ALTERNATIVE RESOLUTIONS

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ALTERNATIVE DISPUTE RESOLUTION SECTION

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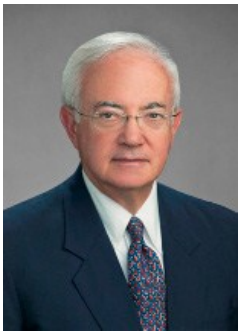
CHAIR'S CORNER
By Alvin L. Zimmerman, Chair, ADR Section



As the newly elected chair of the ADR Section of the State Bar of Texas, I am honored to assume this responsibility. I have practiced in the field of ADR for more than 25 years.

I remember being in the first 40-hour training course in Houston, Texas, offered by Steve Brusche, a Dallas attorney who had an incredible passion and vision for bringing a meaningful alternative to litigation. His approach and technique were grounded in common sense and teaching the eager lawyers how to be transformed from a litigation mentality to a peacemaker. He was an incredible person, attorney, and teacher. I think of that experience often with great fondness and appreciation for his enormous talent in providing all of his students with a new pathway to the alternative that was gripping the practice – Rambo tactics. Although Steve has since passed, his legacy lives brightly through all of his disciples that continue to do his work, some of whom continue teaching his course.

I begin my term thanking all of the former Council Chairs and members for all of their hard work which has permitted our Section to be a leading section in the State Bar. Our new Council especially wants to commend Joey Cope for his wonderful leadership last year and his continued presence and advice on our Council this term. We have a terrific Council who will provide the leadership for going forward: myself, Chair (former state district judge, Zimmerman, Axelrad, Meyer, Stern & Wise P.C., Houston); Ronald Hornberger, Chair-Elect (Plunkett & Gibson, Inc., San Antonio); Donald R. Philbin, Jr., Treasurer (San Antonio); Robert C. Prather, Sr., Secretary (Snell Wylie & Tibbals, Dallas); Hon. Robert A. "Bob" Gammage (former Justice of the Supreme Court of Texas, Llano); Hon. Caroline Baker (Judge of the 295th District Court, Houston); Wayne I. Fagan (Pulman, Cappuccio, Pullen & Benson, LLP, San Antonio); William B. "Bill" Short (Coats Rose, P.C., Dallas); Patty Wenetschlaeger (Brewer Jackson, P.C., Irving); Enrich Birch (Austin); David Calvillo (Cavillo Law Firm, McAllen); Melinda Jayson (Dallas); Linda Meekins McLain (Navasota); and Joey Cope, Immediate Past Chair (Associate Professor Duncan Center for Conflict Resolution at Abiline Christian University, Abilene). Wendy Trachte (Bellville), and Professor Stephen Huber (Professor of Law, University of Houston) are incredible newsletter editors.

Due to the tremendous work spearheaded by Bob Prather and contributed to by the Council, we have revised the Section's By-Laws and will be presenting them to the State Bar for final approval this term.

The ADR Council has already met and confirmed that its annual CLE will be held at the Crown Plaza Hotel in Houston, Texas, on Friday, January 18, 2013, and Ronald Hornberger will be the Course Director. He is well underway planning what promises to be another great CLE. It is an 8-hour CLE with more than 2 hours of ethics. We will be publishing more about this in the next edition of our Newsletter.

I close this letter with my personal congratulations to the Frank Evans Award winners this past year: Lonnie Schooler (Winstead; Houston) and John C. Fleming (Austin). Each year the ADR Section takes nominations from all over the state of outstanding members of the bar in the field of ADR, and we are fortunate to have two outstanding recipients.

Inside This Issue:

Lonnie is well known for his arbitration work with AAA and has served on numerous panels including being selected as an arbitrator for International Disputes. Lonnie, year in and year out, has been a featured and frequent speaker on arbitration updates for many groups including the Houston Bar Association.

John C. Fleming has distinguished himself by serving as a past Chair of this Council and has worked for many years in monitoring ADR legislation in the Legislature and distinguishing himself as a mediator and arbitrator. Both of these attorneys carry on the tradition of excellence in the field of ADR.

Finally, I'd be remiss if I did not express the ADR Section's appreciation to Paula Hinton (Vinson Elkins; Houston, Texas) for Co-chairing with me the first joint CLE co-sponsored by the Litigation and ADR Sections at this past State Bar Convention. This four-hour CLE featured three prominent speakers: Judge Xavier Rodriguez (Federal Judge, San Antonio) "Vanishing Trial"; Hon. Larry Boyle (Federal Magistrate; Idaho) "Mediate, Arbitrate, Litigate, What Would Lincoln Do?"; and Boston Talmadge (Winstead, Dallas) "What Lawyers Can Learn About Negotiation and Counseling from the Career of James Baker." These speakers were followed with a lively panel discussion featuring Paula Hinton, Hon. Bob Gammage (Austin), Wes Christian (Christian, Smith & Jewell, Houston), and myself. I believe this CLE was well received, and I certainly enjoyed participating with this star-studded cast.

In conclusion, I am looking forward to a great year.

Sincerely,
Alvin L. Zimmerman

Looking Back

Joe L. "Joey" Cope
Immediate Past Chair

As the Nominations Committee moved for acceptance of the new slate of officers for the ADR Section for 2012-2013 and the motion passed unanimously, I felt a wave of relief pass over me.

Don't get me wrong, I'll miss my time as chair of the Section. I was able to work with a great Council and an all-star team of officers.

I felt relief because of the tremendous talent on your new Council and the dedication of your new officers. Alvin Zimmerman is a man of far-reaching vision and a rich history as a lawyer and a leader in the field of alternative dispute resolution. He will bring strong guidance for the Section as your new chair. I am also excited about those who will work closely with him. Ronald Hornberger (Chair-Elect), Don Philbin (Treasurer), and Robert Prather, Sr. (Secretary) will contribute greatly to the Section's direction.

I was also excited to see a number of new members added. Brian White, Erich Birch, David Calvillo, Melinda Jayson, and Linda McClain bring a fresh view to the Council and have already expressed their desire to serve you.

I owe a debt of gratitude to a number of individuals who served well and who completed their service to the Council this past year. Susan Schultz was a tremendous chair in 2010-2011 and was a treasured mentor to me as my immediate past chair. Susan is an ardent supporter of ADR in Texas and worked hard to give members of the Section access to the Council and its work. Susan Perin did a marvelous job as Section treasurer with her great spirit and attention to detail. Anne Ashby and Guy Hawkins were faithful Council members who contributed in a major way with their input and with their committee service. Ed Reaves, the special representative from the Dispute Resolution Council Directors Council, was a solid voice for both the DRCs and the Council. While we will miss him, we welcome Donna Phillips who will fill that role this year. I would be remiss in not expressing thanks to Allan Dubois as our board advisor from the State Bar Board of Directors and to Steve Schechter, our alternate board advisor. Both men provided strong support and advice throughout the year. We will be well-served in the coming year with Steve stepping in as board advisor and Sara Dysart moving into the alternate spot.

Looking back, I am pleased with the work of your Council. The following achievements were highlights of our year:

- Committee structures were strengthened and charges were created for each committee to encourage continuity in their purpose and work.

- The Section bylaws were successfully revised and approved by the Section at the June 14 annual meeting of members. Those amended bylaws will be published to members upon final approval by the State Bar Board of Directors.

- The Council made significant contributions on behalf of the Section to the Texas Access to Justice Foundation and to the special veterans project of the ATJ.

- The Council provided updates to Section members and informational support to individuals and organizations involved in giving input to the Supreme Court Rules Committee regarding rules proposed in support of House Bill 274. (State Bar policy prohibits the Section from lobbying or taking a specific position in regard to legislative and state agency matters without approval of the State Bar Board of Directors.)

- The Section co-sponsored successful MCLE events in Austin in January and in conjunction with the State Bar Convention in June. Hon. Alvin Zimmerman capably led both of these efforts.

Our Section newsletter, *Alternative Resolutions*, just gets better and better. My heart-felt thanks to Stephen Huber and Wendy Trachte-Huber, our incredible co-editors.

Again, a big "thank you" to all of last year's Council members and officers who worked so hard to make the year a success.

If you will allow me, I would like to leave these parting concerns and encouragements.

The ADR Section experienced a decline in membership this past year that mirrors a general decline in membership in all State Bar sections. I want to encourage each of you to continue your membership and involvement in your Section. Much work needs to be done. We need you. Encourage your colleagues to join. Be certain to encourage young professionals to become involved in the Section and in our field.

I perceive that alternative dispute resolution is suffering from a lack of clear identity. It's not just a Texas problem, but one that plagues all of us. Recent attacks on the practice of mediation and arbitration from strong voices have confused the public. While it is true that we need to be vigilant in assuring quality in the services we provide, influential sources are diminishing the role of ADR and its effectiveness.

Those voices and those sources, even with some of the inaccuracy, can serve to help us in increasing our focus. We do need to work on some of the profession's weaknesses. Yet we cannot shrink from our duty to herald the immense good that we do. Please carry that message to whomever you can.

I'm proud to be a member of this Section and one of your colleagues. Thank you for the kindnesses you afforded me this past year as your chair. It was a pleasure to serve.

Joe L. "Joey" Cope
Immediate Past Chair

JUSTICE FRANK G. EVANS AWARD RECIPIENTS

Ed Reaves*

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

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

Two individuals were chosen to receive the 2012 award at the Litigation and ADR Sections Joint Meeting during the State Bar of Texas Annual Meeting on June 14, 2012, in Houston, with Justice Evans witnessing the presentations. 2012 marks only the second time that two individuals have been recognized in the same year. The first time was in 2005.

JOHN C. FLEMING

Mr. John Fleming of Austin has been an unsung hero for the ADR Section who has always tracked ADR legislation, testified when necessary on short notice, and provided numerous updates at Continuing Legal Education meetings. Mr. Fleming was the Chair of the Section in 2007, and he recently stepped up again in regard to the new loser-pay legislation.

Mr. Fleming is Of Counsel to Hays & Owens L.L.P., and he practices in the area of banking, mortgage banking, financial services, regulatory and administrative law, commercial litigation, and arbitration. John is an adjunct professor at the University of Texas School of Law and a frequent speaker on arbitration, banking and mortgage law topics.

The American Arbitration Association honored him with the 2008 President's Award for Leadership in Conflict Management in recognition for his work in arbitration, mediation, and education. Mr. Fleming also serves on the Commercial Arbitrator Roster. His articles on ADR have been published in many professional publications.

LIONEL MARK "LONNIE" SCHOOLER

Mr. Lionel M. Schooler of Houston, Texas, has practiced law for over 35 years, and is a partner in the law firm of Jackson Walker, L.L.P. His practice areas include Labor and Employment, Litigation, Appellate, and Construction.

Since 1992, Mr. Schooler has developed extensive experience in arbitration as both an arbitrator and as an advocate. Lonnie is a panelist on the American Arbitration Association's Panel of Arbitrators for Commercial, Construction, and Employment Cases. He is also a panelist of the International Centre for Dispute Resolution. He is a Fellow of the Chartered Institute of Arbitrators and has also been selected as a Fellow of the Texas Bar Foundation.

Mr. Schooler has been a member of the ADR Section of the State Bar since 1998, and he was on the Steering Committee and a presenter at the first State Bar of Texas seminar devoted solely to arbitration in 1998 in Dallas and Houston. He has also provided ethics training for arbitrators with the State Bar ADR Section. Lonnie served as a member of the Leadership Council of the Houston Bar Association's ADR Section (now known as the Dispute Resolution Section) for 2007-2009 and 2010-2011.

Mr. Schooler has been the Editor of *Appellate Lawyer*, the monthly newsletter of the Houston Bar Association's Appellate Law Section. He is the author of numerous professional publications. Two of his articles on arbitration won recognition as best legal articles for 1997 and 2001 in *The Houston Lawyer*.

** **Ed Reaves** served as Chair of the Evans Award Section Committee for 2012. He is the Executive Director of the Hill Country Dispute Resolution Center (Kerrville), and has just completed a term on the ADR Section Council.*

10 Things I Wish The Mediator Asked Me . . . . None Of Which Are "What Is Your Bottom Line?"

*By Kristen M. Blankley**

Advocacy in mediation should be approached in a different manner than advocacy in adjudication. Too often, however, mediation participants fail to appreciate the differences, and the sides fall into the trap of engaging in counter-productive advocacy. Mediators, however, appreciating the differences, can help advocates become better *mediation* advocates.

This article poses ten questions that mediators can be asking parties and their attorneys to keep the mediation process moving in a positive direction. These questions are intended for attorneys to make the most of the mediation process and to work towards an acceptable settlement for all. Although the questions are suggested either before or during the mediation session, any of the questions could be asked at any time.

As noted by the title, none of these ten questions is: "What is your bottom line?". Two reasons support this suggestion. First, attorneys are extraordinarily reluctant to disclose this information, and any information revealed will likely be inaccurate and leave "room" for further negotiation. Second, the true "bottom line" will likely change throughout the mediation based on new information learned and the momentum of the negotiations.

Before the Mediation Session

1. **What do I need to know?** Attorneys expect a mediator to attend the mediation session prepared, and not just prepared to be a process expert. Attorneys expect mediators to be prepared with an understanding of the case so mediators can put the process expertise into action in the context of the case. Before coming to the hearing, the mediator might want an overview of the facts of the case and procedural history. The mediator may also want to read pre-mediation submission papers.

2. **Where are we at?** In addition to understanding the facts and legal posture of the dispute, a mediator should also have some understanding of why the case has not settled. While the first question deals with the parties' legal case, this question deals with the parties' settlement case. Explaining the difference in these two "cases" to the attorneys might help the parties focus on the differences between the two and why the case has not yet settled.

3. **Is everybody here?** Mediation is only successful if all of the parties are at the table (physically or proverbially). Before the mediation session, a mediator should ask who is going to be at the mediation session and whether all of the parties with settlement authority will be present, represented, or available by telephone. Inquiring about any necessary third parties (such as an insurance company) helps ensure that a resolution can be made at the mediation session.

4. **Do you want my opinion?** Mediators should ask – prior to the session – whether or not they will be expected to give opinions or evaluations during the session. The answer to this question is crucial. When mediators give evaluations, particularly legal evaluations, the parties will necessarily engage in advocacy geared toward receiving a good legal evaluation, instead of advocacy geared toward problem-solving. Asking this question sets expectations based on the parties' needs. Entering a mediation session with the answer to this question in mind also helps the advocates prepare for the session.

