

**State Bar of Texas ADR Section**

***Alternative Resolutions* Newsletter**

**Fall 2001 Issue**

# **CHAIR'S CORNER**

**by Wayne Fagan  
Chair, ADR SECTION**

## **“Building On Our Past Success For Our Future Growth”**

As I prepared to assume my position as Chair of our Section and to compose this, my first Chair's Corner, I reviewed the first Chair's Corner written by Caliph Johnson and the report of the first annual retreat of our Council prepared by Debbie McElvaney. Caliph's article provides us with an excellent overview of the evolution of both ADR in Texas and of our Section. Debbie outlined for us the changes in committee structure that the Council felt were necessary to provide for the future growth of our Section and to better serve our members and the ADR community at large. Our challenge over the next twelve months and in the years to come will be to build on the solid foundation our past leadership has provided to us and to develop the organizational infrastructure to implement the vision of our first annual retreat to better serve our current members, broaden our membership base, and become more of a resource to the ADR community (whether neutral, advocate, or party) within the State of Texas, nationally and internationally.

When Ed Koch was mayor of New York City, he would walk the streets of New York and ask people “how are we doing?” Some people thought that Mayor Koch's question was just a gimmick, actually, I thought it was a pretty good question and one that I think our Section would be well served to ask of itself and of others outside of our Section on a regular basis. When I asked myself that question, I found myself breaking down that broad question into the following subset of questions, i.e., Who are our current members? Are they neutrals, advocates, or consumers of ADR services? Can we do a better job of serving our current constituency; if so, how? What are the various ADR processes? Are we doing as good a job as we can to be a resource in all forms of ADR? To better serve the cause of ADR, should we broaden our current membership base, if so, how do we do that? The Texas ADR community is recognized nationally and internationally as one of the leaders in the field. As such, have we done all that we can do to share our knowledge with others both nationally and internationally, while at the same time recognizing that we can always learn from others as well.

When these questions were posed at our first annual council retreat, the answer was clear, i.e., we have done a good job in the past and we can do an even better job in the future by implementing the goals we set for ourselves at the conclusion of our retreat. Here again, Caliph Johnson has provided a great service by summarizing in his final Chair's Corner the work of our Section over the last twelve months. Our goal over the next twelve months is to expand on the work of our committees by, among other things, implementing the following initiatives:

1. To assure that we are always mindful of our roots, and to take full advantage of the wisdom and experience of the past leadership of our Section.

With the permission of the Executive Committee of our Section, I have added a new committee to the ten committees that were established last year. The new committee will be called the “Council of ADR Section Past Chairs” and, as its name implies, will be composed of all past chairs of our Section. As we undertake new initiatives for our Section, our first priority should and will be to better serve our current membership. Who better to help us understand the needs of our current membership than the past leaders of our Section.

2. Our Section website will be redesigned to provide for both a public and members-only Section. What will be contained in each section of the website is still under consideration, but the idea is to provide resources in the members-only section that are not available to the general public. To make it easier to locate the resources in either section of the website we will add a search engine to the website.

3. To provide more accessible training, we will re-institute and expand the “Road Show” which has been so successful in the past.

4. To broaden our base, we will expand our programs and dialogue to assure more collaboration with other Sections of the State Bar of Texas, other ADR organizations, and the consumers of ADR services.

5. To assure transparency of the work of the Council of our Section, the dates of all Council meetings will be posted on our Section website and minutes of each Council meeting will be posted on our website within thirty days following each Council meeting.

6. To provide a mechanism for the publication of more ADR materials, we will undertake a study to determine the need for and feasibility of publishing an ADR Journal while at the same time continuing the publication of our Section Newsletter.

7. While complying with the guidelines of State Bar of Texas Policy, we will set forth our views on ADR related bills that may be introduced in the Texas legislature

I recognize that this is a very ambitious agenda. However, our Section, like any organization, is not and cannot be stagnant. We either move forward or we will lose ground as leaders in the ADR community. We owe it to you, our current membership, to continue our Section’s proud history of leadership in the ADR community, but we cannot do it alone. We need your help. Therefore, in closing I have one request of each of you and that is to please become involved in the activities of our Section. The Honorable John Coselli, one of our esteemed Past Chairs, once gave me some advice for which I will forever be in his debt. John said “. . . remember Wayne, we are all volunteers . . .”. As volunteers, we are limited in the amount of time we are able to devote to Section activities, but as the saying goes “there is strength in numbers.” Therefore, if each one of us will contribute to the activities of our Section, it will ease the work load on each of us, allow our Section to do more, and assure the development of the future leadership of our Section. There are many ways in which you can become involved. In the first place, you are already involved by being a member of our

Section. If that is the most you feel you can do at this time, we are grateful for your membership. For those of us that are in a position to contribute some of our time in addition to our membership, we welcome and encourage your involvement whether it be by recruiting new members; contributing to our Newsletter, educational materials and/or soon to be expanded website; joining and participating in the activities of one of our Committees; assisting with the organization of the Road Show in your own community; providing the Section leadership with suggestions for future activities; attending the Section's annual CLE and/or mid-year meetings; or in any other way you feel you can be helpful.

