MEDIATION

Presenter

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In the legal field, Mr. Bayer has worked as a trial lawyer, in a wide range of cases including personal injury, business, intellectual property and land use. Mr. Bayer has been a guest lecturer in international negotiations and alternative dispute resolution at the University of Monterrey Law School and Anahuac Law School in Mexico City. He is a Fellow at the Center for Public Policy Dispute Resolution and a guest lecturer in alternative dispute resolution, trial tactics, negotiation, and professional responsibility at The University of Texas School of Law. Mr. Bayer received the 1998 Community Peacemaker Award from the Travis Country Dispute Resolution Center. His primary focus these days is on mediation and arbitration.

Mr. Bayer has been a frequent CLE presenter and also writes the popular legal blog *Disputing: Conversations about Dispute Resolution.* The blog just celebrated its 5th anniversary and has been cited by *The Wall Street Journal* and a variety of law review articles. At *Disputing*, Mr. Bayer discusses articles, court cases, legislation, and news relating to alternative dispute resolution. *Disputing* also features commentary from leading practitioners and scholars. You may visit *Disputing* at www.karlbayer.com/blog.

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I. Introduction

In 1987, the Texas Legislature enacted the Texas Alternative Dispute Resolution Act ("Texas ADR Act"). [1] It was the Texas ADR Act, codified in chapter 154 of the Texas Civil Practice and Remedies Code, that jump-started the use of mediation in Texas. The Act stated a clear policy: "It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationships, including the mediation of issues involving conservatorship, possession and support of children, and the early settlement of pending litigation through voluntary settlement procedures." [2]

Mediation in recent years, along with other methods of alternative dispute resolution, has become increasingly popular. Still, there have been few if any challenges to the Texas ADR Act as it was formulated in 1987. Of the ADR methods, mediation is the most popular.[3] Because the main goal of mediation is to resolve disputes early, thereby saving costs and acting in the interest of judicial efficiency, Texas courts have come to greatly favor the process.

The purpose of this paper is to assist lawyers in helping their clients understand the mediation process. Part II will begin by answering the question of what happens before mediation. It will discuss the role of an attorney in mediations, the qualities to look for in a mediator, and will overview case law about court-ordered mediation. Part III will discuss what happens during mediation. It will begin by presenting the case law of mediation confidentiality. It will also explain statues and case law on good faith and bad faith mediation. Next, it will discuss the issue of mediating with governmental entities. Part IV will discuss what happens after mediation. It will review the case law on enforceability of mediated settlement agreements and will provide a background of the intersection between mediation and insurance law. Then, it will discuss briefly case law on mediation and legal malpractice. Part V will conclude the paper. The appendix lists sources of ethical guidelines for mediators.

II. What Happens Before Mediation?

This section considers the many questions one may have before the mediation process were to even begin. Though mediators are not always lawyers, a lawyer involved in mediation will have to alter his conduct and expertise to the specifics of the situation. When on the search for a mediator, many factors will come into play, which will be examined in the second subsection herein. Like searching for a mediator, several factors must also be considered in determining whether to mediate before filing a law suit. Fourth in this section, the question of whether a court could compel a dispute to be mediated will be at issue. Along with that, also to be scrutinized will be the questions of whether one can object to a court's mandated mediation, what penalties could potentially arise from failing to appear at court-ordered mediation, and who is responsible for the financial implications of mediation.

A. What are the Roles a Lawyer Might Assume in Mediation?

The traditional role of the lawyer has been to represent the interests of his or her client. During the process of mediation, the lawyer will continue to perform these traditional functions; however, the manner and context in which those functions are performed will be different:

- **Before mediation**. The lawyer explains the process of mediation to her client, what to expect during mediation, the relevant law governing the mediation process, and how the mediation process complements the court procedures. The lawyer might help select the mediator. The lawyer assists the party in determining

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[1] The Texas ADR Act recognizes five ADR procedures: mediation, mini-trial, moderated settlement conference, summary jury trial, and nonbinding arbitration. Tex. Civ. Prac. & Rem. Code Ann. § 154.021 (Vernon 2005).
[2] Tex. Civ. Prac. & Rem. Code Ann. § 154.002. (Vernon 2005).
[3] Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?,* 47 S. Tex. L. Rev. 849, 850 (2006).

whether timing is a factor in choosing mediation. The lawyer advises the party on the substantive law relevant to the case.

- **During mediation**. The lawyer's role is to assist the party in negotiating for herself, bearing in mind the non-adversarial nature of mediation. The lawyer can guide the party through settlement discussions whether the lawyer attends the mediation sessions or not. The lawyer manages the legal process for the party while mediation is being conducted, keeping the party informed of important dates, responding to and filing necessary pleadings, and conducting discovery. The lawyer may participate in the mediation session(s) by simply observing the mediation and advising the party privately during breaks in the session(s). Direct participation by the lawyer may range from the lawyer occasionally supplementing the party's comments to the lawyer speaking on behalf of the party.

- **After mediation**. The lawyer assists the party in reviewing the terms of any mediated agreement, testing the party's understanding of the terms, and in some cases, preparing formal agreements. If necessary, the lawyer assists the party in enforcing the terms of the agreement as any other written contract. [4]

B. What Qualities Should I Look for in a Mediator?

The following qualities are most likely to be needed to perform the task of a mediator:

- **Investigation.** Effectiveness in identifying and seeking out pertinent information.
- **Empathy.** Conspicuous awareness and consideration of the needs of others.
- **Impartiality.** Effectively maintaining a neutral stance between the parties and avoiding undisclosed conflicts of interest or bias.
- **Generating options.** Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties.
- **Generating agreements.** Effectiveness in moving parties toward finality and in "closing" agreement.
- **Managing the interaction.** Effectiveness in developing strategy, managing the process, and coping with conflicts between clients and representatives.
- **Substantive knowledge.** Adequate competence in the issues and the type of dispute to facilitate communication; help parties develop options; and alert parties to relevant legal information.[5]

C. Should I Mediate Prior to Filing a Suit?

Mediation can take place at any time before litigation is commenced. If litigation has already begun, mediation can come to pass before the jury reaches a verdict, a judge hands down a ruling, or an arbitrator renders an award. [6] The decision whether to mediate prior to filing a lawsuit depends on the circumstances of each case. While mediation in personal injury cases typically occurs after a lawsuit is filed but before a trial before a jury or judge takes place, many of the same reasons for wanting to mediate after suit is filed exist prior to the expense of litigation. These advantages may make settlement more palatable for the parties, including: (1) lower contingency fee split; (2) no cost for defense attorney; (3) no court costs; (4) no expert witness fees; (5) no travel expenses. It also provides

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[4] Geetha Ravindra, *Role of Attorneys in Mediation Process*, American Bar Association (2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/role_of_attorney_in_mediation_process.authcheckdam.pdf

[5] Judy Filner, *Report on Mediator Credentialing and Quality Assurance,* American Bar Association Task Force on Credentialing (October 2002), http://www.americanbar.org/content/dam/aba/migrated/dispute/taksforce_report_2003.authcheckdam.pdf

[6] Ken B. Scott and Cody W. Wilson, *Questions Client Have about Mediation: How Do We Get the Mediator to See It Our Way? When and Where Should I Mediate?* Disputing, (July 22, 2010), available at: http://www.karlbayer.com/blog/?p=9636

each party with the opportunity to understand each other's interests and concerns, as well as opening the door for creative, party driven resolutions. [7]

