ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By Cecilia H. Morgan, Chair, ADR Section

Cecilia H. Morgan

Tuesday, June 20, 2017

On this the 30th anniversary of the Texas Alternative Dispute Resolution Procedures Act, Chapter 154 of the Texas Civil Practice & Remedies Code (the "Texas ADR Act"), I wanted to reflect on our 30 years of keeping the peace in Texas, and particularly the last ten years. In 2008, the 1,400 members of the ADR Section of the State Bar of Texas were fairly evenly divided between mediators, arbitrators, and others (including collaborative lawyers, special masters, facilitators, etc.). Today we ADR professionals solve problems for our clients and offer an alternative to traditional litigation. Today the "A" in ADR does not stand for Alternative, but for Appropriate Dispute Resolution processes. Texans with legal problems can now negotiate, collaborate, mediate, arbitrate and/or litigate.

Over the last ten years, there have been at least eight areas where ADR has grown exponentially; those areas are (1) mediation, (2) arbitration, (3) collaborative law, (4) education, (5) sister organizations, (6) substantively (employment, construction and health care), (7) internationally and, closest to our heart, (8) the ADR Section:

1. Mediation. Texas has continued to lead the nation in providing mediation to its citizens as an adjunct to and an alternative to litigation. Mediation has expanded beyond the courthouse, and there are "Deal" Mediations ("DM") where traditional transactional lawyers now negotiate the deal. Civil actions filed in Texas are resolved by negotiation or mediation 95% of the time. Texans have the blanket protection of the Texas ADR Act's confidentiality provisions, while most other states have passed the Uniform Mediation Act with a piecemeal approach to confidentiality. The ethical guidelines for mediators approved by the Supreme Court of Texas in June 2005 are viewed as The Standard for ethical mediation in the State of Texas. In the Fall of 2009, the Dallas County District Courts adopted a uniform mediation order that is now used by almost all courts throughout the State of Texas.

2. Arbitration. Since 1845, Texas has had a policy for private arbitration of legal disputes. In the last ten years, many state and federal bills have limited access to arbitration by consumers, yet the use of arbitration continues to grow between parties with equal bargaining power. Arbitration is the process used by many businesses in business-to-business disputes, where the parties select their own arbitrator and the rules under which they proceed.

3. Collaborative Law. Collaborative law and the number of collaborative lawyers have increased dramatically over the last ten years. The Texas Collaborative Law Act was passed by the Texas Legislature in June 2009 to expand collaborative law beyond family law to all areas of civil law. In addition, the National Conference of Commissioners on Uniform State Laws (the "NCCUSL") completed a uniform collaborative law statute in the summer of 2009, and many other states have expanded their use of collaborative law.

4. Education. Most Texas students are introduced to mediation in the fourth grade in their peer mediation classes. Peer mediation is taught in every public and private school system in the State of Texas. There are post-graduate certificate programs

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SLATE OF OFFICERS AND COUNCIL MEMBERS APPROVED BY COUNCIL

By John Fleming and Walter A. Wright

At its regular quarterly meeting on April 19, 2008, the ADR Section Council approved the slate of proposed officers and Council members submitted by the Nominating Committee, which was composed of John Fleming, Kris Donley, Reed Leverton, and Jay Zeleskey. The following officers and new Council members were approved and constitute the slate for election at the ADR Section's annual meeting scheduled for 1:30 P.M. to 2:00 P.M. on Thursday, June 26, 2008, in San Antonio, Texas:

1. Chair, John K. Boyce, III (San Antonio)
2. Chair Elect, John Allen Chalk, Sr. (Fort Worth)
3. Treasurer, Regina Giovannini (Houston)
4. Secretary, Susan B. Schultz (Austin)

Council members for three-year terms expiring June 2011:

1. Jeffrey R. Jury (Austin)
2. Sherrie R. Abney (Dallas)
3. Herman Bate (Lufkin)
4. Tad Fowler (Amarillo)
5. Beth Krugler (Fort Worth)
6. Ronald Hornberger (San Antonio)

Cecilia Morgan will remain on the Council for another year as Immediate Past Chair.

John K. Boyce, III was elected to the Council in 2005 and currently serves as Chair Elect. While on the Council, he has been instrumental in revising the *ADR Texas Style* pamphlet, a publication the ADR Section distributes to the public through the State Bar of Texas. John wrote the *Consumer Arbitration in Texas* pamphlet that sets out the State Bar of Texas Fair Practice Guidelines for Consumer Arbitration, and he has participated in the drafting of the *Agreement to Private Arbitration* that appears elsewhere in this newsletter. He has been in practice for twenty-eight years, concentrating in commercial transactions and litigation in state and federal trial and appellate courts. John's principal practice areas are arbitration and mediation. He serves on the commercial panel (large and complex case section) of the American Bar Association, and is an arbitrator for the Institute of Conflict Prevention and Resolution, as well as other national panels.

John Allen Chalk, Sr. has actively practiced law in Texas for thirty-four years and has extensive experience in commercial and employment law litigation. His practice is international in scope. He also has a significant health-care practice representing physicians and allied health professional provider organizations. John joined the Council in 2006 and has been instrumental in assisting the ADR Section in its arbitration roundtable project.

Regina Giovannini, a full-time professional neutral, is a member of the American Arbitration Association's Commercial Arbitration Panel (large and complex cases). She was national president of the Association of Attorney-Mediators in 2000 and chairman of the Houston Bar Association Alternative Dispute Resolution Section in 1999. She is a prolific writer and speaker on ADR subjects. Regina, a graduate of Notre Dame Law School, is a former business litigator.

Susan B. Schultz is currently the Deputy Director of the Center for Public Policy Dispute Resolution at the University of Texas School of Law, an organization that promotes the appropriate use of alternative dispute resolution in Texas government. An attorney with seventeen years of experience in the field of regulatory and administrative law, Susan is a trained mediator and facilitator. She has assisted in ADR trainings, tracked and reported on legislation in the Texas legislature, and consulted with various state agencies to refine or implement ADR programs. She was first elected to the Council in 2005 and has been actively involved in all Section activities.

Jeffrey R. Jury is a partner in the Austin law firm of Burns Anderson Jury & Brenner, LLP. A TMCA Credentialed Distinguished Mediator, he writes and speaks frequently on mediation and is something of an expert on dispute resolution techniques of Vikings (ask him for a demonstration). He has taught courses in Alternative Dispute Resolution as an adjunct professor for Texas State University. A graduate of Baylor University Law School, Jeff also represents clients in transactional and litigation matters.

Sherrie R. Abney is a collaborative lawyer, mediator, arbitrator and collaborative trainer. She has served as chair of the Dallas Bar Association's ADR and Collaborative Law Sections and is a founding director of the Texas Collaborative Law Council. Sherrie, who received her law degree from Oklahoma City Law School, is a member and past secretary of AAM, presenter and trainer for the International Academy of Collaborative Professionals, and a member of the Civil Committee of the Dispute Resolution Section of the American Bar Association.

Herman Bate, who received his law degree from the University of Texas School of Law, is a partner of Fenley & Bate, L.L.P. in Lufkin. He has been board certified in civil trial law and personal injury trial law, and he has many years of courtroom experience in insurance defense, personal injury, products liability, contract, and worker's compensation litigation. He is now a full-time mediator.

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THE ADR COUNCIL UNANIMOUSLY APPROVES CHANGES TO ETHICAL GUIDELINES

By Mike Patterson*

Last year, the ADR Section Council asked a committee to review the ABA's Model Standards of Conduct for Mediators, adopted in August 2005, to consider whether to recommend any changes to the Ethical Guidelines for Mediators adopted by the Texas Supreme Court in June 2005. The committee concluded that our guidelines, for the most part, are working well and recommended only three changes. On January 5, 2008, the ADR Section Council accepted three changes for publication in the ADR Section's newsletter, Alternative Resolutions, for the members' consideration before presenting it for adoption by the ADR Section Council. Members were asked to comment on the proposed changes. After receiving no comments critical of these changes, the ADR Section Council, on April 19, 2008, unanimously approved the three changes to the ethical guidelines.

The first change is in Section 2, which currently provides:

> 2. Mediator Conduct. A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.
>
> Comment (a). A mediator should not use information obtained during the mediation for personal gain or advantage.
>
> Comment (b). The interests of the parties should always be placed above the personal interests of the mediator.
>
> Comment (c.). A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.
>
> Comment (d). Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.
>
> Comment (e). A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

The approved change is an additional comment that will read as follows:

> Comment (f). A mediator should not conduct more than one mediation at a time unless all parties agree to do so.

This change was approved because some mediators that are conducting more than one mediation at the same time without informing the participants that this will occur. Unfortunately, this practice appears to be growing. The problem with not informing the participants and obtaining their consent to this practice is that it is deceptive, and the parties are both wasting time and paying their attorneys for the time they are spending while the mediator is mediating another case. Participants have a right to expect, unless they agree otherwise, that they are paying for the full time and attention of the mediator for the period reserved. If the parties are informed ahead of time that the mediator intends to conduct multiple mediations at the same time, the parties then have an opportunity to consider whether this is acceptable and proceed accordingly.

The second approved change is in Section 4, which currently provides:

> 4. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.
>
> Comment (a). A mediator should withdraw from a mediation if it is inappropriate to serve.
>
> Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

The approved change is the underlined addition, below, so the section will provide as follows:

> 4. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator should make full disclosure of any interest the mediator has in the subject matter of the dispute and of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality.

This change was approved because it was an oversight that resulted in it being excluded from the original draft of the Guidelines. A conflict can come from areas other than just relationships. A mediator's interest in the subject matter of the dispute, like a financial interest in a corporation or involvement in the past with a product or patent, may affect the mediator's

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PRIVATE ARBITRATION IS COMING OUT OF THE GARAGE

Arbitration historically was conducted under the auspices of a recognized institutional provider such as the American Arbitration Association. The arbitration club was small, and those few providers had their own rules and procedures with which "everyone" was familiar. Arbitrations clauses in agreements tended to be so standardized one could recite them from memory.

The dramatic growth in arbitration, however, has witnessed another phenomenon: the growth of private arbitration, sometimes called "garage arbitration." A private arbitration is an arbitration not conducted under the auspices of a traditional administrator. Instead, it may be a post-dispute oral agreement to arbitrate the dispute, or it may arise from a poorly written clause that mentions no provider or leaves out governing rules. The concerns about private mediations are more than academic. They bear on the integrity of the process, the credibility of the arbitrator, and, ultimately, whether the award will withstand a motion to vacate filed in court under the Federal Arbitration Act or the Texas General Arbitration Act. Remember, those statutes are substantive, not procedural, so mere references in a contract to arbitration conducted "in accordance with the Federal Arbitration Act . . . " still leave a host of unanswered questions.

Sensing a need in the arbitration community to address these concerns, the ADR Section Council charged a committee composed of William H. Lemons, III, John K. Boyce, III, and John Allen Chalk to prepare a form governing private arbitrations for general use by section members. The committee worked through numerous drafts for a year and a half. The Council, after a period of comment, voted in its recent April meeting to accept the committee's final draft. It is presented here and should be published shortly on the ADR Section's website.

