State Bar of Texas ADR Section

Alternative Resolutions Newsletter

Summer 2001 Issue

CHAIR'S CORNER

by Caliph Johnson
Chair, ADR SECTION

2000-2001 ADR SECTION REPORT: AN AUSPICIOUS YEAR IN REVIEW

As the 2000-2001 bar-year draws to a close, I am reminded that the Section Chair is required to report on the Section's accomplishment of its mission over the past year. As stated in the Alternative Dispute Resolution (ADR) Section's By-Laws, the purpose or mission of the Section is to promote the use and quality of ADR in Texas. Therefore, the task at hand is to determine: has the Section advanced the use and quality of ADR in Texas, and beyond? The answer to that query is as dynamic as the youthful field of ADR, itself. It is as varied as the different persons and organizations that are active in, and affected by, ADR. This report will approach the task from several different perspectives.

I. INITIATIVES OF THE ADR SECTION

1. FIRST ANNUAL COUNCIL RETREAT

The first major Section initiative of the year was a planned introspection, in the form of its First Annual Council Retreat. The Retreat was held in San Antonio, Texas at the offices of Soules & Wallace. The Council, consisting of its five officers, thirteen general Council Members (both returning and newly elected) and several Past Chairs, held a one-and-one-half day Retreat on August 25-26, 2000.

The goal of the Retreat was to determine what role the ADR Section will serve: to the State Bar, to the Section's membership, to other Sections of the State Bar, to other organizations, institutions and individuals, and to society generally. Once the direction was decided, the body then set out to reshape the Council's committee structure and roles, and set goals and objectives for the coming year.

Barbara Hannon and Wayne Fagan planned the retreat. The law firm of Soules & Wallace generously generously donated the meeting facility in their offices, and provided administrative and logistical support. Wayne Fagan and his wife Julie graciously hosted a reception in their home. Sam Graham, an Austin attorney and mediator, volunteered as facilitator, and deftly led the group through the retreat with great diplomacy and dispatch. By the end of the retreat, all agreed that it was a resounding success.

Following the Retreat, there was a brief Council meeting, the second meeting of the bar-year. Its first meeting was on the afternoon of June 23, 2000.

2. FALL 2000 ANNUAL CONFERENCE: "I'LL SEE YOU IN COURT"

On September 22, 2000, the Section hosted its Fall Annual CLE Conference, "I'll See You in Court," at the South Texas College of Law, in Houston. This Conference was a huge success. The Section was joined by

cooperating organizations that included: State Bar of Texas, State Bar Corporate Counsel Section, ABA Dispute Resolution Section, ABA Law Practice Management Section, Houston Bar Association, Houston Bar Association ADR Section, Houston Bar Association Litigation Section, Harris County Dispute Resolution Center, South Texas College of Law & Center for Legal Responsibility, Resolution Forum and Texas Association of Mediators.

The Planning Committee, ably chaired by Deborah McElvaney, and inspired by Judge John Coselli, was composed of representatives from several of the cooperating organizations and institutions. It was supported by the dedicated teamwork of several Committee members, such as Kathleen Alsina, Eric Bogdan, Ann MacNaughton, Michele O'Brien, Robyn Pietsch, and Richard Waites. The Conference drew a large and highly diverse attendance of 142 participants, and offered 6.25 MCLE credit with 3 hours attributable to ethics. Immediately before the Conference commenced, the Council held its third meeting of the year.

3. FEBRUARY 2001 COUNCIL AND SECTION MID-YEAR MEETINGS, AND CLE CONFERENCE: MEDIATING AND ARBITRATING EMPLOYMENT LAWSUITS: WHAT THE EXPERTS WANT YOU TO KNOW

a. Council Meeting: 9:00 A.M.-10:30 A.M.

On February 10, 2001 the Council held an hour-and-a-half meeting in which it conducted several items of business, including:

(1). Ratified several actions which had been approved by polling Council Members between Council meetings.

(2). Received a report from Kay Elkins-Elliott, Chair of the Publications Committee, who, along with Frank Elliott, serves as co-editors of the revised ADR Handbook 2001, scheduled to be published by June 1, 2001. They submitted a proposal from Imprimatur Press for printing, marketing and distributing the handbook. (At the April 7, 2001 Council meeting, the Council approved entering into a contract with Imprimatur, which involves no out-of-pocket expenditures by the Section).

(3). Received a report from Judge Frank Evans, Chair of the Council's Visionary Committee, which set out goals and objectives for developing a protocol of and ethical guidelines for use of responsible dispute resolution strategies, and a plan for supporting statewide training programs in the courts, schools and other institutional entities.

b. Section Mid-Year Meeting: 10:30 A.M.-12:00 Noon

The Section meeting involved several reports, from: the Section Chair, the Chair of the Legislative Committee who reported on pending legislative bills, and the Council's Representative to the Texas Mediator Credentialing Association who reported on the development of that Association. Finally, there was an open forum dialog between Section Members and the Council and Officers.

C. CLE CONFERENCE: MEDIATING AND ARBITRATING EMPLOYMENT LAWSUITS: WHAT THE EXPERTS WANT YOU TO KNOW: 12:00NOON-4:00 P.M.

The Section hosted its mid-year CLE Conference, at the Texas Law Center, which was entitled: "Mediating and Arbitrating Employment Lawsuits: What the Experts Want You to Know." It was an outstanding program, well attended, and offered 3.75 MCLE hours of credit. All presenters were experts in their fields, and well prepared.

The program was planned and executed by a committee of the Council, which consisted of: Barbara Hannon, who capably served as chair, among the many other roles she filled during the year; and William Lemons and Adair Buckner. This effort represents a major contribution of the Section to the continuing education of the Section and ADR community, generally.

APRIL 7, 2001 COUNCIL MEETING

The Council held its fourth meeting on April 7, 2001 and considered the following:

a. Treasurer's Report

The Treasurer, Michael Schless, reported, among other things, that as of April 6, 2001 the Section had an ending balance of $85,269.07.

b Website

Wayne Fagan, as interim Chair of the Website Committee, reported that he worked closely with the Beckers (the Section's webmasters) to maintain and upgrade the Section's website, while the Council searches for a permanent Chair.

c. Nominations

Gary Condra, Chair of the Nominations Committee, reported to the Council an outstanding slate of nominees for officer positions and general Council member positions.

d. Annual Meeting

As Chair-Elect of the Council and Chair of the Annual Meeting Committee, Wayne Fagan reported on plans for the Section's Annual Meeting activities, on June 15, 2001.

e. Section Membership

According to the State Bar Research and Analysis Department, as of December 31, 2000 the Section membership totaled 1443. Also, the ADR Council, at its April 7, 2001 meeting, voted to approve offering free memberships to lawyers inducted into the State Bar of Texas on May 21, 2001. The Council also voted to make this offer on an ongoing basis.

II. OTHER COLLABORATION AND JOINT INITIATIVES WITH ORGANIZATIONS

During the year, the Section continued to join forces with the State Bar, other Sections of the State Bar, other national and international organizations, institutions and individuals to address such mainstream issues as Multi-Disciplinary Practice, Multi-Jurisdictional Practice, Unauthorized Practice of Law and Uniform Mediation Act. In fact, the 2000 Annual meeting of the Bar, the Section co-sponsored a panel discussion on Multi-Disciplinary Practice with the

Corporate Counsel Section. New issues such as Collaborative Law arose during the 2001 legislative session, which required further joint efforts. Regulating and credentialing Court-Annexed Mediation remain ongoing concerns that have been addressed through the Texas Mediator Credentialing Association and the Supreme Court Advisory Committee.

Under the leadership of Judge Evans, the Council accepted the challenge of becoming one of the partners, along with other supporting entities, of the Partners in Youth Responsibility Volunteer Mentor-Program.

III. LEGISLATIVE ACTIVITIES

1. TEXAS STATE LEGISLATURE

During this year's legislative session, the Section's Legislative Committee, which includes: Barbara Hannon, Chair, John Palmer, John Coselli, Gary Condra, Michael Schless, Mary Elizabeth Jackson, Brian Shannon and John Fleming worked intensely, not only to successfully shepherd the ADR Section-sponsored legislative bill, HB 1364, authored by Representative Goodman, relating to the funding of alternative dispute resolution systems, through the legislative process, but also to monitor and provide input into a myriad of other ADR related legislative bills. Close cooperation with the state Bar staff person, Special Assistant KaLyn Laney, former Council Members Carl Forrester and Paul Keeper, the Center for Public Policy Dispute Resolution and many legislators, legislative staff persons and representatives of other organizations resulted in an amazingly successful legislative session. It was a powerful testament to the merits of cooperation.

