

# PROPOSED CHANGES TO ETHICAL GUIDELINES

By Maxel "Bud" Silverberg\* and Mike Patterson\*\*

Last year, the ADR Section's Council asked a committee to review the ABA's Model Standards of Conduct for Mediators that were adopted in August 2005 and to consider whether any changes should be recommended for the Ethical Guidelines for Mediators that the Texas Supreme Court adopted 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's Council proposed three changes for publication in the ADR Section's newsletter, *Alternative Resolutions*, for the members' consideration before presenting them for adoption by the ADR Section at its annual meeting in Houston on June 27, 2008. Members are encouraged to email any comments regarding the three recommended changes to Mike Patterson at [mike@mikepattersonmediation.com](mailto:mike@mikepattersonmediation.com).

The first proposed 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 proposed change is an additional comment that would 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 is being proposed because there are mediators who 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 waiting 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 proposed 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 proposed change is an addition that is underlined so the section would read 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 is being proposed because an oversight caused it to be 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

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financial interest in a corporation or involvement in the past with a product or patent, may affect the neutrality of the mediator. 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 proposed 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 proposed change is an additional comment that would read as follows:

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

The third change is being proposed 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 en-

gage 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.



\* **Maxel (Bud) Silverberg**, BBA, MBA, JD, of Dallas, has mediated and arbitrated over 3,000 cases. He chaired the committee that created the Ethical Guidelines for Mediators, later adopted by the Texas Supreme Court. An adjunct professor at SMU Law School, past president of Association of Attorney-Mediators, member of the Texas Supreme Court Advisory Committee on Court-Annexed Mediations, and member of the SBOT ADR Council, Bud received the American Arbitration Association's Steve Brutsché Award, and with his wife, Rena, the Justice Frank Evans Award



\*\* **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.

## Chair's Corner

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legislation. This last legislative term, several arbitration bills were proposed. This year, this Committee is working with several stakeholders to develop a balanced report on the bills that may be presented to the next Texas Legislature. The Committee hopes to conduct roundtable discussions in various Texas locations to discuss arbitration. If you would like to be part of this effort, contact John Boyce.

*The Arbitration Ad Hoc Agreement.* In the next issue of Alternative Resolutions, the Section will publish an Arbitration Ad Hoc Agreement for review and comment by our Section. As arbitration has developed in the State of Texas, there have been many arbitrations conducted without administration by a third party. Preparation of the Ad Hoc Agreement has been a two-year project of the Council to provide Texas practitioners with a practice guide. William H. Lemons began work on this project and John Boyce is now heading up this project. Final touches are being added to the Ad Hoc Agreement, so watch for it in the next newsletter.

*Ethical Guidelines for Mediators.* Following this Chair's Corner, you will see Maxel "Bud" Silverberg and Mike Patterson's article, *Proposed Changes to Ethical Guidelines*. This Section began working on and publishing Ethical Guidelines in the early 1990s. In 2005, the Texas Supreme Court adopted a slightly modified version of this Section's Ethical Guidelines. Since that time, several organizations have weighed in with their own ethical standards. Now the American Bar Association ("ABA"), the American Arbitration Association ("AAA"), JAMS The Resolution Experts ("JAMS"), and the Association

for Conflict Resolution ("ACR") have published new ethical standards. The article highlights the changes that your Council has unanimously proposed after comparing all of these new ethical pronouncements. Mike Patterson, Suzanne Duvall, Kris Donley, and Maxel "Bud" Silverberg have worked painstakingly on this Committee to keep Texas mediators ethically current.

*Annual Meeting.* Mark your calendars now to attend the annual meeting in Houston on June 26. The Section will meet at 1:30 p.m. for its annual meeting, followed by two hours of CLE concentrating on arbitration and concluding with the Council meeting. If you want to participate in this program, contact John Boyce.

*Member Services Committee.* Susan Schultz has agreed to chair this new Committee of the Council to look into the various member services and activities of the Section. We want to serve you better! If you have ideas on other services that this Section can provide to you as a dispute resolutionist, please contact Susan at [sschultz@law.utexas.edu](mailto:sschultz@law.utexas.edu). My final Chair's Corner will report on the work of this Committee with focus on the future of ADR in Texas.

We've now looked at the present state of ADR in Texas through the work of this Section. My final Chair's Corner will contemplate the future of Texas ADR. Again, I invite all clairvoyant members to email me at [cmorgan@jamsadr.com](mailto:cmorgan@jamsadr.com) with their crystal-ball predictions. Until then, Peace . . . CHM