at trying to settle the matter. In those instances where I have done so, a number of the matters settled before the trial started and others settled during trial. Even when there is no settlement, counsel, the parties, and the court recognize your extra effort and commitment.

The difference between a very fine mediator and a truly superb mediator is pro-active follow-up. You will settle another 5-10% of your cases by doing so. Without that follow-up, some cases that should settle will not. Other cases will settle without your assistance and, perhaps in the eyes of the parties and their counsel, despite rather than because of your efforts.

A side benefit of follow-up is that it is an extraordinary marketing tool. So few mediators consistently follow-up in a responsible, timely, and meaningful way (at best just returning a phone call or two and often not even that) that a significant follow-up effort by you will not go unnoticed and will distinguish you from the crowd in the minds of the parties, their counsel, and the courts. You will become a Legend; you will be the Talk of the Legal Community; there will be a Buzz about you; you will become an ADR god. You will be famous. You will be so inundated by new cases that you will have to triple your mediation fees so you are not overwhelmed. Counsel will think they won the lottery if you can squeeze their case into your extraordinarily full mediation schedule.[14]

Don't charge for your follow up work on the mediation. It usually only requires a few hours to continue to try to settle a case. Let the parties and attorneys at the mediation know that you will

[13] Okay, that may be an overstatement, but it got your attention.

[14] Just another transparent ploy to get your attention.

not charge for the follow up. Even where a case settles, tell the parties to contact you if they have any problems in finalizing the settlement documents and that you will not charge them for the time you put in. They rarely need additional help, but they appreciate the offer. On the few occasions where substantial time is involved, the attorneys and their clients recognize your extra effort. By not surcharging them, you underscore your commitment to the process and how very reasonable your mediation fee is. It is bread on the water for future mediation business. Follow-up efforts are not chores, they are opportunities to "show your stuff," and some of the best marketing you can do.

SUCCESSFUL MEDIATIONS BREED MORE MEDIATIONS.

WHETHER THE VANISHING (CIVIL) JURY TRIAL?

By Gene Roberts

The following article was originally published on March 4, 2015, at: http://genesdesk.com/2015/03/04/the-vanishing-civil-jury-trial/.

The newest issue of the Texas Bar Journal covers the topic of the "vanishing jury trial." This is a topic that has been on the minds of attorneys and judges for some time. It seems that those who write on the issue, for the most part, say that more civil jury trials are needed so that young attorneys can obtain trial experience, we need more trials in the system so the common law can continue to develop, and well, civil jury trials are just good things to have. I have tremendous respect for those who write on this subject.

But is there any proof to support their assertions? It seems to me that the proof is in the pudding. As you know, I'm an advocate for mediation because of its inherent benefits. I'm also an advocate for our civil justice system, including civil jury trials. Some cases just need to be tried, and that's okay. Go for it.

As I reflect on this topic, it seems to me that I've been looking at this issue of the vanishing civil jury trial from the wrong perspective. The fact that civil jury trials are decreasing means that the market–people–simply don't view civil jury trials as important or necessary or economical as they once did.

Some who write about the vanishing civil jury trial will make the occasional remark that mediation is a reason for the vanishing civil jury trial. They view mediation as an obstacle to jury trials. These advocates of more civil jury trials want to limit people's ability to use mediation or other alternatives to litigation, essentially saying "Let's create systems that force people to go to trial, let's limit their ability to conduct discovery, let's limit the amount of time they have to present their case, and limit their ability to choose how to resolve their disputes."

They are also saying that we need more civil trials so that advocates in mediation can properly inform their clients of the risks of going to trial– that the advocates need personal experience in a trial (maybe in an unrelated issue of law or fact?) so they can inform their client at mediation that going to trial may be risky.

I must admit I don't understand this line of thinking. Do you know the risk of being in an automobile accident today with any degree of certainty? Have you been in an automobile accident? Well, then, maybe you shouldn't drive because you don't know the exact risks of having an accident.

Most good attorneys I know spend a lot of time on jury selection because they know that a jury's make up can help determine a case's outcome. If one wants information about what juries do, one can subscribe to one of the many fine jury reporting services to see how local juries view cases. You don't have to subject yourself, and clients who don't want to try cases, to trials so you can have unique, anecdotal evidence about a jury or whether one judge will allow in a particular piece of evidence or sustain a particular hearsay exception. An individual attorney's experience with jury trials still presents a small sample size that may not be statistically reliable. I think the stronger argument is to study the jury reports to see what juries really do, with a larger sample size, instead of relying upon one's own limited experiences. I know good mediators who subscribe to these jury reports and provide them to the parties and advocates during mediation.

If civil jury trials were more economical, faster, predictable, less stressful, improved opportunity costs, and ensured better justice, people (clients and attorneys) would be clamoring for them and lining up at the courthouse to file and try cases like people line up outside an Apple store for the release of a new iPad or iPhone. But they aren't, and it's because they have an alternative.

