St. Mary's Law Journal

Volume 37 | Number 2 Article 2

1-1-2006

The Law of Mediation in Texas.

L. Wayne Scott

THE LAW OF MEDIATION IN TEXAS

L. WAYNE SCOTT*

* Professor of law and Director of Conflict Resolution Studies, St. Mary's University School of Law. B.A., Southwest Texas State College; M.A., Baylor University; J.D., University of Texas.

The author wishes to thank the Rev. Phillip Stephenson and his wife, Maxine, for leading him into this field. He also wishes to thank his research assistants, Mike Paul and Chris Harris, and the staff of the *St. Mary's Law Journal* for their patient editorial work.

I. INTRODUCTION

The Texas Alternative Dispute Resolution Act (Texas ADR Act),[1] passed in 1987 and codified in chapter 154 of the Texas Civil Practice and Remedies Code, served to jump-start the use of mediation in Texas.[2] In the years following the passage of the Act, mediation has proved to be more successful than ever imagined.[3] Yet,

---

1. TEX. CIV. PRAC. & REM. CODE ANN. ch. 154 (Vernon 2005).

2. *See generally* Frank G. Evans, Introduction, Symposium, *Problem Solving Progress: Peacemakers and the Law*, 11 TEX. WESLEYAN L. REV. 1 (2004) (providing a history of the development of the Texas Alternative Dispute Resolution (Texas ADR Act)).

3. *See generally* Frank Evans & Teresa Stanton Collett, Forward, *Final Report Symposium on Texas Mediator Qualifications and Standards*, 38 S. TEX. L. REV. 375 (1997) (noting the impact of dispute resolution on American society and finding ADR to be regularly practiced in a number of forums, from businesses and the government to schools and institutions); Cyndi Krier & Claudia Nadig, *1987 Alternative Dispute Resolution Procedures Act: An Overview*, 51 TEX. B.J. 22 (1988) (advocating that the passage of the Texas Alternative Dispute Resolution Procedures Act in 1987 was a landmark year for ADR in Texas); John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 814 (1999) (examining court-based mediation in five states, all of which have had "substantial experience with court-based mediation and strong leadership from statewide court-based dispute resolution offices"); M. Colleen McHugh, *ADR: A Report from the Chairman*, 51 TEX. B.J. 14 (1988) (proposing ADR as "an alternative to the often costly and time-consuming process of litigation"); Francis Flaherty, *ADR Industry: Rapid Growth Brings Pains*, ALTERNATIVES TO HIGH COST LITIG., Oct. 1993, at 133 (indicating that the ADR industry has experienced rapid growth and finding it likely that for-profit ADR firms will obtain even more future business). The effectiveness of mediation has spread nationwide. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340-41 (1994) (noting that the Civil Justice Reform Act "promotes settlement through alternative dispute resolution"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982) (asserting that federal judges have abandoned their classic judicial role as disinterested decisionmakers and are now beginning to take on a more active role as mediators, negotiators and planners); Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 882 (1993) (illustrating the development of court-ordered mediation and its interaction with constitutional issues); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 199-201, app. at 229-31 (2003) (discussing the proliferation of mediation).

there have been few judicial interpretations, alterations, or challenges to the Act. Except for some degree of judicial neglect, it could be said that the practice of mediation has been well served and supported by the Texas bench and bar. Whether this neglect has been benign, the result of uninformed attorneys, uninformed courts (which would appear to be the case from the number of opinions, significant to mediation practitioners, that are not designated for publication), or simply good statutory drafting, is a matter open to debate.

It is the purpose of this Article to explore Texas judicial opinions, dealing with the Texas ADR Act. It should be noted at the outset, that many of the opinions referred to in this Article have not been designated for publication by the courts from which they were issued.[4] The concept of unpublished opinions, originally formulated in response to a caseload explosion and to save shelf space in rapidly expanding law libraries,[5] has come under serious ques-

---

4. TEX. R. APP. P. 47.7. This rule provides that "[o]pinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'" *Id.* The rule providing for the nonpublication of opinions, originally written to save on the cost of printed material, is no longer necessary in light of electronic storage and retrieval, and it has been the subject of some controversy. *See generally* Weirich v. Weirich, 867 S.W.2d 787 (Tex. 1993) (Enoch, J., concurring and Doggett, J., dissenting) (discussing the problem of the nonpublication rule, its conflicting interpretation, and its consequences); David M. Gunn, *"Unpublished Opinions Shall Not Be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(I)*, 24 ST. MARY'S L.J. 115, 144 (1992) (discussing the former unpublished opinions rule, Rule 90 of Texas appellate procedure). Gunn notes that the rule effectively balances two competing interests; it allows for unpublished opinions, effectively reducing clutter in libraries, and also prohibits reliance on unpublished opinions. *Id.*

5. DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964); *see* Leah F. Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIBR. J. 362, 362 (1974) (commenting on "the avalanche of published opinions" and discussing the types of judicial action implemented to counter this problem); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 759 (1995) (asserting that "over the past two decades, the federal courts of appeals have regularly employed practices that reduce the roles and uses of published judicial opinions" mainly in response to burgeoning caseloads); Marion A. Oliver, *Rule 90: The Limited Publication Controversy*, 25 TEX. TECH L. REV. 929, 931 (1994) (noting that American "scholars have warned against the 'uncontrolled proliferation of law reports' since the early 19th century"); George M. Weaver, *The Precedential Value of Unpublished Opinions*, 39 MERCER L. REV. 477, 478 (1988) (asserting that the limited publication of judicial decisions was one of the responses of "American courts to the unmanageable growth of law reports").

tion in recent years.[6] In the year 2000, a panel of the Eighth Circuit Court of Appeals, ruling in *Anastasoff v. United States*,[7] held that the federal rule prohibiting the citation of unpublished opinions as precedent was unconstitutional.[8] The Texas Supreme Court was clearly aware of the growing controversy[9] and amended the

6. *See* Robert J. Martineau, *Restriction on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 122 (1994) (discussing the criticisms of unpublished opinions and noting the recommendation of the Advisory Council of Appellate Justice in 1973 to adopt limited publication). Some argue, for example, that unpublished opinions are as important to essential justice and fundamental fairness as published opinions. *See In re* Rules of the United States Court of Appeals for Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, C.J., concurring in part and dissenting in part) ("Each ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation."). Indeed, "[t]o deny a litigant [the right to point to a prior decision and show he is entitled to prevail under it] may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule." *Id.* Also note that the Supreme Court has had opportunities to rule on the constitutionality of federal no-citation rules but has declined to do so. *Id.*; *see also* Jones v. Superintendent, 465 F.2d 1091, 1094 (4th Cir. 1972) (suggesting that the court "cannot deny litigants and the bar the right to urge upon [the court] what [the court has] previously done"); David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 141-45 (1977) (expressing concern about the equal protection and due process implications of federal "no-citation" rules). *But cf.* Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002) (holding that, under certain circumstances, unpublished opinions *can* be used to determine if the law is clearly established).