At The Mediation Session

5. **Who is your audience?** Unlike litigation, the audience in mediation is the *client* sitting across the table. The mediation session may be the first and only time that the attorney has the opportunity to address the other client directly. The client holds the ultimate authority as to whether or not to settle a case, so being able to speak directly to the decision-maker is a tremendous opportunity. With this audience in mind, the mediator should remind the attorneys that the other client will unlikely be convinced with the attorney's best legal case. Instead, the mediator should help the attorneys find reasonable proposals that make sense from a legal, business, timing, social, or other standpoint.

6. **What is YOUR settlement plan?** All too often, parties and attorneys react negatively to proposals made by their negotiating counterparts (sometimes called "reactive devaluation"). In response, the sides often make small, incremental moves sending incorrect signals to the other. To break out of this destructive mode, the mediator should ask about a settlement plan that is independent of the moves of the negotiating counterpart. This plan could include moving in set increments or ending at a pre-determined point. This keeps the powers with the parties and keeps them set on a plan that is not affected by reactive devaluation.

7. **Why is your proposal reasonable?** This question goes hand in hand with the question regarding audience. The mediator should remind the parties that they will make significantly more progress in the mediation if they appeal to reason and not strictly legal arguments.

8. **What is holding this case back?** Presumably, the reason that the parties are in mediation is because they could not settle the case on their own. Any number of impediments could be holding the case back. The parties may have differing views of the law or facts. The parties may not get along. The parties might have unrealistic expectations. Asking about the impediments could help the parties focus on the true stumbling blocks in the dispute.

9. **What do you need to know?** In order for a party to assess the reasonableness of a proposal, that party must have enough information to make an informed decision. Given informational disparities, one side may be missing crucial information without which the case will not settle. By asking about missing information, the mediator can help determine whether, when, and how that information can be exchanged.

10. **Do you need a moment to talk with your client?** A mediator should understand that certain matters can, and should, be discussed outside of the mediator's presence. Attorneys may need time to consult privately with their client in order to determine whether to make or accept a proposal. The mediator should not be offended if the attorney and client need a minute to talk between themselves, and significant progress can be made even outside of the mediator's presence.

Kristen M. Blankley *is an Assistant Professor at the University of Nebraska College of Law, where she teaches on a wide variety of ADR, including negotiation, mediation, and arbitration. She is a summa cum laude graduate of The Ohio State University Moritz College of Law, where she also earned a Certificate of Dispute Resolution. Kristin clerked for federal courts of appeals judges in both the 6th and 8th Circuits, followed by practice at Squire, Sanders & Dempsey, LLP. She is a mediator, as well as an active scholar on professional ethics and ADR topics.*

This article appeared initially in the Nebraska Mediation Association's Mediator Minute, and is reprinted with the permission of the author and the Association.

CONSENT DECREES

Judicial Authority, Discretion & Interpretation

*By Glenn Sanford**

> "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office," 28 U.S.C. § 453:
>
> "I, ____ ____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ____ under the Constitution of the United States. So help me God."

I. Introduction

Taken at its face value, this oath of office reflects a commitment to having the federal judiciary ensure equal access to fair and impartial justice. From 1962 to 2010, the number of civil case dispositions by federal district courts *rose* from 52,000 to 310,000. During the same period, federal district court civil trials *declined* from 5,800 to 5,400. These (rounded) numbers, and much additional data, can be found in Administrative Office of the United States Courts, *2010 Annual Report of the Director: Judicial Business of the United States Courts* (2011) [hereinafter, *2010 Judicial Report*]. See also, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 *J. EMPIRICAL LEGAL STUDIES* 459 (2004).

Given the decreasing frequency of civil trials over the past fifty years, taking the oath of office seriously requires an examination of the alternative dispute resolution ("ADR") processes that are displacing trials. Whether a judge mandates a pre-trial settlement conference, mediation, or approves a consent decree, she is bound by her oath to administer justice. Because a full review of judicial power and discretion as applied to ADR processes would be a vast undertaking, this comment will confine itself to reviewing the role of judges and the extent of judicial authority to approve, reject, modify, and interpret consent decrees that have been agreed to by the parties.

Part II of the comment will discuss the differences between consent decrees and traditional settlements. This discussion will focus on the reasons parties would opt for consent decrees rather than a private settlement—most notably, the hybrid character of consent decrees and their simplified enforcement. The source of these differences is legal force provided by the judicial approval and entry of consent decrees.

Part III examines the requirements for judicial approval of consent decrees. These include subject-matter jurisdiction, the scope of the pleadings, furtherance of the law upon which the complaint was based, and judicial latitude to approve consent decrees that go beyond the relief that could have been awarded at trial. Put simply, this section will examine the requirements for having the government approve and enforce a consent decree as a judicial decision rather than as a privately contracted settlement.

Part IV considers the principles for interpreting and modifying consent decrees. At their core, these principles recognize that consent decrees are both contracts and final judicial orders representing compromises wherein individual elements must be understood within the context of the agreement and

the underlying law. Finally, Part V will conclude with a warning cautionary note to those pondering the use of a consent decree as an alternative to litigation.

II. Distinguishing Consent Decrees from Private Settlements

The law favors the voluntary settlement of civil lawsuits. Rule 41 of the Federal Rules of Civil Procedure allows dismissal of most civil suits by consent of the parties. Rule 41 allows the plaintiff to voluntarily dismiss a suit without a court order by filing notice of such prior to the opposing party filing and answer or a motion for summary judgment. It also allows the parties to agree to dismiss a suit without court order at any time via a filing agreed and signed be all of the parties that have appeared.

The major exceptions to this freedom of settlement are class action suits, shareholder derivative suits, and bankruptcy/receivership actions, all of which are subject to judicial oversight even when the parties to the suit reach a settlement. *See generally*, Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988). As Kramer points out, in a typical settlement "there is no further judicial involvement. The agreement by which the plaintiff agrees to dismiss his lawsuit is an ordinary contract, and it can be enforced, modified or set aside as such." *Id*. at 325. As a private agreement between private parties, such agreements are subject to the standard rules of contract law. Violating the terms of a settlement is treated the same as any other contract violation, and is subject to enforcement via civil litigation wherein the court will seek to give effect to the intent of the parties as expressed by the terms of the agreement.

Historically, some courts treated consent decrees as nothing more than court-recorded settlement agreements. Such courts did not review the merits of the case or weigh equities; rather, the court's only concerns were: (1) that the parties are capable of binding themselves, and (2) that they have agreed to bind themselves. Viewed in this way, a consent decree is more forceful than a normal judgment in that it cannot be modified, set aside, or appealed absent fraud or mutual mistake. Thus, it is an agreement between the parties to end the suit that has been recorded by the court, so the consent excuses error, and ends all contention between the parties. Nothing remains for the court to do but to enter a decree reflecting the agreement of the parties. Furthermore, there is no appeal from such a decree.

Yet, this view has given way to a more expansive view of consent decrees that includes substantial consideration of the role of the judiciary in giving its imprimatur to a private agreement. *See Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986) (requiring that consent decree "must further the objectives of the law upon which the complaint is based") [hereinafter "*Local No. 93*"]; *U.S. v. ITT Continental Banking Co.*, 420 U.S. 223, at 236 n.10 (1975) (recognizing the dual contractual and judicial decree nature of consent decrees and acknowledging "[b]ecause of this dual character, consent decrees are treated as contracts for some purposes but not for others").

Today, consent decrees are viewed as a hybrid combining elements of private contracts and judicial orders. More directly, "[a] consent decree 'embodies an agreement of the parties' and is also an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). Consent decrees go beyond a contractual private settlement in that they seek some form of injunctive relief and/or subsequent judicial oversight of the parties' compliance.

For parties seeking privacy, an unwelcome side effect of utilizing consent decrees is that the judicial approval is by its nature public. Unlike private settlements, courts generally maintain continuing jurisdiction over the entered agreement allowing for simplified enforcement options. Because the consent decree takes the form of a judicial order, a party can seek contempt sanctions without having to begin the litigation process anew in a breach of contract lawsuit.

Beyond the interactions between and options available to the parties, a full appreciation of consent

decrees requires consideration of the discretion and powers of the judges who must accept the agreements and enter them as judicial decrees. We now turn to that topic.

III. Judicial Discretion to Approve, Reject, and Enforce Consent Decrees

A court is not required to determine that a statutory violation has occurred in order to enter a consent decree. In *Swift & Company v. United States*, 276 U.S. 311 (1926), the Supreme Court refused to vacate a consent decree that was entered despite the defendant corporation having entered an answer denying the allegations, a lack of government proof at trial that any violations had occurred, and language in the decree itself that maintained the corporation's innocence. The Court held that although a defendant could normally challenge a court's finding under these circumstances by appealing the error, such an error was waived by the consent to the decree.

Developing this theme in *U.S. v. ITT Banking Co.,* 420 U.S. 223, at 236, 244-45 (1975), the Court stated that because the parties negotiate away their right to litigate the issues, "the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." A defendant that agrees to a consent decree has waived its right to litigate the underlying facts/allegations in exchange for reduced costs and certainty about the judgment that will be entered; thereby granting the court the power to enter a decree without any finding of underlying violations.

Prior to the 1980's judicial approval of consent decrees was narrowly construed. In *System Federation No. 91, Railway Employees' Department, AFL -CIO v. Wright,* 364 U.S. 642, 651 (1961), the Supreme Court ruled that the "authority to adopt consent decrees [came] only from the statute which the decree is intended to enforce" and only allowed courts to approve consent decrees in which each provision of the decree remedied a specific violation of the underlying statute.

However, in 1983 the D.C. Circuit rejected a literal reading of the Supreme Court's admonition. *Citizens for a Better Environment v. Gorusch*, 718 F.2d 1117 (D.C. Cir. 1983). In doing so, the court interpreted the Wright decision as a device for focusing a trial court's attention on the purposes of the statute underlying the litigation rather than the interests of the parties to the settlement.

In its 1986 *Local No. 93* decision, the Supreme Court explicitly stated that a court accepting a consent decree is neither a mere recorder of private agreements nor limited to entering only those decrees offering remedies within the underlying statute. The Court listed three requirements that decrees must meet before a court may accept them:

(1) the decree must resolve a case that is within the court's subject-matter jurisdiction;

(2) the decree must come within the general scope of the case made by the pleadings; and

(3) the decree must further the objectives of the law underlying the lawsuit.

Prior to *Local No. 93*, courts were only required to ensure that a settlement was fundamentally fair, adequate, and reasonable, although this analysis did require a determination that the proposed settlement represented a reasonable factual and legal determination based on the facts in the record. Beyond adding specific elements to the judicial review of proposed consent decrees, *Local No. 93* clarified that because the consent decree derives from the agreement of the parties, a court may approve remedies that it could not have imposed as a result of litigation.

Sierra Club v. Electronic Control Design, 909 F. 2d 1350 (9th Cir. 1990), provides an example of a court entering a decree that it could not have imposed as a result of litigation. The district court refused to enter a proposed consent decree requiring compliance with applicable permit conditions and payment of $45,000 to a private environmental group resolving a citizen suit under the Clean Water Act. When the United States was served with the proposed consent decree under Section 503(c) of the Clean Water Act, it objected arguing that the proposed settlement was at odds with the Clean Water Act," because money paid to be paid by the defendant would be a civil penalty, and the Clean

Water Act requires all civil penalties to be paid to the U.S. Treasury.

The Ninth Circuit applied *Local No. 93* and reversed the district court, finding that while the remedy was beyond the scope of anything the court could have imposed as a result of litigation, the district court was not precluded from entering the agreement so long as the consent decree was not unlawful and furthered the purposes of the Clean Water Act. The appellate court held that because the consent decree ended the litigation without a judicial finding that the defendant had violated the Clean Water Act, the required payment was not a civil penalty.

Further, because the Clean Water Act did not set limits on the settlement options in citizen suits and this payment furthered the purposes of the Clean Water Act, there was no violation of the law and thus, no basis for refusing to enter the consent decree. In this way, under *Local No. 93*, a district court is able to enter and enforce a consent decree provision that the court could not have required as a result of litigation.

Beyond the latitude courts have to approve consent decrees, they also possess the discretion to refuse to accept decrees. In *Dancy v. Cave*, 760 S.W.2d 40 (Tex.App. 1988), Dancy sought a writ of mandamus to compel a district judge to enter a proposed settlement agreement in a civil forfeiture action stemming from a charge of cocaine possession. The Texas appellate court held that because the law under which the property was seized gave the trial court discretion to control the disposition of that property, mandamus would impermissibly limit the exercise of that discretion. The court added that to hold otherwise would be to allow parties to usurp the judge's discretion. Therefore, though parties may go beyond statutorily provided remedies, they may not remove judicial discretion via their proposed agreement.

IV. Interpreting and Modifying Consent Decrees

Because consent decrees are by their nature compromises, they should not be read as having their own purpose; rather, they should be considered as the embodiment of "as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (stating that "in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation").

Here again, because the parties consent to the to agreement (generally before all of the facts have been determined), parties have waived their rights to challenge the decree or seek to have it interpreted as if they had proven their case in the original proceeding. As such, consent decrees are interpreted as contracts between the parties without reference to factual claims or legal theories in the originating litigation, as the parties neither proved their claims nor vindicated their legal theories during trial. Therefore, a consent decree should be interpreted without external reference to the parties' purposes or allegations; rather, the instrument should be interpreted as written.

This limit represents the converse of the courts' power to go beyond statutory remedies owing to the parties consent, in that it limits a court's power to interpret provisions that were achieved by the parties waiving their right to litigate these underlying issues. Just as the parties in *Swift & Company* waived their right to appeal potential errors associated with the entry of a decree without proof of a statutory violation, the parties' agreement and proposal of a consent decree waives their right to have the decree interpreted as if their factual claims had been proven and their legal theories had been vindicated at trial.

Recall that a consent decree is a hybrid evoking features of contracts and judicial orders. For enforcement purposes, consent agreements are interpreted under the principles of contract law, while for modification purposes consent decrees are treated as judicial acts, akin to injunctions.

In this spirit, the D.C. Circuit asked, "Who would sign a consent decree if district courts had free-ranging authority untethered from the decree's ne-

gotiated terms?" *Pigford v. Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002). This question summarized the Court's concern that granting district courts the authority to reinterpret consent decree provisions absent the safeguards surrounding modifications of final orders would both deny parties the benefit of their bargain and discourage consent decrees. Judicial fidelity to the terms of the proposed agreement is part of the bargain that the parties contemplated in their negotiations.