D. Can a Court Refer my Case to Mediation?

Section 154.021(a) of the Texas ADR Act states that a court on its own motion or motion of a party may refer a pending dispute to an ADR procedure.[8] In this referral, an "impartial third party" must be appointed to mediate.[9] To qualify for an appointment as an impartial third party, a person must have completed a minimum of forty hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.[10]

The trial court has discretion in deciding that mediation is appropriate for the case and may consider several factors in the decision, including:

> the nature of the dispute, the complexity of the issues, the number of parties, the extent of past settlement discussions, the posture of the parties, whether there had been sufficient discovery to permit an accurate case evaluation, the status of the case on the docket, and whether a referral would be appropriate at that particular time.[11]

The *Decker* decision laid out a number of the considerations that come along with the trial court's discretion.[12] The court may compel parties to attend mediation, but that is the furthest extent of its authority in that it cannot force a resolution to materialize from this mediation.[13] Only when a party objects to mediation with a reasonable basis for doing so can a court be stripped of its power to refer a dispute to mediation, so a court can compel mediation without issue if it finds a party will not have a reasonable basis for objection.[14]

Using the *Decker* framework along with the factors of use to a trial court in referring a dispute to mediation, courts on a case by case basis have made a fairly predictable determination of whether or not mediation is appropriate with a trend that the court's discretion is broad.[15] Although a trial court ordered mediation to be in good faith in *In re Magallon*, if a trial court does find mediation appropriate, both parties are compelled to attend.[16] The court of appeals could not say that the trial court abused its discretion in finding the party who did not appear at mediation in contempt and neither party made an objection.[17] Regardless of a dispute over the referral to mediation, the referral compels the parties to attend pursuant to the trial court's discretion.[18]

After the issue of compelling parties to meet in mediation has been resolved, it is true that a trial court may only compel the parties to meet but not more.[19] Thus, the court did say the judge in *Decker* overstepped the authority of a trial court by requiring not just that the parties meet, but that they negotiate in good faith and attempt to reach a settlement.[20] Doing more than just compelling the parties to meet would not comport with chapter 154 of the aforementioned Texas Civil Practice & Remedies Code.[21]

Also, a court may, in its discretion, decide that mediation would not be of benefit to the parties and thus not refer the case to mediation.[22] Where a law firm brought suit against a former client for failure to pay legal dues, the

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[7] *See* American Arbitration Association, AAA Mediation Services FAQ, available at http://www.aaamediation.com/faces/FAQ_MediationServices.pdf
[8] Tex. Civ. Prac. & Rem. Code Ann. § 154.021 (Vernon 2005).
[9] Tex Civ. Prac. & Rem. Code Ann. § 154.051(a) (Vernon 2005).
[10] Tex. Civ. Prac. & Rem. Code Ann. § 154.052(a) (Vernon 2005).
[11] *Walton v. Canon, Short & Gaston,* 23 S.W.3d 143, 150 (Tex. App. — El Paso 2000, no pet.).
[12] *Decker v. Lindsay,* 824 S.W.2d 247, 250 (Tex. App. — Hous. [1st Dist.] 1992, no writ).
[13] *Id.*
[14] *Id.*
[15] *See In re Magallon,* 09-07-438CV, 2007 WL 2962934 (Tex. App. — Beaumont Oct. 11, 2007, no pet.).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Decker,* 824 S.W.2d at 250.
[20] *Id.* at 251.
[21] *Id.*
[22] *Walton,* 23 S.W. 3d at 150.

client demanded mediation, claiming that it is required unless the trial court determines it inappropriate.[23] Although the trial court did not make a determination of inappropriateness, there was a dispute over who would be the mediator.[24] The court declared, "We may reasonably infer that the trial court found that referral for [mediation] would not have benefitted the parties and would only have served as a delay."[25] A trial court may refer a case to mediation at its discretion, but it is not forced to when it would find mediation would not be of benefit in the situation.[26]

E. Can I Object to Court-Ordered Mediation?

A party has to object to the mediation referral within ten days after receiving notice. The court, in its discretion, may or may not refer the dispute to mediation. Section 154.022 of the ADR statute provides the basis for objection to referral of pending litigation:

> (a) If a court determines that a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.
>
> (b) Any party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral.
>
> (c) If the court finds that there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.[27]

In *Texas Dept. of Trans. v. Pirtle*, the Fort Worth Court of Appeals addressed the consequences for not filing an objection under the Texas ADR Act.[28] There, the defendant, the Texas Department of Transportation, failed to object to the mediation then, it refused to participate in the mediation.[29] The trial court subsequently sanctioned the defendant.[30] The defendant argued that the defendant never settles cases as a matter of policy.[31] The court distinguished *Pirtle* from other cases where the duty to mediate in good faith did not apply.[32] Finally, the court of appeals, in upholding the sanctions award, found that the duty to mediate attaches when a party is served with a mediation order and fails to object. [33]

F. Can a Court Impose Sanctions for Failing to Appear at Court-Ordered Mediation?

Similar to a court referring a case to mediation in the first place, a trial court is under a discretionary standard concerning imposing sanctions for failure to appear.[34] Discretion is abused when the trial court "acts without reference to any guiding rules or principles."[35] Courts have an inherent power to use sanctions to discipline attorneys when appropriate.[36] The appropriateness of this power or whether an imposition of sanctions is just is analyzed on two-prongs: 1) a direct relationship existing between the offensive conduct and the sanction and 2) determining whether the party, the attorney, or both are responsible for the offensive conduct.[37] In addition, sanctions may not be

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[23] *Id.* at 147-50.
[24] *Id.* at 150.
[25] *Id.*
[26] *Id.*
[27] Tex. Civ. Prac. & Rem. Code Ann. § 154.022 (Vernon 2005).
[28] *Texas Dept. of Transp. v. Pirtle,* 977 S.W.2d 657, 658 (Tex. App. — Fort Worth 1998, pet. denied).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See*, Gleason v. Lawson, 850 S.W.2d 714 (Tex. App. – Corpus Christi 1993, no writ) (Court did not order the mediation); Hansen v. Sullivan, 886 S.W.2d 467 (Tex. App. - Houston [1st Dist.] 1994, no writ) (The parties mediated in good faith but the matter could not be resolved); Decker v. Lindsay, 824 S.W.2d 247 (Tex. App.--Houston [1st Dist.] 1992, no writ) (Party objected to the mediation order but the court overruled the objection).
[33] *Pirtle*, 977 S.W.2d at 658.
[34] *Roberts v. Rose,* 37 S.W.3d 31, 33 (Tex. App. — San Antonio 2000, no pet.).
[35] *Johnson v.. Fourth Court of Appeals,* 700 S.W.2d 916, 918 (Tex.1985).
[36] *Lawrence v. Kohl,* 853 S.W.2d 697, 700 (Tex.App. — Houston [1st Dist.] 1993, no writ).
[37] *Wetherholt v. Mercado Mexico Cafe,* 844 S.W.2d 806, 808 (Tex.App. — Eastland 1992, no writ) (emphasis in original).

excessive and should only be exercised to the extent of satisfying their initial purpose, usually of discouraging further abuse.[38]