MULTI-DISCIPLINARY PRACTICE

The issue of Multi-Disciplinary Practice (MDP) continues to be a concern of the Bar and the Section. In a letter dated March 3, 2000, the President and President-Elect of the State Bar of Texas requested input from the several sections of the Bar on the issue of MDP. In a letter of reply, dated June 4, 2000, Gary Condra, Chair of the ADR Section, requested that the State Bar leadership vote to defer any action on MDP. The Section has taken no further action on the issue.

UNAUTHORIZED PRACTICE OF LAW

Also, related to the issue of MDP, the State Bar, at the request of the Texas Supreme Court, appointed a Task Force to evaluate the State's regulation of the unauthorized practice of law. In October 1999, the Task Force issued a Preliminary Report concerning the ABA Commission's proposal to allow non-lawyers to participate as owners of Multi-Disciplinary Practice groups in which lawyers practice law. In May 2000, the Task Force issued a report, which addressed the subject of what person, other than lawyers, should be allowed to perform services, which constitute the practice of law. The Task Force's recommendations were preliminary. In a hearing on the preliminary recommendations, held by the Task Force on August 2, 2000, Michael Schless

represented the ADR Council. On behalf of the Council, Schless requested more time in which to respond to a request for input from the Council.

At the January 12, 2001 Council of Chairs Meeting, the Vice Chair of the UPL Task Force reported that a new proposal would be presented to the Board of Directors in January 2001. He stated that the Task Force would include a realistic definition of the practice of law.

UNIFORM MEDIATION ACT

On February 10, 2001, the Council ratified its adoption of the position articulated by Brian Shannon, a Member of the Council, entitled "Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems," which opposed the Uniform Mediation Act (UMA) drafters' definition of confidentiality.

On April 7, 2001, Brian Shannon and Wayne Fagan were assigned to a Council Task Force to develop a further recommended position on the most recent draft of the Uniform Mediation Act.

IV. CONCLUSION

In summary, the Section has advanced the use and quality of ADR comprehensively, through CLEs, publications, supporting strategies for developing protocols and guidelines for new systems, and proposing and commenting on legislation. This has been a very good year, thanks to the generous and unselfish contributions of many people and organizations. It has been an affirmation that the true strength of the Section lies in the outstanding collaborative efforts of many, within and outside the Section.

ADR COUNCIL APPROVES NOMINEES FOR SECTION LEADERSHIP *FOR THE YEAR 2001-2002*

By Gary D. Condra, Immediate Past Chair

The ADR Section Council, acting on recommendations of the Nominating Committee, approved the following nominees for Officer and Council positions:

Officers:

Chair-Elect: Debbie McElvaney - Houston
Secretary: Barbara Hannon - Austin
Treasurer: Michael Schless - Austin

Council Members (Terms to Expire in 2002):

James W. Knowles - Tyler (to fill the remaining unexpired term of Cullen Smith)

Council Members (Terms to Expire in 2004):

Romeo M. Flores - Corpus Christi
Ann L. MacNaughton - Houston
Rena Silverberg - Dallas (Public Member)
Michael S. Wilk - Houston

The following members will leave the Council at the Annual Meeting of the Section on June 15, 2001, in Austin: Kay Elkins-Elliott (Dallas), Mary Elizabeth Jackson (Tyler), Maxel "Bud" Silverberg (Dallas), and Cullen Smith (Waco). We appreciate all that they have done for the Section. Caliph Johnson will become Immediate Past Chair and Wayne Fagan will become Chair.

Pursuant to the By-laws, nominees must be approved by the Section at the Annual Meeting in Austin, on June 15, 2001. In selecting nominees, the Council was guided by Section 3, Article V of the by-laws, which states:

Representative Membership: The voting membership of the Section Council should reflect, as much as possible, the membership of the Section as a whole, taking into consideration all relevant factors, including, but not limited to, the geographical location of the membership as a whole and other factors relevant to maintaining a Section as a whole.

A brief description of the qualifications of the nominees follows:

Debbie McElvaney - Houston (Chair-Elect)

Ms. McElvaney has been licensed to practice law in the State of Texas since 1982. She is a member in good standing of the State Bar of Texas, the Houston Bar Association, the U. S. Southern District of Texas, and the U. S. Fifth Circuit Court of Appeals. Ms. McElvaney is a Fellow of the College of the State

Bar, the Texas Bar Foundation, and the Houston Bar Foundation.

Ms. McElvaney has an extensive background in the area of education. She holds a B.S. in English and History (Stephen F. Austin State University) and a M.Ed. in Curriculum and Instruction (University of Houston). In her prior life before law school, Ms. McElvaney served as a public school educator at the secondary level, teaching primarily history, reading and English at the middle and high school levels. During that time, Ms. McElvaney received a Reading Specialist Certificate from the University of Houston and served for several years as a Supervising Teacher for student teachers.

Ms. McElvaney has an extensive background in legal research and writing. She served as in-house counsel to both of the Houston Courts of Appeals and in that capacity**,** handled well over two hundred (200) legal research matters.

Ms. McElvaney has an extensive background in Alternative Dispute Resolution and administrative law. She received her initial mediation training in the first class of the A.A. White Dispute Resolution Institute. Currently she serves as a Special Education Hearing Officer for the Texas Education Agency, a Section 504 Hearing Officer for numerous school districts, and she is on the Panel of Neutrals of the American Arbitration Association, for which she performs mediations and arbitrations. Ms. McElvaney has served as a mediation trainer for the A. A. White Dispute Resolution Institute and the Center for Legal Responsibility at South Texas College of Law.

Ms. McElvaney has served as Chair of the Houston Bar Association's 1) Commercial and Consumer Law Section and 2) ADR Section. She has been on the State Bar Of Texas ADR Council for three years and for two years has been the Secretary of the Section.

Ms. McElvaney is married to Doyle McElvaney. She has one daughter, Leslee Ann. In her spare time she likes to play with her cats: Ricky, Lucy, and Grace.

Barbara Hannon - Austin (Secretary)

Barbara Hannon graduated from the University of Texas School of Law and has a PhD from the University of North Carolina in Chapel Hill, where her studies included a fellowship in an interdisciplinary child and family policy program. Before attending law school she was on the faculty of the University of Texas at Dallas. Since 1993 Barbara has practiced law and mediation in Austin, and has been active in community and bar projects, including planning CLE's, chairing the Travis County Bar ADR section and Settlement Week, and serving on the Council of the State Bar ADR Section.

Michael Schless - Austin (Treasurer)

Mike is an attorney and former judge in Travis County who has practiced mediation and arbitration full time since 1992. He has served as Treasurer of the Section for the past year and was on the Council the preceding year. He has served on the Quality of Practice, CLE, Legislative, Criminal Justice, and

Membership Committees. Mike is a former President of the Texas Association of Mediators, and was a member of the Texas Supreme Court Advisory Committee on Court-annexed Mediation. Mike is a member of the panel of neutrals of the American Arbitration Association as well as the Dalkon Shield Arbitration Program. He is a Fellow of the Center for Public Policy Dispute Resolution at the University of Texas School of Law. Mike is also a member of the Association of Attorney-Mediators, and was the founding co-chair of the Travis County Bar Association's ADR Section. He is a volunteer mediator with the Texas Department of Criminal Justice Victim Offender Mediation Dialogue Program. At a younger age, Mike served as President of the Austin Young Lawyers Association, and has been named the Outstanding Young Lawyer of Travis County. He received his undergraduate and law degrees from the University of Texas.

Council Member Nominees:

James W. Knowles - Tyler

Jim Knowles is an attorney-mediator with the law firm of Wilson, Sheehy, Knowles, Robertson & Cornelius. He received his BBS in accounting and his JD degrees from Southern Methodist University. He has completed over 650 mediations in which parties and issues have ranged from private disputes to governmental entities and have involved regulatory matters, penalties, property rights, contractual rights and damage amount ranging into the millions of dollars. Mr. Knowles has served as President of the Smith County Bar Association, Chairman of the State Bar of Texas Grievance Committee for District 2A and is an Advanced Certified mediator of the Association of Attorney-Mediators, serving as an officer of its East Texas Chapter. He is also a member Federal District Court for the Eastern District of Texas.

Romeo M. Flores - Corpus Christi

Judge Flores has over sixteen years experience as a state district judge. He has mediated over 1700 civil suits, including complex cases, involving personal injury and death, products liability, toxic torts, oil and gas, professional liability, commercial and employment disputes. He has also conducted 284 arbitrations. He served as President of the Coastal Bend Bar Association in 1980-81 and is a graduate of St. Mary's University School of Law.

Ann L. MacNaughton - Houston

Ms. MacNaughton helps parties achieve cooperative business solutions by serving as settlement counsel, settlement consultant to trial and arbitration teams, or as mediator or arbitrator in business disputes. She is also an organizational consultant, trainer, author, and public speaker on dispute avoidance and conflict resolution, strategies for business and workplace disputes in litigation, pre-litigation, alliance and joint venture contexts. Additionally, Ms. MacNaughton consults with law firms and lawyers about success strategies for the emerging global marketplace for multidisciplinary professional services.