The agreement is intended to serve as a "default" document to deal with considerations not addressed by the parties or in the arbitration clause of the agreement. With a well-written clause, it is unnecessary. The agreement is a "check the box" form in the sense that parties are presented with several options. For instance, in paragraph &7, parties may select any of five different procedural rules from the major institutional providers. Similarly, the parties are given a choice of evidentiary rules in &8. Paragraph &6 addresses a topic near and dear to any arbitrator: fees, including cancellation fees, and the circumstances under which a arbitrator may withdraw from a case for non-payment, an area about which existing rules are murky. It makes explicit that an arbitrator may withdraw for non-payment. Finally, given that non-disclosure of conflicts is perhaps the most-litigated issue in arbitration, Exhibit D provides a series of questions for arbitrators to provide parties in deciding whether bias or partiality exists. Nothing in the Agreement waives undisclosed conflicts. Absent clear intention by all parties, the Agreement is not intended to alter the terms of a pre-existing clause, just fill in any holes.

In the spirit of generosity, the Council offers this form to the ADR Section to use as members see fit. The members of the drafting committee genuinely hope it may assist in bringing private arbitration out of the garage and into the light of day.

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AGREEMENT TO PRIVATE ARBITRATION

RECITALS

Certain controversies and disputes have arisen and exist between the parties. Accordingly,

By Court Order dated _____, 200__, or

By written agreement as described below,

the parties have been ordered to/have agreed to arbitration before _____ (the "Arbitrator"), pursuant to the arbitration agreement contained in the _____ Agreement or this "Agreement to Private Arbitration" executed by _____ and _____ dated _____, 200__.

The parties, with the advice of counsel, have agreed to submit their dispute(s) to final and binding arbitration, and this Agreement is intended to memorialize and supplement that agreement and provide the details of their submission to arbitration. Accordingly, the parties stipulate and agree:

1. Each party acknowledges receipt of a copy of the Arbitrator's resume and any disclosures he has made modeled on the disclosure requirements of the Code of Ethics for Commercial Arbitrators promulgated by the ABA and the American Arbitration Association (the "Code of Ethics"). Each party represents, as an express representation and warranty, that to the best of its knowledge, it is not aware of any fact or circumstance that constitutes a conflict of interest or raises an appearance of bias or evident partiality that might justify the Arbitrator's removal or recusal. If any party subsequently becomes aware of a fact or circumstance that may be, or give the appearance of, a conflict of interest or suggestion of evident partiality, it shall immediately notify the Arbitrator and the other parties of such fact or circumstance; otherwise, the right to raise such fact or circumstance shall be forever waived.

SUBMISSION OF DISPUTES

2. The parties hereby irrevocably agree to submit all claims, controversies, and demands currently existing by and between them to binding arbitration, except to the extent specifically excluded on Exhibit "A" hereto. The Arbitrator shall decide the claims, controversies, and demands submitted to the arbitration and the nature and amount of relief, if any, arising under all claims, controversies, and demands submitted to the arbitration proceeding unless expressly excluded by the parties. Upon an affirmative finding by the Arbitrator with regard to the claims, controversies, and demands submitted, the Arbitrator shall decide what nature and amount of relief, if any, will be paid by one party to the prevailing party.

3. This submission to arbitration shall be conducted by the parties, their counsel and by the Arbitrator in accordance with the provisions of the Federal Arbitration Act, 9 U.S.C. Section 1, et. seq. (the "FAA").

TERMS AND CONDITIONS OF ARBITRATION

4. The parties shall execute this Agreement in sufficient multiple originals to allow each party and the Arbitrator to have an original of the Agreement. The multiple originals shall be submitted to the Arbitrator, and the Arbitrator shall execute each original and distribute one original to each of the parties.

5. Upon receipt of an executed original of this Agreement, no party or its counsel shall contact the Arbitrator except jointly or in writing with a true copy of any communication to be furnished contemporaneously to all other parties. No ex parte communication with the Arbitrator shall be permitted.

6. The Arbitrator shall be compensated for his/her services at the hourly rate of (_____) per hour plus all out-of-pocket expenses incurred by the Arbitrator, including study and hearing time, from the date the Arbitrator is retained until the Award has been issued. Arbitrator fees and expenses shall be paid:

by the Defendant/Respondent — by the Plaintiff/Claimant;

jointly by the parties — as provided on Exhibit "B"

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The responsible party or parties will deposit with the Arbitrator the estimated fee and expenses (including time for preparation, hearing, study, and Award preparation), and agrees that this estimated fee/deposit may be increased from time to time upon request from the Arbitrator as warranted by the case and the issues presented. Upon concluding the deliberations and completing the preparation of the Award, the Arbitrator will, prior to publishing the Award, notify all parties of the entire amount of the his/her fees, the amount of any unpaid fees or remaining deposits to be returned to the parties, and direct the payment of the remaining fee to be paid by each party or deposits to be returned.

If one party shall default in the deposit/payment of estimated Arbitrator's fees, the Arbitrator may in his/her discretion a) suspend all further proceedings pending receipt of the required deposit, or b) upon notice to all parties allow a non-defaulting party to cure the default. Any such payment by the non-defaulting party shall not be used, in and of itself, to allege or prove evident bias or partiality. In the event that the deposit exceeds the Arbitrator's total fee, then the remainder shall be disbursed in accordance with the Arbitration award. The parties agree that a) if the arbitration hearing is canceled for any reason on fewer than thirty (30) calendar days notice to the Arbitrator, he/she shall retain all accrued fees and one-half of the deposit and b) if the arbitration hearing is cancelled for any reason on fewer than ten (10) calendar days notice to the Arbitrator, the entirety of the deposit shall be retained and applied as compensation for his/her lost opportunities.

7. Although this matter is not administered by a third party arbitration service provider, the parties agree that the following arbitration/dispute resolution rules (the "Rules") shall apply:

JAMS; AAA CPR NAF

AHLA Other (Specify): _____

Any variations to the applicable Rules, limitations on discovery and the like are set forth on Exhibit "C" attached hereto.

8. To the extent consistent with the parties' arbitration agreement, the Arbitrator shall have full power to make such rules and to give such orders and directions as the Arbitrator deems expedient and consistent with the FAA and this Agreement. Discovery, pre-hearing and evidentiary rulings shall be in accordance with the

Federal Rules of Civil Procedure/Rules of Evidence Texas Rules of Civil Procedure/Rules of Evidence.

Other (Specify):_____

PARTIES TO COOPERATE

15. No party or its counsel shall unreasonably delay or otherwise prevent or impede the arbitration proceeding or the timely rendering of an Award.

COSTS AND EXPENSES

16. Notwithstanding that the parties may have made equal deposits of the Arbitrator's fee, the Arbitrator may in the Award, at the Arbitrator's sole discretion, assess and direct the payment of all costs and expenses of the arbitration, including his/her fees and any expenses of conducting the arbitration.

17. All notices to a party or to the Arbitrator shall be mailed, sent by facsimile, or personally delivered to the party through its counsel or to the Arbitrator at the addresses reflected for him or her and for each such party's counsel on the execution pages hereof or at such other address as may be designated to the Arbitrator and all parties in writing.

NO ACTION AGAINST ARBITRATOR

18. The parties specifically stipulate and agree that no action may be brought against the Arbitrator arising from the discharge of his duties in connection herewith, and expressly agree that neither the Arbitrator nor anyone employed by or affiliated with him or her shall be liable to any party or its counsel for any act or omission relating in any way to or in connection with this arbitration. Each party expressly covenants not to commence an action or administrative proceeding, in court or in arbitration, against the Arbitrator concerning his or her services as Arbitrator. No party or counsel will ever subpoena the Arbitrator to testify in any action or proceeding, in arbitration or otherwise, as to anything arising out of, relating to or connected in any way with this arbitration proceeding. The parties

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also agree that neither the Arbitrator nor anyone employed by or affiliated with him or her are in any way necessary parties in any judicial proceedings related in any way to this arbitration proceeding. Each party agrees to hold the Arbitrator harmless against any claims, demands or lawsuits. The parties further agree that in the event a party does subpoena the Arbitrator to testify, that party shall compensate the Arbitrator at his or her then-applicable hourly rate for all the Arbitrator's time and expense related to the Arbitrator's response to the subpoena.

SIGNED and EFFECTIVE this ____ day of _____, 200___.

_____ Claimant

By: _____

Name: _____

Title: _____

_____ Respondent

By: _____

Name: _____

Title: _____

Attorneys' Signatures:

_____
,Esq.

State Bar No. _____
Address _____
Address _____
City _____
Phone: ( ) _____
Fax: ( ) _____

_____
Attorney for Claimant

_____
, Esq.

State Bar No._____
Address _____
Address _____
City _____
Phone: ( ) _____
Fax: ( ) _____

_____
Attorney for Respondent

ARBITRATOR STATEMENT

The undersigned Arbitrator hereby acknowledges receipt of a copy of this Agreement, the parties' arbitration agreement and the Rules selected by the parties, and represents that he or she has no financial interest in the work or the disputed matter which is the subject of this proceeding or in the business affairs of any Party to this Agreement. The Arbitrator accepts the responsibility to determine the issues submitted hereunder and agrees to faithfully, fairly and promptly, discharge the duties of Arbitrator in accordance with the terms of this Agreement.

The Arbitrator makes the disclosures shown on Exhibit "D."

_____
ARBITRATOR

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EXHIBIT "D"

I have reviewed the list of parties, counsel and disclosed potential witnesses and, after conducting a conflicts check, answer the following questions and execute the Oath shown below:

	Yes	No
1. Do you or your law firm presently represent any person in a proceeding involving any party to the arbitration?	☐	☐
2. Have you represented any person against any party to this arbitration?		
3. Have you had any professional or social relationship with counsel for any party in this proceeding or the firms for which they work?	☐	☐
4. Have you had any professional or social relationship with any parties or witnesses identified to date I n this proceeding or the entities for which they work?	☐	☐
5. Have you had any professional or social relationship of which you are aware with any relative of any of the parties to this proceeding, or any relative of counsel to this proceeding, or any of the witnesses identified to date in the proceeding?	☐	☐
6. Have you, any member of your family, or any close social or business associate ever served as an arbitrator in a proceeding in which any of the identified witnesses or named individual parties gave testimony?	☐	☐
7. Have you, any member of your family, or any close social or business associate been involved in the last five years in a dispute involving the subject matter contained in the case, which you are assigned?	☐	☐
8. Have you ever served as an expert witness or consultant to any party, attorney, witness or other arbitrator identified in this case?	☐	☐
9. Have any of the party representatives, law firms or parties appeared before you in past arbitration cases?		
10. Are you a member of any undisclosed organization that may be relevant to this arbitration?	☐	☐
11. Have you ever sued or been sued by either party or its representative?	☐	☐
12. Do you or your spouse own stock in any of the companies involved in this arbitration?	☐	☐
13. If there is more than one arbitrator appointed to this case, have you had any professional or social relationships with any of the other arbitrators?	☐	☐
14. Are there any connections, direct or indirect, with any of the case participants that have not been covered by the above questions?	☐	☐

Should the answer to any question be "Yes", or if I am aware of any other information that may lead to a justifiable doubt as to my impartiality or independence or create an appearance of partiality, I have described the nature of such on an attached page.

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I have conducted a check for conflicts and have **nothing to disclose**.

I have conducted a check for conflicts and have **made disclosures on an attached sheet.**

State of Texas }

ARBITRATOR'S OATH:

County of _____

I have diligently conducted a conflicts check, including a thorough review of the information provided to me about this case to date, have performed my obligations and duties to disclose in accordance with the applicable Rules, Code of Ethics for Commercial Arbitrators and all applicable statutes pertaining to arbitrator disclosures. I understand that my obligation to check for conflicts and make disclosures is ongoing for the length of my service as an arbitrator in this matter.