I will leave it with each of you to decide how you feel you can best contribute to the work of our Section. I know that I speak for the entire ADR Section Council and your Executive Committee when I say that we sincerely appreciate your membership in the Section and look forward to working with you over the next twelve months.

# ETHICAL PUZZLER

*by Suzanne Mann Duvall*

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

**Question:** Is it unethical for a mediator to be unethical? If so, what, in your opinion, constitutes unethical behavior? If not, why not?

**Judy Corder (Austin):** I would define incompetent mediator behavior as the lack of skills to effectively manage the mediation process that does not cross the line into unethical behavior. I would also distinguish incompetence from the occasional mistakes mediators make. Too many mistakes may indicate incompetence, but all of us make mistakes. As mediation becomes more of a “profession,” I think we are going to increasingly struggle with the line between incompetent behavior and unethical behavior. My own bias is that incompetent behavior is unethical, but I’m not sure that is because I feel so protective of the field and want every mediator to do a terrific job in order to promote mediation as the preferred method of dispute resolution. I do believe that it is unethical to lack the information about what is and is not ethical. I don’t think ignorance of ethics excuses a mediator for the responsibility to behave ethically.

I think that what we have learned from other professions is that incompetence is not generally considered a basis for being unable to practice the profession. In fact, most professions are slow to discipline even unethical behavior. We look to the fields of medicine, law and psychology to see examples of this. In those fields, incompetent practitioners are allowed to continue to practice unless they do harm that rises to some significant level.

Therefore, I don’t believe that in the near future incompetence will be considered unethical unless it crosses some line that violates ethical standards, including the ethical requirement to “do no harm.” My guess is that some of this will be sorted out in the courts or in administrative processes, especially if a statewide grievance process is established.

**Frank Elliott (Granbury):** It should be unethical for a mediator to be incompetent, just as it is for a lawyer to be incompetent, See, for example, Texas Disciplinary Rules of Professional Conduct, Rule 1.01(a) “A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence...” The proposed Texas Rules of Ethics for Mediations and Mediators, Rule 2 “The mediator should be competent to mediate the case. Upon request, the mediator shall disclose the mediator’s training, experience and other qualification. The mediator shall offer to withdraw from the mediation if the matter is beyond the competence of the mediator, or if any party objects to the mediator’s qualifications.”

First of all, do no harm. If a mediator accepts a mediation which he or she knows or should know is beyond his or her competence, it is unethical. The rule for lawyers gives some relief. For example, having another competent mediator to co-mediate, but the lawyer's rule in case of emergencies should not apply to mediators, since an emergency mediation probably needs an even more competent mediator than a non-emergency one.

**Kay Elkins Elliott (Granbury):** In many disputes a vast knowledge of the intricacies of the factual or legal issues which must be addressed and answered is not necessary. For example, in a dispute between Boeing and American Airlines when breach of contract is alleged, the mediator need not be an expert in aerodynamics, but should have competency in the law of contracts. If necessary, the advocates can, through questioning, assure themselves that the mediator's expertise extends to the subject matter of the lawsuit. Additionally, mediators should fully disclose their training and experience to assure parties of their competence.

A mediator may be incompetent for other reasons. For example, if everyone in the dispute is from Africa and the issues entail ongoing relationships, the mediator who is white, with no travel abroad, and no real understanding of the culture of the disputants, may lack cultural competence. This problem may be cured by the addition of a co-mediator familiar with the cultural problems, even one without much mediation experience.

**Michael S. Wilk (Houston):** Is some explanation of the definition of "incompetent" required? Do you mean a mediator that is untrained and unschooled and has no idea what is required to be a mediator? Or, do you mean a mediator who is drunk, stoned, brain damaged, or otherwise mentally incapacitated? Those are my comments.

**James W. Knowles (Tyler):** In a sense, Michael stole my thunder. I guess that is his privilege by being the first to respond. Basically, it seems to me that, at the risk of oversimplification, if your (hypothetical mediator) knows that he or she is incompetent, then it would clearly be unethical to proceed. That is a large question, however. If, on the other hand, the mediator has no personal knowledge of his or her own incompetence, then I have a hard time seeing how it could be "unethical" for the mediator to proceed.