Doe ex rel. Doe v. School Board for Santa Rosa County, Florida, 711 F. Supp. 1320, 1324 (N.D. Fla. 2010). captures this point noting that "[w]hen a consent decree becomes a final judgment of the court it secures for the parties the benefit of their mutually agreed bargain." Without consent of the parties, judges may only modify contract terms upon a showing of illegality, mistake, fraud, duress, or unconscionability. *Villines v. General Motors Corp.*, 324 F.3d 948, 952 (8th Cir. 2003) (holding that the contract between the parties determines their rights and "absent fraud, mistake or duress, the contract is enforceable"). *Accord*, *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1009 (3rd Cir. 1980) (holding that "[a]bsent illegality, unconscionability, fraud, duress, or mistake the parties are bound by the terms of their contract"). Thus, the general respect for mutually agreed contracts serves as a check on ability of courts to modify consent decrees.

The contractual nature of consent decrees notwithstanding, because a decree is also a final order of the court, a party may invoke Rule 60 of the Federal Rules of Civil Procedure (or its state rule counterpart) in an effort to modify the court's order. Rule 60(b)(5)-(6) allows for modification of a final order when its application is no longer equitable, when it is based on a prior judgment that is no longer in force, "or any other reason that justifies relief."

Rule 60 subsumes the common law principle that whether "entered after litigation or by consent…a court does not revoke its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 114-5 (1932). The party seeking modification of a consent decree bears the burden of establishing that changing circumstances has rendered the decree inequitable or unenforceable, and any such modification should be tailored to the new circumstances. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). Thus, though the principles of contract law require the courts to interpret a consent decree as a contract between the parties, the rules governing final judicial orders allow the court to modify the consent decree is order as justice requires. Though modification of the consent decree may deprive one or more of the parties of the benefit of their bargain, this price must be paid to prevent the court from becoming an unwitting agent of injustice.

V. Conclusion

Consent decrees provide parties the opportunity to dispose of litigation without a full trial while retaining the option of judicial oversight and enforcement via contempt proceedings. In addition, the cost savings and reduction of risk that stem from a negotiated settlement, consent decrees allow the parties to craft individualized solutions beyond statutorily-established outcomes.

Yet, because judicial approval of consent decrees requires entry in the court record, they are not appropriate for parties seeking privacy of the settlement terms. Likewise, though courts possess limited power to modify private contracts, because consent decrees are entered as final judicial orders, courts retain the power to modify previously entered decrees as justice requires.

Because the parties agree to the consent decree, their voluntary participation in the decree constitutes a substantial waiver of the parties' rights to litigate the facts/legal theories at issue, to appeal the decision, and to seek modification of the decree without a court order. Finally, even after the parties reach an agreement concerning a proposed consent decree, it is neither final nor binding until the judge agrees to enter it.

Any party considering entering into a consent decree must take notice of the rights that she is waiving, the lack of privacy, and the potential for the court to subsequently modify its order in response to changing conditions. Nonetheless, it will not be uncommon for parties to decide that the benefits of controlling the dispute's outcome, limiting risk exposure and litigation time/costs, and availing themselves of judicial oversight outweigh these costs. Against this backdrop, it is essential that judges commit themselves to the principles of fair and impartial administration of justice as they consider, interpret, and enforce consent decrees negotiated by private parties trading away their individual interests in favor a timely and cost-effective resolution to pending litigation.

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BENEFITS OF EARLY INTERVENTION: ALTERNATIVE DISPUTE RESOLUTION FOR TAX AND PROBATE ISSUES

By Tammy C. Manning*

As attorneys who practice in the tax and probate area well know, most of the conflict between family members first arose many years before the decedent died or the ward became incapacitated. This family strife often is unrelated to the validity of the estate planning documents, or the capacity of the proposed ward. Litigation rarely resolves these conflicts and often makes them worse, and irreparably damages families in the process.

In addition, litigation may not completely resolve the legal issues in a single proceeding. Once a personal representative is appointed at the time the will or guardianship contest is adjudicated, a second proceeding may have to be filed for an accounting from an agent under a power of attorney or a prior personal representative, to recover land or financial assets, or to partition jointly owned property. Early alternative dispute resolution can avoid much of the expense and time involved in these collateral proceedings and allow for creative collaborative solutions that would be impossible in court.

Each probate, trust and guardianship disputes is factually unique; however, the law is generally the same from case to case. Once the facts are adequately explored, alternative dispute resolution should be attempted.

EARLY INTERVENTION DURING THE ESTATE PLANNING PHASE

If you encounter any of the following factual scenarios, you may wish to consider whether your client's estate planning documents should be revised to ensure the estate planning is protected as much as possible. You also may wish to consider whether early ADR would be effective:

- Where one dominant child handles financial matters or caretaking for the client;
- Where there are step-children/step-parents;
- Where there are adopted children;
- Where there is a non-traditional family and/or beneficiaries;
- Where the client wishes to omit children or heirs;
- Where the client wishes to make large bequests to benefit charities (to the exclusion of family members); and
- Where there is a family owned business with one child involved to the exclusion of others.

Early intervention through drafting can drastically change the future. Drafters should consider adding **mandatory mediation and/or arbitration provisions** to wills, trusts, and even durable power of attorneys for agents who are required to account to a personal representative or other third party. See Stephens, Marjorie J., *The Malleable Trust: Carrying Out the Grantor's Intent as Individuals, Families and Societies Change and Evolve*, State Bar of Texas 21st Annual Estate Planning & Probate Drafting Course, October 2010, Chapter 15. Direct negotiations between the parties can also be required before requiring mediation.

Texas law has not yet spoken on the enforceability of mandatory arbitration provisions in wills and trusts; however, these types of clauses in other types of documents have been consistently upheld in Texas

absent fraud or coercion. The distinction between those cases and estate planning documents is that the contesting party does not usually sign the document agreeing to the mandatory mediation or arbitration provision and may not be bound by it. Drafters should instead make mediation or arbitration of a dispute a condition precedent to receiving any share of the estate to support the argument for enforceability. It can also be incorporated into a no contest clause; however, as discussed below, new statutory constraints have made this the less attractive drafting alternative.

No contest clauses or *in terrorem* clauses have been instrumental in thwarting litigation; however, the estate planner's crystal ball must be clairvoyant enough to identify the potential and future troublemakers in order to recommend a sufficient bequest to assure the contestant will choose to uphold the document (and the gift) and forego the contest.

The recent statutory change to TEX. PROB. CODE § 64 requires estate planners to draft just short of forfeiture to avoid the good faith and probable cause exception. Alternatives to no contest clauses that are not controlled or restricted by the Probate Code are **allocation of all fees and expenses** related to the contest to the contestant's share alone. **Special powers of appointment** granted to a surviving spouse for example will also control potential contestants and make them think more than twice about filing a contest. The power of appointment could even be "springing" in nature and only be created if a will contest is filed.

POST-DEATH

Warning signs that a dispute is brewing: After the client's death or incapacity, estate planners are sometimes the first line of defense in warding off litigation and steering the family to alternative dispute resolution. The attorney who prepared the power of attorney, will, or the trust document will usually be contacted first by family members in the event of death or incapacity of the client. Quick action to resolve disputes, create transparency within the family, and protect the client or her assets will help the estate and family to avoid the immense cost of litigation.

Family meetings are difficult but necessary to early successful intervention. As a long time *advocate*, I cringe at the thought of the family meeting and trying to discuss the issues that are creating conflict. I worry about such things as disclosure of litigation strategy, admissions by the parties, privileges, and compromising my client's position. As a *mediator*, however, I realize that these meetings occur every day without counsel (at holidays, visits, birthdays, parties, etc.) and are likely to take place during a mediation. If the informal family meeting is not productive, why not have the meetings with a third party mediator early on before the conflict escalates to litigation?

If the estate planning attorney is not successful in guiding the family to mediation or a meeting, he could suggest the family agree in writing to an expedited arbitration or another ADR process that would save them all the expense of prolonged litigation.

Caveat: The attorney must avoid advising non-client family members and creating any kind of expectancy of an attorney/client relationship forming. See *Vinson & Elkins v. Moran,* 946 S.W.2d 381 (Tex. App. – Houston [14th Dist.] 1997, writ dism'd by agreement).

How to resolve the case early in the process: Litigation often results because of a lack of communication and disclosure. Pick up the phone to talk to any attorneys who contact you on behalf of any other family members. Respond to family members who contact you and encourage your clients to do the same. While you may not be able to provide the information they want, you can at least establish a line of communication and the appearance of transparency. However, caution the caller that you do not represent them and they should seek legal counsel. Keep in mind that you have an attorney/client privilege with the decedent or incapacitated person until it is waived by a personal representative or an agent under a durable power of attorney, or a claim is made to invoke TEX. R. EVID. 503(d) (the exception for claimants to probate or non-probate assets or *inter vivos* transfers through the same deceased client).

Informal Settlement Conferences: Depending on the personalities involved (of both parties and counsel), many parties are returning to the way cases were settled many years ago, *i.e.* without a neutral party acting as a facilitator. It is recommended that attorneys visit first in order to define the issues and a potential settlement structure. The attorneys should attempt to create a settlement proposal that they can both recommend to their clients. One attorney cannot hold it against the other if the clients reject the proposal and a counter-proposal becomes necessary. If counsel agree the case should be settled, a high percentage of clients will follow counsel's advice. A meeting of all interested parties should then be scheduled and the parties should attempt to craft an agreement with which they can all live, although imperfect from their individual points of view.

Mediation is defined as "a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them." TEX. CIV. PRAC. & REM. CODE § 154.023. It is interesting that "reconciliation" and "understanding" are promoted, in addition to settlement. This language speaks directly to probate, trust and guardianship cases which require all three elements for a successful mediation.

Confidentiality is a vital component to mediation. As the mediator works through the process with the parties, information from one party may not be disclosed to the other party without express permission. TEX. CIV. PRAC. & REM. CODE § 154.053(b). The mediator should default to non-disclosure unless the party expressly states that the information can be shared with the opposing side. In other words, the mediator cannot say, "You didn't tell me *not* to disclose that information." It is just the opposite standard. Similarly, the mediator may not disclose anything related to the mediation, including the conduct and demeanor of the parties, to anyone outside the process, including the court. TEX. CIV. PRAC. & REM. CODE § 154.053(c). At the conclusion of the mediation, the mediator should simply write a letter to the Court stating the case did or did not settle.

The parties are encouraged to engage in settlement negotiations and disclose information relevant to the process without the concern that the negotiations or the information can be used against them if the judicial process continues without a resolution. TEX. CIV. PRAC. & REM. CODE § 154.073(a). Mediators and parties cannot be forced to testify or disclose information discovered in the mediation process unless the information is admissible or discoverable independent of the procedure. TEX. CIV. PRAC. & REM. CODE § 154.073 (b), (c).

Caveat: Most information learned in mediation can then be requested in formal discovery and used in the judicial proceedings. *In re Learjet Inc.,* 59 S.W.3d 842, 845 (Tex. App. – Texarkana 2001, orig. proceeding) (videotapes of witness statements prepared for mediation were discoverable).

Much like the attorney/client privilege, a party can waive the mediation confidentiality privilege if she is using it in an offensive manner to hide information that is outcome determinative, and disclosure is the only means by which the other party can obtain the information. *Alford v. Bryant,* 137 S.2W.3d 916, 921-922 (Tex. App. – Dallas 2004, pet. denied). The conduct of the parties during mediation or their style of negotiation is not discoverable and should not be disclosed to the trial court. *In re Acceptance Ins. Co.,* 33 S.W.3d 443, 453 (Tex. App. – Fort Worth 2000, orig. proceeding). Conversely, the fact that a party left mediation without permission of the mediator is not protected by the confidentiality statute. *In re Daley,* 29 S.W.3d 915, 197 (Tex. App. – Beaumont 2000, orig. proceeding).

CHOOSING YOUR IMPARTIAL THIRD PARTY

Mediators are intermediaries who work with parties who have a dispute and need assistance in communication and analysis of their conflict. The mediator's goal is to facilitate designing an agreement that meets the needs of the parties. A mediator cannot impose her judgment on the parties, nor can she compel or coerce the parties to enter into a settlement agreement. TEX. CIV. PRAC. & REM. CODE § 154..053(a). See *In Re McIntosh,* 918 S.W.2d 87, 89 (Tex. App. – Amarillo 1996, no writ). A mediator is neutral, has a good grasp of the law at issue, is capable of maintaining a collaborative setting, and uses communication and conflict resolution skills to con-

duct a successful mediation. There are different styles of mediation—facilitative and evaluative styles are those we see most often in the probate setting.

Facilitative mediators are basically skilled messengers who assist the parties with reaching their own solution. These mediators do not suggest what terms would be appropriate for a settlement and instead encourage communication between the parties to contribute those terms. An **evaluative mediator** must be experienced in the area of the law of the case, and must assess and communicate the strengths and weaknesses of each side's case. This mediator is expected to propose terms that are consistent with his or her assessment of the likely outcome if the litigation commences. **Transformative mediation** is for the purpose of transforming the adversarial relationship to a more harmonious one through empowerment and recognition. Followers of transformative mediation believe that non-financial effects of mediation such as enhanced self-worth and renewed relationships are more valuable to the parties. **Problem solving mediation** requires a total focus on the resolution of the dispute. It involves caucusing for data collection and, in a short period of time, identifying the solution with which both parties will be satisfied. The mediator then moves the parties toward this goal. **Narrative mediators** listen carefully to the parties' stories and then ask questions to discover the underlying issues or interests. The mediator then helps the parties construct a new story without the conflict but containing the aspects of the old story with which the parties agreed. This style improves the relationship between the parties and detaches them from the conflict. However, the narrative process takes the longest amount of time and requires great patience of the parties. A blending of the foregoing styles is common, and often a necessity depending on the personalities of the parties and counsel.

A party and their counsel should decide what style best fits the personalities of the parties and the facts and law of the case. If you are having a difficult time convincing your client of the risks of litigation or a reasonable value of her case, an evaluative mediator would be most helpful because these points can be made by from an objective and neutral point of view. In some cases, a blending of the facilitative and evaluative styles may be most attractive to the attorneys and litigants.

If a mediator is a *pro bono* volunteer, including those working through the Harris County Dispute Resolution Center, that mediator has qualified immunity from civil liability for any actions taken within the scope of his duties as a impartial third party, as long as he does not act with wanton and willful disregard of the rights, safety, or property of another. TEX. CIV. PRAC. & REM. CODE § 154.055. There is no such statutory protection for a paid mediator, regardless of whether he is appointed by the court or agreed to by the parties.

