Alternative Resolutions

State Bar of Texas Alternative Dispute Resolution Section

Donald R. Philbin, Jr., Chair, ADR Section Winter, 2015 Vol. 24, No. 2

The Frank G. Evans Award Presentation

Each year the ADR Section and TexasBarCLE present the annual Alternative Dispute Resolution course. This year, it will be at the Texas Law Center in Austin on Friday, January 23, 2015. Since this is the largest gathering of Section members and ADR leaders, we'll also have a brief meeting and presentation of our highest honor – the Frank G. Evans Award.

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

The award is made annually to people who have performed exceptional and outstanding efforts in promoting or furthering the use or research of alternative dispute resolution methods in Texas. The recipients are recognized leaders in the field of ADR. Here is a link to a list of past recipients.

ADR Section Annual CLE in Austin on January 23, 2015

CLE Course Director and Council Member John DeGroote and his committee have planned a course that mixes legal and ethical updates with strategic advice for 6.5 CLE and 2.0 ethics hours.

Since the U.S. Supreme Court and other appellate courts have been so active in the area of arbitration, Council Secretary Lonny Schooler will lead the program with his oft-requested Arbitration Case Update.

As the nation's demographics continue to change, elder and guardianship issues arise more frequently in mediation and arbitration. Dyann McCully will moderate a panel that includes John Dowdy and Samuel Graham in addressing these issues.
Mediation Dos and Don'ts will help advocates and neutrals maximize value in the 99+% of cases that won't – because for whatever reason they just don't – go to trial and help advocates make the call as to which ones should be tried unless the offers improve. Lisbeth Bulmash will moderate a panel including Cecilia Morgan and Bud Silverberg.

Inside This Issue

Over lunch, we'll have a fun-filled discussion of how technology is impacting ADR. InternetBar president Jeff Aresty and Modria president Colin Rule will take us through some of these technologies on a panel I get to moderate

Our members are constantly searching for other applications for their useful skills and Linda Thomas and John Shipp will explore the push to mediate cases earlier in a session titled "Early Case Mediation and Other Ways Mediators Can Add Value".

We'll then return to arbitration with Schooler and DeGroote examining 10 Ways to Make Arbitration Faster, Better and Cheaper. There have been a variety of reports and suggested best practice and these pros will sum them up for us.

Kim Kovach will wrap it up with a fun-filled look at Ethical Issues in Mediation and Arbitration. It's a great way to fulfill your ethics requirement while learning best practices.We hope to see you in Austin as we celebrate the recipient of our highest award and learn new tips and tricks from our wonderful presenters.

Help Us Advance Practice in Texas
If there are ways the ADR Section can better enrich your practice or the profession in general, please let me or any of the Council members listed on the back of this newsletter know.

Best,
Don

SUBMISSION DATES FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

Issue	Submission Date	Publication Date
Spring	**March 15, 2015**	**April 15, 2015**
Summer	**June 15, 2015**	**July 15, 2015**
Fall	**September 15, 2015**	**October 15, 2015**
Winter	**December 15, 2015**	**January 15, 2016**

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Introduction of New Editor

Tasha Willis

It is with great pleasure and excitement that I am taking over as Editor-and-Chief of the ADR Newsletter. Following in the footsteps of Professor Steve Huber means that I have big shoes to fill and I hope that I can keep up with the standards of excellence that he has set. Steve's service to the bar and to the ADR section, as well as to the role of alternative dispute resolution in law practice has been more than impressive.

Let me tell you a little about myself. I am a Clinical Professor of Law at the University of Houston Law Center and the Director of the Law Center's ADR program. At the Law Center, in addition to a mediation clinic, I annually teach four or more forty hour training programs in mediation for students. This program, I believe, is unique as I joined the University of Houston Law Center to establish a series of annual trainings to provide the forty-hour basic mediation training to its students at no cost. This program has prospered over the past six years and continues to thrive.

I have a J.D. degree from South Texas College of Law and an LLM from Lazarski University, Warsaw, Poland, in conjunction with Boston University and the Center for International Legal Studies, Salzburg, Austria, in Transnational Commercial Practice with a focus on Alternative Dispute Resolution, achieved with highest honors.

Prior to joining the Law Center, I served for the Honorable Frank G. Evans in the Frank Evan's Center for Conflict Resolution and developed an international externship program in Guyana, Jamaica and Panama. During this time I also served as the law clerk for the Honorable John A. Coselli. In addition, during this time I served as an arbitrator for City of Houston Affirmative Action compliance Program and hosted the American Bar Association Regional Client Counseling, Mediation and Negotiation Competitions. I am a member of the board of the Texas Mediator Credentialing Association, State Bar ADR Section Council, and the Houston Bar ADR Section Council. Finally, over the course of the last twelve years I have taught mediation, negotiation and international commercial arbitration in China, Guyana, Jamaica, Malta, Mexico, Panama and the Republic of Georgia.

As an aside, I consider it a special privilege to be introducing myself in an issue that is publishing articles contributed by the Hon. Frank G. Evans, the Hon. John A. Coselli and the Hon. Bruce A. Wettman as without them would not have the career I do today. So, enough of that. Let's get on with the business of the ADR section and the task of exchanging ideas about ADR and further developing its role in the legal system.

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ETHICAL PUZZLER

By Suzanne M. Duvall*
Summer 2014

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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My cup runneth over! Sometimes it's difficult to get people to respond to my requests to submit answers to the Ethical Puzzlers I pose. But, the last issue was an exception. I asked for submissions of personal "lessons learned the hard way" or lessons learned in particularly difficult cases. All of a sudden, I was awash in thoughtful, lengthy submissions which resulted in my having enough material for two issues of the Ethical Puzzler.

You will find this issue particularly gratifying. We have (1) a prospective look from Judge Frank Evans, one of the founders of ADR in Texas, on options in the Rule 169 cases, (2) a look back from Ross Stoddard (widely known as "the mediators' mediator) letting us in on his first mistake, and (3) Donna Phillips perspective on handling some of the many layers of issues in family law cases.

Read and enjoy.

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Ross Stoddard, (Irving):

My First Mistake as a Mediator

Q: How quickly did I make my first major mistake as a mediator?

A: My first mediation!

As the final part of our training in the initial Dallas Bar Association Mediator Training Program in 1989, we were to conduct a couple of three-hour pro bono mediations during the next Dallas County Courts' Settlement Week. As an enthusiastic trainee, I signed up to serve as mediator in as many cases as they would let me--11 cases that week--rather than just a couple.

I was confident that I had found my professional calling, having nudged my way into the Training Program despite it already having been "sold out" to an impressive array of enrollees. I felt like I had "gotten it" during the training about the role of a mediator; was confident that I had learned what to do and say in each phase of the process; was sure that each of the cases in which I served as mediator would settle during the mediation; and was ready to kick off my new career in mediation.

I began the week by conducting five mediations during the first two days. Unfortunately, my first mediation did not result in a settlement. In fact, instead of all five settling…… only two settled. To say that I was extremely disappointed would be a huge understatement; hardly what I had anticipated, and not a particularly promising start to, or indicator of, a likely successful future career as a professional mediator!

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Somewhat discouraged, on Tuesday night I called one of the program trainers—Lila (nka Hesha) Abrams—to see if she could offer any insight into what I was "doing wrong." She graciously consented to assist. The insight from my debriefing with her was enlightening.