Ms. MacNaughton is active and holds leadership positions in several sections of the American Bar Association and numerous other professional organizations. She is Past Chair of both the Corporate Counsel Section and the ADR Committee of the Environmental Law Section of the State Bar of Texas.

Ms. MacNaughton has a BA in psychology, an MBA, and a JD degree from the University of Houston.

Rena Silverberg - Dallas (Public Member)

Rena Silverberg has more than 25 years experience in the fields of mediation, counseling, communication and human relations with responsibilities in administration, management and direct practice with families and children. She has a MS degree in Social Work form the University of Texas at Arlington and is licensed in Social Work as an Advanced Practitioner by the State of Texas.

Ms. Silverberg is a trained mediator and has mediated more than 350 cases involving families (business and personal relationships), divorce (child custody, access, support, division of property), modifications, paternity, termination of parental rights, grandparent and foster parent issues, domestic violence, juveniles (vandalism and restitution, gangs, sexual abuse), community disputes, landlord-tenant disputes, First Amendment issues, employment cases involving employer-employee relations, discrimination (age, gender, and race), sexual harassment, personal injury, professional malpractice, and commercial issues involving property, construction, breach of contract, fraud, insurance and consumer disputes.

Ms. Silverberg is an active member of many ADR-related organizations and has served as a member of the Supreme Court of Texas Advisory Committee on Court-Annexed Mediations.

Michael S. Wilk - Houston

Michael Wilk is an attorney, arbitrator, and mediator with 34 years of experience in the active practice of law and 10 years as an active ADR practitioner. He has mediated approximately 500 civil cases involving commercial, banking, oil and gas, bankruptcy, personal injury, employee and environmental issues.

Mr. Wilk is active in many law and ADR related organizations, having served as Director and President of the National Association of Attorney Mediators, and Co-Chair of the Mediation Committee of the ADR Section of the American Bar Association.

Mr. Wilk holds an LLB with honors from the University of Texas School of Law where he served as Associate Editor of the Texas Law Review.

In the event the Council's choices are approved at the annual meeting, the Council and Executive Committee members will be comprised of the following:

Executive Committee:

Chair, Wayne Fagan - San Antonio
(term ends 2003)
Chair-Elect, Debbie McElvaney - Houston
(term ends 2004)
Secretary, Barbara Hannon - Austin
(term ends 2002)
Treasurer, Michael Schless - Austin
(term ends 2002)
Immediate Past Chair, Caliph Johnson -
Houston (term ends 2002)

Council Members (terms to expire in 2002):

Kathy Bivings-Norris - Conroe (Public Member)
Barbara Hannon - Austin
Michael Schless - Austin
Brian Shannon - Lubbock
James W. Knowles - Tyler

Council Members (terms to expire in 2003):

Virginia Bowers - Dallas (Public Member)
Adair Buckner - Amarillo
Jay Madrid - Dallas
William Lemons - San Antonio
Patricia Palafox - El Paso

Council Members (terms to expire in 2004):

Romeo M. Flores - Corpus Christi
Ann L. MacNaughton - Houston
Rena Silverberg - Dallas (Public Member)
Michael S. Wilk - Houston

ALTERNATIVE DISPUTE RESOLUTION FROM THE PLAINTIFF EMPLOYEE'S PERSPECTIVE

BY Adair M. Buckner

ALTERNATIVE DISPUTE RESOLUTION FROM THE PLAINTIFF EMPLOYEE'S PERSPECTIVE*

With the proliferation of alternative dispute resolution ("ADR") in employment law, you would expect to see significant commentary about the positive benefits of plaintiffs using ADR. You would be wrong. The majority of commentary extolling the virtues of ADR discusses how ADR benefits employers. This presentation will discuss the other side of the coin: how the use of ADR can benefit plaintiffs pursuing employment law claims and specific considerations for Plaintiff's counsel in ADR. Before addressing those issues, however, there are several preliminary matters to discuss.

I. INTRODUCTION

A. The Rise and Fall of Mandatory Arbitration

Much of the discussion relating to the use of ADR in the employment context concerns the pros and cons of mandatory arbitration. The interest in mandatory arbitration is a result of and general disagreement with Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), in which the Court held that a securities representative could be compelled to arbitrate his ADEA claim. After the Court's Gilmer decision, there was a flurry of scholarly activity decrying the unfairness of mandatory arbitration.

While some employers embraced mandatory arbitration after Gilmer as a solution to their litigation woes, mandatory arbitration has not been the scourge that scholarly writers predicted it would be. There are several reasons for the failure of wholesale adoption of mandatory arbitration. First, courts have been somewhat reluctant to condone the use of mandatory arbitration. For example, in EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999), the court held that EEOC was not prevented from pursuing discrimination claims against an employer even though the employee had signed a mandatory arbitration agreement with the employer. Second, mandatory arbitration has not been

uniformly adopted because it is expensive to set up an in-house arbitration program.

There are many types of ADR, but only two have any significance in the employment law context: arbitration and mediation. If properly employed, both types of ADR can benefit plaintiffs pursuing employment law claims.

II. MEDIATION

Mediation is probably the most popular form of ADR in the employment law context, and the EEOC has been using voluntary mediation of charges since 1996. Employers too have been using in-house mediation as a way to head off employment disputes before they reach a crisis stage.

One of the reasons mediation is so popular is because of its success rate. For example, statistics from the EEOC's mediation program indicate that approximately sixty-five percent of cases that are mediated settle. Ninety-six percent of employers and ninety-one percent of employees who used the EEOC's mediation program said they would use it again. Study Shows High Satisfaction Levels with EEOC Voluntary Mediation Program, SHRM/HR News Online available at http://www.shrm.org/hrnews/articles/bna/0928a.htm.

So, then, from a plaintiff's perspective, what are the advantages of using mediation versus pursing the traditional lawsuit?

☐ **Probability of Success.** One of the ironies of employer enthusiasm for mediation is that mediation actually favors plaintiffs over employers in ultimate results. The ultimate goal of mediation, of course, is settlement. To achieve this result, a mediator determines how much an employer is willing to pay to make a case go away and how little a plaintiff is willing to accept to settle a case. Thus, if a case settles in mediation, in the great majority of cases, an employer will end up paying some amount of money and the plaintiff will be assured some amount of recovery. In litigation, on the other hand, plaintiffs may receive no recovery. Some recent statistics indicate that a plaintiff's chance of success in a discrimination case is less than fifteen percent. See Green, Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims, 31 Rutgers L.J. 399, 453 (2000) (citing statistics from 1994 federal court records that only 14.9% of employees who took their claims to court won their cases).

The drawback to mediation for the plaintiff is that the plaintiff employee is not likely to receive as large a recovery as he or she would have received had he or she prevailed at trial. Thus, it is important to accurately assess each case before deciding whether to proceed with mediation. In those cases where the outcome is uncertain or the likely recovery not very large, mediation may be the best alternative.

☐ **Speed.** Mediation is faster than litigation. Whereas it is not unusual for a case to take several years before it reaches trial, mediation is often conducted within thirty days. Indeed, some companies have set up a mechanism

to conduct in-house mediation sessions within a week of the occurrence giving rise to the dispute to avoid charges and litigation completely.

A good example of the way mediation speeds resolution is the EEOC's experience with mediation. In 1999, it took an average of 265 days for the EEOC to resolve a claim that went through to the traditional EEOC investigation process. When an EEOC complaint is submitted, the average time to a mediated resolution is 97 days. Study Shows High Satisfaction Levels with EEOC's Voluntary Mediation Program available http://www.shrm.org/hrnews/articles/bna0928a.htm. The employee benefits because the reality is that even if the employee wins in court, after 2-4 year battle, he or she is rarely reinstated. The rational employee, after a proper settlement has been established, can get on with life, work with a new employer or pursue a new business venture without the distraction of a lawsuit.

☐ **Preservation of Relationship.** It is often the case that an employee subject to discrimination wants to continue working for the employer and simply wants the discrimination to stop. However, once the parties engage in the adversarial process, the relationship often becomes so poisoned that it is impossible for the employee to continue working for the employer or return to work. Mediation can sometimes avoid this result.

Because the nature of mediation is non-adversarial, the plaintiff often can remain in his or her job during the mediation process and afterward. Furthermore, the mediation process may allow the employer to see the problem from the employee's perspective, thereby helping reduce the likelihood that the problem will continue in the future.