The **Harris County Dispute Resolution Center (HCDRC)** (TEX. CIV. PRAC. & REM. CODE § 152.001, *et seq*.) is a program sponsored by the Houston Bar Association and established, funded and controlled by Harris County Commissioners' Court pursuant to TEX. CIV. PRAC. & REM. CODE § 152.001, *et seq*. Approximately $1.4 million is budgeted for this service in the 2010-2011 budget year. There are similar centers across the United States. The policy behind the Center is to promote the "peaceable and expeditious resolution of citizen disputes." TEX. CIV. PRAC. & REM. CODE § 152.002 (a). Any judge (including a probate judge) may refer a case to the HCDRC on its own motion, or the motion of any party. TEX. CIV. PRAC. & REM. CODE § 152.003. Most civil proceedings filed in Harris County require a fee of $10 (which could be increased to $15 pursuant to statute) that is for the sole purpose of establishing and maintaining HCDRC. TEX. CIV. PRAC. & REM. CODE § 152.004; *Dallas Cty. v. Sweitzer,* 881 S.W.2d 757, 767 (Tex. App. – Dallas 1994, writ denied).

The ADR services provided by the HCDRC include mediation, arbitration, and conciliation between "those having an ongoing relationship such as relatives, neighbors, landlords and tenants, employees (Tex. App. – Amarillo 1996, no writ). A mediator is neutral, has a good grasp of the law at issue, is capable of maintaining a collaborative setting, and uses communication and conflict resolution skills to arbitration or moderated settlement conferences if the parties are represented by counsel.

Many probate disputes involve small estates that qualify for HCDRC mediation and could save the parties a great deal of time and expense if mediated early. The HCDRC has specific guidelines for the type of cases they will accept: The amount in dispute cannot exceed $100,000.00, and there cannot be more than three parties named in the pleadings. The mediations are traditionally one-half day, free, and conducted at the volunteer mediator's office, the DRC offices, or the attorneys' offices if agreed. (See www.co.harris.tx.us/drc for more information.)

Qualifications: Texas law has a very low threshold of requirements for a court appointed facilitator of an ADR process. (A mediator agreed to by the parties may be anyone to whom the parties agree without regard to qualifications.) In order to qualify for a court appointment (whether agreed to or not) to conduct an ADR proceeding, the person must have 40 hours of classroom training in ADR techniques in a course conducted by a court approved organization, unless the Court bases its appointment on legal or other professional training or experience in ADR. TEX. CIV. PRAC. & REM. CODE § 154.052(a), (c). If the dispute involves the traditional parent/child relationship governed by the Texas Family Code, the mediator must also have 24 hours of training in family dynamics, child development, and family law. TEX. CIV. PRAC. & REM. CODE § 154.52(b).

Mediators need not be "certified" or "credentialed" in Texas. Various credentialing groups have attempted to have legislation passed to require a certain amount of training and experience in order to call oneself a "certified" or "credentialed" mediator. No such legislation has passed, however. The Texas Supreme Court did announce that it would adopt as its own "aspirational" guidelines the Ethical Guidelines for Mediators promulgated by the Alternative Dispute Resolution Section of the State Bar of Texas. Compliance with these guidelines is voluntary. The Texas Association of Mediators does offer credentialing at different levels, but this qualification is not widely sought after in the probate mediation field, probably due in large part to the small size of the probate bar and consequently small number of available mediators who are familiar with probate law. Our most qualified mediators are those who have litigated in the probate, trust and/or guardianship areas or have previously presided in the statutory probate courts in Harris County. These individuals have real experience with trial, and the toll trials take on the people, both financially and emotionally.

Unlike arbitrators, mediators are rarely attacked for serving when there is believed to be a conflict. An unpublished opinion out of the First Court of Appeals did hold that an attorney who failed to disclose that the mediator had served as an expert witness for him in other cases, before and after the subject mediation, did not commit fraud or conspiracy. *Lehrer v. Weinberg,* 1999 Tx. App. LEXIS 3696 (Tex. App. – Houston [1st Dist.], pet denied) (unpublished). If an attorney previously mediated for the parties on a different issue such as child custody, the parties cannot subsequently be ordered to arbitrate property issues with that same attorney. *In Re Cartwright,* 104 S.W.3d 706 (Tex. App. – Houston [1st Dist.] 2003).

However, the parties may agree to arbitrate with that attorney mediator. The Court relied on the expectation of confidentiality in mediation (TEX. CIV. PRAC. & REM. CODE § 154.001, *et seq*.). If there is a danger of an arbitrator (who was formerly the mediator) using information disclosed during the mediation process under the protection of the confidentiality statutes, the same individual cannot serve as mediator and arbitrator absent consent of the parties. *Id*. at 714. Successful parties at mediation many times agree to allow the mediator to serve as an arbitrator if a dispute arises relating to the mediated settlement agreement. Parties may also agree to allow the mediator to arbitrate a dispute if an impasse occurs. As long as there is an agreement in place to use the same impartial third party, there is no ground for objection by either party.

Voluntary vs. involuntary (court ordered) mediation: It is highly recommended that the parties and counsel select their mediator rather than allowing the court to do so. The attorneys know the personalities of their clients, the facts and law at issue, and, usually, the mediator's style to find the best combination that will work. Also, the more input into the selection of the mediator, the more likely it is that the mediator will be respected by the parties, leading to a successful outcome. If the parties cannot agree to mediate, or cannot agree on a mediator, a motion may be filed by any party asking that the Court compel mediation. Some probate judges will not compel

mediation, believing that the parties will not successfully mediate if they have to be forced to attend. As discussed in more detail below, a Court may compel attendance at mediation but may not order the parties to negotiate or settle. Many courts' docket control orders have a deadline for either agreeing to mediate or filing an objection to mediation. Counsel should endeavor to select a mediator by agreement, and file a written agreement with the name of the mediator and the date mediation is scheduled. Objections to mediation should be reserved for those cases that have no chance of settling due to factors outside the control of the parties and attorneys.

Fees and venue: A mediator's fee structure should also be reviewed before selecting a mediator. Fees will probably range from $800 to $2000 per party in a two party case for a full day mediation. Rates for a one-half day mediation are usually about 50-60 percent of the full day mediation. The court may set a "reasonable" fee and order it paid as costs of suit if the parties do not agree to the payment of fees. TEX. CIV. PRAC. & REM. CODE § 154.054; see also *Decker v. Lindsey,* 824 S.W.2d 247, 249 (Tex. App. – Houston [1st Dist.] 1992, orig. proceeding); *Paul v. Paul,* 870 S.W.2d 349, 350 (Tex. App. – Waco 1994, no writ). Most mediators will charge overtime if the mediation runs past the close of business. The overtime hourly rate will usually be disclosed ahead of time and should be kept in mind as the day progresses.

Most paid mediators conduct the mediations in their office or use a mediation center in order to provide a neutral ground for the parties' comfort. A volunteer mediator through the DRC may ask to use one of counsel's offices for the mediation.

MEDIATION LOGISTICS

Who should attend? All potential beneficiaries should attend mediation although they are not necessary parties to a will contest. If you fail to include a beneficiary, you run the risk of resolving one dispute only to find another disgruntled potential beneficiary later coming forward with their claim. It is acceptable (although sometimes very counter-productive) for spouses of beneficiaries to attend mediation. I also suggest that agents under powers of attorney not participate in mediation unless the principal is unable to meaningfully participate in the process due to mental capacity limitations. If an attorney or guardian ad litem or personal representative has been appointed, that individual should be given the opportunity to attend, although their presence, and the associated expense, may not be necessary. Witnesses and other family members are not usually allowed to attend mediation.

Attendees cannot be forced to settle, but parties can be ordered by the trial and appellate courts to physically attend mediation and are subject to contempt for their failure to do so. The parties cannot be forced to negotiate in good faith. *Gleason v. Lawson,* 850 S.W.2d 714, 717 (Tex. App. – Corpus Christi 1993, no writ) (but see *Texas DOT v. Pirtle*, 977 S.W.2d 657, 658 (Tex. App. – Fort Worth 1998, pet. denied) (an objection must be filed if a party does not intend to negotiate in good faith). "A court cannot force the disputants to peaceably resolve or negotiate their differences." *Hansen v. Sullivan,* 886 S.W.2d 467, 469 (Tex. App. – Houston [1st Dist.] 1994, orig. proceeding). Courts "may" order mediation take place but "shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure." TEX. CIV. PRAC. & REM. CODE § 154.021(a) and (b). If any party files an objection to the referral to ADR within 10 days of the court's order, the court may set aside its order if the objection is supported by a reasonable basis. TEX. CIV. PRAC. & REM. CODE § 154.022; *Decker v. Lindsay,* 824 S.W.2d 247, 250 (Tex. App. – Houston [1st Dist.] 1992, orig. proceeding). If a party fails to file an objection and proceeds to mediation, it is not an abuse of discretion if the Court assesses costs if the party then fails to mediate in good faith. *Pirtle,* 977 S.W.2d at 658.

When are you ready to go to mediation? When you have enough information to reasonably inform your client of the risks and benefits of litigating the issues, you are ready for mediation. If you have followed the recommendations for early intervention and voluntary disclosure, this can occur fairly quickly, sometimes as early as within a week of the dispute arising if no records have to be ordered from medical providers or financial institutions. If records

do have to be ordered, a more realistic time frame is 30-60 days. If no medical or financial records are needed and the dispute revolves around remains, personal property, visitation, or residency, it may be that mediation can be set almost immediately.

What information do you need? You usually need medical records for the time period in which the questioned will, power of attorney or trust was executed. The personal representative, if appointed, can obtain these documents for you without the necessity of a subpoena or deposition by written question. Also, if the dispute involves an incapacitated person, the agent under a valid durable power of attorney can also obtain the records. Even in this day of HIPAA concerns, surviving spouses are sometimes given the records, regardless of whether they have been named as agent under a medical or statutory power of attorney.

Financial records will be needed in most instances, particularly if there are assertions of questionable financial transactions. These can be obtained through a written authorization for the release of the information executed by an agent under a power of attorney or a personal representative (if one has been appointed). Individuals who are named on the accounts as joint owners have a right to the information relating to the accounts and should be able to obtain account agreements, statements, cancelled checks and deposit slips without anything more than a written request. (Depending on the volume of documentation, the financial institution may charge a fee for the record retrieval.) If these methods of informal discovery are not possible for some reason, an application to probate or some other proceeding could be filed for the purposes of issuing subpoenas and depositions by written question. The parties could agree to a "friendly" suit for the sole purpose of obtaining the discovery needed for ADR.

Voluntary disclosures of information are necessary for early ADR to be successful. Parties should agree in writing to informally exchange all relevant medical and financial information, in addition to all estate planning documents such as powers of attorneys, wills (revoked and unrevoked), trusts, declarations, etc. The disclosure should be accompanied by a sworn statement that all such documents have been produced prior to ADR occurring. Avoidance of multiple discovery requests and motions to compel will save the family thousands of dollars in litigation costs.

PREPARATION FOR MEDIATION

1. Compile all relevant documents. At this stage, admissibility is not a major concern since any documents and information can be argued at mediation.

2. List all potential witnesses with a short summary of what they will say. To the extent possible, interview the witnesses and obtain sworn witness statements from major witnesses. If a sworn statement is not possible, have the witness prepare a written statement that is not sworn. The latter approach gives up any control over the content of the statement and will be discoverable if the mediation is not successful and litigation becomes necessary. Potential witnesses include:

Drafter(s) of estate planning and conveyance documents, regardless of date;
Witnesses and notaries on all estate planning and conveyance documents;
Medical providers and caretakers;
Attorneys;
Accountants;
Family members;
Friends;
Business partners and employees; and
Bankers, brokers, and financial planners.

3. You may want a particularly strong non-party witness to be available to be interviewed by the mediator or the opposition during the mediation. Do not bring non-parties to mediation unless they are the spouse or you have the mediator's permission.

4. Prepare a chronology of all relevant events. Include the following in your timeline, depending on the type of case:

Dates of execution for testamentary documents;

Dates of execution for powers of attorney, directives, declarations, etc.;

Dates of relevant medical events;

Dates of relevant correspondence and meetings;

Dates of APS investigations and police reports;

Dates of banking transactions;

Dates of beneficiary designations and changes in designation;

Dates of gifts; and

Dates of deeds or transfers.

Determine what evidence will be disclosed to the mediator and/or the opposition.

5. Explain the mediation process to your client. Make it very clear that the mediator is an impartial facilitator who has no stake in the outcome of the mediation. Discuss the caucusing process that will sometimes take the mediator out of your room for quite some time. Warn the client that the mediator acts as an advocate for both sides, depending on the room he is in at the time. There will be times that the client will fear that the mediator is favoring the opposition. Make the client comfortable with the process and the mediator. Encourage the client to talk to the mediator, if not in opening, at least in the private caucus. Explain the confidentiality that surrounds the mediation process.

6. If court proceedings have commenced, prepare files of all pleadings, discovery responses, and depositions. Extract and/or highlight relevant responses and depositions excerpts.

7. Draft a potential settlement agreement that can be revised during the day. Bring your laptop with a wireless modem (and portable printer if possible) for revisions. You do not want to attempt negotiation of the final settlement agreement language after you leave mediation.

8. Draft any documents that you anticipate may be part of a settlement, such as a declination to serve as executor, guardian, and/or trustee, agreed judgment, deeds, agreed orders probating will or appointing guardian,

9. Order copies of all public records such as recorded deeds, surveys, plats, powers of attorney, certificates of trust, marriage licenses, divorce decrees, birth certificates, assumed name certificates, secretary of state documents, probate or guardianship filings, lawsuits, etc. Deeds, as they contain a property description, are very helpful when drafting a settlement agreement or judgment in order to avoid statute of fraud problems if the agreement has to be enforced.

10. Compile an inventory of probate and non-probate assets with supporting documents if there is any dispute over the assets of the estate.

11. Identify all potential liabilities of the estate, including tax liabilities. Consult with a tax attorney if necessary. This person should also be available to you during the mediation should tax questions arise relating to the structure of the settlement or the tax liabilities.

12. Determine whether the mediator plans on holding an opening session. If so, prepare an opening statement that lays out all of the support for your case in a non-confrontational manner. This may be your only chance to speak to the opposition directly without filtering by opposing counsel. Prepare your client for the possibility of an opening session with all parties present. You will need to decide whether you will advise your client to speak during the opening. In some cases, it may be advisable to allow the parties to speak to one another rather than through their counsel. In any event, your client should be advised not to react negatively to the opposing party's opening statement.