The Arbitrator, being duly sworn, hereby accepts this appointment and will faithfully and fairly hear and decide the matters in controversy between the parties in accordance with their arbitration agreement, the Code of Ethics for Commercial Arbitrators, and the Rules and will make an Award according to the best of the his or her understanding.

Dated:_____ Signed: _____

Sworn before me this ___ day of _____, 200__.

_____
Notary Public, State of Texas

U. S. SUPREME COURT TO "JUDGE ALEX": THE VALIDITY OF YOUR CONTRACT MUST BE DECIDED BY AN ARBITRATOR

By Steven M. Fishburn*

In *Preston v. Ferrer*,[1] a case decided by the U. S. Supreme Court in late February 2008, the Court held by a significant majority—in fact, with only Justice Thomas dissenting—that "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA."[2]

The procedural posture in this contract dispute case was that a lower court in California had determined that Arnold M. Preston's motion to compel arbitration should be denied and enjoined him from going to arbitration until the California Labor Commissioner decided whether she had jurisdiction over the case under the California Talent Agencies Act (TAA).[3] While Preston's appeal of that decision was pending, the U.S. Supreme Court held, in *Buckeye Check Cashing, Inc. v. Cardegna*,[4] that "challenges to the validity of a contract requiring arbitration of disputes 'should . . . be considered by an arbitrator, not a court.'"[5] The California Court of Appeal affirmed the lower court, deciding that the "TAA vested the Labor Commissioner with exclusive original jurisdiction over the dispute, and that *Buckeye* was inapposite because it did not involve an administrative agency with exclusive jurisdiction over a disputed issue."[6] After the California Supreme Court denied Preston's petition for review,[7] the U.S. Supreme Court granted certiorari in order to respond to the following question: "Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum (the holding in *Buckeye*[8]), but also state statutes that refer certain disputes initially to an administrative agency?"[9]

Alex E. Ferrer, a former Florida judge who appears on television as "Judge Alex," became involved in a lawsuit with a California entertainment industry attorney named Arnold M. Preston.[10] In his suit, Preston sought to compel arbitration of their dispute according to the terms of their contract, which contained an arbitration clause, whereas Ferrer was attempting to avoid arbitration and to have the contract between them invalidated on the basis that Preston had acted as a talent agent, but without the license required by the TAA.[11] Further, Ferrer argued that Preston's unlicensed status meant he was not entitled to any compensation for his services.[12] Preston, on the other hand, contended he was not a talent agent, but a personal manager; hence, the TAA did not apply to him, and his contract with Ferrer was both lawful and binding on the parties.[13] According to the opinion written by Justice Ginsburg, the dispositive issue in the case, "is not whether the FAA preempts the TAA wholesale…The FAA plainly has no such destructive aim or effect. Instead, the question is simply *who decides* whether Preston acted as personal manager or a talent agent."[14]

The decision in *Preston v. Ferrer* rests on a line of cases that go back to *Prima Paint* in 1967. *Prima Paint*[15] laid the foundation for the authority of the Federal Arbitration Act (FAA), identifying its underpinning as no less than the power of Congress to enact substantive law under the Commerce Clause. The holding of the Court in *Prima Paint* was, "notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract 'is for the arbitrators and not for the courts.'"[16] This decision was reaffirmed, according to the Court, by its decision in *Moses H. Cone Memorial Hospital*, when the Court expressed its "view that the Arbitration Act 'creates a body of federal substantive law' and expressly stated what was implicit in *Prima Paint*, i.e. the substantive law the Act created was applicable in state and federal courts."[17] That the FAA was applicable in state and federal court cases, as stated in *Southland Corp*.,[18] was reinforced by the Court in *Buckeye Check Cashing,*[19] the case that informed the decision in *Preston v. Ferrer*. In fact, the Court flatly stated in *Preston* that "*Buckeye* largely, if not entirely resolves the dispute before us.[20]

According to the Court in *Buckeye*, Section 2 of the FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts . . . ."[21] The Court continued, reasoning essentially, that written provisions in contracts to settle controversies by arbitration "are valid, irrevocable, and enforceable," with some exceptions in law or equity.[22] The Court then initiated a discussion in which it divided the possible challenges to arbitra-

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U. S. SUPREME COURT TO "JUDGE ALEX": THE VALIDITY OF YOUR CONTRACT MUST BE DECIDED BY AN ARBITRATOR
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tion agreements into two types: "One type challenges specifically the validity of the agreement to arbitrate. . . The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid."[23] The argument in *Preston*, was of the first type, with Ferrer arguing that the contract was void *ab initio* because Preston was an unlicensed talent agent in violation of the TAA and, therefore, there was no agreement to arbitrate.[24]

The opinion in *Buckeye* went on to establish three propositions: "First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts."[25] In electing not to challenge the arbitration clause itself, electing instead to challenge the validity of the contract, Ferrer placed himself firmly within the purview of the second of the *Buckeye* provisions, i.e., that his cause should be decided by an arbitrator.[26] Thus, the central issue in *Preston*, the validity of the contract and who would decide that, was decided earlier in *Buckeye*, so that really leaves only one loose end. *Buckeye* reiterated the holding in *Southland Corp*. that the FAA was applicable in state and federal courts.[27] The loose end, what represents an expansion or progression in the applicability of the FAA, is the Court's extension of the FAA's primacy over yet another forum: the administrative. In the *Preston* case, the administrative forum was the Labor Commission, and the issue was whether the Labor Commissioner had exclusive jurisdiction to decide an issue the parties agreed to arbitrate. The Court found that Ferrer's assertion that the Labor Commissioner had exclusive jurisdiction over the case conflicted with the FAA's dispute resolution provisions[28] and summed up the Court's collective opinion about that point by quoting from *Gilmer v. Interstate/Johnson Lane Corp*.[29] to the effect that "mere involvement of an administrative agency in the enforcement of a statute, . . . does not limit private parties' obligation to comply with their arbitration agreements."[30] Finally, the Court said, "we disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals courts. When parties agree to arbitrate all questions arising under a contract, the FAA superseded state laws lodging primary jurisdiction in another forum, whether judicial or administrative."[31]

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ENDNOTES

[1] Preston v. Ferrer, No. 06-1463, 2008 U.S. LEXIS 2011 (U.S. Feb. 20, 2008).
[2] *Id.* at ***8.
[3] *Id.* at ***1.
[4] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).
[5] *Id.* at 446.
[6] *Preston*, 2008 U.S. LEXIS 2011, at ***2.
[7] *Id.* at ***11.
[8] *Buckeye Check Cashing, Inc.*,, 546 U.S. 440 at 446.
[9] *Preston*, 2008 U.S. LEXIS 2011, at ***8.
[10] *Id.* at ***8-9,
[11] *Id.* at ***9.
[12] *Id.* at ***11.
[13] *Id.* at ***11.
[14] *Id.* at ***11 (emphasis added).
[15] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
[16] *Id.* at 400; *see* Southland Corp. v. Keating, 465 U.S. 1, 11 (1984).
[17] *Southland Corp.*, 465 U.S. at 12 (discussing the Court's decision in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)).
[18] *Id.* at 12.
[19] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).
[20] *Preston*, 2008 U.S. LEXIS 2011, at***15.
[21] *Buckeye Check Cashing, Inc.*, 546 U.S. at 443.
[22] *Id.* at 444.
[23] *Id.* at 444 (internal citations omitted).
[24] *Preston*, 2008 U.S. LEXIS 2011, at ***15 (quoting from Preston, "The contract between Preston and Ferrer clearly 'evidenc [ed] a transaction involving commerce,' 9 U.S.C. § 2, Ferrer has never disputed that the written arbitration provision in the contract falls within the purview of § 2. Moreover, Ferrer sought invalidation of the contract as a whole.").
[25] *Buckeye Check Cashing, Inc.*, 546 U.S. at 445-46.
[26] *Preston*, 2008 U.S. LEXIS 2011, at ***15.
[27] Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).
[28] *Preston*, 2008 U.S. LEXIS 2011, at ***19.
[29] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[30] *Id.* at 28-29.
[31] *Preston*, 2008 U.S. LEXIS 2011, at ***24-25.

FIFTH CIRCUIT HOLDS THAT MEDIATION COSTS CANNOT BE TAXED

By Anna Bartkowski*

In a case appealed from the United States District Court for the Northern District of Texas in 2007, the Fifth Circuit Court of Appeals vacated an award of mediation fees as taxable costs.[1]

In March 2002, David G. Miller ("Miller"), an employee of General Consolidated Management, Inc. ("General Consolidated"), opted out of having his son ("David") as a covered dependent under General Consolidated's ERISA plan, New England PPO ("the Plan"), because the child was already covered under Medicaid. In April 2002, David underwent surgery and further medical treatment for a congenital heart condition at Cook Children's Medical Center ("Cook"). After initially accepting payment for David's treatment at its discounted rate from Medicaid, Cook later returned Medicaid's $76,291.63 payment and demanded that the Plan pay for David's medical services in the amount of $137,952.27. Because Miller had not enrolled David in the Plan at that time, the plan administrator, Deborah Hansen ("Hansen") determined that David was not eligible for coverage for his treatment at Cook in April 2002 and refused to pay Cook's claims.

On September 5, 2003, Cook filed a lawsuit against the Plan and Hansen, who answered Cook's complaint and filed a third-party complaint against New England Life Insurance Company ("the Insurer") for indemnification. The parties conducted discovery and attended mediation, which was not successful. The district court subsequently granted summary judgment in favor of the Plan, Hansen, and the Insurer against Cook and awarded mediation costs in the amount of $1,000. The appellate court affirmed the summary judgment, holding that the denial of Cook's claim was not an abuse of discretion, but vacated the award of mediation fees as taxable costs under 28 U.S.C. §1920.

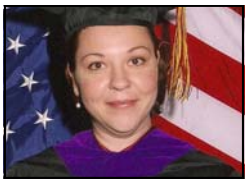
The Fifth Circuit concluded that mediation expenses do not fall within the limited category of costs that may be taxed under 28 U.S.C. § 1920, under which a court may tax the following costs:

> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.[2]

The appellate court pointed out that nothing in these statutory provisions expressly or implicitly provides district courts with the inherent authority or discretion to award mediation fees as costs. Specifically, the court contrasted mediation fees with the recoverable costs of reasonable attorney's fees and costs of action to either party under the law.[3]

Defendants relied upon a Fifth Circuit case from 2004,[4] which upheld an award of fees to an attorney *ad litem*, to support the argument that mediation fees are recoverable expenses; they argued that mediators, like attorneys *ad litem*, essentially act as court-appointed experts. The court rejected this line of reasoning and concluded that aside from acting as neutral parties, mediators appear to share no other significant common qualities with court-appointed experts.

Finally, the court maintained that the preceding case law from its circuit and other circuits[5] does not support the taxation of mediation fees as costs under 28 U.S.C. §1920.[6]



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ENDNOTES

[1] Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol. Mgmt., 491 F.3d 266 (5th Cir. 2007).
[2] 28 U.S.C. §1920.
[3] *Cook Children's Med. Ctr.*, 491 F.3d at 274-75 (citing *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512 (5th Cir.2001), which held that a district court had abused its discretion in taxing mediation fees under 28 U.S.C. § 1920 in a Title VII action).
[4] *Gaddis v. United States*, 381 F3d 444 (5th Cir.2004)
[5] *Brisco-Wade v. Carnahan*, 297 F.3d 781, 782 (8th Cir.2002); *Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc.*, 260 F3d 1054, 1061 (9th Cir.2001).
[6] *ID* at *277*.