I realized that during those first five mediations, I had been focused on "my" role in the process. I was concentrating on: what I was supposed to say during my opening comments; my saying the right thing during the caucuses; being sure that my next step was the right one to make; being on target with my interactions and communications with the participants; my "looking good" in my role while interacting with them; and the thought that by the sheer force of my "good work," I would settle the cases. At all times, I was "thinking" about what was the correct and best thing to say and do next, so that the participants would see me as someone who knew what he was talking about and doing.

What I had failed to do was focus fully on the participants and what they had been saying or needing, rather than what I thought I had needed to be saying or doing next. I might have appeared at times to have been listening to them, but I clearly had not been hearing them. [Recall the old saying: Lawyers (and that includes us attorneys becoming-mediators!) have two natural states of communication—talking; and preparing to talk. (Notice that listening/ hearing is not one of them! We have to retrain ourselves.)]

My focus changed that night. For the remainder of the week, during each mediation, my focus was fully on the participants and their needs and communications. I concentrated on listening to them—actively, with full focus on what they had to say—and really heard what they were saying, when they were saying it. I quit focusing on how I was performing my role as mediator or what I was going to say next, and instead focused on them.

Perhaps most importantly, I also started trusting my "gut instinct," which, for me, really, is a solidly-held faith and belief that all of the guidance we need is readily available and will come to us—as and when needed—if we are receptive to it; and that as mediators we are able to make ourselves "available" to be guided by a much greater power than our own intellect.

The result of my "shift" in focus was that in all of the six remaining cases that week in which I had the privilege to serve as mediator, the parties reached a settlement during their mediation sessions. (And, as mediators, we know and understand that I settled none of them!) The shift in focus from "me to thee" clearly was the key.

Of course, the parties will not always be able to find their way to a full settlement during their mediation sessions, regardless of the mediator's focus. But as mediators, our role is not to assure settlement; rather it is to provide the most viable process possible, so that the parties have the best opportunity to reach a settlement, if one can happen. It worked well then, and has continued to work well during my next two and-a-half decades of service as a mediator. It will work for you, too.

Senior Judge Frank G. Evans, (Houston)

The Lawyer-Mediator's Duty to Inform Parties Regarding ADR Options

As a trial lawyer and mediator, you have gained extensive experience in the facilitation of settlement negotiations in business disputes. Recently, you agreed to mediate a two-party contract dispute in which the plaintiff has alleged monetary damages in an amount less than $100,000. Based upon your initial telephone discussions with each party's attorney, it appears the case may be subject to the new Texas Expedited Civil Action Rule of Civil Procedure (TRCP 169), and both attorneys (who have had no prior experience with that Rule) are concerned about having to engage in discovery and then try their case under the strict procedural limitations of that Rule.

In a joint conference with both parties and their counsel, you are told that both sides would like to negotiate a resolution of the dispute in a prompt, efficient, and inexpensive manner but that it would likely be a waste of everyone's time and effort to attempt a mediation process conducted under the strict time and cost limitations of Rule 169. What ethical responsibility, if any, do you have as a lawyer-mediator to inform the parties regarding their ADR options and what advice, if any, would you give them about circumventing the strict procedural limitations of Rule 169?

Rule 169 and ADR

Rule 169(d)(4) subparagraph A, entitled "Alternative Dispute Resolution," provides that "unless the parties have agreed not to engage in alternative dispute resolution, the court may refer an expedited civil action to an ADR procedure once and the procedure must (i) not exceed a half-day in duration, excluding scheduling time; (ii) not exceed a total cost of twice the amount of applicable civil filing fees; and (iii) be completed no later than 60 days before the initial trial setting." Subparagraph C of this rule specifically provides, however, that "the parties may agree to engage in alternative dispute resolution other than that provided for in subparagraph A."

Lawyer-Mediator Ethical Rules

During the past quarter century, the Texas Supreme Court and the State Bar of Texas, along with a number of local bar associations and professional organizations have issued or adopted a wide range of ethical rules and guidelines relating to the professional conduct of lawyers and of mediators.[1] The Texas Supreme Court's order adopting the Ethical Guidelines for Mediators states that the rules are aspirational and that compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion; and finally, when necessary, by enforcement by the courts through their inherent powers and rules already in existence.[2] Moreover, the Supreme Court stated, "counsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court. They are subject to the Texas Disciplinary Rules for Lawyers and any local rules or orders of the court regarding the mediation of pending cases. They should aspire during mediation to follow The Texas Lawyer's Creed –A Mandate for Professionalism. Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation." Although these rules and guidelines are largely focused on the lawyer's relationship with the client, they also reflect the legal profession's broader interest in the lawyer's responsibility to the legal profession and to the general public.

Available ADR Options

As noted above, the Expedited Civil Actions Rule 169 expressly provides that parties in an action subject to the Rule may by agreement chose to engage in an ADR process other than the one mentioned in subparagraph A of that Rule. Thus, if the parties so decide, they may fashion their own ADR agreement to meet their particular needs, and they are at liberty to select an ADR protocol that is not limited by the restrictive provisions of subparagraph A. Accordingly, by agreement the parties may elect to engage in a mediation or in any one of the evaluative ADR processes such as mini-trial, a moderated settlement conference, or a summary jury trial, as those processes are defined in the Texas Alternative Dispute Resolution Procedures Act,[3] or they could design their own ADR protocol agreement, which might be a hybrid combination of other ADR processes.

Designing a Cooperative ADR Agreement

The parties in an action governed by Rule 169 might also decide to design a "true replacement" to the mandatory expedited action process described in the Rule. In order to achieve this goal, the parties may need to ask the court to remove the case from the expedited process and make a "good cause" showing that the replacement process will result in a fair trial that can be conducted in less time and at

a lower cost than the expedited process.[4] In this regard, the parties might be able to avoid having to make a good cause showing by submitting to the court, for its prior approval, an executed ADR Agreement containing all the essential procedural stipulations needed for the completion of discovery and the conduct of an expedited trial.

Informed Advice About ADR Options

Assuming that a lawyer-mediator does have an ethical duty to provide disputing parties with information about available ADR options, what kind of information is required? Although the ethical guidelines for mediators do not provide definitive answers to this question, the Texas Disciplinary Rules of Professional Conduct require that a lawyer, when functioning as an advisor to the client, must provide the client with an "informed understanding of the client's legal rights and obligations" and explain their "practical implications." In essence, the lawyer should explain the matter to the extent "reasonably necessary to permit the client to make an informed decision regarding the representation." John Lande, Lawyering with Planned Early Negotiations, ABA Publishing (2011) at 139 (the nature and extent of such an explanation will likely depend upon the particular circumstances and the relative sophistication and experience possessed by the client). Accordingly, when giving a client "informed advice" about the relative pros and cons of different ADR procedures, the lawyer should explain the risks and consequences of making a particular choice, the time and cost involved in the selecting the alternative, and whether other alternatives would be a better choice under the particular circumstances. Mark Speigel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U.P. Law Rev. 41 (1979-1980)

Conclusion

If the parties can agree upon a mutually acceptable procedural format that enables them to complete their discovery activities and conduct a trial on the merits in a manner and time that meets the overall goals and objectives of the expedited civil action rule, their creative genius and drafting abilities should ultimately be rewarded by having satisfied clients and the approval of the court. That kind of result, it would seem, should signify a successful ending for everyone involved.