It would seem to me that ethics subsumes a question of intent or volition. Negligence, or malpractice, perhaps does not. But to constitute unethical behavior would, in my opinion, require some knowledge and intent on behalf of the actor. Webster includes as a part of the definition of "ethical" the phrase, "conforming to accepted professional standards of conduct." Also, the Greek "Ethos" refers to "the distinguishing character sentiment, moral nature, or guiding beliefs of a person, group or institution."

As to lawyers, Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct states "a lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's

competence,..." All of these identifying characteristics require some degree of awareness.

Section 154.052 of the Civil Practice and Remedies Code could be interpreted as some type of statutory approval of "competency" simply by a person having completed the specified training hours. In other words, there is no "Bar Exam" for mediators therefore, if a particular mediator has met the statutory requirements and has been appointed by a judicial official pursuant to the law, then there would appear to be a presumption of competency. Only actual knowledge of that particular mediator's incompetence as mediator or unsuitability for the particular case would then be a problem.

In passing, I would also comment on a distinction, which could be drawn between competency in the mediation context as opposed to competency in the particular subject matter of the legal area in which the dispute arises. I firmly believe that competent mediators can proceed and be of value in disputes even when the subject matter of the controversy is not one in which they have particular expertise.

Finally, I would refer you to paragraph 9 of the Preamble to the Texas Disciplinary Rules of Professional Conduct referring to each lawyer being controlled by his own conscience as the touchstone for the test in such matters. As the Greeks recognized "ethics" is a matter of moral conviction and one must know his own mind and heart in that regard. By the way, there are special programs available designed to intervene in the instances of those mediators described in Michael's letter. Perhaps the ethical consideration in that instance would be on the peers and acquaintances of that particular problem mediator in failing to take any such action.

**John Estes (Dallas):** Of course, as phrased, this question means whatever somebody wants it to mean, BUT here are some thoughts:

1. Generally, I believe that incompetence is not unethical; *i.e.*, a lawyer guilty of malpractice should not also be disbarred, absent other conduct.
2. Mediator incompetence generally falls into two categories:
  - a. Lack of knowledge of the substantive law involved in the dispute and/or
  - b. Lack of knowledge or understanding of the mediation process.

With respect to a. above, we have successfully mediated cases where our experience of knowledge of the substantive law is limited. This is especially true of most mediations conducted by non-lawyer mediators. Therefore, mediations of such disputes are not unethical.

With respect to b. above, this is a matter of degree and experience. For example, a well-trained, brand new mediator will not yet have had the experience to be as competent as he/she will be with more experience. We were all there at one time in our ADR career. This is somewhat of a moot question since the market will eventually sort out those who are incompetent in this respect.

To the extent the above indicates that it is unethical for a mediator to be incompetent (without necessarily agreeing so), a good starting point for what is unethical behavior is the Ten Commandments, going on to applicable penal codes, the ADR statute, and maybe concluding with some common sense.

At this point in the development of mediation in Texas, ethical considerations are generally moot since there are no existing enforcement capabilities other than the market.

**COMMENT:** Perhaps competence, like beauty, is in the eyes of the beholder. Perhaps the real question, then, is “what should the mediator do if either he or one of the participants in the mediation process perceives him to be incompetent?”

The Ethical Guidelines for Mediators are promulgated by the Alternative Dispute Resolution Section of the State Bar of Texas in Paragraph 5, “Mediator Qualifications,” states “A mediator should inform the participants of the mediator’s qualifications and experience.” The accompanying comment states: “A mediator’s qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator’s qualifications to mediate the dispute, the mediator should withdraw from the dispute. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.”

The Texas Rules of Ethics for Mediations and Mediators as submitted for consideration to the Supreme Court by the Advisory Committee for Court Annexed-Mediations are more stringent. Rule 2, “Competence,” affirmatively states: “The mediator should be competent to mediate the case. Upon request, the mediator shall disclose the mediator’s training, experience, and other qualifications. The mediator shall offer to withdraw from the mediation if the matter is beyond the competence of the mediator or if any party objects to the mediator’s qualifications.” (emphasis added)

“Bad mediator behavior” including incompetence, is most frequently passive rather than active in nature. Rarely, if ever, does one set out to exhibit bad mediator behavior or to blunder and bluster through a mediation without proper training or knowledge and without the necessary mental or physical good health to proceed. However, once a mediator’s incompetency of any type, real or perceived, becomes an issue to either the mediator or to the participants in a mediation, the mediator has a duty under both the Guidelines and the Rules, to offer to withdraw from the dispute. To do otherwise would be unethical.