FLORIDA FEDERAL DISTRICT COURT ALLOWS ATTORNEY TO ACT AS CORPORATE REPRESENTATIVE IN MEDIATION

By Dustin Andreas*

The United States District Court for the Southern District of Florida upheld the appearance in mediation of an attorney who, while not an attorney of record, acted as the plaintiffs' corporate representative.[1]

On October 11, 2007, the parties attended mediation pursuant to a court order. Old Republic, one of the defendants, appeared through a corporate representative and two attorneys. GMC Land Services, Inc., the other defendant, appeared through a receiver who was also an attorney. The plaintiffs, two insurance companies, appeared exclusively through two attorneys,[2] though one of the attorneys, John Silk, was not an attorney of record at the time of the mediation.[3]

Old Republic filed a motion for sanctions against the plaintiffs, asserting the plaintiffs' failure to attend the mediation through at least one corporate representative with full settlement authority. Old Republic alleged plaintiffs had violated the court's mediation order, which incorporated Local Rule 16.2, requiring all parties to attend mediation with a '"corporate representative and any other required claims professionals' with 'full authority to negotiate a settlement . . . .'"[4] Old Republic also alleged plaintiffs had violated their own Notice of Mediation, which provided, "[t]he client or representative of the client with full authority to settle, other than counsel, should be present. If insurance is involved, a representative of the insurance company shall be present with full authority to settle up to the policy limits or the Plaintiff's last demand, whichever is less."[5] Old Republic requested sanctions against plaintiffs pursuant to Federal Rule of Civil Procedure 16, which provides an award of sanctions for failure to comply with a court's order.[6]

Plaintiffs responded that Mr. Silk was their corporate representative. They filed affidavits asserting they did not retain claims staff in the United States. Instead, they retained Mr. Silk to represent them in any U.S. claims, and they gave him full authority to settle all claims up to policy limits.[7] Mr. Silk, who was not plaintiffs' counsel of record at the time of mediation, had flown from Chicago to Florida for the mediation, and plaintiffs' counsel of record had notified all defendants, prior to the mediation, that Silk would be plaintiffs' corporate representative. Old Republic did not controvert any of plaintiffs' sworn assertions.[8]

After reviewing the factual background, the district court asserted its "inherent power to direct parties to produce individuals with full settlement authority at pretrial settlement conferences."[9] Local Rule 16.2, the court noted, implemented that inherent authority by requiring that "all parties, corporate representatives, and any other required claims professionals (insurance adjusters, etc.) shall be present at the mediation conference with full authority to negotiate the settlement."[10] Moreover, as provided in the same rule, "failure to comply with the attendance or settlement authority requirements may subject a party to sanctions by the Court."[11]

The district court, while recognizing its authority to sanction parties who fail to comply with its orders, decided not to sanction the plaintiffs in this case. The court first noted plaintiffs' uncontroverted assertions of notice to all defendants that Mr. Silk would attend the mediation as their corporate representative. The court also reasoned, "the fact that Mr. Silk is an attorney does not exclude him from representing the interests of Plaintiffs as a claims professional, as he is not and was not at the time of the mediation counsel of record."[12] Finding no other allegations of plaintiffs' misconduct at the mediation, the court denied Old Republic's motion for sanctions.[13]

* ***Dustin Andreas*** *graduated from Sam Houston State University in 2006 with a Bachelor of Science Degree in Political Science and Criminal Justice. He currently attends Texas State University as a candidate for a Master's Degree in Legal Studies. Mr. Andreas was pledge President of the Phi Alpha Delta Legal Fraternity in the 2007 spring semester and currently holds the Professional Development chair of Phi Alpha Delta. He works as a litigation Paralegal in Austin, primarily in employment discrimination law. Mr. Andreas has plans to attend law school after obtaining his Master's D*egree.

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COLLABORATIVE LAW – AN AUSTRALIAN EXPERIENCE*

By Robert Lopich*

Introduction

Collaborative Practice has spread well beyond the United States and Canada, with enthusiastic groups of Collaborative Practitioners in countries as diverse as England, Australia, New Zealand, parts of Europe, Africa, and Ireland. While Collaborative Practice is still principally the realm of family law practitioners, its application in non-family law dispute resolution is gaining recognition.

Stu Webb,[1] the founder of the Collaborative Law movement in the United States, and Marion Korn, a Canadian trainer, conducted the first Collaborative Law training in Australia. A group of some twenty-five lawyers, mediators, therapists, and others attended the training, which was conducted in Sydney in August 2005.

The Collaborative movement has grown significantly in Australia since that small beginning, with practice groups now established in New South Wales, Queensland, Victoria, Western Australia, and the Australian Capital Territory. There are currently some 500 trained Collaborative Professionals (lawyers, mediators, therapists, financial advisors, and others) in Australia.

The Dichotomy

The development of Collaborative Law in Australia has, to a significant degree, mirrored that in the United States and elsewhere. This is particularly true of the way in which Collaborative Family Law was accepted as a natural and desirable fit for the resolution of family disputes in the difficult and complex areas of property and children's issues.

The family law system in Australia falls within the jurisdiction of the federal government and is administered under the Family Law Act, 1974 (Cth). The then-Attorney General, The Hon. Philip Ruddock MP, actively encouraged the use of Collaborative Law as a means of dispute resolution in that jurisdiction. Not surprisingly, the vast majority of Collaborative Professionals in Australia, therefore, are family law practitioners. Importantly, reports of family disputes being successfully resolved using the Collaborative Process have been circulating for some time.

The practitioners working outside of the family law arena (non-family lawyers) are fewer in number and find themselves faced with a sceptical civil and commercial[2] sector of the legal profession, where commercial and non-family mediation is a recognised and accepted method of dispute resolution that enjoys a success rate above eighty percent. Getting the "runs on the board" in relation to civil and commercial disputes has been a much slower process, particularly as it is necessary to convince civil and commercial practitioners of the benefits of the Collaborative Process.

A Civil/Commercial Dispute

It was against this background, then, that in the final quarter of 2007, one of the earliest civil and commercial disputes using the Collaborative Process took place in Australia. The facts of the matter were a classic fit for Collaborative Law.

Albert, the uncle of nephew Ben, conducted a wholesale and retail hardware business in partnership in the outer metropolitan area of Sydney. A dispute arose between Albert and Ben. In issue was Ben's unauthorised use of certain partnership plant and equipment. This, in turn, gave rise to allegations that Ben was not conducting the partnership business in best interests of the partners. The relationship between Albert and Ben deteriorated and became hostile.

Albert and Ben had not entered into a partnership agreement; accordingly, the provisions of the Partnership Act, 1892 (NSW) applied.[3] Ben's father, Charlie, was Albert's brother. Neither Albert nor Ben wanted the dispute to spill over into the broader family; more particularly, neither party wanted the matter to be litigated.

The Preliminary Issues

Albert's lawyer, David, is a trained civil and commercial Collaborative Lawyer who recognised the potential for the dispute to quickly spread beyond Albert and Ben. George, Charlie's lawyer, had acted for Charlie for many years in relation to Charlie's business undertakings. George was asked to act for Ben in dealing with the partnership dispute. George had no training in the Collaborative Process; however, he had undertaken some training as a mediator many years earlier.

David discussed the options available for dealing with the dispute with Albert. Albert stressed that he was anxious not to litigate with his nephew. ADR techniques, including mediation and Collaborative Law, were discussed between David with Albert and considered by Albert, Ben, and Charlie separately.

The parties agreed to attempt resolution of their dispute using the Collaborative Process, provided that George was willing to undertake the matter on that basis. The fall-back position was that Albert and Ben would attempt to mediate their dispute if George was not willing to engage in the Collaborative Process.

David and George had a number of meetings and discussed Collaborative Law and the process. David also provided

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COLLABORATIVE LAW – AN AUSTRALIAN EXPERIENCE*

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George with literature and directed him to a number of web-sites, which contained helpful information on the process. After some discussion, George agreed to advise his client to engage in the Collaborative Process.

The parties agreed to adopt the "pure" collaborative model, and each signed a Participation Agreement that required the lawyers to withdraw from the matter if the parties were not able to negotiate a resolution of the dispute between them. David and George agreed they were able to diligently represent their respective clients' interests, but that their respective retainers were to be limited to the Collaborative settlement negotiations between the parties.

The Process

After the preliminary discussions, the Collaborative Process proceeded with surprisingly few "bumps". The Participation Agreement was signed at the first four-way meeting. After opening statements were made and preliminary issues were addressed, the parties decided to jointly engage an independent financial expert to value the partnership assets.

The business of the first four-way meeting was concluded in just two hours. The parties deciding to convene the next four-way meeting as soon as the financial expert's valuation had been prepared.

The second four-way took place ten days after the first meeting. The parties were noticeably more relaxed and comfortable with the process than they had appeared to be during the first four-way. In a little less than four hours, the parties had reached an agreement that was commercially sound and acceptable to them. Throughout, the lawyers advocated their respective clients' interests in a strong but non-adversarial manner. David and George reduced the agreement reached between Albert and Ben to writing, which Albert and Ben then signed later that day before leaving George's office.

The Close

At the conclusion of the matter, Albert and Ben shook hands and wished each other well. They both acknowledged that although litigation had been ruled out as an alternative early in their discussions, they were concerned that if an outcome was not reached the dispute was likely to spread to the family at large.

In the debriefing between David and Albert, Albert expressed the view that he had at all times felt that he was "safe" and that his interests were being looked after; but importantly for him, he was given an opportunity to "have his say."

The debriefing between David and George was cordial and ended with George agreeing to attend the next Collaborative Law training that he could fit into his busy schedule.

A small, but nonetheless significant, start to civil and commercial collaborative dispute resolution in Australia.

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ENDNOTES

[1] StuWbb@aol.com
[2] For the purposes of this article I will refer to all non-family law disputes as "civil and commercial" disputes.
[3] Section 24 of the Partnership Act, 1892 (NSW).

REFLECTIONS FROM THE EDGE

PREPARATION IS POWER

By Kay Elkins-Elliott*

Recently in a personal injury case I mediated, I observed the results of lack of preparation. The case was four years old, had been on the dismissal docket twice, was scheduled for trial in late April, and involved a small amount of damages (between $2,000-$4,000 for the property damages to an old car, approximately $5,000 in medical expenses supported by documentation filed with the court, an additional $5000 with a chiropractor that had not been documented, and an unspecified amount for pain and suffering). The plaintiff's attorney had signed a letter of protection, and the hospital had filed a lien. The defendant driver was absent and told his lawyer that his car was pushed from behind into the intersection, causing the collision with the plaintiff. There were two passengers in the defendant's car that would testify to that fact. The plaintiff's lawyer had the case on a contingency and seemed disinclined to settle for anything less than what the jury would award on a really good day in court. As the mediation progressed, it became apparent to everyone that neither side had prepared for the settlement conference. On the defense side, when asked to show pictures of the damage done to the defendant driver' s car when he was rear ended, the pictures showed no such damage - nor had any repairs to that vehicle occurred. On the plaintiff's side, the attorney was unwilling to help his client understand that settlement value is not what a jury would award on a very good day. The plaintiff's insistence that he was not at fault, and therefore should receive as much as the best verdict that could be obtained, could not be altered by an explanation of probabilities, risk tolerance, or by referring to settlement as a business decision, not a complete vindication for the collision.