7. 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000).

8. Anastasoff v. United States, 223 F.3d 898, 899-900 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000); *see* Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90, 91 (2000) (advocating that in *Anastasoff v. United States*, the Eighth Circuit reopened the debate on unpublished opinions by declaring an unpublished opinion binding and indicating "that the Constitution [forbids] non[ ]precedential dispositions").

9. *See generally Weirich*, 867 S.W.2d at 787-89 (containing concurring and dissenting opinions debating the denial of a motion to publish); David Gunn, *The Crumbling Relevance of Rule 47.7*, 13 APP. ADVOC. 3, 9 (2000) (advocating dictum from the Texas Supreme Court in order to address how the doctrine of stare decisis applies in the courts of appeals); David W. Holman, *Is an Unpublished Opinion Still an Opinion?*, 13 APP. ADVOC. 2, 3 (2000) (suggesting that "Rule 47.7 should be changed to allow [an] unpublished opinion to be treated as persuasive authority"). Interestingly, while prohibiting attorneys from citing to unpublished Texas opinions, the Texas Supreme Court cited to unpublished opinions in other states. *See, e.g.*, N. Natural Gas Co. v. Conoco, Inc., 986 S.W.2d 603, 606 n.2 (Tex. 1998) (citing to an unpublished Virginia opinion); Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 455 (Tex. 1998) (citing to an unpublished Tennessee opinion); Bohatch v. Butler & Binion, 977 S.W.2d 543, 553 (Tex. 1998) (citing to an unpublished Florida opinion); Worthy v. Collagen Corp., 967 S.W.2d 360, 375 (Tex. 1998) (citing to an unpublished federal district court opinion).

unpublished opinion rule in 1997 and again in 2002. Since January 1, 2003, the Texas Supreme Court has recognized that these opinions may be cited in judicial proceedings, even though they have "no precedential value."[10] At the very minimum, the unpublished opinions are now fair game for consideration.

The opinions collected in this Article, whether published or unpublished, serve to illustrate application of the Texas ADR Act. They provide the only guidance that practitioners, judges, and scholars have in interpreting the Act. This fact demonstrates the problems with courts writing opinions used to determine the rights of the parties, which are not published and which may not be used as authority to decide other cases. The appellate courts' failure to recognize the significance of decisions impacting the area of mediation, alone, justifies the collection of their decisions dealing with mediation to call attention to the need for the publication of any decision dealing with mediation.

With the passage of the Texas ADR Act, it became public policy 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."[11] The legislature decreed that "[i]t is the responsibility of all trial and appellate courts and their court administrators to carry out the pol-

---

10. TEX. R. APP. PROC. 47.7. The notion that an opinion that settles the rights of parties to a dispute, which reflects the judgment of the judges issuing the opinion, may be cited (i.e., given to another court for consideration), but has "no precedential value" is a contradictory statement. *Id.* The Amarillo Court of Appeals has taken a workable approach to the conundrum created by prohibiting an opinion from being considered as precedent, but allowing it to be cited by counsel and courts:

> By stating that unpublished opinions may be cited but have no precedential value, we perceive the intent of the rule to be that a court has no obligation to follow such opinions. The effect of the rule is to afford parties more flexibility in pointing out such opinions and the reasoning employed in them rather then simply arguing, without reference, that same reasoning. However, the court to [which] an unpublished opinion is cited has no obligation to follow the opinion or to specifically distinguish such opinion. They may be cited merely as an aid in developing reasoning that may be employed by the reviewing court be it similar or different. Even so, we do not view Rule 47.7, or the former rule, as justifying unreasoned inconsistency on the part of an appellate court.

Carrillo v. State, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

11. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005).

icy under [s]ection 154.002."[12] One of the means authorized by this legislation to carry out this policy was mediation.[13]

II. GETTING TO MEDIATION[14]

A. *Mediation Defined*

Under section 154.023(a) of the Texas Civil Practice and Remedies Code, "[m]ediation is a forum in which an impartial person,

---

12. *Id.* § 154.003.

13. *Id.* § 154.023(a).

14. *See* UNIF. MEDIATION ACT § 3 (2002) (noting that a comparison of the UMA and the Texas ADR Act demonstrates that existing Texas law, both statutory and judicial, seems to conform to the Act). The Texas ADR Act provides the following:

> SECTION 3. SCOPE.
>
> (a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:
>
> (1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;
>
> (2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or
>
> (3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.
>
> (b) The [Act] does not apply to a mediation:
>
> (1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;
>
> (2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;
>
> (3) conducted by a judge who might make a ruling on the case; or
>
> (4) conducted under the auspices of:
>
> (A) a primary or secondary school if all the parties are students or
>
> (B) a correctional institution for youths if all the parties are residents of that institution.
>
> (c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under [s]ections 4 through 6 do not apply to the mediation or part agreed upon. However, [s]ections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.
>
> *Legislative Note: To the extent that the Act applies to mediations conducted under the authority of a State's courts, State judiciaries should consider enacting conforming court rules.*

Id.

the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them."[15] Obviously, not all settlement meetings constitute mediation,[16] but any doubt can be resolved by either a court order to mediate or by an agreement to mediate. The Texas ADR Act further declares that in mediation, "[a] mediator may not impose his own judgment on the issues for that of the parties."[17] This, arguably, precludes mediators from giving case evaluations, although mediators in Texas regularly give such evaluations. It should be clear from this language that settlement conferences with judges are not mediations,[18] but some issues remain open, such as whether the mediation definition covers peer mediations that are excluded under the Uniform Mediation Act (UMA).[19]

B. *Court-Ordered Mediation*

Under the Texas Civil Practice and Remedies Code, section 154.021(a), any court[20] on its own motion, may refer a dispute to mediation.[21] This power should exist as long as a court retains ple-

---

15. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (Vernon 2005).

16. Saeta v. Superior Court, 11 Cal. Rptr. 3d 610, 612 (Ct. App. 2004) (holding that a hearing held by a termination review board was not a mediation, and thus, not protected by the confidentiality provisions of the mediation statute). *But see* DeRolph v. State, 758 N.E.2d 1113, 1118 (Ohio 2001) (holding that a settlement conference is a mediation).

17. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(b) (Vernon 2005).

18. *See* James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11, 12 (indicating that "Texas bar and judicial disciplinary commissions" have interpreted a provision in the 1972 ABA Model Code of Judicial Conduct as one that prohibits judges from acting as mediators or arbitrators in settlement conferences); Frank E.A. Sander, *A Friendly Amendment*, 6-1 DISP. RESOL. MAG., Fall 1999, at 11, 22, 24 (urging that judges should not act as mediators in cases that they will later adjudicate).

19. UNIF. MEDIATION ACT § 3 (2002).

20. TEX. CIV. PRAC. & REM. CODE ANN. § 154.001(1) (Vernon 2005) (stating that "'court' includes an appellate court, district court, constitutional county court, statutory county court, family law court, probate court, municipal court, or justice of the peace court").