Using the two-pronged analysis, Texas has upheld sanctions in that the "punishment fits the crime."[39] In a corporate suit between a company president and two people alleged of misuse of company funds among other unprofessional behavior, the court first found bad faith on part of the company president Luxenberg in his "callous disregard" of the mediation process.[40] The court found a direct relationship between Luxenberg's pleadings and the sanction against him, and he was found to be the only possible responsible party.[41] Concerning the excessiveness of the sanctions, the court found the order not to be severe in that several lesser orders were given to Luxenberg without response.[42]

Courts have also upheld sanctions imposed pursuant to the broad power to sanction.[43] In a suit against several attorneys who were found to have violated local rules of Nueces County concerning random assignment of cases, the judge imposed $10,000 sanctions to each attorney.[44] Recognizing the "inherent power" of a court to sanction, the Supreme Court of Texas found that the lower court had not overstepped its bounds.[45] This power is not unlimited, however, and constitutional considerations of due process must be kept in mind.[46] However, the Court found no due process violation because the attorneys were fully aware of the local system and intentionally tried to avoid it.[47]

More recently, courts have furthered the broad power of trial courts to impose sanctions for failing to appear at court-ordered mediation. In a 2000 suit over an unpaid debt, the court again found the sanction appropriate under the two-pronged analysis.[48] Taking the second prong first, the court found only attorney Roberts to be responsible for the party missing mediation, because all other evidence demonstrated an eager client who followed all advice of his attorney but was not informed of the mediation.[49] The court did not make mention of the direct relationship prong, establishing that it is very difficult to defeat a sanction on this basis, thereby furthering the broad discretionary power of trial courts.[50] Finally, the court ruled that the sanction was not excessive in that it was not outrageous and would prevent further attorney abuse, so the court was also very deferential to the trial court in terms of the appropriate level of sanction.[51] In the same year, the court took the "inherent powers" a step further in that these powers are a threshold for considering the two-pronged analysis.[52] The court wrote, "Because we overrule appellant's first issue on the basis that the trial court did not abuse the discretion it has pursuant to its inherent powers, we need not and do not address whether the sanctions imposed would have been appropriate."[53] In 2006, a Texas court reinforced the power of the trial court and gave their decision a high presumption of validity.[54] Although the court recognized the aforementioned pronged tests and the need for sanctions to not be severe, there were no cites to the record that the trial court abused its discretion, so the trial court's decision was assumed to be legitimate.[55]

Though it does not seem to be commonplace, a sanction that is deemed too severe will be overruled.[56] In conjunction with the severity, a court "must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance."[57] Because the trial court did not make any such considerations

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[38] *Luxenberg v. Marshall,* 835 S.W.2d 136, 141 (Tex.App. — Dallas 1992, no writ).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *In re Bennett,* 960 S.W.2d 35, 40 (Tex. 1997).
[44] *Id.* at 37.
[45] *Id.* at 40.
[46] *Id.*
[47] *Id.*
[48] *Roberts*, 37 S.W.3d at 33.
[49] *Id*.
[50] *See id.*
[51] *Id.*
[52] *Garcia v. Mireles*, 14 S.W.3d 839, 843 (Tex. App. – Amarillo 2000, no pet.).
[53] *Id.*
[54] *Bostow v. Bank of Am.*, 14-04-00256-CV, 2006 WL 89446 (Tex. App. — Hous. [14th Dist.] Jan. 17, 2006, no pet.).
[55] *Id.*
[56] *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991).
[57] *Id.* at 917.

and immediately imposed the most devastating sanction possible, that sanction was deemed too severe and could not be imposed.[58] [59] Also seemingly rare, there have been cases when the trial court was deemed to be not acting pursuant to its discretion because it did not act in relation to the appropriate guiding rules.

G. Who Pays for the Mediation Fees?

Section 154.054 of the Texas ADR Act discusses compensation of impartial third parties. It allows the court to set a reasonable fee for the services of an impartial third party appointed by the court. Unless the parties agree to a different method of payment, the court shall tax the fee for services of the impartial third party as costs of suit. The parties can also agree to split the fees other than 50/50. If a court denies an objection that the client is unable to pay for mediation, a mandamus proceeding alleging that the court abused its discretion may be filed for.[60]

III. What Happens During Mediation?

Once it is decided that mediation will be taking place, the first consideration is how the mediation will be structured. Along with this structure, it is important to consider within the framework whether the parties mediating can trust in the confidentiality of the process and whether the parties must mediate in good faith and what happens if bad faith plays a role. Next, this section will investigate mediation in regard to government agencies. Finally, a prescription or recipe for successful mediation will be laid out.

A. How is a Mediation Structured?

Mediations follow a fairly set formula. To begin, there is a joint session, where parties will meet with the mediator and learn the ground rules and goals of the session. Following the beginning setup, the parties will make their opening statements directed to the other party, not to the mediator. If the parties are hostile toward one another, only attorneys should be present at this meeting rather than having the clients attend as well. The brunt of mediation, then, will be private caucuses, in which the mediator works with each party separately to gather information and realistically make efforts toward settlement and then negotiation. During the negotiation process, if impasse is reached, the mediator will either bring the parties together in a joint session or meet further on an individual basis to make it as clear as possible that settlement is the best outcome and will do all in her power to reach it. If settlement is reached, an agreement will first be orally summarized by the mediator then written and signed by the attorneys. If settlement is not reached, the mediator may give the parties time to come mediate at a later date.[61]

B. Is the Mediation Confidential?

The confidentiality of mediation communications is critical for a successful mediation. Participants' faith in the system will be fostered through the creation of enforceable confidentiality rights and privileges. Once participants trust the process and the mediator, maintaining a secure and successful environment in which mediation can flourish is a relatively simple task.

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[58] *Id.*

[59] Nine years later, the same consideration and ruling was made in *Wal-Mart Stores, Inc. v. Butler* in the context of discovery sanctions cases

[60] Tex. Civ. Prac. & Rem. Code Ann. § 154.054 (Vernon 2005).

[61] For a more in-depth look, please see Ken B. Scott and Cody W. Wilson, *Questions Client Have about Mediation: What Happens in Mediation?* Disputing, (July 19, 2010), available at: http://www.karlbayer.com/blog/?p=10011

Mediation

The Texas ADR Act, particularly two provisions taken in conjunction, provides for very broad confidentiality in mediation procedures. Section 154.073 states in relevant portion that:

> (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
>
> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.
>
> (c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.
>
> (d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.
>
> (e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.[62]

Thus, the Texas ADR Act provides for a great deal of confidentiality except for a few excepted occasions. The broad scope is further reinforced in another provision of the act, wherein it is declared, "Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute," and, "Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court."[63]

Given the broad nature of these provisions, a problem that arises is a lack of uniformity or certainty in their interpretation. Although the Texas confidentiality rules are not perfect, Texas has for years taken a stance against adopting the Uniform Mediation Act (UMA), which has been adopted or at least introduced or addressed in nearly half of the United States. The UMA takes quite the opposite approach in terms of confidentiality; while the Texas ADR Act begins with a presumption of confidentiality until a valid exception is raised, the UMA Section 8 says, "Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State."[64] Of course, either act has its positive notes and drawbacks. One of the main purposes for confidentiality of mediation proceedings is that those participating in the mediation trust both the mediator and in the process itself, thereby promoting efficacy. With a more limited stance on confidentiality, the UMA may cause many to harbor more doubt in relation to mediation, thereby acting as a detriment to the underlying cause. On the other hand, the framers of the UMA have recognized the value uniformity across states could have on mediation in America, which would ease doubts in mediation from a different, horizontal choice-of-law type of angle. The problem is that the numerous exceptions and seemingly complex structure of the UMA do not make it attractive in comparison to the Texas ADR Act.