13. Be creative and identify potential settlement structures that will appeal to different parties. This will help find common ground among the parties, identify those assets that cannot be sold by agreement, those that can be liquidated, and those hot button issues that will cause impasse.

14. Meet with a client in a contested guardianship case and identify all care, custody and guardianship

issues for the proposed ward. Determine whether to hire a care manager to perform an assessment prior to the mediation.

15. Do not discuss a 'bottom line' settlement with your client. Inevitably, during the mediation process that line will change and you would then have to change your client's expectations. You should identify those issues about which your client feels strongly and are most important to him.

16. Determine whether a title search should be done on any real estate in dispute. You do not want to accept real property in settlement only to find out it is encumbered, or worse, not wholly owned by the decedent.

17. Have appraisals performed if there is a wide discrepancy in valuations by the parties. Sometimes, the parties may agree to share the cost and be bound by the appraisal done for the purpose of mediation. Be aware of environmental issues with any real property and discuss the need for any testing before bargaining for real estate that may be polluted.

18. If the case warrants a medical or financial expert, obtain a report for use at mediation.

MEDIATION DAY

What to give the mediator: It makes little sense to forego the opportunity to educate the mediator prior to beginning the process. A comprehensive mediation memorandum with the following categories of information is imperative to a successful mediation:

> Factual background – reference and attach relevant testimony and documentation;
> Factual and legal disputes – summarize and attach key case law;
> History of settlement negotiations regardless if the offers are still on the table; and
> Trial date and other deadlines.

The information can be provided in letter format and should not be shared with anyone other than the mediator. Include a discussion of the family dynamics, a detailed family tree, and care issues if a guardianship is contemplated. All relevant documents such as estate planning documents, medical records, and correspondence to or from the testator or proposed ward should be attached. Witness statements and expert reports are especially helpful to the mediator. As the mediation progresses, you can decide whether to allow the mediator to disclose the existence of the statements and reports. It is highly recommended to disclose these types of documents and hold little back in order to bring the mediation to a successful conclusion.

Most mediators will thoroughly read the materials they are provided in advance of the mediation. This will save a great deal of time during the mediation and allow the parties to feel comfortable with the mediator's level of interest and his qualifications.

The mediation process is fairly simple – there may be an opening session of all parties and counsel, individual meetings (caucuses) between the mediator and each party with their counsel, and all parties and counsel signing a mediated settlement agreement. Each mediation is different despite the simple process. Some mediators will not recommend an opening session with all parties coming together due to the high emotional state of some or all parties. In those instances, the mediator will conduct separate opening sessions with each party to discuss the procedure for the day, the goal of a written settlement agreement, and the expectation of confidentiality.

Keep in mind that some personal representatives may have to sign agreements subject to court approval. The parties may then file a joint motion for approval of settlement agreement and include in the order of approval a ratification of the personal representative's signature and authorization to carry out all terms of the settlement agreement.

Enforceability of a mediated settlement agreement: If the parties to a lawsuit reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable as a written contract. TEX. CIV. PRAC. & REM. CODE § 154.071. Under Texas law, a court may enforce a settlement agreement if it complies with Rule 11 of the Texas Rules of Civil Procedure. *Padilla v. La France*, 907 S.W.2d 454, 461, 38 Tex. Sup. Ct. J. 663 (Tex. 1995). A settlement agreement con-

forms with the requirements of Rule 11 if it is: 1) in writing; 2) signed; and 3) filed with the Court or entered in open court prior to a party seeking enforcement. See TEX. R. CIV. P. 11; see also *Ashmore v. Ashmore*, 2004 Tex. App. LEXIS 4722 at *3-4 (Tex. App. – Austin 2004, no pet.). If a settlement agreement complies with Rule 11, a Court may enforce the terms of that agreement by entering a judgment. See *Padilla v. La France*, 907 S.W.2d at 461. This is true even if one side no longer consents to the settlement. See *id.* Procedurally, a settlement agreement complying with Rule 11 is enforceable after sufficient notice and proof of the enforcement claim. See generally *Bayway Servs., Inc. v. Ameri-Build Constr., LC*, 106 S.W.3d 156, 160 (Tex. App. – Houston [1st Dist.] 2003, no pet.). A party seeking enforcement of a written settlement agreement as a contract also must support it by proof. See *Bayway Servs.*, 106 S.W.3d at 160.

If a court refuses to enforce the written settlement agreement as a Rule 11 agreement, a breach of contract claim must be filed. Specific performance, damages and attorney fees may be sought for breach of the settlement agreement.

OTHER TYPES OF ALTERNATIVE DISPUTE RESOLUTION

1. Arbitration has different variations. The trial and appellate courts may order parties to non-binding arbitration which is defined as "a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award." TEX. CIV. PRAC. & REM. CODE § 154.027(a). The award is not binding and may only serve as a basis for further settlement negotiations. TEX. CIV. PRAC. & REM. CODE § 154.027(b). The parties may also stipulate in advance that the award is binding and enforceable as a contract. *Id*. **It is unknown whether an award could be incorporated into a judgment similar to the judgment that confirms the award pursuant to TEX. CIV. PRAC. & REM. CODE § 171.001 *et seq*., or whether it would have to be enforced through a breach of contract claim.** Presumably, an award under this section of the CPRC would have to be enforced through a breach of contract suit, similar to a mediated settlement agreement pursuant to TEX. CIV. PRAC. & REM. CODE § 154.071. Use of this ADR procedure would be very helpful if the parties refuse to negotiate with one another but may at least benefit from an objective arbitrator hearing their case and giving them their "day in court".

The Texas Arbitration Act (TEX. CIV. PRAC. & REM. CODE § 171.001, *et seq*.) and the Federal Arbitration Act (9 U.S.C. §§1-16) set out the procedure for traditional binding arbitration that does not have to be court ordered, although the courts sometimes have to compel the parties to honor their arbitration agreement. TEX. CIV. PRAC. & REM. CODE § 171.021. A written agreement to arbitrate a controversy is enforceable if the controversy exists at the time of the agreement or arises after the agreement. TEX. CIV. PRAC. & REM. CODE § 171.001(a). Usually the choice of arbitrators is governed by the agreement itself, or the rules the parties agree to apply. In the absence of such an agreement, a court may appoint one or more arbitrators who are governed by the majority. TEX. CIV. PRAC. & REM. CODE § 171.042. Arbitrators may allow depositions and issue subpoenas for witnesses or documents. TEX. CIV. PRAC. & REM. CODE §§ 171.050, 171,051. The arbitrators' award may be confirmed by a court and, subject to modification or correction, incorporated into a judgment. TEX. CIV. PRAC. & REM. CODE §§ 171.087, 171.092.

Arbitration can mimic a trial in many ways. The parties may agree on a docket control order, discovery, and parameters of the offered evidence. The case can be conducted similarly to a trial with witnesses subject to cross-examination and the admission of documents, subject to the rules of evidence, and result in an award and judgment that may have more certainty than a trial court judgment due to the limited reasons an arbitration award can be set aside. This may be a more adequate remedy than a civil trial for those estates that require an expedited result at less cost with little risk of appeal.

2. Mini-Trials are conducted under agreement of the parties and differ only slightly from the non-

binding arbitration discussed above. See TEX. CIV. PRAC. & REM. CODE § 154.024. The parties agree to select representatives for each party or a single impartial person (who may be chosen by the court) is chosen to hear the case. *Id*.; TEX. CIV. PRAC. & REM. CODE § 154.051 The attorneys present their cases in a summary fashion and may be assisted by witnesses such as experts. The opposing party and person presiding may ask questions and receive answers. The neutral party issues an advisory opinion only. It is binding on the parties only if they so agree and they enter into a written settlement agreement. This provision is rarely used but, unlike arbitration, seems to allow the parties to agree to the binding nature before or after the award is issued, and requires a second step of entering into a written settlement agreement. Id. The advisory opinion is for the purpose of defining issues and developing a basis for realistic settlement negotiations that occur after the mini-trial. *Id*.

A positive aspect of a mini-trial is the disputant does not give up control over the dispute or forfeit the right to proceed with litigation; however, he will hear the arguments of the opposing counsel and receive an advisory opinion. Like most ADR proceedings, the process is confidential, and disclosures during the mini-trial and any opinion issued may not be used in later court proceedings.

3. Moderated Settlement Conference. This is similar to a mini-trial; however, there is a panel of impartial third parties chosen by the parties or the court who review written summaries of the opposing sides, hear oral presentations of less than 30 minutes from each side, allow for questions and answers of each side by the panel and opposition, listen to a brief summation from all counsel, and issue an advisory opinion for the purpose of case evaluation and settlement negotiations. The advisory opinion can include liability and/or damages of the parties, and is not binding. Hopefully, the opinion will then provide the parties with a basis for negotiating a binding settlement agreement. See TEX. CIV. PRAC. & REM. CODE §154.025.

4. Summary Jury Trial. This **process** involves the informal presentation of the parties' positions before the trial judge and a panel of 6 jury members chosen by the attorneys. Like the processes described above, the purpose of this type of dispute resolution is to allow for early case evaluation and development of realistic settlement negotiations. TEX. CIV. PRAC. & REM. CODE § 154.026. Attorneys for the parties present the evidence (that would be admissible at trial) in summary form and do not generally call witnesses. After instruction by the Court, the panel issues a non-binding advisory opinion as to liability and damages. The jurors are not told that the verdict is merely advisory until after their verdict is announced. The court will then allow the attorneys to interview the panel to further assist in their case evaluation.

5. Trial by Special Judge. This is a procedure that allows the parties to have their "day in court" and preserves the right to appeal. It is especially useful if other ADR techniques have been unsuccessful and the trial court is unable to try the case as quickly as the parties want. Trial by special judge is allowed by TEX. CIV. PRAC. & REM. CODE § 151.001, *et seq*., only with agreement of the parties and a referral from the trial court judge. Such a referral stays the court proceedings if the referral is of all issues. TEX. CIV. PRAC. & REM. CODE § 151.001. A judge may refer any or all of the factual and legal issues to a special judge. *Id*. The special judge must be a retired or former district, statutory county court (such as probate court), or appellate judge who has served as a judge for at least four years, has developed substantial experience in his or her area of specialty, has not been removed from office or resigned while under investigation for discipline or removal, and annually completes at least 5 days of continuing legal education. TEX. CIV. PRAC. & REM. CODE § 151.003.

The parties must file a motion with the trial court that requests the referral, waives the right to a jury trial, states the issues to be referred, states the time and place agreed on by the parties for the trial, and states the name of the special judge. TEX. CIV. PRAC. & REM. CODE § 151.002. The special judge must have agreed to hear the case and the fee for the special judge must be disclosed in the motion. *Id*.; see *NCF, Inc. v. Harless,* 846 S.W.2d 79,81 (Tex. App. – Dallas 1992, orig. proceeding). The order of referral must specify the issues referred and the name of the judge while the time and place for trial and time

for filing the special judge's report "may" be included in the order. TEX. CIV. PRAC. & REM. CODE § 151.004.

Unlike arbitration, the Texas Rules of Civil Procedure and Texas Rules of Evidence of the trial court apply to a trial by a special judge. *Id*. Essentially, the trial is identical to a bench trial before the trial judge, including the right to appeal, except a special judge does not have the power to hold a party in contempt unless the person is a witness before the special judge. TEX. CIV. PRAC. & REM. CODE § 151.006. (If the judge is appointed to the case under TEX. GOVT. CODE §74.056, this limited power of contempt is expanded to a full power of contempt.) The special judge "shall" provide a certified court reporter and the judge's and court reporter's fees and costs are equally shared by the parties. TEX. CIV. PRAC. & REM. CODE §§ 151.008-151.009. Each party bears the cost of any witnesses appearing for the trial and no costs may be assessed against the state or local government agencies. *Id*. Although the referring judge may order otherwise, the public's courtrooms and employees may not be used in a proceeding presided over by a special judge during regular working hours. *Id*. This provision would allow for a county employee or court reporter to work for the special judge after hours. TEX. CIV. PRAC. & REM. CODE § 151.010.

There is no prohibition against a special judge allowing discovery; ruling on discovery disputes, motions for summary judgment, and other pre-trial matters; and, entering a docket control order.

Within 60 days of the conclusion of the trial (unless specified differently in the order of referral), the special judge shall submit her verdict in the form required of the trial court. This verdict stands as a verdict of the referring judge's court. TEX. CIV. PRAC. & REM. CODE § 151.011. A new trial may be granted by the referring judge if the special judge fails to timely submit her verdict, a party files a motion for new trial, notice of an oral hearing on the motion is provided, and a hearing is held. TEX. CIV. PRAC. & REM. CODE § 151.013.

The parties' right to appeal the verdict is preserved but only ripens after the verdict is submitted, all parties and claims are disposed of, and the trial court signs an order memorializing the finality of the case. TEX. CIV. PRAC. & REM. CODE § 151.013; *Baroid Equip., Inc. v. Odeco Drilling, Inc.,* 64 S.W.3d 504, 505 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

CONCLUSION

Alternative dispute resolution is imperative in probate cases. **Early** ADR is recommended so that we do not end up mediating the issue of attorney fees instead of incapacity or undue influence—issues which become irrelevant due to the depletion of the estate by litigation fees. Many of our probate, trust and guardianship cases evolve from family dysfunction that has been present for years and sometimes decades. While we cannot heal the family in one ADR session, we can at least try to preserve not only their estate, but any hope of family relationships enduring the loss of the decedent or the incapacity of the proposed ward.

Negotiate early and, if necessary, often!

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Executive Summary of the Texas Uniform Collaborative Law Act

By Lawrence R. Maxwell, Jr. *

This paper will provide an introduction to the collaborative dispute resolution process and address the future of the process in Texas, explain the reasons and benefits of codifying the process, describe the work of the Uniform Law Commission in drafting a Uniform Collaborative Law Act, provide a sectionbysection analysis of the Texas Uniform Collaborative Law Act and encourage its enactment in the 83rd Session of the Texas Legislature.

Overview of Collaborative Law:

The collaborative dispute resolution process (commonly known as "Collaborative Law") is a part of the movement toward the delivery of "unbundled" legal representation. It separates, by agreement, representation in settlementoriented processes from representation in an adjudicatory processes. The organized bar has recognized unbundled legal services like collaborative law as useful options available to parties.