21. *See id.* § 154.021 (indicating that mediation is only one of the choices the court may use in implementing the policy of the state). This section of the Texas Civil Practices and Remedies Code allows courts to authorize:

> (a)(1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);
>
> (2) a dispute resolution organization; or

nary power over a case.[22] In *Dennis v. Smith*,[23] however, the Texas Court of Appeals in Houston (First District) held that a court has no power to order mediation as a prerequisite to filing any future motion to modify an agreement concerning child support and custody.[24] In contrast, under the Texas Family Code, section 153.0071, a trial court may order mediation in a suit affecting the parent-child relationship,[25] and under section 153.134(b)(5), the court may "recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation."[26] Clearly, the court's order in *Dennis* was improper, because it did not apply to a suit and was not a recommendation.

"If a court determines that a pending dispute is appropriate for referral under [s]ection 154.021, the court shall notify the parties of its determination."[27] Then, "[a]ny party may, within [ten] days after receiving the notice under [s]ubsection (a), file a written objection to the referral."[28] Once an objection is filed, "[i]f the court finds that there is a reasonable basis for an objection filed under [s]ubsection (b), the court may not refer the dispute under [s]ection 154.021."[29] The failure of a party to timely object to mediation

---

(3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

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

Id. (footnote omitted); *see also* Paul v. Paul, 870 S.W.2d 349, 349-50 (Tex. App.—Waco 1994, no writ) (indicating that parties may file a written proposal suggesting the most appropriate ADR procedure under section 154.021(b) of the Texas Civil Practice and Remedies Code); Decker v. Lindsay, 824 S.W.2d 247, 250 (Tex. App.—Houston [1st Dist.] 1992, no writ) (stating that section 154.021(a) of the Texas Civil Practice and Remedies Code authorizes a trial court to refer a dispute to an ADR procedure on its own motion).

22. *See* Permanente Med. Ass'n of Tex. v. Johnson, 917 S.W.2d 515, 517 (Tex. App.—Waco 1996, no writ) (stating that mediation should not be ordered during a period of statutory abatement).

23. 962 S.W.2d 67 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

24. *See* Dennis v. Smith, 962 S.W.2d 67, 74 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (holding that the trial court erred by ordering mediation as a prerequisite to filing a motion to modify).

25. TEX. FAM. CODE ANN. § 153.0071 (Vernon 2002).

26. *Id.* § 153.134(b)(5).

27. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(a) (Vernon 2005).

28. *Id.* § 154.022(b).

29. *Id.* § 154.022(c).

may result in sanctions, if the party then fails to appear at the mediation[30] or fails to mediate in good faith.[31] Likewise, on appeal, the failure to mediate in accordance with the appellate court's order[32] may result in the dismissal of an appeal, if the appellant fails to timely mediate and then fails to respond to an order to complete mediation by a specified date.[33]

C. *Suggestions for Mediation*

While any party or counsel for any party, as well as the court, may suggest referral to mediation,[34] it is improper for the jury to be asked to decide whether to adjourn the case for mediation before hearing evidence.[35] Where the parties have, by contract, agreed to allow either party to call for conciliation or arbitration, it is improper to deny conciliation, in favor of arbitration, where conciliation[36] is elected by one of the parties.[37] An agreement to mediate, before submitting a case to arbitration, is a condition precedent to

---

30. *See* Seidel v. Bradberry, No. 3:94-CV-0147-G, 1998 WL 386161, at *1-3 (N.D. Tex. July 7, 1998) (holding that the court can levy sanctions upon a party who fails to attend a court-ordered mediation).

31. *See* Tex. Dep't of Transp. v. Pirtle, 977 S.W.2d 657, 658 (Tex. App.—Fort Worth 1998, pet. denied) (finding that a trial court can assess costs when a party does not file a written objection to a court's order to mediate and then refuses to mediate in good faith).

32. *See* TEX. R. APP. P. 42.3 (authorizing dismissal "because the appellant . . . failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time").

33. *See* Holley v. Lefebvre, No. 14-99-0709-CV, 2000 WL 4930, at *1 (Tex. App.—Houston [14th Dist.] Jan. 6, 2000, no pet.) (not designated for publication) (ordering that the appeal be dismissed because the parties failed to complete mediation by a specific date).

34. *See* Downey v. Gregory, 757 S.W.2d 524, 525 (Tex. App.—Houston [1st Dist.] 1988, no writ) (stating that any party may suggest referral to an ADR procedure).

35. *See* Owens-Corning Fiberglass Corp. v. Malone, 916 S.W.2d 551, 566 (Tex. App.—Houston [1st Dist.] 1996, no writ) (finding error to be harmless because "the reference to mediation was cured by the trial court's strict admonition that the jurors were not to infer from his remarks anything about the merits of the case").

36. *See* Freis v. Canales, 877 S.W.2d 283, 284 (Tex. 1994) (orig. proceeding) (noting that the term "conciliation" was apparently used in the contract, but whether the parties intended to use the less formal process of conciliation than mediation is not clear). In any event, any difference in meaning did not change the holding of the court. *Id.*

37. *See id.* (holding that the plaintiff had a contractual right to choose either conciliation or arbitration, and that because plaintiff chose conciliation, the trial court was without power to order arbitration); *see also* Belmont Constructors, Inc. v. Lyondell Petrochemical Co., 896 S.W.2d 352, 357 (Tex. App.—Houston [1st Dist.] 1995, no writ) (concluding that the contract provided for mandatory arbitration only in the event the parties could not first agree on an alternate method of resolution).

arbitration.[38] However, if the mediation is unsuccessful, arbitration is then required and may be compelled.[39]

While no Texas court has yet discussed the issue, it seems that the Texas statute[40] will apply to any form of mediation agreed to by the parties. As discussed in the commentary to the UMA, the issue can be left to the self-determination of the parties, including those provided by religious groups.[41] The issues to be considered are discussed in the commentary of section 3 of the UMA:

> Finally, on the issue of [s]ection 3(a) inclusions into the Act, the Drafting Committees discussed whether it should cover the many cultural and religious practices that are similar to mediation and that use a person similar to the mediator, as defined in this Act. On the one hand, many of these cultural and religious practices, like more traditional mediation, streamline and resolve conflicts, while solving problems and restoring relationships. Some examples of these practices are Ho'oponopono, circle ceremonies, family conferencing, and pastoral or marital counseling. These cultural and religious practices bring richness to the quality of life and contribute to traditional mediation. On the other hand, there are instances in which the application of the Act to these practices would be disruptive of the practices and therefore undesirable. On balance, furthering the principle of self-determination, the Drafting Committees decided that those involved should make the choice to be covered by the Act in those instances in which other definitional requirements of [s]ection 2 are met by entering into an agreement to mediate reflected by a record or securing a court or agency referral pursuant to [s]ection 3(a)(1). At the same time, these persons could opt out the Act's coverage by not using this triggering mechanism. This leaves a great deal of leeway, appropriately, with those involved in the practices.[42]

---

38. *See Belmont Constructors*, 896 S.W.2d at 357 (holding that the contract language calling for a different method of dispute resolution constituted a condition precedent to mandatory arbitration).