People—clients and the professionals who are advising clients—want mediation and other alternatives to traditional litigation and the best evidence of this is that civil jury trials are "vanishing" (by the way, civil jury trials aren't vanishing–it's simply that there are fewer of them occurring now than in the past). According to the Texas Lawyer, filings are down 17% over the last 10 years.*

We've had jury trials in this country since its founding. Over 200 years of experience with civil jury trials. The fact that there are fewer civil jury trials, and that case filings are going down, can be suggestive of many things, but none of them are necessarily "positive" in the sense that the civil jury trial is the better mousetrap.

The bottom line is mediation (and other forms of non-litigation dispute resolution) works and people want to use mediation, more than using trials, to resolve their disputes.

One of the nice things about life is that we can improve. Disruptions happen. Those who made buggy whips saw their market disappear because of the development of the car. We no longer have 8-track tapes. Do we see people bemoan the vanishing buggy whip economy or bulky cartridges of music? I'm sure there are some, but we also know that cars and digital music are better products. The market's spoken on these items.

We know that having a neutral third-party provides significant settlement advantages to parties to a dispute: the parties can save face, the neutral is the one who carries the bad news, the neutral can evaluate for those who want that, resolutions can be more creative than what's available in a court, opportunity costs are improved, and some people simply appreciate the privacy mediation allows, compared to the public nature of a civil trial.

Forcing people to try civil cases that they don't want to try isn't the answer. The market—the people—have spoken. We don't need to "fix" the system so they'll want more of what only some of them want. The answer, and our energy, needs to be on training advocates and clients on how to negotiate better, how to create value, and perhaps most importantly, providing systems so that clients have the freedom to choose the manner that will help them best resolve their dispute.

Try the matters that need to be tried. Arbitrate the matters that need to be arbitrated. Mediate the matters that need to be mediated. Negotiate the matters that need to be negotiated. Focus on the client's interests first.

Special thanks to my friend and colleague, John DeGroote for his insightful thoughts and help with this issue. But the opinions in this blog are mine. Don't be upset with him. Similarly, the opinions in my blogs are mine and don't represent anyone or any organization that I'm associated with.

*** Note:** Forbes reports today that McDonald's sales are down 1.7% in February, marking nine months of decline. McDonald's response isn't to force people to eat at its restaurants. Instead, the company said ""McDonald's current performance reflects the urgent need to evolve with today's consumers, reset strategic priorities and restore business momentum." McDonald's is responding to the market. Should the civil justice system be any different?

Gene Roberts is the director of the Student Legal and Mediation Services at Sam Houston State University and is a Council Member for the State Bar of Texas ADR Section. He is the Immediate Past President of the Texas Association of Mediators.

TEXAS VACATUR FOR "EXCEEDED POWERS"

D.R. Horton–Texas, LTD. v. Bernhard,
423 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)

By: John Allen Chalk, Sr. [1]

The Texas Supreme Court recently denied a petition to review the Fourteenth Court of Appeals holding that an arbitrator did not exceed his authority by awarding attorney's fees to a prevailing party on a Residential Construction Liability Act ("RCLA") claim.[2] Applying the Texas Arbitration Act ("TAA"), the Court of Appeals held that despite the arbitration agreement's language stating "each party shall bear the fees and expenses of its counsel," the arbitrator had authority to award the prevailing party attorney's fees since such relief is authorized by RCLA.[3] Additionally, the Court of Appeals reemphasized that the "exceeded powers" vacatur ground[4] is a high threshold, not applicable even where an arbitrator may have misinterpreted the arbitration agreement or misapplied the law.[5]

The sales contract between the Bernhards and D.R. Horton–Texas, LTD. ("D.R. Horton") for a home the Bernhards purchased from D.R. Horton also contained an arbitration clause. After discovering a construction defect in the home, the Bernhards sued D.R. Horton under RCLA. The trial court referred the case to arbitration where the arbitrator eventually entered an award for the Bernhards in the amount of $144,477.45 in damages.[6] The damages included $31,027.93 in attorney's fees as RCLA "economic damages."[7]

DR. Horton moved to vacate the arbitrator's award of attorney's fees since the arbitration agreement expressly provided: "Each party shall bear the fees and expenses or [sic] counsel, witnesses and employees of such party, and any other costs and expenses incurred for the benefit of such party."[8] The trial court denied D.R. Horton's motion to vacate and confirmed the award; however, the trial court further awarded appellate attorney's fees to the Bernhards, not provided for in the parties' arbitration clause.[9] In its appeal, D.R. Horton asserted the trial court erred on two issues: (1) confirming the attorney's fees portion of damages in the arbitration award; and (2) awarding additional attorney's fees for appealing the arbitration award.[10]

On the first issue, D.R. Horton asserted that "the trial court erred by enforcing the arbitrator's award of attorney's fees because the arbitrator exceeded his power under the Texas Arbitration Act (TAA)."[11] "Exceeded powers" vacatur ground occurs under the TAA when "an arbitrator… disregards the contract and dispenses his own idea of justice."[12] The proper inquiry for this vacatur ground is "'not whether the arbitrator decided an issue ***correctly***, but instead whether she had the authority to decide the issue ***at all***.'"[13] An arbitrator does not exceed his or her powers "by committing a mistake of law, but instead by deciding a matter not properly before her."[14]

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[1] Printed by permission from "The Arbitration Newsletter." My thanks to Nicole Muñoz, third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] *D.R. Horton-Texas, Ltd. v. Bernhard*, 423 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

[3] *Id.* at 535-36 (citing TEX. CIV. PRAC. & REM. CODE § 171.048(c)).