If only three percent of filed cases will be tried, preparation for mediation should focus more on underlying rationales than on positions, and to be successful, the parties need a common way to discuss the underlying rationales that resulted in those positions. For many years, negotiation scholars, such as Howard Raiffa, have urged decision analysis as a tool to assist in reaching rational decisions. An excellent article appeared in the April 2008 American Arbitration Association Dispute Resolution Journal, written by a Texan: Donald R. Philbin Jr.[1]

In the Negotiator's Field book, published by the American Bar Association, another article dealt with the same topic.[2] The approach can be very powerful, but must be based on the legal remedies allowed by law and the facts supporting them. The defendants had made a decision in the above case to pay as much as $10,000, which probably represented a sixty percent chance that the plaintiff would be successful at the $20,000 or above level. Unfortunately, the plaintiff either would not or could not be objective in looking at risk as explained by the mediator. In fact, he seemed oblivious to his risks and his lawyer, on a contingent fee, seemed willing to invest his time in a case he could not reasonably expect to make more than $8,000 on and that he had a forty percent or better chance of losing. What is decision analysis, and how does it help clients and attorneys reach rational decisions?

The human mind is subject to many biases: *reactive devaluation* (if they are offering $10,000 my case must be worth more because they cannot be trusted); imperfect information ("I had a man offer me $5,000 for my old car just three days before the accident, so that is what it is worth"); overconfidence ("the jury will like my client and believe my three witnesses more than the unsubstantiated testimony of the other side, even though the police gave my client a ticket for failure to yield"); *anchoring* ("a friend got a big jury verdict in his personal injury case, so I should get at least that much for mine"); and strong negative emotions ("it isn't fair that I got hurt, I still have pain, and lost my wonderful car while the other guy didn't have any damage or injuries and caused mine!").

When we use economic analysis as well as legal analysis (what are the strengths and weaknesses of my case and the other party's case), we can minimize those biases and get better results. Because clients do not question their own conclusions, and certainly will be defensive if their lawyer does, bringing in a neutral, third-party mediator who understands and can apply decision analysis to the case, can help a client face his own unrealistic expectations and scrutinize his options in terms of his best alternative to a negotiated settlement (BATNA): a successful trial**.** Most plaintiffs are risk-averse and need to be helped to see the settlement offer as certain gain, rather than as losing the highest amount they hope a jury will award.

What would this look like in a simple business dispute involving breach of contract? Let us suppose that the plaintiff and defendant were once business partners in an interior-design business until the plaintiff left the business due to ill health. The former partners enter into a contract for the defendant to buy out the plaintiff's share for $30,000 on condition that the plaintiff continues to refer business to the defendant for two years following the buy-out. Eighteen months later, the defendant has failed to pay any of that amount, and the former partner files suit. The defendant still is operating the business, but is in grave financial trouble. The contract stipulated that $15,000 was to be paid by the end of the first year following the date of the contract. The defendant files a counterclaim because the plaintiff has not referred any new business, revenues are down, and she has been unable to pay the amount owed. In fact, the mediator learns in caucus that if the plaintiff is successful, the defendant plans to declare bankruptcy. The decision tree would include the probabilities of the motion for

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summary judgment being granted (20%) or denied (80%), followed by the range of values a jury might award (anywhere from $30,000 plus attorney fees down to a verdict of no liability), and the transaction costs of plaintiff and defendant. Assume the defendant has offered $13,000, paid out over twelve months, to settle the matter if the plaintiff will refer four new clients to her within the next eight months. Assume further that pre and post-judgment interest will not be factored into the decision analysis. Here is what the decision tree would look like from the plaintiff's point of view.

Figure 1 Plaintiff's Scenario with Transaction Costs
(See page 18)

If the plaintiff is successful in receiving any of the specified outcomes ($30,000, for full recovery for breach of contract, $20,000 or $ 10,000 for partial recovery because of the offset that the jury may award the defendant) and is awarded attorney fees of $10,000 (a conservative fee we will assume for these purposes), the expected value of each outcome is calculated by multiplying the outcome by the probability of its occurrence, then adding the expected values.

$30,000 X .10 = $3,000
$20,000 X .35 = $7,000
$10,000 X .20 = $2,000
Total $12,000

If the plaintiff is unsuccessful, the $10,000 attorney fees must still be paid to the plaintiff's attorney, and the defendant's victory may result in the plaintiff being ordered to pay the defendant's attorney fees of $10,000 on its counter claim - a conservative fee used for the sake of simplicity. Thus the $12,000 must be discounted by the *35%* chance of a finding of no liability ($10,000 P's attorney fees and $10,000 D's attorney fees x *.35* = $7,000), so the Net Expected Value of the probable outcomes is $12,000 - $7,000 = $5,000. These values are conditioned further on the ruling by the court on the MSJ: (80% chance of denial, 20% chance of success), so the actual NEV of the BATNA (litigation) is $5,000 x .80 =$4,000. If the MSJ is granted, the plaintiff has agreed to pay $3,000 to his attorney.

Viewed in this way, the $13,000 settlement differ is much better than the best alternative to a negotiated agreement - trial to verdict - and should be accepted by the plaintiff. Without the decision analysis, the plaintiff will often anchor on the desired amount ($30,000 plus $10,000 attorney fees) and reject the very reasonable offer of $13,000. Of course, the plaintiff could object to the probability estimates, but the legal remedies that are most likely are usually known by the trial attorney. Assessing risk factors is not an exact science, but in doing the decision analysis, the client is forced to take a business- like look at the risks inherent in any trial. Having the mediator use the plaintiff's attorney to assess risk and help in calculating the net expected value is a less painful way for the client to see the risk of trial versus a certain *gain* of $13,000 today. The attorney can still express confidence in the case, while acknowledging that every trial is a risk because juries are not perfectly predictable.

Now let's do a little mathematical role - reversal and step into the defendant's shoes. Why offer $13,000?
Figure 2 Defendant's Scenario with Defendant's Costs
(See Page 19)

The Defendant happens to agree with the estimates for the MSJ being granted or denied (an unusual but useful assumption for this article!) and even agrees with the probability of the four different outcomes. But the defendant faces transaction costs whether the plaintiff is successful or not; the defendant will have to pay its own attorney. This fact increases the perception of risk from the defendant's perspective and must be calculated into the negotiation/mediation planning. Where is the zone of possible agreement according to the math?
So how does the decision analysis look from the defendant's side? If the plaintiff is successful in getting full recovery, the defendant will be ordered to pay $30,000 and will still pay its own attorney fees. At each level the defendant faces this risk.

.10 x $30,000 + $10,000 in attorney fees = $4,000
.35 x $20,000 + $10,000 in attorney fees = $7,000
.20 x $10,000 + $10,000 in attorney fees = $4,000

Sub Total=$11,000
.35 x $10,000=$3,500
Total = $18,500

If the defendant is successful in its defense, however, it will still have to pay its own attorney fees. Since both parties agree there is a thirty-five percent chance the jury will make a finding of no liability on the plaintiff's claim, the expected value must allow for this outcome,($0 verdict and defendant pays own fees of $10,000: *.35* x $10,000 =$3,500.) So the $15,000 is now $18,500. But we still have to factor in the 80% chance the MSJ will be denied. Thus the Net Expected Value is now .80 x $18,500 = $14,000. Note that even if the MSJ is granted the defendant will pay $5,000 in attorney fees and that must be considered.

To capture all of the risks however, we need to see the decision tree with all of the transaction costs factored into the defendant's scenario. Look below and ask yourself these questions: If I were the plaintiff, would I now accept the $13,000 settlement offer? If I were the defendant, would I now offer $ 13,000?

Figure 3 Defendant's Scenario with all Transaction Costs
(See Page 19)

If the plaintiff is successful at any level, defendant's transaction costs are $20,000 because it will pay all of the attorney fees. The defendant's NEV (exposure) is $22,800 after adding all of the attorney fees to the probable outcomes.

The plaintiff may still say no to the $13,000 offer, and the defendant may still not accept what its exposure is, but now they can argue about the outcomes (based on the facts and the law) and the probabilities, not on generalities of "good case" versus "bad case." Focusing on the math brings the negotiation into

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the frontal cortex - where good problem solving needs to be. Decision analysis elevates the mediation to an examination of realities and statistics, rather than letting parties get lost in their unconscious, biased, and irrational thinking.

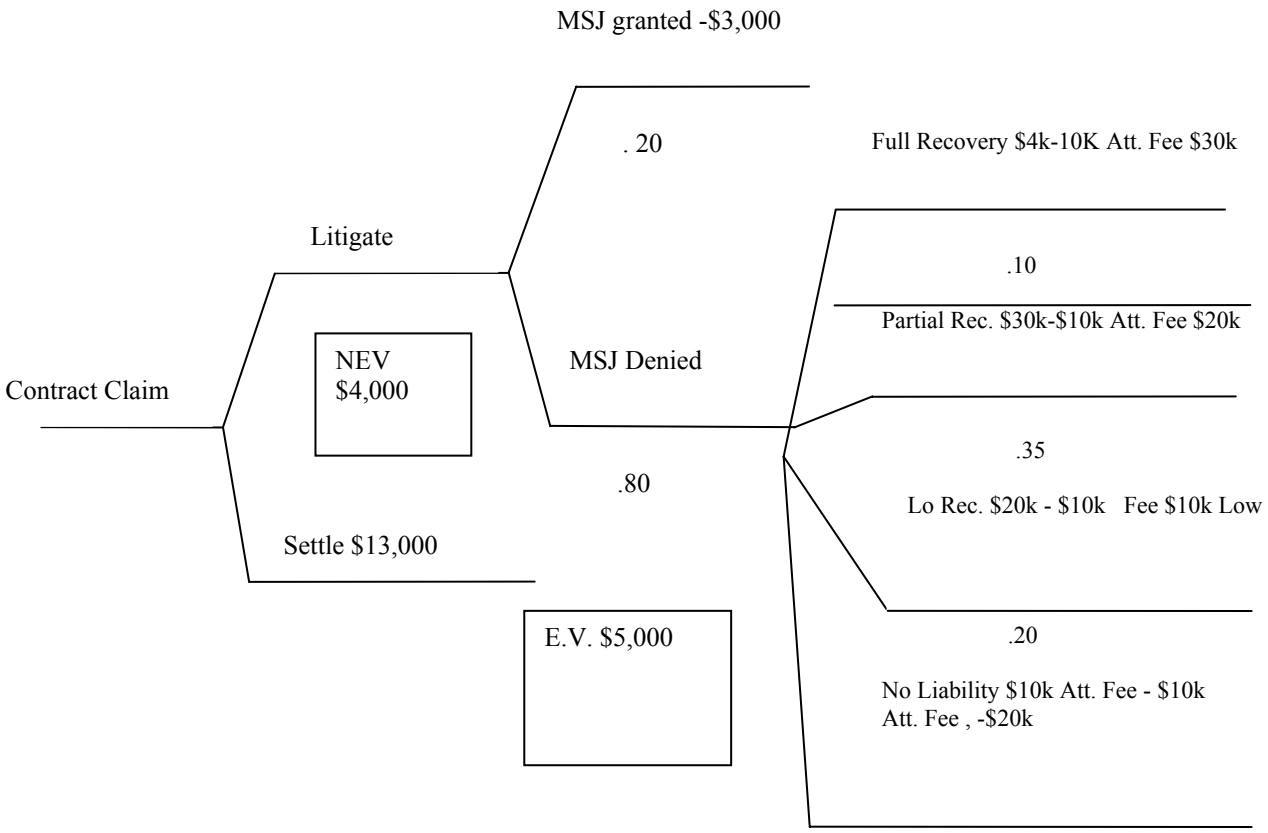
**** Kay Elkins-Elliott**, J.D., LL.M., M.A., has arbitrated and mediated over 1700 cases since 1982, specializing in employment, family, and business matters. She served for three years as an Administrative Law Hearing Officer for the EEOC. She has taught ADR, Mediation, Family Mediation, Settlement Advocacy, and Negotiation at Texas Wesleyan University School of Law for 13 years, and during that time has coached national championship teams in Negotiation and in International On-Line Negotiation, and regional championship teams in Client Counseling and Representation in Mediation. She has coordinated the Certificate in Conflict Resolution program for Texas Woman's University for 9 years, teaching courses on Arbitration, Conflict Resolution, Mediation, Family Mediation, and Negotiation. She is a Life Fellow of the Texas Bar Foundation, president of ACR, Dallas , Council Member of the Texas Mediation Trainers Round Table, a former Council Member of the ADR Section of the State Bar of Texas, a Credentialed Distinguished Mediator, and serves on the Board of the Texas Mediator Credentialing Association. She was co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003).*

ENDNOTES

[1] Philbin, Donald R; "*The Value of Economic Analysis in Preparing for Mediation*"; Dispute Resolution Journal; Feb - April 2008, 48 - 55.