1. See, for example, the State Bar of Texas Guidelines for Mediators, which were adopted by the Texas Supreme Court; and the website of the Texas Mediator Credentialing Association, http://www.tmca.org

2. Texas Supreme Court, Order Approving Ethical Guidelines for Mediators, Misc. No. 05-9107 (June 15, 2005)

3. Tex. Civ. Prac. & Rem. Code Ann. §§ 154.001-154.073 (Vernon 2005)

4. See Morrison, Wren and Galeczks, Expedited Civil Actions in Texas and the U.S.: A Survey of State Procedures and a Guide to Implementing Texas' New Expedited Actions Process, Vol. 65.3 Baylor Law Review 824, 887 (2013)

Donna Phillips, (Waco)

Background: Parties have been married for twelve years and have two minor children. During the marriage, there have been continuous financial struggles, and extended family members on both sides have provided frequent and substantial support. For the past few years, the couple and their children have lived in a mobile home on Husband's parents' property, just yards from the main house. Wife eventually became "fed up," changed the locks on the mobile home, delivered Husband's clothes and personal toiletries to his parents' house and called Husband at work to let him know the marriage was over. That night, Husband took up residence with his parents.

Wife immediately emptied the parties' joint vacation savings account, hired attorney Jones, and filed for divorce, asking for sole conservatorship. In her petition, Wife alleged sole conservatorship was appropriate as Husband had numerous affairs (she can name names…), abused prescription drugs, illegal drugs, and alcohol, and could not be trusted to have custody of the children.

Husband's parents hired attorney Smith to Counterpetition for Husband to have sole conservatorship of the children, alleging Wife had numerous affairs (he can name names…), introduced him to the pleasures of illegal drugs and excessive alcohol indulgence and could not be trusted to have custody of the children.

Attorneys Smith and Jones negotiated Agreed Temporary Orders that provided for Wife to have primary custody of the children, with Husband paying child support and having Standard Possession.

During the months leading up to scheduled mediation, did not go well. There were on-going allegations back and forth of continued drug usage, and the police were called several times by neighbors, because of loud arguing, door slamming, etc.

Husband's parents hired Attorney Smith to intervene on their behalf. Intervenor's Supporting Affidavits alleged numerous affairs on Husband's part and on Wife's part, abuses of prescription and illegal drugs by both parties, and excessive consumption of alcohol by both parties, sufficient to place the children in danger. Intervenors pled that neither Husband nor Wife was competent to have custody of the children and therefore possession of the children should be awarded to Intervenors.

Husband's grandmother hired Attorney Smith to intervene on her behalf. Husband's grandmother claims to have a $15,000.00 interest in the marital estate, in that she purchased the mobile home on behalf of Husband and Wife and had not received repayment. Husband's grandmother asked the court not to rule on division of property without considering her claim. In her sworn Supporting Affidavit, Husband's grandmother outlined numerous occasions when the parties were "down on their luck" and extended family members had to contribute financially. She summarized by alleging that Husband and Wife had never been able to handle what little money they earned, as they spent so much on drugs and alcohol. She expressed concerned that if what property and assets they had, however minor, was awarded by the Court to the parties, she would never be able to recoup her loan. Attorney Jones requests the parties participate in mediation. Their parties having low paying jobs and high debt, attorneys agreed to take the case to their community mediation center, the McLennan County Dispute Resolution Center.

Mediation

At mediation, Smith, Husband, Husband's parents and Husband's grandmother inform the mediator that they would like to share a conference room rather than be separated, because after all, their interests are all aligned.

Once mediation is underway, there comes a time during private caucus, when Wife asks the mediator to take a proposal to Husband, however, there is a caveat: Wife does not want Husband's parents to be privy to the offer. She indicates that she is willing to soften her position, if Husband will agree to restrict his visitation with the children to occur away from Husband's parents. She feels his parents have enabled the couple's problems during the marriage, by always being ready to "bail them out" when they ran out of money and by "covering" for them with their children when they were intoxicated and behaving irresponsibly.

Attorney Jones shares with the mediator that she is concerned that even if the mediator meets with Husband and his attorney, away from his parents and grandmother, to present this offer, Attorney Smith may not be able to balance the competing interests of her clients.

What I did

I asked Attorney Jones if she would be willing to express her concerns to Attorney Smith, without revealing the offer, so that Attorney Smith might participate in creating a workable solution. Attorney Jones was willing to share her apprehensions.

I then invited Attorneys Smith and Jones to meet with me privately in my office, outside the presence of all parties to mediation.

When presented with Jones' concerns, Smith expressed the position that she should be trusted to share with each of her clients, only that which pertained to their interests. Smith continued to maintain that despite what the pleadings stated, her clients were aligned in wanting Husband named Joint Managing Conservator with Standard Possession of the children. She further stated that Intervenor Parents and Intervenor Grandmother were prepared to drop their suits, if things could be worked out for Husband.

Allowing what I considered to be enough time for the two attorneys to exhaust their options, and no acceptable alternatives having been raised, I put forth a possibility. If their clients agreed, would Attorneys be willing to allow Husband and Wife to meet with me, without other parties and the attorneys present? I assured the attorneys that I would only assist the parties in generating creative alternatives and would not give any legal advice, call a halt to the meeting if wither party appeared to be intimated by the other, and not allow the parties to enter into any final agreement without first consulting their attorneys. Both agreed, and the parties joined me for some brainstorming, without anyone else present.

After about thirty minutes of collaboration, and with prodding by the mediator for creativity, Husband and Wife arrived at a unique schedule that would allow each of them to feel good about the outcome and the case successfully resolved as to all issues in controversy for all parties.

COMMENT: For me to say anything more would just be gilding the lily.

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.

Redesigning ADR Protocols for Efficiency and Affordability

By Senior Judge Frank G. Evans

The Texas ADR Protocols

Considering the large number of mediators and other ADR service providers now actively involved in the Texas civil justice system, it seems reasonable to assume that most received their formal ADR training at one of Texas' dispute resolution centers, law schools, or other academic institutions. If this assumption is correct, it also seems reasonable to assume that a significant number of Texas mediators continue to follow the same basic ADR protocols they learned during their early ADR training.[1] While these ADR protocols have been widely accepted as the norm by members of the Texas bench and bar, there has been no focused examination of their relative efficiency and affordability when used in different kinds of civil disputes. The primary goal of this paper is to consider whether the structure of these ADR protocols might be redesigned to improve their efficiency and affordability when used in relatively simple two-party disputes.