Parties are represented by counsel in the collaborative process. It is a voluntary, structured, nonadversarial approach to resolving disputes wherein parties and their counsel seek to negotiate a resolution of the dispute without having a ruling imposed upon them by a court, arbitrator or other adjudicatory body. The process is based upon cooperation between the parties, teamwork, full disclosure, honesty and integrity, respect and civility, and parity of costs. As is the case with mediation, collaborative law has its roots in the area of family law, and the process is expanding for resolving disputes in many areas of civil law. The process is different from other dispute resolution processes due to its non-adversarial nature and ability to provide a prompt, cost effective resolution for many parties.

The Future of Collaborative Law in Texas:

The collaborative process is a rapidly developing procedure for managing conflicts and resolving civil disputes in all areas of law outside of the courthouse. Voluntary early settlement increases party satisfaction, reduces unnecessary expenditure of personal and business resources for dispute resolution, and promotes a more civil society. The future growth and development of Collaborative Law has significant benefits for parties and the legal profession.

In 2011, the 82nd Texas Legislative Session enacted the Collaborative Family Law Act which became effective September 1, 2011. The Collaborative Family Law Act applies only to matters arising under Title 1 or 5 of the Texas Family Code.

The Texas Uniform Collaborative Law Act ("Texas UCLA") does **not** apply to family law matters governed by the Collaborative Family Law Act, and its enactment will have no effect whatsoever on the Collaborative Family Law Act. The Texas UCLA will amend the Texas Civil Practices and Remedies Code by adding a new Chapter 161, entitled Uniform Collaborative Law Act.

The Texas UCLA has no limitation on matters that can be submitted to the collaborative process and will be covered by the Act. Its enactment will expand the benefits of a collaborative law statute to parties who wish to use the process for resolving disputes in all areas of law.

The Need for Uniformity from State to State:

A number of states have enacted statutes of varying length and complexity that recognize collaborative law, and courts in several states have taken similar action through the enactment of court rules. Collabo-

rative Law agreements are crossing state lines as more individuals and businesses are utilizing the collaborative process.

As the use of the process continues to grow, the Uniform Collaborative Law Act will:

- Provide uniformity from state to state and make the collaborative process more accessible,
- Assure that the process is voluntary,
- Assure that prospective parties are informed as to the material benefits and risks of the process,
- Protect against parties inadvertently or inappropriately entering into the process,
- Provide consistency from state to state regarding enforceability of collaborative law agreements,
- Provide automatic tolling and recommending of applicable statutes of limitations,
- Establish when the collaborative process begins and concludes,
- Assure confidentiality of communications in the process,
- Provide a stay of court and other adversarial proceedings while parties are in the process,
- Make provision for obtaining emergency orders,
- Provide a privilege with appropriate limitations should the process not result in settlement, and
- Eliminate choice of law determinations.

The Need for Uniformity for Resolving International Disputes:

Canada, Australia, several European countries including Ireland and the United Kingdom, and countries in South America have embraced Collaborative Law, and many other countries have shown an interest in the collaborative process. The nature of Collaborative Law makes it ideal for resolving international disputes since it allows the parties a great deal of flexibity when determining choice of law and scheduling.

Passage of the Texas UCLA would provide parties in Texas an additional resource for managing and resolving transnational disputes.

The Uniform Law Commission's Drafting Process:

The Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable. The signature product of the Commission, the **Uniform Commercial Code**, is a prime example of how the work of the Commission has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

In 2007, the Commission determined that uniformity would bring "clarity and stability" to the collaborative process, and set about the task of codifying the process. The stated purpose of the Uniform Collaborative Law Act is "to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties." A Drafting Committee of the Commission conducted a series of conferences for the purpose of drafting an act to codify collaborative law procedures into a uniform act.

In July 2009, meeting in its one-hundred and eighteenth year, the Commission unanimously approved a Uniform Collaborative Law Act.

In March 2010, the UCLA Drafting Committee reconvened and made several additions to the original Act, including the addition of court rules which mirror the Act, and a provision whereby states would have alternatives as to the scope of the Act: (1) limit its application to matters arising under the family laws of a state, or (2) imposing no limitation on matters that can be submitted to the collaborative process.

The Texas Uniform Collaborative Law Act:

a. The Texas UCLA is essentially the original 2009 UCLA with certain modifications that:

b. strengthen the privilege and confidentiality provisions (Sec. 161.112 and 161.113),

c. strengthen the enforceability of settlement agree-

ments under the Act (Sec. 161.105),

d. add a requirement to include the disqualification provision, which is an essential element of the collaborative process, in a collaborative law participation agreement (Sec. 161.101(A)(7)); and,

add a provision to address applicable statutes of limitations (Sec. 161.102(J)). **Section by Section Summary of the Texas UCLA:**

SECTION 1. – SUBCHAPTER A.
APPLICATION AND CONSTRUCTION

Sec. 161.001 sets forth the policy of the State of Texas to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.

Sec. 161.002 provides that in the event the Chapter conflicts with another statute or rule that cannot be reconciled, the Act prevails, and that the Chapter does not apply to family law matters governed by the Collaborative Family Law Act.

Sec. 161.003 emphasizes the need to promote uniformity of the law among states that enact a collaborative law process act.

Sec. 161.004 provides that the Chapter modifies, limits and supersedes federal statutes regarding electronic signatures.

SECTION 1. – SUBCHAPTER B.
GENERAL PROVISIONS

Sec. 161.051 sets forth the title: Uniform Collaborative Law Act.

Sec. 161.052 sets forth definitions of key terms used in the Act, including Collaborative law communication, Collaborative law participation agreement, Collaborative law process, Party, Non-party and Prospective party, Law firm and Proceeding and Tribunal.

Sec. 161.053 makes the Chapter applicable to a collaborative law participation agreement meeting the requirements of Sec. 161.101, which is signed on or after its effective date.

SECTION 1. - SUBCHAPTER C.
COLLABORATIVE LAW PROCESS

Sec.161.101 establishes minimum requirements for a collaborative law participation agreement, which is the agreement, that parties sign to initiate the collaborative law process.

The agreement (1) must be in a record, (2) signed by the parties, (3) state the parties intention to resolve the matter through collaborative law, (4) describe the nature and scope of the matter, (5) identify the collaborative lawyers, (6) confirm the engagement of each collaborative lawyer, and (7) state that the collaborative lawyers are disqualified from representing their respective parties before a tribunal relating to the collaborative matter, except as otherwise provided in the Chapter.

The Section further provides that the parties may include other provisions not inconsistent with the Chapter.

Sec.161.102 specifies when and how the collaborative law process begins, and how the process is concluded or terminated. The process begins when parties sign a participation agreement, and any party may unilaterally terminate the process at any time without specifying a reason. The process is concluded by a negotiated, signed agreement resolving all of the matter, or a portion of the matters and the parties' agreement that the remaining portions of the matters will not be resolved in the process.

Several actions will terminate the process, such as a party giving notice that the process is terminated, beginning a proceeding, filing motions or pleadings, or requesting a hearing in an adjudicatory proceeding without the agreement of all parties, or the discharge or withdrawal of a collaborative lawyer.

The Section provides that under certain conditions the collaborative process may continue with a successor collaborative lawyer in the event of the with-

drawal or discharge of a collaborative lawyer. The parties' participation agreement may provide additional methods of terminating the process.

The Section further provides that a tribunal may not order a party to participate in the process over that party's objection and contains a provision to address applicable statutes of limitations.

Sec. 161.103 creates a stay of proceedings before a tribunal (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law with the tribunal. A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to insure confidentiality of the collaborative law process.

Parties must notify a tribunal when the collaborative process concludes or terminates. Two years after the date of the stay, after giving the parties an opportunity to be heard, a tribunal may dismiss a proceeding based on delay or failure to prosecute.

Sec. 161.104 creates an exception to the stay of proceedings by authorizing a tribunal to issue emergency orders to protect the health, safety, welfare or interests of a party or nonparty; which would include the financial or other interests of a party in any critical area in any civil dispute. However, the granting of such emergency orders must be agreed to by all parties; otherwise, the process is terminated.

Sec. 161.105 makes a settlement under the Act enforceable in the same manner as a written settlement agreement under Sec. 154.071 of the Civ. Prac. & Rem. Code, provided that the settlement agreement is signed by each party and their collaborative lawyers and clearly states that it is not subject to revocation.

Sec. 161.106 sets forth the disqualification provision, which is a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process conclude or terminate without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated, are disqualified from representing a party in a proceeding before a tribunal relating to the collaborative matter, except to seek emergency orders ***(Sec. 161.104)*** or to approve an agreement resulting from the collaborative law process ***(Sec. 161.105).***

The disqualification requirement is further modified regarding collaborative lawyers representing low-income parties ***(Sec.161.107)*** and governmental entities as parties ***(Sec. 161.108)***.

Sec. 161.107 creates an exception to the disqualification for lawyers representing qualified, low income parties, such as in a legal aid office, law school clinic; or, a law firm providing free legal services to low income parties. If the process terminates without settlement, a lawyer in such organizations or law firms with which the collaborative lawyer is associated may represent the low income party in an adjudicatory proceeding involving the matter in the collaborative law process, provided that the participation agreement so provides, and the representation is without fee, and the individual collaborative lawyer is appropriately isolated from any participation in the collaborative matter before a tribunal.

Sec. 161.108 creates a similar exception to the disqualification requirement for lawyers representing a party that is a government or governmental subdivision, agency or instrumentality.

Sec. 161.109 sets forth another core element of collaborative law process. Parties in the process must, upon request of a party, make timely, full, candid, and informal disclosure of non-privileged information substantially related to the collaborative matter without formal discovery, and promptly update information that has materially changed. Parties are free to define the scope of disclosure in the collaborative process, provided that limits on disclosure do not violate another law, such as an Open Records Act.

Sec. 161.110 affirms that standards of professional responsibility of lawyers and child and adult abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.

Sec. 161.111 sets forth requirements that collaborative lawyers fully inform prospective parties regard-

ing the specifics of the collaborative process prior to signing a participation agreement. A collaborative lawyer is required to discuss with a prospective client factors that the collaborative lawyer reasonably believes relate to the appropriateness of the prospective client's matter for the collaborative process, and provide sufficient information for the client to make an informed decision about the material benefits and risks of the process as compared to the benefit and risks of other reasonably available processes, such as litigation, arbitration, mediation or expert evaluation.

A prospective party must be informed that the collaborative process is voluntary and any party can unilaterally terminate the process without cause, and of the other events that will terminate the process. Further, a prospective party must be informed of the effect of the disqualification requirement in the event the matter is not settled.

Sec. 161.112 provides that collaborative law communications developed in the collaborative process are confidential to the extent agreed by the parties, or as provided by state law other than the Chapter.

This Section provides that the conduct and demeanor of participants in the process is confidential; and, if agreed by the participants, confidentiality may relate to communications occurring before a participation agreement is signed.

This Section further provides for *in camera* inspection of communications, records or materials to determine disclosure issues which cannot be resolved by the participants.

Sec. 161.113 creates a broad privilege prohibiting disclosure or the admission into evidence or testimony before a tribunal of communications developed in the process in legal proceedings. The privilege applies to party and non-party participants in the process and the collaborative lawyers.

An oral communications or written material in the collaborative process is admissible or discoverable if it is admissible or discoverable independent of the collaborative law process, or obtained outside of the process.

This Section further provides for *in camera* inspection of communications and written material to determine disclosure or admissibility issues which cannot be resolved by the participants.

Sec. 161.114 sets forth a number of exceptions to the privilege and confidentiality based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records act, or to prove or disprove professional misconduct or malpractice or that a settlement agreement was procured by fraud or duress, or to challenge or defend the enforceability of a settlement agreement.

The Section provides that all participants may agree in advance in a signed record that all or part of the process is not privileged or confidential. The Section further provides under certain circumstances, that there is no privilege or confidentiality if, after a hearing *in camera* a tribunal finds that the evidence is not otherwise available and the need for the evidence substantially outweighs the interest in protecting privilege or confidentiality.

Sec. 161.115 deals with enforcement of flawed settlement agreements, i.e., agreements made in a collaborative process that fail to meet the mandatory requirements for a participation agreement as set forth in Sec.161.101; and/or situations where a collaborative lawyer has not fully complied with the informed consent requirements of Sec. 161.014.

The Section provides that when the interests of justice so require, a tribunal is given discretion to enforce an agreement resulting from a flawed participation agreement, if the tribunal finds that the parties intended to enter into a participation agreement, and reasonably believed that they were participating in the collaborative process.

Support Enactment of the Texas UCLA:

The Texas UCLA has the full support of the Uniform Law Commission, the ADR and Collaborative Law Sections of the State Bar of Texas, and many members of the judiciary, legal educators, individuals and organizatons in Texas.

The future growth and development of Collaborative Law has significant benefits for parties and the legal profession, and codifying the collaborative process will make it a more accessible dispute resolution option for parties

Supporters of the Texas UCLA encourage its enactment in the 83rd Session of the Texas Legislature.

Lawrence R. Maxwell, Jr. *is an attorney, mediator, arbitrator and practitioner of collaborative law in Dallas. Larry was chair of the committee that drafted the Texas Uniform Collaborative Law Act. He was the ABA Section of Dispute Resolution Advisor to the Uniform Law Commission's Drafting Committee that drafted the original Uniform Collaborative Law Act. He currently serves as co-chair of the Section's Collaborative Law Committee. Larry was a cofounder and currently serves as chair of the State Bar of Texas Collaborative Law Section. He was a co-founder and is currently serving as the Executive Director of the Global Collaborative Law Council. He has authored numerous articles and has made presentations on collaborative law nationally and internationally.*

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The author wishes to acknowledge the valuable contributions made by a number of Texas attorneys in drafting the original UCLA (which has been enacted in four states and the District of Columbia); the Texas Family Collaborative Law Act (which was enacted by Texas in 2011); and the Texas UCLA (which will be introduced in the 2013 Session of the Texas Legislature). Thank you: Peter K. Munson, Harry L. Tindall, Norma L. Trusch, Kevin R. Fuller, Gay G. Cox, Kristen Algert, Thomas L. Ausley, Winifred "Winnie" Huff, Sherrie R.Abney, Robert C. Prather, Jr., and Harry L. Munsinger.