[2] Senger, Jeffrey M., *Analyzing Risk,* Chapter 51 of The Negotiator's Fieldbook. American Bar Association (2006).

Figure 1 Plaintiff's Scenario with Transaction Costs



continued on page 19

PREPARATION IS POWER
continued from page 18

Figure 2 Defendant's Scenario with Defendant's Costs

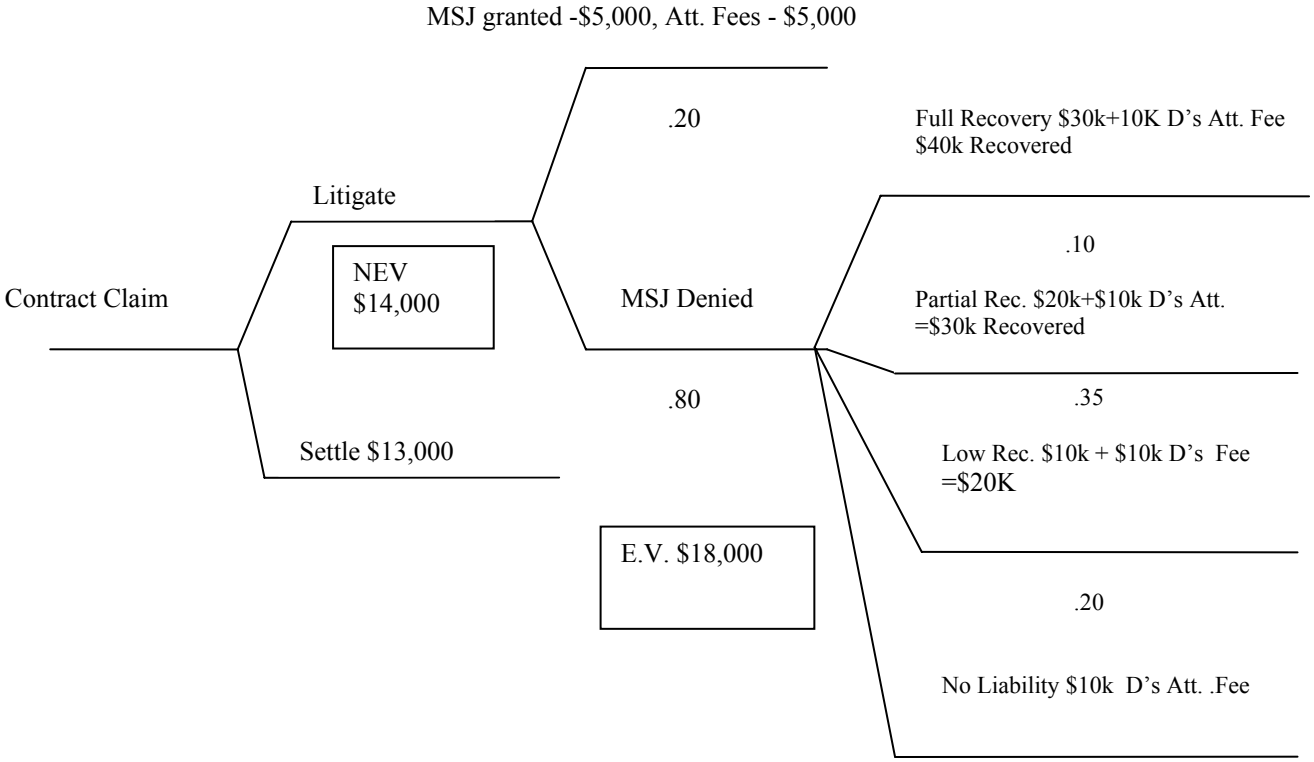
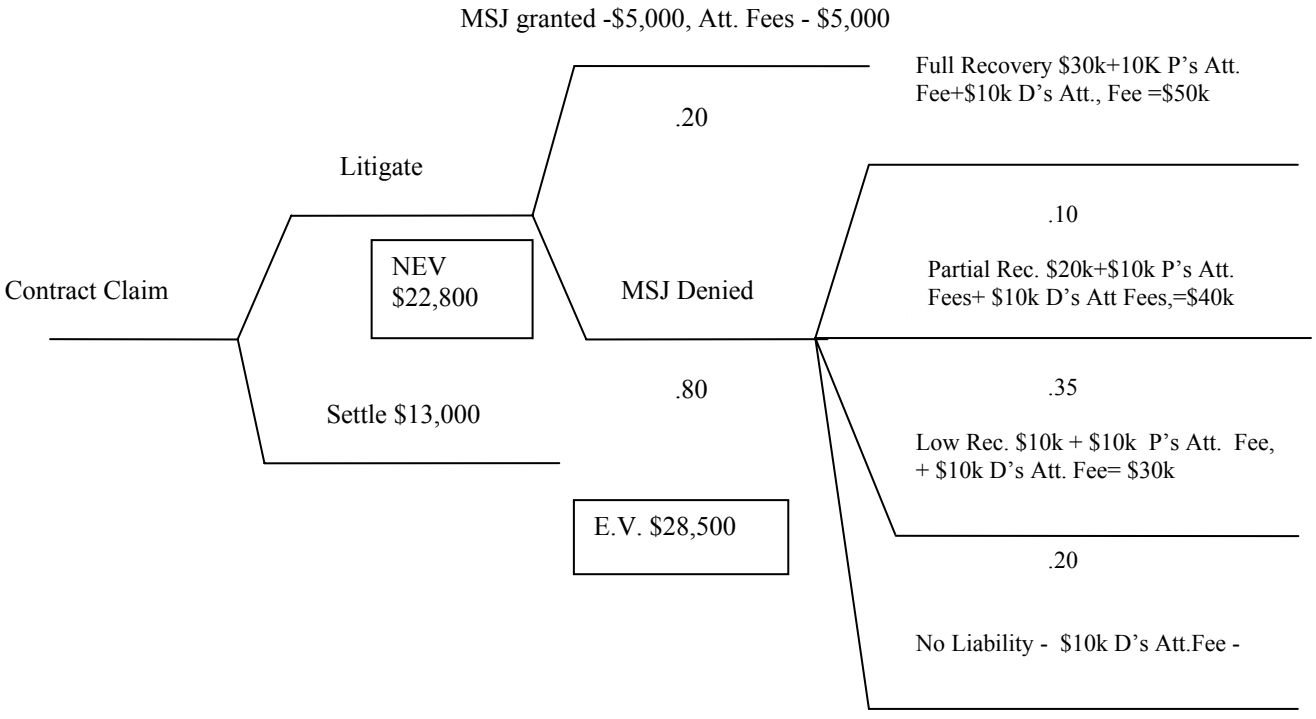


Figure 3 Defendant's Scenario with all Transaction Costs



ETHICAL PUZZLER

by Suzanne Mann Duvall*

****

You have a close personal family relationship with a family member who is mentally ill (bi-polar). During your lifetime, you have become well-versed on the illness, its causes, its effects, its treatment, its successes and failures, along with the impact that such illness can have on family members. During the mediation of a divorce case involving a bi-polar spouse, you feel that sharing your knowledge and experience can be of value to both parties. How do you handle this situation? Do you volunteer the information? Do you remain mum?

****

C. Bruce Stratton (Liberty): To begin with, I would not volunteer or otherwise disclose this personal information and alleged "understanding that I *think* I may have." A little or perceived knowledge in any professional field could lead to disaster. You are dealing with an emotional, mental, and medical condition of one of the parties and the potential effect it may have had on the marriage relationship. Anything you may suggest or volunteer to either party could easily be misinterpreted as being for or against one party or the other, causing a rift in the negotiations that could not be overcome. You are not a doctor, nor should you spend such a quantity of time exploring the party's illness in an effort to better understand or equate it rightly or wrongly with that of your relative.

The **Alternative Dispute Resolution, State Bar of Texas Guidelines for Mediators ("Ethical Guidelines")** provide, in **11. Professional Advice,** that "[a] mediator should not give legal or other professional advice before, **during** or after the mediation process." (Emphasis added) By sharing your alleged medical knowledge and experience, you would be giving "professional advice" or could at least be perceived as giving such by one or both of the parties. **The Texas Rules of Ethics for Mediations and Mediators ("Rules of Ethics"),** under **1 Protections of the Integrity of the Process**, provide "d. [t]he mediator shall not knowingly act in a manner that may cause harm to the parties or erode their confidence in the mediation process." If the mediator has any sense of reality, it should be that the sharing of informal "experience and knowledge" concerning a bi-polar condition is exploring unchartered waters. If you have expert knowledge in the legal field, don't you advise the counsel to provide the legal advice and then use your mediation skills to aid the parties in reaching a settlement within that framework? The same concerning medical knowledge. You were hired as a mediator, not as a doctor.

The **Ethical Guidelines** provide, under **9. Impartiality,** that "[a} mediator should be impartial toward all parties." You may well lose your impartiality or the perception of impartiality by characterizing certain behavior and its potential effect on the issues confronting the marriage, whether it be in explanation thereof or in the hopes of a better understanding. "Impartiality means freedom from favoritism or bias in word, action, and appearance." If you find that your impartiality has been compromised, you should offer to withdraw. Under the circumstances, I would think the offer would be accepted.

The **Rules of Ethics,** under **3. Impartiality,** provide, "[t]he mediator shall remain impartial and neutral; that is, free from favoritism or bias in word, act, or appearance." By injecting your personal knowledge concerning the bi-polar condition into the mediation process, you could well violate each of these provisions. The key word in both of these examples is "appearance." Could you shape your comments to avoid giving the appearance of favoring the wife or the husband? Probably not. A husband, for example, could take the position that his wife's bi-polar condition is the cause of the marriage problems, with the wife saying that the problems exist in spite of her condition. **One additional comment.** You well could have very strong feelings concerning a bi-polar condition based on the experience obtained from your relative, and those feelings could be weighted either in favor of the relative or those in contact with the relative. Should you have a bias either way concerning this condition, or should an appearance of impartiality possibly emanate from your handling of the issues during the mediation, you have the obligation to offer to withdraw in accordance with the foregoing provisions.