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

## ALTERNATIVE DISPUTE RESOLUTION SECTION

**The State Bar of Texas ADR Section  
Invites your Section, Committee, or Task Force  
To designate a representative to the new**

### **ADR ADVISORY GROUP**

#### **2001-2002 GOALS AND OBJECTIVES:**

- Create a mechanism for communication within the State Bar of Texas, across substantive practice areas and other points of focus, for the exchange of information and ideas about current events of common interest to ADR practitioners and the users of ADR services.
- Help plan the ADR Section's 2002 Annual CLE Conference (Ft. Worth, February 1-2).
- Identify other value opportunities that can result from a broad exchange of information relevant to continued **development of quality ADR services and useful emerging settlement strategies in the State of Texas.**

All ADR Advisory Group communications will take place via electronic communication (including but not necessarily limited to e-mail, and periodic teleconferences), and one meeting at the State Bar of Texas Annual Meeting that will be scheduled so as to avoid conflict with other entity meetings.

Please complete and fax this form to either of the two ADR Advisory Group Co-Chairs: Ann L. MacNaughton at 713-646-2001 or Bill Lemons at 210-472-0515.

Entity Name: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Designated Liaison: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Mailing Address: \_\_\_\_\_  
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TELEPHONE: \_\_\_\_\_ FAX: \_\_\_\_\_  
INTERNET ADDRESS: \_\_\_\_\_

# Collaborative Law: What it Means to Texas Mediators

*BY JUDY K. DOUGHERTY & JOSEFINA M. RENDÓN*

***In the last couple of years some Texas attorneys have embraced a completely new way of practicing law in divorce cases – Collaborative Law. The 2001 legislative session passed HB 1363 which sanctioned the practice of Collaborative Law in family cases in Texas.***

## **Origins**

Collaborative law was the inspiration of Stuart Webb, a frustrated family lawyer practicing in Minneapolis in about 1990. While he quickly appreciated the benefit of mediation to families, he felt there should be a process that included early input from attorneys into the negotiation process. His “settlement only” model emphasized the skills of lawyers as creative problem solvers. Collaborative law arrived in California in 1993 after Minneapolis lawyers presented the idea at a national conference for the Academy of Family Mediators. Collaborative lawyers such as Pauline Tesler and Chip Rose, and others have shared their knowledge across the country and helped practice groups begin collaborative law practice groups. They have been instrumental in the creation of the American Institute of Collaborative Professionals.<sup>1</sup> John McShane, Dallas, and Don Royall, Houston, have led the drive for recognition of collaborative law techniques in Texas.

## **The New Law**

The new bill adds Sections 6.603 and 153.0072 to the Family Code. Both sections state as follows: “On a written agreement of the parties and their attorneys, a dissolution of marriage proceeding or a suit affecting the parent child relationship may be conducted under collaborative law procedures. “

## **Definition**

The bill defines Collaborative Law as follows: “a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.”

## **Provisions of a Collaborative Law**

### **Agreement**

The new statute also states that a collaborative law agreement must include provisions for:(1) full and candid exchange of information between the

parties and their attorneys as necessary to make a proper evaluation of the case;(2) suspending court intervention in the dispute while the parties are using collaborative law procedures;(3) hiring experts, as jointly agreed, to be used in the procedure;(4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

### ***Judgment on a Collaborative Law Settlement***

The new law states that notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:(1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and 2) is signed by each party to the agreement and the attorney of each party.

### ***The Court's Authority***

Subject to Subsection (g), a court that is notified 30 days before trial that the parties are using Collaborative Law procedures to attempt to settle a dispute may not, until a party notifies the court that the Collaborative Law procedures did not result in a settlement:(1) set a hearing or trial in the case; (2) impose discovery deadlines; (3) require compliance with scheduling orders; or (4) dismiss the case.

### ***The Parties' Obligations***

The parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and(2)a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures. (g) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:(1) set the suit for trial on the regular docket; or (2) dismiss the suit without prejudice. (Note: it is also important to know that the parties can opt out of the collaborative law process at any time prior to signing an irrevocable settlement agreement.)

### ***Collaborative Law in Practice***

Central to the Collaborative process is the idea that the parties and their attorneys work as a “team”. The “team” may also include neutral experts for any issue that requires specific experts. The attorneys model for their clients an attitude of co-operation and respect that allows the parties, their attorneys, and any neutral experts to share their knowledge, skills, and resources.