Confidentiality. Mediation is confidential and no written opinion is generated based on the results of the mediation. If the parties reach a settlement of the matter through mediation, the settlement agreement likely will provide that the settlement is confidential. This is important for those plaintiffs who do not wish to reveal the details of any employment actions taken against them and who wish to preserve their relationships with their employer and fellow workers.

☐ **Access.** Because mediation is less costly than litigation, a plaintiff who might not otherwise be able to obtain representation can have his or her case heard by a third party mediator. In the ordinary situation, the employer will pay the mediation costs, or, if the employee has filed a claim with the EEOC, the EEOC will provide mediation services at no cost to the employer and employee.

☐ **Cost to Obtain Resolution.** The possibility of mediating at the charge stage or early in litigation is attractive to both the plaintiff employee and his or her counsel because so little costs and lawyer time have been invested in the case at that point. Settlement is much more attractive at a lower figure at that stage, before significant investment of time and money have increased the plaintiff's and/or attorney's stake in the case.

☐ **Experienced Neutrals.** If the parties engage a third party mediator, they often have a choice of mediators experienced in the subject matter of the dispute. Unlike judges, who may have no background in employment law, an experienced mediator may have many years of experience in the relevant subject area. The mediator also can help fashion much broader and more innovative solutions. Furthermore, the plaintiff may have the opportunity to select a mediator who comes closer to matching his or her racial, socioeconomic, or religious background than a judge, who, therefore, may be more sympathetic and understanding of the plaintiff's position.

☐ **Early Peek at Employer's Position** Particularly in the EEOC mediations at the charge level, this is a valuable opportunity the plaintiff and his or her attorney would not otherwise get until after suit is filed to learn the employer's position. It can amount to very early, virtually cost-free discovery that is otherwise impossible. This can help the plaintiff and his or her lawyer discern what defenses the employer will assert and how strongly the employer will fight the case. It gives the plaintiff's attorney the early opportunity to gauge the veracity of the plaintiff's version of events versus the employer's, and whether it is even worthwhile to pursue suit if the charge is not resolved.

III. ARBITRATION

Although there are two types of arbitration, binding and non-binding, there is relatively little use of non-binding arbitration in the employment law context; therefore, we will not discuss non-binding arbitration here. Its concepts are similar to those of mediation.

Traditionally, arbitration, particularly mandatory arbitration, has been thought to benefit employers, but this traditional notion is coming under attack. Arbitrators have the freedom to craft a resolution that both sides can live with, as opposed to a court action where there is an all-or-nothing resolution. Because arbitration allows for meet-in-the-middle resolutions, it is a generally more plaintiff-friendly dispute resolution mechanism.

☐ **Results.** Statistically, plaintiffs win more often in arbitration than in litigation. Statistics indicate that plaintiffs prevail 63% of the time in arbitration versus approximately 15% of the time in litigation. Michael Green, Debunking the Myth of Employer Advantage from Using Mandatory Arbitration from Discrimination Claims, 31 Rutgers L.J. 399 (2000). Like mediation, one of the advantages of arbitration is that arbitrators are not necessarily bound by formal rules of evidence and are not restrained by traditional elements of a cause of action. This is particularly important for those cases where it is clear that the employee has suffered adverse consequences, but where the case may not fit neatly within the traditional elements of a cause of action.

☐ **Speed.** When a case is submitted to arbitration, it is not heard as quickly as if it were submitted to mediation, but, in most cases, it is heard more quickly than if it is litigated. Arbitration is often speedier than litigation because arbitration allows only limited discovery. This limited discovery can benefit a plaintiff that has a facially strong case, but one which can be rebutted through

meticulous discovery. If the employer never has the opportunity to discover all the underlying facts, then the plaintiff's case remains stronger. Of course, the negative side of limited discovery is that the plaintiff may not be able to discover information helpful to his or her case.

☐ **Confidentiality.** Like mediation, arbitration is a confidential process. If a plaintiff wishes to avoid the glare of public scrutiny, then arbitration may be a better alternative than litigation. This is particularly true in embarrassing sexual harassment cases.

☐ **Cost.** There is a dispute whether arbitration ends up costing less than litigation. In most arbitrations, both sides are represented by an attorney, and the arbitration proceeding may take as much preparation as a trial. Nevertheless, many argue that there are still costs savings associated with limited discovery and the time within which an arbitration proceeding is heard versus the time it takes to get a case to trial. Overall, there are cost savings in submitting to arbitration versus trial, but the savings are not as significant as in mediation.

IV. CONCLUSION ON BENEFITS OF ADR FOR PLAINTIFFS.

The use of ADR in the employment context is here to stay. Some plaintiffs' attorneys have been reluctant to embrace this change. There is no reason for this reluctance. Mediation and arbitration offer plaintiffs an opportunity to quickly resolve their employment disputes, and in many instances, may provide more favorable results than pursuing a case to trial.

5. SPECIFIC POINTERS FOR PLAINTIFF'S COUNSEL IN ADR.

A. Selection of a mediator.

1. Is the race or gender of the mediator important to your client or the opposite side?
2. If you have not had a mediation with the particular mediator, contact him or her to determine what his/her process is and/or ask for the names of other advocates which have used this mediator's services for that information. **There is nothing improper in "ex parte" contact with a mediator.**
3. Your choice in a mediator or theirs? Do you need to make sure it is someone their client will listen to or one yours will listen to?

B. When is the best time to have a mediation? (Other than EEOC mediations)

1. Do you have enough information to evaluate your case and your opponent's case with respect to liability?
2. Do you have enough information to evaluate damages?
3. Do you know what the "smoking guns" are of your opponent's case?
4. Have you taken the "key" depositions or are you willing to try to settle the case without knowing those details? Do you have an affidavit or declaration or are you going to play "well, he's going to say x" versus "he's going to say y" games all day?
5. If you are not prepared and feel that you can't respond to every argument you can anticipate, don't go forward with the mediation.

6. Are **all** the parties available?

7. What is the status of dispositive motions? One school of thought is that you should not mediate until those are resolved; the other is that so long as they are pending, both sides are at risk.

Who should attend the mediation?

1. **ALL** persons who have anything to say about the settlement decision, including a spouse.

2. What about "the" bad guy?

a. If you represent the plaintiff, if (s)he cannot face the bad guy for a few hours, how will (s)he deal with a several week trial?

b. Will the bad guy disrupt the settlement process?

c. Will his/her posturing make mediation a worthless, but not inexpensive, effort?

6. Preparing your client for mediation.

1. How is (s)he to dress?

2. Is this the first time the opposing decision maker has had a chance to size up your client?

3. Make sure they know the verdict ranges and settlement ranges.

Make sure they know the costs involved in taking the case to trial or hearing.

E. Preparing yourself for the mediation.

1. KNOW THE LAW.

a. What are the evidentiary issues associated with getting that "smoking gun" admitted at trial? If you can't get it in, it's not worth a whole lot.

b. Can the proper foundation be laid for the admission of the individual the plaintiff wishes to couch as a speaking agent for the defendant?

c. What is the answer to why the plaintiff never complained about the conduct for years?

2. Find out what the verdicts have been in similar cases in the jurisdiction of the case. You and your client need to know whether your juries are conservative, and if so, in what situations. How does your case compare to these? Talk with counsel who have tried similar cases.

3. What is the nature of the claim insofar as taxation is an issue? If the case goes to trial, are you likely to have past wages awarded as damages which will then be subject to taxation? Is there an advantage in settling for less money in the mediation but which can be characterized in a different format to keep tax implications to a minimum?

4. Do you want to have exchanged an initial demand and offer prior to the mediation or make the first overtures there? There is a basic benefit in "getting over" the initial demands and initial offers and getting down to work on the real settlement issues.

5. Make sure your client understands the risks associated with trial and the potential weaknesses of your case. While it is harder for a mediator when counsel says,

"We have considered "x" and that does not affect our position for settlement," you don't want bad news to come from the mediator first.

6. What do you put in your written materials?

   a. Enough to get the mediator up to speed.

   b. Not so much that you have buried him/her in unnecessary details and/or the cost of the mediation just got out of control.

7. Do you want a joint session? Can the plaintiff face her employer or the bad guy? Will more animosity be created.

8. What do you say at the joint session if you decide to have one?

1. You're not there to convince the mediator of anything.
2. Being bully to "show them what they'll get at trial" has limited use.
3. If you think there is something the other client does not know, now is the time to get the information across.
4. Does your client need the opportunity to vent?
5. Is your client prepared to vent in an appropriate way?

8. The negotiation process.

   1. Know the bottom/top position of the client and be prepared to go to that point. Don't come to a mediation without authority defined. 2. How creative can you be in settlement options?
   a. Is money the only option?
   b. Is there a way to affect retirement benefits?
   c. Is there another campus or location where the bad guy or the plaintiff can work or will this simply give rise to another lawsuit with another group of workers?
   3. Is your client reasonably evaluating the risk if they refuse or offer any money in settlement?
   4. If you made an unreasonable demand or offer initially (or to satisfy a client need), is your client prepared to get realistic?
   5. Is your client aware of the risks associated with going forward with litigation?