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[62] Tex. Civ. Prac. & Rem. Code Ann. § 154.073 (Vernon 2005).
[63] Tex. Civ. Prac. & Rem. Code Ann. § 154.053(b), (c) (Vernon 2005).
[64] § 8. Confidentiality., Unif.Med. Act § 8.

Even the most recent Texas cases have shown at least a consistency within the state of Texas in following the general outline of the Texas ADR Act provisions. In 2010, an order compelling discovery and attorney testimony were said to have violated the confidentiality requirements of the act.[65] Following a settlement agreement reached in mediation between H. Glenn Gunter and the Empire Pipeline Corporation over which there were attempts to rescind or invoke from the respective parties, Harris, attorney for Empire Pipeline, was informed that he would be required to produce various discovery documents.[66] The court of appeals in the Fifth Circuit determined, "[A]ll such discovery is barred by sections 154.073(a) and 154.073(b) of the civil practice and remedies code…[and] the trial court abused its discretion by ordering the testimony and production of documents at issue."[67] At the very least, then, recent jurisprudence reveals courts in an uncontroversial manner adhering to the Texas ADR Act.

Although the limited text concerning exceptions to the broad rule of confidentiality within the ADA Act, courts have made the right moves in interpreting the possibly enigmatic provisions. Perhaps it makes the most logical sense to consider the portions of §154.073 in order. In subsection (a), "communication relating to the *subject matter* of" mediation is protected as confidential.[68] (emphasis added) So the question arising from the language is whether unrelated communication during mediation is also confidential and how this would gel with subsection (b)'s assurance of a confidential record at mediation.[69] Taking these two provisions together, a Texas court has found no confidentiality when the material sought did not relate to the substantive issues of the mediation.[70] In a case stemming from an automobile accident, the court required an employee of an insurance company holding the policy of one of the accident's victims to attend mediation.[71] The lower court ordered that the deposition of this employee should be limited to "the sole issue of whether Paul Daley left the mediation session in this case prior to its conclusion, and whether he did so with or without the mediator's permission."[72] Daley argued that he was protected under the confidentiality guaranteed in the Texas ADR Act, but the court ruled, "Here, the matter in contention concerns only the procedural issue of attendance, not the subject matter of the dispute being mediated. Therefore, we hold the trial court's order is not in violation of the Alternate Dispute Resolution statute."[73]

Courts have also done some work in clarifying the language of Section 154.073(c). In a dispute concerning a family business, defendants argued that, because the plaintiff brought suit concerning an agreement forged through mediation, the mediator should have to testify pursuant to that provision of the Texas ADR Act.[74] The court succinctly dismissed the defendant's argument by explaining, "§ 154.073(c) provides that oral communications and written materials that are otherwise admissible or discoverable are not made inadmissible or non-discoverable solely because they have been uttered or disseminated in an alternative dispute resolution proceeding. To interpret § 154.073(c) as do defendants would unjustifiably create an exception to the confidentiality proviso of § 154.073(b) that is not expressly set out in the Texas ADR Act and that should not be impliedly recognized in the face of the Act's pellucid confidentiality requirements."[75] Also excepted from confidentiality under subsection (c) is an example of videotaping for the purposes of mediation.[76] Where Learjet was sued by Raytheon in a breach of contract claim, Learjet videotaped the statements of several of its employees to be played during mediation, but the mediation failed.[77] Raytheon requested that the tapes be played during trial, but Learjet insisted that the tapes were not discoverable under confidentiality and were subject to the attorney-client privilege.[78] Combining the language of § 154.073(c) allowing for a confidentiality exception in this instance as well as its finding that the attorney-client privilege was not applicable, the court concluded that "the videotapes constitute discoverable material, that the mediation activities did not provide a blanket protection for all such material, and that this particular material is not protected by that privilege."[79]

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[65] *In re Empire Pipeline Corp.*, 323 S.W.3d 308, 315 (Tex. App. — Dallas 2010, no pet.).
[66] *Id.* at 309-10.
[67] *Id.* at 314.
[68] Tex. Civ. Prac. & Rem. Code Ann. § 154.073(a) (Vernon 2005).
[69] *See* Tex. Civ. Prac. & Rem. Code Ann. § 154.073(b) (Vernon 2005).
[70] *In re Daley*, 29 S.W.3d 915, 918 (Tex. App. — Beaumont 2000, no pet.).
[71] *Id.* at 917.
[72] *Id.*
[73] *Id.* at 918.
[74] *Smith v. Smith*, 154 F.R.D. 661, 669 (N.D. Tex. 1994).
[75] *Id.*
[76] *In re Learjet Inc.*, 59 S.W.3d 842, 845 (Tex. App. – Texarkana 2001, no pet.).
[77] *Id.*
[78] *Id.*
[79] *Id.*

Perhaps the most cited case in the mediation confidentiality jurisprudence of Texas resulted from, in part, an interpretation of subsection (e).[80] *Avary* involved a wrongful death action and court-ordered mediation subsequent.[81] The court, being careful to note that the circumstances of the case were very limited, concluded, "[W]here a claim is based upon a new and independent tort committed in the course of the mediation proceedings, and that tort encompasses a duty to disclose, section 154.073 does not bar discovery of the claim where the trial judge finds in light of the "facts, circumstances, and context," disclosure is warranted."[82] Because there was a new tort being forged here concerning a fiduciary relationship that required disclosure, there was a collision between the disclosure requirement and the Texas ADR Act so that subsection (e) came into play.[83]

Thus, the cases do show courts adhering to the intention of the Texas ADR Act in that there is a general presumption of confidentiality of communication from mediation and only a few exceptions exist for this confidentiality, though they will be respected in the rare circumstances in which they arise. Although the choice would remain to switch to the UMA in the interest of state-to-state uniformity in mediation confidentiality, the cases show that Texas does have a workable system that promotes confidentiality and trust in the mediation process from lawyers and non-lawyer participants alike.

C. Is there a Requirement to Mediate in Good Faith?

Unlike many other jurisdictions, the Texas statutes are silent on the good faith issue. Perhaps the most pertinent provision within chapter 154 of the Texas Civil Practices and Remedies Code is found at §154.002, stating, "It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through *voluntary* settlement procedures"[84] (emphasis added). This "voluntary" requirement implies no good faith requirement, as mandating good faith places a pressure on those involved in the mediation that could surpass a truly voluntary process. Although a good faith requirement would add to the perceived legitimacy of the mediation process and act as a deterrent to unwanted conduct, several other concerns would arise and provide insight why the idea has not been adopted in Texas. Putting the focus on the conduct of parties in mediation acts as a distraction to the main goal underlying the process, encourages frivolous claims over the good faith or lack thereof, and overall could discourage participation in mediation altogether.