39. *See In re* Weekley Homes, 985 S.W.2d 111, 114-15 (Tex. App.—San Antonio 1998, no pet.) (holding that, whether a party is released from a purchase agreement's arbitration provision as a result of the vendor's failure to seek mediation, is a procedural question properly addressed by the arbitrator).

40. TEX. CIV. PRAC. & REM. CODE ANN. ch. 154 (Vernon 2005).

41. UNIF. MEDIATION ACT § 3 cmt. 2(a) (2002).

42. *Id.*; *see also* F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695, 1698-99 (2000) (describing the types and usefulness of various forms of religious mediations).

No cases dealing with any form of religious mediation were found in researching case law for this Article.

D. *Limitation upon the Power to Order Mediation*

1. Administrative Appeals

Stays of administrative appeals for mediation may not be valid, at least where the appeal is not controlled by the Administrative Procedure Act, codified in chapter 2001 of the Texas Government Code.[43] While the Administrative Procedure Act includes a provision permitting modifications of any of the time limits prescribed for an administrative agency, that Act does not apply to all administrative appeals.[44] For example, under the Texas Education Code, an appeal from the Commissioner of Education is not controlled by the Administrative Procedure Act.[45]

In *Moses v. Dallas Independent School District*,[46] Cortez, a public school teacher, contested her proposed termination to the Commissioner of Education.[47] After a hearing, and following the recommendation of the hearing examiner, the Dallas Independent School District (DISD) Board of Trustees terminated Cortez's employment.[48] Cortez filed a petition for review with the Commissioner on December 9, 1997.[49] Any response by the DISD was due by December 29, 1997, but was not received.[50] The material was reforwarded in January 1998.[51] The parties agreed to waive the failure to follow the procedural requirements of the Texas Education Code.[52] On January 8, 1998, the administrative law judge or-

---

43. *See* Moses v. Dallas Indep. Sch. Dist., 12 S.W.3d 168, 171 (Tex. App.—Dallas 2000, no pet.) (stating that unlike the Administrative Procedure Act, the Texas Education Code has no provisions permitting modification of any time limits).

44. *See* TEX. GOV'T CODE ANN. § 2001.147 (Vernon 2000) (indicating that the individual state agency must approve any modifications of time limits).

45. *See* TEX. EDUC. CODE ANN. § 21.301(e) (Vernon 1996) (stating that an appeal to the commissioner under the Texas Education Code is not subject to chapter 2001 of the Texas Government Code).

46. 12 S.W.3d 168 (Tex. App.—Dallas 2000, no pet.).

47. *See* Moses v. Dallas Indep. Sch. Dist., 12 S.W.3d 168, 171-72 (Tex. App.—Dallas 2000, no pet.) (explaining that after the superintendent recommended Cortez's termination, Cortez appealed the matter to the Commissioner of Education).

48. *Id.* at 170.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Moses*, 12 S.W.3d at 170.

dered the appeal abated for 120 days to allow mediation of the case.[53] The appeal was reinstated on February 23, 1998, after the DISD rejected the agreement resulting from the mediation.[54] The DISD filed for judicial review on April 20, 1998.[55] The district court reversed the Commissioner's decision and ordered Cortez reinstated.[56] The court of appeals vacated the trial court's judgment and dismissed the appeal.[57]

The Texas Education Code requires an appeal within thirty days of receipt of notice of the Commissioner's decision.[58] The court of appeals found that a timely notice was jurisdictional, and that the Commissioner did not have the authority to abate the statutory deadlines.[59] The court of appeals rejected the argument that the state's "policy encouraging the use of alternative dispute resolution procedure in appropriate aspects of a state agency's operations and programs" gave the Commissioner authority to abate the appeal.[60] They found this "expression of general policy is [not] sufficient to override the mandatory statutory deadlines set forth in the education code."[61] Since the mandatory time for perfecting the appeal was not met, the court dismissed the appeal for want of jurisdiction.

---

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *See Moses*, 12 S.W.3d at 171-72 (explaining the court of appeals's decision in the case).

58. *See* TEX. EDUC. CODE ANN. § 21.307(b) (Vernon 1996) (addressing the timeframe in which an appeal must be perfected under the Texas Education Code).

59. *See* Moses v. Dallas Indep. Sch. Dist., 12 S.W.3d 168, 171-72 (Tex. App.—Dallas 2000, no pet.) (holding that the Commissioner had no authority to modify the timetables, and because neither party had perfected a judicial appeal within the specified time, the court was without jurisdiction).

60. *See id.* at 171 (noting the current citation of the "Act of May 21, 1997, 75th Leg., R.S., ch. 934, § 1, 1997 Tex. Gen. Laws 2932 (renumbered and amended 1999) (current version at TEX. GOV'T CODE ANN. §§ 2009.001-.055 (Vernon 2000)").

61. *Id.*

2. Peace Bond Proceedings

Disputes arising from peace bond applications[62] may not be ordered to be mediated.[63]

3. Other Forms of Proceedings

Texas might want to consider whether to extend or exclude the coverage of the Texas ADR Act to international commercial conciliation, which is covered by specific statute in some states.[64]

E. *The Appointment of the Third-Party-Neutral: The Mediator Qualifications and Training Requirement*

Both lawyers and nonlawyers[65] serve as mediators in Texas.[66] While issues are raised concerning whether mediation constitutes the practice of law by lawyers (thus controlled by the ethics of the legal profession) acting in a nonlawyer role,[67] the issue is more

---

62. *See* TEX. CODE CRIM. PROC. ANN. arts. 7.01-.18 (Vernon 2005) (describing the process of peace bond applications).

63. *See In re* Jones, 55 S.W.3d 243, 247, 249-50 (Tex. Spec. Ct. Rev. 2000) (ordering the justices of the peace to receive special instruction on the limits of a magistrate's power to order mediation in peace bond proceedings).

64. *See, e.g.*, CAL. CIV. PROC. CODE § 1297.401 (West 1988) (stating that a written conciliation agreement shall be treated as an arbitral award and shall have the same effect as a final award in arbitration); FLA. STAT. § 684.10 (1986) (stating that if during the arbitral proceedings a party claims in writing that another party has not complied with an agreement to submit a dispute to mediation or conciliation, the arbitral tribunal shall hold the proceeding in abeyance pending submission of the dispute to mediation or conciliation as agreed); N.C. GEN. STAT. § 1-567.60 (1991) (indicating that an arbitral tribunal, upon agreement of the parties, may use mediation, conciliation, or other procedures to encourage settlement of the dispute).