1. Consider keeping the mediator involved to help resolve disputes in the drafting of the settlement documents, especially if there is a "letter of recommendation" or something similar involved in the settlement.

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2001 CALENDAR OF EVENTS

40-Hour Basic Mediation Training ◆ Houston ◆ June 14-16, 21-23, 2001 ◆ Worklife Institute ◆ Contact Diana Dale or Elizabeth F. Burleigh at (713) 266-2456

Family & Divorce Mediation Training (30 hours) ◆ Houston ◆ July 11-14, 2001 ◆ Worklife Institute ◆ Contact Diana Dale or Elizabeth F. Burleigh at (713) 266-2456

Advanced Communication & Mediation Ethics ◆ Denton ◆ June 7-10, 2001 ◆ Texas Woman's University ◆ (940) 898-3466

Conflict Resolution ◆ Denton ◆ August 9-12, 2001 ◆ Texas Woman's University ◆ (940) 898-3466

40-Hour Divorce Mediation ◆ Denton ◆ September 19-23, 2001 ◆ Texas Woman's University ◆ (940) 898-3466

Advanced Family Mediation ◆ Denton ◆ October 4-7, 2001 ◆ Texas Woman's University ◆ (940) 898-3466

Negotiation ◆ Denton ◆ November 1-4, 2001 ◆ Texas Woman's University ◆ (940) 898-3466

40-Hour Basic Mediation Training ◆ Houston ◆ June 18-22, 2001; July 23-27, 2001; September 10-14, 2001 ◆ University of Houston A. A. White Dispute Resolution Institute ◆ (713) 743-4933

Facilitating Group Decision-Making ◆ Austin ◆ June 13-15, 2001 ◆ Center for Public Policy Dispute Resolution, The University of Texas Law School ◆ (512) 471-3507

40-Hour Basic Mediation ◆ Austin ◆June 25-29, 2001 ◆ Center for Public Policy Dispute Resolution, The University of Texas Law School ◆ (512) 471-3507

Advanced Facilitator Training: Techniques and Activities for Group Problem-Solving ◆Austin ◆August 10, 2001 ◆ Center for Public Policy Dispute Resolution, The University of Texas Law School ◆ (512) 471-3507

Advanced Mediation Training in Employment Disputes ◆ Austin ◆ August 22-24, 2001 ◆ Center for Public Policy Dispute Resolution, The University of Texas Law School ◆ (512) 471-3507

NEWSLETTER SUBMISSION DATE FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Summer	May 15, 2001	July 15, 2001
Fall	August 15, 2001	October 15, 2001
Winter	December 3, 2001	January , 2001
Spring	March 1, 2001	April, 2001

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

SEE PUBLICATION POLICIES ON PAGE 19 AND SEND ARTICLES TO:

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CASE LAW & LEGISLATION UPDATE

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

ON THE LEGISLATIVE FRONT

As this article is written, the 2001 Texas Legislature is less than a month from winding up business for this session. We count in excess of one hundred bills which contain an alternative dispute resolution term (such as mediation, arbitration, policy dialogue, etc).

In many cases, such as HB 24 relating to limitations on contingency fees, ADR proceedings are simply included alongside litigation as to the scope of the legislation's coverage. In other cases, such as SB 748 relating to the creation of groundwater districts, the Legislature includes dispute resolution processes as being expressly permitted by newly created political subdivisions. It is unclear how many of these bills will be enacted. Our impression is that a lot of these bills are likely to die in committee or fail to clear the Calendars Committee and reach the floor.

As of May 2, the only ADR bill to be adopted in both Chambers is SCR 20, a resolution sponsored by Senator West which encourages Texas courts to promote and use ADR more widely in family law matters. Although the resolution makes no substantive change to the statutes, SCR 20 does make a strong affirmation by the Texas Legislature that the public policy of this state is to promote and use alternative dispute resolution.

The ADR Section's official legislative initiative is found in HB 1364 sponsored by Rep. Toby Goodman. This bill amends Civil Practice and Remedies Code Chapter 152 to permit on a local option basis an increase in the filing fee surcharge which is used to fund local Dispute Resolution Centers. The current cap of $10 has been in effect for more than ten years, and HB 1364 would permit counties to increase this amount to $15. The bill also would permit counties to assess a filing fee of up to $5 for cases in JP court. Currently, only Harris County is permitted to assess the fee in JP court. This bill acknowledges the very important role the 18 community Dispute Resolution Centers play in Texas. These Centers have dedicated and able leadership, and effective volunteer mediators. Thanks to Rep. Goodman, HB 1364 has passed the House and now awaits action in the Senate.

Perhaps the most interesting ADR bill of the session is HB 1363 which was passed to third reading in the House on May 2 (the date of this writing). This bill gives statutory recognition to "collaborative law process" for family law

matters. A collaborative law process is one which is characterized by the following elements: the parties and their attorneys enter into a written agreement to use the collaborative law process to resolve the family law proceeding through good faith negotiations; the parties and attorneys agree to negotiate in good faith and to refrain from seeking court intervention as long as the parties are in the process; the parties agree to full mutual disclosure of all relevant facts; the parties agree to hire joint experts; and the parties and lawyers agree that if a negotiated resolution is not reached by use of the process, the lawyers will withdraw and be disqualified from representing the parties in the litigation of the matter. Where parties have notified the court that they are using a collaborative law process, the courts are not to force the parties to trial or impose discovery deadlines until one of the parties notifies the court the process has not been resolved and the process terminated.

As originally introduced, the bill would have been an amendment to Chapter 154 of the Civil Practice and Remedies Code (the Texas ADR Act) and could have applied to any civil proceeding. The bill was amended in the House Civil Practices Committee to limit its applicability to family law matters and to move the bill to the Family Code. This alleviated the concerns of numerous section members that the original version was not an appropriate addition to Chapter 154.

Considerable discussion within and without the Halls of the Legislature revolved around the issue of why legislation is needed to do something that parties are certainly free to contract to do in any event. The response from the bill's proponents is that in some areas of the state, the family courts' expedited docketing of cases for trial and imposition of strict scheduling orders and discovery schedules makes the use of the process difficult. The proponents are looking for a statutory "King's X" as it were. Additionally, some proponents reported that some courts are not respecting the parties agreement that the collaborative process lawyers be permitted to withdraw if the process does not result in a negotiated resolution.

The proponents of collaborative law process suggest that it can be used successfully in many different contexts, and is particularly well suited to disputes where parties may have continuing relationships such as landlord tenant disputes, probate disputes among family members, franchiser/franchisee disputes, and patent owner/licensee disputes.

Questions do remain among some practitioners, however, as to whether or not any legislative sanctioning is necessary or desirable. Others have asked whether or not a process should be called an "alternative dispute resolution process" if it does not involve a mediator or other third party neutral. To the latter issue, the proponents would respond that it is an ADR process if one's definition of ADR includes negotiation as an ADR process. Look for this discussion to continue among section members prior to the next legislative session.

HB 1740 is an attempt to end the "dual track problem" for interlocutory appeals of orders in arbitration cases. When a party in state court pleads that an

agreement to arbitrate is governed by the Texas Arbitration Act or in the alternative by the Federal Arbitration Act, funny things can happen on attempted appeal. If the case is governed by the Texas Arbitration Act, interlocutory appeal is permitted in some instances under Civil and Practice and Remedies Section 171.098. However, if the case is governed by the Federal Arbitration Act, the appropriate procedural device for review is a writ of mandamus. Since many practitioners plead alternative coverage, review of certain orders, such as denying a motion to compel arbitration, require that practitioners simultaneously file an interlocutory appeal to secure review under the TAA and a writ of mandamus to secure review under the FAA. Why file two pieces of paper to perfect what is essentially one appeal? The problem arises from the Texas Supreme Court's pronouncement in Anglin v. Tipps 842 SW 2d 266 (Tex. 1992). Because there is no Texas statute granting Texas appellate courts jurisdiction to hear interlocutory appeals under the FAA, the Texas Supreme Court has said one must resort to writ of mandamus. HB 1740 would add a new subsection expressly granting Texas appellate courts jurisdiction to hear interlocutory appeals under the FAA, thus eliminating the need for that second piece of paper.

However, the current version of the bill does more. The current version would also expand the kinds of orders which can be the subject of interlocutory appeal. Under existing law, an order denying a motion to compel arbitration can be the subject of an interlocutory appeal, but an order granting a motion to compel cannot. HB 1740 would permit both under the Texas Arbitration Act, thus shifting the Act's "bias" in favor of arbitration to a more neutral posture. Likewise, the amendment would permit for the first time interlocutory appeal of an order granting a stay of litigation pending arbitration. Currently only appeals from orders denying a motion to stay litigation pending arbitration are permitted.