The Collaborative Law model generally includes the following steps:

a. Orientation: The prospective new client is informed by the attorney of the Collaborative Law model as an option for reaching settlement of their legal proceeding.

b. Client Conference: The new client who wishes to use the Collaborative Law model meets with the attorney and is advised by the attorney about his/her case. Information is gathered from the client.

c. Settlement Conferences: Generally, the parties and their attorneys meet together in four-way conferences. The parties sign the Collaborative Law Participation Agreement at the first settlement conference. The parties decide the timing of the filing of the Original Petition. Usually a joint petition is filed. Information is gathered, parties' interests are identified, solutions are brainstormed, and temporary agreements are reached. Later, conferences are scheduled as needed.

e. Final Agreement: The final agreement is drafted and signed. This agreement can be made irrevocable by the use of the proper statutory language.<sup>ii</sup> The culmination of the Collaborative Law process is to produce the formal written agreement, which is usually the Agreed Final Decree and other required documents that are needed for completion to finalize the matter on the uncontested docket.<sup>iii</sup>

### **Impact on Texas Mediators**

Some of Texas' most respected family lawyers have already embraced Collaborative Law and are frequently practicing it in clusters with other colleagues. However, Collaborative Law can be practiced by any attorney with the appropriate skills.

Surprisingly, many Texas mediators have reacted negatively to this new trend of collaborative law very much the same way as numerous attorneys reacted to the advent of mediation. Among comments the authors have heard are, that this type of practice would eliminate the need for mediators and would negatively impact traditional litigation advocacy roles.

### ***Similar to Impact of the ADR Act***

The Texas Alternative Dispute Resolution Procedures Act (Texas ADR Act) states that it is the policy of the State of Texas to encourage the peaceable resolution of disputes.<sup>iv</sup> The Act emphasizes family law cases by stating that special consideration be given to "disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children", as well as the early settlement of pending litigation through voluntary settlement procedures.<sup>v</sup> Similarly the Family Code encourages the use of ADR by requiring that an ADR statement be included in the first pleading filed by the parties in several proceedings under the Family Code.<sup>vi</sup> Collaborative Law is in effect an Alternative Dispute Resolution method<sup>vii</sup> and is faithful to the ADR Act's and the Family Code's policy of peaceful resolution.

Since the enactment of the ADR statute there is a growing body of evidence, that some families want a safe environment in which to work out their own unique solutions without judicial intervention.<sup>viii</sup> The practice of Collaborative Law not only incorporates the strengths of both the conference and caucus models of mediation but also addresses their potential weaknesses. For

example, attorneys are involved from the beginning of the negotiation sessions in a cooperative mode similar to mediation rather than waiting until the eve of trial when positions are more solidified. The high costs of discovery and experts can be avoided by the use of full disclosure and hiring of mutual experts.

### ***Does it Eliminate the Need for Mediators?***

In practice, many of the attorneys who practice collaborative law are also mediators who prefer collaboration to litigation and who believe Collaborative Law is a positive step towards creating a less contentious culture among lawyers and their clients. It is unlikely that the new law will negatively affect those attorney mediators who also practice family law. On the contrary, Collaborative Law is likely to become the divorcing public's preferred method of representation.

These attorney-mediators will also be able to use their mediation skills in the furtherance of the spirit of the Texas Alternative Dispute Resolution Act. Attorney-mediators have often felt frustrated that, once they assumed the role of mediators, they were not able to represent or advise parties because of a conflict of roles. In some cases there is no need for an extra layer of expense. Therefore, Collaborative Law offers the best of both worlds in those cases and attorneys can represent their clients' interests and at the same time promote the process of resolution at an earlier stage.

There is a chance that Collaborative Law may decrease the need for family mediators. However, mediators will still be needed when the parties do not reach settlement. Also the parties may have important relational and emotional issues and could benefit from mediation before embarking into the resolution of legal issues.

### ***Does it Eliminate the Need for Aggressive Lawyers?***

The reality seems to be that there will always be demand for aggressive litigators. As long as there are rancorous litigants and powerless parties there will also be the need for litigators to represent them. These will continue to benefit from mediation.

