

# MEDIATOR QUALIFICATION TRAINING MANUAL

## *PREFACE*

In the first chapter of this manual, the reader will find a brief historical reference to *alternative* resolution (ADR) forms used by early Texas settlers. Although this history suggests an awareness of ADR concepts by these pioneer leaders, it actually was many years later that Texas first adopted a comprehensive ADR procedural system. In 1987, Texas enacted the Texas Alternative Dispute Resolution Procedures Act as did many other states, which mandates and empowers all Texas courts to implement the state's declared policy of encouraging the peaceable resolution of disputes and the voluntary settlement of pending litigation. Since the creation of this broad ADR procedural system, Texas has led the nation in developing new *alternative* ways for people to resolve their disputes.

Today, as never before, we need to examine new and innovative ways to make ADR processes more efficient, effective, and affordable. In this training course, we hope to give each participant skills training and a basic knowledge of mediation and other ADR processes. We also hope to create an awareness of several new ADR processes that use advanced computer technology and telecommunication systems to assist parties in rational decision-making and online settlement negotiations.

We believe it is eventually possible to attain a societal future of peaceable dispute resolution where conflict is no longer resolved through destructive means. However, we also recognize that such a goal may only be achieved through a collaborative global effort in which conflict resolution protocols are founded on *responsible dispute resolution* ideals such as truth, civility, and mutual respect.

We welcome your participation in this collaborative effort.



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## CONFLICTS AND DISPUTE RESOLUTION

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### I. INTRODUCTION TO CONFLICT

#### A. Dynamics of Conflict

People frequently have conflict in their lives. When one person wants something and another person seems to stand in the way, a conflict often occurs. Although both parties may recognize the reason for their conflict, they often find it difficult to confront one another and to reach a mutually productive solution. With this understanding, we may consider ways to manage and resolve conflicts through alternative dispute resolution (ADR) methods. In an ADR process, everyone *wins*.

#### B. The Conflict Spiral

When two or more people have a conflict, the longer their dispute continues the more it intensifies. People who have a conflict tend to lose their objectivity. Both sides become increasingly unreasonable. As their tensions mount, the scope of their disagreement widens. Soon, neither party seeks to understand or even recognize the other party's position. The conflict becomes destructive and escalates into a *conflict spiral*, which usually follows the following pattern:

- two parties with a conflict;
- take opposing positions, become hardened in their differences;
- cease to communicate, perceptions become distorted; and
- when a sense of crisis emerges, someone takes drastic action.

*Like a tornado that increases in intensity, the conflict spirals upward and outward, growing in size and fury. Other persons may be brought into the fray, further exacerbating the tensions and costs. Unless restrained, the conflict spiral proceeds upward and onward.*

A conflict spiral signifies personal misunderstanding and discord; it often generates unproductive behavior such as manipulation, threats, coercion, and deception. It may even result in self-destructive conduct.

### **C. Consequences of Extended Conflict**

When a conflict escalates into a formal grievance, it often generates an adversarial process such as litigation. When this happens, the adversarial process itself serves as a vehicle for the spiral's upward climb, spawning new claims and counterclaims and taking on a life of its own. As the adversarial process expands, there are attendant increases in time and costs. Thus, in extended litigation, it is not surprising that legal fees and costs may sometimes equal or even exceed the value of the parties' claims. Moreover, litigation is a process where one party must win and the other must lose, and the outcome may seldom be predicted with certainty. This continuing uncertainty causes anxiety for both parties, which over an extended period of time may be extremely stressful and frustrating. Indeed, even the party who prevails in a lawsuit may emerge from the process feeling bitter and depressed.

### **D. Avoiding the Conflict Spiral**

To prevent the needless escalation of emerging conflicts, people may take advantage of alternative dispute resolution processes such as assisted negotiation, mediation, and other conflict management methods. Frequently, a neutral third party, one who is fair, objective, and trained, may help parties expeditiously resolve a dispute that has been fomenting for months, even years. It is sometimes also possible to avoid unnecessary conflicts by preventive planning and the use of pre-conflict resolution strategies.

## **II. DISPUTE RESOLUTION METHODS**

### **A. Early Conflict Resolution**

Disputes among individuals have existed since the dawn of time and our predecessors experimented with many different ways to resolve such disputes. Early history records bizarre, even gruesome, methods to resolve interpersonal conflicts. As one ADR historian has noted, the fearsome consequences of conflict, born of competition for survival and dominance among people, were conquest, war, famine, and death.<sup>1</sup>

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<sup>1</sup>B.E. Phillips, *A Historical Perspective of Alternative Dispute Resolution (ADR)*, State Bar of Texas ADR Section, *Alternative Resolutions*, October 1995.

## *Early Dispute Resolution in Texas*

As with many frontier nations, Texas civil dispute system grew out of the legal philosophy, training, and experience of its early Hispanic and Anglo-Saxon immigrants. Those immigrants included not only the settlers who came with Stephen F. Austin in 1821, but also the Spanish and Mexican immigrants who had arrived in the seventeenth and eighteenth centuries. Thus, the judicial system established by our ancestors had a distinctive Hispanic flavor. During those early days, frontiersmen sometimes settled their disputes by dueling, ambush, or other drastic means. But even in those times, our judicial system included embryonic elements of alternative dispute resolution such as arbitration and trial by conciliation. Thus, early Texas settlers used ADR to settle their disputes over debts and to establish their ownership of horses, cattle, and land.

From about 1519 to 1821, Texas was under Spanish rule. In 1821, Iturbide declared Mexican Independence, and that event was closely followed by the Constitutive Act of the Mexican Congress of January 31, 1824, which united the Mexican states of Coahuila, Nueva Leon, and Texas. Later that year, on August 15, 1824, Nueva Leon became an independent state, and the Congress of Coahuila and Texas established a provisional government as part of the federation.<sup>2</sup> In 1836, just 12 years later, Texas declared its independence from Mexico, and the new Republic of Texas adopted its first Constitution on March 16, 1836. Nine years later, on December 29, 1845, Texas became a state and it organized its first state government on February 16, 1846.<sup>3</sup>

When Texas became a Republic, and later when it became a state, it retained its vested rights in land acquired under former governments. Indeed, its title under such grants was recognized not only under the laws of preceding governments but also under laws then applicable.<sup>4</sup> Thus, Texas enjoys the rare distinction of having retained its vested ownership in all unappropriated and vacant lands. As a result of this succession of governing laws, Texas inherited many of the legal concepts and principles established by Spain and Mexico such as those governing community property, riparian, and water rights and laws pertaining to Spanish and Mexican land titles. See, Walton's Civil Law in Spain and Spanish America, Handbook of Mexican Law - Kerr, Las Siete Partidas.<sup>5</sup>

The Spaniards had a tradition of trial by conciliation, which had procedural aspects somewhat similar to those of mediation and arbitration. In the trial by conciliation process, each party appointed a disinterested person as a representative (*hombre bueno*) and the judge (*alcalde*) appointed two disinterested persons who (with the *hombre buenos*) cast their votes on the

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<sup>2</sup> Lange, Fred A. Texas Practice -Land Titles and Title Examination, Vol.2, Vernon=s (1961), p.2-3

<sup>3</sup> Id. at 4

<sup>4</sup> Id. at 7

<sup>5</sup> Id. at 3

<sup>6</sup> Tijerna Andreas, Tejanos de Tejas under the Mexican Flag, 1821-1836, Texas A & M University Press, College Station, Texas (1994), p. 79-86.

outcome of the dispute. Based on the plurality of votes cast, the alcalde decided the verdict. In 1829, the State of Coahuila and Texas refined the Recopilacion and set monetary limits, similar to our jurisdictional limits, on cases submitted for trial by conciliation. The decisions in all submitted cases were then recorded in the Book of Judgment by Arbitration.<sup>6</sup> The trial by conciliation process contained procedural elements that bear strong resemblance to our current day arbitration practices.

In 1821, Stephen F. Austin, who had been granted absolute judicial power by the provincial governor of Texas, started to devise his own civil code.<sup>7</sup> Interestingly, Austin relied on the advice of the Mexican Governor Jose Antonio Saucedo in developing this code, and on Saucedo's advice, he added two articles dealing with the regulation of livestock.<sup>8</sup> In 1824, Austin produced his new code, which the governor approved in 1826. This code provided for judgment by conciliation through Arbitrators, making it Texas' first arbitration law.<sup>9</sup> By 1826 Anglo settlers were registering cases of Judgment by Arbitration, and some eight years later the legislature of Coahuila and Texas created a procedure for trial by jury.<sup>10</sup> After Mexico won its independence from Spain in 1821, and later when Texas became a Republic, and subsequently a state, those laws continued to be recognized. Accordingly, the early Spanish concepts of conciliation and arbitration have been carried forward and recognized as a philosophical basis for the Texas' dispute resolution system.

In 1845, the Texas Constitution directed the Texas legislature to pass such laws as may be necessary and proper to decide difference by arbitration, when the parties shall elect that method of trial.<sup>11</sup>

## **B. The American Common Law System**

The English common law provides the genesis for most of America's civil law. During England's formative years, many civil disputes were resolved through trial by battle, trial by fire, trial by water, and trial by torture. During the early Norman Conquest, many considered trial by dueling to be the preferred method of obtaining satisfaction for a civil grievance. In the Twelfth Century, certain types of civil disputes, such as those involving church and state, were submitted to a jury comprised of county citizens. Later in that century, the civil justice system was revised to provide for twelve jurors who were charged with determining the outcome of the parties' dispute. This revision marked the beginning of a dispute resolution process that has been the bedrock of America's justice system for over 200 years.

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7 Id. at 72

8 Jackson, Jack. Los Mestenos, Texas A & M University Press, College Station, Texas (1986) p. 16

<sup>9</sup> Tijerna, at 43.

<sup>10</sup> Id.

<sup>11</sup> Texas Constitution, Art. VII, Sec. 15, Vol.2 Gamell's Laws of Texas, p. 1293

## **C. The American System**

As Texas' civil justice system developed over the years, people became accustomed to submitting their disputes for determination by a judge or jury. Under this system of justice, every individual is assured of access to legal representation by counsel of their choice and to a trial by jury before a body of their peers. Also, because the court's judicial decisions are guided by legal precedent, litigants may make reasonable estimates regarding the likely outcome of a court proceeding.

The traditional civil justice system was not designed, however, to manage the high volume and complexity of modern day litigation. Since the end of World War II, litigation has become so time-consuming, costly, and stressful that many people of moderate income feel they no longer may afford to resolve their disputes in the traditional manner. Also, many people are reluctant to wait years while their disputes are being resolved and are even less inclined to spend large sums of money on the full panoply of a trial. Thus, the oppressive weight of post-war litigation led to growing interest in finding new and more convenient dispute resolution processes.

## **III. THE DEVELOPMENT OF ADR**

### **A. The ADR Movement**

Within the past three decades, America has experienced a major philosophical shift in its concept of dispute resolution. This shift, sometimes called the ADR Movement, represents a global re-thinking of the way conflicts should be resolved. It has been so revolutionary, so broad in its scope and impact, that it has changed the core assumptions of America's justice system. As a result, courts and legislative bodies across the United States now encourage the use of Alternative Dispute Resolution (ADRA) processes in almost every field of human endeavor.

As a result of this sweeping social change, a new dispute resolution concept has emerged. In an ADR process, the parties themselves are allowed to decide the outcome of their dispute and thus have the option of avoiding the risks, costs, delay, and stress inherent in traditional litigation. The use of ADR also gives courts more time to concentrate their efforts on cases that must be decided in the traditional manner.

Although ADR processes are based on dispute techniques that were developed in ancient civilizations, their use did not become in vogue until several decades ago. But within a relatively short time, this dispute resolution concept has become widely accepted by the public in a rapidly expanding worldwide movement. Moreover, new ADR processes and technologies are continuously being discovered, which offer even greater efficiency and cost-effectiveness.

ADR, however, is not a panacea for all of the ills that affect our society. Court trials continue to be the mainstay of our justice system, and ADR methods simply complement these traditional dispute resolution procedures. To better understand this relationship between ADR and the court system, one must understand how ADR came into being in Texas and how ADR compares with other dispute resolution methods.

## B. The ADR Concept

Generally, the term Alternative dispute resolution has been used to describe dispute resolution methods that are *non-binding*. Therefore, the term used in its limited sense would seem to suggest a non-adjudicatory dispute resolution process such as mediation. However, when used in its broader sense, ADR may be used in reference to a binding, adjudicatory process such as arbitration or trial by special judge. In this training effort, we will use the term generally to describe all alternative dispute resolution processes, whether *non-binding* or *binding*, if those processes are conducted *outside* the traditional court arena.

To better understand how ADR methods fit within our existing dispute resolution structure; compare the two basic classifications of dispute resolution processes:

<u>Binding</u>	<u>Non-Binding</u>
Arbitration (Binding)	Two-party Negotiation
Court Proceedings	Third-Party Facilitation
Administrative Hearings	Mediation/Settlement Conference
Trial by Special Judge	Neutral Case Evaluation
	Moderated Settlement Conference
	Mini-trial
	Summary jury trial
	Non-binding arbitration

In a binding process, the outcome of the dispute is decided by a third party, such as a judge, jury, or arbitrator, and not by the parties themselves. The third party's decision is final unless a party decides to challenge the decision. Typical binding processes are adjudicatory court proceedings, arbitration, trial by special judge, and administrative hearings.

In a non-binding process, the parties retain control over the dispute and decide the outcome. The parties, through their own negotiation efforts, often may resolve the dispute without any assistance from third persons. At other times, however, the parties may seek the help of a third-party facilitator, *e.g.* a mediator, to assist them in their negotiations. Within this *non-binding* category are mediation *and* neutral case evaluation processes, *i.e.*, moderated settlement conference, mini-trial, summary jury trial, and non-binding arbitration. When a facilitator in a non-binding case neutral evaluation process issues a decision, the ruling is advisory only, providing the parties with an evaluative benchmark for use in further settlement negotiations. The non-binding processes are generally deemed voluntary in nature, because the parties cannot be compelled to reach an agreement, nor are they bound by any action until a final agreement is reached.

### **C. ADR in the United States**

During the first half of the past century, most courts in the United States were able to dispose of their litigation dockets with reasonable efficiency and dispatch. In the post WWII era, however, many courts found their efficiency impaired by the high volume of civil case filings. This problem was exacerbated by new discovery rules that placed even greater demands on the courts' time and resources.

In an effort to resolve these high-volume problems, local communities began to search for more efficient and affordable dispute resolution systems. There soon emerged a number of small, independent dispute resolution centers, which were staffed by volunteer mediators who dealt with so-called minor disputes such as a neighbor's barking dogs and fence encroachments. Most of these centers, while seriously underfinanced, became welcome contributors to the communities' existing dispute resolution systems.

### **D. The Multi-Door Projects**

In the 1976 Pound Conference, an influential body of judges, lawyers, and law professors met to consider ways to help courts deal with their burgeoning civil dockets. One of the conference participants, Harvard Law Professor Frank E. A. Sander, proposed a new a multi-door courthouse concept that would give litigants the opportunity to choose from a variety of dispute resolution doors and allow the selection of a process that is the best a forum to fit the fuss. The beauty of Professor Sander's multi-door idea is that it may readily be implemented by rather simple revisions of existing civil dispute resolution procedures.

Professor Sander's vision of the multi-door courthouse was soon to become a reality. Within a few years following the Pound Conference, a committee of the American Bar Association helped expand the multi-door concept nationwide through the establishment of multi-door projects in Houston, Tulsa, and Washington, D.C.

### **E. ADR in Texas**

As noted above, Texas has long recognized some form of ADR. It was not until the late 1970's, however, that Texas judges and lawyers began investigating the use of non-binding alternative dispute resolution processes. Texas opened its first dispute resolution center in Houston in late 1980. At that time the center had only one a door, the civil complaint desk of the local prosecutor's office. Soon, however, the center began to create new multi-options for disputants,

extending its dispute resolution services to some sixteen justice of the peace courts, municipal courts, and various satellite centers. Because of the success of this expanded effort, the American Bar Association selected Houston as one of three sites in its nationwide a multi-door experiment.

As Houston's multi-door Dispute Resolution Center expanded its services, it recruited and trained an increasing number of volunteer mediators. By the end of the decade, the Houston DRC had initiated a new victim-offender program to mediate both juvenile and adult criminal cases, a family law mediation program, a bankruptcy court program, and an annual a Settlement Week, which encouraged lawyers to resolve their pending cases in a single week's time. As a result of these successful efforts, the district and county courts began to use mediation and other ADR processes on a regular basis - to the point that the DRC was required to establish a new a Litigation Division to coordinate the services of new volunteer mediators and neutral evaluators. In the year 2000, the Houston DRC opened approximately 3400 new cases. Of that number it scheduled 2600 mediation sessions and resolved almost 2000 of those cases. The success ratio of the DRC is about 70% of the cases mediated. Over the year the center received some 45,000 telephone calls requesting information about ADR assistance. In 1983, the Texas legislature created a statutory funding base for all Texas county governments, enabling each county to create and fund its own dispute resolution center by a special a user fee imposed on the filing of each new civil case in county and district courts. In most counties, the funds generated by this fee are sufficient to meet the basic expenses of the local dispute resolution center. As a result, dispute resolution centers have been established in some sixteen cities across the state.

Along with this legislation, other Texas statutes provide for the use of arbitration and other ADR processes in certain kinds of disputes.<sup>12</sup> In 1987, the Texas legislature enacted the Texas Alternative Dispute Resolution Procedures Act, which is discussed *infra* at Chapter 2.

## **F. Changing Consumer Expectations**

Several years ago, the American Judicature Society conducted a multi-panel symposium, entitled *Alternative Futures of the State Courts of 2020*, which resulted in a published report of the symposium's conclusions. The following summary reflects the panel's consensus regarding the public's expectations of the justice system:

*People want their disputes settled quickly and fairly. They want to have confidence in the wisdom and justice of the judges. They want to be treated fairly and politely by service providers. They want to believe that the service is being rendered efficiently, with cutting-edge technologies complementing, indeed, helping to preserve, traditional rights and procedures. And they want the service*

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<sup>12</sup>See, Rau & Sherman's *Texas ADR and Arbitration Statutes: Commentary and Annotations*, Shepard's McGraw-Hill 1994, at 179.

*provided on their turf and terms, not merely at the time, place, and convenience of the providers.*<sup>13</sup>

Consumer studies show that clients with legal problems want to be treated with dignity and respect; to have an opportunity to be heard; to receive quality services at a reasonable cost; and to get on with their lives. As U.S. Court of Appeals Senior Justice Thomas M. Reavley explains:

*When the consumer brings his problems to a lawyer, he needs holistic advice. He should be told the alternatives available and the public consequences to choose the best option. What he probably does not need is a lawyer who knows only how to sue, who is ready to dispatch a demanding letter to the enemy and prepare for courthouse battle. That lawyer is like the doctor whose only answer to pain is to operate.*<sup>14</sup>

Clients today expect the justice system to give them guidance about how they may avoid unnecessary disputes and how to deal effectively with disputes that cannot be avoided. To meet these expectations, the justice system must devise ways to give the public increased access to alternative dispute resolution processes.

## **G. Responsible Dispute Resolution Protocols**

Although mediation and other ADR processes tend to encourage collaborative problem solving, such dispute resolution methods are not governed by strict procedural rules. As a result, an unscrupulous party or an overzealous attorney sometimes may abuse the process and undermine the facilitator's efforts. Thus, there is a need for some informal but effective way to encourage positive and cooperative interaction during the negotiation process.

To meet this need, the Institute for Responsible Dispute Resolution, which was created in the year 2000, seeks to encourage the adoption of new dispute resolution protocols. In essence; the Institute proposes to encourage public commitment to a *responsible dispute resolution* environment that makes dispute resolution services more efficient, effective and affordable. Under this protocol, each party makes a commitment: (1) to treat the other party and their counsel with civility and respect; (2) to speak and write truthfully and in a manner that will not mislead or deceive; (3) to examine the dispute from the standpoint of the other party; and (4) to exercise good faith in their settlement negotiations. By adopting these responsible dispute resolution strategies, the parties may raise the ethical level of their communications and avoid offending one another through words or actions.

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<sup>13</sup> American Judicature Society Report: *Alternative Futures of the State Courts, 2020* (1991).

<sup>14</sup> Hon. T. M. Reavley, *Consider Our Consumers*, 14 Pepp. L. Rev. 787, 788 (1989).



## TEXAS ALTERNATIVE DISPUTE RESOLUTION PROCEDURES ACT

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### A. The Nature of Settlements

Statistical surveys have shown that some 95% of all civil disputes filed in court are settled before submission to a judge or jury. Most cases are resolved through the parties' own negotiations without the help of a dispute resolution facilitator. However, in many cases meaningful settlement negotiations do not occur until after the parties have invested substantial amounts of time and money in the adversarial process. The longer the process continues, the greater the toll in monetary cost, loss of productive time, and emotional stress. Although the parties usually engage in sporadic settlement discussions over the life of a trial, most settlements are not reached until the trial or other day of reckoning is imminent.

In an ADR process, the settlement negotiations are accelerated, compacted, and restructured C moving from the *horizontal* to a *vertical* plane. Thus, in a mediation, the parties' negotiations are *vertically* structured in a planned format to focus their attention on the resolution of the dispute. Instead of the dispute taking months or years to resolve, it may often be settled within a day or less.

### B. The ADR Facilitator

The time of settlement may often be accelerated by the parties agreeing to engage in a daylong session of joint problem solving. Frequently, however, there is such hostility and hard feelings among the parties that the conflict is elevated. Discussions, if not managed, may result in *more* name-calling, threats, and accusations. Unless the parties have trust and respect for one another, they usually will benefit from the services of a neutral and objective dispute resolution facilitator. If the parties have enough information to make a reasonable evaluation of their respective positions, a trained, experienced, neutral facilitator may usually help them reach a successful resolution of their dispute. The essential factor in any ADR process is the facilitator's *neutrality*.

### C. The Texas ADR Act

In 1987, the Texas Legislature enacted the Alternative Dispute Resolution Procedures Act ("Texas ADR Act"), which is set forth in the Appendix. This statute has had far greater impact

on the growth of Texas ADR than the originators of the legislation ever anticipated. Indeed, the statute effectively changed the culture of Texas litigation so that almost all lawyers, judges, and the general public now accept ADR as a viable method for resolving certain types of disputes.

In essence, the Texas ADR statute declares a new state policy that encourages the peaceable resolution of civil disputes, particularly those affecting the parent and children's relationship, and the early settlement of all types of pending litigation. The Act then mandates all courts, trial and appellate, to carry out this state policy and authorizes the courts, in their discretion, to direct litigants to engage in ADR processes. Further, the Act sets forth the standards, qualifications, and conducts of court-appointed mediators and provides a very broad protection of confidentiality.

Since the enactment of this statute, there has been a tremendous growth of the use of ADR procedures. Almost all Texas courts, both state and federal, now have some type of ADR policy, system, or program. In practice, lawyers and judges have found very few civil disputes that are not susceptible to resolution by an ADR process.

## **I. POLICY AND MANDATE**

The Texas ADR Act represents the state's first generic approval of ADR as a means for resolving people's civil disputes and encouraging the early settlement of pending litigation. The statute's opening paragraph set forth this new state policy in unequivocal terms.

### **' 154.002 - Policy**

*It is the policy of this State to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.*

The statute next issues a mandate to all state courts, both trial and appellate.

### **' 154.003 - Responsibility of Courts and Court Administrators**

*It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002.*

## II. REFERRAL OF CASES TO ADR

Almost *all* civil disputes are appropriate subjects for an ADR process. For example, the following types of claims may usually be resolved through some ADR process:

- Q *Business and Contract Claims*
  - breach of contract
  - fraudulent or illegal conduct
  - commercial disputes
- Q *Consumer Complaints*
  - billing complaints
  - medical malpractice
  - negligence claims
- Q *Employee Grievances*
  - sexual, racial, age and disability discrimination
  - sexual, racial, age and disability harassment
- Q *Family Law Claims*
  - divorce
  - suits affecting the parent-child relationship
- Q *Social, Business or Political Conflicts.*
- Q *Tort Claims*
  - intentional and negligent torts
  - criminal misconduct

In some cases, an ADR process will not be appropriate. For example, an insurance company may need to obtain a judicial interpretation of a clause in its insurance policy. But this type of case is an exception- rather than the rule, and most cases are susceptible to resolution through one or more ADR processes. Thus, the Texas ADR Act confers discretionary authority upon the courts to refer pending cases for resolution by ADR process.

### ' 154.021 - Referral of Disputes to ADR Process

*(a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:*

- (1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 237aa, Vernon's Texas Civil Statutes);*
- (2) a dispute resolution organization; or*
- (3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the*

*intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.*

*(b) The court shall confer with the parties in the determination of the most appropriate dispute resolution procedure.*

### **III. INITIATING THE REFERRAL PROCESS**

The Texas ADR Act gives the courts discretionary authority to decide: (1) whether a particular dispute is an appropriate case to refer for ADR disposition; (2) whether enough information has been obtained for the parties to make a realistic evaluation of their positions; (3) which type of ADR process would be best suited to the case; and (4) who should be designated to facilitate the process. Some jurisdictions have issued a blanket ADR referral orders requiring all cases to go through an ADR process before proceeding to trial. Most courts, however, made ADR referrals with respect to individual cases, relying on the recommendations of their court coordinators and the lawyers in the case. Thus, most ADR referrals are the result of a motion filed by one or both counsel or an order issued by a court in a given case.

#### **A. Conference with the Court**

The Texas ADR Act ' 154.021(b) instructs the courts, when making an ADR referral, to confer with the parties about the most appropriate ADR process. However, there are evidently some courts that order parties to mediation without any prior communication. Parties so ordered may request an informal conference with the court before submitting formal objections to the proposed referral.

#### **B. Criteria for Referral**

As discussed above, most civil cases are appropriate for referral to an ADR process. There are a number of criteria a court and counsel should consider when deciding whether a referral is appropriate. Among other factors, the court and counsel should consider:

- ✓ The nature of the dispute, the amount in controversy, and the relief being sought;
- ✓ Whether additional discovery is needed to obtain facts essential to a settlement valuation;
- ✓ The need for a judicial determination of the law on a specific set of facts, and whether such need justifies exposing the client to the risks, time, cost, and stress of an adversarial proceeding;

- ✓ The client's underlying interests and needs, as well as the client's emotional and financial ability to withstand a lengthy trial and appellate process;
- ✓ Whether the parties have some existing or potential relationship that should be maintained in the client's best interest;
- ✓ Whether a confidential process and outcome would be in the client's best interest; and
- ✓ Whether the client's position would be supported by a neutral case evaluation process such as a moderated settlement conference, or whether a facilitated negotiation process such as mediation would better serve the client's interest.

Generally speaking, it is never too early to consider an ADR process. Indeed, pre-litigation settlements ordinarily save both sides time and expense and help the parties maintain their business or personal relationship. By the same token, it is generally never too late to consider an ADR process. Most civil cases are susceptible to settlement after verdict and while the case is on appeal. In most instances, the question is whether some imminent event, such as a pending appellate review, creates such doubt and uncertainty that the parties are motivated to compromise their differences. In essence, ADR processes help the parties place realistic values on their case and motivate them to seek reasonable solution to their problems.

### **C. Selecting the Facilitator**

There is increasing public discussion and debate in Texas regarding appropriate methods for assuring the competency of ADR practitioners and controlling their actions. These issues are discussed in greater detail in later chapters. Since the enactment of the Texas ADR Act in 1987, courts have dealt with the selection process in several different ways. Some judges, relying on their personal knowledge of particular mediators, have been very selective in their appointments and have appointed the same mediators time after time. Other judges have let the lawyers in the case decide who should mediate, or have left the initial determination to their court coordinators to make selections from an approved list of facilitators. Others still have given the parties an initial right of selection, and have appointed a facilitator only when the parties have failed to make a timely selection. Over recent years, it has become common practice for the parties to recommend the appointment of a given facilitator, and for the court to honor that recommendation unless it determines the person recommended does not meet the court's minimum standards for appointment.

## IV. OBJECTIONS TO REFERRAL

If the court decides to refer a case to an ADR process, it must notify the parties, who may file written objection to the proposed referral:

### • 154.022 - Notification and Objection

- (a) If a court determines that a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.*
- (b) Any party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral.*
- (c) If the court finds that there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.*

### A. Basis for Objections

In most disputes, the client will benefit from an ADR referral for the reasons discussed above. However, circumstances sometimes may arise that require counsel to resist the ADR referral. These circumstances might be that: (1) the ADR referral is too early in the discovery process, and additional information is needed before counsel may make a realistic case evaluation; (2) the type of case is inappropriate for an ADR process; (3) the value of the case does not justify the expenditure of money and time required for the ADR process; and (4) the need of the client to be protected against disclosure of information should prevail over the benefits to be gained through an ADR settlement.

To avoid a proposed ADR referral, counsel should ordinarily try to obtain the agreement of opposing counsel to a request that the court withdraw or postpone the proposed referral. If that does not prove successful, counsel may request an informal conference with the court as discussed above. Finally, pursuant to section 154.022(b), counsel may file written objections to the proposed referral within 10 days of receiving the court's notification. If the court finds there is a reasonable basis for the objections, the court may *not* refer the dispute. Usually, a court will withdraw or postpone an order of referral if a party demonstrates there is a good reason to do so. It is not likely, however, that the court will sustain an objection that simply states that the party is opposed to negotiation and will not settle short of trial.

## B. Appellate Review

If the trial court overrules a party's timely written objections to an ADR referral, counsel for the resisting party must decide whether the court's action merits appellate review. Because the rules do not authorize a direct appeal from the trial court's order, the resisting party must seek appellate relief through mandamus or some other extraordinary proceeding. The burden on the applicant is considerable in such a case, because the applicant must show more than mere error in the trial court's ruling. In essence, the applicant must demonstrate that the trial court's order is void and a clear abuse of the court's discretion.<sup>15</sup>

In 1987, the Texas Legislature enacted the Alternative Dispute Resolution Procedures Act ("Texas ADR Act"), which is set forth in the Appendix. This Act declared a state policy favoring alternative dispute resolution, mandated the courts to carry out this policy, and established a broad procedural framework for the resolution of all kinds of civil disputes. Pursuant to this legislative mandate, most trial courts and many appellate courts have adopted formal court rules and procedures encouraging the early settlement of pending litigation.

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<sup>15</sup>Mandamus was conditionally granted in one case: *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. App. - Houston [1st Dist.] 1992)(order requiring parties to negotiate in *good faith* held void); but mandamus was denied in another: *Downey v. Gregory*, 757 S.W.2d 525 (Tex. App. - Houston [1st Dist.] 1988)(post-trial motion for ADR referral held to lie within trial court's discretion.).

## THE MEDIATION PROCESS

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### I. THE NATURE OF MEDIATION

Mediation is the most frequently used of all ADR processes. This is probably, because mediation offers a matrix of two related ADR methods, *case evaluation* and *communication facilitation*. Also, because mediation has had more extended use, a large number of consumers of dispute resolution services are familiar with mediation's format and nuances.

Mediation gives parties a relatively inexpensive way to resolve their conflicts at an early point in time. It offers them an opportunity to avoid the time; expense and stress involved in lengthy litigation and helps them maintain valuable business and personal relationships. Mediation allows people to retain decision-making power and to craft solutions limited only by their own imagination.

Mediation is essentially a form of assisted negotiation. In mediation, a neutral third person helps the parties identify issues and interests, vent anger and frustration, negotiate effectively, and find creative solutions to their problems. Mediation differs from litigation or arbitration in that the parties themselves own the process and have the power to decide whether and when to compromise. While the mediator directs the course of the process, the parties themselves maintain control over the content.

#### A. The Process Defined

There are many different definitions of the word mediation. The Texas Alternative Dispute Resolution Procedures Act defines mediation as follows:

- (a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.
- (b) A mediator may not impose his own judgment on the issues for that of the parties.

Generally speaking, mediation offers a private, confidential process in which an impartial third party, sometimes called a neutral facilitator, encourages and helps the disputing parties

communicate effectively with one another. In essence, mediation provides a structured but flexible negotiation format in which the parties may talk confidentially with one another and, more importantly, listen carefully to what the other party is trying to say.

## **B. The Mediation Format**

Mediation is normally conducted in a relaxed and informal manner. Because the process involves human behavior, it should be adapted to meet the parties' particular needs. In the course of the mediation, the parties are encouraged to give their respective versions of the dispute and to vent their anger and frustration. During these discussions, the mediator seeks to identify the parties' underlying interests and to focus their attention on possible solutions. Next, the mediator assists the parties in their settlement discussions, reframing their communications in neutral language and offering them encouragement regarding the progress of their negotiations. When the parties reach an accord, they usually execute a written agreement that may be enforced as any other contract. Often, if a dispute later arises regarding the terms of the settlement agreement, the parties return to the mediator to negotiate a resolution of that dispute.