[4] *See* TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A).

[5] *D.R. Horton*, 423 S.W.3d at 534.

[6] *Id.* at 533.

[7] *Id.*; *see* TEX. PROP. CODE. ANN. § 27.004(g)(6) (allowing a claimant to recover reasonable and necessary attorney's fees as economic damages).

Concluding that the arbitrator had not exceeded his authority, the Court explained that the issue of attorney's fees was in Bernhards' original petition—never timely objected to by D.R. Horton—and was clearly submitted to the arbitrator, causing the arbitrator to consult both the parties' arbitration agreement and RCLA statute concerning attorney's fees to reach his decision.[15] The Court further held that the arbitrator did not exceed his authority since the TAA explicitly authorizes an arbitrator to award attorney's fees "if the fees are provided for: (1) in the agreement to arbitrate; or (2) by law for recovery in a civil action in the district court on a cause of action on which any part of the award is based."[16] Since RCLA authorizes an award of attorney's fees to the prevailing party,[17] and the Bernhards were the prevailing party, the arbitrator had the power to include these fees as RCLA "economic damages" in his final award. In addition, the Court found that the arbitrator's decision was not "merely dispensing his own idea of justice," since he reasonably relied on the language in the parties' contractual agreement stating that it was "subject to" RCLA.[18]

The Court of Appeals reversed the trial court's grant of appellate attorney's fees, agreeing with D.R. Horton.[19] The Court explained that "when an arbitrator decides the issue of attorney's fees, a trial court ordinarily may not modify the award to include additional appellate attorney's fees."[20] Relying on numerous cases, the Court held that unless an arbitration agreement provides otherwise, "the award of additional attorney fees for enforcing or appealing the confirmation of the award" is not permitted.[21] There was no TAA authority for the trial court's grant of appellate attorney's fees.[22]

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[8] *D.R. Horton*, 423 S.W.3d at 533.

[9] *Id.*

[10] *Id.* at 534.

[11] *Id.*; Just as in the Federal Arbitration Act, the TAA specifies that a court shall vacate an award if the arbitrator exceeded his or her powers. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(A), *with* 9 U.S.C. §10(a)(4).

[12] *D.R. Horton*, 423 S.W.3d at 534.

[13] *Id.* (quoting *LeFoumba v. Legend Classic Homes, Ltd.*, No. 14-08-00243-CV, 2009 Tex. App. LEXIS 773 at *3 (Tex. App.—Houston [14th Dist.] Sept. 17, 2009, no pet.).

[14] *Id.* (citing *LeFoumba,* 2009 Tex. App. LEXIS 773 at *3).

[15] *Id.* at 535.

[16] *Id.*; *see* TEX. CIV. PRAC. &REM. CODE ANN. § 171.048(c).

[17] TEX. PROP. CODE ANN. § 27.004(g)(6); *see D.R. Horton*, 423 S.W.3d at 535.

[18] *D.R. Horton*, 423 S.W.3d at 535; *see Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.).

[19] *D.R. Horton*, 423 S.W.3d at 536.

[20] *Id.* (citing *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied).

[21] *Id.*

[22] *Id.*

OBSERVATIONS

1. If a contract containing an arbitration agreement indicates that the contract is subject to a specific statute, drafters of the arbitration agreement should examine the types of relief available under that statute.

2. *D.R. Horton* does not answer the question of: can parties limit by agreement attorney's fees authorized by statute? *Gilmore v. Interstate/Johnson Lane Corporation* makes it clear that for employment discrimination claims, arbitration agreements cannot limit statutory relief.[23]

3. The "exceeded powers" vacatur ground is a high threshold to meet and will not be established simply by showing an arbitrator made an error of law or fact.[24]

4. Since the TAA authorizes arbitrators to award attorney's fees if either of two conditions is met, drafters of arbitration agreements must carefully consider what arbitration law—TAA or FAA—is to govern the arbitration.

5. If parties intend to include appellate attorney's fees in the relief a party may recover for appeals of arbitration awards, it must be explicitly stated in the arbitration agreement.

[23] *Id.* at 532. But in the employment context, the arbitration agreement drafter must not limit federal statutory remedies available to employees. *See Gilmore v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991).

[24] *D.R. Horton*, 423 S.W.3d at 534; *see also Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 830 (Tex. App.—Dallas 2009, no pet.) ("Thus, improvident, even silly interpretations by arbitrators usually survive judicial challenges.").

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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2014 to June 2015. 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:_____

2014-2015 Section Committee Choice_____

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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