Wendy Huber -- Peacemaker Extraordinaire

By Alvin Zimmerman

Elizabeth Winthrop ("Wendy") Huber, a former Chair of the State Bar of Texas ADR Section, is a University of Houston Law Center graduate. She has two children and lives in Bellville, Texas, with her husband, Professor Stephen Huber (who is the co-editor of our Section's newsletter with Wendy). She is being featured in this edition of the ADR Newsletter because of her extraordinary career, and a recent life changing event. Wendy's journey through dispute resolution has now found a new and permanent home, which is discussed below.

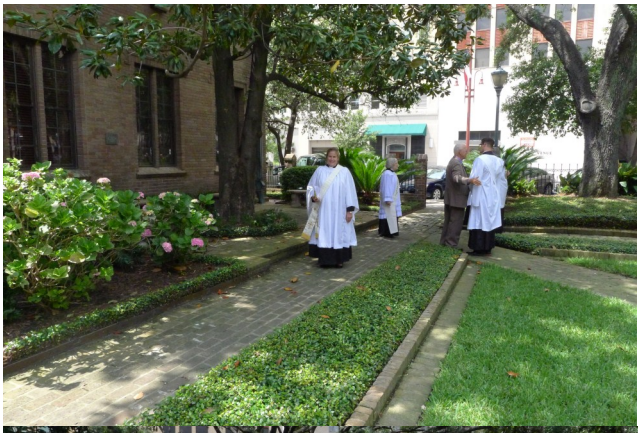
Wendy was born in 1956. She completed college at the University of Houston, where she graduated *magna cum laude*, and was President of the Students' Association. Her career has included the practice of law in Houston, Texas. She has been the Executive Director of the AA White Dispute Resolution Institute, where she taught and trained mediators through that program; independent consultant to companies that were creating in-house dispute resolution programs; and the CEO of the Dow Corning Settlement Trust (reporting to a federal judge. Under this program she supervised 250 employees, and was responsible for a multi-billion dollar trust that settled claims in multiple countries.

She also served for several years as the Southwest regional vice president for the American Arbitration Association (Texas and surrounding states). While at the AAA, she was involved in coordinating the use of arbitration clauses in user/company contracts, preparing and revising forms, rules and training material, and conducting and organizing their training sessions/CLE for AAA panelists throughout the country.

On June 17, 2012, in Houston, Texas, after completing a multi-year program, Wendy was ordained as a Deacon in the Episcopal Church; she will be ordained a Priest in about six months (depending on the schedule of the Bishop of the Archdiocese of Texas). She is the Pastoral Leader at St. John's Episcopal Church in Marlin, Texas. From an attorney who worked to settle cases, to full time mediator who resolve other party's conflicts, to a teacher of students in improving and crafting the skills of ADR persons, to an organizer and administrator of dispute resolution procedures with national groups, to such a grand new place marker in such a special career of a very special person–she now wears the collar of her faith to shepherd her flock into the ultimate peacemaking–confession, contrition, and tending to the many personal, spiritual, and life cycle events and needs of her congregation and her fellow man.

We, who know Wendy, congratulate her on this milestone event in her life. May this new journey be filled with love, compassion and peace.

WENDY HUBER ORDAINED IN THE EPISCOPAL CHURCH



Someone to Talk To

Some Reasons to Create an Organizational Ombuds Office

By Michael Palmer and Kay Elkins Elliott

Three months after joining Superior Games, Inc., Sandra, a single mother of two small children, could hardly wait to leave on her first business trip. But shortly after arriving in Houston, she was mortified as some of the men walked around in the firm's apartment in their underwear, played pornographic DVD's on the TV, and made sexually suggestive comments to her. The worst offender was her direct supervisor.

What would you do, if you were Sandra? Would you report the problem? To whom? Superior Games has a close-knit culture. The investigation following a report to HR or the president would disclose your identity, setting you up for various kinds of retaliation.

Would you seek out a lawyer? A lawyer would probably tell you that repeated occurrences of this kind of thing is evidence of an illegally hostile work environment, but an isolated incident might not be enough to win a case. And even with a good case, it would take years before you would be vindicated, leaving you vulnerable to termination and other kinds of retaliation in the meantime.

Most people in Sandra's situation try to cope on their own because they fear their lives will be made worse if they report the harassment or bullying. But that's not good for them or their employers. Many people can't cope on their own. They get headaches, anxiety attacks, or even more serious illnesses. They start missing work. They show up only for the required hours and make at best a minimal effort. Productivity suffers. Sometimes victims of abuse steal or commit acts of sabotage to get back at the company.

The most capable targets of harassment and bullying find other jobs and leave, taking all their knowledge and skills with them, some of which the organization paid for. On average organizations pay roughly 1.5 times the total compensation package of departing employees for replacements, not counting all the training needed to get them up to the level of the people they replace.

These and other consequences of the failure to prevent and deal effectively with harassment and bullying cost the average unprotected organization between $500 and $1,000 per employee every year. The average company with no effective harassment prevention program in place loses between $500 and $1,000 per employee every year from unnecessary turnover, absenteeism, illness, and other expenses. *See* Michael Palmer, "The Financial Costs of Harassment, Bullying, and Abuse in Organizations," (An Ethics By Design Whitepaper, February 2012) [copy available upon request to mp@ethicsbydesign.com]. That means that the annual profit of a company with 200 employees shrinks by $100,000 to $200,000. At a 10% profit margin, the company must sell $1,000,000 to $2,000,000 of goods and services to make up the difference. Unprotected organizations also risk being sued by targets of harassment. On average, defendants incur an average of $250,000 in legal expenses and damage awards averaging the same amount if they lose. In one recent case, a jury awarded the plaintiff over $90 million against a multi-state company with 10,000 employees.

Or consider George's story. At 55, George is growing increasingly anxious about keeping his job as a paralegal at Stellar Law Firm, PLC. The

comments about his age, claiming that he can't keep up with cases might be filing expense reports containing substantial personal travel and lodging expenses to be billed to the client, he knew he should say something. But he felt his job already hung by a slender thread. Should he risk going up against one of the most powerful women in the firm? And what if his suspicions were wrong?

If you were George, would you blow the whistle on the senior attorney? She brings in a ton of business and has a lot of clout in the firm. What will happen to George if he is mistaken about the expense reports? The firm might be looking for an excuse to get rid of him, and his unfounded report would give it a defense to an age-discrimination claim. George will likely keep his suspicions to himself, saying nothing to anyone who might be able to investigate. If George's suspicions are correct, on the other hand, the firm is in jeopardy of having a major scandal erupt with severe damage to its reputation, not to mention the risk that the senior attorney might be stealing in other ways.

Unprotected organizations annually lose 5-7% of gross revenue to fraud, theft, and corruption. The Association of Certified Fraud Examiners estimates that the average organization with no fraud prevention program in place loses between 5-7% of its revenue through fraud, theft, and corruption every year. A company with $5,000,000 of income could take an annual hit to its bottom line by as much as $250,000 to $350,000. Stellar Law Firm, PLC, acting rationally, would want to know what George knows.

Most people in George's situation keep what they know to themselves. The potential costs to whistleblowers is just too great—even if they are correct.

The stories of Sandra and George and millions of others just like them present organizations of all types and sizes—commercial enterprises, nonprofits, and government agencies—with a serious problem. They lose efficiency and money because misconduct goes unreported. While targets of abuse desperately want to tell someone, they value confidentiality more. And the organization cannot guarantee confidentiality if it receives official notice of the problem. Under federal and some state statutes, once an organization has official notice of harassment and other types of misconduct, it has no affirmative defense against a lawsuit if it fails to investigate and take remedial action. *See, e.g., Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). A report to any supervisor or manager constitutes official notice for affirmative defense purposes.

> "I think employees and licensees found that they could trust the ombuds office. They could talk to me. They couldn't talk to their regional manager. Their zone manager was kind of removed. **People need somebody they can talk to."**
>
> John D. Cooke
> Founding Ombuds
> McDonald's

The Organizational Ombuds Office

What if employees could go to an office within the organization to get help with interpersonal frictions and other grievances with a *guarantee of confidentiality*, an office with dispute resolution experts who were completely impartial, and that operated with full independence from managerial interference? Would employees use such an office? Would it help to resolve problems before they escalate into major lawsuits? Is such a thing possible?

The answer is Yes. Organizational Ombuds Offices perform this function in hundreds of organizations around the country with remarkable success. And although an ombuds privilege of confidentiality has not yet been recognized by all courts, it has been widely adopted in numerous court decisions. *See* Charles L. Howard, *The Organizational Ombudsman: Origins, Roles, and Operations* 220 -255 (Chicago: American Bar Association, 2010).

Moreover, Texas and other states are considering passage of shield laws that will function much like the Uniform Mediation Act to establish an ombuds-employee privilege.

In 2001, Dispute Resolution Section of the American Bar Association adopted a resolution setting forth three principles of effective ombuds offices:

Independence

Impartiality

Confidentiality

directly responsible for a person under the ombuds jurisdiction (a) can control or limit the ombuds performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office." **Ombuds Offices Provide Multiple Financial and Other Net Benefits**

Organizational ombuds offices add a powerful but inexpensive resource to organizations, enabling them to help resolve conflicts for which employees have no legal recourse. Consider, for example, soft-spoken Jennifer, an exceptionally competent bookkeeper. Joe, the head of the company had told her how much they valued her work and backed up the praise with substantial raises and benefits. The HR director was shocked, therefore, when she submitted her resignation.

On the day she left, Joe took Jenny aside to find out why she was going to another job. After some hesitation, she finally blurted out, "Well, if you must know. Barbara has been bullying me for almost a year now. I tried everything to get her to stop, but she kept getting worse. I just couldn't take it anymore." Stunned, Joe said he had known nothing about this and asked why she hadn't come to him with the problem. "I was afraid you would take her side and I'd be out of a job. I just decided my best alternative was to find another job."

What might happen if Jenny could go to an ombuds on a strictly confidential basis?

First, she would have someone to talk to, someone trained to listen empathetically, someone who was professionally trained in conflict management, someone who could help her develop a strategy for resolving the problem.

Second, she could ask the ombuds to mediate the conflict. If she chose this option, she would have given up confidentiality, at least with respect to her tormentor, but it would be her choice.

Third, the ombuds officer might help her get a transfer or find another non-confrontational solution.

The value of an ombuds office to the company goes beyond resolving individual disputes (and reducing unnecessary illness, absenteeism, and turnover). As Howard explains, the work of an organizational ombuds "can be distilled into three broad categories: communications and outreach, issue resolution, and identification of areas for systemic change and issue prevention."

The Ombuds will

Listen to concerns

Keep information confidential

Remain impartial to all individuals

Help clarify concerns

Help identify and evaluate resolution options

Provide information and coaching

Assist in achieving outcomes consistent with fairness, Eaton values and the law

Offer informal mediation and shuttle diplomacy

Act as an early warning system and identify workplace issue trends

Identify changes that prevent issues from recurring

The Ombuds will <u>not</u>

- Breach confidentiality
- Take sides
- Conduct formal or in-depth investigations
- Determine policy
- Make management decisions
- Substitute for formal channels

Serve as an agent of notice for Eaton Corporation

The ombuds office can promote systemic change and issue prevention by aggregating case information anonymously and using the statistical results to make recommendations about harassment prevention training, the development of new policies, the adoption of an ethical leadership program for managers, and other prevention strategies.

Ethics and Organizational Risk Management

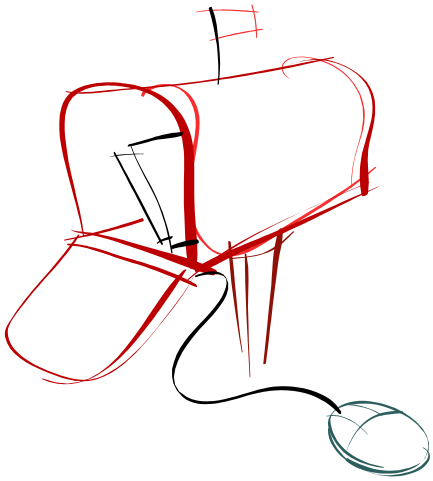
Following the Enron, Worldcom, Tyco, Peregrine Systems, and Adelphia scandals, Congress enacted ethics requirements in the Sarbanes-Oxley legislation, the United States Sentencing Commission expanded the ethics provisions of the U.S. Sentencing Guidelines, and Congress ordered the revision of the ethics provisions of the Federal Acquisition Regulation. All of these efforts were designed to reduce crime in the suites but also to make public corporations healthier and more durable. When organizations adopt effective ethics programs, not only do the organizations cause less harm to outsiders, but they are also better protected against predators from within.

The federal legislation and regulations are creating a federal law of ethics that is becoming the default standard not only for public corporations and government contractors but also for non-profits, private entities, and municipalities and other government agencies. While not required under this federal law of ethics, ombuds offices provide all organizations with 100 or more employees with a powerful instrument to help the organization do the right thing.

In the next installment of this series, Kay Elliott and I will expand on the importance of effective ethics programs in municipalities and similar organizations.

A native of Pampa, Texas, Michael Palmer has worked since 1980 as a lawyer and dispute resolution professional first for Jenner & Block in Chicago and then as head of his own firm in Middlebury, Vermont. Holder of a Ph.D. in ethics and a J.D. from Georgetown, Mike founded ETHICS BY DESIGN in 2007 to help organizations of all types and sizes build trust, assure compliance, and prevent fraud and misconduct. Mike is the inventor of the Case Valuation Analyzer™ and the author of the soon-to-be-published book, *Win Before Trial: What Every Courtroom Lawyer Must Know and Do to Get the Best Deals for their Clients* as well as *Complying With the Ethics Mandates of the Federal Acquisition Regulation* and other books and articles on organizational ethics. He can be reached at mp@ethicsbydesign.com and 802 870 3450.

**** Kay Elkins Elliott*** maintains a private practice, Elliott Mediations, serves as ADR coordinator and adjunct professor at Texas Wesleyan University School of Law, and is a founding member of the Texas Mediation Trainers Roundtable. Ms. Elliott is a board member of the Texas Mediator Credentialing Association, the only organization in Texas that offers credentialing to mediators. She served on the State Bar of Texas ADR Council, is co-editor of the Texas ADR Handbook, 3rd edition and writes a mediation column in the Texas Association of Mediators Newsletter and the TCAM Newsletter.