In flow chart form, the mediation format has four basic components:



Within this structural format, the participants may repeat the individual stages as often as necessary.

## **II. THE MEDIATOR'S ROLE**

Win or lose, the mediator and the parties' counsel are paid for the services rendered. After all, who should receive credit for a successful mediation, or blame for an unsuccessful one? Let's use an analogy father's will relate to: You have just taken the training wheels off your child's bicycle, given the bike a gentle push, and watched with pride as he or she wobbles and pedals into a new stage in life. Whose accomplishment is it? Clearly, it is chiefly your child's, not yours. You did play a crucial part, however. You arranged the circumstances in which the youngster could achieve that dramatic moment. If the bike topples and the child falls, it simply means he or she

was not ready for the venture. Just so, the mediator arranges and facilitates the conditions in which the parties and their counsel may constructively move toward resolution, the achievement of which, ultimately, is up to the parties.

If you think about it, an extra financial or tangible reward to a mediator for a successful mediation would only serve to infect the mediator's objectivity and perhaps neutrality. The function of a mediator is to orchestrate the process that leads to settlement. It is not his job to tell the participants what to do but rather to remind them of the advantages of constructive negotiation and final settlement. Remember, mediation is consensual, a fact the mediator should convey to the parties at the outset of the proceeding.

(An attorney friend once told me he only wants a mediator that "pushes the parties aggressively to settlement." Reasonably, encouragingly, even urgingly--but never aggressively or forcefully. Unreasonable pressure is dangerously close, if not tantamount to making a decision for the parties or forcing a settlement, both violations of mediators' Standards of Professional Conduct, Rules 10.020 and 10.050.)

So, how is the mediator rewarded for the task performed? Forgive the play on the cliché, but a mediated resolution is its own reward. The mediator truly enjoys the satisfaction of having helped disputants settle their differences and save the cost and avoid the stress, delay and uncertainty of a trial. By the same token, when an impasse is reached, a mediator invariably searches his or her soul, to assure everything was done in the process that could have been done--a sometimes-unreachable goal--to help the parties settle.

Summary, mediator's primary function is to assist the parties in their communication with one another. The mediator conducts the process, controls the flow of information, and orchestrates the parties' negotiations. During the course of the mediation, the mediator will try to focus the parties' attention on the real issues in dispute and help them generate problem-solving options. Sometimes the mediator serves as a facilitator of communications by actively supervising the parties' negotiations; at other times, the mediator functions as a teacher, helping the parties understand the dynamics of their conflict and how to make effective use of the mediation process.

Often, the mediator performs the role of a devil's advocate, encouraging each party to look at the dispute from the other party's point of view and to make a realistic evaluation of the other side's position. The mediator, however, does not perform the function of a judge or jury. Thus, a mediator should refrain from making decisions or advocating a particular outcome of the case. The mediator's sole obligation is to assist the parties in reaching a *voluntary* settlement, and the mediator should never coerce the parties to enter into an agreement against their wishes. Although the mediator may ethically make suggestions regarding settlement options, all settlement decisions must be left to the parties.

### III. THE MEDIATION ENVIRONMENT

Parties to a dispute often come to mediation with preconceived notions about the merits of the controversy and with definite ideas about how it should be resolved. It is not unusual for the parties to feel anger toward the opposite side and they may also be apprehensive about the mediation process. Because of this pre-mediation tension, the mediator must conduct the process in an environment that is neutral, comfortable, and calming. In setting the stage for mediation, the mediator should consider the following items:

- *A Neutral Site*

If possible, the mediation should be conducted at a neutral site. This might be the mediator's office, a hotel conference room, or an executive suite. Unless no other location is available, the mediation should *not* be conducted in the offices of one of the parties or their counsel.

- *Space and Seating*

Parties often come to mediation with a high degree of emotion, anxiety, and even hostility. The mediator should try to create a mediation environment that encourages cooperative interaction. The mediator must be aware that even the seating arrangement and the distance between the parties may be important considerations.

Different cultures have established norms regarding the acceptable distance between people in various situations.<sup>16</sup> In the United States people normally engage in personal relationships within a distance of 1 to 2 feet. Working relationships and formal social interactions are normally conducted within four to seven feet. People become uncomfortable when the space between them does not fit their cultural expectations. Therefore, the mediator must see that the parties' cultural norms are honored in the mediation process.<sup>17</sup>

There should be ample space for the participants to move freely and room temperatures should be maintained at a comfortable level. The rooms should be soundproof so as to preserve confidentiality and should be readily accessible to the mediator.

Ideally the facility should have enough space for a joint meeting room, with smaller conference rooms available for the participants should it become necessary to move from a joint session into private meetings. A caucus room should also be provided for *each* party to the mediation, apart from the central conference room, so that each side may meet privately with the mediator.

- *Food and Accessories*

Frequently, the mediator will supply soft drinks, coffee, and nutritional snacks for the disputants. If the mediation lasts a full day, the mediator should make suitable arrangements for lunch, and meals should be scheduled so that they enhance, rather than disrupt, the natural rhythm of the parties' negotiations.

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<sup>16</sup>Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* at 149 (1989).

<sup>17</sup>*Id.* at 150.

If possible, each caucus room should be equipped with a telephone, drawing board, and writing pads. In some instances a VCR monitor, a computer, or other electronic equipment may be helpful.

## IV. THE MEDIATION ATMOSPHERE

### A. The Mediator's Responsibility

An important part of the mediation environment is the mediation atmosphere. To create a positive mediation atmosphere, the mediator must be sensitive to the needs of the parties and demonstrate continuing concern about their comfort and well being. People who feel safe and cared for tend to become more reasonable and caring themselves. Above all, the mediator must demonstrate his or her continuing *neutrality* and *impartiality*.

Beyond these basic qualifications, mediators may have very different mediation styles. Generally, mediators tend to be either evaluative or facilitative. A mediator with an evaluative style is one who tends to be assessing. In contrast, the mediator with a facilitative style is one who tends to take a problem-solving approach. Most mediators have a preference for one style over the other but are able to move smoothly between an *evaluative* or *facilitative* or have a style somewhere between those two extremes..

### B. The Parties' Responsibility

Several factors are usually present in any successful mediation. First, the parties must voluntarily decide that it is in their best interest to try to settle the dispute. Sometimes this decision is not made before the commencement of the mediation process. But, if the mediation is to be successful, both parties must reach this decision at some point in their negotiations. Second, the decision-makers among the parties must either be present at the mediation or give their representative full authority to negotiate and agree to a settlement on their behalf. When a party's representative attends a mediation without adequate settlement authority, the parties' settlement negotiations will be severely hampered. Finally, the parties attending the mediation must be prepared to make a realistic evaluation of their positions. Unless both sides have the necessary information, expertise, and motivation to make an objective appraisal of their risks, their settlement efforts may not be fruitful.

The parties and their representatives must also be adequately prepared for the mediation session. They should have a good idea of the mechanics of the process and know what is expected of them. To assure such an understanding, the mediator should, if possible, make preliminary contact with the parties' counsel in advance of the mediation session. A form of a mediator's letter to counsel and a sample agreement to mediate are contained in the appendix.

The mediator should also try to have some communication with the parties before the commencement of the mediation session. In these communications, the mediator may begin to build trust and confidence to alleviate some of the parties' anxieties and concerns. The mediator may also start the task of gathering information about the parties and their dispute. If parties are

mentally prepared for and committed to the mediation process before coming to the mediation session, they will more likely be willing to engage in good faith settlement negotiation.

## V. CONDUCTING THE MEDIATION

Mediation, as with all dispute resolution processes, consists of a series of stages. Although these stages may overlap, they usually will include five identifiable steps:

- Mediator's Introduction
- Establish rapport with disputants
- Explain process, roles, and format
- Obtain commitments from parties
- Party Presentations
- Joint or Private Caucus Meetings
- Settlement Options
- Closing
- Obtain written agreement
- Set date for further communications

Throughout these stages, the mediator should try to:

- build trust and confidence in the process;
- reduce the parties' anxieties and hostilities; and
- help the parties examine alternative solutions.

### A. Mediator's Introduction

The mediator's introduction is one of the most important stages of the mediation session, because it sets the tone for the parties' negotiations. Before commencing the mediation, the mediator should make certain disclosures and explanations to the parties and their counsel.

*Each one readily believes what he fears or what he desires.*  
-Jean de La Fontaine (1621-1695)

Mediators often hear an attorney say, "I'm not going to waste time on an opening statement." Then, turning to opposing counsel, "You know what it's all about anyway."

Oh? He does? The client does? Opposing counsel knows what he or she believes "it's all about." It is doubtful he or she - certainly not the client - knows what their opponent considers it to be all about. And therein rests the ongoing debate over the value of opening statements by counsel.

From the clients' viewpoints, the mediator's opening comments are calculated to clarify what the process is all about, why the parties are there, and what they should be trying to accomplish.

Similarly, an attorney's opening soliloquy conveys an important message. Not only does it enlighten the mediator on the nature of the dispute (we rarely receive a written summary) but it also attempts, or should attempt to elicit a response, however silent and undisclosed, from opposing counsel and, perhaps more importantly, from the latter's client

Opening statements in mediation are rarely as detailed or impassioned as their counterparts in trial. That said, however, their goals are much the same. In addition to influencing the other attorney, either with substantive arguments or persuasive rhetoric, it behooves counsel to remember that clients are not stupid. They, too, listen carefully, either on their own volition in their own best interests, or, because of the mediator's earlier urging to be attentive to what's being said. Indeed, it is not unusual for a client to question his or her own counsel during a breakout session as to the "truth" of what the other attorney has said. What is happening at that moment is a further step in the search for the truth, albeit in the form of a diminution of the client's resolve.

Do not underestimate the value of opening comments. It is tempting to regard them with the proverbial "grain of salt," given their advocative source. But their later impression, however paraphrased, on a juror is something you will never know for certain. Any attorney with more than one trial under his or her belt knows how effective a lie can be in the course of trial testimony. Different and otherwise honest slants on or versions of facts can be even more effective.

Use the mediation process for what it is worth. Prepare almost as you would for a trial. The neutral mediator may perform a valuable service, but it is the attorney who ultimately carries the day, and that is as it should be.

- *Disclosures and Explanations*

A mediator should make full disclosure of any known relationships with the parties or their counsel that might affect or give the appearance of affecting the mediator's neutrality. Indeed, it is usually appropriate for a mediator to withdraw if either party expresses dissatisfaction with the mediator's neutrality or impartiality. Thus, it is important that the mediator fully inform the parties about: (1) his or her experience and qualifications; (2) any existing or prior relationships that might raise question about the mediator's neutrality and impartiality; and (3) the mediator's fees and other costs charged to the mediation. If the parties cannot agree with the mediator about the mediator's fee, the mediator should decline to serve so the parties may obtain another mediator.

After the parties are introduced and given an opportunity to ask preliminary questions, the mediator should explain the mediation process, describe the respective roles of the mediator and the parties, and advise the parties about the private, informal, and confidential aspects of the process. The mediator should then ask the parties to make the following commitments:



- *Commitments as to Time and Settlement Authority*

Before convening the mediation, the mediator should ascertain that all parties and their representatives have adequate authority to negotiate a settlement and have set aside sufficient time for the mediation. Further, the mediator should refuse to proceed with the mediation if, in the opinion of the mediator, a pro se party does not fully understand that the mediator will not provide legal representation. The mediator should also explain to a pro se party there might be risks in proceeding without independent counsel or professional advisors.

- *Commitments as to Good Faith Negotiations*

Next, the mediator should obtain the parties' commitments they will abide by the rules and procedures established by the mediator and will engage in good-faith negotiations to try to reach a compromise of their dispute. At the end of the mediator's introductory statement, the parties should fully understand the mediation process and be mentally committed to try to settle the dispute. The mediator should then give the parties another opportunity to ask questions and make comments.

A sample mediation checklist and introductory statement are contained in the appendix.

## **B. Party Presentations**

At the conclusion of the introduction phase, the mediator often invites the parties to make brief oral presentations regarding their positions and asks them to state what they hope to accomplish in the mediation. In many cases the party's attorney will make the introductory presentation on behalf of the client. These presentations give the parties an opportunity to have their positions heard before a neutral third party, and more importantly, by the opposite party. An experienced mediator usually will encourage the parties to listen attentively to this exchange of information, because it often represents the first meaningful communication since the inception of the conflict. Although the format of this exchange is informal and relaxed, the mediator maintains careful control over the process so that each side has an uninterrupted opportunity to speak and be heard.

- *Role of the Advocate*

Each party's counsel plays a significant role in settlement negotiations. In the initial presentation the lawyer has an adversarial role similar to that of a trial lawyer in voir dire jury proceedings. In essence, the lawyer will try to make a presentation that places the client's position in the best possible light.

In mediation, however, the target audience is not a judge or jury, but rather the opposing side. Thus, the effective settlement advocate will try to design a presentation that will have maximum impact on the opposition.

- *Issue Identification and Analysis*

In the course of trial preparation, most lawyers seek to identify the key issues and develop their case in accordance with those issues. Unfortunately, legal and factual issues sometimes become muddled and distorted by lawyers preparing for a mediation session. Moreover, even experienced lawyers sometimes succumb to the enchantment of their own arguments, and this seduction process often prevents the parties from developing an objective evaluation of their case.

In preparing for a mediation, each party and their counsel should make a serious effort to identify and analyze the key issues in the case and to focus the other party's attention on the benefits to be gained from a particular settlement outcome.

- *Conferences with Clients*

It is important that the lawyer confer with the clients *before* the mediation session. In this pre-mediation conference the parties and their counsel should discuss ways in which to encourage the other side to *want* to settle on their terms. They should consider: (1) what legal and financial forces bear on settlement discussions; (2) what underlying interests will be motivating factors; and (3) how to circumvent any artificial barriers to settlement. They should also discuss whether the client will participate in the verbal presentation at the beginning of the mediation, and what part, if any; the client will play in the bargaining sessions. They should also consider confidential information should be given to and withheld from the mediator and the other side.

- *Placing Value on the Dispute*

It is difficult for most lawyers and their clients to develop a realistic evaluation of the dispute. The lawyer (and in some cases the client) may have a general notion of the worth of *similar* cases but that evaluative premise may not be accurate when applied to the specific case. Thus, an effective settlement advocate will encourage the client to make an objective evaluation of the dispute, taking into consideration the risks involved in the litigation, the probable costs of trial and appellate proceedings, and the intangible costs such as time and stress.

- *Role of the Parties*

In a mediation process, the parties are the real decision-makers. Thus, the parties with the guidance of their counsel must determine their goals in the mediation process. At very least, the parties should endeavor to identify the real interests underlying the dispute and to test whether

those interests may be satisfied by negotiations during the mediation process. It is important that the parties recognize the mediation process as a unique opportunity: (1) to confer directly with one another; (2) to listen to each other; and (3) to fashion a mutually acceptable resolution of the dispute.

- *Goal of Presentations*

The parties' presentations tend to set the tone for the negotiations and they may have considerable impact in motivating the other side to accept a reasonable settlement. Both the lawyer and the client should continuously keep in mind the target audience in mediation is the other *party* and not the mediator. The basic goal of the presentations is to set the stage for meaningful negotiations by giving each side an opportunity to hear the other party's position and what that party hopes to accomplish in the mediation process.

- *Client Participation*

If a party is reasonably articulate and knowledgeable, it is usually wise to encourage their participation in the presentation. A client who will be persuasive and appealing at trial will obviously be a compelling witness in the presentation process. On the other hand, if the client appears to be arrogant or condescending, it is usually a mistake to let them participate actively in the mediation. Similarly, if the client is excessively timid or unskilled in personal communications, it is usually better for the lawyer to serve as the party's voice.

Sometimes a party will arrive at a mediation session accompanied by an accountant, financial planner, or friend who has no individual or professional interest in the dispute. The mediator should try to ascertain, before the mediation begins, if possible, the exact role such non-party intends to play in the mediation process and whether the opposing party objects to his or her attendance. The mediator must then decide whether the third party will be permitted to attend the mediation process.

- *Mediator's Analysis*

After both sides have made their presentations, the mediator should have a reasonably good idea of the issues underlying the dispute and the parties' positions on those issues. The mediator should also have some preliminary notions about problems that may occur during the mediation, including the potential of a power imbalance and whether the parties may work together in developing creative solutions to the problem.

## **C. Parties' Negotiations**

- *Joint and Separate Conferences*

Following the parties' presentations, the mediator must decide whether to continue with the joint meeting or whether the parties should be separated for private, confidential meetings with the mediator. These separate meetings, known as caucuses, are frequently used where there is some

animosity between the parties or where each party needs a separate room to discuss negotiation bids and settlement options.

The caucus model provides an opportunity for parties to confer privately in developing their negotiating bids and make responses. It also allows the parties to vent feelings of anger or frustration in a private session with just the mediator present. During the caucus session, the mediator may translate into neutral language the parties' bargaining bids and responses and offer encouragement for their continued negotiations. If an impasse should develop during this bargaining stage, the mediator may call the parties together in a joint meeting for the purpose of discussing their next course of action.

- *Gathering Information*

During the course of the negotiating process, the mediator continues to gather and analyze information. This information gathering is important, because most parties, during their opening presentations, will have concentrated only on the information they believed to be important. In subsequent conversations, the mediator should review the information received in the opening presentations and explore with the parties whether there are additional facts that bear consideration. In this way, the mediator begins to identify and bring to the surface other issues and interests that may motivate the parties in their efforts to reach an acceptable settlement.

- *Identifying Issues and Interests*

In the parties' opening presentations, they will usually tell the mediator which issues they feel are most important. Indeed, most parties are eager to advise the mediator about the problem that must be fixed in order to achieve an acceptable settlement. Although the parties and their counsel may usually define the legal issues that must be addressed, those issues may not be the key to a resolution of the dispute. Often one or both parties have special needs some underlying interest must be satisfied if a settlement is to be achieved. Unless the mediator is able to identify these special needs and interests through his or her confidential discussions with the parties, such information may never be forthcoming. Thus, the mediator should continue to probe for information that will shed light on these underlying interests.

- *Restating and Analyzing Positions*

In the course of gathering this additional information, the mediator may restate the parties' positional statements in neutral language and help them analyze the merits of their positions. This restatement process serves several purposes: (1) it shows the parties they are being heard and that someone understands their point of view; and (2) it also gives the mediator an opportunity to set an agenda regarding the priority of future discussions; and (3) it tends to define

the issues and interests so the parties may commence an objective evaluation of their respective positions.

- *Obtaining and Transmitting Settlement Offers*

After the parties have been given ample opportunity to express themselves in both joint and private sessions, the mediator may encourage them to begin transmitting settlement offers. Usually, these negotiations are distributive in nature, so that one party, usually the claimant, makes a demand for money or other thing of value for the purpose of eliciting a responsive bid from the other party.

During these negotiations, the mediator serves both as a neutral messenger and as a neutral advisor. As a neutral advisor, the mediator may offer objective advice about the progress of the negotiations. The mediator also provides helpful information regarding the productivity of the bargaining process. In giving this advice, however, the mediator must maintain complete neutrality and respect the confidentiality of the parties' private communications. As the negotiations progress, the mediator may encourage the parties to explore new settlement possibilities, but the mediator should avoid recommending one particular option over another. The mediator's role at this stage is simply to encourage the parties to continue their negotiations and to help them decide which settlement option is to their best advantage.

- *Creating and Testing Settlement Options*

In many cases, the parties will be able to resolve their dispute by negotiating a payment of money.

Some cases, however, may only be resolved through creative settlement agreements. In these cases, the mediator must work with the parties in brainstorming ideas about ways in which the dispute might be resolved. The parties should be encouraged to suggest a variety of ideas, no matter how ridiculous they might seem. If the mediator is able to establish a creative and collaborative atmosphere for the problem-solving effort, the parties themselves usually will find their own solutions. The mediator should serve as the facilitator and motivator for the process, but should avoid suggesting specific options too early in the brainstorming process. What may appear to the mediator to be a most reasonable and viable solution may not seem appealing to one or both of the parties.

In this brainstorming process, the mediator should encourage the parties to think laterally and *outside the box* so their creativity is not limited by the apparent parameters of the dispute. In appropriate circumstances, the mediator may suggest possible options the parties may have overlooked. Throughout the problem-solving exercise, the parties should be challenged to meet the mediator's expectations that they cooperatively look for mutually advantageous solutions.

Whenever one party suggests a particular solution, the mediator should help that party analyze, test, and evaluate the option. By asking questions, the mediator should help the party decide whether the suggested solution is realistic and how the other party may perceive it. Only after this initial testing and evaluation should the mediator propose the option (in neutral terms) to the other side. Once the parties have tentatively agreed that an option if a particular option is acceptable, the mediator should go over the option again and discuss its pros and cons in detail with both sides. At this point, if all parties agree, the mediator is ready to help the parties close their agreement.

#### **D. Closing the Agreement**

If the parties' negotiations result in a settlement, the mediator will assist them in reducing their agreement to writing. Sometimes, the complexity of the dispute will require further documentation. If that is the case, the mediator should encourage the parties to reduce the terms of their agreement to a memorandum of understanding, which will serve as a benchmark for their continuing discussions. A sample memorandum of understanding is contained in the appendix.

If the parties do not reach a settlement, but the mediator feels that further negotiations will be productive, the mediator may direct the parties: (1) to continue their settlement discussions and maintain contact with the mediator; (2) to resume the mediation at some later date; (3) to gather further information or engage in an evaluative exercise; or (4) to consider some other ADR process such as binding arbitration, trial by special judge, mini-trial, moderated settlement conference, or summary jury trial.

### **VI. POST-MEDIATION COMMUNICATIONS**

If the parties do not reach an agreement at the initial mediation session, the mediator should try to encourage the parties to engage in future negotiations. Because the parties will likely have a variety of settlement options yet available to them, it is probable they will be able to negotiate a settlement at some future date. A patient and persistent mediator is often rewarded by the passage of time.

## NEGOTIATION STRATEGIES

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### I. THE RATIONALE OF NEGOTIATION

Most disputes, whether civil or criminal, are resolved by negotiation. Indeed, the world turns on the concept of compromise. Without compromise, there would be little progress in the world. We would have neither peace nor stability in our lives. Because compromise is based on negotiation, we must learn to negotiate in order to gain a productive compromise.

#### A. Value of Negotiation Skills

We all are negotiators. In our personal and professional relationships, we negotiate almost daily. We negotiate with strangers, with our colleagues, and with our family and friends. Our negotiations range from bargaining with an automobile salesman over the price of a new car to a conversation with our spouse about where to go for dinner. Although these negotiations are important to us, most of us simply rely on intuition and personal experience when we negotiate. To become more effective as negotiators, we need to understand the conceptual theories of negotiation and learn how to apply these theories in our everyday practice.

#### B. The Negotiation Game

Negotiation is sometimes referred to as a *people game*. Because negotiation is motivated by both psychological and sociological influences, each negotiation is a unique experience. An effective negotiator will seek to adapt his or her negotiation strategies to fit the particular circumstances. Often, the key to a successful negotiation is the ability to be patient and persistent, allowing the negotiation process to unfold within the game's parameters.

Negotiations are conducted in every conceivable format. Negotiations occur at home among family members, at the workplace, in courts and administrative agencies, and in public bodies and institutions. Although negotiation practices may differ widely according to the forum, there is little difference in the basic nature of the process.

## II. METHODS OF NEGOTIATION

### A. Competitive Negotiation

One traditional negotiation concept has been termed *competitive, distributive, or positional bargaining*. This negotiation method assumes the negotiating parties are motivated by egocentric self-interests and that there are limited resources to be distributed. In a competitive negotiation, it is assumed that one side's gain necessarily results in the other side's loss. Thus, the competitive negotiator's primary goal is to maximize personal resources and satisfaction. The competitive negotiator is not particularly concerned about the potential impact of the negotiation on the parties' future relationship.

The stereotype of a *competitive (or hard)* negotiator is one who is tough, demanding, dominating, forceful, and unyielding. The hard negotiator has a strong need to win and tends to see any conflict as a contest of wills. Often taking extreme positions, the hard negotiator tries to hold out longer than the adversary. Sometimes this hard approach is successful, and the competitive negotiator wins. In that case, the other party will take less of the pie than if both parties had engaged in more cooperative negotiations. However, studies indicate that competitive negotiation is not always in the clients' best interest. Hard strategies may backfire, causing resentment and animosity, as well as heightened commitment of the other side to win the adversarial contest. Moreover, such tactics tend to create barriers to future settlement discussions, and when carried too far, such strategies may put an end to meaningful negotiations.

### B. Cooperative Negotiation

Another method of negotiation, sometimes called *cooperative or collaborative negotiation*, assumes that all participants have certain interests in common and that these interests may be advanced by collaborative negotiations. Here, the negotiators seek to identify the parties' *underlying interests*, and having done so, work to develop solutions that will satisfy both parties' needs. If the parties' claims seem to exceed available resources, the cooperative negotiators look for ways to expand the size, amount, or value of the subject to be distributed.

The stereotype of a *cooperative (or soft)* negotiator is one who seeks to avoid personal conflict at practically any cost. The soft negotiator tends to value an amicable settlement over receiving a fair share of the item in dispute. Thus, a soft negotiator may make substantial concessions just to reach a peaceful agreement. Unfortunately, once a settlement has been reached, the soft negotiator may feel inept, exploited, and bitter about the negotiation process.

It is difficult to say which negotiation theory, *competitive* or *cooperative* will produce the best results in a given case. Studies have shown that each negotiation method has its advantages and disadvantages. Negotiators must be aware of the different approaches and be able to recognize and respond to the different negotiating styles.

## C. The Principled Approach

Another negotiation method, the *principled* approach, incorporates some aspects of both the competitive and cooperative theories. In this type of negotiation, the negotiators look for areas of mutual interest, and if those interests conflict, they try to agree upon the value of their respective positions according to some fair and objective standards. This method of negotiation is said to be hard on the problem and soft on the people. It has obvious advantages even where one negotiator has adopted a competitive approach.

In a principled negotiation, the negotiators have the following objectives:

- **People:** Separates the people from the problem. (Participants work side by side, attacking the problem and not each other).
- **Interests:** Focuses on interests, not positions. (A positional negotiation often obscures what the parties really want).
- **Options:** Generates a variety of possible options before making any decision about outcome. (Inventing options creates mutual gain).
- **Criteria:** Insists that the outcome be based on objective criteria. (Adopting a stipulated fair standard such as market value).

To be effective in a principled negotiation, the negotiator must:

- **Use Restraint:** Act rationally and control his or her emotions.
- **Perceive Only:** Seek to understand the other side's position.
- **Discuss Well:** Try to communicate effectively.
- **Be Responsible:** Behave in a reliable and ethical manner.
- **Demonstrate Trust:** Accept the legitimacy of the other party's motivation.

In essence, the principled negotiator must remain *unconditionally constructive* in his or her approach, *regardless* of the strategy used by the other side.

## D. The Negotiator's Style

Negotiators must adopt a negotiation style that is most comfortable to their individual personalities. Instead of trying to develop a specific style, they should focus on improving their effectiveness *within* their personal style. However, negotiators should be versatile in their approach to negotiation and should try to adapt their style to meet the needs of a particular situation. Thus, an effective negotiator will seek to develop negotiation strategies that protect the client's interests, while discouraging the opponent from engaging in unproductive gamesmanship.

When a negotiator fights hard on substantive issue, it often tends to increase the pressure for an effective solution. However, being firm in a position does not mean being closed-minded to the other party's point of view. Indeed, many successful settlements may be attributed to the ability of negotiators to maintain a firm position on the issues and an open mind on the arguments of the other party. When negotiators are *firm* and *cooperative*, they likely will be successful in their efforts.

### III. NEGOTIATION COMMUNICATIONS

People, even those who have lived together for many years, have misunderstandings due to lapses in communication. Thus, it is not surprising that most disputes are the result of some breakdown in the parties' communications.

In negotiations, one negotiator may cause a gap in communications by failing to give due respect to the merits of the other party's position. Or, the negotiator's attention may be so concentrated on extraneous matters; he or she fails to understand the message being conveyed by the other negotiator. In other cases, the negotiators may be hindered in their communications by their pent up anger and hostility, or by reason of some language or cultural barrier.

The obvious solution to communication problems is for the *speaker* to concentrate on the *accuracy* of the message and on the *tone* and *manner* in which it is presented. In response, the listener must give *active* attention to the *words*, *tone*, and *manner* in which the message is transmitted. If both sides remain cognizant of the potential for communications problems, they will endeavor to speak and write carefully, listen attentively, and give each other the benefit of the doubt. By exercising care in their communications, they may avoid the adverse consequences of unnecessary misunderstandings.

#### A. Preliminary Meetings

An effective negotiator will often try to develop some measure of trust and confidence with the parties and the opposing negotiator *before* the negotiations begin. This pre-negotiation relationship will help prevent unnecessary tensions and avoid misunderstandings. It will also help the negotiator develop a negotiation strategy.

#### B. Negotiation Atmosphere

If possible, actual negotiations should be limited to the negotiator and one decision-making representative for each of the parties. Larger groups tend to distract the negotiations and to create confusion, frustration, and anger.

When people are angry or fearful, they seldom are able to negotiate effectively. When people feel their own survival is at issue, they may see every issue in those terms. Thus, it is important that the negotiator be aware of the other parties' emotional needs and try to develop a negotiation environment that will place everyone at ease.

Because of these emotional considerations, the negotiator should carefully measure each statement before speaking. Although candor is generally desirable, in some instances things are better left unsaid.

### **C. Venting Emotions**

An effective negotiator sometimes encourages the other party to express their emotions and to vent their anger or frustration. Similarly, an effective negotiator will usually talk candidly about his or her own special needs. After both parties have had an opportunity to express themselves, it is generally easier for them to control their emotions and to deal with one another in a rational manner.

An effective negotiator should avoid the tactical error of downplaying the other party's emotional outbursts or of outright rejection of the other side's position. An effective negotiator usually reflects empathy toward the other party's feelings and sometimes uses the occasion to make a sincere apology or to express regret that harm occurred.

### **D. Changing Perceptions**

When people quarrel, they sometimes think they may resolve the problem by focusing on the subject matter of the dispute. This is often an erroneous assumption. People need, of course, to understand what the quarrel is about, but they do not usually need to know every conceivable aspect of the dispute. Ultimately, the solution to a conflict does not lie in either truth or objective reality; it rests on how each party perceives the conflict and how they want to deal with it.

### **E. Separating the Problem**

When people have a conflict, the substance of their problem often gets entangled with their relationship. When one party becomes frustrated about an unresolved conflict, he or she may unconsciously make an angry or critical remark that tends to inflame the controversy and prevent meaningful communications. Or, the party hearing the remark may misinterpret the speaker's intent. For example, innocuous comments from one spouse to another that, We are going to have to do something about our child, may be heard by the listener as a criticism of his or her parenting ability.

### **F. Positional Statements**

When a negotiator makes a positional statement, his or her declaration may serve a useful purpose. It tells the other party what the negotiator wants and helps nail down uncertainties about the party's position. A positional statement may have negative consequences, however, if it is so extreme the other party considers it absurd or insulting. In essence, an extreme positional statement may be perceived not as a negotiating strategy but as personal snub that insults the listener's intelligence.

As a general rule, the claimant's negotiator should open negotiations with a positional bid that, while very much in the claimant's favor, will encourage a responding bid from the other side. That is, even though the bid would likely be considered extreme, it is not so patently *unreasonable* as to dissuade the other side from making a response. Similarly, the respondent's reply bid, while also somewhat extreme, should generate a responsive bid from the claimant. Moreover, both negotiators should try to support their respective positional statements with objective data and reasonable logic.

## **G. Maintaining Good Relationships**

An effective negotiator will try to build a relationship of trust and confidence with the other negotiator rather than simply looking at the opposing negotiator as *the other side*. Effective negotiators will not allow themselves to get personally embroiled in the dispute and will always look for possible solutions that will benefit both parties. To be an effective negotiator, we must remember that our opponents are simply human beings who need to be treated with dignity and respect. An effective negotiator is able to deal with substantive problems and yet maintain a good relationship with the opposing party. If the other party has inaccurate perceptions about the dispute, the negotiator should look for ways to persuade the other party to re-examine his or her position. If the parties' emotions are running high, the negotiator should seek ways to allow them to vent their emotions without causing harm to one another.

Effective negotiators try to speak and write accurately and to treat the other party with civility and respect. They try to make the dispute appear as a problem to be resolved by the mutual effort of both parties. Instead of attaching blame, they encourage collaborative action and focus attention on their own perceptions and needs, not on the other party's. Thus, an effective negotiator will avoid making statements that appear to shift the blame to the other side, and instead will try only to show the nature of any damages that may have been sustained.