Time and Cost of Civil Litigation

One long-standing problem about which the Texas bar and judiciary seem to be in agreement is that civil litigation ordinarily takes too long and costs too much to be reasonably accessible by a large sector of the general public. Addressing this problem in his last State of the Judiciary speech to the Texas Legislature, the Hon. Wallace Jefferson, former Chief Justice of the Texas Supreme Court, asked this question: "Do we have liberty and justice for all. Or have we come to accept liberty and justice only for some?[2] Calling upon the Texas Legislature to provide legal aid to the poor and to make justice more affordable to the middle class, he observed that "if the remedy is unaffordable, justice is denied." Specifically, the Chief Justice advised the legislature that reforms would have to be made in the civil justice system to expedite case disposition and to reduce discovery costs, particularly in cases involving less than $100,000."[3]

Legislative and Judicial Response

In response to Judge Jefferson's call and related public pressures, the Texas Legislature enacted House Bill 274, which created a new civil actions proceeding effective March 1, 2013.[4] In passing this legislation, the Texas Legislature stated that its intent was to promote the prompt, efficient, and cost effective resolution of certain civil actions; and it mandated the Texas Supreme Court to adopt rules that would lower the cost of discovery and expedite certain trials through the civil justice system.[5] In response to this mandate, the Texas Supreme Court promulgated a new set of civil procedure rules, including Civil Actions Rule (TRCP 169), which makes the civil actions process mandatory in cases where the claimant seeks only monetary relief in an amount that does not exceed $100,000.[6]

Predicted Impact of Rule 169

The ultimate impact of the new expedited civil actions rules has been the subject of continuing discussion and debate among a wide sector of the Texas legal community. Many lawyers and mediators have expressed serious concern about the uncertain impact of the new rules and have earnestly suggested that the rules should be avoided by pleading out of the rules or by seeking the court's leave to be removed from their effect.[7] Others, however, have expressed a more optimistic view, predicting that the new rules will foster development of specialized practices devoted to the cost-efficient

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processing and trial of smaller cases.[8] Another predicted "benefit" of the new rules is said to exist for those firms that are dedicated to the litigation of larger cases. [9]

Rule 169 and ADR Processes

One of the most controversial aspects of the new expedited civil actions rules is a provision in Rule 169(d)(4), which purports to limit a trial court's ability to utilize court-annexed ADR procedures, notwithstanding the discretionary authority expressly vested in such courts under the Texas Alternative Dispute Resolution statutes enacted in 1983 and again in 1987 [10]

Rule 169(d) (4) provides as follows:

(A) Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer to an alternative dispute resolution once, and the procedure must:
   i. not exceed a half-day in duration, excluding scheduling time;
   ii. not exceed a total cost of twice the amount of applicable civil filing fees; and
   iii. be completed no later than 50 days before the initial trial setting.

(B) The court must consider objections to the referral unless prohibited by statute.

(C) The parties may agree to engage in alternative dispute resolution other than that provided for in (A)[11]

Consequences of a Mandatory Rule 169

Since the enactment of the so-called ADR statutes some 30 years ago, a strong mediation practice has developed in Texas with very little controversy about the time and cost involved in mediations or regarding alleged abuses by the courts in the selection and compensation of mediators and other ADR facilitators.[12] A rather obvious question, therefore, would seem to be whether a mandatory procedural rule such as Rule 169 is needed to preclude trial courts from exercising their discretionary authority in determining the amount of time and cost a party should reasonably be required to expend as a participant in a court-ordered mediation or other ADR procedure. While it is understandable that some of the larger law firms might see the expedited actions rule as creating an "ideal training ground" for young inexperienced lawyers, does that fact alone (even if true) serve as a sound justification for curtailing the discretionary powers of trial courts, which have been expressly granted by well-established state statutes? A more important question, it would seem, is whether the mandatory civil actions rules will provide litigants with a cost-effective avenue to the courtroom and ultimately whether in a given case the rules will advance or retard fairness and justice.[13]

Rule 169 and Court-Annexed ADR

As one experienced and respected lawyer-mediator recently observed: "It is still too early to measure the significance of the limitations on ADR prescribed by rule 169(d)(4). Given the strong foundation of court-annexed mediation in the Texas courts, it may well be that there is little impact on mediation practice. One thing remains certain: whether or not the path to trial is made less expensive, less time-consuming, and with a quicker trial date, cases will be settled. Mediation as utilized by our Texas courts has always been viewed as part of the litigation process, just as have traditional settlement negotiations."[14]

"When one considers that trial rates in state courts have likely not increased in any significant degree or at all in the intervening years, it becomes clear that preservation of court-annexed mediation is essential to the civil trial system's overall health and mediation's survival. Many mediation adherents have often said that court-annexed mediation is not simply about settlement. Indeed, all participants in the trial process: judges, advocates, and knowledgeable clients, recognize that most cases will settle. Instead, mediation is a tool that allows for *early* settlement with savings, both directly and indirectly, and is wholly consistent with the underlying policies for both the expedited trial statute, §22.004(h), Government Code, and the 1987 Texas ADR Procedures Act: the prompt, fair, and cost-effective resolution of civil actions and disputes. And, one must recognize that the bulk of a trial court's civil docket involves individual litigants who, with their families, bear the personal difficulties unavoidable with protracted litigation."[15]

Developing ADR Protocols in Texas

After more than 30 years of actual practice, the potential benefits of ADR procedures seem to be well established in Texas. There is, however, some remaining uncertainty about whether traditional ADR protocols, as currently structured, are appropriately designed for efficiency and affordability in the "smaller" two-party cases involving relatively simple issues in dispute. If so, is it feasible to redesign the structure of such protocols to achieve a higher level of efficiency and affordability?

In the years since the enactment of the Texas ADR Procedures Act, the Texas bench and bar have been engaged in an ongoing collaborative effort to develop and test cost-effective ADR procedures as authorized by that Act. As a result of these efforts, the Texas bench and bar, in cooperation with the ADR community, have developed a variety of ADR guidelines and standards of practice that collectively might be termed "traditional" ADR protocols. The following example shows how such protocols have evolved in the Texas civil justice system.

In a typical two-party case involving an amount in controversy within the scope of Rule 169, a mediator following "traditional" ADR protocols might be expected to schedule a "half-day," or possibly, a "full day" for the conduct of the mediation.[16] During an introductory session with the parties and their counsel, the facilitator normally will explain the ADR protocols that will govern the conduct of the process and obtain the commitments of the parties and their counsel to adhere to those procedural standards.[17] The mediator then takes the parties through a number of ADR procedural events or "stages," which often include opening statements made by the lawyers and sometimes the clients; the identification of the principle and analysis of the parties' different positions; and suggestions regarding viable settlement options. The parties and their attorneys then engage in active settlement negotiations al issues and interests in dispute; objective evaluation with the goal of reaching a formal settlement agreement.[18] In most cases, the parties and their attorneys will be able to complete the mediation process within the time periods initially scheduled. In some cases, however, it may become necessary for the process to be extended or even postponed until some later date, particularly if the parties enter into a mutual agreement that enables them to avoid strict compliance with Rule 169 or which removes the case from the mandatory expedited actions process; in either event, it would probably be prudent to have their agreement meet the requirements of Rule 11 or be expressly approved by the court and entered as part of an agreed order.[19]

Maintaining Party Control Over Time and Cost

Generally, the more time and money the parties are required to invest in an ADR procedure, the greater their total investment in the litigation proceedings. Also, unless the ADR event happens *early* in the course of the pending litigation, the time and cost attributable to the ADR event, including the parties' respective attorneys fees, sometimes become so intertwined with the overall cost of the litigation proceedings that such expense cannot readily be separated from other pre-trial expense such as the cost of taking depositions, exchanging documents, or obtaining the testimony of third party experts. Moreover, once the parties and their attorneys become immersed in pretrial preparation and settlement negotiations, they may find it increasingly difficult to maintain effective cost-control over their ever-increasing legal expenses.