Perhaps the real "eye brow raiser" in HB 1740 is the hall talk that the language expanding what can be reviewed by interlocutory appeal under the Texas Arbitration Act is written in a way that one could argue that Texas courts could also review orders granting motions to compel arbitration or denying motions to stay litigation pending arbitration when the case is covered under the Federal Act as well. This would create the strange situation where Texas appellate courts could not have interlocutory review of certain Federal Act proceedings where the Federal courts do not. The naysayers argue Federal preemption will prevail, and that it is inconceivable that the Texas Legislature can in effect rewrite what can and cannot be the subject of an interlocutory appeal under the Federal Arbitration Act. Those who are chomping at the bit to test the waters, argue that since this is merely a procedural provision and not a substantive one, the Leg is certainly within its rights to decide when and what can be the subject of interlocutory appeal in Texas courts. This could be fun to watch if HB 1740 passes. The bill has cleared committee, but has not yet reached the floor of the House.

The original version of HB 1740 would have simply repealed the entire appeal provisions of the Texas Arbitration Act. The thought was that then both FAA cases and TAA cases would be reviewed by writ of mandamus. However,

the repeal of 171.098 would have possibly created a lot of confusion about what, when, and if an appellate court in Texas could review something governed by the TAA. Believe it or not the original version was actually passed by the House in 1999, and could have passed the Senate if the constitutional clock had not expired on the Legislative session.

By the time you read this, the Legislature will have adjourned. To update the status of these bills or to read the text, check "Texas Legislature Online." If you want a complete listing of the ADR bills which survive the process, check the website for the Center for Public Policy Dispute Resolution at the University of Texas School of Law which should post the results in early to mid-June.

And as for Case Law…..

In the event you have been in some small out of the way country without media coverage, the Supreme Court of the United States handed down the much anticipated opinion in Circuit City Stores, Inc v. Adams 121 SCt 1302 (March 21, 2001). Adams applied for a job with Circuit City. The employment application contained a provision that stated that any controversy relating to employment was subject to arbitration as the exclusive procedure for resolving the controversy. Two years after he was hired, Adams filed an employment discrimination claim in state court under state law. Circuit City filed in federal court to stay the state court proceeding and to compel arbitration. Adam's argued that employment agreements are exempt from the reach of the Federal Arbitration Act because of Section 1, which exempts from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In a 5-4 opinion, the majority construed the language "or any other class of worker…" to be limited to the same kind of workers as seamen or railroad workers, that is to transportation workers. Since Adams was not a transportation worker, his contract was not excluded from the FAA, and his discrimination claim was subject to arbitration. The dissent looked extensively at legislative history (ignored by the majority) and would have held that Section 1 was intended to exclude all employment contracts of workers engaged in interstate commerce from coverage under the FAA.

And now watch for this one….

The US Supreme Court has accepted writ in EEOC v. Waffle House. This is an appeal from a Fourth Circuit decision found at 193 F3rd 805. In this case Waffle House's employee (appropriately named Baker) had signed a binding arbitration agreement. Baker filed a complaint with the EEOC alleging violations of the Americans with Disability Act. The EEOC brought suit against Waffle House to enjoin improper employment practices and to seek monetary compensation on behalf of Baker. Waffle House moved to compel arbitration. The Fourth Circuit ruled that the EEOC cannot be compelled to arbitrate that part of its law suit which seeks broad injunctive relief to correct unlawful practices of the employer, but the agreement to arbitrate signed by Baker did preclude the EEOC from pursuing in court those portions of its suit that sought Baker's monetary damages and his individual relief. Since the EEOC had announced it

had no intention of arbitrating Baker's individual claim, the Fourth Circuit ordered that portion of the lawsuit dismissed without addressing the question of whether the EEOC has the authority to engage in arbitration on an individual's behalf.

EXPRESSIONS OF NEWS

NATIONAL NEWS

EMPLOYMENT ARBITRATION
(Victim Specific Damage Awards)

The issue in this arbitration case is whether the Equal Employment Opportunity Commission (EEOC) is limited to seeking injunctive relief or can pursue compensatory relief for an individual employee who has signed a pre-hire mandatory arbitration provision.

In June 1994, Eric Baker completed a job application with Waffle House in Columbia, South Carolina. The application contained an agreement for the applicant to submit to binding arbitration. Eventually, Baker started working at another Waffle House in West Columbia without signing a new application. Baker was terminated in September 1994, after suffering a seizure. Waffle House in its termination letter determined that, for the safety of guests and co-workers, it was proper for Baker to be let go. The EEOC filed suit on behalf of Baker to "correct unlawful employment practices on the basis of Baker's disability." Specifically, the complaint sought injunctive relief, backpay-reinstatement and punitive damages. The court below concluded that the EEOC was not bound to the signed arbitration agreement as far as injunctive relief. However, the court determined that, because of the liberal federal policy favoring arbitration, the EEOC could not seek "make whole" relief in a judicial forum because Baker had agreed to arbitrate his statutory claim. Currently, there is a split among the circuits as to whether the EEOC has the power to pursue compensatory relief for individual plaintiffs who sign arbitration agreements.

UNITED STATES SUPREME COURT NEWS 2000-2001
Willamette Law Online - Willamette University College of Law
Web Site located at: http://www.willamette.edu/wucl/wlo

Uniform Mediation Act Update

The Uniform Mediation Act is being drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the ABA Section of Dispute Resolution (ABA DR). This is the first time in its 115 year history that NCCUSL has worked jointly with another drafting group and the drafting committees are crafting proposed legislation that each state may adopt to bring clarity and uniformity to the mediation process. The key provisions of the Act provide an evidentiary privilege to protect the confidentiality of mediation communications. The Act is crafted as a minimum level of protection in those states that have none and is not meant to replace stronger confidentiality protections already on the books. For more information about the Uniform Mediation Act, visit http://www.pon.harvard.edu/guests/uma/.

Revised Uniform Arbitration Act

The Revised Uniform Arbitration Act updates the original Uniform Arbitration Act to reflect the modern practice of arbitration and changes in the law. These issues include who decides the arbitrability of a dispute, arbitrator disclosures, what remedies an arbitrator can award, and how parties initiate an arbitration. The National Council of Commissioners on Uniform State Laws approved and recommended the RUAA for enactment at its meeting in August, 2000. The RUAA was endorsed by the ABA Section of Dispute Resolution in April, 2000. For more information about the RUAA, visit http://www.law.upenn.edu/bll/ulc/uarba/arb1031.htm

E-Commerce and ADR

Five sections of the American Bar Association,
have jointly created the ABA Task Force on E-Commerce and ADR and an accompanying Advisory Committee to propose consensus-based protocols, workable guidelines and standards that can be implemented by parties for on-line transactions and by online dispute resolution providers. The Task Force will focus on the challenges raised by multi-jurisdictional business to business ("B2B") and business to consumer ("B2C") transactions. The five sections participating in this effort are the Section of Dispute Resolution, the Section of Business Law, the Section of Litigation, the International Law and Practice Section, and the Intellectual Property Law Section. For more information see the Task Force site at http://www.law.washington.edu/ABA-eADR

ABA Section of Dispute Resolution Draft Resolution on Mediationand the Unauthorized Practice of Law

There is considerable controversy within the mediation community about whether mediation constitutes the practice of law. The Section of Dispute Resolution believes that statutes and rules governing the unauthorized practice of law should be construed to allow all individuals, regardless of whether they are lawyers, to serve as mediators. In order to encourage such interpretations, the Section has drafted a Resolution on Mediation and the Unauthorized Practice of Law. The Draft Resolution contains commentary comparing the Resolution with particular state guidelines and with existing and emerging ethical guidelines for mediators. See the Resolution at http://www.abanet.org/dispute/resolution.html.

Family Mediation Standards

The Model Standards of Practice for Family and Divorce Mediation are the product of a multi-year collaborative effort to define the role of family mediation in the dispute resolution system. The Model Standards unify pre-existing codes and guidelines promulgated by a variety of organizations, courts, and legislatures in the past 20 years and address particular issues and problems in family mediation practice. The standards have three primary functions: to guide the conduct of family mediators; to inform the mediation participants about the process; and to promote public confidence in mediation as a process for resolving family disputes

For more information, see http://www.afccnet.org/pdf/modelstandardsfinal.pdf

Models, Styles and The Process of Family Mediation

By Judy K. Dougherty & Josefina M. Rendón

Note: The following is an excerpt of the Chapter on Family Mediation from the upcoming "Handbook of Texas ADR" to be published by the State Bar of Texas. TAM member Kay Elliot is the editor.