The case history in Texas shows a firm rejection of a good faith requirement. Shortly after the passage of the Texas ADR Act, the Texas Court of Appeals in Houston ruled void a mediation referral requiring parties to negotiate in good faith because "[a] court cannot force the disputants to peaceably resolve their differences, but it can compel them to sit down with each other."[85] This has been the norm within the Texas courts, as a Fort Worth court described, "An order requiring 'good faith' negotiation does not comport with the voluntary nature of the mediation process and [is] void."[86] Because the trial court in that Fort Worth case made an order that was void because of its good faith requirement, the court could not make further inquiry as to whether that court order was adhered to.[87]

One exception that could arise concerning good faith deals with filing an objection to mediation, which must be done within ten days of the court ordering a mediation in order to have effect. A Texas court has approved a sanction for a failure to mediate in good faith where the Texas Department of Transportation did not expressly object.[88] In closing, this court declared, "We find that it is not an abuse of discretion for a trial court to assess costs when a party does not file a written objection to a court's order to mediate, but nevertheless refuses to mediate in good faith."[89] Given the chance to continue down this path, however, the court of appeals in Austin rejected this

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[80] *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 786 (Tex. App. — Dallas 2002, pet. denied).
[81] *Id.*
[82] *Id.* at 803.
[83] *Id.*
[84] Tex. Civ. Prac. & Rem. Code Ann. § 154.002 (Vernon 2005).
[85] *Decker v. Lindsay*, 824 S.W.2d 247, 250 (Tex. App. — Hous. [1st Dist.] 1992, no writ).
[86] *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 452 (Tex. App. — Fort Worth 2000, no pet.).
[87] *Id.*
[88] *Texas Dept. of Transp. v. Pirtle*, 977 S.W.2d 657, 658 (Tex. App.--Fort Worth 1998, pet. denied).
[89] *Id.*

mode of thought and declined to follow *Pirtle*.[90] In this case, the Texas Parks and Wildlife Department did object to mediation according to proper procedure in a suit where park guest Davis was harmed as the result of a bench collapsing underneath him, but the court overruled the objection.[91] Unlike *Pirtle*, though, the Department did attend mediation and made an offer, so the Department's complaint was sustained "as to the trial court's award of attorney's fees as a sanction for the Department's alleged failure to negotiate in good faith."[92] Given the chance to make exceptions to the lack of a good faith requirement commonplace, Texas courts have not followed that path.

The Texas tendency to not require good faith is backed by several sound policy justifications. Requiring good faith would necessitate more judicial intrusion into the mediation process than is currently taking place, thus threatening the fundamental rights of the parties within mediation. In cases when the good faith requirement would come into collision with the confidentiality guarantees so that confidentiality would have to be breached in order to analyze what happened during mediation for good faith or lack thereof, the parties would be greatly hindered. This would almost certainly degrade confidence in mediation and discourage mediation altogether. Because the main goal of mediation should be to resolve the parties' dispute, a good faith requirement may act as a distraction to the main goal and sidetrack what is really supposed to be achieved. Finally, a good faith requirement may open up the floodgates to frivolous claims of a lack of good faith, further straining the purposes of mediation and hindering the process.[93]

D. What if Someone Acts in Bad Faith?

In 2009, the Texas Legislature signed into law Texas House Bill 2256. The bill provides a procedure for mediation of out-of-network health benefit claim disputes. The law now gives patients the option to mediate when they are "balance-billed" by their insurance company for services provided by out-of-network facility-based physicians like radiologists, pathologists, and neonatologists. Balance billing occurs when a physician bills a patient for the difference between what the physician charges for a service and what an insurer pays the physician for that service. When a physician is not in-network for an insurer, there is no contracted payment rate that the physician has agreed to accept from the insurer so the insurer can pay what is deemed appropriate and the patient is billed for the difference. [94]

Texas HB 2256, however, requires the mediator to report "bad faith" mediation to the insurance commissioner or the Texas Medical Board. Under the statute, "bad faith" mediation means: failing to participate in the mediation; failing to provide information the mediator believes is necessary to facilitate an agreement; or failing to designate a representative participating in the mediation with full authority to enter into any mediated agreement. [95]

This reporting provision has not been well received by mediation commentators. Susan Schultz, Program Director at the Center for Public Policy Dispute Resolution has stated,

> According to this section, the mediator will need to evaluate whether a party has engaged in "bad faith mediation" and, if so, to report the conduct to the appropriate state agency for the imposition of an administrative penalty. For mediators, this requirement is bad news with alarming consequences. Let's look for example at two tenets of mediator conduct: impartiality and confidentiality. As the mediator is weighing (role more often associated with decision-maker) whether one party is engaging in bad faith mediation, how is that affecting the mediator's

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[90] *Texas Parks & Wildlife Dept. v. Davis*, 988 S.W.2d 370, 375 (Tex. App. — Austin 1999, no pet.).
[91] *Id.*
[92] *Id.*
[93] *See* Samara Zimmerman, *Judges Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in "Bad Faith" Should be Reevaluated in Court-Ordered Mandatory Mediation*, available at http://cojcr.org/vol11no1/353-384.pdf
[94] *See* Holly Hayes, *Texas HB Makes Possible a New Mediation Procedure for 'Balance Billing,'* Disputing (June 29, 2009), http://www.karlbayer.com/blog/?p=2273
[95] *See* Holly Hayes, *Texas House Bill 2256 and Bad Faith Mediation in 'Balance Billing,'* Disputing (August 5, 2009), http://www.karlbayer.com/blog/?p=4075

> impartiality? How can the mediator report bad faith mediation without breaching confidentiality?[96]

It is too early to know the implications of HB 2256's "bad faith" provisions in mediation case law in Texas. The bill, designed to solve the "balance billing" issue, in practice it will conflict with mediation impartiality and confidentiality, which goes against the spirit of the Texas ADR Act.

E. Can I Mediate with Governmental Entities?

When considering the Texas ADR Act and mediation within the private sector, it should be taken into account how this applies to governmental entities. The Texas Legislature etched out the translation between the private and public sector first through the Governmental Dispute Resolution Act (GDR Act) in 1997. It bears repeating here:

> (a) Each governmental body may develop and use alternative dispute resolution procedures. Alternative dispute resolution procedures developed and used by a governmental body must be consistent with Chapter 154, Civil Practice and Remedies Code.
>
> (b) Alternative dispute resolution procedures developed and used by a state agency also must be consistent with the administrative procedure law, Chapter 2001. The State Office of Administrative Hearings may issue model guidelines for the use of alternative dispute resolution procedures by state agencies.
>
> (c) If a state agency that is subject to Chapter 2001 adopts an alternative dispute resolution procedure, it may do so by rule.[97]

Generally, then, the GDR Act encourages mediation along with the other alternative dispute resolution measures as enumerated in the Texas ADR Act. Many provisions, including those on the requirements of an impartial third party, are directly incorporated from the Texas ADR Act into the GDR Act.[98] Sovereign immunity is not waived in regard to mediation with governmental entities.[99] Confidentiality is limited slightly from the Texas ADR Act to the extent that final agreements with governmental agencies are not per se confidential just because they result from mediation.[100]

Some Texas governmental entities have developed their own procedures concerning alternative dispute resolution, which warrants a discussion of the State Office of Administrative Hearings (SOAH), an independent agency hearing mediations from various government agencies. The SOAH guidelines for mediation are as follows:

> (a) Requesting mediation.
>
> (1) A party may request mediation in writing, or orally during a prehearing conference or hearing.
>
> (2) A request for mediation must be based on a good faith belief that the parties may be able to resolve all or a portion of their dispute in mediation.
>
> (3) A party may object to a request for mediation orally or in writing.
>
> (4) Mediation may not be used as a delay or discovery tactic.
>
> (5) Mediation does not stay an existing procedural schedule unless ordered by the presiding judge.
>
> (6) A judge may refer a case to mediation without agreement of the parties.
>
> (b) Evaluation.
>
> (1) A party may request, or the judge may order, that a mediator evaluate whether a case is appropriate for mediation.