The Cooperative ADR Agreement

One way in which disputing parties can improve their level of control over time and costs is through the use of a "Cooperative ADR Agreement." As the title of this document suggests, this agreement would confirm the parties' mutual intent to achieve a collaborative and cost-effective resolution of the disputed issues and confirm their genuine commitments to reduce the time and cost of settlement negotiations through redesigned ADR protocols. In essence, this agreement will divide the mediation into three separate but interrelated phases as follows: (1) the initial introductory phase in which each party and their counsel meet separately with the ADR facilitator, either in person or through digital communications, to consider the specific terms to be included in the ADR agreement; (2) a general session

attended by both parties and their counsel to carry out their own private and confidential evaluation of the parties' respective positions; and (3) an additional session, if needed, for the parties to continue their settlement discussions, if necessary, and to discuss with the mediator the need for any additional discovery or other pre-trial activities to complete the ADR procedure. As indicated, the agreement gives the parties and their counsel much greater control over the time and expense involved in the conduct of the ADR proceedings and tends to assure their compliance with the basic objectives of the expedited actions rules to simplify the ADR proceedings and expedite the final determination of the dispute.[20]

Conclusion

While most Texas lawyers, judges, and ADR service providers are aware of and generally appreciate the benefits of mediation and other ADR processes, there are yet unresolved questions regarding the efficiency and affordability of such processes, especially when applied to cases subject to the expedited civil actions rules. Thus, there is a continuing need for the collection and analysis of data relating to such cases and concerning the reaction of the bench and bar to the new rules encouraging the expedited disposition of such cases.

[1] See, for example, the State Bar of Texas Alternative Dispute Resolution Section ADR Handbook, Third Edition (2003); State Bar of Texas Guidelines for Mediators, adopted by Texas Supreme Court Misc. Order No. 05-9107 (June 15, 2003)

[2] See, Austin American-Statesman, *Texas Court: Chief Justice Calls for Deep Court Reforms.* March 7, 2013.

[3] Id.

[4] Act of May 25, 2011, 82d Leg. R.S., ch.203, 1.01, 2.01, 2011 Tex. Gen. Laws 757, codified as amendment to TEX.GOV'T CODE ANN. §22.04 (West Supp. 2012).

[5] Id. §2.01.

[6] Order for Final Approval of Rules for Dismissal and Expedited Actions, Misc. Docket No. 13-9022 at 221.

[7] See, Morrison, Wren and Galeczks, *Expedited Civil Actions in Texas and the U.S., A Survey of State Procedures and a Guide to Implementing Texas' New Expedited Actions Process,* Vol.65.3 Baylor Law Review, 824, 887 (2013) at 860.

[8] Id. (this prediction seems to be based on the notion that "because the new rules are mandatory, firms can develop dockets of smaller case knowing the new rules will apply. This predictability allows for the implementation of routine procedures and the development of expertise across a larger body of cases, with the potential to further reduce cost and increase the quality of results. *The advantage will go to those firms that approach expedited trials systematically rather than as the occasional exception".(*Italics inserted)

[9] Id. This argument suggests that "small expedited trials offer the opportunity to increase trial experience for attorneys" and that "mandatory trial rules will allow firms to implement a docket of smaller cases suitable for development of trial experience, with limited cost exposure and with limitations on potential verdicts.

[10] See, Tex.Civ. Prac. & Rem.Code.Ann., chapters 154 and 152.

[11] Id. § 169(d)(4).

[12] See, Tex.Civ. Prac. & Rem. Code Ann., §154.054 (granting courts discretionary authority to set a reasonable fee for serving as a mediator or other third party neutral in an ADR process.)

[14] Mike Amis, Founder of TAMC and attorney-mediator in Dallas, Texas.

[15] Id.

[16] State Bar ADR Handbook, Chapter 3, *Mediation,* Kimberlee K. Kovach, at 45-50 (outlining topics generally covered in a mediation process)..

[17] Id.

[18] Id.

[19] See, Morrison, Wren and Galeczks, 65.3 Baylor Law Review, at 887.

[20] A skeleton outline of the provisions comprising a typical Cooperative ADR Agreement may be obtained without charge by contacting the author of this paper at www.EvansADR.com.

Judge Frank Evans is widely regarded as the "father" of alternative dispute resolution in Texas because of his successful work in developing ADR programs across the state. In the 1970's, Judge Evans was instrumental in developing the first appellate settlement conference program in the state, and he also helped initiate Texas' first peer mediation programs for youth in elementary and middle schools. In 1983, he helped draft Texas' first ADR financing and court referral statute, and several years later he was a principal draftsman of the 1987 Texas Alternative Dispute Resolution Procedures Act, which established a new state policy encouraging the voluntary and peaceable resolution of civil disputes. During his extensive legal and judicial careers, Judge Evans has taught courses and presented educational programs on a wide variety of ADR topics throughout the United States and in Canada, England, Mexico, Argentina, Panama, Guyana, Jamaica, Turkey, and Malta. Currently, Judge Evans serves pro bono as President of Resolution Forum, Inc., a 501(c)(3) dispute resolution organization, which is dedicated to developing new dispute resolution systems that make access to justice more efficient and affordable to everyone, including those with limited financial means.

Court Appointed Mediator Qualifications and Credentialing

By Judge John Coselli

Texas law requires that State trial Courts be active in promoting alternative dispute resolution, and authorizes the Courts to refer cases to mediation and appoint mediators. Issues regarding mediator qualifications and ethics have finally resulted in mediator credentialing in Texas in a effort to assist the Courts, attorneys and the public in identifying mediators who have accomplished a meaningful level of mediator training and experience, and who have committed themselves to practice standards and rules of ethics for mediators enforceable through a grievance procedure.

This article will provide Judges, mediators and the public with the following important information about the significance of mediator credentialing to the work of the Courts in referring cases to mediation:

1. The Court's statutory obligations in making referrals to mediation.
2. The statutory criteria the Court must consider in making referrals of cases to qualified mediators.
3. The nature and significance of mediator credentialing to the Court in making referrals of cases to mediators.
4. Identifying credentialed mediators.

1. The Court's statutory obligations in making referrals to mediation.

While the Texas legislature has required the Courts to encourage the use of ADR, mediation has become a significant part of the resolution of litigation and the administration of justice in Texas. Judges have been appointing mediators and referring cases to mediation and for many years. Although the Courts have broad discretion in the matter, the Texas legislature has established criteria in the Texas Alternative Dispute Resolution Procedures Act (Chapter 154 of the Civil Practices and Remedies Code) for the Court to consider in making such referrals and appointments.

Texas law provides that it is the policy of the State to promote ADR (Sec.154.002 of Title 7 of the Act), that the courts should implement the policy (Sec. 154.003 of the Act), that the Courts may refer cases to mediation and appoint mediators in implementing the policy (Sec. 154.021 of the Act), that mediators appointed by the Courts must be qualified (Sec. 154.052 and Sec. 154.053 of the Act), that the Court may set reasonable mediator fees (Sec. 154.054 of the Act), and that volunteer mediators appointed by the Court are immune from liability under certain circumstances when the Court appoints a mediator (Sec. 154.055 of the Act).

2. Statutory criteria in appointing a mediator.

A mediator appointed by the Court must be impartial and qualified under the Act (Sec. 154.051 of the Act).