## **H. Striving for Impact**

The principle goal of a negotiator is to make his or her interests and needs thoroughly understood by the other party. For example, in a neighborhood dispute over a proposed construction project, the group opposing the project should clearly delineate how the project will damage their property values and threaten their children's safety. Vivid, concrete details not only make a

position more tenable, they tend to add passion and emotional impact. Of course, the negotiator's explanation should appear to be neutral and objective and it should not come across as a personal attack on the other party's integrity. Similarly, a good negotiator will actively listen to and acknowledge the other side's position, while trying to identify any commonality of interests. An effective negotiator will seek to focus the other party's attention on the future, rather than looking backward at the past.

## IV. STEPPING INTO THE OTHER PARTY'S SHOES

### A. Different Perceptions

People tend to see the world from their own standpoint. When faced with complex information, they tend to emphasize facts that confirm their prior perceptions and to disregard facts that are contrary to their views. In view of this tendency, it is not surprising that a party to a dispute sees the conflict solely from his or her own perspective and refuses even to acknowledge the possibility that the other party's position may have merit.

An effective negotiator must be able to see the dispute as the other side sees it. In essence, the negotiator must be able to step into the opponent's shoes.<sup>18</sup> Consider, for example, the parties' different perceptions in a landlord-tenant dispute:<sup>19</sup>

#### Tenant's Perception

- Rent already too high
- Many afford to pay higher rent
- Apartment needs painting
- Neighborhood is run down
- Know people who pay less rent
- Pays rent when landlord asks
- Landlord cold and distant

#### Landlord's Perception

- No increase in rent for a long time
- Need more income to meet costs
- Apartment has heavy wear and tear
- Need to raise rent to upgrade area
- Know people who pay more
- Never pays rent unless asked
- Considerate and does not intrude

In this landlord-tenant dispute, an effective negotiator would want to *understand* the opposition's viewpoint, even if it did not appear to have much merit. If the negotiator may look at the dispute from the opposing party's point of view, he or she will be in a much better position to define the parameters of the conflict and to develop appropriate negotiation strategies.

### B. Restating Positions

A negotiator should generally be willing to engage in frank discussions with the opposing side and to give objective recognition to the strength of the other party's position. The negotiator need not agree with the opposing viewpoint, but he or she should actively listen to and acknowledge an understanding of that viewpoint.

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<sup>18</sup>*Getting to Yes*, at 23.

<sup>19</sup>*Id.* at 24.

Some negotiators, as a matter of strategy, consistently ignore or refuse to concede any validity in the other side's viewpoint. Other negotiators, however, often do just the reverse and openly give recognition to the other point of view. Sometimes, the negotiator even restates the other party's position to show that their viewpoint has been heard and understood. After restating the other side's case in its strongest light, the negotiator may refute it with a reasonable analysis. This bold strategy tends to give credence to the negotiator's own position, making his or her case seem even stronger, and helps the other side better understand the relative strengths and weaknesses of their case.

### **C. Identifying Mutual Interests**

An effective negotiator must look beyond the other party's stated position and try to identify any underlying interests. When two people disagree and take opposite sides of an issue, they often assume that their interests are opposed as well. For example, a landlord seeking to raise a tenant's rent may assume he has nothing in common with the tenant, who wants to maintain the rent at its existing level. Such an assumption is usually incorrect. One common interest of both parties is stability. The landlord wants a stable tenant; the tenant wants a permanent address. Both want to see the apartment well maintained. Both are interested in a good relationship with each other. The landlord wants the rent paid on time; the tenant wants the premises kept in good condition.

Thus, even when parties have dissimilar interests, they share certain basic *human* needs:

- a need for security
- a need for economic well-being
- a need for a sense of belonging
- a need for recognition of their value
- a need to control their own destiny.

These needs are always present even in disputes ostensibly about money. The negotiator's task is to identify which of these needs, in addition to or in lieu of money, are most important to the other party. If the parties may negotiate a compromise on the basis of shared interests, they may usually reach a mutually acceptable compromise. For example, the landlord might be willing to extend the term of the lease in return for an increase in rent, which in turn will enable him to refurbish the apartment units.

One-way to identify the other party's underlying interests is to ask questions. *Why does the landlord want a higher rental? Simply for more money? Or, does he want a higher rental to refurbish the apartment units?* Getting the answers to such questions helps the negotiator understand the landlord's demands and responds to them more intelligently.



## V. INVESTING IN THE OUTCOME

### A. Collaborative Problem Solving

When people seek to persuade others of the merits of their position, they may choose one of two paths: they may either invite the other party to participate in the problem-solving exercise, or they may decide the outcome they want to achieve and try to persuade the other party of its merit. Too often, people choose the latter course of action.

Unless both parties participate in the problem-solving process, one may reject any proposal made by the other. Thus, no matter how meritorious the proposal appears, the other party's resistance may usually be expected. Experienced negotiators are aware of the need to have both parties involved in the problem-solving effort so they both will feel they have designed the outcome.

People involved in a dispute are often loath to look at alternative solutions. Convinced that they are right, they seek only solutions that tend to vindicate their positions. In most disputes, the parties are reluctant to consider alternative solutions, because:

- they have a strong mind-set that their position is the correct one;
- they seek only a single answer to the problem;
- they assume there is a fixed pie of finite proportions;
- they think solving *their* problem will solve the *only* problem.

The last reason may need some further explanation. People tend to focus on their own problems, not those of their adversaries. Therefore, in negotiating a compromise, people tend to look only to their own self-interest and are slow to recognize the need for a settlement that will serve the interests on both parties. An effective negotiator will try to elevate the negotiations above such self-serving influences and will look for settlement options that meet the needs of both parties.

### B. Creating Viable Options

In developing settlement options, the negotiator must try to separate the creative process of invention from the judgmental act of testing and selection. In essence, the negotiator must first invent, then, test, and finally decide which outcome is best for the case.

To set the right tone for an inventive session, the negotiators should cooperatively establish guidelines for a brainstorming session. One important rule is that there will be no criticism until after all ideas have been submitted. This rule, which encourages the parties to engage in brainstorming efforts without fear that their suggestions will be ridiculed or rejected out of hand, tends to stimulate enthusiastic and spontaneous thinking by all participants. In such an environment, a creative idea advanced by one party often encourages creative proposals by others.

It is important for the negotiators to set a positive tone for the brainstorming process. The atmosphere should be relaxed, informal, and comfortable. The participants should be seated together, and if possible, all should be *facing* the problem. The guidelines should be restated and the parties' agreements to abide by them confirmed. All suggested ideas should be listed, recorded, and rephrased in their most positive light. The participants should then be asked to rank and prioritize the different suggestions and to agree upon a method for evaluating and refining the various ideas.

## VI. THE STAGES OF NEGOTIATIONS

### A. Preparing for a Negotiation

There are three primary stages to any negotiation: (1) analysis; (2) planning; and (3) discussion. During the first two stages the negotiator will diagnose the problem, gather information, and establish his or her negotiation strategies. In this process, the negotiator will seek to:

- Gain a full understanding of the relevant facts surrounding the dispute and the parties. Usually, the negotiator will want to develop this information in advance of the negotiations.
- Anticipate the opponent's arguments and develop a counter-strategy for each one. In this exercise, negotiators should try to place themselves in their opponent's shoes and look at the dispute from their opponent's point of view.
- Choreograph the negotiation process so that the anticipated events will lead to a desired result. This exercise should produce a rough road map that may have many side roads and detours, but which shows the ultimate destination. Naturally, this plan must be flexible, and the negotiator should be prepared to make appropriate modifications during the course of the negotiation.
- Develop alternative goals that will produce an acceptable outcome. If during negotiations the negotiator consistently attains pre-determined objectives, this often means the negotiator's aspirations should have been set at a higher level. On the other hand, if a negotiator fails to attain such pre-set objectives, the pre-determined aspirations may need to be lowered.

## **B. Best Alternative to Negotiated Settlement**

During the third stage, when the parties begin their actual negotiations, the negotiator will seek to further identify underlying interests and to clarify erroneous perceptions. The negotiator will also participate in the invention, testing and selection of viable settlement options. During this stage in the negotiations, an effective negotiator will continuously re-assess his or her Best Alternatives To Negotiated Agreement (BATNA). This BATNA simply represents the negotiator's ultimate fall-back position, requiring the negotiator to continuously ask himself or herself the question: What will be the consequence if I refuse to negotiate further? By continuously making this BATNA re-assessment, the negotiator may determine whether and when to accept or reject the other side's proposals. The BATNA will change during the course of the negotiations as the negotiator gains additional information and insight. The BATNA should include all relevant factors such as risk evaluation, transactional and emotional costs, and time expenditure.

## **C. The Negotiator's Role**

The role of a negotiator is not to make it hard on the other party to come to an agreement. Indeed, it is exactly the opposite. An effective negotiator will try to generate options that will be perceived by the other party as clear, appealing, and consistent with that party's needs and interests. How does the negotiator create such desirable alternatives? By gathering accurate information regarding the other party's needs and wants, and by placing himself or herself in the other person's shoes. Thus, an effective negotiator must work diligently to understand and appreciate the other party's needs and then to develop settlement options that meet those needs.

## COMMUNICATION PROBLEMS DEALING WITH DIFFERENT PERCEPTIONS

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### I. TYPES OF COMMUNICATION

#### A. Verbal

The mediator must establish a sense of trust with the parties so they will willingly participate in the mediation, share information, and discuss settlement options. In developing this trust, the mediator may use *active* listening techniques to assure the parties that their messages are being accurately received and interpreted. This active response mechanism encourages the parties to disclose additional information, clarify their interests and needs, and consider different settlement options. By making effective use of these techniques, the mediator may facilitate the flow of communications and help the parties move toward resolution of the dispute.

#### B. Non-Verbal

Eye contact, hand gestures, facial expressions, body positioning, vocal tone, and pitch all convey messages to the receiver. These non-verbal communications are often more telling of a person's true feelings than verbal exchanges. Indeed, communication theorists suggest that a speaker's words comprise only 7% of the message communicated to the listener. The bulk of a speaker's message, some 93%, is expressed in non-verbal communications. Of that percentage, about 38% is conveyed by tone of voice and facial expressions, while the greatest part, about 55%, is conveyed by the speaker's body language. Because such a large part of people's communication is non-verbal, the mediator must pay close attention to the speaker's tone of voice, facial expressions, and body language.

In the role of an active listener, the mediator may receive both the content or substantive part of the speaker's message, as well as the effective or feeling part.<sup>20</sup> By paying attention to a party's non-verbal communications, the mediator may ascertain both the *content* and *effect* of the speaker's message, thereby gaining a better understanding of the nuances underlying the dispute.

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<sup>20</sup>Kimberlee Kovach, *Mediation: Principles and Practice*, at 35 (West 1994).

## C. Active Listening

The mediator's active listening technique not only assures the parties they have been heard and encourages them to give additional information, it provides valuable feedback to the parties and serves as a model for them to follow in their negotiations with one another.

The mastery of active listening requires practice and concentrated effort. To become an active listener, one must learn how to keep the mind clear of common distractions. Even experienced mediators are sometimes distracted by thoughts of their next moves and by whatever the parties are saying. An effective mediator must be able to clear the mind of these distractions and to listen actively to the party's verbal and non-verbal communications.<sup>21</sup>

In active listening, it is the listener's *demeanor* that encourages the speaker to keep talking. It is the listener's body language such as eye contact or a nod of the head, or the listener's verbal response such as Oh, or I see, which communicates to the speaker the listener's active interest in and involvement with what is being said.<sup>22</sup> Thus, the active listening technique allows the listener to elicit information from the speaker without interrupting the speaker's train of thought.

Active listening is a mirroring process, which plays back the speaker's message and feelings in a neutral, non-judgmental manner. By paraphrasing and summarizing the speaker's words, the mediator shows the speaker that the import of the message was understood and accurately interpreted. This play-back in turn encourages the speaker to elaborate and clarify his or her position and to begin to understand how the dispute may be perceived by an objective, neutral party.

Listening for details is a part of active listening process. Therefore, the mediator must balance the importance of taking notes with the need to maintain eye contact with the speaker. Since the mediator does not serve the function of either a judge or fact finder, it is important that they demonstrate objectivity and neutrality when conducting active listening sessions with the parties.<sup>23</sup>

## D. Asking Questions

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<sup>21</sup>David A. Binder, *et al.*, *LAWYERS AS COUNSELORS, A CLIENT-CENTERED APPROACH* 49 (1974).

<sup>22</sup>Kovach at 33.

<sup>23</sup>Kovach at 35.

During the information-gathering stage of the mediation, the mediator will ask questions that encourage the parties to provide information about themselves and the dispute. In this process, the mediator should resist the temptation to immediately narrow the focus of the dispute. In essence, the mediator should ask questions that are open-ended and call for clarification rather than Yes or No answers. In most cases, the mediator may routinely ask each party the same type of open-ended questions.<sup>24</sup> For example, the mediator may ask:

- What do you think?
- Tell me more about...
- How did you feel when...
- Could you explain...

Or, the mediator may inquire:

- How did you feel when you first learned that...
- What happened after the meeting?

These and other open-ended questions usually elicit the broadest types of answers. The mediator may employ other types of questions to elicit specific information. Using the right type of question at the right time is something a mediator learns through practice.

Often a mediator needs to ask parties to clarify their statements. Some questions tend to invoke more focused response:

- Help me to understand why the automobile is not worth *x*.
- What, specifically, about your health is your main concern?

To the extent possible, the mediator should avoid asking leading questions that suggest an answer. For example, the mediator should avoid close-ended questions such as:

- You've had back trouble before, haven't you?
- The red car was going over 70 mph, correct?

The use of close-ended questions may sometimes be needed to confirm a party's wishes regarding a particular matter or to elicit specific, factual information. For example:

- Tell me again, do you want to continue working at the plant?
- How many years did you work for Maytag?

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<sup>24</sup>Kovach at 92.

But a mediator should usually avoid asking compound questions such as What type of party was it: social, professional, or was it just people from the office, and were spouses invited?

## II. CHANGING PERCEPTIONS

### A. Cultural Perceptions

People of one culture often tend to make generalizations or assumptions about people of other cultures. These uniformed assumptions may be based on a wide variety of factors, ranging from obvious differences such as age, gender, race, nationality, and ethnicity to more subtle factors such as personal values, education, economic or social status, and sexual orientation.

The mediator should be aware of the destructive impact such cultural stereotyping may have on the mediation process. Stereotypes and cultural differences are not comfortable topics to discuss. There is a fear that merely acknowledging such differences perpetuates and ratifies their place in contemporary life. As one student of cross-cultural communication recounts:

From the start, we are caught in what seems to be an insolvable problem. On the one hand, since we know more about the world (thanks to anthropology, travel, cinema, television, tourism, immigration, wars of independence, and ethnic and civil rights movements), we are aware of differences, and we fight for the right to maintain these differences. On the other hand, the (justified) fear of racism and its hideous consequences incites us to maintain forcefully that we are all the same, universal human beings. We constantly fall into the trap of wanting to reconcile these two truths; we are caught between the desire to deny differences (we are all human) and the desire to emphasize them (the right to be different).<sup>25</sup>

The topic is perhaps less threatening if the focus is redefined. Rather than attempting to chronicle the specific manner in which members of differing groups share similar traits or perceptions, we may concede the benefit that flows from acknowledging that differences in outlook may be caused by differences in experiences. The United States Supreme Court has recognized that distinct groups bring different outlooks.<sup>26</sup> This fact of contemporary life has the *possibility* of influencing the mediation process.

Communication specialists recognize that people tend to negotiate more cooperatively when their opponents are members of the same race and culture.<sup>27</sup> Numerous international business

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<sup>25</sup>Raymond Carroll, *CULTURAL MISUNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE*, trans. Carol Volk (The University of Chicago Press 1988) at 2.

<sup>26</sup>*J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994).

<sup>27</sup>Charles B. Craver, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (Michie, 2<sup>nd</sup> ed. 1993) at 221. *See also* Thomas Kochman, *BLACK AND WHITE STYLES IN CONFLICT* (The University of Chicago Press 1981) discussing how American inter-ethnic communication styles vary.

writers have chronicled the manner in which negotiators in different countries are affected by their cultural orientation.<sup>28</sup> Within the United States itself, cultural anthropologists and students of interpersonal relationships have noted that cultural orientation plays an important role in communication. Socio-linguists have reached mass markets with best-selling books describing how men and women use words and communication skills differently.<sup>29</sup> In addition, studies from the mid-1970's indicate that certain cultural groups exhibit more cooperative behavior overall than do other groups. For example, some have suggested that female negotiators tend to behave more cooperatively than their male counterparts.<sup>30</sup>

Third-party neutrals who find themselves mediating between people of different sexes or cultures have a wealth of social science literature available to attune them to the possible differences that might arise during that process. A brief overview of some of those differences follows.

## **B. Cultural Differences**

- **International Differences**

People from diverse cultural background often ascribe different meanings to non-verbal communications. This is frequently encountered in interactions between people from different countries. For example, the American okay signal (index finger and thumb in a circle, with remaining fingers pointing up) is considered vulgar or obscene in Brazil and Germany, impolite in Greece and Russia, as a sign for money in Japan, and as a sign for worthless in France.<sup>31</sup> Pointing with the index finger is considered impolite in most Middle and Far Eastern countries. In those regions, pointing is usually done with the open hand. In Indonesia, however, the thumb is used.<sup>32</sup> The physical space typically afforded between people engaged in conversation varies

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<sup>28</sup>Terri Morrison, Wayne A. Conaway, George A. Borden, *KISS, BOW OR SHAKE HANDS* (Bob Adams 1994). The author notes that most experts in cultural orientation consider citizens of the United States to be closed-minded.

<sup>29</sup>Deborah Tannen, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (Morrow 1990).

<sup>30</sup>Craver at 221, *citing*, J.Rubin & B. Brown, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (Academic Press 1975) 163, 172 and R. Harper, A. Weins & J. Matarazzo, *NONVERBAL COMMUNICATION: THE STATE OF THE ART* (Wiley-Interscience 1978) 225, 278.

<sup>31</sup>*THE BEST-SELLING GUIDE TO INTERNATIONAL BEHAVIOR*, ed. Roger E. Axtell (Wiley and Sons 1993) at 47. Similarly, in most Middle and Far Eastern countries, it is considered impolite to point with the index finger. *Id.* at 48.

<sup>32</sup>*Id.*, at 48.

among different cultures. In America, people tend to remain an arm's length apart, while in other cultures a distance of eight to twelve inches is the norm.<sup>33</sup>

Similarly, people from different countries employ various negotiation styles. For example, Indonesians are comfortable with silent pauses in both social and business settings. These pauses may not imply either acceptance or rejection. Rather, the slight pause allows time for thought.<sup>34</sup> The issue of punctuality is also a cultural product. In America, an arrival of more than ten minutes late to a business meeting is unacceptable, while in various Latin American countries a 30 to 45 minute delay is not uncommon.<sup>35</sup> The meaning of words used in negotiation also varies by culture. For example, when negotiators from Mexico use maybe or we will see, they may actually mean no.<sup>36</sup> Similar practices are encountered with negotiators from Thailand, who tend to avoid confrontation at all costs and who will make implausible excuses or pretend not to understand English rather than having to say no.<sup>37</sup>

### • The United States

America is proud of its melting pot image; however, the many cultural heritages result in recognizable differences in negotiating styles. Different racial and ethnic group members may have cultural differences that impact their attitudes about a wide range of topics such as:

1. How much socializing is appropriate before getting down to business?
2. When is the proper time for expressiveness and reserve?
3. How should males and females properly interact?
4. Where is the line drawn between appropriate concern or interest and unwarranted intrusion?<sup>38</sup>
5. What problem-solving style is dominant: cooperative or competitive?

## C. Gender-Based Differences in the United States

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<sup>33</sup>Craver at 225.

<sup>34</sup>Morrison, Conoway & Borden at 180.

<sup>35</sup>Craver at 224.

<sup>36</sup>Morrison, Conoway & Borden at 233.

<sup>37</sup>*Id.* at 384. Similar styles have been noted by Americans negotiating with the Japanese. The traditional Japanese host is reluctant to openly reject a visitor's proposal. Thus the Japanese host may reply with seemingly affirmative responses [i.e. This is something we must seriously consider] which in reality is a polite rejection. Carver at 236.

<sup>38</sup>Kochman.

Even among people with a shared racial or ethnic cultural heritage, the issue of gender may play a significant role in negotiation. This may be manifested in nonverbal communications such as how women tend to arrange the seating at a negotiation and the physical interaction distances between the parties.<sup>39</sup> It has been more recently noted, however, that gender-based verbal differences tend to diminish in the presence of formal education.

## **D. Socio-Economic Cultural Differences in the United States**

Social scientists have noted that it is often difficult for people from disparate socio-economic backgrounds to understand one another's hopes and fears.<sup>40</sup> These cultural differences may impact a negotiation, because of the distinct value each group may place on the concepts of delayed gratification in contrast to short-term benefits.<sup>41</sup> Another possible impediment to negotiation, which stems from differences in the socio-economic position of the parties, is the degree of comfort felt by each party. For example, each party may experience a degree of intimidation and discomfort during the initial interaction.<sup>42</sup>

## **E. Special Skills for Mediators**

When people of different races, genders or cultures negotiate, the neutral should consider taking more time to establish rapport.<sup>43</sup> The neutral will adapt more readily to cultural differences to the degree that he/she has the following traits:

- A positive self-image that allows him/her to respond positively in unfamiliar environments rather than *reacting* negatively.<sup>44</sup>
- A tolerance for ambiguity and uncertainty.<sup>45</sup>
- A sensitivity to environment that allows him/her to be aware of communication patterns more quickly.<sup>46</sup>

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<sup>39</sup>Carver at 221, *citing* two studies from the late 1970's.

<sup>40</sup>*Id.* at 226.

<sup>41</sup>*Id.* at 226.

<sup>42</sup>*Id.* at 236.

<sup>43</sup>*Id.* at 227.

<sup>44</sup>V. Lynn Tyler, INTERCULTURAL INTERACTING (BYU, David M. Kennedy Center for International Studies 1987) at 44.

<sup>45</sup>*Id.* at 44.

The mediator needs to recognize that cultural attitudes are so internalized that they are both unconscious and instinctive.<sup>47</sup> Thus the mediator must be sensitive to the tendency to project personal norms onto people from other cultures. In addition to recognizing the impact of cultural differences on the neutral's perceptions of the negotiation, the mediator may need to caucus with the parties individually to assist them in recognizing the differences as well. The role of reality checking and clearly defining the terms of any agreement reached should assume heightened importance when negotiating across cultural norms.

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<sup>46</sup>*Id.* at 44.

<sup>47</sup>Craig Storti, *CROSS-CULTURAL DIALOGUES* (International Press 1994) at 4.

## CIRCUMVENTING IMPASSE

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### I. IMPASSE HAPPENS

No matter how skillful the mediator, occasionally one party will reject the other party's last offer and decline to make a responsive offer. When this occurs, the parties have reached an apparent stalemate or *impasse* in their negotiations. This impasse does not mean, however, that further negotiations will fail; it means only that one or both of the parties are unwilling to make any further negotiation bid *at that time*.

An impasse is a common occurrence in mediations, and the mediator should not be discouraged when one occurs. Indeed, the mediator should simply accept the fact that the parties are then unwilling to proceed further with their negotiations and analyze whether further negotiations are advisable. Usually, the parties do want to settle their dispute and are frustrated with their inability to reach a settlement. It is the mediator's job is to encourage their further communications and to help them overcome the communication blocks that led to the impasse.

#### A. Impasse Avoidance

Often, the mediator may help the parties avoid the negative aspects of impasse by *teaching* them, at the beginning of the mediation, how to deal with barriers to their settlement negotiations.<sup>48</sup> By educating the parties about the dynamics of the negotiation process, the mediator may prepare them for the potential of impasse so they do not overreact if one should occur. Thus, the mediator, when obtaining the parties' commitment to negotiate in good faith, should ask for their commitment to continue their communication even in the face of an apparent impasse.

#### B. When Impasse Occurs

If the parties do find themselves in an impasse, the mediator should look for new and creative ways to help them overcome their communication barriers. Sometimes the mediator may simply encourage the parties and their counsel to search harder for possible solutions. Frequently, the parties and their lawyers will come forward with solutions that the mediator has overlooked. Moreover, when parties have reached an impasse, they often become more attuned to the

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<sup>48</sup>See, Eric Galton, *MEDIATION: A TEXAS PRACTICE GUIDE* (Texas Lawyer Press 1993), for an excellent analysis of impasse-breaking techniques), pp. 90-98.

consequences of their failure. Thus, in the face of such consequences, the parties may be more inclined to give consideration to issues of risk, time, cost, and emotional stress. In essence, they may be more willing to consider their BATNA, weighing the consequences of not settling against what they consider to be an undesirable settlement. The mediator should also remind the parties that their decision to litigate removes them from the position of being able to decide their own destiny and that a judge or jury whom they have never met will make the ultimate decision in their dispute.

Sometimes, the parties are unable to distance their emotions from the business aspects of the dispute. In such a situation, the mediator should give the parties another opportunity to vent their emotional frustrations, and then try to persuade them to look at the dispute from a business perspective. The mediator may also ask the parties to restate their respective positions, so the issues may be rephrased in a different way. This sometimes enables the parties to move away from their previous stonewall position and to change their bargaining stance without appearing to give in.

Finally, the mediator may decide to re-examine areas that could reveal interests not previously discussed. This may be especially useful if the parties have not fully discussed their interests and, instead, continue to argue the facts and the law. This exercise goes hand in hand with the process of discovering the parties' real motivations and getting past their emotionalism.

## II. SPECIFIC BARRIERS TO SETTLEMENT

In today's litigation environment, the mediator faces a number of barriers to settlement that are inherent in the adversarial process. Below are some specific barriers and some possible ways a mediator may avoid or overcome them.

### A. Lack of Adequate Settlement Authority

An impasse may occur if one of the party's representatives appears at the mediation without adequate and ultimate decision-making authority. When a party's representative is given only limited settlement authority, this limitation tends to anchor the representative's negotiation ability and destroy the flexibility of the bargaining process. Once the parties perceive their position as being inflexible, their negotiations often result in a stalemate.

***Solution:*** The mediator should determine, in advance of the mediation if possible that all parties and their representatives have adequate authority to settle. The mediator need not obtain a commitment of settlement authority for the full amount of the other party's demand; however, the mediator should ascertain that settlement authority exists within the *framework* of the demand. If an ultimate decision-maker cannot attend the scheduled mediation, the mediator may elect to

postpone the mediation until that person is available. However, if both sides want to go forward with the mediation, the mediator may decide to proceed on the assurance that the ultimate decision-maker: (1) will be available by telephone, and (2) usually will follow the party representative's recommendations in deciding whether a particular settlement is advisable.

## **B. The Party Advisor**

Sometimes a party will arrive at a mediation with an *advisor*, such as a spouse, a son or daughter, a boy friend or girl friend, or simply an interested acquaintance. In cases where there is insurance coverage, an in-house adjuster or an adjuster often accompanies the defendant from a separate firm. A corporate defendant or claimant may arrive with a plethora of people who are supposedly knowledgeable or needed in the decision-making process. Depending on the personality and role of the party advisor, their participation may either help or undermine the mediation process.

***Solution:*** The mediator should carefully consider whether the party will be a help or hindrance to the mediation process. Mediation is a confidential process, and only those persons having some legal connection to the dispute are entitled to attend. Therefore, unless the mediator is persuaded that a party's friend or advisor will contribute to the mediation process, the mediator may decide not to allow the advisor to participate. In such a case, the mediator may simply advise the parties that only those persons having some direct interest in the dispute will be permitted to attend the mediation.

## **C. Economic Problems**

Mediators have expressed concern about the increasing difficulties of settling civil litigation. With costs of litigation steadily increasing, what action may a mediator take to encourage obstinate parties to engage in good faith settlement negotiations?

***Solution:*** The mediator may first explain to the parties the practical advantage of a settlement. Instead of describing mediation as a procedural alternative, the mediator may explain how it is an economic opportunity. For example, in the opening statement, the mediator may emphasize the money savings aspects of mediation and focus the parties' attention on their pocket books. Throughout the mediation, the mediator may continue to stress the economics of litigation, discuss the present dollar value of cases heard by recent juries, consider the length of time it will take to get the case to trial, and make a list of all the expenses involved. The mediator should also explain there is an economic reality to everything, including a civil trial. The mediator should explain, for example, how

it is unwise to spend \$20,000 in an effort to obtain a verdict that, in real dollars, is worth only \$10,000. While conducting these discussions, the mediator should concentrate his or her attention on the persons who likely will be the decision-makers in the case.

## **D. The Secret Weapon**

During private sessions with the mediator, it is not unusual for one or both of the parties' counsel to tell the mediator about some dramatic evidence that will destroy the other party's case. Generally, this smoking gun evidence exists only in the unbriefed recesses of the lawyer's mind and seldom has the explosive impact described to the mediator.

***Solution:*** To meet and counteract such hidden evidence arguments, the mediator should encourage the parties to exchange all evidence and legal authorities that may be relevant to the mediation session. This gives opposing counsel an opportunity to challenge and respond to the legal or evidentiary arguments. In addition, the mediator may stress the uncertainty of litigation and point out that the opposing counsel has not yet tested the issue. In these discussions, the mediator should encourage the parties to engage in realistic, deductive reasoning to test and evaluate their respective positions.

## **E. The Time Problem**

Sometimes a party or the party's counsel may use the bottom line negotiation ploy: I don't have any more time, or My last offer is my bottom line I'm out of here. The mediator should usually disregard such expressions, because the passage of time is an essential part of mediation process. After the parties are given a sufficient amount of time to express their hurt, anger and frustration, they are much more apt to start thinking realistically about money and how they may reduce their losses. Therefore, so that the parties will have adequate time to process their dispute, the mediator should avoid imposing arbitrary time limitations on their negotiations.

***Solution:*** Arbitrary time barriers generally arise at some point after a settlement offer has been made by one of the parties. To neutralize the impact of a time barrier, the mediator may often distract the party asserting the barrier by asking questions that do not relate to the settlement amount. These questions generally help the mediator prolong the mediation and focus the parties' attention on realistic settlement options. Some types of distractive questions are:

- How much discovery remains to be done before trial?
- Do you plan to use an expert?
- What do you estimate will be the remaining cost of discovery?

- What will the expert charge?
- What will have to be submitted to the jury for you to prevail?
- Who are the witnesses you intend to use?
- What amount of recovery in cases like this have you experienced in the past?
- What is the worst case scenario?
- What about the discount factor in not getting your money now but several years from now?

If the mediation process is being conducted pursuant to a court order, the mediator may also advise the parties that the court expects the parties to remain in attendance until the mediator has declared an impasse or a settlement has been reached.

## **F. Matter of Principle**

It is not unusual for a party or their representative to become inflexible in their negotiation position, because, of a matter of principle. For instance, an adjustor may say that, I have been handling these cases for 30 years and I've never paid as much as \$20,000 for a soft tissue injury. Or, a corporate executive may state: If we pay this one, we'll have everybody suing us. These matter-of-principle positions present serious problems for the mediator, because the decision-makers are often so emotionally tied to the position that rational thinking is very difficult.

**Solution:** Perhaps the best way to deal with this problem is with the formula: Tenacity + Time + Doubt = Settlement. The mediator should try to persuade the parties to undertake realistic risk evaluations and should focus the parties' attention on the economic advantages of settlement as opposed to the cost and risk of litigation.

## **G. Multi-Party Problems**

The mediator will likely have special difficulty trying to resolve multi-party cases, particularly those where various parties are denying responsibility or trying to shift blame to other defendants. Such cases usually involve complicated legal theories, and in many such cases, counsels' discovery battles seriously drain the parties' coffers and challenge the court's patience. What may the mediator do to bring the parties and their counsel toward a realistic settlement?

**Solution:** Again, the mediator must try to focus the parties' attention on the economic realities of the case. Also, the mediator should ask the parties to give their worst case scenarios about what a judge or jury would likely do regarding the law and equities of the case. This kind of discussion will often give the mediator valuable information about the parties' views regarding the value of their case.

## **H. Angry Parties**

Often one or both of the parties are so angry and frustrated that their anger prevents any rational consideration of the problem. In a contested divorce, for example, both parties may be very angry and upset, and they may also be very afraid, because the divorce jeopardizes their economic stability. Quite often, these angry parties simply want the mediator to transfer their hurt and angry feelings to the other side. This, of course, is beyond the scope and purpose of the mediator's role.

**Solution:** The mediator should try to direct questions in a way that will encourage the angry party to vent. Time, along with the mediator's persistence and patience, will help the venting process. In the course of these discussions, the mediator may explain how anger usually increases the parties' costs. It is very important that the mediator be a good listener, because an angry party usually wants someone in an official capacity to hear their opinion about the dispute and about the other party.