65. *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 49 (1991) (arguing that the elimination of nonlawyer mediators can adversely impact the practice of mediation); Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499, 500 (2005) (arguing that nonlawyers should be allowed to mediate disputes and that the elimination of nonlawyer mediators can adversely impact the practice of mediation).

66. TEX. CIV. PRAC. & REM. CODE ANN. § 154.052 (Vernon 2005) (noting that the requirements to serve as an impartial third party in Texas does not include having a law degree, but rather, it requires attending a certain amount of training in dispute resolution techniques).

67. *See* Michelle D. Gaines, *A Proposed Conflict of Interest Rule for Attorney-Mediators*, 73 WASH. L. REV. 699, 699 (1998) (noting that "[w]hen attorneys practice mediation, it is unclear where they should look for guidance: attorney rules of professional conduct, mediator ethical standards, or both"); Sandra Purnell, *The Attorney As Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 987 (1985) (discussing the prac-

commonly raised as to whether nonlawyer-mediators are practicing law.[68]

There is a great misconception that there is some governmental method of certifying[69] Texas mediators who receive forty hours of mediation training.[70] There is not. Although the Texas Supreme Court and its Advisory Committee on Court-Annexed Mediations studied such a process,[71] no government sanctioned procedure currently exists for the certification of mediators.[72] To the contrary, in June 2005, the Advisory Committee on Court-Annexed Mediations found that there "was no consensus within the mediation profession in Texas as to whether the [s]upreme [c]ourt should become involved in credentialing and/or registration of mediators. Therefore, the committee recommended that the [c]ourt take no action

---

tice of law and whether the professional norms of the legal practice should govern mediation); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, ALTERNATIVES TO HIGH COST LITIG., May 1996, at 57, 60 (asking whether mediation falls under the practice of law).

68. *See* Derek A. Denckla, *Non-Lawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581-82 (1999) (explaining that in all states, nonlawyers are prohibited from practicing law); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 269-73 (2002) (discussing how mediation and the practice of law overlap); Geetha Ravindra, *When Mediation Becomes the Unauthorized Practice of Law*, ALTERNATIVES TO HIGH COST LITIG., Aug. 1997, at 94, 94 (discussing West Virginia litigation on the subject of the unauthorized practice of law).

69. *See generally* Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 758-59 (1996) (indicating that there is no governmental standard for certifying mediators but that there is a public interest in such certification); Ellen Waldman, *Credentialing Approaches: The Slow Movement Toward Skills-Based Testing Continues*, DISP. RESOL. MAG., Fall 2001, at 13, 14 (describing the Texas system).

70. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.052 (Vernon 2005) (stating that forty hours of training is required in most situations); Tex. Mediator Credentialing Ass'n, Criteria for Credentials, http://www.txmca.org/criteria.htm (last visited Oct. 13, 2005) (listing the criteria that the Texas Mediator Credentialing Association requires of mediators) (on file with the *St. Mary's Law Journal*).

71. *See* Suzanne M. Duvall & John P. Palmer, *ADR Council Authorizes Committee to Meet with Mediator Groups to Establish Credentialing Program Based on the Revised Proposal for a Voluntary Program for Mediators' Designation "Credentialed Mediator"*, Tex. Mediator Credentialing Ass'n, http://www.texasadr.org/tmca.cfm#toc (last visited Oct. 13, 2005) (describing the creation of the Quality of Practice Task Force and the Texas Supreme Court Advisory Committee) (on file with the *St. Mary's Law Journal*).

72. *See* Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 724, 730-32 (1996) (discussing the defeat of Senate Bill 1428, which sought to establish a system for certification of mediators).

with regard to credentialing."[73] Attempts at voluntary credentialing, in the works for some time,[74] appear to be bearing fruit in the form of the Texas Mediator Credentialing Association.[75]

The court, making the appointment of a third-party-neutral, instead, is given wide latitude in choosing the third-party-neutral. The statute provides that "[i]f a court refers a pending dispute for resolution by an alternative dispute resolution procedure under [s]ection 154.021, the court may appoint an impartial third party to facilitate the procedure."[76] In addition, "[t]he court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter."[77] This third-party-neutral is to "have completed a minimum of [forty] classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment[,]"[78] unless the case is one relating to the parent-child relationship, in which event, the "person must complete the training required by [s]ubsection (a) and an additional [twenty-four] hours of training in the fields of family dynamics, child development, and family law."[79]

---

73. Tex. Sup. Ct., Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (June 13, 2005), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf (last visited Oct. 21, 2005) (on file with the *St. Mary's Law Journal*); *see also Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 856 (2005) (announcing the recent approval of ethical guidelines for mediators by the Texas Supreme Court).

74. *See* R. Michael Rogers & John P. Palmer, *A Speaking Analysis of ADR Legislation for the Divorce Neutral*, 31 ST. MARY'S L.J. 871, 940-47 (2000) (reporting on the formation and development of the Texas Mediator Credentialing Committee (TMCC)). *See generally* Suzanne M. Duvall & John P. Palmer, *ADR Council Authorizes Committee to Meet with Mediator Groups to Establish Credentialing Program Based on the Revised Proposal for a Voluntary Program for Mediators' Designation "Credentialed Mediator"*, Tex. Mediator Credentialing Ass'n, http://www.texasadr.org/tmca.cfm#toc (last visited Oct. 13, 2005) (addressing efforts to establish a voluntary credentialing program) (on file with the *St. Mary's Law Journal*).

75. *See* Charles Pou, Jr., *"Embracing Limbo": Thinking About Rethinking Dispute Resolution Ethics*, 108 PENN ST. L. REV. 199, 218 n.96 (2003) (discussing the Texas project); Tex. Mediator Credentialing Ass'n, Criteria for Credentials, http://www.txmca.org/criteria.htm (last visited Oct. 13, 2005) (establishing the criteria that the Texas Mediator Credentialing Association requires of mediators) (on file with the *St. Mary's Law Journal*).

76. TEX. CIV. PRAC. & REM. CODE ANN. § 154.051(a) (Vernon 2005).

77. *Id.* § 154.051(b). "The court may appoint more than one third party." *Id.* § 154.051(c).

78. *Id.* § 154.052(a).

79. *Id.* § 154.052(b).

The court may, "[i]n appropriate circumstances . . . in its discretion appoint a person as an impartial third party who does not qualify under [s]ubsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes."[80]

1. Ethical Standards or Guidelines for Mediators

Until recently, no officially sanctioned guideline for the ethical conduct of mediators existed, although a number of organizational standards have been promulgated.[81] This subject is one where development has long been expected,[82] but few cases exist to assist in defining the ethical guidelines to be followed by mediators.[83] In June 2005, the Texas Supreme Court adopted the recommendation of its Advisory Committee on Court-Annexed Mediations,[84] find-

---

80. *Id.* § 154.052(c).