One other portion of the **Ethical Guidelines** is appropriate. As provided in **1. Mediation Defined,** "[a] mediator should not render a decision on the issues in dispute." There is no question in my mind that the bi-polar condition would be an issue in dispute, either directly or indirectly, as it may affect other issues within the marriage relationship like custody, debts, or the division of property. The mediator's alleged "knowledge and experience" would probably suffice as a comment on these issues in dispute. The **Rules of Ethics** under **"Mediation"** in the Definition paragraph, provide, "[i]n mediation, the mediator assists the parties in their communications, helps them **identify** *key issues and underlying interests*, and encourages them to explore and evaluate settlement options." (Emphasis added) To assist the parties in identifying the underlying issues and the resulting potential effect on the concerns expressed within the mediation is one thing. To explain the na-

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ETHICAL PUZZLER
continued from page 20

ture, symptoms, and underlying basis of the illness and how it may have affected the parties is another.

Aside from that I would use the knowledge **QUIETLY** and **DISCREETLY** in the promotion of an equitable settlement between the parties and not otherwise.

Melanie C. Grimes (Dallas): Foremost, it would be important to understand whether the diagnosis of "bi-polar" was an agreed-upon diagnosis of the affected spouse. I've often found this a labeling versus an actual diagnosis. If it were confirmed by both parties that one spouse had been diagnosed as "bi-polar," I feel strongly that sharing some of this experience, even if only sparingly, can communicate empathy – both toward the spouse experiencing the unsettling, sometimes devastating effects of this illness and the spouse who may have been subject to such effects. My conversations with each spouse about my personal experience would likely be different – the extent of this form of sharing would depend on whether I felt my experience might help either better understand the other spouse's viewpoints. I would take great care not to "transfer" my experience upon either spouse or to label bi-polar behavior as a "mental" illness.

Tom Newhouse (Houston): The commandment "Thou shalt not compromise the process" leads to the answer: "Mum's the word!"

Sharing our knowledge and wisdom with others is a common and (usually!) appreciated practice. Mediators, however, should exercise care and restraint doing this in mediation for two reasons: 1) It might negatively impact parties' perception of mediator neutrality; or 2) It might "breach" expectations of one or both of the parties concerning the mediation process. Either result imperils potential for success of the process. On the other hand, mediator knowledge or expertise in the subject matter of the dispute (not revealed) can provide significant help framing effective questions for risk assessment, reality checking, and generations of options.

Reason # 1 is of special concern if knowledge of the mediator is based (as in this case) on personal involvement in a similar situation. A party with a different or opposed role to that of the mediator could well "sour" on the mediator's neutrality. That, in turn, undermines the mediator's ability to manage the process.

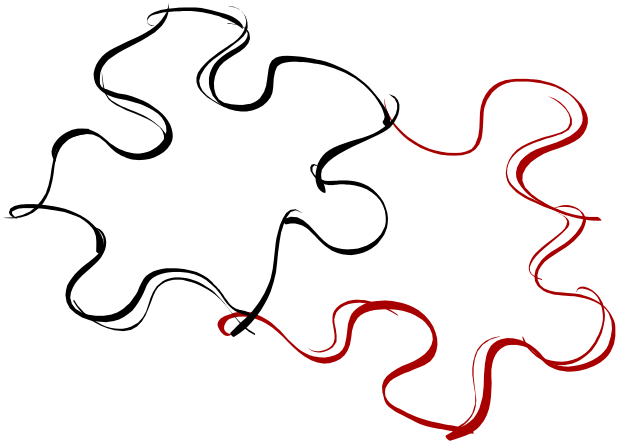
If the mediator's knowledge arises from his or her area of professional competence, then neutrality is not so much at risk. Rather, the ethical issue of facilitative vs. evaluative mediator style comes in to play. That triggers Reason #2.

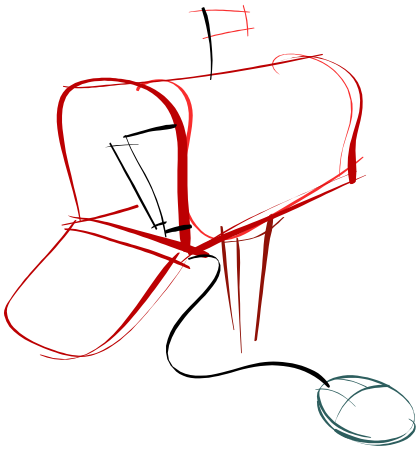
Even when mediator knowledge arises from personal involvement in a similar situation, it is possible the nature of that involvement might put perception of neutrality at risk. In that case, secure permission of both parties, and share away! Discernment of that risk is an ethically significant mediator skill.

Shelly Hudson, (Richmond): I remain mum. Certainly, my experience would help me with the overall understanding of the situation. It may afford me the ability to ask more probing questions. However, I think disclosing such might result in a perception by one or both parties that I was not neutral.

Comment: The "long and short of it" seems to be while all life experiences, whether personal or professional, help us in our profession as mediators – indeed these very experiences are a large part of why one mediator is selected over another for a particular type of case – we must always walk that fine line between experience and the constraints of the Ethical Guidelines of the Supreme Court and/or the ADR Section and/or the Ethical Rules of the Texas Mediator Credentialing Association, all of which require that we be non-judgmental, non-directive and render no professional advice. However, as Tom Newhouse and Shelly Hudson pointed out, such experiences can provide significant help in forming effective questions at all stages of the process.

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





ADR on the Web

By Mary Thompson*

MEDIATION CHANNEL

http://mediationchannel.com/

Diane Levin, a Boston attorney and mediator, publishes this popular and award-winning blog, which focuses on ADR and "people-focused innovations in the practice of law." Levin is cited regularly in the ADR blogosphere, and is also the creator of the World Directory of ADR Blogs.

The information is organized into over forty "Categories." A sampling from three of the categories provides an idea of the scope of the content:

"Attorneys and Mediators"

- An article that examines whether judges make the best neutrals
- A discussion of whether attorneys make the best family mediators
- An ongoing series by Levin, entitled "Bridging the Divide Between Lawyers and Mediators," which describes ways in which mediators can work more effectively with advocates in mediation

"ADR Scholarship"

- A link to articles by ADR professor Carrie Menkel-Meadow, including her article written for the twenty-fifth anniversary of *Getting to Yes* , "Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections"
- A brief review of three articles on gender and negotiation
- A link to an article published in *Science Creative Quarterly* that examines the economic costs of one of our more-intractable domestic conflicts: "The Social Norm of Leaving the Toilet Seat Down: A Game Theoretic Analysis"

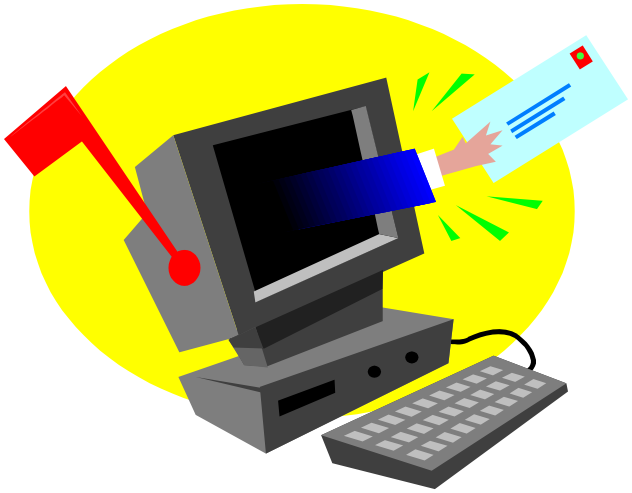
"Mediation Practice"

- A brief commentary and links to three articles on mediator bias
- A link to a PDF document, "ADR in the 21st Century: Easy Tech Tools to Market and Manage Your Practice"
- A link to an article that challenges the use of ground rules in mediation

Examples of additional categories are Brainstorming and Creativity, Healthcare in ADR, Negotiation Tips, Dispute Resolution and Your Business, and Mediation Ethics. Some of the content is dated, and much of it has little connection to mediation, but the mere scope of the material is a testament to the current creativity and diversity of our profession.

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

If you are interested in writing a review of an ADR-related web site for Alternative Resolutions, contact Mary at emmond@aol.com.



Chair's Corner
continued from front page

offered in conflict resolution at Abilene Christian University, in dispute resolution at Southern Methodist University and mediation at Texas State University. St. Edward's University offers a Masters in Conflict Resolution. South Texas College of Law's Frank Evans Center for Conflict Resolution offers a certificate in dispute resolution processes to its law students. Education in dispute resolution once consisted of the "minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment" (Section 154.052, Texas Civil Practice and Remedies Code). Now, dispute resolution is integral to curriculums from elementary school all the way through law school.

5. Sister Organizations. The Texas Association of Mediators continues to be the largest mediation trade organization serving mediators of all professions. The Association of Attorney-Mediators continues to grow and serves mediators in Texas, California, New Mexico, Oklahoma, Kansas, Louisiana, Kentucky, Arkansas, Tennessee, Mississippi and Florida. In every city in Texas, there are neighborhood Dispute Resolution Centers where Texans can walk in and seek a mediator's help to solve their problems with other Texans and Texas businesses for a nominal fee.

The ADR organization that has come to the most prominence in the last ten years is the Texas Mediator Credentialing Association ("TMCA"). Fifteen years ago, the Texas Supreme Court made a hard choice not to establish a state agency certifying mediators. Instead, the Texas Supreme Court encouraged mediators to self-regulate, and out of that self-regulation came the TMCA. Texas is now the recognized leader in self-policing mediation through credentialing. The accepted designation of quality for mediators is "TMCA Credentialed Mediator."

Of course, we all recall the extraordinary Spring 2012 Continuing Education Program in which all the sister organizations met in Luckenbach to celebrate the 25th anniversary of the Texas ADR Act. I know I will never forget Willie Nelson's breakout session, entitled "Getting Back to the Basics of Love," in which members of the Hatfield and McCoy families discussed the events that led to their 2003 peace treaty.

6. Substantively. The biggest expansion of ADR has been in employment. Every major employer in the United States now has a dispute resolution system providing for negotiation between employees, mediation between employees and employers, ombudsmen and the option of arbitration or litigation only in the most difficult matters. These "dispute wise" systems, which manage business and workplace conflicts, enjoy low operating costs and preserve business relationships. With the growth of nationalized health, patients' complaints are now resolved by on-site mediators who regularly deal with every dispute from patient care to billing. At every construction site, there is a project neutral who is an ADR specialist. The project neutral's only client is the project and the project neutral works with the parties to facilitate dispute resolution as the project proceeds. In 2007, when the AIA documents were amended, the concept of a project neutral and/or Dispute Resolution Boards ("DRBs") was first incorporated in the AIA documents. Now most projects have neutrals or DRBs and only one percent of the contracts have resulted in litigation.

7. Internationally. The playing field for business is now global. The globalization of business is the result of spectacular technological advances in computers and communications and profound political changes after the end of the Cold War with the creation of the European Union and North America Freed Trade Agreement ("NAFTA"). International commercial arbitration has continued to be the primary dispute resolution mechanism for international business; however, mediation is now an attractive alternative. Mediation is particularly attractive for intellectual property disputes because companies can maintain their confidential trade secrets longer than through national patent systems. The International Mediation Institute has established a global mediator certification. ADR skills are being taught in such far-reaching areas as Guyana, Jamaica, Mexico, Nigeria, Panama, Slovakia, Thailand, Uganda and Uruguay by Texas-trained ADR professionals.