## **I. The Law Argument**

A mediator is often faced with issues of law in which the two counsel are diametrically opposed, each relying solely on his or her own undeveloped interpretation of the law. The legal issue may be quite simple or it may relate to some obscure and unsettled field of law. Regardless of the complexity of the issue, both sides often will contend that their position is *clearly* right as a matter of law. What should the mediator do to help the parties resolve their legal dilemma?

**Solution:** A stalemate over a legal position often continues until the parties begin to doubt the strength of their positions. This doubt may be created in one of various ways.

The mediator may recess the mediation until some future date so that counsel may brief the law or submit the matter to a neutral case evaluation process;

The mediator may suggest the parties research the issue while the mediation continues in progress;

The mediator may try to neutralize the problem by focusing the parties' attention on the equities. Questions such as, Is it your opinion that even though your client entered into a written agreement to perform these services, and the plaintiff paid the full amount of the money provided by the contract, that your client may convince a judge, as a matter of law, that the agreement is legally enforceable? Are you basing your whole case on that position?

Thus, the mediation may try to motivate the parties to think more realistically and practically about their positions. The mediator should also stress that a litigant (and litigant's counsel) does not always win just, because he or she is convinced that their legal position is correct.

## **J. The Rambo Litigator**

To defuse this type of attorney, the mediator must be firm and even-handed. From the very beginning of the mediation, the mediator must caution the parties and their counsel that the mediation rules prohibit any form of disrespect or brow beating, and that each and every participant must address the other in a civil manner.

***Solution:*** If one side begins to intimidate the other, the mediator should bring the mediation to a halt with a courteous but firm admonition: Please remember that we are here to try to settle this matter, and name-calling will not help us reach that goal. If necessary, the mediator should take the attorneys aside and speak to them apart from the clients.

## **K. The Economic Disparity**

What should the mediator do when the damages are high but a party cannot pay? Even if liability is demonstrated, and damages are clear, the targeted party may have little or no financial ability to respond to damages.

***Solution:*** In this situation, the mediator must reach into his or her bag of tricks, and try to inject some new ideas for the parties to consider. The mediator might ask the parties if they have considered an installment payout represented by a note, or perhaps a structured settlement. Or, the mediator could ask if the doctors and chiropractor might be willing to discount some of the medial expenses. In some instances, the mediator might suggest the possibility of a bank loan, or finally, a consent judgment for an amount equal to or in excess of the settlement. Often the claimant does not believe the defendant is really insolvent, and sometimes a financial statement or audit will be necessary to convince the other party of that fact. Hence, the mediator's job is to encourage the parties to exchange enough information that they develop trust in one another's positions.

## **L. The Unfit Parent**

One of the most difficult areas of mediation involves the custody of children. The mediator seldom will have an easy custody dispute, and many custody cases will be settled only through litigation. Frequently, neither parent feels the other is a fit parent, and one party may have deeply bruised the ego of the other. Thus, a custody suit may not really be about children but about getting even. Sometimes, custody cases are resolved by the passage of time, because of changes in the parties' lives. Intervening factors such a job changes, financial problems, one or both of the spouse's involvement with a third party, children getting older, and other such life changes may cause the parties to rethink their intractable positions. But what may a mediator do to help the parties expedite this rethinking process?

***Solution:*** The mediator must endeavor, by lengthy and specific questions, often in private caucuses, to remove the parties from the here and now of the dispute. The mediator should encourage the parties to look into the future and try to predict how the continued stress between them may affect the children's lives. The mediator may also point out to the parents that the children need both of them. Using economics as a driver, the mediator should explain how devastated both parties will be if they pursue their vendetta against one another. Sometimes getting the attorneys alone may help. The laundry list of the reality factors the mediator may stress includes:

Economics B the parties cannot afford extended litigation;  
Bitterness will destroy them and the children;  
Look toward the future, toward new horizons;  
Time is what life is made of and it is being wasted;  
Consider the needs and desires of the children;  
Joint custody is not so awful;  
Both sides simply cannot win;  
Children need both parents.

Custody cases are difficult for everyone, and the mediator will need a full measure of imagination and patience to bring settlement to fruition.

## **II. CONCLUSION**

There is not one simple solution for every kind of settlement barrier. Most such barriers simply represent a mind set on the part of one or both parties. Generally, the mediator should continue to stress the economics of the case, focus the parties' attention on the equities, and try to get them to recognize there is always some doubt about the outcome of litigation.

As soon as the mediator perceives the existence of an impasse, the situation should be acknowledged in the presence of the parties, who should be asked to assist in finding ways to renew the settlement negotiations. In most instances, the parties and their counsel will respond affirmatively to such a request and will assume some of the responsibility for finding solutions. Once the parties begin to look upon the impasse as a common problem and to focus their collaborative energies on it solution, their cooperative actions often yield a solution.

Finally, the mediator must realize that even the great Babe Ruth struck out on occasion. Some cases simply are not going to be resolved by mediation. The mediator must not feel personally responsible for the failure of the parties to resolve their problem if he or she has given the time and attention it deserves. However, the mediator must be tenacious, and the mediator should never give up just, because the parties have done so.

## THE EVALUATIVE ADR PROCESSES

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### I. PROCESSES UNDER THE ADR ACT

#### A. Statutory Processes

The Texas Alternative Dispute Resolution Procedures Act (Sections 154.024 through 154.027) describes various ADR processes that, in addition to mediation, give the parties a means for obtaining a neutral evaluation of their dispute. Each of these non-binding processes, used separately or together with mediation or some other ADR process, provides an advisory estimate of the probable outcome of the dispute, which becomes a factor for the parties to consider in their further settlement negotiations. The different features of these evaluative processes, i.e. mini-trial; moderated settlement conference; summary jury trial, and non-binding arbitration, are outlined below.

#### B. Mini-Trial

##### § 154.024 Mini-Trial

- (a) *A mini-trial is conducted under an agreement of the parties.*
- (b) *Each party and counsel for the party present the position of the party, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations.*
- (c) *The impartial third party may issue an advisory opinion regarding the merits of the case.*
- (d) *The advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement.*

A mini-trial is a private, non-binding, evaluative process that frequently is used to resolve disputes between companies. In this process, the parties' representatives hear a "mini-trial" presentation of each side's "best case" and then use their business experience to negotiate a settlement. This process is conducted before a third-party neutral, or advisor, who moderates the proceeding. If the parties' representatives fail to negotiate a settlement, they may ask the neutral advisor to render a non-binding advisory opinion, which will provide an objective valuation benchmark in their further negotiations.

The primary purpose of a mini-trial is to focus the parties' attention on the relative strengths and weaknesses of their respective positions by an accelerated presentation of the merits of the case. Essentially, a mini-trial gives the parties' decision-makers a "crash course" on the merits of the dispute so that each side will better understand and appreciate the negative, as well as the positive, aspects of their position. A mini-trial may usually be conducted within one or two days, and the parties themselves agree upon the procedural aspects of the process. Customarily, the parties' agreement will specify the format of the presentation and will outline the role of the neutral advisor. In most instances, the proceedings and the settlement outcome will be treated as confidential.

The mini-trial has a number of advantages: (1) it is informal, (2) the rules of evidence are usually relaxed, (3) questions are usually permitted by the parties' representatives, (4) discovery is limited, and (5) procedural conflicts may quickly be settled by the neutral advisor. A mini-trial may be especially helpful in resolving business disputes, because it helps preserve future relationships, because it is confidential, flexible, and faster than going to trial.

## **C. Moderated Settlement Conference**

### **§ 154.025 Moderated Settlement Conference**

- (a) *A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.*
- (b) *Each party and counsel for the party presents the position of the party before a panel of impartial third parties.*
- (c) *The panel may issue an advisory opinion regarding the liability or damages of the parties or both.*
- (d) *The advisory opinion is not binding on the parties.*

A moderated settlement conference is a case evaluation process in which the parties present their case to a panel of neutral moderators, usually attorneys, retired judges, or other professionals who have knowledge and experience in the field of the dispute. After each side presents their case, the moderators render a non-binding evaluative opinion on the issues presented.

A moderated settlement conference is usually conducted under relaxed evidentiary and procedural rules. Indeed, the parties may often complete their presentations and receive the panel's non-binding, advisory decision within an hour or two. After the parties' initial presentations, the moderators often encourage the parties and their counsel to engage in an open question and answer session regarding their respective positions. The panel then retires to a private room to discuss the merits of the case. If the panel reaches a "verdict" on the issues, their findings are presented to the parties. If the panel members cannot agree, their individual verdicts are delivered to the parties. The panel's verdict indicates how a court might decide the issues upon the facts presented. The parties then continue their settlement negotiations in light of this

objective evaluation. In appropriate cases, the process may be used in conjunction with an existing or future mediation to help the parties' obtain a realistic evaluation of their case.

This process is one of the newest and most innovative of the ADR processes. It is very adaptable and it may be tailored to fit almost every kind of dispute. If the parties wish to conduct settlement negotiations without assistance of a mediator, the moderated settlement conference may be a most efficient means of obtaining an objective case evaluation. Moreover, even if the parties choose to mediate their dispute, the process may help them value their positions for the purpose of the mediation.

## **D. Summary Jury Trial**

### **§ 154.026 Summary Jury Trial**

- (a) *A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations.*
- (b) *Each party and counsel for the party presents the position of the party before a panel of jurors.*
- (c) *The number of jurors on the panel is six unless the parties agree otherwise.*
- (d) *The panel may issue an advisory opinion regarding the liability or damages of the parties or both.*
- (e) *The advisory opinion is not binding on the parties.*

The summary jury trial, sometimes called "jury mediation," employs a jury panel to evaluate the parties' dispute. The jury panelists may be selected from a court's regular jury pool or chosen in any other manner agreeable to the parties. Although the parties may agree on any number of jurors, six jurors are customarily selected. The jury's advisory verdict simply gives the litigants a realistic view of how a neutral jury might perceive the issues and decide the case.

The process is conducted in substantially the same manner as a civil trial, but in an abbreviated manner. Indeed, issues that normally require several weeks to try in a traditional court proceeding may often be decided within a day or two in a summary jury trial. After the jury is selected, the parties' counsel makes brief opening statements; present they're abbreviated cases; and make condensed final arguments. Rules of evidence and procedure are relaxed, and attorneys are discouraged from making unnecessary objections. If witnesses are called, their testimony is usually given in short, narrative form that focuses on the essential elements of the case. The jury is given a simplified charge and asked to return, if possible, a unanimous verdict; otherwise, each juror may use an individual verdict form. After the jury renders a verdict, the judge informs the jury panel that although their verdict is advisory and non-binding, it provides a most valuable function in helping the parties resolve their dispute. The jurors are then encouraged to stay in the courtroom and to discuss the issues with the disputants and their attorneys.

This process is intended to give the parties some indication of how a jury might view their respective positions. While one jury's verdict does not mean all juries would reach the same decision, it does provide an objective evaluation from a jury's standpoint. Thus, a summary jury trial may be an effective settlement tool, giving litigants their day in court through a speedy, cost-effective and confidential dispute resolution mechanism.

## **E. Non-Binding Arbitration**

### **§ 154.027 Arbitration (Non-binding)**

- (a) *Non-binding arbitration is 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.*
- (b) *If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.*

The term "non-binding arbitration" is often misleading, because most lawyers and business people consider an arbitration to be a binding process. As defined in the Texas ADR Act, the process is simply a "forum in which each party and their counsel present their positions to an impartial third party, who renders a specific award. If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not so stipulate, the arbitrator's non-binding award and serves only as a factor in the parties' further settlement negotiations."

This process uses a neutral case evaluator, the arbitrator, who hears the merits of a pending case and renders a private, confidential award. The process may be implemented quickly and is relatively inexpensive. If the parties stipulate in advance of the hearing that the award will be binding, it is enforceable in the same manner as any other contract obligation. The parties may also place "high" or "low" limits on the binding arbitration award. Because the arbitrator's decision is advisory only, rules of evidence and procedure are usually relaxed as in other non-binding processes.

Non-binding arbitration, although used less frequently than other case evaluation processes, may be effective in appropriate situations. Where the parties or a court need a prompt relatively inexpensive case evaluation by a single neutral, particularly one who has experience in the subject matter, this process has much to offer. Unless the parties otherwise agree, the arbitration and the award are confidential, and the arbitrator's fees may be taxed as costs of suit. If the parties decide to stipulate in advance of the arbitration that the award will be binding, it is binding and enforceable as any other contract.

## F. Hybrid ADR Processes

In addition to the statutory processes outlined above, the courts are authorized to refer pending cases to any other "non-judicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party." Thus, the Texas ADR Act allows the courts and the parties to fashion hybrid ADR processes, such as by combining mediation and arbitration ("med-arb"), to fit the ADR process to a particular dispute. Some of the most commonly used hybrid processes are *med-arb*, *arb-med*, and *binding neutral evaluation*. In the *med-arb* process, the parties participate in mediation before engaging in a binding arbitration. If the parties are unable to resolve all issues involved in their dispute, they proceed to submit those issues for a binding arbitration. In the *arb-med* process, the parties agree to mediate any issues between them that were not conclusively decided by the binding arbitration.

A *binding neutral evaluation*, such as a mini-trial, moderated settlement conference, or summary jury trial, may be modified by agreement so that it produces a stipulated final result. For example, the parties in a summary jury trial may agree (as is frequently the case in a binding arbitration) that the jury's verdict will result in a binding award of a certain amount that will not exceed a designated ceiling or "high", nor be less than a designated floor or "low." Thus, under such an agreement, the claimant will receive some minimum amount and the respondent's liability will be limited to a designated sum.

The provisions of the Texas ADR Act give the courts and litigants considerable latitude in fashioning hybrid ADR processes that will fit the special needs of the particular case. The bench and bar should be knowledgeable regarding these processes that offer cost-effective alternatives to expensive and time-consuming litigation.

## G. Collaborative Law

This relatively new process provides clients and their lawyers with a new non-adversarial approach for resolving disputes. The parties are to engage in cooperative non-combative behavior as they work to eliminate litigation as an option.<sup>49</sup> One of the key elements of collaborative law is the disqualification of the participating lawyers if the negotiation process breaks down.<sup>50</sup> As such, the lawyers are motivated to make the collaborative process succeed.<sup>51</sup>

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49 The Collaborative Law Center, *Representation Without Litigation*, (available at <http://www.collaborativelaw.com>) (accessed Feb. 16, 2003).

50 *See Id.*

51 *See Id.*

The basic premise being the lawyers will be driven to seek workable solution, because they know they will not have an opportunity to litigate the case.<sup>52</sup> In the end, openness and candor should replace secrecy and threats as the tool of a successful negotiation.<sup>53</sup> Collaborative law differs from other ADR methods, because there is no third party neutral involved.<sup>54</sup> Furthermore, where parties to other forms of ADR are free to leave, the parties involved in collaborative law commit to continuing until a solution is reached.<sup>55</sup>

## **II. NEW EVALUATIVE PROCESSES**

### **A. Facilitated Settlement Conferences**

When disputants begin settlement negotiations, they often have widely divergent views about what constitutes a reasonable settlement range. Thus, the services of an experienced facilitator may be needed to help the parties develop an objective evaluation of their respective positions. Unless the parties are able to make a realistic appraisal of their case, there is a good chance they may reach an impasse early in their negotiations. In such event, they may blame the facilitator and the process, concluding that the entire settlement process was a waste of their time and money.

In helping parties develop an objective evaluation of their dispute, the facilitator will usually encourage each party to “step back” and view the dispute from the standpoint of the other side. Traditionally, in making this evaluation, the parties and the facilitator have been forced to rely on information exchanged during the negotiation session. As a result, the process of analyzing such information is often so slow and tedious that the parties and their counsel become frustrated with their evaluative efforts.

A specially trained facilitator may improve the efficiency of the process by helping the parties and their counsel develop a realistic plan for the exchange and analysis of essential data. In this way, the facilitator may help the parties streamline the settlement process and accelerate the time when they are prepared to engage in serious negotiations.

### **B. The Facilitator’s Role**

In most cases, parties enter into settlement negotiations with a good faith belief that they have made a fair and objective evaluation of their case. However, parties often begin their settlement discussions with strongly held but somewhat unrealistic views about the value of their positions.

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<sup>52</sup> *See Id.*

<sup>53</sup> *See Id.*

<sup>54</sup> *See Id.*

<sup>55</sup> *See Id.*

Thus, a facilitator may face difficult obstacles in helping the parties develop an objective evaluation of their dispute.

In providing this evaluative help to the parties, the facilitator may assume a purely facilitative role, never indicating by word, manner, or expression his or her views about the merits of the dispute. On the other hand, the facilitator may assume a more pro-active role, engaging in frank and provocative discussion of the merits with either or both of the parties. Or, taking the middle ground, the facilitator may adopt a role that is in accordance with the wishes of the particular parties.

### **C. Developing an Objective Evaluation**

The development of an objective evaluation usually plays an important part in the negotiation process. A facilitator, using confidential questionnaires designed to elicit the parties' positions on the issues and interests involved in the dispute, may help educate the parties regarding their relative strengths and weaknesses and begin to establish a priority of their underlying goals.

In some cases, the facilitator may be able to encourage the parties to agree upon a reasonable range for their settlement negotiations. In most cases, however, the facilitator may need the help of a structured evaluative process such as a moderated settlement conference, a summary jury trial, or a panel of neutral experts. In such a neutral evaluation process, the facilitator is not limited to being either facilitative or pro-active. Rather, the facilitator may help the parties focus on the issues without compromising the essence of his or her neutrality.

### **D. Neutral Expert Evaluation**

Where parties need only to develop an objective evaluation of their positions before engaging in productive negotiations, they may decide to use a Neutral Expert Evaluation process. In a format similar to a moderated settlement conference, a panel of retired judges, attorneys, or other experts may evaluate the party's positions and give a non-binding estimate regarding the probable outcome of the case. The parties then use this advisory decision as an objective factor to guide their negotiations in further settlement discussions.

This facilitated settlement process is relatively simple, quick, and cost-effective. It may be used with computer technology to provide mathematical risk evaluation, option selection and cost-benefits analysis. In sum, it helps the parties negotiate with greater assurance of finality and predictability.

### **E. Computer-Assisted Negotiations**

Parties to a dispute usually make some effort to evaluate their probable risks, costs, and outcome. This evaluative process may be quite simple, e.g. making an analysis on the basis of jury verdicts published in similar cases, or it may be more complex, e.g. using a decision-tree formula to develop a mathematical analysis of risks, costs, and probable outcomes. Using available commercial software, litigants may factor into their analysis a wide variety of factors that may affect their settlement decisions.

A facilitator using state-of-the art computer software may help the parties and their counsel analyze: (1) the risks and costs involved in further adversarial proceedings (2) the selection and prioritization of different solutions; and (3) the intangible long range cost-benefits of settlement as opposed to further litigation.

## **F. Internet Conferencing**

Mediation and other ADR processes have traditionally involved face-to-face communications. But such “warm-body” interaction is not always a critical element in the resolution of disputes. Indeed, experience has shown that, while face-to-face participation may be desirable in many cases, it is possible (and sometimes even desirable) for the parties to communicate effectively through Internet Conferencing techniques.

Internet Conferencing, conducted simply as Text Messaging or combined with Video-conferencing, may provide a cost-effective means for conducting a facilitated settlement process. Using advanced telecommunications technology, parties may participate in “real-time” settlement negotiations without undergoing the time, cost, and inconvenience of modern-day business travel.

Assume, for example, a dispute between one company in Chicago, another in New York, and a third in Tokyo. Using state-of-the art Internet Conferencing, the parties’ representatives and counsel may engage in real-time negotiations through an assisted negotiation process conducted by a facilitator in Houston. If need be, the facilitator may incorporate the evaluative expertise of a panel of jurists situated in Atlanta, San Francisco, and Miami. The entire Internet conferencing process may usually be accomplished within a matter of hours.

Internet Conferencing process may be quickly initiated and is relatively inexpensive. The process may usually be conducted with less time, cost, and stress than a traditional ADR process and with lesser degree of manipulative posturing by parties and their counsel. In international disputes, Internet Conferencing protocols may help the parties avoid cultural misunderstandings and help reduce the time, cost and inconvenience of long-distance travel.

## **G. The MAY-WIN<sup>SM</sup> System**

Resolution Forum, Inc., a § 501(c) (3) educational organization, has developed a computer-assisted negotiation process, called Computer-Assisted Negotiation – Web International Network (“MAY-WIN”), which offers efficient on-line evaluation and negotiation conferencing for a wide variety of disputes. A specially trained settlement conference facilitator, using this ADR process, may help parties resolve their disputes quickly and cost-effectively with dispute resolution protocols designed specifically for Internet Conferencing.

The MAY-WIN<sup>SM</sup> conferencing system is easily initiated and simple to use. Each party’s representatives, using standard browser software (such as Netscape or Internet Explorer), logs into the Conference Room by entering their name on a list appearing on each party’s screen. When a party leaves the Conference Room or a new party arrives, an appropriate message notes their departure or arrival. There are at least two conference rooms so that the parties may have “breakout” sessions in the customary fashion. The parties in one conference room cannot usually overhear or talk directly with the parties in another conference room, but the facilitator may direct the flow of communication between and among the parties. The facilitator also possesses unique identification codes that enable him or her to perform special functions during the conference. For example, the facilitator may communicate with both parties simultaneously; remove a party from the conference either temporarily or permanently; or clear the message area on all participants’ screens. The facilitator may also conduct discussions with neutral experts retained to provide evaluative analysis of the parties’ positions. External confidentiality is preserved by password-protected access to the conference, which is controlled by the Program Administrator.

## **H. Value of Text Messaging**

In today’s world of television and telephone, people sometimes underestimate the value of the written word. People who are under the stress of conflict often write messages that are provocative, poorly phrased, and carry implications of hostility and intimidation. Unless parties take the time to edit such writings, they tend to exacerbate the dispute and destroy the opportunity for effective settlement discussions.

Written communications may, however, be an effective medium for productive settlement negotiations. This is especially true of Internet Conferencing, which enables the parties and their counsel to engage in real-time text messaging while remaining in the comfort and convenience of their own offices. Using this system of communication, a trained facilitator may conduct an ADR process within a matter of hours that would normally have required a fully day or more of the parties’ time.

## CONFIDENTIALITY OF ADR IN TEXAS

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The Texas ADR Procedures Act provides that, subject to certain exceptions, the ADR process is confidential.

### ' 154.073 Confidentiality of Certain Records And Communications

- (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
- (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.
- (c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.
- (d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.
- (e) If this section conflicts with other legal requirements for disclosure of communications or material, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

- (f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.
- (g) This section applies to victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

## I. POLICY CONSIDERATIONS

As discussed earlier, it is usually essential to the mediation process that the mediator gain the parties' trust and confidence. Absent such confidence, it is often difficult, if not impossible, for the mediator to obtain the candid, confidential information needed for meaningful settlement negotiations. Because disputing parties often fear their disclosures may later be used against them, they frequently are reluctant to divulge confidential information to the mediator. Thus, the mediator must try to establish a *confidential environment* that will encourage the parties to be candid and to participate fully in the mediation process.

Texas has adopted a strong public policy supporting the confidentiality of communications transmitted during ADR processes. Indeed, the Texas ADR statute is said to provide one of the broadest ADR privilege provisions in the country,<sup>56</sup> often being credited with the rapid growth of ADR in Texas since the enactment of the 1987 Texas ADR Act:

Many proponents of ADR (and particularly of mediation) claim that confidentiality is critical to the success of the process. They maintain that parties will not speak freely if confidentiality is not guaranteed and that the ability to get to the heart of the dispute will be jeopardized. They also argue that the independence of the mediator would be undermined if she could be required to testify about the mediation at some future time. In opposition to a broad claim for mediation, confidentiality is our tradition that all relevant evidence should be available in judicial proceedings. The right to every man's evidence is a basic principle only outweighed in the case of certain limited privileges. There are sometimes strong arguments for breaching the confidentiality of an ADR proceeding. One party may challenge a settlement agreement on the basis of fraud, coercion, or mistake in the ADR proceeding, and what occurred or what was said in an ADR proceeding may be critical to resolving some other dispute. A dispute may attract public interest, and the confidentiality may be challenged

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<sup>56</sup>See, Allan S. Rau and Edward F. Sherman, Texas ADR and Arbitration Statutes, Shepards/McGraw-Hill, Inc., pp. 39-40 (1994).

by the media or interest groups on the ground of a public right to know. The facts, evidence, or terms of settlement may significantly impact on public health or safety or the administration of public functions.

This debate was resolved in Texas in favor of broad confidentiality.<sup>57</sup>

In essence, the Texas ADR Act provides statutory assurance of confidentiality throughout the mediation process.<sup>58</sup>

## II. EXCLUSION OR PRIVILEGE

Although statutes, local court rules, and ethical guidelines provide for confidentiality in mediation, the term has been interpreted to have two distinct meanings. Confidentiality may be thought of as an evidentiary exclusion, which prohibits certain evidence obtained through the mediation process from being admitted at trial. On the other hand, confidentiality may be considered a privilege, which provides a broader scope by protecting against other disclosures than trial or discovery.

Evidentiary exclusionary rules protect settlement negotiations by providing that negotiations relating to a disputed legal claim are not admissible in evidence to prove the claim or its amount. Both the federal and state rule of evidence 408 provides an evidentiary exclusion for settlement discussions that are applicable to the ADR process.<sup>59</sup> Compromise offers or discussions about

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<sup>57</sup>*Id.*

<sup>58</sup>*Id.* at 40-48.

<sup>59</sup>Fed. R. Evid. 408. The federal rule of evidence, Compromise and Offers to Compromise provides: Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely, because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Tex. R. Evid. 408. The Texas rule of evidence provides: Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for, in invalidity of, the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely, because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

the amount or validity of a claim are also not admissible to prove liability.<sup>60</sup> Evidence of conduct or statements made in compromise negotiations are also not admissible.<sup>61</sup> The purpose of the rule is not only to promote settlement and encourage openness and candor in settlement negotiations but also to prevent a jury from interpreting evidence of a settlement offer as an admission of a weak legal case.

Federal Rule 408 has limited application as courts have held that only statements that are used to prove validity of the claim or amount are excluded from evidence.<sup>62</sup> Therefore, compromise statements that do not pertain to proving the claim are not excluded from being admitted at trial.<sup>63</sup> This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, proving an effort to obstruct a criminal investigation or prosecution, or to prove that statements made in the negotiations were misrepresentations.<sup>64</sup> The exceptions to the rule's primary

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<sup>60</sup>See *Barrett v. United States Brass Corporation*, 864 S.W.2d 606, 634 (Tex. App. B Houston [1st Dist.] 1993, appl. writ err granted, modified 919 S.W.2d 644) (U.S. Brass sought to introduce its offers of settlement to directly defeat its alleged liability and the amount of damages claimed. This is not the offering of evidence under Rule 408 for >another purpose,= and is in derogation of the Rule 408 prohibition against admitting evidence of offers of settlement for the purpose of proving liability, for, or invalidity of, the claim or its amount).

<sup>61</sup>Kristina M. Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 Rev. Litig. , (Summer 1993) interpreting Fed. R. Evid. 408 advisory committee=s note, Rule 408 expressly overrules the former common law rule practice that admissions of fact made during attempts to settle were admissible unless the information was made without prejudice or inseparably connected with the offer so that it could not be correctly understood without reading the two together. Rule 408 expressly overrules this practice, making all conduct and statements made during compromise negotiation inadmissible, in an effort to encourage unrestrained communication during settlement attempts.

<sup>62</sup>See Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, A 39 Hastings, L.J. 955, 966 (July 1988) (the scope of 408 is limited, the more consequential limit on the rule's scope is the proviso that it applies only when the purpose of admitting evidence from the negotiations is to prove liability for or invalidity of the claim or its amount. Thus, by its own term, Rule 408 does not preclude admission of offers of compromise, or statements made in negotiations, when admitting the evidence would serve any purpose other than directly proving or disproving liability for or the amount of the claim.

<sup>63</sup>Michael D. Young and David S. Ross, *Confidentiality of Mediation Proceedings*, C879 ALI-ABA 571, 574 (November 18, 1993) (No court has directly ruled that mediation should be considered a settlement negotiation' for purposes of Rule 408 or the common law exclusionary rule. But, many parties and mediators assume that mediation is such a settlement negotiation' and thus deserves the protection of these rules.) (Mediation is a type of negotiation process and therefore should probably be considered a settlement negotiation' for purposes of the exclusionary rules.).

<sup>64</sup>See *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 537 (Tex. App. B Corpus Christi 1985, *ref. n.r.e.*) cert. denied 106 S.Ct. 1200 (1986) (Rule 408 does not require exclusion when the evidence is offered for another purpose, court allowed evidence of settlement negotiations were admissible to show that statements in negotiations were admissible to show that statements in negotiations were misrepresentations); See also Kerwin at 668.

purpose of excluding settlement information have limited the protection afforded the mediation process.

Settlement communications that are not admissible at trial for certain purposes may still be subject to pretrial discovery. In order to prevent these communications from being discoverable, advocates of protecting the confidentiality of mediation proceedings consider settlement communication to be privileged under Rule 408. The argument may be made that the parties involved in a mediation have a protected relationship. A privilege may be established by recognition of a protected relationship, such as husband-wife, attorney-client, and priest-penitent. Statements made by a person within a protected relationship are protected by law from forced disclosure on the witness stand at the option of the witness, client, penitent or spouse. In discovery, when interrogatories, depositions, or other forms of discovery seek information, which is otherwise privileged, the party from whom it is sought may claim his or her privilege.<sup>65</sup> If communications made in connection with settlement are privileged, they will fall outside the scope of discovery.<sup>66</sup>

A strong argument in favor of viewing Rule 408 as creating a privilege may be built from the principal purpose of the rule. Because its principal purpose is to encourage settlement by encouraging 'freedom of communications with respect to compromise, even among lawyers, Rule 408 has something very important in common with traditionally recognized privileges.' The principal reason the law cloaks communications between attorney and client with confidentiality, for example, is to encourage clients to 'tell all' to their lawyers. The traditional privileges, in short, have been designed to serve a closely analogous function is a major argument in favor of viewing it as creating a privilege.<sup>67</sup>

Due to the uncertainty of a court determining whether Rule 408 or recognition of a discovery privilege excludes settlement communications from evidence, states have created statutes providing additional protection against disclosure of communication made during mediation. Parties who fear that statements or documents made during the process might be used against them in subsequent adversarial proceedings will be less likely to be candid during discussions. In addition, parties may undermine the purpose of mediation by using the process as a discovery tool. Furthermore, potential volunteers may choose not to serve as mediators for fear of having to testify.<sup>68</sup> In response to these concerns, the trend is the creation of legislation at the state level

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<sup>65</sup>See Fed. R. Civ. P.; Fed. R. Crim. P. 16.

<sup>66</sup>See *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 629 (Tex. App. B Houston [14th Dist.] 1993, orig. proceeding) (if a matter sought to be discovered is privileged, it is not subject to discovery.).

<sup>67</sup>Brazil at 989.

<sup>68</sup>Young at 575.

based on a desire to increase the confidentiality of settlement proceedings and thereby foster an atmosphere of cooperation and full disclosure.

### III. STATUTORY AND COURT PROTECTION

In order to encourage the use of ADR, federal and state laws generally protect communications made by the mediator or the parties to a mediation from disclosures in subsequent judicial or administrative proceedings. Texas has provided broad statutory protection to communications made during ADR procedures for both civil and criminal disputes.<sup>69</sup> The protection applies to either voluntary or court-referred mediation and whether before or after the institution of formal court proceedings. The Act expands the scope of protections provided by the rules of evidence excluding evidence relating to compromise negotiations.

The Texas ADR Act provides, in effect, that communications made in, and records relating to alternative dispute resolution procedures are confidential, not subject to disclosure, and are inadmissible in any judicial or administrative proceeding. Therefore, subject to certain exceptions, the parties and the mediator may not be compelled to testify about matters relating to the dispute and are not subject or process requiring disclosure of confidential information. In addition, the records used in the procedure are also considered to be confidential subject to the exception that an oral or written communication relating to an ADR process. If the statutory confidentiality provision conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the communications or materials sought to be disclosed warrant a protective order of the Court of whether the facilitator the duty to maintain confidentiality at all times with respect to communications relating to the subject matter of the dispute.<sup>70</sup> Thus, the neutral third party may not disclose to either party information given in confidence by the other unless expressly authorized by the disclosing party. Further, unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may not be disclosed to anyone, including the appointing court.<sup>71</sup>

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<sup>69</sup>Tex. Civ. Prac. & Rem. Code, Sec. 154.073; *See also, Williams v. State of Texas*, 770 S.W.2d 948, 949 (Tex. App. B Houston [1st Dist.] 1989, *no writ*) (Awe may not consider any evidence from the dispute resolution procedure that appellant and complainant participated in prior to his arrest, as disclosures made in an ADR procedure are confidential, and not subject to disclosure.).