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[96] Susan Schultz, *Bad Faith Mediation; Bad News for Mediators*, Texas Mediator (Winter 2009).
[97] Tex. Gov't Code Ann. § 2009.051 (Vernon 2005).
[98] *See* Tex. Gov't Code Ann. § 2009 (Vernon 2005).
[99] *Id.* at § 2009.005.
[100] *Id.* at § 2009.054.

(2) The mediator evaluating the case may conduct confidential, *ex parte* communications with the parties during the course of the evaluation.

(3) The mediator will make a written recommendation to the judge. The written recommendation will be served on all parties.

(c) Referral to mediation.

(1) If a request for mediation is granted, the judge will refer the case to SOAH's ADR Team Leader for assignment of a mediator, unless the parties have notified the judge that they intend to retain and pay a private mediator qualified in accordance with Tex. Civ. Prac. & Rem. Code Chapter 154.

(2) The referral order may include requirements to facilitate the mediation.

(d) Assignment of SOAH mediators.

(1) SOAH's ADR Team Leader will assign a qualified judge or judges to serve as mediator or co-mediators.

(2) If either party promptly and with good cause objects to an appointed mediator, SOAH will appoint another qualified judge to serve as mediator.

(3) The appointed mediator will not serve as presiding judge in the case.

(e) Use of non-SOAH mediators.

(1) Parties who agree to retain a non-SOAH qualified private mediator shall notify the presiding judge within ten days of the mediator's retention.

(A) The notice must include the name, address, and telephone number of the non-SOAH mediator selected; a statement that the parties have entered into an agreement with the mediator regarding the mediator's rate and method of compensation; and an affirmation that the mediator is qualified to serve according to Tex. Civ. Prac. & Rem. Code Chapter 154.

(B) The judge shall issue an order specifying the date by which the mediation must be completed.

(2) When a judge refers a TCEQ case to mediation, the mediation will be conducted by a TCEQ mediator unless a party or TCEQ's Senior Mediator requests that SOAH conduct the mediation. TCEQ enforcement cases shall not be referred to mediation except on request of the Executive Director's representative.

(f) Confidentiality of mediation.

(1) All communications in a mediation are confidential and subject to the provisions of the Governmental Dispute Resolution Act, Tex. Gov't Code §2009.054 and Tex. R. Evid. 408.

(2) The mediator shall not communicate about the mediation with the presiding judge except to disclose in a written report, copied to all parties, whether the parties attended the mediation, whether the matter settled, and any other stipulations or matters the parties agree to be reported.

(3) The mediator shall not be required to testify about communications that occur in a mediation or to produce documents submitted to the mediator.

(g) Agreements reached in mediation.

(1) Agreements reached by the parties in mediation shall be reduced to writing and signed by the parties before the end of the mediation, if possible.

(2) Whether an agreement signed by a governmental entity is subject to disclosure shall be determined in accordance with applicable law.

(h) Limits on mediator's authority.

(1) A mediator has no authority to order the parties to settle their dispute.

(2) A mediator has no authority to issue orders in a case referred to mediation. Deadlines in the case may be extended only by order of the presiding judge.

(i) This section does not limit the parties' ability to settle cases without mediation.[101]

[101] 1 Tex. Admin. Code § 155.351 (Vernon 2008).

F. Is There a Recipe for a Successful Mediation?

The success of mediation is mainly determined by the parties. It is their process and they are in control of the ultimate result. While there is no guarantee that any mediation will succeed, there are some common elements found in successful mediations:

- The mediator selected by the parties had the skills, knowledge and style (i.e., evaluative or facilitative) that fit the dispute and personalities involved in the mediation.
- People with knowledge of the dispute and others with authority to settle on each side's behalf were present at the mediation.
- The parties exchanged enough information to be able to understand the positions and perspectives of the other.
- The attorneys and the party representatives were well prepared to mediate.
- The parties identified their respective needs and interests and formulated proposals that would satisfy the interests of each participant.

The mediator, the parties and their attorneys were committed to making the mediation work. They did not give up on the process too early and were willing to explore all available avenues and options.[102]

IV. What Happens After Mediation?

Although a court can mandate mediation, settlement determinations are supposed to rest with the parties.[103] If the parties to the injury suit can come together on a settlement, the mediator or the attorneys drafts a short settlement agreement and the injury claim is finalized usually within 30 days following mediation. If however, the parties are unable to come together on a fair settlement, the case will generally go to trial. This section first addresses the enforceability of settlements reached through mediation. Next, the possible complexity of insurance claims being involved and the *Stowers* doctrine will be discussed. Finally, a look will be taken at mediation with respect to legal malpractice.

A. Are Mediated Settlement Agreements Enforceable?

The background rule for enforceability of mediated settlement agreements ("MSA"), as described in the Texas ADR Act, provides that the settlement agreement is enforceable as any other contract, and the court may incorporate the terms of the settlement agreement into the court's final decree.[104] Although the settlement agreement arises from the suit, enforcement of a mediation agreement, even if reached through court-ordered mediation, must be determined in a breach-of-contract cause of action under normal rules of pleading and evidence.[105] Thus, any mediated settlement is enforceable as a contract.[106]

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[102] Ken B. Scott and Cody W. Wilson, *Questions Client Have about Mediation: Is there a Recipe for a Successful Mediation?* Disputing, (July 26, 2010), http://www.karlbayer.com/blog/?p=10007
[103] *Decker v. Lindsay*, 824 S.W.2d 247, 250 (Tex. App. — Hous. [1st Dist.] 1992, no writ).
[104] Tex. Civ. Prac. & Rem. Code Ann. § 154.071 (Vernon 2005).
[105] *Cadle Co. v. Castle*, 913 S.W.2d 627 (Tex. App. – Dallas 1995, writ denied).
[106] *Hardman v. Dault*, 2 S.W.2d 378, 380 (Tex. App. – San Antonio 1999, no pet.) (citing C.P. & R.C. § 154.071(a)).