81. *See, e.g.*, ABA Model Standards of Conduct for Mediators, http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf (last visited Sept. 4, 2005) (listing model standards of conduct for mediators) (on file with the *St. Mary's Law Journal*); The Association of Attorney-Mediators Ethical Guidelines, http://www.attorney-mediators.org/ethics.html (last visited on Sept. 4, 2005) (summarizing developing issues in the field of mediation) (on file with the *St. Mary's Law Journal*); The State Bar of Texas, Alternative Dispute Resolution Section, Ethical Guidelines for Mediators, http://www.texasadr.org/ethicalguidelines.cfm (last visited Sept. 4, 2005) (displaying the State Bar of Texas guidelines for mediators) (on file with the *St. Mary's Law Journal*); The State Bar of Texas, Alternative Dispute Resolution Section, The Texas Mediation Trainer Roundtable Standards, http://www.texasadr.org/standards.cfm (last visited Sept. 4, 2005) (reviewing the standards for basic mediation training in Texas) (on file with the *St. Mary's Law Journal*); Texas Association of Mediators, Standards of Conduct, at 1-6, http://www.txmediator.org/TAM%20SOP.pdf (last visited Oct. 14, 2005) (listing the mediator standards of conduct adopted by the Texas Association of Mediators) (on file with the *St. Mary's Law Journal*); *see* John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 459 (1997) (summarizing different proposed standards and discussing the subject areas with references to various ethical codes and cases on point); Stephanie A. Henning, Note, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 198-99 (1999) (examining four proposed standards for the certification of mediators).

82. *See* Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV. 292, 292 (2004) (discussing development in the field of mediation).

83. *See* Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct of Mediators*, 2 HARV. NEGOT. L. REV. 87, 98-99 (1997) (noting that lawsuits against mediators are rare).

84. Tex. Sup. Ct., Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (June 13, 2005), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf (last visited Oct. 21, 2005) (on file with the *St. Mary's Law Journal*); *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 856 (2005).

ing that "there currently is consensus within the Texas mediation profession that the [c]ourt should promulgate ethical rules. Therefore, the committee recommended the Court adopt as its own aspirational guidelines those guidelines that the Alternative Dispute Resolution section of the State Bar of Texas has adopted."[85] In adopting these guidelines, the court noted that "[t]hese rules are aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion, and finally, when necessary by enforcement by the courts through their inherent powers and rules already in existence."[86] Finally, the court concluded by noting:

> Moreover, counsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court. They are subject to the Texas Disciplinary Rules for Lawyers and any local rules or orders of the court regarding the mediation of pending cases. They should aspire during mediation to follow the The Texas Lawyer's Creed—A Mandate for Professionalism. Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation.[87]

2. Duties of the Third-Party-Neutral

It is the duty of the third-party-neutral, appointed as the mediator, to "encourage and assist the parties in reaching a settlement of their dispute but [the mediator] may not compel or coerce the parties to enter into a settlement agreement."[88] The third-party-neutral mediator:

> unless expressly authorized by the disclosing 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. Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement pro-

---

85. *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 856 (2005).

86. *Id.*

87. *Id.*

88. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (Vernon 2005).

cess, are confidential and may never be disclosed to anyone, including the appointing court.[89]

3. The "Style of the Mediator"

The Texas ADR Act provides that "[a] mediator may not impose his own judgment on the issues for that of the parties."[90] Additionally, the mediator is to "encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement."[91] Beyond this, the Act is silent on the methods to be used by a mediator in settling a case, and the Texas cases, with few exceptions, have not gone into this aspect of mediation. Although it can be argued that the language allows only the use of facilitative mediation, evaluative mediation seems to predominate as the method used by most mediators in Texas.[92] However, given the academic discussions surrounding style, it is inevitable that the issues concerning style will find their way into the courts. It is not the purpose of this Article to fully examine the merits of the various styles, but there is evolving literature on the subject.[93]

---

89. *Id.* § 154.053(b), (c).

90. *Id.* § 154.023(b).

91. *Id.* § 154.053(a).

92. *See* James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions & Tentative Proposals, From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 770-71 (1997) (discussing the evaluative mediation method and its prevalence in practice); D. Ryan Nayar, Note, *Texas ADR 101: Analyzing the Use of Compulsory Mediation Clauses in Commercial Contracts: Advantages, Enforceability, & Drafting Guidelines*, 40 TEX. J. BUS. L. 257, 268 (2004) (noting the popularity of evaluative mediation); Nick Hall, *Alternative Dispute Resolution 2020*, HOUS. LAW., Sept.-Oct. 2000, at 37, 38-39 (observing that of the many methods of mediation, evaluative mediation is the process of choice, especially in disputes bound for or pending in court).

93. *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 50, 59-73 (1991) (examining the new Florida mediation programs and concerns with its implementation); Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996) (discussing the different mediator strategies, techniques, and styles); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 950 (1997) (examining problems with the Florida Mediation rules and calling for a more flexible system); Joseph B. Stullberg, *Facilitative Versus Evaluative Mediator Orientations: End Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1002-03 (1997) (expressing problems with the "Riskin Grid"); Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, DISP. RESOL. MAG., Winter 2003, at 22, 22-25 (withdrawing the use of evaluation in the mediation process, at least where it interferes with

4. Fees

The appointing court is authorized to set "a reasonable fee for the services of an impartial third party appointed."[94] After the appointing court sets a reasonable fee, "[u]nless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of court."[95] At this time, no

---

self-determination); *see also* Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 42 (2000) (discussing the variations in mediation styles and why those styles may change during the course of a case); John Bickerman, *An Evaluative Mediator Responds*, ALTERNATIVES TO HIGH COST LITIG., June 1996, at 70, 70 (approving of evaluative mediation styles, even though some consider it a legalistic approach); Leonard Riskin, *Mediator Orientations, Strategies and Techniques*, ALTERNATIVES TO HIGH COST LITIG., Sept. 1994, at 111, 111-12 (proposing a system for classifying mediator orientations). Critics suggest that this approach represents a legalistic approach to mediation. *See, e.g.*, Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN ST. L. REV. 1017, 1023 (2004) (reflecting on the art of mediation and the commercial mediator); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1556 (1991) (identifying dangers in the mediation process for women); Kimberly K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71, 89 (1998) (explaining the origins of mediation); John Lande, *How Will Lawyering and Mediation Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997) (examining the potential implications for lawyers and mediators of the growing "liti-mediation" culture); Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 269 (2001) (analyzing the evaluative method of mediation); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 937 (1997) (discouraging the evaluative method in mediation); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 769-70 (1997) (discussing the positives and negatives of evaluative mediation); Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 508 (1997) (discussing mediation and activist mediators); Nancy Welsh, *The Thinning Vision of Self- Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEG. L. REV. 1, 37-58 (2001) (examining the possible means to protect a party's self-determination in the mediation process); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 661-63 (2002) (indicating that attorneys think that mediators are less fair when they push for a particular settlement); Laurence D. Connor, *How to Combine Facilitation with Evaluation*, ALTERNATIVES TO HIGH COST LITIG., Feb. 1996, at 15, 15 (discussing the difference between mediators in standard evaluations and special mediators); Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is an Oxymoron*, ALTERNATIVES TO HIGH COST LITIG., Mar. 1996, at 31, 31 (challenging the evaluative method in mediation); Maureen Laflin, *Can Informed Consent Preserve the Integrity of Mediation?*, ADVOC. (Idaho), Nov. 2000, at 12, 12 (examining the Virginia lawyer-mediator rules and discussing the purpose of mediation).

