

THE ADR COUNCIL UNANIMOUSLY APPROVES CHANGES TO ETHICAL GUIDELINES

By Mike Patterson*

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

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

2. Mediator Conduct. A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.

Comment (a). A mediator should not use information obtained during the mediation for personal gain or advantage.

Comment (b). The interests of the parties should always be placed above the personal interests of the mediator.

Comment (c.). A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.

Comment (d). Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.

Comment (e). A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

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

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

This change was approved because some mediators that are conducting more than one mediation at the same time without

informing the participants that this will occur. Unfortunately, this practice appears to be growing. The problem with not informing the participants and obtaining their consent to this practice is that it is deceptive, and the parties are both wasting time and paying their attorneys for the time they are spending while the mediator is mediating another case. Participants have a right to expect, unless they agree otherwise, that they are paying for the full time and attention of the mediator for the period reserved. If the parties are informed ahead of time that the mediator intends to conduct multiple mediations at the same time, the parties then have an opportunity to consider whether this is acceptable and proceed accordingly.

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

4. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

Comment (a). A mediator should withdraw from a mediation if it is inappropriate to serve.

Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

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

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

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

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SLATE OF OFFICERS AND COUNCIL MEMBERS APPROVED BY COUNCIL

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

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

Ronald Hornberger, who received his law degree from the University of Texas School of Law, is a shareholder of Plunkett & Gibson, Inc., of San Antonio. He is a mediator and arbitrator, and he has practiced law for thirty-nine years in the

fields of bankruptcy, commercial litigation, construction law, and secured transactions. He was a law clerk to the Honorable John H. Wood, Jr., U.S. District Judge (Deceased) from 1972 to 1976. He has a long record of service to the bar, especially in the field of bankruptcy law.

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

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

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

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

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

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

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

The third change was accepted to make clear that in protecting

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



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

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

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

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ENDNOTES

¹ Lloyds of London v. GMC Land Services, Inc., No. 06-60325-CIV., 2007 WL 3306964 (S.D. Fla., Nov. 6, 2007).

² *Id.* at *1.

³ *Id.* at *3.

⁴ *Id.* at *1 (citing Local Rule 16.2 of the United States District Court for the Southern District of Florida).

⁵ *Id.* (citing D.E. 73, Ex. B).

⁶ *Id.* (citing Fed. R. Civ. P. 16).

⁷ *Id.* at *2.

⁸ *Id.*

⁹ *Id.* (citing *In re Novak*, 932 F.2d 1397, 1407 (11th Cir.1991)).

¹⁰ *Id.* (citing Local Rule 16.2 of the United States District Court for the Southern District of Florida).

¹¹ *Id.*

¹² *Id.* at *3.

¹³ *Id.*