<sup>70</sup>*See Hur v. City of Mesquite*, 893 S.W. 2d 227, 234 (Tex. App. B Amarillo 1995, *writ denied*) (party claimed that section 154.053(c) precludes bringing a breach of contract claim arising out of mediation. The court held that this provision speaks only to the duties imposed upon impartial third parties who participate in alternative dispute resolution proceedings, not the duties of the parties to the process.).

<sup>71</sup>Tex. Civ. Prac. & Rem. Code ' 154.053(b),(c) provides:

Other states have enacted statutes similar to the Texas Act that recognize the mediator's duty of non-disclosure; however, few courts have addressed the issue of confidentiality in mediation. In 1980, the Ninth Circuit, in *National Labor Relations Board v. Joseph Macaluso, Inc.*, revoked a subpoena for the testimony of a federal mediator. In denying the subpoena, the court concluded that a mediator who discloses confidential information against one side may no longer be perceived by the parties as impartial, and will be seen as favoring one side or the other.<sup>72</sup> Similarly, the District of Columbia Court of Appeals denied a labor union's request for an order to compel the National Mediation Board to terminate mediation and begin arbitration. The court held that NMB decisions were not subject to judicial review, and that to compel NMB to justify continuing mediation would require disclosure of the mediator's impressions of the parties' conduct, secrets and offers, or chances of settlement, thereby compromising mediator impartiality and interfering with the mediation process.<sup>73</sup>

In *Smith v. Smith*, the U.S. District Court in Dallas upheld a U.S. magistrate's decision to quash a subpoena, which had been served on a state court-appointed mediator to give testimony in a subsequent federal action.<sup>74</sup> The court acknowledged that the Texas ADR Act plus the local court rules and orders expressly provide expansive confidentiality provisions protecting the

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(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process are confidential and may never be disclosed to anyone, including the appointing court.

<sup>72</sup>*National Labor Relations Board v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980).

<sup>73</sup>See *Local 808, Building Maintenance, Service & Railroad Workers V. National Mediation Board*, 888 F.2d 1428, 1435-36 (D.C. Cir. 1989).

<sup>74</sup>See *Smith v. Smith*, 154 F.R.D. 661 (N.D. Texas, Dallas 1994) (Andrew Smith, Plaintiff, brought suit against his brothers in both state and federal court. The state district court appointed a mediator and the family settled the state court suits and executed a settlement agreement and release. Afterwards, Andrew brought an action in federal court asking for specific performance of the settlement agreement. Defendants issued a subpoena duces tecum to the mediator of the state court lawsuits commanding that he appear as witness at trial and produce and permit inspection and copying of all documents in his possession relating to mediation. The mediator moved to quash the subpoena on the basis that the requested testimony was prohibited by section 154.073. The magistrate decided in favor of the mediator and quashed the subpoena. Although the magistrate assumed the mediator's testimony would not be rendered inadmissible by Rule 408, he found it unnecessary to decide whether Texas law was binding on this court, because comity required the court to give due deference to the Texas law and rules. In addition, the magistrate concluded that a mediator privilege as applicable.)

mediator. However, the court declined to consider the issue of the so-called mediator's privilege.

Federal law governs whether there is a mediator privilege in a case like the present one, the extent to which federal courts currently recognize such a privilege is narrow, and the Supreme Court and Fifth Circuit will not confer a new privilege without carefully balancing the relevant competing interests. While confidentiality appears to be widely accepted in state law as a desirable component of the mediation process, there are legitimate countervailing interests to be accounted for in formulating a privilege that is invocable by a mediator, and not the least of which is the venerable right to every man's evidence. The privilege question should be decided only in a case that requires that the issue be resolved, and then only after carefully examining and weighing the relevant factors.<sup>75</sup>

Nevertheless, the court did recognize federal court decisions that had adopted a mediator privilege (primarily in the context of labor mediations where courts have relied upon explicit national policy reasons) to preclude mediators from testifying.<sup>76</sup> In addition, the court noted that most states have passed laws protecting communications made during mediation.

#### **IV. CONTRACTUAL PROTECTION**

Parties to a mediation may also execute a confidentiality agreement which contains protections extending beyond the statutory limits or which clarify uncertainties in the statutory language. In essence, the parties may create their own provisions relating to disclosure. Assuming that the parties enter such an agreement knowingly and voluntarily, the agreement will be enforceable to the extent that its provisions are not inconsistent with the statutory provisions. Such an agreement may deter the parties to the mediation from violating their confidentiality understanding and also deter parties from seeking confidential information.<sup>77</sup>

#### **V. MEDIATOR'S DUTIES TO DISCLOSE**

Communications protected under the confidentiality provisions of the ADR Act may have to be disclosed if there is a conflict between the ADR Act and some overriding law that requires disclosure. If such a conflict occurs, the issue of confidentiality may be presented to the court to determine, in camera, whether the facts, circumstances, and context of the communications or

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<sup>75</sup>*Id.* at 670.

<sup>76</sup>*Id.* at 671.

<sup>77</sup>Rau & Sherman, at 48.

materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure. Under certain circumstances, for example, a state or federal statute may establish an affirmative duty to disclose certain information. The most common situations involve child abuse as well as abuse of the elderly or disabled.<sup>78</sup>

Further, a mediator may be confronted with the dilemma of a public policy statute or ethical guideline requiring disclosure of professional misconduct by licensed professionals such as physicians and attorneys. Other compelling policy reasons for disclosure may include situations where the mediator learns of criminal acts, threats of imminent harm to the individual, or fraudulent behavior by a party involved in the mediation.<sup>79</sup>

As the use of ADR expands, there will very likely be increased involvement of the courts, the organized bar, and other ADR professional groups. Because no one agency or organization has exclusive administrative control over ADR processes, it will require patience, understanding, and continuing communication among these interested groups to deal with the tensions emanating from conflicted viewpoints. The ultimate test of ADR maturity in Texas is whether these different ADR groups will interact with one another in a collaborative, ethical, and professional manner.

## **VI. CONFIDENTIALITY: OPEN COURT RECORDS AND MEDIATED SETTLEMENTS**

Another issue arising in Texas is the balance between the need for confidentiality in mediation and the right of the public to know about matters affecting the public's interest. For example, will the public's right to know be given a higher priority than a litigant's right to privacy and protection of proprietary rights? What special circumstances will tip the balance one-way or the other? Which entities, *e.g.* the courts or the legislature, will make these determinations? And what effect will those decisions have on the assurance of statutory protections in mediations?

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<sup>78</sup>*See*, Irene Stanley Said, "The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute," 36 S. Tex. L.Rev. 579, 609 (April 1995) (discussing section 34.01 of the Texas Family Code requirement of reporting suspected child abuse and abuse of an elderly or disabled person under §§ 48.036 through 48.041 of the Texas Human Resources Code.).

<sup>79</sup>Note, however, there may be no legal duty to make a disclosure. *See*, Bird v. W.C.W., 868 S.W.2d 767, 770 (Tex. 1994) (holding there is no general duty to report the threat of another to commit a felonious act.).

## THE SETTLEMENT AGREEMENT

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The Texas ADR Procedures Act specifies under what circumstances an agreement reached through an ADR process will be effective and enforceable.

### ' 154.071 - Effect of Written Settlement Agreement

- (a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
- (b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.
- (c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

### I. ENFORCEMENT OF A CONTRACT

Texas courts have held that general contract law applies to a settlement agreement reached after a mediation conducted pursuant to the Texas ADR Act. *Ortega-Carter v. American Int'l Adjustment Co.*, 834 S.W.2d 439, 442 (Tex. App. - Dallas 1992, *writ denied*). Thus a breach of a settlement contract after mediation is not different than a breach of settlement agreement without mediation. *Island Entertainment, Inc. v. Castenada*, 882 S.W.2d 2, 5 (Tex. App - Houston [1st Dist.] 1994, *writ denied*).

#### A. Oral Agreements

Standard contract principles permit the enforcement of an oral settlement agreement if the party seeking to enforce the agreement may prove the contractual relationship, the substance of the contract, and a breach of the contract. *Hur v. City of Mesquite*, 893 S.W.2d 227, 232-233 (Tex. App. - Amarillo 1995, *writ denied*) (allegations of breach of verbal settlement agreement reached during mediation held to state a valid cause of action). Of course, the party alleging breach of contract must prove by admissible evidence that the alleged agreement has the requisites of a

valid contract.<sup>80</sup> Moreover, if the oral settlement agreement relates to a matter that is the subject of pending litigation, it may not be enforceable unless it is reduced to writing and meets the requirements of Texas Rule of Civil Procedure 11, discussed below.<sup>81</sup>

## **B. Written Agreements**

As expressly stated in the language of the Texas ADR Act, a written settlement agreement reached after a mediation is enforceable in the same manner as any other contract. Tex. Civ. Prac. & Rem. Code Ann. ' 154.071; *Manta v. Fifth Circuit Court of Appeals*, 925 S.W.2d 656 (Tex. 1996) (per curiam). Under contract law, a party to a valid section 154.071 settlement agreement may enforce the agreement without the other party's consent. *Mantas*, at 658. In *Cadle Company v. Castle*, 913 S.W.2d 627 (Tex. App. - Dallas 1995, writ denied) the court, sitting en banc, explained:

Under section 154.071(a), either party to a written settlement agreement may enforce the agreement under general contract law. The law regarding enforcement of contracts is well established in Texas. A cause of action for breach of contract consists of the contract itself, which is the primary right of the plaintiff, and its breach by an act or omission of the defendant. A petition in an action based on a contract must contain a short statement of the cause of action sufficient to give fair notice of the claim involved, including an allegation of a contractual relationship between the parties, and the substance of the contract which supports the pleader's right to recover. In response, a defendant may file a general denial, which puts at issue all matters. Many defenses to a breach of contract suit, including lack of capacity, denial of execution, lack of consideration, and usury, must be made by verified denial. Further, the affirmative defenses of accord and satisfaction, duress, failure of consideration,

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<sup>80</sup>The confidentiality aspects of mediation create a formidable barrier to an offer of proof of a verbal settlement agreement. The mediator cannot, of course, be compelled to testify about the parties' negotiations that led to an alleged agreement. Tex. Civ. Prac. & Rem. Code Section 154.053(c). In some circumstances, one of the parties may be permitted to testify regarding matters that directly affect the validity of the mediated settlement agreement. See, *Randle v. MidGulf*, 1996 WL 447954 (Tex. App. - Houston [14th Dist.] 1996, no writ) (in suit to specifically enforce mediated settlement, party resisting settlement could testify about alleged duress, notwithstanding confidentiality protection of Section 154.073); see also, *Hur v. City of Mesquite*, at 232 (party to a settlement agreement with City might prove that City's representative had fraudulently misrepresented he had City's authority to contractually bind the City to the agreement).

<sup>81</sup>Tex. R. Civ.Prac. Rule 11 provides, in essence, that unless otherwise provided by the rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it is in writing and complies with the other requisites of the rule. The Texas Supreme Court has stated that a settlement agreement must be judged by the standards of Rule 11. See *Kennedy v. Hyde*, at 528. Does this mean that the courts will refuse enforcement of a verbal settlement agreement if there is a suit pending?

fraud, illegality, statutes of frauds, and other matters in avoidance must be affirmatively pleaded. A party to a breach of contract suit is entitled to pretrial discovery. A party is entitled to a summary judgment in a breach of contract suit when no material fact issues exist and the movant establishes its right to judgment as a matter of law. If, however, a trial on the merits is necessary, a party to a breach of contract suit is entitled to a jury trial on disputed issues of fact. Until the recent per curiam decision of the Texas Supreme Court in *Mantas*, it was unclear when a party needed to bring a separate suit to enforce a settlement contract. In *Mantas*, the court clarified its position:

We recently reaffirmed that a written settlement agreement may be enforced though one party withdraws consent before judgment is rendered on the agreement. Where consent is lacking, however, a court may not render an agreed judgment on the settlement agreement, but rather may enforce it only as a written contract. Where the settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number. However, where the dispute arises while the underlying action is on appeal, as in this case, the party seeking enforcement must file a separate breach of contract action. Because Barnett revoked his consent to the settlement before the court of appeals dismissed the appeal in accordance with the agreement, the court correctly determined that *Mantas* was required to seek enforcement in a separate suit. *Mantas*, at 659.

Thus, it appears that a written settlement agreement may be enforced by one or more of the following methods: (a) a suit on the settlement contract; (b) by a motion filed with the court pursuant to Rule 11 of the Texas Rules of Civil Procedure; and (c) showing compliance with the requirements of that statute.

## II. RULE 11 AGREEMENTS

Texas Rule of Civil Procedure 11 provides that unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it is in writing, signed and filed with the papers as part of the record, or unless it is made in open court and entered on record.

This rule has been in existence since 1840, and it has contained the filing requirement since 1877. The reason for the rule is that verbal agreements between counsels are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies. *Padilla v. LaFrance*, 907 S.W.2d 454, 459 (Tex. 1995). In a footnote in the *Padilla* case, the Texas Supreme Court noted: Because the primary purpose of Rule 11 is to require the parties to reduce their agreements to writing, the court in *Kennedy* refused to enforce an oral settlement

agreement. *Padilla*, at 459, n.6 While the court has never articulated what was necessary to satisfy the in writing requirement of Rule 11, the court will analogize to the statute of frauds, which requires certain contracts to be in writing. To satisfy the statute of frauds, there must be a written memorandum, which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract may be ascertained from the writings without resorting to oral testimony. *Id.* at 460. It is unclear what proof must be submitted to support a Rule 11 motion for judgment. It seems like the movant would have to offer some uncontroverted proof that the settlement agreement was properly executed in accordance with the requirements of the rule. Further, if the motion is contested, the movant would probably be required to offer pleading and proof establishing a valid contract.

### **III. CONSENT JUDGMENTS**

#### **A. Incorporation in Consent Decree**

As provided by Texas Civil Practice and Remedies Code section 154.071(b), a court may incorporate the terms of the agreement in the court's final decree disposing of the case. Thus, the court may make the terms of the agreement enforceable by decretal provisions of the court's judgment, as well as by enforcement remedies afforded in a suit on the contract.

#### **B. Withdrawal of Consent**

Even though a settlement agreement may have been executed in compliance with the provisions of section 154.071 and Texas Rule of Civil Procedure 11, until the court actually renders the consent judgment incorporating the terms of the settlement agreement into the decree, either party may withdraw consent to the entry of the consent decree. *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984). If consent is withdrawn before the judgment is rendered, the settlement agreement may be enforced as a contract, either by a suit on the contract or, in an appropriate case, by a Rule 11 motion. *Rizk v. Millard*, 810 S.W.2d 318, 320 (Tex. App. - Houston [14th Dist.] 1991, *no writ*).

#### **C. The Family Law Statute**

In 1995, the Texas Legislature enacted section 153.0071 (as amended in 1997 and 1999)<sup>82</sup> of the Texas Family Law Code to read:

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<sup>82</sup> In 1997, the legislature repealed §153.0071 (f) and in 1999 added the current section providing that in cases of family violence an objection to mediation may be filed and upon the court's finding the suit may or may not be referred to mediation, and if referred to mediation special considerations must be ordered to ensure the safety of the party filing the objection.

- (d) A mediated settlement agreement is binding on the parties if the agreement:
  - (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
  - (2) is signed by each party to the agreement; and
  - (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
- (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
- (f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. The subsection does not apply to suits filed under Chapter 262.

Thus, in a family law case affected by this statute, it appears that a court might hold the *Burnaman* rule (that consent to an agreed settlement order may be withdrawn prior to rendition of the decree) has been superseded by this statute, provided the parties' settlement agreement meets the requirements of the statute.<sup>83</sup>

#### IV. MEMORANDUM OF UNDERSTANDING

To be enforceable as a contract, an agreement must reflect an unconditional, binding offer and acceptance. *Williford Energy Co. v. Submersible Cable Serv., Inc.* 895 S.W.2d 379, 384 (Tex. App. B Amarillo 1994, *no writ*). Thus, preliminary offers or proposals, the acceptances of which are conditioned upon review of legal counsel and later finalization, are insufficient, in

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<sup>83</sup> In 1999, the legislature amended §153.0071(d)(1) and added §6.602(b)(1) with the result that a *boldfaced type or capital letters or underlined* revocation statement is now required both in a suit affecting the parent-child relationship and in an action for dissolution of marriage.

themselves, to constitute the basis for a binding, enforceable contract. *In the matter of Macintosh*, 918 S.W.2d 87, 88 (Tex. App. B Amarillo 1996, *no writ*).

The parties' written settlement agreement should be drafted in clear, simple language so that there will be no question about the parties' intent. The contents of the agreement should specify the contractual obligations of each of the parties and how they will perform those obligations. In essence, the agreement should provide a legal basis for judicial enforcement. In some cases, it will be feasible for the parties, and their counsel, to complete all final settlement documentation at the time of the mediation session. However, in other cases, the drafting of the final settlement documents may require extensive time and perhaps further negotiation regarding some aspects of the settlement transaction. In those cases the mediator faces a dilemma: Should the mediator encourage the parties and their counsel to reduce their agreement to writing even though some of the contract documents may require more drafting and discussion efforts? In most cases, the prudent mediator will offer such encouragement, because intervening circumstances (such as a change in one party's circumstance) may quickly change a party's position and result in the withdrawal of the party's verbal commitments to enter into the settlement contract.

The parties' execution of a memorandum of understanding, such as the one set forth in the appendix, often prevents the parties from backing out of their verbal commitments. However, if the parties have left important substantive terms to future negotiations, there is always the chance that one party may refuse to consummate the agreement.

## **V. MEDIATOR'S FUNCTION IN DRAFTING AGREEMENTS**

The mediator plays an important role in helping the parties finalize their settlement understanding. This role, however, is different from that of a lawyer or other professional advisor. If the parties request, the mediator may serve as a Scribner in helping the parties reduce their verbal agreement to writing, but the mediator should only write in the language provided by the parties or their counsel. The mediator should avoid making suggestions or giving advice that would result in a departure from his or her neutral role in the process.

Once the parties have reached a verbal understanding, it is not uncommon for them to be anxious to conclude the drafting process. Thus, parties, and sometimes their counsel, may be inclined to forego discussion of important details that are needed to complete their agreement. It is the mediator's responsibility to remind the parties that the settlement agreement will be a final and binding document, and that all important stipulations must be incorporated in their written understanding. In addition, the mediator should help the parties test their proposed agreement against the realities of their respective positions. Finally, the mediator should assist the parties in making and distributing copies of the agreement, as appropriate, to each other and the court.

## QUALIFICATIONS, STANDARDS AND DUTIES OF NEUTRALS

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### I. THE TEXAS ADR PROFESSIONAL

When Texas first entered the ADR field in the early 1980's, most mediators and other ADR practitioners were trained by and affiliated with an established agency or organization. As a result, early mediator training in Texas was usually conducted by the staff of a Neighborhood Justice Center (now a Dispute Resolution Center) or the Federal Mediation and Conciliation Service, which used similar curriculum and training methodology.<sup>84</sup> Thus, most early Texas mediators received a rather uniform training course that continues to provide the standard for Texas' 40-hour mediation training programs.<sup>85</sup>

In 1987 Texas first established minimum qualifications and proscribed the standards, duties, and compensation of court-appointed ADR facilitators.

#### ' 154.052 Qualifications of Impartial Third Party

- (a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.
- (b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law.

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<sup>84</sup>The first Texas Dispute Resolution Center (then called the Neighborhood Justice Center) was opened in Houston in 1980. The Center's first group of volunteer mediators was trained by Center Director, Mike Thompson (formerly director of Kansas City's Neighborhood Justice Center) and Assistant Director, Kimberlee K. Kovach (formerly a staff director at Columbus, Ohio's dispute resolution program).

<sup>85</sup>The initial training curriculum was adopted from Kansas City, Columbus, and Atlanta, Georgia's dispute resolution programs. This same training curriculum has been replicated in almost all Texas dispute resolution centers.

- (c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes

#### **' 154.053 Standards and Duties of Impartial Third Parties**

- (a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.
- (b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.
- (c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process are confidential and may never be disclosed to anyone, including the appointing court.
- (d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code and Subchapter C, Chapter 48, Human Resources Code.

#### **' 154.054 Compensation of Impartial Third Parties**

- (a) The court may set a reasonable fee for the services of an impartial third party appointed under this subchapter.
- (b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

By subsequent legislation, Texas created a statutory qualified immunity for volunteer ADR providers who serve without compensation in excess of reimbursement for expenses incurred.

#### **' 154.055 Qualified Immunity of Impartial Third Parties**

- (a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution

system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

- (b) This section neither applies to nor is intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty

Following the enactment of the 1987 Texas ADR Act, the mediation scene began to change in Texas. In the late 1980s, a new class of ADR professional began to emerge in Texas, individuals seeking to develop private careers in the mediation field. Also, during this period of time, state and federal courts in Texas were finding that mediation and other ADR processes could provide relief to courts' overburdened litigation dockets. As more and more courts started to refer cases to ADR processes, the demand for "commercial" mediators steadily rose.<sup>86</sup> This rapid increase in the number of Texas mediators also created problems.<sup>87</sup> Because there were no specific means to control mediators, or the quality of mediation services (other than as specified in the Texas ADR statute), the ADR community began to voice concerns about the potential for mediation abuse. In response to these concerns, the State Bar of Texas ADR Committee in 1992 established a Task Force on Quality of ADR Practice in Texas. This group, after making a survey of mediators and consumers, and conducting a conference among ADR practitioners, concluded in a 1993 report that the practice of ADR methods should be considered a *profession*, and that a uniform code should be developed to address issues such as mediator training and qualifications.<sup>88</sup> Thereafter, the Committee drafted and adopted Ethical Guidelines for Mediators, a copy of which is contained in the Appendix. These guidelines were approved and adopted by the newly formed State Bar ADR Section in 1994.<sup>89</sup>

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<sup>86</sup>The use of mediation as a means of resolving pending litigation rose from practically none in the 1980s to thousands of court cases in the 1990s.

<sup>87</sup>The competition for mediation referrals has resulted in considerable tension among ADR practitioners, both lawyers and non-lawyers. This tension lacks an outlet, because there is no single multi-disciplinary forum for mediators to exchange their professional views and ideas.

<sup>88</sup>See Rau & Sherman at 32.

<sup>89</sup>*Id.*

Over the years that have followed the enactment of the Texas ADR Procedures Act, Texas courts have experimented with different systems for making ADR referrals. Initially, most courts zealously controlled the appointment process and appointed only individuals who had been selected by the court. This practice led to complaints that some courts unfairly favored individuals who had a "quid pro quo" relationship with the court, because of the appointee's campaign contributions.<sup>90</sup> The Texas Supreme Court, responding to these complaints, appointed a Task Force to Examine Appointments by the Judiciary, which found "no convincing evidence of widespread abuse" and observed that potential abusers might be deterred through strengthened requirements for disclosure of fees and appointments.<sup>91</sup> A majority of the Task Force also recommended that before referring a case to an ADR process, the court should hold a conference with counsel to determine if the case should be so referred, and if so, to what kind of ADR process, as well as who should be designated as the neutral.<sup>92</sup> The Task Force further recommended that the ADR Act be amended to prohibit a court from entering an ADR referral order in disregard of the parties' agreements. In recent years, most Texas courts afford considerable deference to the parties' wishes regarding the selection of the neutral facilitator. If both parties may arrive at an agreement, the court normally accepts their selection.

Presently, there are no specific sanctions for abuse of the Ethical Guidelines for Mediators. Unless the neutral is also a lawyer, the courts and the organized bar have little to say regarding the mediator's actions or the conduct of the mediation process. Some mediator organizations have established specific rules for handling consumer complaints and for conducting grievance procedures.<sup>93</sup> However, since no single entity has been vested with the legal responsibility for overseeing Texas mediators, the Texas ADR community has been engaged for several years in a continuing debate about the need for professional performance standards, as well as licensing and credentialing requirements. These and related topics will be discussed below.

## **A. Professional Performance Standards**

In 1989, the Society of Professionals in Dispute Resolution (SPIDR) empanelled a Commission on Qualifications to investigate and report on basic principles that might influence policy for setting qualifications for mediators, arbitrators and other ADR professionals. In its report, the Commission concluded:

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<sup>90</sup>*Id.* at 29.

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>*See*, Texas Association of Mediators Grievance Procedures.

- In many cases, the disputants are sufficiently sophisticated that there is no need for performance standards and the "market-place" provides sufficient protection for the consumer. In an increasing number of cases, however, standards should be set to ensure consistent delivery of services;
- No particular type or degree of prior education or job experience has been shown to be an effective predictor of success as a mediator, arbitrator, or other professional neutral, and where standards are appropriate, they should be "performance-based."
- No single entity (rather, a variety of organizations) should establish qualifications for neutrals.

In 1995, the National Institute for Dispute Resolution (NIDR) published a Methodology for use in selecting, training, and evaluating mediators. This Methodology provides a "framework" for "any given program to use the underlying principles and approaches in ways consistent with its own principles and resources." It suggests the use of a set of evaluation scales for determining a mediator's capabilities, which represent several variants such as: (1) gathering information; (2) empathy; (3) impartiality; (4) generating options; (5) generating agreements; and (6) managing the interaction.

Also in 1995, SPIDR's Commission on Qualifications issued a second report that sets out a "Seven Steps Framework" for analyzing, within each mediation "context," how high quality performance might be achieved. Thus, the SPIDR Commission set performance criteria to determine: (1) in the particular context of the mediation; (2) who is responsible for assuring competence; (3) what the mediator does; (4) how competence is determined; (5) how mediators become competent; (6) how competence is assessed; and (7) how assessment tools should be used to assure competency.

Further, in 1995, the American Bar Association's sections of Dispute Resolution and Litigation, joining with the American Arbitration Association and SPIDR, published Standards of Conduct for Mediators, which are similar to but not as extensive as the Guidelines of the State Bar ADR Section. Although one practitioner complained that the ABA standards are little more than a "restatement of the Ten Commandments," some of the provisions were considered unrealistic and unworkable. For example, the ABA provision that a mediator should "refrain from providing professional advice" has been criticized as being unrealistic and in direct conflict with a mediator's duty to propose settlement options.<sup>94</sup>

## **B. Ethical Rules and Credentialing**

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<sup>94</sup>See, R.C. Ruben, *Model Rules Limit Mediator=s Role*, ABA Journal, January 1996 at 25.

Early in 1996, the State Bar ADR Section's council distributed to the members of the section the final report of the Quality of Practice Task Force, entitled "Proposal for a Voluntary Program for Mediator's Designation Credentialed by the Alternative Dispute Resolution Section of the State Bar of Texas." Among other questions raised by the section's newsletter, which distributed this proposal, is whether the multi-disciplinary committee charged with administering the credentialing process should be under the overall supervision of the ADR section or independent of the Section and the State Bar. The issuance of this proposal raised considerable concern among the ADR community about the intent of the bar regarding the governance of ADR neutrals. In response to the section's proposal, a number of concerned ADR professionals initiated the Council of Texas Mediators, which issued its own proposal for a voluntary credentialing process. This proposal, which contains terms almost identical to those in the ADR section's proposal, contemplates a credentialing program administered by the Texas Council Board of Directors comprised of representatives of multi-disciplinary committees from the ADR community and its consumers. In 1998, the State Bar ADR Section proposed a new, revised version of its earlier proposal, which is different in that it does not specify the administrative body other than to suggest it be a multi-disciplinary group of individuals.

### **C. Texas Supreme Court Advisory Committee**

In May 1996, the Texas Supreme Court, responding to a letter written on behalf of the State Bar ADR Section, created a 25-member Advisory Committee on Court-Annexed Mediations, determining "at a minimum" that "ethical rules governing court-annexed mediations and mediators should be implemented and enforced." The Supreme Court directed the Committee to examine the issues and make recommendations to the Court, stating that the Committee's task "includes but is not limited to the formulation of ethical rules for court-annexed mediations and mediators" and to making recommendations "on the structure and composition of a commission or similar body to enforce those rules." The Court further directed that the "proposed ethical rules should address, among other matters, the avoidance of conflicts of interest, and the timely disclosure of fees and potential conflicts of interest." With respect to the question of credentialing, the Court asked the Committee to consider: (a) whether some level of credentialing was necessary and appropriate; (b) whether credentialing under the auspices of the Court is needed or appropriate; and (c) if so, what substantive requirements should be set regarding training and continuing education, as well as recommendations regarding procedural implementation.

This Advisory Committee met periodically for some 18 months to consider these issues, and on March 18, 1998, it issued its report making recommendations regarding (a) minimum qualifications for mediators; (b) a commission to establish standards and evaluate curricula for mediation training courses; and (c) mandatory rules of ethics for mediations and mediators that apply to All mediations governed by Chapter 154 of the Texas Civil Practice and Remedies Code. A copy of this report is set forth in the Appendix, with attached comments of individual

Advisory Committee members who had concerns regarding the Committee's recommendations. These comments raise a number of questions about the proposed rules, including the question of whether the courts have the power to regulate out-of-court mediations by non-lawyer mediators. As a result of these and other comments, the proposed rules were revised as reflected by the supplemental report in the Appendix. The Texas Supreme Court has not yet acted upon these revised recommendations.

## **D. The Texas ADR Professional Symposium on Mediator Qualifications and Standards**

In October 1996, the South Texas College of Law Center for Legal Responsibility, in cooperation with some 25 co-sponsoring organizations, conducted a two-day Facilitated Symposium at South Texas College of Law in Houston to consider issues relating to the conduct of Texas mediations. After extensive group discussions, the symposium participants answered the issues as follows:

- **Education and Training**

Are you aware of any instances where mediators lacking the minimum requirements of Tex. Civ. Prac. & Rem. Code Ann. ' 154.052 have been appointed in court-annexed disputes?

**Answer:      No: 72%    Yes: 28%**

- **Mediator Advertising**

The Ethical Guidelines for Mediators provide that a mediator may advertise the mediator's qualifications and availability to mediate, but the mediator should not solicit a specific case or matter. Are you aware of any instances where mediators or mediation organizations have not complied with this guideline?

**Answer:      No: 85%    Yes: 15%**

- **Relationship with Judiciary**

The Ethical Guidelines for Mediators provide that a mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation. Are you aware of any instances where a mediator or mediator organization has not complied with this guideline?

**Answer: No: 74% Yes: 26%**

- **Mediator's Conduct**

- ***Failure to Explain Fees***

The Ethical Guidelines for Mediators provide that before a mediation begins, the mediator should explain all fees and expenses to be charged for the mediation. Are you aware of any instances where a mediator or mediator organization has consistently failed to make this advance explanation to the parties and/or their counsel?

**Answer: No: 90% Yes: 10%**

- ***Inappropriate Fees***

The Ethical Guidelines for Mediators provide that a mediator should not charge a contingent fee or a fee based on the outcome of the mediation, and that in an appropriate case, the mediator should serve at a reduced fee or without compensation. A comment to this guideline suggests that a mediator also should avoid any appearance of impropriety regarding possible negative perceptions relating to the amount of the fee charged. Are you aware of any instances where a mediator or a mediator organization has not complied with this guideline?

**Answer: No: 75% Yes: 25%**

- ***Disclosure of Conflicts***

The Ethical Guidelines for Mediators provide, in essence, that before commencing a mediation, the mediator should: (1) make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality; and (2) refuse to serve (or later withdraw) if a party objects on the ground of a real or perceived conflict. Are you aware of any instances where a mediator has not complied with this guideline?

**Answer: No: 97% Yes: 3%**

- ***Relationship with Parties***

The Ethical Guidelines for Mediators provide, in essence, that: (1) the primary responsibility for the resolution of a dispute rests with the parties; (2) that, while a mediator may make suggestions to the parties, the mediator should not make a decision or coerce the parties in any way, and the mediator's obligation is to assist the parties in reaching a voluntary settlement. Moreover, the guidelines further provide, in essence, that the mediator should not give legal or other

professional advice to the parties. Are you aware of any instance where a mediator has not complied with these guidelines?

**Answer: No: 61% Yes: 39%**

- ***Later Service In Binding Process***

The Ethical Guidelines for Mediators provide, subject to certain exceptions, that a mediator in a given matter should not later serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in the same matter. Are you aware of any instances where a mediator has not complied with this guideline?

**Answer: No: 90% Yes: 10%**

***Breach of Confidentiality***

Tex. Civ. Prac. & Rem. Code Ann. ' 154.073 sets forth certain conditions relating to the confidentiality of the mediation proceedings, and the Ethical Guidelines for Mediators provide, in essence, that a mediator should not reveal information that is privileged and confidential, which is made available in the mediation process, unless the parties otherwise agree, or as may be required by law. Are you aware of any instances where a mediator or mediator organization has failed to comply with these provisions?