To be qualified the mediator must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course approved by the statute, or have legal or other professional training or experience in mediation approved by the Court. To be qualified for appointment in a case involving the parent-child relationship, the mediator must have completed an additional 24 hours of training in the fields of family dynamics, child development and family law, or have legal or other professional training or experience in mediation approved by the Court (Sec. 154.052 of the Act).

The statute also establishes standards for mediator conduct that the Court should attempt to protect by appointing only qualified mediators. Mediators must be neutral and impartial in the matter being mediated, must assist the parties in reaching a resolution of their dispute in an appropriate manner, may not compel or coerce the parties, must protect the parties confidential information shared with the mediator, and must report child and elder abuse (Sec. 154.053 of the Act).

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3. The nature and significance of mediator credentialing to the Court in making referrals of cases to mediators.

The State of Texas does not license, certify or credential mediators. With the exception of the statutory criteria the Courts should use in appointing mediators, mediators and mediation in Texas is unregulated. The only mechanism for policing mediator conduct in cases where the Courts appoint mediators is the diligence of the Courts in appointing qualified mediators.

With an ever increasing number of the attorneys and others seeking selection by the parties and appointment by the Courts to mediate cases, there has been a corresponding number of questions about the qualifications, experience and reputation of mediators. It has generally been only by word of mouth, personal experience or mediator advertising that attorneys, the Courts and the litigants have been able to identify what appear to be qualified mediators.

Mediators appointed by the Court have the authority of the Court to be trusted with and handle the parties' most sensitive and confidential information during mediation. The Court's appointment charges the mediator with the responsibility of neutral and impartial conduct and with the responsibility of conducting themselves in a manner that will not only protect the confidences of the parties, but in a manner that will protect and enhance the opportunity of the parties to resolve their litigation at the time of the mediation. The importance of the Court placing this authority only in qualified mediators cannot be overstated. When a Court appoints a mediator, the appointment carries with it a representation by the Court that the mediator is qualified for the appointment.

The trust and confidence of attorneys and their clients in the capabilities and ethics of Court appointed mediators must be protected by the judiciary.

It is reasonable to believe that the level of a mediator's training and experience has a meaningful relationship to the mediator's qualifications. It is also reasonable to believe that mediators who are accountable for their conduct through some grievance process would be perceived as having a greater level of commitment to their work and accountability for their conduct.

If mediators held credentials that were recognized in connection with specific levels of training, experience and commitment, such credentials would be helpful to the Courts in identifying qualified mediators for appointment to cases referred to mediation informally or by Court order.

With the Texas legislature having mandated that the Courts should promote ADR, the Texas Supreme Court has expressed concern about the qualifications, conduct and ethics of mediators who are appointed to mediate pending litigation. On May 7, 1996 the Supreme Court signed an order creating an Advisory Committee on court-connected mediation. In that Order the Court expressed its intent by writing that:

> "The Court has determined that, at a minimum, ethical rules governing court-annexed mediations and mediators should be implemented and enforced. The Court is also considering whether some level of credentialing is necessary and appropriate.
>
> Accordingly, the Court hereby creates an Advisory Committee to examine these issues and to make recommendations to the Court."

The Advisory Committee made its recommendations to the Court that the Court adopt specific rules of ethics for mediator conduct and a procedure for enforcing compliance with the rules.

While the Court was considering the Advisory Committee's recommendations the Court was also aware of the work of the Texas Mediator Credentialing Association ("TMCA") in addressing mediator qualifications and ethics through credentialing. After meetings of TMCA representatives with Chief Justice Tom Phillips, Justice Priscilla Owens, and members of the Advisory Committee, the Court decided not to adopt mandatory rules for mediator ethics or credentialing, and on June 13, 2005 the Court signed an Approval of Ethical Guidelines for Mediators declaring in part, that:

> "The Supreme Court has long recognized the need for oversight of the quality of mediation in Texas.... Thus, the Court created the Advisory Committee on Court-Annexed Mediations to formulate mediation ethics rules. The Court also instructed the Advisory Committee to

study whether further oversight, such as licensing or credentialing, was warranted." "Ultimately, the Committee concluded that there currently was no consensus within the mediation profession in Texas as to whether the Supreme Court should become involved in credentialing and/or registration of mediators. The Committee, however concluded that there currently is consensus within the Texas mediation profession that the Court should promulgate ethical rules. Therefore, the Committee recommended the Court adopt as its own aspirations guidelines those guidelines that the Alternative Dispute Resolution Section of the State Bar of Texas has adopted."

> "Thus, the Court promulgates and adopts the Ethical Guidelines for Mediators. These rules are aspirational. Compliance, with the rules depends primarily upon understanding and voluntary compliance, secondarily upon enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence."
>
> "Moreover, counsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court. They are subject to the Texas Disciplinary Rules for Lawyers and any local rules or orders of the court regarding the mediation of pending cases...Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation."

The Supreme Court has not otherwise regulated mediator ethics in Texas.

The Texas Mediator Credentialing Association ("TMCA") began issuing credentials to mediators in 2004. The TMCA is a Texas non-profit, non-governmental corporation with a Sec. 503.c (6) designation under the U.S. Internal Revenue Code that issues credentials to mediators who meet training, experience and commitment qualifications for the credentials. Credential holders must also meet annual continuing education and experience requirements in order to maintain a credential.

The TMCA is uniquely appropriate to issue credentials to mediators, in that its ten member Board of Directors is composed of the representatives of major mediation organizations (the Texas Dispute Resolution Centers funded through the ADR Act, the Texas Association of Mediators, the ADR Section of the State Bar of Texas, the Association of Attorney Mediators, the Center for Public Policy Resolution, and the Texas Mediators Trainers Roundtable) who are appointed by each such organization to the Board, and representatives of education, consumers, mediator trainers and the judiciary nominated and elected to the Board by the organizational members of the Board.

The work of the TMCA represents an historic collaboration by mediators and their leaders to take professional responsibility for the quality of mediators in Texas and to provide to the Courts and the public credentials through which they can identify mediators who have accomplished and maintain specific levels of training and experience identified with the credentials.

The work of the Supreme Court and the Texas Mediator Credentialing Association has provided significant support to counsel, their clients, and the trial and appellate Courts in selecting and appointing qualified mediators. Although credentials do not ensure quality, the enhanced ability to identify and select qualified mediators improves and protects the public's confidence in mediator competency, mediator ethics, and the administration of justice through Court ordered mediation. More information about the TMCA may be found at www.txmca.org.

The Honorable John Coselli served as the presiding Judge of the 125th Civil District Court of the State of Texas and as an assigned State District Judge for ten years. Prior to taking the Bench he was in private practice with the law firm of Carl, Lee & Coselli (formerly Carl, Lee, Fisher & Coselli) from 1977 until appointed to the Court in 1999. As a mediator he has mediated over 1,500 cases involving the resolution of over a billion dollars in collective controversy. Those cases have included state and federal court business, commercial and construction litigation; labor and employment; insurance; condemnation; environmental; product liability; intellectual property; personal injury; professional malpractice; probate; oil and gas; worker's compensation; deceptive trade practice; banking; fraud; bankruptcy; family; class actions; and appellate disputes, among others.