***Judy Kurth Dougherty is a 1978 graduate and former adjunct professor of the University of Houston Law School with a Masters in Social Work from the University of Texas. She is a former President/ founder of Family Mediation Network of Greater Houston, a former Director/founder of the Texas Association of Family Mediators, former Director of the Houston Bar Association ADR Committee, Director of HBA, ADR Section, former Director of Association of Attorney Mediators, advanced practitioner of the Association for Conflict Resolution (formerly SPIDR & AFM). She is a partner in the Houston firm of Dougherty and Dougherty, and has been a mediator since 1980 for, among others, American Arbitration Association, U.S. Postal Service, World Bank, U.S. Southern District Panel, and trainer for Harris County Dispute Resolution Center. She is also a director of the Houston Chapter of ACR.***

**Josefina Muñiz Rendón** is a 1976 graduate of the University of Houston Law Center. She has been a mediator since 1993 for, among others, the U. S. Postal Service, Equal Employment Opportunity Commission, Texas Education Agency, Department of Justice Civil Rights Section, Harris County Dispute Resolution Center, Better Business Bureau and the World Bank. She was the former Judge of Municipal Court #5 and former Vice-chair of the City of Houston Civil Service Commission. Judge Rendón is also the editor of *THE TEXAS MEDIATOR* and was on the editorial boards of *THE HOUSTON LAWYER* and the *TEXAS BAR JOURNAL*. She is presently a director of the Houston Chapter of the Association for Conflict Resolution, an Associate Municipal Judge and a mediator in private practice.

## FOOTNOTES

<sup>i</sup> Pauline Tesler, *Collaborative Law: Where did it Come From, Where is it Now and Where is it Going?* THE COLLABORATIVE QUARTERLY- JOURNAL OF AMERICAN INSTITUTE OF COLLABORATIVE PROFESSIONALS (MAY 1999).

<sup>ii</sup> TEX. FAM. CODE ANN. §§ 6.603(d)(1) & 105.30072(d)(1).

<sup>iii</sup> Collaborative Law Institute, *Collaborative Law Practice Model* (1995).

<sup>iv</sup> TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001-154.073 (Vernon Supp. 2000).

<sup>v</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon Supp. 2000).

<sup>vi</sup> TEX. FAM. CODE ANN. §§ 6.404 & 102.0085.

"I AM AWARE, THAT IT IS THE POLICY OF THE STATE OF TEXAS TO PROMOTE THE AMICABLE AND NONJUDICIAL SETTLEMENT OF DISPUTES INVOLVING CHILDREN AND FAMILIES. I AM AWARE OF ALTERNATIVE DISPUTE RESOLUTION METHODS INCLUDING MEDIATION. WHILE I RECOGNIZE THAT ALTERNATIVE DISPUTE RESOLUTION IS AN ALTERNATIVE TO AND NOT A SUBSTITUTE FOR A TRIAL AND THAT THIS CASE MAY BE TRIED IF IT IS NOT SETTLED, I REPRESENT TO THE COURT THAT I WILL ATTEMPT IN GOOD FAITH TO RESOLVE BEFORE FINAL TRIAL CONTESTED ISSUES IN THIS CASE BY ALTERNATIVE DISPUTE RESOLUTION WITHOUT THE NECESSITY OF COURT INTERVENTION." (The requirement of a mediation statement applies to the following portions of the Family Code: Title 1. Marriage Relationship; Chap. 102 Filing Suit; Chap. 151 Parent-Child Relationship; Chap. 153 Conservatorship, Possession & Access; Chap. 154 Child Support; Chap. 156 Modification; Chap. 160 Determination of Parentage; Chap. 161 Termination of Parent Child Relationship).

<sup>vii</sup> In fact, HB-1363 was originally intended to be part of the ADR Act. However, there was a concern that inclusion in the ADR Chapter of the Civil Practice and Remedies Code would make Collaborative Law procedures technically applicable to other civil litigation cases, thereby preventing the civil courts from ordering the parties to do certain things such as discovery and going to trial.

<sup>viii</sup> J. Sampson, H.L. Tindall, R.O. Dawson, *SAMPSON'S & TINDALL'S TEXAS FAMILY CODE ANNOTATED* (2001) at 88.

# **2001-2002 CALENDAR OF** **EVENTS**

**40-Hour Basic Mediation Training** ♦ Houston ♦ November 5-9, 2001 ♦  
Worklife Institute ♦ Contact Diana Dale or Elizabeth F. Burleigh at (713) 266-2456

**24-Hour Advanced Training: Divorce & Child Custody (Family) Mediation Training** ♦ Houston ♦ November 7-9, 2001 ♦ University of Houston A. A. White  
Dispute Resolution Institute ♦ (713) 743-4933

**Fall CLE Program of the Association of Attorney-Mediators** ♦ Dallas  
♦ November 9, 2001 ♦  
Contact Brenda Rachuig at (800) 280-1368 or visit our website at [www.attorney-mediators.org](http://www.attorney-mediators.org)

**30-Hour Advanced Communication and ADR Marketing** ♦ Denton ♦  
November 29-30, December 1-2, 2001 ♦ Texas Woman's University ♦ Contact  
Bonnie Louther at (940) 898-3466  
A. A. White Dispute Resolution Institute ♦ (713) 743-4933

**40-Hour Basic Mediation Training** ♦ Denton ♦ January 9-13, 2001 ♦ Texas  
Woman's University ♦ Contact Bonnie Louther or Kay Elkins Elliott at (940)  
898-3466

**State Bar of Texas ADR Section Annual Meeting** ♦ February 1-2, 2002  
♦ Texas Wesleyan School of Law in Fort Worth, Texas ♦ More details coming  
soon!