**Answer: No: 79% Yes: 21%**

- **Conduct of Court and Counsel**

***Counsel's Responsibility***

The Texas Supreme Court's "Mandate for Professionalism" requires counsel to advise their clients regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes. This mandate, as well as the State Bar of Texas Disciplinary Rules for Attorneys, also prohibits counsel from pursuing tactics that are intended primarily for delay or to harass or drain the financial resources of the opposing party. Moreover, most court orders referring a case to a mediation process require parties and their counsel to appear at the mediation in person or through representatives who have adequate settlement authority. Are you aware of any instances where counsel involved in a court-annexed mediation has failed to comply with these requirements?

**Answer: Yes: 59% No: 41%**

***Court's Responsibility***

Tex. Civ. Prac. & Rem. Code Ann. ' 154.003, et. seq. require, in essence, that all Texas state courts, trial and appellate, and their court administrators carry out the declared policy of the legislature, and that referrals of court-annexed disputes by the courts to dispute resolution processes be accomplished in accordance with the provisions of this statute. Are you aware of any instances where courts or court administrators, in referring a dispute to a court-annexed mediation, have failed to comply with the provisions of this statute?

**Answer: Yes: 86% No: 14%**

At the end of the group meetings, each group leader reported a group consensus regarding the following issues:

1. Minimum Standards: What minimum qualifications and standards should persons conducting mediations in Texas be required to meet?

**Answer: Each group listed certain minimal levels of education and/or training that are attached to the symposium report.**

2. Credentialing:

- (a) Should Texas develop a process for the credentialing of mediators?

**Answer: No: 56% Yes: 44%**

- (b) If such a process is developed, should it be voluntary or involuntary?

**Answer: Voluntary**

- (c) If such a process is developed, what entity should administer it?

<b>Answer:</b>	<b>The Texas Supreme Court</b>	<b>No: 100%</b>	<b>Yes: 0%</b>
	<b>State Agency</b>	<b>No: 87%</b>	<b>Yes: 13%</b>
	<b>State Bar of Texas</b>	<b>No: 74%</b>	<b>Yes: 26%</b>
	<b>Independent, Multi-Disciplinary Group</b>	<b>Yes: 76%</b>	<b>No: 24%</b>

- (d) Should the Texas Supreme Court and/or the State Bar of Texas promulgate rules and procedures for training, education, appointment and conduct of mediators conducting court-annexed mediations?

**Answer: No: 79% Yes: 21%**

- (e) If the Supreme Court and/or the State Bar should promulgate such rules and procedures, should they be mandatory?

**Answer: No: 67% Yes : 33%**

- (f) Should sanctions be imposed for the violation of such rules and procedures?

**Answer: No: 64% Yes: 36%**

The Texas Supreme Court Advisory Committee was furnished the Symposium results during the stage of its information gathering. However, despite the strong Symposium consensus that rules be aspirational only, the Advisory Committee chose to recommend that the Texas Supreme Court promulgate mandatory rules of ethical conduct that would apply to all mediators and mediations *governed by* the Texas ADR Procedures Act. It remains to be seen whether this recommendation, if adopted by the Texas Supreme Court, will be construed to apply only to mediations that are *ordered* by a court pursuant to the Act.

## ARBITRATION AND TRIAL BY SPECIAL JUDGE

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### I. BINDING ARBITRATION

#### A. At Common Law

Under common law, Texas courts have refused to specifically enforce agreements to arbitrate future disputes. Thus, either party to an executory agreement to arbitrate could revoke the agreement at any time before the issuance of an arbitration award, the liability of the revoking party being limited to any damages resulting from the breach of contract.<sup>95</sup> The rationale behind the common law rule rested on a public policy argument that private persons should not be able to oust the courts of their jurisdiction to determine the parties' contract rights and obligations.<sup>96</sup>

However, an arbitration award made pursuant to the parties' arbitration agreement has long been recognized as a legitimate basis for a cause of action.<sup>97</sup> Once the parties have submitted their dispute to arbitration, and the arbitrator has issued an award, the award is binding on the parties and enforceable in court.<sup>98</sup> Texas courts have held, as have the courts in many other states, that the common law remedy of arbitration remains available to those who choose to use it, and that statutory arbitration remedies are merely cumulative.<sup>99</sup>

#### B. Under Texas Statutes

Texas first recognized the validity of arbitration in its first Constitution, when it directed the Legislature to pass laws providing for arbitration of differences when the parties elected to use that method.<sup>100</sup> In response to that mandate, the first legislature of the State of Texas, on April

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<sup>95</sup>L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 352 (Tex. 1977).

<sup>96</sup>*Id.*

<sup>97</sup>*Carpenter v. North River Insurance Co.*, 436 S.W.2d 549, 551 (Tex. Civ. App. B Houston [14<sup>th</sup> Dist] 1969, writ ref. n.r.e.).

<sup>98</sup>L.H. Lacy Co., at 352; *Carpenter*, at 551.

<sup>99</sup>*See*, *Carpenter*, at 553.

<sup>100</sup>Texas Constitution, Art. VII, Sec., 15, Vol. 2 *Gamell's Laws of Texas*, p. 1293.

25, 1846, enacted Texas' first arbitration statute which established a procedure for arbitration of existing disputes and accrued causes of action.<sup>101</sup> This statute also provided that the statutory award, subject to an appeal if the right of appeal was reserved, should be entered as a judgment of the court.<sup>102</sup> Thus, an agreement to arbitrate made in accordance with the statutory procedure was not revocable, as was an agreement made at common law.<sup>103</sup>

- **The Texas General Arbitration Statutes**

There was little change in the 1846 arbitration statute until 1965, when Texas enacted a version of the Uniform Arbitration Act, on which many state statutes have been modeled.<sup>104</sup> This statute, subject to certain exceptions and qualifications, provided that agreements to submit to arbitration both existing controversies and any controversy thereafter arising between the parties would be valid, enforceable, and irrevocable.<sup>105</sup>

The 1965 arbitration statute was quite restrictive. The statute provided that before an agreement to arbitrate would be enforceable, it had to be signed by the counsel for both parties. The statute also excluded from its provisions insurance, construction, and employment contracts.<sup>106</sup> The act was sharply criticized as not encouraging business people to arbitrate their disputes in Texas.<sup>107</sup> In 1979, the statute was amended, eliminating the general requirement regarding counsels' signatures and the exclusion regarding insurance, employment, and construction contracts.<sup>108</sup> However, the 1979 amendment did retain some of the 1965 statute's restrictions and exclusions, including: (1) an arbitration provision regarding a personal injury claim requires the advice of counsel to both parties as evidenced by a written agreement signed by counsel to both parties; (2) the amended statute does not apply to a collective bargaining agreement between an employer and a labor union; and (3) if a dispute involves individual contract to acquire property, services, money, or credit for a total consideration of \$50,000 or less, the arbitration agreement must be signed by both parties and their attorneys.

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<sup>101</sup>Vol. 2, *Gamell's Laws*, p. 1433.

<sup>102</sup>*Id.*

<sup>103</sup>Carpenter, at 551.

<sup>104</sup>Rau & Sherman=s *Texas ADR and Arbitration Statutes: Commentary and Annotations*, Shepard McGraw B Hill 1994, at 179.

<sup>105</sup>*Id.*

<sup>106</sup>Rau & Sherman, at 184.

<sup>107</sup>Coulson, *Texas Arbitration B Modern Machinery Standing Idle*, 25 Southwestern L.J. 290, 292 (1971).

<sup>108</sup>Rau & Sherman, at 184.

The 1979 statute also added two new provisions: (1) article 224, which provides that a court shall refuse to enforce an arbitration agreement if it finds it was unconscionable at the time the agreement or contract was made and (2) article 224-1, which provides that no agreement shall be arbitrated unless notice that a contract is subject to arbitration under this Act is typed in underline capital letters, or is rubber-stamped prominently, on the first page of the contract. This last provision (article 224-1) requiring notice was repealed in 1987.<sup>109</sup> In reviewing an arbitration agreement, it is important to be aware of the effective dates of these statutory amendments, because the law may govern the agreement in effect at the time the contract was made.<sup>110</sup>

- **Texas Judicial Decisions**

Arbitration has generally been favored in Texas decisions and statutes, and arbitration awards have been construed liberally in keeping with this public policy.<sup>111</sup> In these decisions, the courts have acknowledged the public value of arbitration and other ADR processes in providing disputants reasonable access to justice.<sup>112</sup> In several cases, the Texas Supreme Court has reiterated a strong public policy favoring the enforcement of arbitration clauses.<sup>113</sup>

Although arbitration is considered to be a very cost-effective way to resolve disputes, most claimants have turned to the courts for relief. There appear to be several reasons for this reluctance to use arbitration. First, most lawyers are not as familiar with arbitration as they are with traditional litigation and their knowledge of arbitration is often based on the anecdotal information of others. Second, critics of arbitration contend that it does not offer the same predictability as a court decision. Indeed, they argue, arbitrators unguided by precedent often tend to divide the disputed item equally between the parties instead of rendering a reasonable decision based on the law and the facts. Finally, critics say that while arbitration is supposed to

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<sup>109</sup>Rau & Sherman, at 184.

<sup>110</sup>*Id.*

<sup>111</sup>*Carpenter v. North River Insurance Company*, at 553.

<sup>112</sup>*Wylie Ind. Sch. Dist. v. TMC Foundations, Inc.*, 770 S.W.2d 19 (Tex. App. B Dallas 1989, writ dismissed) (to deny specific enforcement of agreements to arbitrate would be to ignore...the present emphasis on alternative dispute resolution); *Olshan Demolishing Co., v. Angleton Ind. School Dist.*, 684 S.W.2d 179 (Tex. App. B Houston [14<sup>th</sup> Dist.] 1984, writ refused n.r.e.) (encouraging arbitration will reduce some of the backlog in our trial courts); *Cindy's Candle Co., Inc. v. WNS, Inc.*, 721 F. Supp. 167 (N.D. Ill. 1989) (this court believes the Texas Supreme Court would allow specific enforcement of agreements to arbitrate under Texas common law).

<sup>113</sup>*Jack V. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992); *Capitol Income Properties B LXXX v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992); *Prudential Securities v. Marshall*, 909 S.W.2d 896 (Tex. 1995) (policy in favor of enforcing arbitration agreement so compelling the court should not deny arbitration unless it may be said with positive assurance that arbitration clause cannot be interpreted to cover the dispute).

be quicker and less costly than litigation, it is often the case that arbitration takes longer and costs more.

Such criticisms, while undoubtedly based on real experiences; do not accurately reflect the potential of a properly conducted arbitration. Often when parties participate in an arbitration without a realistic understanding of its effect and limitations, they will be dissatisfied with its result. This misconception often occurs when the arbitrators and the parties' counsel fail to adequately prepare them for the arbitration.

As a general rule, arbitrators are no more prone to reach a middle-ground decision than a decision-maker in court. Indeed, it has been suggested that a panel of trained arbitrators will more likely arrive at a well-discussed and collegially evolved result than a single decision-maker or a jury who may have to decide difficult issues under severe time constraints.<sup>114</sup> If the parties want to be sure that the arbitrators follow substantive law and act within appropriate legal guidelines, they may control the arbitrators' actions by careful draftsmanship of the arbitration agreement. In addition, the parties may elect to have the arbitrators render a reasoned written opinion for their award and to have the award made subject to appellate review.

- **Federal Arbitration Act**

The Federal Arbitration Act, which was enacted in 1925 and codified in 1947, makes enforceable arbitration agreements involving any maritime transaction or contract evidencing a transaction involving commerce.<sup>115</sup> There has been continuing debate about the scope of the Federal Arbitration Act, but some courts have indicated its terms should be given a broad interpretation.<sup>116</sup>

To bring an action in a federal court for the enforcement of an arbitration agreement, there must be an independent source of federal jurisdiction, such as diversity of citizenship.<sup>117</sup> Because the parties' contract may involve commerce does not in itself establish federal jurisdiction.<sup>118</sup> Any request to compel arbitration must be made to the United States district court which, save for the

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<sup>114</sup>B. Hoeninger, *Commercial Arbitration Handbook*, ' 1.06.

<sup>115</sup>9 U.S.C. ' 1 B 307.

<sup>116</sup>*See*, for example, *Woodward Pipeline, Inc. Reliance Pipeline Co., Inc.*, 776 S.W.2d 241, 245 (Tex. App. B Houston [1<sup>st</sup> Dist.] 1989, writ denied) (joint venture agreement found to involve interstate commerce); *Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145, 147 - 48 (5<sup>th</sup> Cir. 1987); *see also*, for comparison of cases *Rau & Sherman* at pp. 88-91.

<sup>117</sup>*Rau & Sherman*, at 92.

<sup>118</sup>*Id.*

arbitration agreement, would have jurisdiction of a civil action or in admiralty of the subject matter of a suit arising out of the controversy.<sup>119</sup>

The Federal Arbitration Act has been credited with reversing centuries of judicial hostility toward the enforceability of arbitration agreements.<sup>120</sup> The relationship between the federal act and the Texas statute is a matter for the lawyers' careful consideration in drafting the parties' arbitration agreement.<sup>121</sup>

- **Drafting Arbitration Agreements**

Once parties decide to submit a future dispute to arbitration, they need to consider appropriate arbitration language in their contract. Parties using a model arbitration clause may simply provide:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by final and binding arbitration, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

This clause, while constituting a sufficient basis for initiating the arbitration process, does little to provide guidance for avoiding future problems. For example, the quoted clause does not clearly delineate the type of claims that are arbitrable, the rules that will govern the selection of the arbitrators, or the conduct of the arbitration. Neither does the clause indicate whether the federal arbitration statute will control in the event of conflict with the state law.

The contract or arbitration rules should specify, at a very minimum, the following:

- the location of the arbitration forum;
- the choice of law that will govern;
- how the arbitrators will be selected;
- when and how the hearing will be scheduled;
- who will bear the costs;
- how evidentiary and discovery matters will be handled;
- what remedies are afforded;
- when and how the arbitrator's award will be entered;

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<sup>119</sup>*Id.*

<sup>120</sup>Rau & Sherman, at 94.

<sup>121</sup>*See* Rau & Sherman=s 94 - 167 for a complete discussion of the federal act.

- how the award will be enforced; and
- a definition of any court review that is agreed upon.

In the absence of a comprehensive pre-dispute arbitration clause, these same issues will face the parties should they decide to arbitrate after the dispute has arisen.

A provision modified to incorporate some of these items might read as follows:

Any controversy or claim (whether sounding in contract, tort or otherwise) arising out of or relating to this contract, or any breach, or the commercial or economic relationship of the parties, shall be settled by final and binding arbitration in accordance with the Rules and Procedures for Arbitration of, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Unless the parties otherwise agree, and except as may be provided in writing, the arbitration will be governed by the substantive and procedural laws of the jurisdiction in which the proceeding takes place; provided however, the arbitration will be governed by the U.S. Arbitration Act, 9 U.S. C. Secs., 1 - 16, to the exclusion of any inconsistent provisions of state law inconsistent or when would produce a different result.

Even though this modified provision is quite brief, it expressly includes within the scope of arbitration those claims that sound in tort as well as contract, thus minimizing later disputes about whether particular acts, especially tortious ones, arise out of, or relate to, the contract.<sup>122</sup> Similarly, the insertion of the phrase or the commercial or economic relationship of the parties, clarifies the parties' intent to include within the scope of arbitration all claims arising from the parties' business relationship.<sup>123</sup>

In summary, when parties decide to incorporate an arbitration clause in their agreement, they should be aware of the need to customize the provisions to fit their particular relationship.<sup>124</sup>

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<sup>122</sup>Hoeninger, Sec. 5.02.

<sup>123</sup>*Id.* Sec. 5.02; Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64-F.3rd. 993 (5<sup>th</sup> Cir. 1995) (court should conduct *do novo* scrutiny of arbitrator=s decision on law where agreement specified that arbitration decision would be final and binding *except* as to errors of law that were subject to appeal.).

<sup>124</sup>*See*, John P. Bowman, Arbitration Agreement for Energy Joint Ventures, @ *Fulbright and Jaworski Energy Newsletter*, Winter, 1999.

Indeed, it has been suggested that all model clauses should be modified and supplemented to fit like a [tailored] suit.<sup>125</sup>

- **General Considerations**

Arbitration is merely one dispute-resolution process. Like litigation, it is a procedural forum that has been developed through custom and usage. Over years of experience, these customary procedures have become established into the written rules of an arbitration practice. However, unless defined by statute or court order, arbitration rules may differ from one arbitration organization to the next, and possibly, from one arbitrator to another. For this reason, it is important that the arbitration agreement provide adequate procedural guidance to the parties and the arbitrator.

What are the parties' principal concerns in an arbitration? In most cases, the parties will hope to resolve their dispute efficiently with the least expenditure of time and money. But, the parties also seek a fair result, an award that is not simply an equal division of the amount in controversy, and an award based upon precedent and legal reasoning. By careful selection of appropriate contract provisions, counsel may do much to assure that these goals are attained.

### *Preliminary Processes*

From the standpoint of time and cost-savings, post-dispute negotiation, mediation, and other non-binding ADR processes have much to offer. Thus, the parties should consider the inclusion of contractual language that encourages early negotiation efforts and commits the parties to try mediation or other such ADR processes before resorting to arbitration. When these provisions are effectively used, the parties may often settle their dispute within days or weeks of the time the dispute arises. These provisions may be inserted as sequential steps in the parties' contract, and each step may be timed so that the parties move expeditiously from one step to the next.

### *Procedural Considerations*

In proceeding to arbitration, the parties will want to have a fair, efficient, speedy, and relatively inexpensive proceeding. To attain these goals, the contractual agreement should:

- appoint active, experienced arbitrators quickly;
- guide the arbitrators in their duties so they may take charge from the start;

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<sup>125</sup>Hoeninger, Sec. 1 - 11; *see also*, John P. Bowman, *Drafting Effective Dispute Resolution Agreements*, ADR in the Corporate Environment, Resolution Forum Inc/Center for Legal Responsibility, South Texas College of Law, February 11, 1999.

- define precisely the law that the arbitrators will apply;
- specify the permitted scope of discovery and the arbitrator's authority regarding discovery and provisional remedies; and
- define the arbitrator's duties and powers in making the award.<sup>126</sup>

If the arbitrators are highly experienced and well qualified in dispute resolution processes, it is much more likely that the arbitration will be fairly and efficiently conducted.<sup>127</sup>

Most procedural difficulties may be avoided by including specific provisions in the contract dealing with these issues or by referring to separate rules that are incorporated by reference in the contract.

## 1. Forum Selection

A party may contractually consent to the jurisdiction of a particular forum, and the agreement will be enforced unless the agreement is found to be unfair or unreasonable.<sup>128</sup>

## 2. Choice of Law

Most commercial contracts contain some type of choice of law provision. In the absence of a valid choice of law clause, serious calamity may occur. Even where the parties have included a written provision in their agreement expressing their choice of law, the result may not always be what they wanted.<sup>129</sup>

The Texas Supreme Court has held that choice of law provisions in contracts are enforceable if the particular issue in dispute is one that the parties could have resolved by specific provision in their contract. If the issue is not one that may be resolved by agreement, the parties' choice of law will nevertheless be enforced unless:

- (a) the chosen jurisdiction has no substantial relationship to the parties, and there is no other reasonable basis for the parties' choice; or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state that has a materially greater interest than the chosen state in the

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<sup>126</sup>Hoeninger, sec. 6.01, at 6 - 12.

<sup>127</sup>*Id.*

<sup>128</sup>See, however, Sareddine v. Moussa, 820 S.W.2d 837, 840-841 (Tex. App. B Dallas 1991, no writ).

<sup>129</sup>Hoeninger, sec. 5.07, et. seq.

determination of the particular issue, and which in the absence of an effective choice of law, would be the state of the applicable law.<sup>130</sup>

Thus, as a general rule, the parties may agree to the application of law of any state or nation having a reasonable relationship to the transaction.<sup>131</sup>

### 3. Scope of Claims Covered by Arbitration:

When an arbitration clause simply provides for arbitration of all claims arising out of the contract, a court must ultimately decide whether the claim in dispute arose from the contract or if it was simply peripheral and incidental to the contract, in which case arbitration would not be required. Texas courts have been inclined to uphold the validity of arbitration clauses and to find them applicable to a wide variety of claims arising from the transaction. In *Jack B. Anglin Co., v. Tipps*, the court held that a DTPA claim was so factually intertwined with the breach of contract claim that the entire dispute was subject to the arbitration provision and that the Federal Arbitration Act preempts application of the DTPA's non-waiver provision.<sup>132</sup>

In drafting an arbitration clause, the prudent lawyer will want to modify or supplement model arbitration clauses so that they clearly express the parties' intent. Despite recent decisions that seem to expand the scope of arbitrable claims, the parties may wish to expressly provide that All claims, whether sounding in contract, tort or otherwise, and which arise out of or relate to the contract, the breach thereof, or the commercial or economic relationship of the parties, are included in the arbitration clause.<sup>133</sup>

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<sup>130</sup>*DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-678 (Tex. 1990) (adopting Restatement (second) of Conflict of Laws Sec. 187).

<sup>131</sup>*See*, W. Dorsaneo, Texas Litigation Guide, Sec. 62.03 (3), 62 -27, 30. [Under certain circumstances, a provision for arbitration in another state of a claim based on a contract to construct or make improvements on real property in the State of Texas may be voidable if the contract was executed on or after August 26, 1991, *See*, Tex. Bus. & Com. Code ' 35.53 (a); Acts 1991, 72<sup>nd</sup>. Leg. ch. 840, Sec. 4. eff. August 26, 1991.]

<sup>132</sup>*Jack B. Anglin v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992).

<sup>133</sup>*Capitol Income Properties - LXXX v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992). Other courts applying Texas law have reached similar conclusions: *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 63 (5<sup>th</sup> Cir. 1987) (Any and all differences and disputes of whatsoever nature arising out of this Charter held broad enough to encompass a RICO claim); *Valero Energy Corp. V. Wagner & Brown*, 777 S.W.2d 564, 567 (Tex. App. B El Paso 1989, writ denied) (tort claim based on wrongful curtailment of casing head gas held intertwined with contract); *but see*, *Decision Control Sys. V. Personnel Cost Control*, 787 S.W.2d 98, 100 (Tex. App. B Dallas 1990, no writ) (holding arbitration clause covering All questions as to rights and obligations arising under the terms of the agreement did not apply to claims asserted under DTPA.).

The parties should also be aware of the impact a choice of law provision (or the lack of one) might have on the application of various statutes of limitation and repose.<sup>134</sup> As a general rule, in the absence of contractual agreement, the forum state will apply its own statutes of limitation, even when the substantive law of another state is dictated by choice of law rules.<sup>135</sup> An exception exists when the statute creates a right and also contains a limitation provision qualifying the right.<sup>136</sup> The careful lawyer should consider the adoption of a specific state's statutes of limitation that would be applied to all issues involved in the arbitration.

The parties should also consider the effect the arbitration clause might have on the applicability of the Federal Arbitration Act. In *Volt Info. Sciences v. Stanford University*, the United States Supreme Court held that, because the parties had agreed that their contract would be governed as to choice of law, it would be enforced even to the exclusion of the provisions of the Federal Arbitration Act, which otherwise clearly would be applicable.<sup>137</sup> The Court held that the Federal Arbitration Act did not preempt an exclusive choice of law provision as long as the law of the chosen state was generally hospitable and favorable to arbitration.<sup>138</sup>

Because the arbitration provisions of state law and the Federal Arbitration Act will usually be substantially in accord, the decision in *Volt* may have little practical effect on parties using the standard boiler-plate clause contained in the *Volt* contract. However, the *Volt* decision could present a problem if there were substantial differences in law or circumstance. For example, the state law might empower the arbitrators to consolidate claims or make an award of punitive damages contrary to the parties' intent.<sup>139</sup> These problems probably may be avoided by modifying the standard choice of law provision so that it operates to the exclusion of any provisions of state law inconsistent therewith or which would produce a different result.<sup>140</sup> On the other hand, the parties may wish to opt out of the Federal Arbitration Act so as to obtain a more favorable state law.<sup>141</sup>

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<sup>134</sup>See, W. Dorsaneo, 3 Texas Litigation Guide, Sec. 5.01, et seq.

<sup>135</sup>For example, see *Chrisman v. Cooper Industries*, 748 S.W.2d 273 (Tex. App. B Dallas 1988, writ denied) (Florida 12 year statute of repose applied in product liability case.).

<sup>136</sup>See, *State of California v. Copus*, 158 Tex. 196, 309 S.W.2d 227, 230 (1958), cert. den 356 U.S. 967.

<sup>137</sup>*Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 1009 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

<sup>138</sup>*Id.* 479.

<sup>139</sup>Hoegner, Sec. 5.08 - 9.

<sup>140</sup>Hoegner, Sec. 5.01, 5-12.

<sup>141</sup>Rau & Sherman, at 183.

## Selecting the Arbitrator

Two uniform complaints voiced by those who have extensive experience in arbitration are (1) the time and difficulty encountered in selecting the arbitrators and (2) setting the arbitration hearing date(s). Too frequently, this task requires months and even years of extensive negotiations. If the parties are willing to delegate responsibility to an administering institution, they may expedite the arbitration selection process and bring the matter to a prompt hearing. Moreover, if the parties have chosen an arbitration forum that may select a group of arbitrators of known competence, they may reasonably be assured of a more efficient, less time-consuming arbitration process.

## Procedural Issues

The arbitration agreement, or rules of practice incorporated by reference, should explain the procedural format of the arbitration, including any pre-hearing procedures. For example, the rules should specify the following:

- *Pleading* B Whether formal pleadings will be required. At a minimum, the rules should require the parties to delineate the issues to be decided by the arbitrator.
- *Prehearing Conference* B Whether the parties or the arbitrator may request a prehearing conference to develop the procedural format of the arbitration, narrow the issues, decide discovery matters, and establish a plan for mediation or other pretrial settlement negotiations. The pre-hearing conference may be conducted by phone or with a personal meeting of the parties and the arbitrator. In most cases the prehearing conference will be time well spent, because it will usually prevent later misunderstandings and disagreements about procedural matters.
- *Discovery* B The nature and scope of discovery and how it will be managed. For example, the rules may give the arbitrator broad control over discovery, along with some instructions for limiting the amount of discovery needed for the arbitration. The Texas General Arbitration Act gives an arbitrator considerable discretion in taking depositions and in requiring production of documents, but in the absence of agreement, discovery is limited and must be funneled through the arbitrator.
- *Time, Place and Date of Hearing* B The time, place and date of the arbitration hearing. An often-repeated criticism of arbitration is the difficulty of getting a case set for hearing. This is particularly true where the case is complex and the hearing will be protracted. Thus, the arbitration agreement should specify the arbitrator's role in promptly setting the case for hearing and giving adequate notice to the parties.

- *Conducting the Hearing* B The manner in which the hearing will be conducted, including the arbitrator's responsibility in securing attendance of witnesses and production of documents, the admission and exclusion of evidence, the order of receiving proof, and the nature of the evidence which may be considered by the arbitrator. The agreement should explicitly state whether the arbitrator will be able to consider affidavit or hearsay evidence. Similarly, the agreement should state applicable substantive and procedural laws and preferably recite its own statute of limitations or repose.
- *Party's Default* B The ramifications of one party defaulting by not attending the arbitration hearing. The arbitration agreement should specify the consequence of such an occurrence and define the party's responsibility in that event.

### Arbitrator's Award

The parties' contract should also specify the manner and time in which the arbitrator is required to make an award and the nature and scope of the relief to be granted in the award. The agreement should also state: (a) whether the arbitrator is required to render a reasoned opinion explaining the award, (b) the method for enforcing the award, and (c) whether judicial review is allowed.<sup>142</sup>

- **International Arbitration**

Although alternative dispute resolution is now a growth industry in the United States, one particular ADR process arbitration has been used to resolve international commercial disputes for many years. Agreements to arbitrate future disputes are much more prevalent in international transactions than in domestic contracts for several reasons:

- First, people transacting international business want to avoid litigating in foreign courts they fear may be biased or unfriendly. Litigating abroad also increases the time and expenditure costs, and the litigants generally have little control over the application of foreign law.
- Second, arbitration offers some procedural flexibility. The parties may agree, in advance, about how the arbitrators will be selected, and the manner in which the arbitration will be conducted. They may also stipulate the substantive law will be applied; the location of the arbitration; and any other matters they feel will assure a fair and efficient resolution of any

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<sup>142</sup>Hoeniger, Sec. 6.22 - 24. (See especially, discussion of arbitrator's power to award punitive damages and attorneys' fees, and advisability of requiring arbitrators to issue draft opinions and reasoned explanations for the award).

dispute. Further, the parties may agree each side will be entitled to call expert witnesses who are learned and experienced in the particular field.

- Third, in addition to the parties' concern about the uncertainty of outcome in foreign litigation, there is also a concern about the enforceability of a foreign judgment. In many countries, the enforcement of an arbitration award is simpler and more assured than the enforcement of a foreign judgment.<sup>143</sup> This favorable treatment of arbitration decisions, which has been reinforced by international treaty, may be due to the courts' recognition an arbitration award is the result of the parties' own contract, rather than the exercise of sovereign power.<sup>144</sup>

The United States Supreme Court has held there is a strong public policy favoring the resolution of international commerce disputes through arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631-32 (1985). In enunciating this policy, the Court reasoned (w)e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts. *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 10 (1972). Likening an agreement to arbitrate as a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedures to be used in resolving the dispute, the Court has concluded such agreements (in foreign transactions) are an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 - 520 (1974). Further, the Court has stated , not only does arbitration minimize the danger of a forum hostile to one of the parties; it tends to assure courts of other countries will enforce awards rendered in this country or in favor of American business. *See McDermott Int'l Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1207 (5th Cir. 1991).

- ***International Arbitration Treaties***

The United States has entered into two treaties, the New York Convention and the Panama Convention,<sup>145</sup> which recognizes the validity of agreements to arbitrate and govern the enforcement of arbitration awards. The United Nations Commissions on International Trade Law (UNCITRAL) has published a Model Law in an effort to harmonize national arbitration laws and has recommended its adoption by member countries.<sup>146</sup> This model law forms the basis

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<sup>143</sup>J. S. Murray, A.S. Rau, and E. F. Sherman, *Arbitration*, The Foundation Press, Inc., 1996

<sup>144</sup>*Id.*

<sup>145</sup>21 U.S.T. 2517, T.I.A.S. No 6997, 30 U.N.T.S. 38, codified in 9 U.S. Sec. 20 - 208 (1990) (New York Convention).

<sup>146</sup>Report of the United Nations Commission on International Trade Law, 40 U. N. GAOR Supp (no. 17) annex 1, at 81 - 93, U. N. Doc. A/40/17 (1985) (Model Law).

of Texas' International Arbitration and Conciliator Act.<sup>147</sup> The rules of the various international arbitration contract as well as the question of its own jurisdiction to administer the arbitration.<sup>148</sup> The place of arbitration may determine, at least to some degree, the law under which the arbitration will be conducted. If the parties cannot agree, the institution may select the location.<sup>149</sup>

- ***International Arbitration Services***

There are a number of institutions which promote the use of arbitration to settle international commercial disputes. The primary purpose of these institutions is to administer and supervise the arbitration process and none of them actually engage in the conduct of the arbitration. The activities of several prominent institutions are outlined below:

- International Chamber of Commerce (ICC). 38 Cours Alber ler; 75008 Paris, France; Tel: (011) 331.49.53.28.28

The ICC is located in Paris and is represented by national committees in over 60 countries. The arbitrators are appointed by the parties or by the ICC's Court of Arbitration (the Court). The Court meets three times a month to appoint new arbitrators, approve draft arbitral awards, fix fees of arbitrations, and similar matters. It is the ICC's use of Terms of Reference (which are submitted in advance and define the issues to be arbitrated) and the institutional review of an award before it takes effect, which give the ICC enhanced enforceability and credibility of awards rendered under its Rules. The ICC also has the equivalent of a clerk of the court who serves notices, receives all pleadings and is the main channel of communication between the Court and the parties involved in the arbitration. The ICC is generally recognized as the most prominent organization engaged in international arbitration in terms of caseload and new requests for arbitration.

- American Arbitration Association (AAA). 140 West 51st Street; New York, NY, 10020; Tel: (212) 484-4000.

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<sup>147</sup>Tex. Rev. Civ. Stat. Ann., Sec. 249 - 43 (Vernon Supp. 1993) (Texas International Arbitration and Conciliation Act).

<sup>148</sup>See, for example AA Rules at 15(1), (2); UNCITRAL Rules, at 21(1)(2); IACAC Rules, at 21(1)(2); ICC Rules, at 8(4).

<sup>149</sup>See UNCITRAL Rules, at 16; IACA Rules, at 16 and AAA Rules, at 13.

The AAA is next in order of importance in terms of international caseload. The AAA is headquartered in New York City, but has many branch offices in many U.S. cities. The AAA has an unstructured approach to arbitration, largely leaving most issues to the arbitral tribunal. Its primary responsibilities are: deciding challenges to arbitrators; acting as a clearinghouse for correspondence between the parties; appointing arbitrators and place of arbitration if the parties cannot agree; and helping the parties agree on the arbitrator's fee. The AAA is probably the least intrusive into the individual arbitrations it administers, compared to the other services.