As an arbitrator he has presided over approximately 100 cases resolving millions of dollars in disputes in business, contract, construction, appraisal, insurance and personal injury cases.

Enforceable Mediated Settlement Agreements

By Hon. Frank G. Evans and Hon. Bruce W. Wettman

Enforceability of Settlement Agreements

A written settlement agreement reached after a mediation conducted pursuant to the Texas ADR Act is enforceable in the same manner as any other written contract. Tex. Civ. Prac. & Rem. Code Ann. §154.071 ("if the parties reach an agreement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other contract.") General contract law applies to a settlement agreement, whether reached as a result of a mediation or through the parties' own settlement negotiations. *Ortega-Carter v. American Int'l Adjustment Co.*, 834 S.W. 2d 439, 442 (Tex. App. – Dallas 1992, writ denied). Thus, except as modified by the parties' contractual stipulations under Texas Family Code §6.606, which is discussed below, a settlement contract reached after a mediation has no legal effect different from one that is reached by the parties without mediation. *Island Entertainment, Inc. v. Castenada*, 882 S.W. 2d 2, 5 (Tex. App. – Houston (1st Dist.) 1994, writ denied.

Although there seems to be no case directly in point, there is some authority for the proposition that an oral settlement agreement is enforceable if the party seeking enforcement can prove the contractual relationship, the substance of the agreement, and a breach of that agreement. See, *Hur v. City of Mesquite*, 893 S.W.2d 227, 233 (Tex. App. – Amarillo 1995, writ denied). Admissible evidence proving the validity of the contract and its breach may be difficult to obtain, however, because of the confidentially related to the mediation process. See, Texas ADR Act, §154.053 ©. But in an appropriate case, it seems that the parties, if not the mediator, may be permitted to testify about particular aspects of the contractual relationship. *Hur v. City of Mesquite*, 893 S.W.2d at 232 (party allowed to testify that City's representative had misrepresented that he had City's authority to bind the City to the agreement.)

If the party seeking to enforce a settlement agreement seeks does so under the provisions of Tex. R. Civ. Proc. 11, the agreement must meet the prerequisites of a "Rule 11 agreement." ("unless otherwise provided by these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered on record."); see also, *Padilla v. LaFrance*, 907 S.W.2d 454. 459, 459, n.6)(Tex. 1995) (oral agreement held unenforceable in such a circumstance.)

The Enforcement Procedure

A party seeking to enforce a settlement agreement in a summary judgment proceeding must establish, as a matter of law, the existence of a valid contract and its breach. Unless the party offers uncontroverted proof of such facts, the existence of the contract and its breach must be established at a trial on the merits. *Manta v. Fifth Circuit Court of Appeals*, 925 S.W.2d 656 (Tex.1996) (per curium). If the claim for enforcement is asserted in pending litigation, the action should be brought in the court having jurisdiction over the underlying claim. If the suit is the subject of a pending appeal, the claim for enforcement should be filed as a separate breach of contract action. Id., at 659.

The Consent Judgment

The Texas ADR Act §154.071 (b) provides that a trial court, in its discretion, may incorporate the terms of the settlement agreement in the court's final decree disposing of the case. Under established case law, however, even though the agreement may have been executed in compliance with §154.071 and Rule 11, either party can withdraw their consent to the agreed judgment until the court actually renders the judgment incorporating the terms of their agreement. *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984). When consent is withdrawn, the settlement agreement may still be enforceable as a written contract, either by a suit on

the contract, of if the facts are uncontroverted by an appropriate Rule 11 motion. *Risk v. Millard,* 810 S.W. 2d 318, 320 (Tex. App. – Houston (14th Dist.) 1991, no writ; see also, *Manta,* at 658; *Cadle Company v. Castle,* 913 S.W.2d 627 (Tex. App. – Dallas 1995) writ denied; see also, Tex. Fam.Code §6.602 discussed below.

Texas Family Code §6.602 – the Mediated Settlement Agreement

A relatively recent provision in the Texas Family Code §6.602 entitled "Mediation Procedures, " provides as follows:

(a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.

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

provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; and(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any who is present at the time the agreement is signed.

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

(d) A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of marriage to mediation on the basis of family violence having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held an d the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation.

Several court decisions have addressed §§6.602 and considered its legal implications. See, *Hall v. Hall,*2005 Tex. App. LEXIS 6810 (Tex. App. – Tyler Apr.29, 2005)(a mediated settlement agreement that meets the prerequisites of §6.602 expressly precludes the applicability of other statutes such as Tex.Civ.Prac. & Rem. Code §154.071); *Chace v. Chace,* 2005 Tex. App. LEXIS 2851 (Tex. App. – Houston 14th Dist. Apr. 14, 2005 (Texas Family Code does not provide for an interlocutory appeal of an order enforcing a mediated settlement agreement); *In re Calderon,* 96 S.W. 3rd 711, 2003 Tex. App. LEXIS 1091 (Tex. App. – Tyler 2003)(a party seeking enforcement of a mediated settlement agreement meeting the requirements of §6.602 need not bring a separate suit and is entitled to judgment even if one party withdraws consent to the agreement.); *Zimmerman v. Zimmerman,* 2005 Tex. App. LEXIS 6064 (Tex. App. San Antonio Aug.3, 2005)(a mediated settlement agreement meeting the requirements of §6.602 is binding notwithstanding Rule 11; see also, however, *Lee v. Lee,* 158 S. W. 3rd 612, 2005 Tex. App. LEXIS 1137 (Tex. App. – Fort Worth 2005)(a mediated settlement agreement necessarily requires a "mediation" and a "mediator" being present; otherwise, there was no "mediated settlement agreement" within the meaning of §6.602 – the couple's agreement was simply an agreement under Tex. Family Code Ann §7.006 (a).

A mediated settlement agreement meeting the requirements of §6.602 is considered to be final, not subject to revocation, and immediately binding even in the absence of a divorce decree incorporating its terms. *Olvera v. Olvera,* 2008 Tex. App. LEXIS 1598 (Tex. App. Houston 1st Dist. Mar. 6, 2008). If the requirements of §6.602 are met, a spouse's purported withdrawal of consent under Tex.R.Civ.P. 11 does not negate the validity of the mediated settlement agreement. *Gaskin v. Gaskin,* 2006 Tex. App. LEXIS 7689 (Tex. App. Fort Worth Aug.31, 2006). In some circumstances, however, i.e. the fraudulent concealment of property when there is a duty to disclose, the provisions of §6.602 will not preclude judicial inquiry. *Boyd v. Boyd,* 67 S.W. 3rd 398, 2002 Tex. App. LEXIS 16 (Tex. App. Fort Worth 2002). But see also *Kott v. Kott,* 2008 Tex. App. LEXIS 1464 (Tex. App. Austin Feb.29, 2008) (wife's action challenging the fairness of an agreement, standing alone, held to have been foreclosed by the Texas legislature in enacting Tex. Family Code §6.602); see also, *Spiegal v. KLRU Endowment Fund,* 228 S.W.3rd 237, 2007 Tex. App. LEXIS 3317 at 12-13 (Tex. App. Austin 2007) (mediated

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settlement agreement enforced where widower made no allegations of fraud, duress, coercion of other dishonest means.).