A wrinkle is added in to this provision of the Texas ADR Act when reconciling with Rule 11 of the Texas Rules of Civil Procedure, which states, "Unless otherwise provided in these rules, no agreement between 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."[107] Though Rule 11 has antiquated roots in avoiding litigation, the recent proliferation of mediation has created a conflict between a largely unchanged rule from over a century ago being applied to a relatively new practice.[108] In *Kennedy*, the court made a first order determination that settlement agreements must comply with Rule 11 regardless of Rule 11 originating from before 1900.[109] Eleven years after the *Kennedy* decision, however, the Supreme Court of Texas was able to finagle a way around the constraints of the *Kennedy* court through semantics concerning the filing requirement of Rule 11.[110] The agreement in *Padilla* had been signed as required by Rule 11, but the Court did not find important *when* the agreement was filed, thereby minimizing the strictness of Rule 11.[111] Following *Padilla*, then, mediation settlement agreements should comply with Rule 11's three requirements to be valid, but there is wiggle room within the application.[112]

With this background on Rule 11, some case law can be considered. Recent case law shows instances of both upholding and striking down mediated settlement agreements for various reasons. In *Castano*, the San Felipe Company ran water through a ditch on Castano's land, leading to a cause of action for trespass as well as claims for emotional distress.[113] After San Felipe altered the mediation agreement and Castano did not agree, San Felipe filed and was granted a summary judgment motion against Castano for breaching the settlement agreement.[114] The higher court dismissed the issue fairly quickly; noting that mediated settlement agreements are to be enforced as contracts, the court found there was a valid agreement signed by both sides and so Castano was bound by said agreement.[115]

Mediated settlement agreements are not the final word of authority and can be superseded by other means.[116] Guaranty Life Insurance Company filed suit against Pickell, an insurance salesman, for tortuous interference stemming from alleged purposeful misstatements Pickell made to policy holders.[117] Although a mediated settlement agreement seemed to have been reached, certain documents were not returned to Guaranty, leading to a default judgment being entered against Pickell at trial when he did not appear at trial relying on the apparent settlement.[118] Noting its sympathy toward Pickell's plight, the court still determined that Pickell was required to be at trial in spite of the perceived mediation agreement.[119] "Although most judges probably would have inquired further and attempted to contact Mr. Pickell to find out why he was not at the pre-trial conference or trial, or to inquire further about the settlement," the court admitted, "a trial court is not *required* to take such steps when a litigant fails to appear for the pre-trial conference or trial."[120] A recent mass tort litigation case is similar in that, although an agreement pursuant to Rule 11 seemed to be reached, it did not designate a specific dollar amount, meaning that defendants were not bound to any mediation settlement agreement.[121]

B. What Happens if There is an Insurance Claim Involved?

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[107] Tex. R. Civ. P. 11.
[108] *See Kennedy v. Hyde*, 682 S.W.2d 525, 526 (Tex. 1984).
[109] *Id.* at 530.
[110] *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).
[111] *Id.*
[112] *See id.*
[113] *Castano v. San Felipe Agric., Mfg., & Irr. Co*., 147 S.W.3d 444, 446 (Tex. App. – San Antonio 2004, no pet.).
[114] *Id.*
[115] *Id.* at 451.
[116] *Pickell v. Guar. Nat. Life Ins. Co.,* 917 S.W.2d 439, 440 (Tex. App.--Hous. [14th Dist.] 1996, no writ).
[117] *Id.*
[118] *Id.*
[119] *Id.* at 443.
[120] *Id.*
[121] *Authorlee v. Tuboscope Vetco Intern., Inc*., 274 S.W.3d 111, 121 (Tex. App. — Hous. [1st Dist.] 2008, pet. denied).

Mediation

Liability insurance policies often include ADR clauses, including: (1) Binding arbitration only; (2) Mediation and, if mediation is unsuccessful, then binding arbitration; (3) Election between mediation and arbitration, with insured having veto power over the insurer's selection; and (4) Mediation or binding arbitration with a waiting period before suit is filed if mediation is selected. [122]

Section 541.161 of the Texas Insurance Code sets out the mediation requirements as follows:

> (a) A party may, not later than the 90th day after the date a pleading seeking relief under this subchapter is served, file a motion to compel mediation of the dispute in the manner provided by this section.
>
> (b) The court shall, not later than the 30th day after the date a motion under this section is filed, sign an order setting the time and place of the mediation.
>
> (c) The court shall appoint a mediator if the parties do not agree on a mediator.
>
> (d) The mediation must be held not later than the 30th day after the date the order is signed, unless:
>
> (1) the parties agree otherwise; or
> (2) the court determines that additional time not to exceed 30 days is warranted.
>
> (e) Each party who has appeared in the action, except as agreed to by all parties who have appeared, shall:
>
> (1) participate in the mediation; and
> (2) except as provided by Subsection (f), share the mediation fee.
>
> (f) A party may not compel mediation under this section if the amount of actual damages claimed is less than $15,000 unless the party seeking to compel mediation agrees to pay the costs of the mediation. [123]

In Texas, the landmark decision recognizing an insurer's duty to settle a third-party liability claim is *G.A. Stowers Furniture Co. v. American Indemnity Co*.[124] In *Stowers,* the court held that when a primary liability insurance carrier defends an insured person against a covered claim made by a third party, the primary insurer has a common law duty to exercise reasonable care in responding to a settlement demand that is within the policy's limits. Thus, if an insurance company that is given the opportunity to settle within its policy limits fails to do so, it could potentially become responsible not only for any excess judgment, but also liable to their own insured for breach of the duty of good faith and fair dealing, D.T.P.A., claims under the Texas Insurance Code another claims. This duty of reasonable care is known as the *Stowers* doctrine.

The Texas Supreme Court further clarified the *Stowers* duty in *American Physicians Insurance Exchange v. Garcia.* [125] In *Garcia*, the court went on to explained that the *Stowers* doctrine is activated when a third party seeking to impose liability on an insured makes a demand to settle the claims and the following circumstances exists:

> (1) the claim against the insured is within the scope of the policy's coverage;
> (2) the settlement demand is within policy limits or a stated sum of money within the policy's limits;
> (3) the proposed settlement is one that will result in a full release of the insured; and
> (4) the terms of the settlement demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. [126]

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[122] Ernest Martin, Jr, *Hot Tips on Managing the Liability Crisis Through Insurance,* Haynes and Boone, LLP (June 24, 2004), http://www.haynesboone.com/files/Publication/9991fc72-dac1-4979-a770-3f17641511f6/Presentation/PublicationAttachment/9a1d6487-5f35-4f1e-8b42-3e2c49e90853/E%20Martin-%20Hot%20Tips.pdf

[123] Tex. Ins. Code Ann. § 541.161 (Vernon 2005).

[124] 15 S.W.2d 544, 544-46 (Comm'n App. 1929, holding approved).

[125] *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994). (when the attorney incorrectly thought several policies could stack and therefore made an offer which was not actually within the non-stacked policy limits (but would have been within the stacked policy limits), the insurance company is not *Stowerized*.)

[126] *Id*. at 848-49*; see also* Trinity Universal Ins. Co. v. Bleeker, 966 S.W.2d 489 (Tex. 1998).