# ***ADR SECTION COUNCIL*** **HOLDS SECOND ANNUAL RETREAT**

*By William H. Lemons, III*

The Council of the ADR Section held its Second Annual Retreat in San Antonio on August 17-18. Called by Wayne Fagan, the Section's Chair, the emphasis of this year's Retreat largely was to follow up on the tasks and goals established during last year's Retreat, the first ever held. Wayne's law firm, Soules & Wallace, graciously hosted the Retreat, and all participants again enjoyed a lovely dinner Friday night at Wayne and Julie's home.

About eighteen officers, Council members (both newly elected and existing) and past Chairs took time from their busy schedules and families to attend. Before the Retreat, a survey had determined general "themes" that Council members identified as timely topics for discussion. The Retreat, which was professionally facilitated, emphasized efficiency, accountability and strategic goal setting. Its task was to identify and address "future trends that will affect the field of dispute resolution (and thus the Section) in the next five years."

The participants analyzed a) what they had been able to accomplish in the year after the first Retreat, b) what was "in process" from the first Retreat and c) what action items had not been accomplished as of yet. Among other things, participants made a detailed introspection of exactly who the typical ADR Section member was and what he or she might expect from the Section and its Council.

A considerable period of time was spent on Strategic Planning. Among the goals established were a) Outreach ("evangelistic ADR") in order to better promote the use and awareness of ADR, b) Enhanced Member Services in order to make the Section and its Council - more available to the constituent members of the Section, c) Quality Assurance -to promote the overall quality of ADR through a Journal, and protection of the integrity of the process through legislative participation; and d) Liaison - to heighten the involvement in ADR and the Section by other ethnic groups, government and other SBOT Sections.

The Retreat also centered on several functional goals: a) the continuation of the Section's highly-successful CLE Program(s); b) expanded and better use of the Section's WebPage and Newsletter; and c) expanded geographical representation. Toward this last goal, events will be planned in the near future for the Rio Grande Valley and other parts of South Texas.

As part of its Liaison function, the Section will co-sponsor a significant CLE event on November 2, 2001, in San Antonio, Texas in conjunction with the SBOT Labor and Employment Law Section. The increased use of arbitration was identified as an emerging trend in ADR for future years. Titled ***Labor and Employment Law in Practice: Arbitration***, the CLE Program will delve into the nuts and bolts of arbitration as an ADR process, and will feature speakers who are members of both Sections as well as arbitrators, judges and ADR providers. More about this CLE program is provided on pages 8 and 9 of this newsletter.

# BOOK REVIEW

## THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE

By Michael Lang and Alison Taylor  
Jossey-Bass, 2000  
242 pages

In the practice of mediation, what makes the difference between competence and artistry? This is the question addressed by Micheal Lang, editor of Mediation Quarterly, and co-author Alison Taylor.

Drawing heavily from MIT philosopher Donald Schon's writings on reflective practice and University of Chicago psychologist Mihayi Csikszentmihalyi's work on creativity, the authors attempt to plot a theory of professional development for the mediation field. As the authors describe it, mediators who are at the level of novice, apprentice and practitioner are mostly concerned with acquiring the knowledge and skill for competency. In Texas, where a fair number of mediators now have ten or fifteen years of experience under their belts, the timing may be right to reflect on the next level of practice. *The Making of a Mediator* contains some interesting ideas for the development of "artistry:"

- A challenge for mediators to use their knowledge and skill not as the parameters of practice, but as the foundation for their use of intuition, creativity, experimentation and responsiveness to the parties and their specific conflict.
- A description of "reflective practice": an increased awareness of interactions during the mediation session and a willingness to reflect on and learn from one's experience after the mediation session.
- The importance of a congruent philosophical basis for practice and an intriguing way to organize our thinking on this topic by identifying - and distinguishing - core beliefs, theories, models, and information.
- The use of reflective coaching strategies for mediation trainers as a way to build the student's capacity for reflective practice.