- London Court of International Arbitration (LCIA). 30-32 St. Mary Axe London EC3A 8ET England; Tel: (011) 44.71.626.7962.

Similar to the ICC, the LCIA acts as a clearinghouse for communications between the parties and the arbitrator(s) using its service. The LCIA is based in London, but provides comprehensive commercial arbitration services throughout the world, both under its own Rules and also under the UNCITRAL Rules. Its functions include: ensuring the application of the LCIA Rules; acting as the sole authority for appointing arbitrators under the Rules; deciding challenges to the arbitrators and approving determination of costs. In terms of caseload in the arena of international arbitration, the LCIA is recognized as falling in third, behind AAA.

- ***Ad Hoc (Non-Institutional) Arbitration***

Instead of choosing an institution to administer the arbitration, the parties may themselves agree on the *ad hoc* administration of the arbitration. If the parties decide to do this themselves, they must decide how and where the arbitration is to be conducted and all other matters relating to the conduct of the arbitration and the issuance and enforcement of the award. An *ad hoc* arbitration is attractive from a cost and time perspective since both of these factors may be minimized in a non-institutional setting. On the other hand, if the parties fail to specify in their agreement and cannot later agree upon some important governing procedure, there is a potential for detrimental consequences. Once the arbitrators have issued an award, the award is generally as enforceable as one issued pursuant to an institutional arbitration forum.

- ***Rules of International Arbitration***

Parties to an international arbitration may specify in detail the procedures which will govern their arbitration, including the manner in which the arbitration may be initiated; the tribunal (institution or forum) will administer the proceeding; the selection of the arbitrators; the applicable substantive law; the conduct of the hearing; right to discovery and evidentiary

considerations; the issuance of the award, including available remedies; and the right of appellate review if desired.

As indicated above, a number of arbitration institutions have developed procedural rules which may be incorporated verbatim or by reference in the parties' contract. In addition, the United Nations Commission on International Trade Law (UNCITRAL) has issued Arbitration Rules to govern the conduct of arbitrations and the parties may incorporate these rules in their contract by reference if they wish to use an *ad hoc* rather than an institution administered arbitration. The American Commercial Arbitration Commission has also adopted Rules of Procedure which may be used for such arbitrations.

A thorough study and comparison of applicable international laws and institutional rules should precede the drafting of an international arbitration clause.<sup>150</sup> The parties to the agreement should include in any such clause the following information:

- the forum (place) of the arbitration and a description of the type of arbitration;
- the substantive law to govern the proceeding;
- the procedural rules (if other than the institution's) which apply;
- the language of the proceeding
- the number and manner of selection of the arbitrators;
- the duties and compensation of the arbitrators;
- the time when the arbitrators shall render an award and whether it will be accompanied by a reasoned opinion; and
- to what extent the award may be reviewed and the grounds on which it may be vacated.

Used as a Win-Win mechanism, the arbitration process has often yielded compromises which satisfy all parties to an international transaction. Particularly in situations where the parties want to create or maintain a future business relationship, their desire to compromise will often lead to creative solutions, which probably would not be achieved in the courtroom.

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<sup>150</sup>For further analysis and assistance in drafting international arbitration clauses, see generally *Rau & Sherman's Texas ADR and Arbitration Statutes: Commentary and Annotation*, Shepard's McGraw-Hill 1994, pp. 244-335; *Murray, Rau & Sherman: Arbitration*, The Foundation Press, Inc. 1996; E.W. Trachte-Huber and S.K. Huber, *Alternative Dispute Resolution: Strategies for Law and Business*, pp. 513-591, Anderson Publishing Co. 1996; B.J. Roth, R.W. Wulff, and C.A. Cooper, *The Alternative Dispute Resolution Practice Guide*, Ch. 19, pp. 1-29, Lawyers Cooperative Publishing 1993; J.P. Bouman, *International Arbitration: A Primer from the American Perspective*, Association of International Petroleum Negotiators 1996 Annual Meeting, San Antonio, Texas, in the library of the Center for Legal Responsibility.

## **II. TRIAL BY SPECIAL JUDGE**

This statutory process is not designated under Section 154 of the Texas Civil Practices and Remedies code, but rather under a separate part of the Code, Title 7, Alternative Methods of Dispute Resolution, Chapter 151. Trial by Special Judge. Although it results in a binding, appealable court judgment, it should be considered as a relatively prompt and inexpensive alternative to a regular court proceeding. In essence, Section 151.001 of the Texas ADR Act authorizes a court, on the agreement of the parties, in a civil or family law matter, to order referral of a pending case, on any or all of the issues in dispute, to a retired or former trial or appellate judge for a non-jury trial.

### **A. Implementing the Process**

To obtain a trial by special judge, the parties simply file an agreed motion with the court requesting the referral. In their motions, the parties should specify: (1) the issues to be determined, (2) the time and place for the trial, (3) the name of the special judge, (4) the judge's agreement to hear the case, and (5) the judge's agreed-upon compensation.

The Special Judge Act requires the requested judge: (1) must have served a minimum of four years as a trial or appellate court judge; (2) have substantial experience in his or her area of specialty; (3) not have been removed from office or resigned while under investigation for discipline or removal; and (4) have completed five or more hours of CLE approved courses during the past year. The statute further provides, except for matters of contempt, the judge shall have the same authority as a district court judge trying a non-jury trial; the judge must provide a court reporter for the proceeding, which may not be heard in a public courtroom; and no public employee shall be involved in the trial during their regular working hours. Finally, the statute provides the special judge must submit his or her verdict to the court within 60 days from the date the trial adjourns, and such a verdict will stand as the judgment of the district court. The statute also provides the right of appeal is preserved under the Texas Rules of Civil Procedure.

### **B. Analysis of the Process**

The Trial by Special Judge Act has been used infrequently, probably, because relatively few lawyers are aware of the benefits to be gained from its use. The process offers an advantage to parties who want a particular judge to hear and decide both the facts and law of their case, and who do not wish to deal with a court's busy court docket. In jurisdictions where non-jury trial settings may be obtained within a relatively short time, the process may not offer as much of an advantage.

## DESIGNING ADR SYSTEMS

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### I. TRADITIONAL GRIEVANCE SYSTEMS

Internal dispute resolution systems are not new to the institutional field. Traditionally, corporations and institutions have used internal dispute resolution policies and procedures to resolve employee and other disputes. Collective bargaining agreements and employee grievance procedures, for example, have created an internal framework for the joint determination of employee grievances.

Corporations and institutions have adopted a variety of internal procedures to resolve employee grievances. Among the most frequently used are the (1) open door-policy, (2) the ombudsman procedure, and (3) employee grievance plans.

#### A. The Open-Door Policy

The management-initiated *open-door* policy is essentially an ADR concept formalized in the institution's employee grievance plan. Under a typical open-door policy, the employer expressly encourages open communication between the employees and upper level management. In effect, the upper managers become dispute resolution facilitators who mediate disputes between employees and their immediate supervisors.

The key to the success of an open-door plan is two-fold: (1) the employer must have a continuing commitment to the concept, which encourages the employees to access the services of upper management; and (2) the facilitator must be able to develop and maintain the employee's trust and confidence.

#### B. Ombudsman Programs

The *ombudsman* concept, which originated in Sweden, has become increasingly popular among corporate and institutional employers. In essence, an ombudsman is an institutional representative charged with the duty of assisting employees in the satisfactory resolution of employment-related problems. While paid by the employer, the ombudsman is clothed with an independent status and often is given a separate staff and offices. The ombudsman's function is to gather information and to advise and assist the employee in finding an acceptable solution to

the problem. Accordingly, the ombudsman provides service as a counselor and as an advocate of the employee's rights. The success of an ombudsman program will usually depend upon the extent of management's support and upon the ombudsman's ability to negotiate on behalf of the employee within the management's employee policies.

## C. Grievance Plans

An *employee grievance plan* is usually created as part of a larger union-management system or an employer-run grievance program. It might also take the form of a company-sponsored arbitration program in which institutional arbitrators decide the outcome of employee grievances according to the common law of the shop. Most larger corporations and institutions have adopted some form of employee grievance procedures.

## II. MANDATORY ARBITRATION OF EMPLOYEE CLAIMS

In 1974, the United States Supreme Court held an employee was not precluded from asserting a federal cause of action under Title VII of the 1964 Civil Rights Act by having first submitted the grievance to arbitration under a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36,49 (1974). In support of its ruling, the Court observed labor arbitrators had neither the experience nor the authority to resolve Title VII claims; arbitral fact-finding procedures were inadequate to protect employee's Title VII rights; arbitrators were under no obligation to issue written opinions; and the union exercised exclusive control over the manner and extent to which the employee's grievance is presented. For the next decade, the Court employed similar reasoning to strike down compulsory arbitration clauses in collective bargaining agreements.

In 1985, however, the United States Supreme Court changed its course, and in the several years following, it approved several compulsory arbitration provisions involving statutory claims. *See, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-29 (1985); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238-42 (1987); and *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477-9 (1989). In those cases, the Court decided under the language of the Federal Arbitration Act it should be presumed Congress did not intend to prohibit arbitration of statutory claims, unless it expressly said so in the statute. The Court also rejected arguments questioning the arbitrators' competence and the sufficiency of the arbitral procedures.

In 1991, the United States Supreme Court issued the much cited *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20,35 (1991), ruling an age discrimination claim asserted by a fired financial services manager under the Age Discrimination Act of 1967 was precluded by the employee's securities registration agreement. In its decision the Court distinguished its 1974 decision in *Gardner-Denver*, saying the collective bargaining in the case might not have protected the employee's rights and the earlier case had not involved the Federal Arbitration Act. The Court also rejected *Gilmer's* arguments regarding the adequacy of the arbitrators and the arbitration proceedings, which were similar to those made in *Mitsubishi* and the two *Shearson* cases. Since *Gilmer*, a number of federal circuit and district courts, including the Fifth Circuit, have upheld compulsory arbitration of Title VII claims. Thus, many employers have been encouraged to adopt compulsory arbitration clauses dealing with employee claims. The

book is not closed, however. In July 1997, the Equal Employment Opportunity Commission issued its policy statement which set out the commission's position mandatory arbitration systems imposed as a condition of employment are fundamentally inconsistent with civil rights laws. Instead, the Commission has approved a strictly voluntary and confidential mediation-based program. In November 1998, the United States Supreme Court denied certiorari in *Duffield v. Robertson Stephens & Co.*, 144 F.3<sup>rd</sup> 1183 (9<sup>th</sup> Cir. 1998). In *Duffield* case the circuit court refused to enforce a compulsory arbitration clause in a Title VII case, concluding the 1991 amendments to Title VII provide a right to a jury trial, (and) that right evidences a congressional intent to allow claimants to escape the binding effect of arbitrations they initiated by signing compulsory arbitration agreements. On the heels of the *Duffield* case, the United States Supreme Court refused to enforce an arbitration clause in a collective bargaining agreement absent a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. *Wright v. Universal Maritime Service Corp.*, U.S. Lexis 2770, 119 S.Ct. 391 (1998). In its decision the Court distinguished its holding in *Gilmer*, saying *Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees hence the clear and unmistakable standard was not applicable.

In line with these recent decisions, it should be noted the Securities Exchange Commission, the American Arbitration Association and J.A.M.S.-Endispute have adopted internal policies and procedures rejecting arbitration of compulsory arbitration clauses in certain kinds of cases. Although a carefully crafted compulsory arbitration agreement may yet stand the test of time, lawyers representing institutional management should be wary in recommending the adoption of such agreements. *See also, Tenet Healthcare v. Cooper*, 960 S.W.2d 386 (Tex. App. B Houston [14th Dist.] 1997 no writ) (refused to compel employee to arbitrate.).

### **III. ADR IN THE CORPORATE ENVIRONMENT**

The American ADR movement has created a new paradigm of thinking about the resolution of institutional disputes. Moreover, experience over the past decade has shown ADR processes may be a most cost-effective way to resolve employee claims. As a result, an increasing number of employers are incorporating some form of ADR into their institutional personnel procedures.

Most, if not all, employee claims, including wrongful discharge, discrimination, and sexual harassment, are readily susceptible to resolution through some ADR process. ADR has been used successfully to resolve claims of discrimination based on age, race, sex, religion, national origin, and disability. ADR has also been used successfully to resolve state tort claims arising from employment such as defamation, invasion of privacy, false imprisonment, intentional infliction of emotional distress, sexual harassment, and wrongful termination.

#### **A. ADR from Employer's Perspective**

An employer may expend a tremendous amount of its resources B money and time B defending employee related claims. As one writer aptly observed, the only thing rising faster than the number of employment-related lawsuits is the cost of defending them.

Given the dramatic increase in the filing of statutory employee claims, one might expect all employers to rush toward ADR as a quick and inexpensive fix. But this has not always been the case. Some employers, particularly those with no prior experience in ADR, have been understandably concerned about the long-range consequences of internal ADR systems. Others may fear an ADR system will diminish management's control or will encourage the filing of frivolous claims. In actuality, none of these concerns have proven to be a problem in carefully drafted and implemented ADR policies.

#### **B. ADR from Employee's Perspective**

Employees also have been reluctant to embrace management-inspired ADR systems. In essence, their concerns are similar to management's: Will such a system help me and protect my rights, or will it work to my detriment? Once again, the end result will depend on how well the ADR system is crafted and implemented. These and related issues are discussed infra. Employees may only benefit from a carefully devised ADR system in which they have helped plan and implement.

#### **C. The Advantages of a Cooperative Plan**

Misunderstandings between employees and management often result in continuing turmoil and distrust, because both sides cannot win an adversarial contest. Moreover, if an employee's dispute is left unresolved, it tends to escalate and intensify B ultimately resulting in a failed working relationship. If the employee files a formal grievance, the employee often fears B sometimes with justification B the complaint will lead to reprisal or retaliation. Ongoing conflicts between employees and management tend to discourage any kind of collaborative problem solving. Thus, many such disputes take an unnecessary toll in time and cost for both parties.

As more employers and employees become familiar with the concepts and usage of ADR, there has been increasing acceptance of internal ADR systems. A fair and effective ADR system may serve the dual purpose of protecting the employee's rights while fostering a productive work environment. America's institutional and corporate leaders are now embracing ADR as a means to encourage cooperative dispute resolution in the workplace.

#### **D. Designing an ADR System**

Employers and employees stand to gain from a well-designed and carefully implemented ADR plan. The key to success of an in-house ADR plan is the concurrence of three criteria:

- The plan must be developed through the collaborative effort of management and the employees.
- It must have the moral and financial support of upper level management.
- It must be specially tailored to meet the needs and culture of the particular work environment.

If the plan meets these criteria, it may take different forms. It may be simply a modest extension of the employer's existing grievance programs. For example, it may be the addition of an open-door or ombudsman procedures to an existing grievance plan. Or it may be an entirely new and comprehensive plan, which incorporates a wide range of dispute resolution methods.

An employer developing an internal ADR plan should also:

- Try to develop procedures, which are as flexible as possible. Most employees will resist (and undermine) plans, which give someone else the arbitrary right to decide the outcome of their dispute.
- Seek to incorporate promptness in the dispute resolution process. When an employee is suffering disappointment, anxiety, and emotional stress as a result of a work-related

incident, the employer's failure to take prompt action is often perceived as further evidence of the employer's non-caring attitude.

- Consider the emotional dynamics at play in an employment dispute. An ADR process, such as mediation, helps alleviate the employee's natural fear, anger, and humiliation. The ADR plan should take into account the possible need for the employee to vent frustration and hostile feelings; otherwise, the animosity toward management will likely linger and spread throughout the workplace.
- Devote the time and effort necessary to develop a collaborative ADR plan. The employer should assign individuals with decision-making authority the task of designing and implementing such a collaborative plan.

Finally, the employer should take steps to ensure all management personnel are fully educated about and committed to the ADR plan. Once both management and employee representatives have developed a mutually agreeable ADR plan, it should be incorporated into the institutional culture as a permanent dispute resolution and problem-solving system.

#### **IV. AN ANALYSIS OF EXISTING PLANS**

A prudent institutional employer will look to other employers to obtain guidance regarding particular ADR plans. Most companies will be glad to share their experiences in this learning process. The programs briefly reviewed below cover a span of more than a decade of experience:

##### **A. The Qantas Program**

In 1983, Qantas introduced a three-step grievance procedure for its 300 employees in North and South America. Under this plan, an employee first complains to his or her immediate supervisor. If the dispute is not resolved at that level, the employee submits a written complaint to the department head. If still dissatisfied, the employee then files a written complaint with the general manager or the vice president of human resources. Under Qantas' open door policy, the employee is permitted to bypass step one and go immediately to step two. If these meetings with higher-level supervisors fail to produce a settlement, the company offers mediation with outside mediators at no cost to the employees. Qantas reports the program has been well received by its employees and it has had only one employment-related lawsuit since the program started.

##### **B. The Motorola Experience**

In 1985, Motorola, Inc., a major electronics manufacturer and sales company, created a special ADR team to study and make recommendations about the effective use of ADR. Motorola's

management prepared and distributed a 60-page introductory manual to its legal department personnel and embarked on an extensive training and educational program to develop employee and consumer awareness of ADR processes. Since then, Motorola has provided continuing support to this program and it routinely resolves disputes through ADR methods. Motorola's general counsel reports internal evaluations strongly suggest expensive discovery, heated motions, and other furious (litigation) activity often fail to produce any better results than those negotiated at the onset of a dispute.

### **C. The Hughes Aircraft Program**

In 1992, Hughes Aircraft, after an unfavorable jury verdict, began to rethink its employment complaint program. After getting input from both employee and focus groups, it decided to continue its existing plan in which an employee's claim proceeds through the steps of management hierarchy. But at step three, it added a new feature. If the employee is dissatisfied with the decision at that level, he or she may choose an executive advisor from a panel of eligible executives. This advisor helps the employee evaluate the merits of the claim and prepare for the next step in the process. Hughes also initiated a fourth step, which entitles the employee to a hearing before a consensus review board comprised of a panel of three executive and mid-level managers selected by the human resources department. This board is empowered to rescind layoffs or discharges, grant salary increases, change performance ratings, or take other appropriate action. The board may not, however, alter company policy or award compensatory or punitive damages. If the employee is not satisfied with the board decision, he or she may seek binding arbitration. According to Hughes, this program substantially raised employee morale, because it gave the employees the feeling they were an important part of the institutional process. In the first year of the program, some 70% of the employees' claims were resolved before board action, and 60% of the claims submitted to the board were resolved to the employees' satisfaction.

### **D. The Brown & Root System**

Houston-based Brown & Root, Inc. is renowned worldwide for its vast construction, maintenance, and engineering services. After it obtained a favorable verdict in a sexual harassment case (but spent some \$450,000 on legal fees), it began to look seriously at an ADR plan. It first initiated a series of task force meetings among senior operations managers, labor and employment department representatives, outside counsel, and system design experts to arrive at a plan of action. In 1993, Brown & Root, Inc. implemented a four-option program which provided for: (1) an open-door policy; (2) a conference with a dispute resolution representative to choose a resolution method such as an internal, informal mediation with a company advisor; (3) a formal mediation with an American Arbitration Association (AAA) mediator; and (4) the use of AAA's employee arbitration program. The Brown & Root program is universal, because it applies to virtually every kind of employment dispute other than worker's compensation

claims and unemployment claims. It binds all employees from senior executives to entry-level employees. According to Brown & Root's Associate General Counsel William L. Bedman, the success of the program depends upon management's commitment to equitable and uniform application and to comprehensive and consistent training for all personnel.

## **E. Shell Resolve Program**

In 1997, Shell Oil Company initiated its Shell Resolve Program, which features:

- Early workplace resolution, in which the employee is provided an opportunity to sit down face-to-face with the other person to discuss ways to resolve the problem.
- Shell ombudsman, designated as a fair and impartial conflict resolution specialist who will answer questions, offer support and advice, and refer to internal or external processes or resources.
- External mediation (and arbitration), which is available through the Shell ombuds-person. Mediation is a condition of employment at Shell: if the conflict is not satisfactorily resolved through mediation and the conflict involves a legally protected right, the employee may request arbitration or proceed to litigation.

Under Shell's legal assistance plan the employee pays a deductible and a co-payment, and Shell pays the balance up to an annual limit.

## **F. Attorney General Ombudsman Program**

The Attorney General of the State of Texas has developed a four-step Employee Complaint Procedure, which is intended to aid in the resolution of problems its employees may encounter in the performance of their job duties. Under this procedure any employee may contact an ombudsman at any time. In the four-step procedure, an employee is encouraged to first discuss the complaint with his or her immediate supervisor. If the discussion is inappropriate or does not result in satisfaction of the complaint, the employee may submit a written complaint to the division chief with copy to the ombudsman. If that step does not produce desirable results, the employee may seek help from the ombudsman to verify the nature of the complaint and to help the employee complete a formal complaint form. In the fourth and final step, the ombudsman will make final recommendations, as appropriate, to the employee's division chief (if the complaint is informal) or to the executive management member (if the complaint is formal). The First Assistant Attorney General may, on the employee's request or his own motion, review the final decision made in the matter. The ombudsman is specifically charged with the following responsibilities:

- Answer the employee's questions regarding procedures and structure;
- Act as go-between in dispute between employee and supervisor;

- Assist in identifying, alleviating, or correcting a conflict related to work environment, mis-communication, or other employee situation;
- Alert appropriate personnel in event of serious violation of policy; and
- Respond immediately to allegations of sexual harassment or discrimination.

All discussions between employee and ombudsman are private and, except for issues of sexual harassment, unlawful activity, and workplace violence, are confidential.

## **V. MAKING A NEEDS ASSESSMENT**

In designing and implementing an in-house ADR program, an employer should take the time and make the effort to determine what type of ADR system will best fit the organization's needs. The CPR Institute for Dispute Resolution has identified five broad phases which should be addressed:

### **A. Design of the System**

In this initial phase, the employer should engage in a deliberate design process which considers overall ADR needs and potential. What has been done in the past? Are currently used dispute resolution processes working and how well? What will occur if no changes are made? What are similar organizations doing in the field?

In the field of litigation, similar inquiries should be made. Are litigation costs too high compared with those of similar companies? Does litigation take too much of management's time? Are proprietary materials being exposed to competitors? What impact is litigation having on business relationships? What is it doing to the company's business reputation?

The design strategy should isolate disputes which are appropriate for ADR and marshal ADR processes that meet the institutional culture. The employer should consider ADR processes which will:

- Reduce exposure to adverse decisions;
- Avoid disruption of business relationships;
- Protect work time; and
- Assure client and consumer confidentiality.

The employer's needs assessment should also focus on the types of disputes normally encountered; the average time it takes to resolve different types of disputes; which disputes take the highest toll in employer time and costs; and the indirect costs of traditional dispute resolution methods. Finally, the employer should try to determine which ADR processes would best fit the most troublesome disputes and how the company may best initiate those processes. In making this needs assessment, the employer should also investigate the approaches taken by companies with similar employee relationships.

## **B. Selecting the Program Model**

Having made a needs assessment, the employer should next consider the kind of ADR system which will be most feasible. In making this determination, the employer should develop a team drawn from internal management, human resources, legal, risk management, and its employees' representatives. The team should consider a wide range of issues: Should the ADR system simply upgrade existing ADR procedures? Should it focus on encouraging greater awareness of ADR? Or should it undertake a full-scale, in-house ADR program? The cultural and environmental factors within the employer's workplace will be important factors in making this determination.

The employer should also analyze the types of disputes which will be handled by the system. Will the processes be used primarily to resolve statutory discrimination claims? How will governmental agencies such as the EEOC and the Texas Commission on Human Rights fit into the picture? Should the ADR system have some binding as well as non-binding features? Should these be mandatory (compulsory as a condition to employment), and if so, how will the employees react to such a program?

## **C. Obtaining Critical Support**

Before embarking on any ADR system, the program designers should obtain the employer's assurance of full and continuing support. Unless this support is forthcoming, the rank and file of the company may not take the program seriously. This commitment should include a dedication of additional resources in the way of staff, supplies, and equipment in line with a pre-approved budget. The program designers should also seek inter-organizational support from all critical management levels, as well as a commitment of outside counsel and public relations representatives. Finally, the designers should obtain the commitment of all employees and representatives to become knowledgeable about the ADR plan and to make themselves reasonably available for meetings to discuss the plan.

## **D. Designing the ADR Plan**

Nothing is mysterious or complex about designing an internal ADR system. Often, an ADR plan is simply a designed extension of an existing grievance plan which the company has used for many years. Most ADR plans begin with a statement of policy along the following lines:

This company and its employees are committed to the fair and impartial resolution of all employee disputes as quickly and efficiently as possible. To this end, the employer and the employees have mutually agreed, as a continuing condition to their employment relationship, that all disputes arising out of such relationship, including those related to some state or federal law, will be resolved in accordance with, and pursuant to, the employer's ADR system.

Following such a policy statement, the ADR plan might set out the various steps of the grievance process. The plan should explain the employer's open door policy, if any, as well as the role of any third-party facilitator, such as an ombudsman or executive advisor. It should also set forth the procedural guidelines for the specified ADR processes.

The ADR plan might offer one or more ADR alternatives for the resolution of the dispute. Or, it might require the parties to use a multi-step sequence of ADR processes, conditioning the use of some processes on the parties first having tried (and failed) to resolve their dispute by some other process. Thus, the plan might require the parties, before a complaint is filed, to make a good-faith effort to reach a settlement through their own negotiations. Then, if those negotiations prove unsuccessful, the parties must make a good-faith effort to mediate before proceeding to the next ADR process, such as a binding arbitration or trial by special judge. The plan might also have loop-back provisions, so if the parties need to gain a realistic third-party evaluation before proceeding with their negotiations, the plan would move them back into the negotiation phase after evaluation had been obtained. As suggested earlier, the plan should be as voluntary as possible, permit maximum participation by both parties and their counsel, allow sufficient time and opportunity for discovery of requisite information, be fair and even in application, and assure complete neutrality in the selection and functioning of the third-party facilitator.

## **E. Implementing the ADR Program**

Once the employer's management representatives have completed a discussion draft of the proposed ADR plan, their job has just begun. To what extent should the employees, outside counsel, and advisors, circulate the plan for consideration and feedback? Will the final plan be voluntary or compulsory, in whole or in part? How will the employees and lower management be encouraged (or required) to abide by and use the plan? Will quotas be imposed? If outside dispute resolution providers will be involved, will the ADR processes be administered internally or referred to other organizations such as the American Arbitration Association or JAMS-

Endispute? Which organization or department will be responsible for selecting third-party neutrals and what criteria will be used for such selection process? How and by whom will the employees and managers be trained to make effective use of the plan? How and by whom will the plan be monitored and evaluated? Does the plan, as designed, really meet the employer's principal needs and fit its scheme of operation? Should a modest pilot program first be implemented to test and evaluate the program's successful implementation of such a plan. Moreover, putting a well-designed program in place is no guarantee it will succeed. The employer must constantly measure the effectiveness of the program and look for ways to improve it.

## **F. Creating a Fair ADR System**

Employers wishing to reduce their dispute resolution costs and to improve their workplace environment will need to become fully knowledgeable about ADR processes and creative in their design of internal ADR systems. Although courts now look with favor on ADR processes as acceptable means for resolving employment disputes, it is by no means certain every employer-initiated ADR program will receive judicial and administrative approval. Thus, employers should be able to demonstrate their ADR systems have essential elements of voluntariness and fairness, and their employees' rights are safeguarded by considerations of due process. Further, to gain employee acceptance, the ADR plan should require the neutral selection and functioning of any third-party facilitators.

## **VI. THE ROLE OF LAWYERS IN THE DESIGN PROCESS**

The bench and bar have been at the forefront of the ADR movement in Texas, and all major changes in Texas' dispute resolution system have been accomplished with the bar's support and approval. The development of an effective internal ADR system will require the careful scrutiny, guidance, and draftsmanship of the employer's counsel. Although it might seem, facially at least, an internally administered ADR system would be contrary to the lawyer's economic interest, past experience with ADR indicates otherwise. Indeed, if the implementation of an ADR system results in cost savings for the client, the lawyer who participates in planning and implementing the system is very likely going to benefit from the client's increased satisfaction and productivity.

## **VII. SUMMARY**

The experiences of employers who have implemented successful ADR systems have demonstrated the advantages of such programs far outweigh their disadvantages. As a result, more and more employers and their counsel have begun to recognize the benefits ADR systems may provide. An ADR program, when carefully designed and effectively implemented, may serve as an efficient, cost-effective, and fair way to resolve disputes arising from the workplace, as well as discourage frivolous claims, reduce costs, and increase employees' morale. These benefits, in turn, translate into greater organizational productivity, a guaranteed Win-Win situation.

## NOTES

# NOTES

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# APPENDICES

## **Appendix A**

**TEXAS STATUTES AND CODES  
CIVIL PRACTICE AND REMEDIES CODE  
TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION  
CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES**

**§ 154.001. Definitions.**

In this chapter:

- (1) "Court" includes an appellate court, district court, constitutional county court, statutory county court, family law court, probate court, municipal court, or justice of the peace court.
- (2) "Dispute resolution organization" means a private profit or nonprofit corporation, political subdivision, or public corporation, or a combination of these, that offers alternative dispute resolution services to the public.

**§ 154.002. Policy.**

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

**§ 154.003. Responsibility of Courts and Court Administrators.**

It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002.

**[§§ 154.004 through 154.020. Reserved for expansion.]**

**§ 154.021. Referral of Pending Disputes for Alternative Dispute Resolution Procedure.**

(a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:

- (1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372a, Vernon's Texas Civil Statutes;
- (2) a dispute resolution organization; or
- (3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

(b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.

**§ 154.022. Notification and Objection.**

(a) If a court determines a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.

(b) Any party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral.

(c) If the court finds there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.

**§ 154.023. Mediation.**

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

(b) A mediator may not impose his own judgment on the issues of the parties.

**§ 154.024. Mini-Trial.**

(a) A mini-trial is conducted under an agreement of the parties.

(b) Each party and counsel for the party present the position of the party, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations.

(c) The impartial third party may issue an advisory opinion regarding the merits of the case.

(d) The advisory opinion is not binding on the parties unless the parties agree it is binding and enter into a written settlement agreement.

**§ 154.025. Moderated Settlement Conference.**

(a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.

(b) Each party and counsel for the party presents the position of the party before a panel of impartial third parties.

(c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

(d) The advisory opinion is not binding on the parties.

**§ 154.026. Summary Jury Trial.**

(a) A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations.

(b) Each party and counsel for the party presents the position of the party before a panel of jurors.

(c) The number of jurors on the panel is six unless the parties agree otherwise.

(d) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

(e) The advisory opinion is not binding on the parties.

**§ 154.027. Arbitration.**

(a) Nonbinding arbitration is 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.

(b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

**[§§ 154.028 through 154.050. Reserved for expansion.]**

**§ 154.051. Appointment of Impartial Third Parties.**

(a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under Section 154.021, the court may appoint an impartial third party to facilitate the procedure.

(b) The court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter.

(c) The court may appoint more than one third party under this section.

**§ 154.052. Qualifications of Impartial Third Party.**

(a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.

(b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law.

(c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.

**§ 154.053. Standards and Duties of Impartial Third Parties.**

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

**§ 154.054. Compensation of Impartial Third Parties.**

(a) The court may set a reasonable fee for the services of an impartial third party appointed under this subchapter.

(b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

**§ 154.055. Qualified Immunity of Impartial Third Parties.**

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

(b) This section neither applies to nor is it intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty.

**[§§ 154.056 through 154.070. Reserved for expansion.]**

**§ 154.071. Effect of Written Settlement Agreement.**

(a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.

(b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.

(c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

**§ 154.072. Statistical Information on Disputes Referred.**

The Texas Supreme Court shall determine the need and method for statistical reporting of disputes referred by the courts to alternative dispute resolution procedures.

**§ 154.073. Confidentiality of Certain Records and Communications.**

(a) Except as provided by Subsections (c), (d), and (e), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

[(e1)] [As added by Acts 1999, [76th Leg., ch. 1150](#), Sec. 30] This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

[(e2)] [As redesignated by Acts 1999, [76th Leg., ch. 1352](#), Sec. 6] If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

**Amended by Acts 1999, [76th Leg., ch. 1150](#), Sec. 30, eff. Sept. 1, 1999.**

**Amended by Acts 1999, [76th Leg., ch. 1352](#), Sec. 6, eff. Sept. 1, 1999.**

**Note:** Acts 1999, [76th Leg., ch. 1150](#), Sec. 30, eff. Sept. 1, 1999, added a new subsection (e) to this section. Acts 1999, [76th Leg., Ch. 1352](#) added a new subsection (d) and relettered former subsection (d) as subsection (e). The publisher has redesignated the subsection added by ch. 1150 as subsection [(e1)] and the subsection (d) relettered as subsection (e) by ch. 1352 as subsection [(e2)] pending reconciliation by the legislature.