There has been tension between different proponents of different models and styles of mediation, where each proponent believes that their style is the best or only effective way to mediate. Some of the early mediator practitioners in Texas had initially limited their definition of mediation to a conference or joint, multiple session model. Others use the private caucus model to define their idea of mediation. The proponents of each of these models tend to differ in the timing and use of attorneys, the length and number of mediation sessions, the role of the parties and their control of the process, and the role of the mediator from strictly facilitative to more evaluative or directive. It is important to understand the essential elements of these different family mediation models.

Conference Model

The initial pioneers in mediation developed a model that tended to exclude lawyers in initial negotiations between the parties. This was partly due to the belief that somehow attorneys would tend to create an atmosphere that would stymie a creative exploration of ideas.[1] It was believed that attorney participation would discourage full participation of the parties. There was a need to teach skills to allow restructuring of the family according to its own uniqueness rather than according to guidelines. It was felt that a process involving a third party neutral would provide a safe environment for more positive interaction and create a structure to handle future problems.

In the traditional conference style model, the multiple, shorter sessions often begin early in the process, sometimes before the divorce petition is even filed. A description of the traditional conference model follows.

After a decision has been made by a party that a separation and divorce are inevitable, or that a modification of an existing divorce decree is necessary, the parties make an appointment with a mediator for an orientation session, where the process is explained. Guidelines are discussed regarding confidentiality, the parties' and mediator's conduct, and full disclosure of assets. Other topics reviewed are visitation and child support guidelines, custody, anticipated costs, and the use of attorneys and other experts. The benefits of cooperation, especially as related to the needs of the children, are stressed. The

commitment to the pursuit of a fair settlement, as determined by the parties with appropriate expert advice, is emphasized. The parties state the issues they need to resolve and their long-term and short-term goals.

If the parties and the mediator decide that this is an appropriate process for them, an agreement to mediate is signed. This signifies agreement to abide by the guidelines, acknowledges that the mediator represents neither of the parties now or in the future, acknowledges the need for representation by and/or consultation with an attorney and waives the right to call the mediator as a witness. A temporary agreement may be worked out to enable the family to stabilize while final agreements are being made.

Parties are given tasks that are necessary for their education, and reality testing begins regarding possession periods and budgets. The parties are asked to provide lists of assets and liabilities, along with documentation of present values, where applicable.

During the mediation sessions, information is gathered in an atmosphere that encourages objectivity and cooperation, the issues are clarified, and productive communication on the issues is facilitated. The parties begin to realize the inherent problem of managing two households on income that often barely maintained one. With the mediator's help, the parties brainstorm different creative options for continued parenting and other financial issues, attempting to find mutual interests that create a more beneficial outcome for everyone in the family.

The role of attorneys in the traditional conference model is not as active as in the caucus model. Nevertheless, the parties are encouraged to consult with and keep their attorneys informed before and after mediation sessions, especially on more complex issues. In especially complex cases, memoranda are written after each session to clarify areas needing discussion and for review by the parties' respective attorneys. In some sessions where there are legal or complex issues, the attorneys will be present at the sessions, but they are usually requested to avoid taking control over the negotiations. The parties may consult with other experts, such as accountants, business evaluators, appraisers and psychiatrists, as needed. They are encouraged to choose one neutral expert for both rather than each hire his or her own. After a decision regarding the children is reached, the children may be consulted to get their input and to assure them that their parents are working hard to maintain stability in their lives.

Since trust is often a primary issue, the family mediator usually sees the clients together and avoids caucusing (which involves separating the clients and the mediator shuttling back and forth) except where negotiations are leading to an impasse. Unlike other mediation models, the purpose of a caucus in this situation is not to keep confidences, but to develop other strategies for sharing information in a more productive manner and to get past unrealistic expectations and barriers.

After a final agreement is reached on all the issues, a memorandum of agreement is prepared reflecting the decisions made by the parties. The memorandum reflects agreements on issues and may provide reasons for

departure from norms. The parties are requested to take this final agreement to the attorneys for further review as a further protection for the parties. If significant changes are suggested, the parties are encouraged to go back to mediation to resolve their differences. When the final agreement is reached, one of the attorneys prepares a court order and other necessary documentation to finalize the matter.

Caucus Model

Many attorneys who became involved as mediators in the 1990's have felt more comfortable and effective with a mediator style that focused on private caucuses and require the active participation and direction of each party's attorney. There is a concern that parties without more direct assistance from counsel may be ill prepared to make decisions with legal implications.

Most mediations using the caucus model take place after the divorce petition is filed and as a result of the court's referral under the code.[2] Although mediation often occurs prior to a contested temporary hearing, it occurs more often on the eve of trial. It may be of interest to note that the mediation prior to the final trial is usually not ordered or required until full discovery is completed, even though this may be more costly financially and emotionally.

The sessions may last from half a day to late into the night and may occasionally require more than one day. The orientation session explaining the mediation process and guidelines may be the only time that the parties and opposing counsel meet jointly with the mediator, and sometimes this joint session is skipped due to concerns of the attorney or mediator of the level of conflict between the parties. The mediator shuttles between private confidential meetings with the parties and their counsel, often spending long periods of time with distrustful or difficult parties. An agreement may be con-structed by offers and counteroffers that cover the essential issues needed to resolve the contested disputes of the parties.

The mediator using a caucus model may become more evaluative in helping the attorney provide a more practical view of the parties' case in court and of the realistic constraints of the legal process. A memorandum of agreement is drafted which may consist of a pre-prepared mediator's checklist with suggested issues for decision-making or a more open-ended format that is more dependent upon the attorney's recognition of the important elements of resolution. Usually the irrevocable language is included,[3] and at minimum, a Rule 11 agreement[4] is signed by the parties and their attorneys.

Other Models and Styles

Even though Texas mediators have often tried to more narrowly define mediation to these primary models of conference and caucus models, mediation professionals have many different models that they purport to be effective such as transformative, therapeutic, technologically driven[5], med/arb[6], to name a few.

Within these various mediation models, the mediator's style and degree of participation will also vary. In order of degree of intervention, the mediator may

choose to be 1) directive- steering the parties towards the mediators' idea of what is appropriate for them; 2) evaluative- assessing the parties' legal arguments and chances in court; 3) facilitative - merely aiding the parties in their negotiations without imposing his/her own ideas or evaluating the parties' case, or 4) relational – focusing on the parties relationship rather than on achieving settlement.

Problem-Solving versus Transformative Mediation

Most mediation models and styles have in common a focus on settlements and problem solving. This focus has been criticized because, as mediators steer the parties toward settlement and solution, they tend to minimize or displace the parties' own problems and needs.[7] In addition, a focus on settlement or problem solving may generally be accompanied by a greater preoccupation with quantity rather than quality of settlements[8]

Many family mediations also potentially have collateral effects in which the spouses reach new insights about themselves or others, or gain a new sense of self-worth or of the other person's problems.[9] These collateral effects of better understanding, and at times reconciliation, affect the parties at a more personal, relational level than the actual settlement agreement. Transformative Mediation is a new movement where the "collateral" effects of mediation are in fact the central goal.

Authors R.A.B. Bush & J. P. Folger argue that both conflict and mediation provide the opportunity to transform and achieve moral growth and maturity as people strengthen their "selves" and reach beyond themselves to relate to others. Transformative Mediation has two dimensions, empowerment[10] and recognition.[11] This mediation model attained national credibility when it was embraced by the United States Postal Services to resolve their workplace disputes. It also seems particularly suited for family mediations.

There are practitioners in family disputes between parents from different cultures or countries that believe that the focus in the transformative model in building trust and having client control is necessary for the parties to understand and be willing to accept differences in perception and laws. Often due to difficulty in legal enforcement between countries the perception for fairness attained by the parties construction of the agreement is required to insure their commitment to the agreement.[12]

Integrating Models and Styles

Perhaps a more pragmatic approach to effective mediation is a recognition that each of these approaches may have a place depending upon the case and the needs and abilities of the parties. In considering the question of which type of mediation is appropriate, the issues regarding the individuals' overall emotional, cognitive, and psychic development and the parents' progress in the divorcing process are important factors.[13] For example, the issue of healing was

perhaps a primary factor in the inception of mediation and may also be a factor in the choice of a mediation model. With the use of the right process for a particular family, healing may be more likely to occur. There is a debate regarding this issue. Some consider healing to be to be an unrealistic expectation that happens only by chance and the settlement of the dispute will allow the parties and family to go forward, and time will be the greatest factor in healing. Others believe that the goal has such long range significance for families that it is more important than the settlement itself.