*The Making of a Mediator* contains considerable self-help jargon that could be off-putting to some. In addition, repetition of many of the themes seems to detract from the content. Nevertheless, Lang and Taylor provide important and timely insights into how to think about our work as mediators and mediation trainers and offer a valuable reminder that becoming a mediator is not an end, but a process.

**Mary Thompson**, of Corder/Thompson & Associates is a mediator and mediation trainer based in Austin.

# **MARK YOUR CALENDARS!**

**State Bar of Texas**

**Alternative Dispute Resolution Section Annual Meeting**

**Feb 1-2, 2002 in Ft. Worth, Texas!**

***A Funny thing Happened on the  
Way to The Courthouse***

This is one program you will not want to miss! This is **NOT** your ordinary CLE program! You will have loads of fun learning how to facilitate in Corder & Thompson's Two-Hour Facilitation Workshop; join Rona Mears' and Benjamin Davis' cutting edge technology showcase mediating cases online; listen to the Hon. John A. Coselli, Jr. in "Litigation and Conflict Resolution Risk Analysis" giving a reprise of "See you in Court!" Other topics to watch for include Arbitration, Government Dispute Resolution, Partnering and Ombudsman. *3 Hours Ethics Pending*

**DATE** February 1-2, 2002

**PLACE** Texas Wesleyan School of Law at 1515  
Commerce (Downtown Fort Worth near the Convention  
Center)

**TIME** Day One—9:30 a.m. to 5:45 p.m.  
Day Two —9:30 a.m. to Noon followed by:

**SECTION MEETING:** Noon—1:30 p.m.

**COUNCIL MEETING:** 1:30 —3 p.m.

There will be a social gathering on the evening of Friday, February 1, 2002 at the stockyards so bring your cowboy hats and boots!

***Yahoo!***

**Surprise Speaker!**

**Look for more information in your mailbox  
and on the Internet in the weeks to come!**

## ***REGISTRATION FEE***

Members—\$175

Students —\$30

Government Employees — \$75

Sitting Full Time Judges — Free

**Contact Kay Elkins Elliott @ 214.546.3338 for further details.**

# CASE LAW & LEGISLATION UPDATE

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

The Texas Supreme Court has issued two opinions further solidifying the enforceability of arbitration agreements in Texas consumer cases.

**In Re: First Meritbank** 44 Tex Sup J 900 , 2001 Tex. Lexis 59 (as amended August 2, 2001). In this case the Supreme Court ruled that an arbitration clause in an addendum to a retail installment contract for a mobile home was enforceable. The debtor had attempted to rescind the contract because of allegations of fraud in the inducement, misrepresentation, defects in the mobile home, and unconscionability. The Texas Supreme Court followed the holdings in an extensive number of arbitration cases which hold that claims as to fraud in the inducement and unconscionability as to the whole contract are not defenses to the enforceability to the arbitration clause itself. Thus, only claims that there was fraud in the inducement of the arbitration clause itself (as contrasted to the whole contract) could act as a bar to enforceability of the arbitration clause. The claimants also asserted that the arbitration was unconscionable because of the excessive expense to arbitrate the case. In support of this claim, the claimants filed affidavits that the filing fee before AAA would be \$2,000. However, because the claimants did not show that in fact AAA would administer the case or in fact charge those fees, the claimant had not met its burden of proof that the costs of arbitration would be excessive.

**In Re American Homestar of Lancaster, Inc** 50 SW3rd 480 (2001). In this case the Texas Supreme Court faced the question of whether or not the Magnuson -Moss Warranty Act "trumped" the Federal Arbitration Act, and thus permit purchasers of a mobile home to pursue their claim in court rather than under the arbitration clause contained in the contract. The Texas Supreme Court noted that the Magnuson-Moss warranty act contained no language either permitting or prohibiting the use of binding arbitration. Thus, in passing Magnuson-Moss, Congress did not evidence a clear intent to override the federal policy established by the FAA favoring the enforceability of arbitration agreement.

**NEWSLETTER SUBMISSION DATE FOR UPCOMING ISSUES OF  
*ALTERNATIVE RESOLUTIONS***

<b><u>Issue</u></b>	<b><u>Submission Date</u></b>	<b><u>Publication Date</u></b>
Winter	December 1, 2001	January 15, 2002
Spring	February 27, 2002	April 15, 2002
Summer	June 1, 2002	July, 2002
Fall	September 1, 2002	October 15, 2002

**All Dates are Tentative and Subject to Change. Articles Must Be  
Submitted On A Disk With A Hard Copy Included Or By E-mail.**

**SEE PUBLICATION POLICIES ON PAGE 19 AND SEND ARTICLES TO:**

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