## Appendix B

### State Bar of Texas ADR Section Ethical Guidelines for Mediators

#### PREAMBLE

These Ethical Guidelines are intended to promote public confidence in the mediation process and to be a general guide for mediator conduct. They are not intended to be disciplinary rules or a code of conduct. Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly. These Ethical Guidelines are intended to apply to mediators conducting mediations in connection with all civil, criminal, administrative and appellate matters, whether the mediation is pre-suit or court-annexed and whether the mediation is court-ordered or voluntary.

#### GUIDELINES

**1. Mediation Defined.** Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

**Comment.** A mediator's obligation is to assist the parties in reaching a voluntary settlement. The mediator should not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves.

**2. Mediator Conduct.** A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.

**Comment (a).** A mediator should not use information obtained during the mediation for personal gain or advantage.

**Comment (b).** The interests of the parties should always be placed above the personal interests of the mediator.

**Comment (c).** A mediator should not accept mediations, which cannot be completed in a timely manner or as directed by a court.

**Comment (d).** Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.

**Comment (e).** A mediator should not mediate a dispute when the mediator has knowledge another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

**3. Mediation Costs.** As early as practical, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator should perform mediation services at a reduced fee or without compensation.

**Comment (a).** A mediator should avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.

**Comment (b).** If a party and the mediator have a dispute which cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so the parties may obtain another mediator.

**4. Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

**Comment (a).** A mediator should withdraw from mediation if it is inappropriate to serve.

**Comment (b).** If after commencement of the mediation the mediator discovers such a relationship exists, the mediator should make full disclosure as soon as practicable.

**5. Mediator Qualifications.** A mediator should inform the participants of the mediator's qualifications and experience.

**Comment.** A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

**6. The Mediation Process.** A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.

**Comment (a).** A mediator should inform the parties about the mediation process no later than the opening session.

**Comment (b).** At a minimum the mediator should inform the parties of the following: (1) the mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend.); (2) the mediation is informal (There are no court reporters present, no record is made of the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.); and (3) the mediation is confidential to the extent provided by law. (See, e.g., §§154.053, and 154.073, Tex. Civ. Prac. & Rem. Code.)

**7. Convening the Mediation.** Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be

productive.

**Comment.** A mediator should not convene the mediation if the mediator has reason to believe a *pro se* party fails to understand the mediator is not providing legal representation for the *pro se* party. In connection with *pro se* parties, see also Guidelines #9, 11 and 13 and associated comments below.

**8. Confidentiality.** A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.

**Comment (a).** A mediator should not permit recordings or transcripts to be made of mediation proceedings.

**Comment (b).** A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.

**Comment (c).** Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and the mediation either resulted in a settlement or an impasse, or the mediation was either recessed or rescheduled.

**Comment (d).** In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties disclosure is required and will be made.

**9. Impartiality.** A mediator should be impartial toward all parties.

**Comment.** If a mediator or the parties find the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

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

**11. Professional Advice.** A mediator should not give legal or other professional advice to the parties.

**Comment (a).** In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during, or after the mediation process.

**Comment (b).** A mediator should explain generally to *pro se* parties there may be risks in proceeding without independent counsel or other professional advisors.

**12. No Judicial Action Taken.** A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.

**Comment.** It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator has had communications with one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem, or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believes nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity.

**13. Termination of Mediation Session.** A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

**14. Agreements in Writing.** A mediator should encourage the parties to reduce all settlement agreements to writing.

**15. Mediator's Relationship with the Judiciary.** A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.

## Appendix C

### TEXAS STATUTES AND CODES CIVIL PRACTICE AND REMEDIES CODE TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION CHAPTER 151. TRIAL BY SPECIAL JURY

#### **§ 151.001. Referral by Agreement**

On agreement of the parties, in civil or family law matters, the judge in whose court the case is filed may order referral of the case as provided by this chapter and shall stay proceedings in his court pending the outcome of the trial. Any or all of the issues in the cases, whether an issue of fact or law, may be referred.

#### **§ 151.002. Motion for Referral**

Each party to the action must file in the court in which the case is filed a motion:

- (1) requests the referral;
- (2) waives the party's right to trial by jury;
- (3) states the issues to be referred;
- (4) states the time and place agreed on by the parties for the trial; and
- (5) states the name of the special judge, the fact the special judge has agreed to hear the case, and the fee the judge is to receive as agreed on by the parties.

#### **§ 151.003. Qualifications of Judge**

The special judge must be a retired or former district, statutory county court, or appellate judge who:

- (1) has served as a judge for at least four years in a district, statutory county court, or appellate court;
- (2) has developed substantial experience in his area of specialty;
- (3) has not been removed from office or resigned while under investigation for discipline or removal; and
- (4) annually demonstrates he has completed in the past calendar year at least five days of continuing legal education in courses approved by the state bar or the Supreme Court.

#### **§ 151.004. Referral Order Entered**

An order of referral must specify the issue referred and the name of the special judge. An order of referral may designate the time and place for trial and the time for filing of the special judge's report. The clerk of the court shall send a copy of the order to the special judge.

#### **§ 151.005. Procedure**

Rules and statutes relating to procedure and evidence in district court apply to a trial under this chapter.

### **§ 151.006. Powers of Special Judge**

(a) A special judge shall conduct the trial in the same manner as a court trying an issue without a jury.

(b) While serving as a special judge, the judge has the powers of a district court judge except he may not hold a person in contempt of court unless the person is a witness before him.

### **§ 151.007. Representation by Attorney**

A party has the right to be represented by an attorney at the trial held as provided by this chapter.

### **§ 151.008. Court Reporter Required**

To maintain a record of the proceedings at the hearing, the special judge shall provide a court reporter who meets the qualifications prescribed by law for district court reporters.

### **§ 151.009. Fees and Costs**

(a) The parties, in equal shares, shall pay:

(1) the special judge's fee; and

(2) all administrative costs, including the court reporter's fee, related to the trial.

(b) A cost for a witness called by a party or any other cost related only to a single party's case shall be paid by the party who incurred the cost.

(c) The state or a unit of local government may not pay any costs related to a trial under this chapter.

### **§ 151.010. Restrictions**

A trial under this chapter may not be held in a public courtroom, and a public employee may not be involved in the trial during regular working hours.

### **§ 151.011. Special Judge's Verdict**

The special judge's verdict must comply with the requirements for a verdict by the court. The verdict stands as a verdict of the district court. Unless otherwise specified in an order of referral, the special judge shall submit the verdict not later than the 60th day after the day the trial adjourns.

### **§ 151.012. New Trial**

If the special judge does not submit the verdict within the time period provided by Section 151.011, the court may grant a new trial if:

(1) a party files a motion requesting the new trial;

(2) notice is given to all parties stating the time and place a hearing will be held on the motion; and

(3) the hearing is held.

### **§ 151.013. Right to Appeal**

The right to appeal is preserved. An appeal is from the order of the district court as provided by the Texas Rules of Civil Procedure.

## Appendix D

**TEXAS STATUTES AND CODES  
CIVIL PRACTICE AND REMEDIES CODE  
TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION  
CHAPTER 152. ALTERNATIVE DISPUTE RESOLUTION SYSTEM ESTABLISHED  
BY COUNTIES**

### **§ 152.001. Definition**

In this chapter, "alternative dispute resolution system" means an informal forum in which mediation, conciliation, or arbitration is used to resolve disputes among individuals, including those having an ongoing relationship such as relatives, neighbors, landlords and tenants, employees and employers, and merchants and consumers.

### **§ 152.002. Establishment**

(a) The commissioner's court of a county by order may establish an alternative dispute resolution system for the peaceable and expeditious resolution of citizen disputes.

(b) The commissioner's court may do all necessary acts to make the alternative dispute resolution system effective, including:

(1) contracting with a private nonprofit corporation, a political subdivision, a public corporation, or a combination of these entities for the purpose of administering the system;

(2) making reasonable rules relating to the system; and

(3) vesting management of the system in a committee selected by the county bar association.

(c) The actions of a committee authorized by Subsection (b)(3) are subject to the approval of the commissioner's court.

### **§ 152.003. Referral of Cases**

A judge of a district court, county court, statutory county court, probate court, or justice of the peace court in a county in which an alternative dispute resolution system has been established may, on motion of a party or on the judge's or justice's own motion, refer a case to the system. Referral under this section does not prejudice the case.

### **§ 152.004. Financing**

(a) To establish and maintain an alternative dispute resolution system, the commissioners court may set a court cost in an amount not to exceed \$10 to be taxed, collected, and paid as other court costs in each civil case filed in a county or district court in the county, including a civil case relating to probate matters but not including:

(1) a suit for delinquent taxes;

(2) a condemnation proceeding under Chapter 21, Property Code; or

(3) a proceeding under Subtitle C, Title 7, Health and Safety Code.

(b) The county is not liable for the payment of a court cost under this section.

(c) The clerks of the courts in the county shall collect and pay the costs to the county treasurer or,

if the county does not have a treasurer, to the county officer who performs the functions of the treasurer, who shall deposit the costs in a separate fund known as the alternative dispute resolution system fund. The fund shall be administered by the commissioner's court and may only be used to establish and maintain the system. The system shall be operated at one or more convenient and accessible places in the county.

**§ 152.005. Additional Fee for Certain Counties**

(a) To establish and maintain an alternative dispute resolution system, the commissioner's court of a county with a population of 2.5 million or more may, in addition to the court cost authorized under Section 152.004, set a court cost in an amount not to exceed \$3 for civil cases filed in a justice court located in the county, but not including:

(1) a suit for delinquent taxes; or

(2) an eviction proceeding, including a forcible detainer, a forcible entry and detainer, or a writ of re-entry.

(b) A clerk of the court shall collect and pay the court cost in the manner prescribed by Section 152.004(c).

## **Appendix E**

**TEXAS STATUTES AND CODES  
CIVIL PRACTICE AND REMEDIES CODE  
TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION  
CHAPTER 171. GENERAL ARBITRATION  
SUBCHAPTER A. GENERAL PROVISIONS**

### **§ 171.001. Arbitration Agreements Valid**

- (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy :
- (1) exists at the time of the agreement; or
  - (2) arises between the parties after the date of the agreement.
- (b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

### **§ 171.002. Scope of Chapter**

- (a) This chapter does not apply to:
- (1) a collective bargaining agreement between an employer and a labor union;
  - (2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than \$50,000, except as provided by Subsection (b);
  - (3) a claim for personal injury, except as provided by Subsection (c);
  - (4) a claim for workers' compensation benefits; or
  - (5) an agreement made before January 1, 1966.
- (b) An agreement described by Subsection (a)(2) is subject to this chapter if:
- (1) the parties to the agreement agree in writing to arbitrate; and
  - (2) the agreement is signed by each party and each party's attorney.
- (c) A claim described by Subsection (a)(3) is subject to this chapter if:
- (1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and
  - (2) the agreement is signed by each party and each party's attorney.

### **§ 171.003. Uniform Interpretation**

This chapter shall be construed to affect its purpose and make uniform the construction of other states' law applicable to an arbitration.

**CIVIL PRACTICE AND REMEDIES CODE**  
**TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION**  
**CHAPTER 171. GENERAL ARBITRATION**  
**SUBCHAPTER B. PROCEEDINGS TO COMPEL OR STAY ARBITRATIONS**

**§ 171.021. Proceeding to Compel Arbitration**

- (a) A court shall order the parties to arbitrate on application of a party showing:
  - (1) an agreement to arbitrate; and
  - (2) the opposing party's refusal to arbitrate.
- (b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine the issue. The court shall order the arbitration if it finds for the party who made the application. If the court does not find for the party, the court shall deny the application.
- (c) An order compelling arbitration must include a stay of any proceeding subject to Section 171.025.

**§ 171.022. Unconscionable Agreements Unenforceable**

A court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made.

**§ 171.023. Proceeding to Stay Arbitration**

- (a) A court may stay an arbitration commenced or threatened on application and a showing there is not an agreement to arbitrate.
- (b) If there is a substantial bona fide dispute as to whether an agreement to arbitrate exists, the court shall try the issue promptly and summarily.
- (c) The court shall stay the arbitration if the court finds for the party moving for the stay. If the court finds for the party opposing the stay, the court shall order the parties to arbitrate.

**§ 171.024. Place for Making Application**

- (a) If there is a proceeding pending in a court involving an issue referable to arbitration under an alleged agreement to arbitrate, a party may make an application under this subchapter only in that court.

(b) If Subsection (a) does not apply, a party may make an application in any court, subject to Section 171.096.

### **§ 171.025. Stay of Related Proceeding**

(a) The court shall stay a proceeding, which involves an issue subject to arbitration if an order for arbitration or an application for order is made under this subchapter.

(b) The stay applies only to the issue subject to arbitration if the issue is severable from the remainder of the proceeding.

### **§ 171.026. Validity of Underlying Claim**

A court may not refuse to order arbitration, because:

- (1) the claim lacks merit or bona fides; or
- (2) the fault or ground for the claim is not shown.

**CIVIL PRACTICE AND REMEDIES CODE  
TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION  
CHAPTER 171. GENERAL ARBITRATION  
SUBCHAPTER C. ARBITRATION**

### **§ 171.041. Appointment of Arbitrators**

(a) The method of appointment of arbitrators is as specified in the agreement to arbitrate.

(b) The court, on application of a party stating the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators, shall appoint one or more qualified arbitrators if:

- (1) the agreement to arbitrate does not specify a method of appointment;
- (2) the agreed method fails or cannot be followed; or
- (3) an appointed arbitrator fails or is unable to act and a successor has not been appointed.

(c) An arbitrator appointed under Subsection (b) has the powers of an arbitrator named in the agreement to arbitrate.

### **§ 171.042. Majority Action by Arbitrators**

The powers of the arbitrators are exercised by a majority unless otherwise provided by the agreement to arbitrate or this chapter.

### **§ 171.043. Hearing Conducted by Arbitrators**

- (a) Unless otherwise provided by the agreement to arbitrate, all the arbitrators shall conduct the hearing. A majority of the arbitrators may determine a question and render a final award.
- (b) If, during the course of the hearing, an arbitrator ceases to act, one or more remaining arbitrators appointed to act as neutral arbitrators may hear and determine the controversy.

### **§ 171.044. Time and Place of Hearing; Notice**

- (a) Unless otherwise provided by the agreement to arbitrate, the arbitrators shall set a time and place for the hearing and notify each party.
- (b) The notice must be served not later than the fifth day before the hearing either personally or by registered or certified mail with return receipt requested. Appearance at the hearing waives the notice.
- (c) The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

### **§ 171.045. Adjournment or Postponement**

Unless otherwise provided by the agreement to arbitrate, the arbitrators may:

- (1) adjourn the hearing as necessary; and
- (2) on request of a party and for good cause, or on their own motion, postpone the hearing to a time not later than:
  - (A) the date set by the agreement for making the award; or
  - (B) a later date agreed to by the parties.

### **§ 171.046. Failure of Party to Appear**

Unless otherwise provided by the agreement to arbitrate, the arbitrators may hear and determine the controversy on the evidence produced without regard to whether a party who has been notified as provided by Section 171.044 fails to appear.

### **§ 171.047. Rights of Party at Hearing**

Unless otherwise provided by the agreement to arbitrate, a party at the hearing is entitled to:

- (1) be heard;
- (2) present evidence material to the controversy; and
- (3) cross-examine any witness.

### **§ 171.048. Representation by Attorney; Fees**

- (a) A party is entitled to representation by an attorney at a proceeding under this chapter.

- (b) A waiver of the right described by Subsection (a) before the proceeding is ineffective.
- (c) The arbitrators shall award attorney's fees as additional sums required to be paid under the award only if the fees are provided for:
  - (1) in the agreement to arbitrate; or
  - (2) by law for a recovery in a civil action in the district court on a cause of action on which any part of the award is based.

#### **§ 171.049. Oath**

The arbitrators, or an arbitrator at the direction of the arbitrators, may administer to each witness testifying before them the oath required of a witness in a civil action pending in a district court.

#### **§ 171.050. Depositions**

- (a) The arbitrators may authorize a deposition:
  - (1) for use as evidence to be taken of a witness who cannot be required by subpoena to appear before the arbitrators or who is unable to attend the hearing; or
  - (2) for discovery or evidentiary purposes to be taken of an adverse witness.
- (b) A deposition under this section shall be taken in the manner provided by law for a deposition in a civil action pending in a district court.

#### **§ 171.051. Subpoenas**

- (a) The arbitrators, or an arbitrator at the direction of the arbitrators, may issue a subpoena for:
  - (1) attendance of a witness; or
  - (2) production of books, records, documents, or other evidence.
- (b) A witness required to appear by subpoena under this section may appear at the hearing before the arbitrators or at a deposition.
- (c) A subpoena issued under this section shall be served in the manner provided by law for the service of a subpoena issued in a civil action pending in a district court.
- (d) Each provision of law requiring a witness to appear, produce evidence, and testify under a subpoena issued in a civil action pending in a district court applies to a subpoena issued under this section.

#### **§ 171.052. Witness Fee**

The fee for a witness attending a hearing or a deposition under this subchapter is the same as the fee for a witness in a civil action in a district court.

#### **§ 171.053. Arbitrators' Award**

- (a) The arbitrators' award must be in writing and signed by each arbitrator joining in the award.

- (b) The arbitrators shall deliver a copy of the award to each party personally, by registered or certified mail, or as provided in the agreement.
- (c) The arbitrators shall make the award:
  - (1) within the time established by the agreement to arbitrate; or
  - (2) if a time is not established by the agreement, within the time ordered by the court on application of a party.
- (d) The parties may extend the time for making the award either before or after the time expires. The extension must be in writing.
- (e) A party waives the objection an award was not made within the time required unless the party notifies the arbitrators of the objection before the delivery of the award to the party.

#### **§ 171.054. Modification or Correction to Award**

- (a) The arbitrators may modify or correct an award:
  - (1) on the grounds stated in Section 171.091; or
  - (2) to clarify the award.
- (b) A modification or correction under Subsection (a) may be made only:
  - (1) on application of a party; or
  - (2) on submission to the arbitrators by a court, if an application to the court is pending under Sections 171.087, 171.088, 171.089, and 171.091, subject to any condition ordered by the court.
- (c) A party may make an application under this section not later than the 20th day after the date the award is delivered to the applicant.
- (d) An applicant shall give written notice of the application promptly to the opposing party. The notice must state the opposing party must serve any objection to the application not later than the 10th day after the date of notice.
- (e) An award modified or corrected under this section is subject to Sections 171.087, 171.088, 171.089, 171.090, and 171.091.

#### **§ 171.055. Arbitrator's Fees and Expenses**

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, with other expenses incurred in conducting the arbitration, shall be paid as provided in the award.

**CIVIL PRACTICE AND REMEDIES CODE  
TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION  
CHAPTER 171. GENERAL ARBITRATION  
SUBCHAPTER D. COURT PROCEEDINGS**

#### **§ 171.081. Jurisdiction**

The making of an agreement described by Section 171.001 provides for or authorizes an

arbitration in this state and to which section applies confers jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.

#### **§ 171.082. Application to Court; Fees**

- (a) The filing with the clerk of the court of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the court.
- (b) On the filing of the initial application and the payment to the clerk of the fees of court required to be paid on the filing of a civil action in the court, the clerk shall docket the proceeding as a civil action pending in that court.

#### **§ 171.083. Time for Filing**

An applicant for a court order under this chapter may file the application:

- (1) before arbitration proceedings begin in support of those proceedings;
- (2) during the period the arbitration is pending before the arbitrators; or
- (3) subject to this chapter, at or after the conclusion of the arbitration.

#### **§ 171.084. Stay of Certain Proceedings**

- (a) After an initial application is filed, the court may stay:
  - (1) a proceeding under a later filed application in another court to:
    - (A) invoke the jurisdiction of that court; or
    - (B) obtain an order under this chapter; or
  - (2) a proceeding instituted after the initial application has been filed.
- (b) A stay under this section affects only an issue subject to arbitration under an agreement in accordance with the terms of the initial application.

#### **§ 171.085. Contents of Application**

- (a) A court may require an application filed under this chapter:
  - (1) show the jurisdiction of the court;
  - (2) have attached a copy of the agreement to arbitrate;
  - (3) define the issue subject to arbitration between the parties under the agreement;
  - (4) specify the status of the arbitration before the arbitrators; and
  - (5) show the need for the court order sought by the applicant.
- (b) A court may not find an application inadequate, because of the absence of a requirement listed in Subsection (a) unless the court, in its discretion:
  - (1) requires the applicant amend the application to meet the requirements of the court; and
  - (2) grants the applicant a 10-day period to comply.

## **§ 171.086. Orders Which May be Rendered**

- (a) Before arbitration proceedings begin, in support of arbitration a party may file an application for a court order, including an order to:
- (1) invoke the jurisdiction of the court over the adverse party and to effect jurisdiction by service of process on the party before arbitration proceedings begin;
  - (2) invoke the jurisdiction of the court over an ancillary proceeding in rem, including by attachment, garnishment, or sequestration, in the manner and subject to the conditions under which the proceeding may be instituted and conducted ancillary to a civil action in a district court;
  - (3) restrain or enjoin:
    - (A) the destruction of all or an essential part of the subject matter of the controversy; or
    - (B) the destruction or alteration of books, records, documents, or other evidence needed for the arbitration;
  - (4) obtain from the court in its discretion an order for a deposition for discovery, perpetuation of testimony, or evidence needed before the arbitration proceedings begin;
  - (5) appoint one or more arbitrators so an arbitration under the agreement to arbitrate may proceed; or
  - (6) obtain other relief, which the court may grant in its discretion, needed to permit the arbitration to be conducted in an orderly manner and to prevent improper interference or delay of the arbitration.
- (b) During the period an arbitration is pending before the arbitrators or at or after the conclusion of the arbitration, a party may file an application for a court order, including an order:
- (1) which was referred to or would serve a purpose referred to in Subsection (a);
  - (2) to require compliance by an adverse party or any witness with an order made under this chapter by the arbitrators during the arbitration;
  - (3) to require the issuance and service under court order, rather than under the arbitrators' order, of a subpoena, notice, or other court process:
    - (A) in support of the arbitration; or
    - (B) in an ancillary proceeding in rem, including by attachment, garnishment, or sequestration, in the manner of and subject to the conditions under which the proceeding may be conducted ancillary to a civil action in a district court;
  - (4) to require security for the satisfaction of a court judgment which may be later entered under an award;
  - (5) to support the enforcement of a court order entered under this chapter; or
  - (6) to obtain relief under Section 171.087, 171.088, 171.089, or 171.091.
- (c) A court may not require an applicant for an order under Subsection (a)(1) to show the adverse party is about to, or may, leave the state if jurisdiction over that party is not effected by service of process before the arbitration proceedings begin.

## **§ 171.087. Confirmation of Award**

Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award.

### **§ 171.088. Vacating Award**

- (a) On application of a party, the court shall vacate an award if:
- (1) the award was obtained by corruption, fraud, or other undue means;
  - (2) the rights of a party were prejudiced by:
    - (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
    - (B) corruption in an arbitrator; or
    - (C) misconduct or willful misbehavior of an arbitrator;
  - (3) the arbitrators:
    - (A) exceeded their powers;
    - (B) refused to postpone the hearing after a showing of sufficient cause for the postponement;
    - (C) refused to hear evidence material to the controversy; or
    - (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or
  - (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.
- (b) A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant. A party must make an application under Subsection (a)(1) not later than the 90th day after the date the grounds for the application are known or should have been known.
- (c) If the application to vacate is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

### **§ 171.089. Rehearing After Award Vacated**

- (a) On vacating an award on grounds other than the grounds stated in Section 171.088(a)(4), the court may order a rehearing before new arbitrators chosen:
- (1) as provided in the agreement to arbitrate; or
  - (2) by the court under Section 171.041, if the agreement does not provide the manner for choosing the arbitrators.
- (b) If the award is vacated under Section 171.088(a)(3), the court may order a rehearing before the arbitrators who made the award or their successors appointed under Section 171.041.
- (c) The period within which the agreement to arbitrate requires the award to be made applies to a rehearing under this section and commences from the date of the order.

### **§ 171.090. Type of Relief Not Factor**

The fact the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

### **§ 171.091. Modifying or Correcting Award**

- (a) On application, the court shall modify or correct an award if:
  - (1) the award contains:
    - (A) an evident miscalculation of numbers; or
    - (B) an evident mistake in the description of a person, thing, or property referred to in the award;
  - (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or
  - (3) the form of the award is imperfect in a manner not affecting the merits of the controversy.
- (b) A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant.
- (c) If the application is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as modified or corrected. If the application is not granted, the court shall confirm the award.
- (d) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

### **§ 171.092. Judgment on Award**

- (a) On granting an order that confirms, modifies, or corrects an award; the court shall enter a judgment or decree conforming to the order. The judgment or decree may be enforced in the same manner as any other judgment or decree.
- (b) The court may award:
  - (1) costs of the application and of the proceedings subsequent to the application; and
  - (2) disbursements.

### **§ 171.093. Hearing; Notice**

The court shall hear each initial and subsequent application under this subchapter in the manner and with the notice required by law or court rule for making and hearing a motion filed in a pending civil action in a district court.

### **§ 171.094. Service of Process for Initial Application**

- (a) On the filing of an initial application under this subchapter, the clerk of the court shall:
  - (1) issue process for service on each adverse party named in the application; and
  - (2) attach a copy of the application to the process.
- (b) To the extent applicable, the process and service and the return of service must be in the form

and include the substance required for process and service on a defendant in a civil action in a district court.

(c) An authorized official may effect the service of process.

### **§ 171.095. Service of Process for Subsequent Applications**

(a) After an initial application has been made, notice to an adverse party for each subsequent application shall be made in the same manner as is required for a motion filed in a pending civil action in a district court. This subsection applies only if:

(1) jurisdiction over the adverse party has been established by service of process on the party or in rem for the initial application; and

(2) the subsequent application relates to:

(A) the same arbitration or a prospective arbitration under the same agreement to arbitrate; and

(B) the same controversy or controversies.

(b) If Subsection (a) does not apply, service of process shall be made on the adverse party in the manner provided by Section 171.094.

### **§ 171.096. Place of Filing**

(a) Except as otherwise provided by this section, a party must file the initial application:

(1) in the county in which an adverse party resides or has a place of business; or

(2) if an adverse party does not have a residence or place of business in this state, in any county.

(b) If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application with the clerk of the court of that county.

(c) If a hearing before the arbitrators has been held, a party must file the initial application with the clerk of the court of the county in which the hearing was held.

(d) Consistent with Section 171.024, if a proceeding is pending in a court relating to arbitration of an issue subject to arbitration under an agreement before the filing of the initial application, a party must file the initial application and any subsequent application relating to the arbitration in that court.

### **§ 171.097. Transfer**

(a) On application of a party adverse to the party who filed the initial application, a court that has jurisdiction but which is located in a county other than as described by Section 171.096 shall transfer the application to a court of a county described by that section.

(b) The court shall transfer the application by an order comparable to an order sustaining a plea of privilege to be sued in a civil action in a district court of a county other than the county in which an action is filed.

(c) The party must file the application under this section:

(1) not later than the 20th day after the date of service of process on the adverse party; and

(2) before any other appearance in the court by the adverse party, other than an appearance to challenge the jurisdiction of the court.

**§ 171.098. Appeal**

(a) A party may appeal a judgment or decree entered under this chapter or an order:

(1) denying an application to compel arbitration made under Section 171.021;

(2) granting an application to stay arbitration made under Section 171.023;

(3) confirming or denying confirmation of an award;

(4) modifying or correcting an award; or

(5) vacating an award without directing a rehearing.

(b) The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action.

## Appendix F

**TEXAS FAMILY CODE**  
**TITLE 1. THE MARRIAGE RELATIONSHIP**  
**SUBTITLE C. DISSOLUTION OF MARRIAGE**  
**CHAPTER 6. SUIT FOR DISSOLUTION OF MARRIAGE**  
**SUBCHAPTER G. ALTERNATIVE DISPUTE RESOLUTION**

### § 6.601. Arbitration Procedures

- (a) On written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must state whether the arbitration is binding or nonbinding.
- (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award.

### § 6.602. Mediation Procedures

- (a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.
- (b) A mediated settlement agreement is binding on the parties if the agreement:
  - (1) provides, in a prominently displayed statement which is in boldfaced type or capital letters or underlined, the agreement is not subject to revocation;
  - (2) is signed by each party to the agreement; and
  - (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
- (c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding [Rule 11, Texas Rules of Civil Procedure](#), or another rule of law.
- (d) A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of a marriage to mediation on the basis of family violence having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and the parties be placed in separate rooms during mediation.

### § 6.603. Collaborative Law

- (a) On a written agreement of the parties and their attorneys, a dissolution of marriage

proceeding may be conducted under collaborative law procedures.

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

(c) A collaborative law agreement must include provisions for:

(1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) suspending court intervention in the dispute while the parties are using collaborative law procedures;

(3) hiring experts, as jointly agreed, to be used in the procedure;

(4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and

(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

(d) Notwithstanding [Rule 11, Texas Rules of Civil Procedure](#), or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement which is boldfaced, capitalized, or underlined, the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) Subject to Subsection (g), a court which is notified 30 days before trial the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial in the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(f) The parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(g) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice.

## Appendix G

### Style of Mediators

- **CASPER MILQUETOAST:**  
Shy, wallflower type. Sits back, says little, let's the parties run the show. Believes mediator's presence is sufficient by itself and shines forth—in a bright circle above the head.
- **PSYCHIATRIST:**  
A telepathist. Has a high school major in psychology. Reads minds and believes knows what the parties are going to do before they do it. What's fun is when they don't!
- **BULLDOZER:**  
Aggressive type. Pushes parties to settle—whether they want to or not! Settle or not, they may leave a little unhappy, but figures what else is new?
- **SHERMAN TANK:**  
The Bulldozer plus Weapons. Blasts away to get parties to settle. Takes no prisoners. They settle—or else!
- **PREVARICATOR:**  
Creative. A great story teller to his children—and to mediating parties. In caucus, weaves positions out of whole cloth to get parties to settle. Everyone's happy—until parties' counsel compare notes the day after.
- **POLITICIAN:**  
Nobody is left unhappy. Settling parties leave the proceeding bewildered and talking to themselves: “What happened? What did I do? Why did I do it?”
- **CHAMELEON:**  
“What do you want me to be?” Changes with the mood of the environment. Unpredictable. Reacts and adapts to the unique personalities of the parties. Has no identifiable style—or personality.
- **GROUCH:**  
Nothing seems to make this mediator happy. Miserable if you impasse. If you settle, you're not sure you did right—but you enjoy seeing the glimmer of a smile, however short-lived, on the mediator's face!

- **FRANKENSTEIN’S MONSTER:**  
Rants and raves. Parties settle out of sheer terror, uncertain of the measure of this demon’s wrath.
- **I-DOTTER/T-CROSSER:**  
Exacting to a fault. Step one inch over mediation’s statutory or regulatory line, and you will hear chapter and verse from this mediator’s bible. Foreheads bounce off the table during his interminable opening statements.
- **STYLIST:**  
A frustrated actor. Believes the mediator must have a unique style and tries to dazzle you with the uniqueness. Has forgotten different strokes for different folks. Sometimes works, if the right combination of personalities are present.
- **AGNOSTIC:**  
“Why am I here, and what am I doing?” Milquetoast’s first cousin. True believer in letting the parties reach their own decision—dubious about the whole process, still trying to figure out what to do and why.
- **PREACHER:**  
“We are here for a reason, and we are doing God’s will.” Has no doubt about the virtues of The Process. When all else fails and negotiations are going south, resorts to silent prayer—but only if group won’t join.
- **LEGAL EAGLE:**  
The lawyer-mediator. Knows he shouldn’t render a legal opinion but can’t help it, bursts with enthusiasm to do so. Walks a thin line, sometime gets the job done, but won’t see the loser of the legal argument again.
- **SLEEPWALKER:**  
Hello! We’re here. Are you? Never seems to connect with the group. Ambulates wearily through the process. Probably had a tough night before. Always there on pay day, however.
- **COMEDIAN:**  
Doesn’t know much about the process but tells damned good stories. Amidst the humor, parties settle, if only to maintain the levity of the moment. What’s fun is when they don’t laugh!
- **GREENHORN:**  
Watch this mediator’s eyes as they bounce repeatedly off the checklist clipped to the corner of the mediation file. Stressed but thorough. Gets the

job done—among yawns around the table. Eventually learns to relax—or becomes I-DOTTER/T-CROSSER’s prime student.

- **CLICHÉ MONGER:**

Doesn’t have an original thought, just worn clichés, which are driven into parties’ heads like nails into a new roof. The approach often works—probably, because parties and counsel compete with mediator for the same worn clichés.