8. *The ADR Section*. The ADR Section of the State Bar of Texas has continued to grow because every Texas lawyer is a problem solver and every Texas ADR professional is a member of the State Bar of Texas ADR Section. In the last nine years, the communication vehicle of the Section has moved from the quarterly newsletter to the ever-evolving, interactive website. The website receives more hits than any other State Bar website. The Section represents the people who seriously embrace Rule 1 of the Texas Rules of Civil Procedure to provide "a just, fair, equitable and impartial" problem solving system. From ten years down the road, wishing you Peace . . . Cecilia H. Morgan

P.S. This is my obvious attempt to predict a positive future for ADR during the next ten years. On a more serious note, I have truly enjoyed the opportunity to serve you as the Chair of the ADR Section. Thank you to the Executive Council, the Council, the Newsletter Editorial Board, the Editor of the Newsletter and the Webmaster, the CLE speakers and you, the members of this Section, who are active problem solvers and seek peace. I look forward to knowing each of you better over the next ten exciting years. Please continue to contact me at cmorgan@jamsadr.com.

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SLATE OF OFFICERS AND COUNCIL MEMBERS APPROVED BY COUNCIL
continued from page 2

Tad Fowler, who received his law degree from the University of Texas School of Law, has practiced law in Amarillo for twenty-six years. For the last twelve years, he has been in private practice and has acted as a neutral in over 1,900 mediations and arbitrations. Tad is board certified in civil trial law and personal injury trial law. He is active in the Amarillo Bar Association and is currently serving as Chair of the District 13 Grievance Committee.

Beth Krugler, who received her law degree from Baylor University Law School, is a mediator in Fort Worth.

Ronald Hornberger, who received his law degree from the University of Texas School of Law, is a shareholder of Plunkett & Gibson, Inc., of San Antonio. He is a mediator and arbitrator, and he has practiced law for thirty-nine years in the fields of bankruptcy, commercial litigation, construction law, and secured transactions. He was a law clerk to the Honorable John H. Wood, Jr., U.S. District Judge (Deceased) from 1972 to 1976. He has a long record of service to the bar, especially in the field of bankruptcy law.

The ADR Section bids a fond farewell to four individuals whose tenure on the Council ends in June. Jay A. Cantrell, Thomas C. Newhouse, and Mike Patterson, who all provided active service on the Council, will depart after serving three-year terms. John Fleming, now Immediate Past Chair, will leave the Council after serving as a Council member, Chair-Elect, and Chair.

Please join us for the annual meeting in San Antonio on June 26, 2008, commencing at 1:30 P.M. The annual meeting will take place at the George R. Brown Convention Center in Houston. The exact location of the meeting will be announced in Houston and will be specified in the materials participants receive at registration.

THE ADR COUNCIL UNANIMOUSLY APPROVES CHANGES TO ETHICAL GUIDELINES
continued from page 3

neutrality. Just as with the disclosure of relationships, the parties or their counsel should have an opportunity to consider any conflict with the subject matter before agreeing to proceed.

The third approved change is in Section 10, which currently provides:

> 10. Disclosure and Exchange of Information. A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

The approved change is an additional comment that will provide as follows:

> Comment. A mediator should not knowingly misrepresent any material fact or circumstance in the course of a mediation.

The third change was accepted to make clear that in protecting the integrity of the mediation process, the mediator should not knowingly misrepresent any material fact or circumstance. Those involved in the mediation negotiations may engage in some puffing or exaggerating in an attempt to minimize weaknesses or magnify strengths. However, the mediator should not cross the line and knowingly misrepresent any material fact or circumstance during the mediation.

* ***Mike Patterson***, of Tyler, serves on the ADR Section's Council. He has almost twenty years of experience as a trial lawyer in state and federal courts, plus more than ten years of experience as a full-time mediator, having conducted over 1,400 mediations. A member of TAM and AAM, he has been president of the East Texas Trial Lawyers Association (1993-1994) and the Smith County Bar Association (1987). He received a J.D. from Southern Methodist University in 1977.

The third approved change is in Section 10, which currently provides:

FLORIDA FEDERAL DISTRICT COURT ALLOWS ATTORNEY TO ACT AS CORPORATE REPRESENTATIVE IN MEDIATION
continued from page 13

ENDNOTES

[1] Lloyds of London v. GMC Land Services, Inc., No. 06-60325-CIV., 2007 WL 3306964 (S.D. Fla., Nov. 6, 2007).
[2] *Id.* at *1.
[3] *Id.* at *3.
[4] *Id.* at *1 (citing Local Rule 16.2 of the United States District Court for the Southern District of Florida).
[5] *Id.* (citing D.E. 73, Ex. B).
[6] *Id.* (citing Fed. R. Civ. P. 16).
[7] *Id.* at *2.
[8] *Id.*
[9] *Id.* (citing In re Novak, 932 F.2d 1397, 1407 (11th Cir.1991)).
[10] *Id.* (citing Local Rule 16.2 of the United States District Court for the Southern District of Florida).
[11] *Id.*
[12] *Id.* at *3.
[13] *Id.*

ATTEND THE ADR SECTION'S CLE PROGRAM AT THE STATE BAR OF TEXAS ANNUAL MEETING ON THURSDAY, JUNE 26, 2008!

2:00- 3:15

Panel Discussion: "Arbitration Perspectives"

John K. Boyce, III, Moderator
Chair, ADR Section

Panelists:

Hon. Royal Ferguson, District Judge, Western District of Texas, San Antonio

Richard H. Alderman, University of Houston School of Law

Richard Naimark, Vice-President, American Arbitration Association, New York

Mark Fellows, Counsel, National Arbitration Forum, Minneapolis

3:45-4:30

"Trends in International Arbitration & Mediation"

F. Peter Phillips, Business Conflict Management, LLC, Montclair, New Jersey (formerly with CPR Institute, New York)

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SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Summer	June 30, 2008	August 30, 2008
Fall	October 15, 2008	November 15, 2008
Winter	December 15, 2008	February 15, 2009
Spring	March 15, 2009	May 15, 2009

SEE PUBLICATION POLICIES ON PAGE 22 AND SEND ARTICLES TO:

ROBYN G. PIETSCH, A.A. White Dispute Resolution Center, University of Houston Law Center, 100 Law Center, Houston, Texas 77204-6060, Phone: 713.743.2066 FAX:713.743.2097 or rpietsch@central.uh.edu

ADR SECTION WEBSITE TO BE REVAMPED

At its April 19, 2008 meeting, the ADR Section Council reviewed a presentation on revision of the Section's website by our Section webmaster, Jenni Small. Various updates to the website were suggested, including a new structure and look, as well as changes to navigation tools so that the site will be easier to navigate. The Council endorsed the need for an update. It also recommended developing processes to update information on the site on a more timely basis and providing more relevant content for Section members. Joe Cope is the incoming chair of the website committee. Joe and several other Council members will consider various ideas for updating the website. If you have ideas or suggestions for revision of the website, please send them to Joe Cope at copej@acu.edu or Jay Cantrell (current chair of the website committee) at jay@jaycantrell.com.

2008 CALENDAR OF EVENTS

40-Hour Basic Mediation * Houston * University of Houston AA White Dispute Resolution Center * May 30, 31, June 1 continuing June 6, 7, 8, 2008 *(approved for 41.75 participatory hours and 4.5 ethics hours) * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation Training * Austin * June 2-6, 2008 * The Center for Public Policy Dispute Resolution; University of Texas School of Law * Kim Kovach, Trainer * For more information call 512-471-3507 or www.utexas.edu/law/cppdr

Basic 40-Hour Mediation Training * Houston * June 12-14 & 19-21, 2008 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, efburleigh@aol.com or see www.worklifeinstitute.com

Basic 40-Hour Mediation Training * Denton * Texas Woman's University * June 18 - June 22, 2008 * Trainer: Kay Elliott * (approved for 38.5 participatory hours, 2.5 ethics hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

40-Hour Basic Mediation Training * Dallas * Dispute Mediation Service * June 20, 21 & 26-28, 2008 * Trainer: Nancy Ferrell * For more information call, 214.754.0022 * Website: www.dms-adr.org

Managing the Difficult Conversation * Austin * July 16, 2008 *The Center for Public Policy Dispute Resolution; University of Texas School of Law * Mary Thompson, Trainer * For more information call 512-471-3507 or www.utexas.edu/law/cppdr

Family and Divorce Mediation Training * Houston * July 16-19, 2008 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com

Negotiation Training * Austin * July 23-25, 2008 * The Center for Public Policy Dispute Resolution; University of Texas School of Law * John Fleming, Trainer * For more information call 512-471-3507 or www.utexas.edu/law/cppdr

Family Mediation Training * Denton * Texas Woman's University * August 21 - 24, 2008*Trainer: Kay Elliott * (approved for 28.5 participatory hours and 2.5 ethics hours) (3 ethics hours may be taken separately) For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu *Website: www.twu.edu/lifelong

4th Annual Civil Collaborative Law Training * Dallas * September 17 Boot Camp, September 18-19 Advanced Training * Dallas Bar Association Collaborative Law Section and Texas Collaborative Law Council * For more information contact Sherrie Abney, 972-417-7198 or Nicole LeBoeuf, 214-780-1499 Website: www.collaborativelaw.us

Conflict Resolution * Denton * Texas Woman's University * October 16 - 19, 2008 * Trainer: Kay Elliott & Co-Trainer Dr. Galindo (approved for 29.25 participatory hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu *Website: www.twu.edu/lifelong

30-Hour Family Mediation Training * Houston * University of Houston Law Center *AA White Dispute Resolution Center * October, 2008 * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

Basic 40-Hour Mediation Training * Denton * Texas Woman's University * June 3 - 7, 2009 * Trainer: Kay Elliott * (approved for 38.5 participatory hours, 2.5 ethics hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

Basic 40-Hour Mediation Training * Denton * Texas Woman's University * January 21-25, 2000 * Trainer: Kay Elliott * (approved for 38.5 participatory hours, 2.5 ethics hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

Mediation Magic *Austin * Lakeside Mediation Center * June 13-14, 2008 For more information, contact (512) 477-9300or by e-mail inquiry: www.adr@lakesidemediation.com

Basic Mediation Training * Ruidoso, New Mexico * Lubbock County Dispute Resolution * September 8-12, 2008 * For more information drc@co.lubbock.tx.us

Family Mediation Training * Ruidoso, New Mexico * Lubbock County Dispute Resolution * October 7-9, 2008 * Trainer: D. Gene Valentini *For more information drc@co.lubbock.tx.us

40-Hour Basic Mediation Training * Dallas * Dispute Mediation Service * October 17, 18 & 23-25, 2008 * Trainer: Nancy Ferrell * For more information call, 214.754.0022 * Website: www.dms-adr.org

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 2008 to June 2009. 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_____

Address_____

Bar Card Number_____

City_____ State_____ Zip_____

Business Telephone_____ Fax_____ Cell_____

E-Mail Address:_____

2008-2009 Section Committee Choice_____

_____

ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. An author who wishes an article to appear in a specific issue of the newsletter should submit the article by the deadline set in the preceding issue of the newsletter.
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. All quotations, titles, names, and dates should be double-checked for accuracy.
5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. If possible, the writer should submit an article via e-mail attachment addressed to Walter Wright at ww05@txstate.edu or Robyn Pietsch at rpietsch@central.uh.edu. If the author does not have access to e-mail, the author may send a diskette containing the article to Walter Wright, c/o Department of Political Science, Texas State University, 601 University Drive, San Marcos, Texas 78666.
8. Each author should send his or her photo (in jpeg format) with the article.
9. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The newsletter 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, 2008, 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

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