ADR ON THE WEB

By Mary Thompson*

TEDTalks

http://www.ted.com/

How to Conservatives and Liberals See the World
Bill Moyers' Interview with Jonathan Haidt
http://billmoyers.com/episode/how-do-conservatives-and-liberals-see-the-world/

Jonathan Haidt on the Moral Roots of Liberals and Conservatives
TED Talks
http://www.ted.com/talks/jonathan_haidt_on_the_moral_mind.html

Civilpolitics.org
Evidence-based ideas for Improving America's Political Dialogue
http://civilpolitics.org/

In the last several years, the dispute resolution field has been influenced by disciplines that explore perceptions of differences: social constructionist theory, social psychiatry, and cognitive science. These areas of inquiry have given rise to innovative approaches to conflict, especially in the areas of value conflict, political discourse and the polarization of the American political system.

This is the context for the work of Jonathan Haidt, a social psychologist from the University of Virginia. His book, *The Righteous Mind: Why Good People are Divided by Politics and Religion,* explores the moral biases, and the costs of American society's divisions.

Haidt proposes that liberals and conservatives not only live by distinct moral codes, but exist in "lifestyle enclaves", thereby isolating themselves from people who are different. As Haidt says to a liberal audience, "once you understand this difference, you'll understand why anybody would eat at Appleby's, just not anybody you know."

The differences between liberals and conservatives can be understood based on affiliations with six moral foundations: care/compassion, liberty, fairness, loyalty, authority and sanctity. Liberals and conservatives relate to these foundations in different ways, and the differences are consistent across cultures. These foundations are used not only to justify views on public issues but also to construct separate realities, (or "moral matrices") which lead to demonizing and discounting the other side.

Haidt's solutions to this challenge to civil discourse will be familiar to dispute resolution professionals. Our society must set standards and expectations for civil discourse, and against demonizing those with whom we disagree. We need to step out of our comfortable "moral matrix" to seek to understand the perspective of our opponents. And we to bring together people who disagree, because, as Haidt claims, the truth is not found through individual reasoning, but through the pursuit of understanding and common ground among competing viewpoints.

Listed above are just a few of the web-based resources relating to Haidt's work. Moyers' interview with Haidt is an in-depth conversation focusing on the current political climate in the US. The TED Talks presentation is a 20-minute, entertaining, humorous and rapid-fire overview of Haidt's work on

moral development and its role in society. Haidt's website, CivilPolitics offers research, teaching materials and practical strategies for understanding differences and for bridging the moral divide. His work provides a valuable perspective for those who might want to help change the tone of another contentious campaign season.

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

Editors' Comment: TED provides interesting discussions about often complex topics that is addressed to moderately serious readers -- such as the individuals who peruse the pages of Alternative Resolutions. Set out below is some information about TED and TEDTalks that appears on the TED Web Site.

TED is a nonprofit devoted to Ideas Worth Spreading. It started out (in 1984) as a conference bringing together people from three worlds: **Technology, Entertainment, Design.**Since then its scope has become ever broader. Along with two annual conferences -- the TED Conference in Long Beach and Palm Springs each spring, and the TEDGlobal conference in Edinburgh UK each summer -- TED includes the award-winning TEDTalks video site, the Open Translation Project and TED Conversations, the inspiring TED Fellows and TEDx programs, and the annual TED Prize.

TEDTalks began as a simple attempt to share what happens at TED with the world. Under the moniker "ideas worth spreading," talks were released online. They rapidly attracted a global audience in the millions. Indeed, the reaction was so enthusiastic that the entire TED website has been reengineered around TEDTalks, with the goal of giving everyone on-demand access to the world's most inspiring voices.

ETHICAL PUZZLER

By Suzanne M. Duvall

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to214-368-7528.

"It's not what you don't know that get's you in trouble, it's what you think you know for sure—especially if it ain't so."

Mark Twain

In this issue I have asked several prominent mediators and/or arbitrators to examine, without breaching confidentiality, some of their mistakes and how those mistakes have helped them to become better mediators and/or arbitrators. Here are their answers.

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Jeff Abrams (Dallas): Early in the first year of my mediation career, I convened a joint session in a personal injury case. I asked for "brief presentations" by both sides. Plaintiff's counsel brought his demonstrative exhibits and proceeded to grandstand with an opening presentation that lasted 3 hours, monopolizing the room, and taking potshots at the individual defendants. I lost control of the process and it was hard to get back on track. Even though we settled the matter at the end of the day, I vowed not to lose control ever again.

I learned to establish clear objectives with counsel by telephone in advance of the mediation and to communicate MY expectations in terms of the opening session. I ask that presentations be kept to a minimum, preferably 10 to 15 minutes (30 minutes maximum). I ask that they cover key strengths, both factually and legally. I suggest the presentation be directed to the decision-maker, not to opposing counsel. I advise that they be firm and respectful, extending an olive-branch desire to settle coupled with a clear determination to pursue the claim/defense if a negotiated settlement is not achieved. I begin to discuss negotiation strategy before sitting down at mediation.

I'm often convincing lawyers not to dispense with the opening session. It offers valuable insight into the issues as framed by the lawyers, the "bookends to the problem." A joint session gives the parties an opportunity to evaluate opposing counsel as a presenter and advocate. I often ask the parties to listen as dispassionately as possible to both sides, to put themselves in the shoes of the neutral "juror" without a stake in the outcome; I thank the for listening attentively.

As Mediator, I control the room, orchestrate the process, and conduct the proceedings. Joint session work cuts through communication problems, putting a face on the other side, fostering a positive atmosphere (when done well), and encourage dialogue, a process of speaking and listening directly, without a filter. It gives the Mediator a running start for analysis, since everything said in joint session is on the table. It is a face-off, for the problem and the people.

Tension in the joint session is not bad; it can be used to shift paradigms. I allow a level of discomfort (not disrespect) so the parties get a taste of what the alternative (the real courtroom) might be like. Some tension is good and productive. If it gets to be too much for a party to handle, I break into caucus and someone is grateful for being rescued. Either way, it maintains my authority as a mediator. I take from the joint session what is needed to begin the process of settling the case.

My lessons — stay in control, communicate expectations to counsel, plan a strategy, encourage a joint session, and manage it well.

Erich Birch (Austin): Early in my mediation practice I took it for granted that adversarial parties, especially in a business dispute, would want to maximize their final settlement amount. However, I learned that even in business matters the heart can play an important role. In one mediated business dispute it became apparent during caucus discussions that one party was completely out-matched financially. In fact, it was very likely that the plaintiff might not even be able to maintain his lawsuit. The defendants were aware that the plaintiff had limited funds and shared with me their planned strategy to simply outspend the plaintiff in the litigation. I acknowledged (within confidentiality limits) the potential for success of this strategy.

But I then reminded the defendants that the plaintiff had stated some legitimate claims, and asked if they'd really thought about the plaintiff's circumstances and the devastating financial impact this strategy would have on the plaintiff if they were successful. After some additional discussion along these lines, to my surprise, the defendants moved from their initial position of "not one dime" to unilaterally crafting a settlement specifically designed to allow the plaintiff to pay off his debts and stay in business. The defendants felt the plaintiff was naïve and had learned a lesson, and decided they wanted to help and essentially viewed their settlement payment as a benevolent grant. So I marveled and learned it might be a mistake to overlook the extent to which the financially irrational heart can play a role, even in a hotly contested business dispute.

William H. Lemons (San Antonio): At the recent CLE Program that the Association of Attorney-Mediators put on in Chicago, I was astonished to learn that such stalwarts as Ross Stoddard and Tray Bergman had, contrary to general public perception, *never* settled a case as Mediator. Not one. *Nada*. Now, they have helped several thousand parties settle their cases, however. This brought to mind something that happened during one of my very first mediations.

I had just completed AMI training, had my new notebook and all of the forms, and was raring to go. Sure enough, I got appointed by a federal court in the Northern District of Texas to mediate a fire case. Conflagration. A homeowner's electric oven/range had allegedly started a fire that burned down his house. The insurance company, as a subrogee, now sued the manufacturer of the range. I suppose that had I paid a little more attention to the style of the pleadings, I would have noticed that this was a Godzilla vs. King Kong situation.

The manufacturer was represented in my mediation by a crusty ole trial lawyer who did nothing but defend fire cases. If it burned, sparked or caused a conflagration, Steve got involved. So in my general session, he played a full color narrated Underwriter's Laboratory 28-minute film of a test that proved conclusively this oven could not possibly start a fire. No how, no way. And so, Mr. Lemons, "that is why we have never paid a dime in settlement of one of these cases, and see no reason to do that today."

The representative of the insurance company, who was maybe 24 years old, and on the job a mere 6 weeks, explained to me in a private caucus that, if fit would help the process, his insurance company subrogee-to-the-homeowner could non-suit the case against the oven manufacturer. Well, Bingo we got a settlement in the first 30 minutes!

But it really irritated me that Steve told me he would not pay a dime in *my mediation*. So I worked the case hard until mid-afternoon, when he begrudgingly offered to pay $10,000 in cash to settle, but not a dime more.

My insurance company responded that it would require two things to settle, and I took that message to Steve. Steve, they want $12,000. What else he asked? Well, I knew I had him then. Steve, they want a copy of the VHS tape that you played in the general session. They have never seen anything like that. Well, Steve lit up like a small child on his birthday, and ran a copy of the tape while I wrote up the $12,000 settlement.

Later, I learned that representatives of both companies met in a large city in the northeast and settled 278 more cases where this oven had burned down someone's house. Allegedly.

The problem that confounded me as I flew home to San Antonio that evening is that I had taken control of the parties' settlement. The constituents would have settled for a dismissal without prejudice, and no further consideration. But no, that was a challenge, indeed an insult, to this Mediator and the damned oven manufacturer had no business getting off that light. Not in one of my mediations.

And so, that is the one and only case that I settled as a Mediator. I have had many hundreds after that where the parties settled the dispute, and I kept my nose out of it. So remember, when one side asks "what would you do now," or "how much should we put on the table," to be careful that this doesn't become your settlement. There is no such thing as a bad or unfair settlement, where both sides are armed with enough information to make an informed decision, and make that call. But I have to constantly try to remember that it is not my case, and certainly not my call.

Mike Patterson (Tyler): When I first started to mediate I would review the confidential information summaries from the attorneys, listen intently to everyone during the joint session (everyone wanted a joint session back then), and after meeting with each party I would decide what I thought would be a fair settlement. Then I went to work trying to get the parties to land there. Of course, they usually didn't settle at my number.

After hearing a couple of times from the attorneys after the mediation things like, "Mike, I knew you were pushing for X, and you didn't know this, but, we couldn't offer that because of Y…," a light went off. I came to understand that my role as a mediator did not involve deciding what constituted my idea of a fair settlement, rather my role was to insure a fair process and allow the parties to decide what they thought was fair. Like beauty, a fair settlement is in the eye of the beholder. There are often issues and factors involves of which the mediator is unaware. Just the value in settling and ending a lawsuit can vary greatly depending on the individual.

Today, after 15 years of mediating I still have to remind myself of this early lesson. I have to watch out for what I call the arrogance of experience. Even though after hearing a little bit about the case I may have a good ides where the case will settle, I let the parties move along and negotiate in the manner in which they are comfortable, without any pressure from me so that they can settle on a mutually agreeable resolution.

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Comment: Common sense would tell us that it's the inexperienced mediator, the rookie mediator, the "baby mediator" who is most likely to make mistakes that turn out to be learning experiences. But here we have well-seasoned mediators who all paint us the same picture—proving that Mark Twain was right, *"It's not what you don't know that gets you in trouble, it's what you think you know for sure — especially if it ain't so…"* to which I might add, in Mike Patterson's eloquent phrase, especially if we suffer from the arrogance of experience.

* ***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.*

CALENDAR OF EVENTS 2012

Commercial Arbitration Training * Houston * August 15-18, 2012 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Austin * August 15, 16, 17, 21 and 22, 2012 * Corder/Thompson & Associates, **www.austindrc.org**

40-Hour Basic Mediation Training * Houston * August 16-18 continuing August 23-25, 2012 * *Worklife Institute* * For more information contact Diana C. Dale or Elizabeth F. Burleigh * Phone: 713.266.2456 * Website: **http://www.worklifeinstitute.com**

8th Annual Civil Collaborative Law Training & Symposium * Dallas * August 23-24, 2012 * *Dallas Bar Association Collaborative Law Section, Global Collaborative Law Council and Texas Center for Legal Ethics* * Contact Anne Shuttee 214-237-2922 or Larry Maxwell 214-265-9668 * Website: **http://www.collaborativelaw.us/articles/training/GCLC_Training.pdf**

40-Hour Basic Mediation Training * Houston * September 7-9 continuing September 14-16, 2012 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Ruidoso, New Mexico * September 10-14, 2012 * *Office of Dispute Resolution of Lubbock County* * For more information Harrison W. Hill at (806)775.1720 * HHill@co.lubbock.tx.us * Website:**http://www.co.lubbock.tx.us/egov/docs/1291311234620.htm**

40-Hour Mediation Training * Houston * September 27-30, 2012 * *Manousso Mediation & Alternative Dispute Resolution—Conflict Resolution Services and Training* * Phone 713.840.0828 * Website: **http://www.manousso.us**

Family Mediation Training * Houston * October 17-20 * *Worklife Institute* * For more information contact Diana C. Dale or Elizabeth F. Burleigh * Phone: 713.266.2456 * Website: **http://www.worklifeinstitute.com**

40-Hour Basic Mediation Training * Austin * November 26-30, 2012 * *The University of Texas in Austin School of Law, Center for Public Policy Dispute Resolution** Phone 512.471.3507 * email at cppdr@law.utexas.edu * Website: **http://www.utexas.edu/law/centers/cppdr**

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Fall	September 15, 2012	October 15, 2012
Winter	December 15, 2012	January 15, 2013
Spring	March 15, 2013	April 15, 2013
Summer	June 15, 2013	July 15, 2013

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

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

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2012 to June 2013. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____

Public Member _____ **Attorney**_____

Bar Card Number _____

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City_____ **State**_____ **Zip**_____

Business Telephone_____ **Fax**_____ **Cell**_____

E-Mail Address:_____

2012-2013 Section Committee Choice_____

ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. Names, dates, quotations, and citations should be double-checked for accuracy.
5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. Check your mailing information, and change as appropriate.
8. The author should provide a brief professional biography and a photo (in jpeg format).
9. The article may have been published previously, provided that the author has the right to submit the article to Alternative Resolutions for publication.

Selection of Article

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

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

Preparation for Publishing

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

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

Future Publishing Right

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

ALTERNATIVE RESOLUTIONS
POLICY FOR LISTING OF TRAINING PROGRAMS

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

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

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

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

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

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

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

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

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2012, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

http://www.texasadr.org