94. TEX. CIV. PRAC. & REM. CODE ANN. § 154.054(a) (Vernon 2005).

95. *Id.* § 154.054(b).

constitutional challenge has been made to a court's order taxing mediation fees as court costs.

5. Limited Immunity for the Third-Party-Neutral

There is limited immunity for uncompensated third-party-neutrals. The Texas Civil Practice and Remedies Code, section 154.055(a), provides:

> A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under [c]hapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.[96]

6. Broader Immunity

In the case of court-ordered mediation, the mediator exercises judgment and uses discretion, and therefore, acts in a judicial capacity. This, it would seem, should entitle the court appointed mediator to derived judicial immunity,[97] at least "when all parties to a

---

96. *Id.* § 154.055(a).

97. *See* Wagshal v. Foster, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (holding that there is quasi-judicial immunity for a mediator). Such a holding finds support in Texas. *See* Dallas County v. Halsey, 87 S.W.3d 552, 557 (Tex. 2002) (holding that a court reporter was not entitled to judicial immunity but indicating that judicial immunity is available to court functionaries, such as ad litems, who perform a judicial function). The policy reasons for judicial immunity are also implicated when a judge delegates or appoints another person to perform services for the court or when a person otherwise serves as an officer of the court. *Id.* In this circumstance, the immunity attaching to the judge follows the delegation, appointment, or court employment. *Id.* The person acting in such a capacity also enjoys absolute immunity, known as derived judicial immunity. *Id.* at 554; *accord* Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 436 (1993) (stating that judicial immunity does not extend to court reporters, but only to those whose "judgments are 'functional[ly] comparab[le]' to those of judges" and who "'exercise a discretionary judgment' as a part of their function"); *see also* Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (stating that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction'" (quoting Bradley v. Fisher, 80

dispute are receiving independent legal advice."[98]

III. Inability to Order Good Faith Negotiation

Although it has been argued that there should be a duty of good faith in mediation,[99] beyond mandating the neutrality of the mediator and the confidentiality of the proceedings, the Texas statute, unlike others,[100] is silent about the duties of the participants in mediation. One of the few areas of mediation that has generated real judicial discussion concerns the power of courts to sanction parties who fail to mediate in good faith.[101] Shortly after the passage of chapter 154 of the Texas Civil Practice and Remedies Code, the Houston Court of Appeals for the First District, in an enlightened

---

U.S. 335, 351 (1871))); Turner v. Pruitt, 342 S.W.2d 422, 423 (Tex. 1961) (noting that if the court has jurisdiction, the judge is immune from liability for the actions taken); Delcourt v. Silverman, 919 S.W.2d 777, 781 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (extending derived judicial immunity in a child custody case to a psychologist who had been appointed under Texas Rule of Civil Procedure 167(a)(d)(1), (repealed in 1998, but now found in substantially the same form at Texas Rule of Civil Procedure 204.4(a)), to examine the child). In *Delcourt*, the court also extended immunity to a guardian ad litem appointed under Texas Family Code section 11.10 (repealed in 1995 and now codified at Texas Family Code section 107.001) to represent the child and give the court impartial recommendations. *See id.* (extending immunity to a guardian ad litem). *But see* Byrd v. Woodruff, 891 S.W.2d 689, 707 (Tex. App.—Dallas 1994, writ dism'd by agr.) (holding that a guardian ad litem appointed under Texas Rule of Civil Procedure 173 was not entitled to derived immunity in a personal injury suit because the ad litem acted as the minor's personal representative in the settlement proceedings, and not on behalf of the court); *see also* Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 Ohio St. J. on Disp. Resol. 629, 635-48 (1997) (analyzing mediator immunity and discussing whether it is necessary); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, Alternatives to High Cost Litig., May 1996, at 57, 61 (noting the current trend is to grant quasi-judicial immunity to court-based mediators).

98. Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, Alternatives to High Cost Litig., May 1996, at 57, 61.

99. *See generally* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. Tex. L. Rev. 575 (1997) (arguing the benefits of good faith in mediation).

100. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69, 78-80 (2002) (reporting that "[a]t least twenty-two states and the territory of Guam have such statutory requirements" and that "[a]t least twenty-one federal district courts and seventeen state courts have local rules requiring good-faith participation").

101. *See generally* Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation*, 43 A.L.R.5th 545 (1996) (discussing sanctions for failure to participate in alternative dispute resolutions).

decision, *Decker v. Lindsay*,[102] found that the power to order mediation does not include the power to order the parties to mediate in good faith.[103] The court noted that "[c]hapter 154 contemplates mandatory referral only, not mandatory negotiation[,]"[104] and that "[a] court cannot force the disputants to peaceably resolve their differences, but it can compel them to sit down with each other."[105]

In *Hansen v. Sullivan*,[106] the trial court granted the plaintiff's motion for mediation, and ordered the parties to "conduct settlement negotiations in good faith."[107] Subsequently, the plaintiff filed a motion for sanctions for the defendant's failure to negotiate in good faith. The defendant's attorney filed an affidavit that he and the defendant had been present for more than three hours, until the mediator declared an impasse. The trial court ordered the defendant to pay the plaintiff's mediation costs, plus attorney's fees. The court of appeals conditionally granted a writ of mandamus, finding the sanction order to be void.[108]

Referring to an order requiring "good faith" negotiations as void, the Fort Worth Court of Appeals, in *In re Acceptance Insurance Co.*,[109] reasoned that:

> An order requiring "good faith" negotiation does not comport with the voluntary nature of the mediation process. . . . A trial court has power to enforce its "lawful" orders. But because the portion of the trial court's mediation orders directing the parties to "make a good faith effort to settle" is void, the trial court had no authority to

---

102. 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, no writ).

103. *See* Decker v. Lindsay, 824 S.W.2d 247, 251 (Tex. App.—Houston [1st Dist.] 1992, no writ) (finding that the judges order cannot require that the parties mediate in good faith).

104. *Id.*; *accord* Charles J. McPheeters, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 1992 J. DISP. RESOL. 377, 386-87 (1992) (analyzing the holding in *Decker*); *see also* Johnson v. Elayyan, No. 14-01-00381-CV, 2002 WL 959518, at *1 (Tex. App.—Houston [14 Dist.] May 9, 2002, pet. denied) (not designated for publication) (holding that the trial court did not err in ordering mediation).

105. *Decker*, 824 S.W.2d at 250.

106. 886 S.W.2d 467 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).