Drafting the Settlement Agreement

A settlement agreement should be drafted in clear, simple language so there will be no question about the parties' intent. In some cases it will be feasible for the parties and their counsel to complete all final settlement documentation at the mediation session. In other cases, however, the drafting of the agreement may require extensive time and perhaps further negotiation of the terms of settlement. In those instances the mediator faces a dilemma – should the mediator seek to persuade the parties to complete their written contract before leaving the mediation session – or should the mediator bow to the parties' desire to postpone the drafting decisions until some later time?

A significant number of family law practitioners believe that it is the duty of the mediator to explain to the parties the importance of their developing a written contract and to urge them and their counsel to complete the drafting process – at least to the point of creating a written memorandum setting forth their oral understandings. This belief is at least partially founded on the notion that if the parties are willing to develop such a memorandum, it is more likely they will proceed with their efforts to draft a more complete document covering all aspects of their agreement. (There is a contrary belief, however, held by some highly respected mediators that the parties, having reached the semblance of an oral understanding, should be given time to reconsider their oral commitments – even though this may result in the development of "buyers' remorse.")

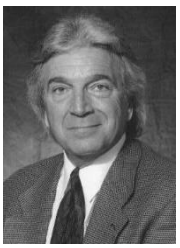
Mediator's Role in Drafting the Agreement

The mediator can play an important role in the drafting of the mediation agreement and in the consummation of the settlement process. This role, however, should not be confused with the role that a lawyer or other professional advisor would play in such circumstances. Generally, the mediator should limit the scope of his or her function to asking questions regarding the feasibility of different settlement options and how those options might be incorporated in a settlement agreement. In this limited role, the prudent mediator will avoid making comments or suggestions that, either directly or indirectly, could be construed as giving legal advice. The mediator should also refrain from becoming involved in the actual writing of the settlement document and should avoid suggesting the particular language of the terms to be incorporated in the agreement. The potential problems arising from the mediator's assuming a greater role in the drafting process have been discussed in a number of professional publications. See, for example: Suzanne Mann Duvall, "*Unauthorized Practice of Law or "What Me Worry? I'm a Mediator,"* The Texas Mediator, Spring 2003, page 13.

Once the parties have reached a verbal understanding, it is not uncommon for them to try to expedite the drafting process. In such circumstances the parties may be inclined to forego discussion of important facts and may overlook important details needed to complete their settlement agreement. Generally, it is the mediator's responsibility to remind the parties that the agreement will be a final and binding document and that all important stipulations need to be incorporated in the writing to be enforceable. In addition, the mediator should encourage the parties to finalize their settlement in a manner that meets the requirements of the court related to the final disposition of the litigation.

The Executed Settlement Agreement

After the parties have signed the settlement agreement, it may or may not be considered confidential, depending upon its terms. Generally, the prudent mediator will not assume responsibility for handling or maintaining the original signed agreements and will not file the document with a court except upon specific written instructions signed by all parties and their counsel. Certainly, the mediator should avoid becoming entangled in any activities that might serve as a basis for challenging the integrity of the mediation process or circumventing any protections of confidentiality relating to the parties' agreement.



Judge Bruce Wayne Wettman has more than 40 years of experience as a judge, lawyer, and alternative dispute resolution (ADR) neutral. He was first elected District Judge of the 247th Judicial District Court for the State of Texas in 1978, and still serves as an assigned Senior District Judge for the Second Administrative Judicial Region of the State of Texas. He is an Adjunct Professor of Law teaching mediation and is the Director the Mediation Clinic at South Texas College of Law, where he recieved the Faculty Excellence Award for Outstanding Adjunct Professor.

For more on Judge Frank Evans please see page 11.

Texas Mediator Credentialing Association Seeks Input for Future Symposium Planning

By Judge John Coselli

Dear Current or Former TMCA Credentialed Mediator:

Texas Mediator Credentialing Association would like your input to help us plan our future symposiums. Please follow the following link to complete a survey that will only take a few minutes to complete. We really appreciate your input!
https://www.surveymonkey.com/s/Tx_Mediator_Credentialing_Assn

Also, if you have not renewed for 2015, please consider doing so before the year end. The link to our website is
www.txmca.org<http://www.txmca.org.

Happy New Year!

John "J.P." Palmer, Chair
Texas Mediator Credentialing Association

Joshua Graham
Recipient of 2014 James Gibson Award
by the
Texas Mediator Credentialing Association

Joshua Graham was named the recipient of the 2014 James Gibson Award. Established by the Texas Mediator Credentialing Association, the award is presented to an individual who has worked to advance the quality of mediation in Texas and who has demonstrated unusual ability and dedication to the highest values of mediator professionalism. The award was presented at the TMCA symposium in Austin on Oct. 25.

The James Gibson Award is given in honor of Dr. James W. Gibson, one of the founders of the TMCA organization. An attorney, mediator, and educator with an extensive background in alternative dispute resolution and conflict management, Gibson was awarded the highest honor obtainable by a mediator in the State of Texas by the Texas Association of Mediators in 2007. He received this award based upon 18 years of contributions to the advancement of mediation in Texas and the nation.

For more information on the TMCA, visit:
http://www.txmca.org/index.html.

CALENDAR OF EVENTS 2015

JANUARY

40-Hour Basic Mediation Training * Ft. Worth ***** January 23-25 continuing February 6-8, 2015* *Mediation Dynamics* * E-Mail: email@MediationDynamics.com * Phone: 817-926-5555 * **www.mediationdynamics.com**

FEBRUARY

30-Hour Family Mediation Training * Ft. Worth ***** February 14-15 continuing February 21-22, 2015* *Mediation Dynamics* * E-Mail: email@MediationDynamics.com * Phone: 817-926-5555 * **www.mediationdynamics.com**

Basic Mediation Training * Austin * February 12-21 * *Baylor Law School and Waco DRC* * (254) 752-0955 * **DRCWACO@HOT.RR.COM**

Basic Mediation Training * Austin * February 25-27 continuing March 3-4 19-20, 2015 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

MARCH

30-Hour Advanced Family Mediation Training * Houston ***** March 6, 7, 8, 2015 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Dallas ***** March 17-18, 2015* *Conflict Happens* * 214.526.4525 * **www.conflicthappens.com** nkferrell@sbcglobal.net

APRIL

40-Hour Basic Mediation Training * Houston ***** April 10-12 continuing April 17-19, 2015 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

Basic Mediation Training * Austin * April 22, 23, 24, 28, 29 continuing March 3-4, 2015 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

rappug55@gmail.com.
Include name of training, date, location, contact information (telephone and/or email) and Internet address

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS ALTERNATIVE DISPUTE RESOLUTION SECTION

MEMBERSHIP APPLICATION

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

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 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, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.

3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.

4. Names, dates, quotations, and citations should be double-checked for accuracy.

5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.

6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.

7. Check your mailing information, and change as appropriate.

8. The author should provide a brief professional biography and a photo (in jpeg format).

9. The article may have been published previously, provided that the author has the right to submit the article to Alternative Resolutions for publication.

Selection of Article

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

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

Preparation for Publishing

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

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

Future Publishing Right

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

ALTERNATIVE RESOLUTIONS
POLICY FOR LISTING OF TRAINING PROGRAMS

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

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

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

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

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

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

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

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

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 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

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ALTERNATIVE DISPUTE RESOLUTION SECTION

http://www.texasadr.org

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