Any of above factors may determine the appropriate model or style of mediation to be used with the particular parties. If the issues are primarily property and legal issues, or highly conflictual, and there are no children, the frequent use of caucuses or private meeting may be better suited to meet the needs of the parties. The same may be true if the parties have special concerns regarding mental health or safety issues due to abuse. On the other hand, these same parties and their attorneys may benefit from some joint sessions with a specially trained mediator and perhaps a mental health professional.

It may be important to note that the traditional conference model of mediation has already given way to a more streamlined, modified conference model in which the parties meet in longer but fewer sessions but that, similarly, emphasizes the face-to- face meeting of the parties. This model more often involves greater attorney involvement though still emphasizing the parties' participation and self-determination.

Some mediators may have the experience, skills, and interest in conforming their style of mediation dependent upon the changing needs of the situation. The choice of the mediator may differ according to the needs of the case, and it may be that there is no one style but a continuum of methods that shift depending upon the issues and particular needs of the parties. In other words, perhaps the best choice of mediator is one who has been trained or is cognizant of all these different mediation models, styles and philosophies and is able to use any of them as situationally appropriate.

The Role of Attorneys

The parties can mediate with or without an attorney. However, with the irrevocability language of many mediated agreements, the role of an attorney in family mediation has become even more important. A party's attorney should be aware that he/she does not have to be present in the mediation for the family mediation agreement to be irrevocable.[14] If the attorney cannot be present, he/she should advise the client to either not sign anything without first consulting with the attorney, or to refuse to sign an agreement that includes an irrevocability clause. A mediator should go along with the parties' decision.

As in other types of court-annexed cases, attorney's representing divorcing spouses can take different roles during a mediation. They can cover a gamut of styles ranging from aggressively adversarial, to effective negotiators, to collaborative peacemakers on the other extreme. Since the parties generally rely

on their attorney for guidance, an attorney can greatly influence the mediation process.[15] An attorney can potentially bring elements of objectivity, expertise, and even reflection to the mediation process. On the other hand, if the attorney is too adversarial, he or she may encourage party intractability or overlook the children's interests.[16]

The role of attorneys in family mediations is, however, gradually evolving away from the adversarial role that places parent against parent and defines a good advocate as one who obtains for his client the most rights and concessions allowed by aggressive negotiation and law. Instead, the role of attorneys in family mediation is evolving to one of guide or counselor who assists clients in custom-made, mutually satisfactory decisions.[17] This new approach often includes more relational, family-oriented, collaborative atmosphere that takes into consideration the best interest of the children and goes along more with what the parties want to do that truly meets the family's needs rather than with how much they can get.[18] This may include the decision to make concessions in the short run to provide a better working atmosphere and future mutually satisfactory, long-term benefits.

Most mediators encourage, and some require, the parties to seek independent counsel at some time during the mediation process. Even in the traditional conference model of mediation, the lawyer can and should be used in the pre-referral stage, during the mediation process and during the review phase.

During the pre-referral stage, the parties and their attorneys can determine which mediation model and style the parties are likely to benefit from the most. Clients must have the maturity and ability to temporarily set aside their hostility and share in the responsibility of negotiating a result. The lawyer can set the stage by explaining what information will be needed and the range of legal rights and possibilities. The lawyer should also remain available for advice and consultation throughout the process even when parties have chosen a traditional conference style model .

During the actual mediation, the lawyer may help with evaluations, clarification of issues, legal questions, development of options, consideration of the range of possible judicial rulings for particular issues and development of trade-offs. The attorney is in direct contact with the client during this stage. Often, in mediations where the attorneys are not present, memos of each session are prepared by the mediator so that the particular legal questions are clear and so the attorneys can point out problem areas before a final agreement is solidified and "owned" by the parties.

When the parties have participated in a traditional conference style mediation the review phase can be quite varied and sometimes quite difficult, depending on the timing of the attorney's involvement in the mediation process. The understanding which the attorney reaches with the client on the attorney's role needs to be clarified in written form, especially regarding how much investigation is necessary and expected during the review. However, some clients want attorneys merely to review the agreement and draft an order.

The attorney should clarify his or her role and educate the client regarding applicable law and the consequences of decisions. Throughout the mediation process, it is important for the attorney to be sensitive to the client's need for autonomy and a sense of fairness that may be somewhat inconsistent with strict legal analysis. It is extremely important to investigate the client's satisfaction with the agreement, because mediation creates a very personal result. This can be determined partly by whether the client understood his or her rights and thought the process was fair to both parties. Usually, significant changes that are in conflict should go back to mediation.

Because of the unusual provisions that are often a part of the mediation agreement, attorneys should advise their client regarding the enforceability of decisions while insuring the integrity of the agreement.

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TEXAS BAR JOURNAL. She is presently an Associate Municipal Judge and a mediator in private practice.

Footnotes:

[1]O.J. Coogler, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS (1978).

[2] TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a) (Vernon Supp. 2000).

[3] See note 97, *infra*.

[4]TEX. CIV. RULE PROC. 11 (Vernon Supp.1999) states: Unless otherwise provided in these rules, no agreement between the attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

[5] Especially when children are not the primary issue, some people relate better to a more rational, technologically based approach that tends to separate the

emotions from the process with specific tasks. This approach uses software programs, workbooks and spreadsheets that clarify values, assets, and liabilities and demonstrate different options on a computer screen. See: Adams Mediation and Financial Resources Center, PLANS FOR PARENTING WORKBOOK , (1997).

[6] Med-arb has different definitions within the term in that the third party neutral may serve both the roles of mediator and arbitrator or two different neutrals are utilized within the same process. Permission to use med-arb is obtained from the parties prior to the start of the mediation and arbitration occurs if no agreement is reached.

[7] Bush, Robert A. & Folger, Joseph P. THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION, (1994) at 75.

[8] *Id*. at 75; Fleisher, Janice M., *Directing and Administering a Mediation Program: The Transformative Approach,* 13 MEDIATION Q. 295 (Summer1996) at 298-299; Pope, Sally Galong, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition* 13 MEDIATION Q. 287 (Summer1996); Sander, Frank E.A. *The Obsession with Settlement Rates*, NEGOTIATION J. (Oct. 95) 329.

[9] Bush & Folger, *supra,* note 60.

[10] Empowerment means "realizing and strengthening one's inherent capacity for dealing with difficulties of all kinds by engaging in conscious, deliberate reflection, choice and action." *Id..* Note 60 at. 81 Empowerment is attained when the parties "experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face, regardless of external constraints." *Id* .at 84.

[11] Recognition is defined as: "reaching beyond the self to relate to others," and is attained when, after acquiring some sense of empowerment, the parties "experience an expanded willingness to acknowledge and be responsive to other parties' situations and common human qualities." *Id* .at 84.

[12] Luciano Rodriguez, *Cultural Aspects of Trans-border Mediation of Family Law Matters,* The Texas Association of Mediators, Annual conference, THE HEALING POWER OF MEDIATION, Houston Texas, (Feb. 2000); Rendón, *When You Can't Get Through to Them: Cultural Diversity in Mediation*, 11:3 ALTERNATIVE RESOLUTIONS (2000); W. Wright, *Cultural Issues in Mediation: A Practical Guide for Individualist and Collectivist Paradigms,* The Association of Attorney Mediators' Website: <http://www.attorney-mediators.org/wright.html> .

[13] Jane Walden, C.P. Roth, et al, *A Therapeutic Mediation Model for Child Custody Dispute Resolution,* 3 MEDIATION Q. 5 at 19 (1983).

[14] TEX.FAM.CODE ANN., § 6.602(b) (2000).

[15] Shepard, Andrew , *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985).

[16] *Id*. at 739-40 "Adversarial procedure legitimizes the notion that the parents are enemies after divorce and furthers the social acceptability of threatening a custody trial to extract concessions on financial matters in settlement. The custody-money negotiations that result mean one parent can be required to bargain away some or all of her involvement with the child in return for lesser financial obligations. Or they may mean that one parent may have to sacrifice needed financial support in return for maintaining a relationship with the child. Furthermore, linking custody with money delays settling custody until financial concessions are made, rather than settling disputes in accordance with the child's sense of time. In any event, an adversary atmosphere shifts the focus of the question the parents must resolve in negotiations from what is good for the child's relationship with both parents to what is in the interest of one parent or the other, financially or otherwise."

[17] See: J. Rendón, *Blessed are the Lawyers,* THE LOOKOUT (October 22, 1995) for a discussion on how attorneys are adopting the role of peacemakers.
[18] For a broader discussion of this more relational and collaborative movement among lawyers, see: J. Rendón & J. K. Dougherty, *Going Postal: A New Definition and Model for Employment ADR*, THE HOUSTON LAWYER (Jan/Feb. 2000); 19 Bush & Folger, *supra,* note 7; and Collaborative Law Websites: http://www.collaborativelaw.org/ and http://collaborativeattorneys.com.

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