Two recent Texas cases reinforce the use of the *Stowers* doctrine as prevalent practice. After a 2001 automobile accident with Francisco Rangel, Edward McDonald was admitted to Memorial Hermann Hosptial, and the hospital filed a "Notice of Hospital Lien" saying, "The name of the person alleged to be liable for damages arising from the injury is any and all responsible parties. The lien is for the amount of the hospital charges for services provided to the injured individual during the first 100 days of the injured individual's hospitalization."[127] McDonald's lawyer sent Rangel's insurance company a notice wherein it was explicitly stated that this was to be a *Stowers* offer.[128] As the deadline in the notice passed, McDonald's lawyer let Rangel's insurance company know that he felt the *Stowers* duty had thereby been breached and settlement efforts had terminated.[129] The case went to trial, where both parties filed motions for summary judgment.[130] The court of appeals found the "settlement demand insufficient to trigger a *Stowers* duty because it did not include a release of the lien, and, therefore, an ordinarily prudent insurer would not accept the settlement demand. Specifically, the court found that the demand did not explicitly offer any release of potential claims against Rangel."[131] "[T]he court rejected McDonald's contention that the Insurer impliedly accepted a *Stowers* duty here by not discussing the lien's release with McDonald in its settlement discussions. Instead, the court reasoned that the Insurer still could have required the release as part of any later formal settlement."[132]

A different court recently answered "the question as to how to *Stowerize* an excess carrier—although doing so requires the assistance of the primary carrier in the first instance."[133] After a truck collision on Highway 287, defendants filed suit against the other driver as well as the truck company of the other driver, alleging vicarious liability.[134] The defendants made a settlement offer to the other driver with no mention of releasing claims against the company, and later, the insurance companies involved moved for summary judgment arguing a *Stowers* duty to accept the settlement that had not been accepted.[135] After outlining the *Stowers* doctrine, the court "found that an insurer may enter into a reasonable settlement with one of several claimants even though it would exhaust or diminish the money available to satisfy the other claims."[136] Also, "a valid *Stowers* demand mandates that an insurer settle on behalf of a single insured even if it exhausts the policy limits and thereby exposing the remaining insureds, so this result prevents an insurer from settling on behalf of one insured and having to choose between continuing to defend a non-settling insured beyond policy limits or facing liability for treating the nonsettling insureds unequally."[137]

The *Stowers* doctrine intersects with mediation law in several issues. First, if there is not a judgment, there cannot be a *Stowers* cause of action. Because a "*Stowers* cause of action does not accrue until the judgment in the underlying case becomes final." Therefore, there cannot be a *Stowers* cause of action if the case is settled in mediation before a *Stowers* demand is made. Another issue is the effect of a *Stowers* demand at the time of the mediation. Since any settlement which does not exceed the policy limits would automatically bar any future contractual claim, as a prerequisite is a judgment in excess of the policy limits, settlement at mediation almost always results in making a *Stowers* issue moot. Lastly, we should consider the effect of mediation negotiations on the *Stowers* demand. If a demand is made during mediation, and such demand is less than the policy limits, and the case does not settle during mediation, then such demand would seem to have no effect in a future *Stowers* claims. The reason is that mediation confidentiality would not allow mediation negotiations to be used as evidence in court.[138]

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[127] *McDonald v. Home State County Mut. Ins. Co.*, 01-09-00838-CV, 2011 WL 1103116 (Tex. App. — Hous. [1st Dist.] Mar. 24, 2011, no pet.).
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Lee H. Shidlofsky, *Insurance Law Newsletter*. Vol. 5 Issue 1. May 27, 2011, at 2.
[132] *Id.*
[133] *Id.*
[134] *Pride Transp. v. Cont'l Cas. Co.*, 2011 WL 1197306 (N.D. Tex. Mar. 31, 2011).
[135] *Id.*
[136] Shidlofsky, at 4.
[137] *Id.*
[138] Steven C. Laird, *New Mediation Techniques*, Texas Trial Lawyers Association (September 17-18, 1998), http://www.texlawyers.com/law_firm/legal_articles/new_mediation_techniques.html

C. Mediation and Legal Malpractice

Only a few cases have come out of the last decade concerning legal malpractice as relating to mediation. After being unsatisfied with the work of the two attorneys he hired in a divorce proceeding, Lehrer sued these two for malpractice.[139] This subsequent suit went to mediation, but Lehrer again unsatisfied brought further suit against the mediator and the attorney he hired to bring suit against the first two attorneys.[140] Summary judgment was entered for the mediator.[141] The court outlined that, in legal malpractice cases, the standard of review is that the legal action taken by the professional must be a wrongful one that causes some legal injury.[142] Lehrer found offense in that the mediator and opposing counsel had a former professional relationship, but the court found this had no impact on the mediation settlement agreement and that the mediator fully executed his legal duties.[143]

Legal malpractice as an issue in a case does not seem to change background principles of the Texas ADR Act.[144] In 2004, Bryant employed Long as attorney to represent her in a dispute over a roofing contract.[145] A written settlement agreement was hammered out in mediation, but a part of this settlement was that attorney's fees would be left to the trial court.[146] Bryant then sued her attorney for legal malpractice for failure to warn that this could be a possible outcome of settlement through mediation, but Long claimed that this was discussed between the two and the mediator.[147] The court first elucidated how a party waives a privilege through "offensive use" of information and that Bryant waived confidentiality of the mediation through offensive use.[148] Although Bryant at trial was fine with the testimony of the mediator to help his case, Bryant now tried to oppose it, citing confidentiality.[149] The court, however, concluded that the testimony of the mediator should not be excluded because "[i]t is disingenuous for Bryant to claim error now when she expressly consented to this procedure at trial."[150]

These ideals also seem to extend outside of Texas. In a 2007 case, a lawyer who had been admitted to the respective bars of Virginia and Florida ended up participating in mediation in Arizona but felt justified because of the Florida mediation rules with which she was familiar.[151] It was ruled that the lawyer should be sanctioned for unauthorized practice of law in Arizona, but because it was determined that the attorney's wrongful action led to little if any legal injury, the lawyer was only subject to an informal reprimand.[152]

V. Conclusion

Preparation of the client for mediation is a key component of a successful mediation settlement. Before mediation, the attorney should discuss with the client who should be the mediator, in particular, what qualifications should be desired on the mediator, such as skills and subject matter expertise. The attorney should also explain what to expect the day of the mediation and discuss any confidentiality concerns regarding information that might be disclosed during mediation. Finally, the attorney should also inform the client about enforcement of meditated settlement agreements. If an insurance claim is involved, the *Stowers* doctrine should be considered in making settlement demands at mediation.

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[139] *Lehrer v. Zwernemann*, 14 S.W.3d 775, 776 (Tex. App. – Hous. [1st Dist.] 2000, pet. denied).
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Alford v. Bryant*, 137 S.W.3d 916, 919 (Tex. App. — Dallas 2004, pet. denied).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 921 (citing *TransAmerican Natural Gas Corp. v. Flores).*
[149] *Id.* at 922.
[150] *Id.*
[151] *In re Non-Member of State Bar of Arizona, Van Dox*, 214 Ariz. 300, 302, 152 P.3d 1183, 1185 (2007).
[152] *Id.*at 309.

Appendix - Ethical Guidelines for Mediators

1. ABA Model Standards of Conduct for Mediators
   http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf

2. AAA Model Standards of Conduct for Mediators
   http://www.adr.org/si.asp?id=3827

3. State Bar of Texas
   http://www.texasadr.org/SBOT%20ADR%20Ethical%20Guidelines%20for%20Mediators%20%282008%20Amendments%29.pdf

4. The Texas Supreme Court amended its Ethical Guidelines for Mediators on April 11, 2011. These amendments, effective on June 1, 2011 are available at:
   http://tmtr.org/wp-content/uploads/2011/04/Eth-Guideline-Amended-Order.pdf