107. Hansen v. Sullivan, 886 S.W.2d 467, 468 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).

108. *Id.* at 469 (citing Decker v. Lindsay, 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, no writ)).

109. 33 S.W.3d 443 (Tex. App.—Fort Worth 2000, orig. proceeding).

> investigate whether relator complied with that portion of the orders.[110]

The court in *In re Acceptance Insurance Co.*, specifically indicated that the issue of a party's preparedness could not be the subject of a postmediation inquiry, since "[t]he issue of preparedness relates to whether a party mediated in good faith, not to whether the party attended or participated in the mediation."[111]

The first court to approve a sanction for the failure to mediate in good faith was the Fort Worth Court of Appeals in *Texas Department of Transportation v. Pirtle*,[112] which involved an action by a motorist against the Texas Department of Transportation for injuries received in a one-car accident.[113] The trial court ordered the parties to mediation, even though the Department of Transportation told the trial judge "from the beginning they weren't going to mediate because it's the position of the Department of Transportation that part of its responsibilities in fulfilling its public trust is not to settle disputed liability cases."[114] The Department of Transportation did not object to the referral to mediation.[115] A jury found that the Department of Transportation was not liable for damages, but the trial court assessed against the Department of Transportation all costs of court, including attorney's fees and the mediation fees Pirtle incurred, "finding that it had failed to mediate in good faith."[116] The court of appeals affirmed the trial court's award of mediation costs to the plaintiffs, noting that "[h]ad the department exercised its statutory remedy by filing a written objection, Pirtle would have been spared the expense of attending mediation."[117] Further, the court found "that it is not an abuse of discretion for a trial court to assess costs where a party does not file a written objection to a court's order to mediation, but nevertheless refuses to mediate in good faith."[118]

---

110. *In re* Acceptance Ins. Co., 33 S.W.3d 443, 452 (Tex. App.—Fort Worth 2000, orig. proceeding).

111. *Id.*

112. 977 S.W.2d 657 (Tex. App.—Fort Worth 1998, pet. denied).

113. Tex. Dep't of Transp. v. Pirtle, 977 S.W.2d 657, 658 (Tex. App.—Fort Worth 1998, pet. denied).

114. *Id.*

115. *Id.*

116. *Id.* at 657.

117. *Id.* at 658.

118. *Pirtle*, 977 S.W.2d at 658.

The Fort Worth court, in *Pirtle*, distinguished earlier cases denying recovery for the failure to mediate in good faith.[119] It indicated that, in *Gleason v. Lawson*,[120] the judge had not ordered the parties to mediation.[121] The court further noted that in *Hansen v. Sullivan*, the litigant did mediate in good faith, but was unable to resolve the dispute.[122] The court also reconciled the prior decision in *Decker v. Lindsay,* by stating that it "addresses situations where a litigant does file a written objection within ten days, but the judge overrules the objection."[123] In *Texas Parks & Wildlife Department v. Davis*,[124] the Austin Court of Appeals refused to follow *Pirtle,* on the ground that the Texas Parks and Wildlife Department had timely objected to being ordered to mediation, did attend the mediation, and did make an offer of settlement.[125]

In summary, under existing authority, courts cannot sanction a party for the failure to mediate in good faith where: (1) the court does not order the mediation; (2) the party mediates but fails to settle;[126] or (3) the party timely objects to mediation, but is ordered to mediate anyway.[127] However, a sanction is possible if the party does not object to the court-ordered mediation and still takes the position at the mediation that it will not negotiate.[128] Likewise, a nonparty mediation participant who never objects to attending the mediation and who voluntarily attends on behalf of his employer, subjects himself to "the jurisdiction of the trial court and its handling of the administrative and procedural matters concerning the

---

119. *Id.*

120. 850 S.W.2d 714 (Tex. App.—Corpus Christi 1993, no writ).

121. Gleason v. Lawson, 850 S.W.2d 714, 717 (Tex. App.—Corpus Christi 1993, no writ); *see Pirtle*, 977 S.W.2d at 658 (discussing *Gleason*).

122. *Pirtle*, 977 S.W.2d at 658.

123. *See id.* (addressing Decker v. Lindsay, 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, no writ)).

124. 988 S.W.2d 370 (Tex. App.—Austin 1999, no pet.).

125. *See* Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 375 (Tex. App.—Austin 1999, no pet.) (declining to follow *Pirtle*).

126. Hansen v. Sullivan, 886 S.W.2d 467, 469 (Tex. App.—Houston [1st Dist.] 1994, no writ).

127. *Decker*, 824 S.W.2d at 251; *see also Tex. Parks & Wildlife Dep't*, 988 S.W.2d at 375 (holding that a court can order the party to attend mediation over objection, but cannot require good faith mediation).

128. *See* Tex. Dep't of Transp. v. Pirtle, 977 S.W.2d 657, 658 (Tex. App.—Fort Worth 1998, pet. denied) (assessing costs to a party for refusing to mediate in good faith).

mediation."[129] Other states and commentators have addressed the "good faith" problem surrounding mediation and seem to generally be in accord with the Texas approach.[130]

IV. SANCTIONS

A. *Failure to Participate Without Time to Object*

As noted earlier, under section 154.022 of the Texas Civil Practice and Remedies Code, a party must be allowed ten days after receipt of notice of the order for mediation in which to object to the referral to mediation.[131] Thus, an order for sanctions for failure to participate in mediation ordered within less than ten days notice is erroneous.[132] Note, however, that failure to object to a mediation order without the appropriate time for objection will waive the right to object. The Dallas court stated in *Keene Corp. v. Gardner*:[133]

> Although the trial court has an interest in expediting the resolution of pending litigation, it cannot force the parties to follow an unreasonable timetable. If the trial court can force a resisting party to

---

129. *In re* Daley, 29 S.W.3d 915, 919 (Tex. App.—Beaumont 2000, orig. proceeding).

130. *See generally* Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 37-45 (1993) (discussing when and what sanctions are appropriate in compelled alternative dispute resolution procedures); Charles J. McPheeters, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 1992 J. DISP. RESOL. 377, 391 (1992) (stating that "[g]ood faith negotiation is not the equivalent of an agreement, it is not a synonym for settlement, and it does not require any particular outcome. . . . All that [courts] can require is that parties make an effort to reach an agreement."); Edward Sherman, *Court Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2096-2103 (1993) (suggesting that the term "good faith" be replaced by "minimal meaningful participation" to clarify what is expected of parties during alternative dispute resolution negotiations); Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith, or Comply with Agreement Made in Mediation*, 43 A.L.R.5TH 545 (1996) (examining the tools used by the courts to encourage good faith effort by the parties to settle a dispute); Annette M. Sansone, Annotation, *Imposition of Sanctions by Federal Courts for Failure to Engage in Compromise and Settlement Negotiations*, 104 A.L.R. FED. 461 (1991) (analyzing the use of sanctions by federal courts for failure to participate in settlement negotiations).

131. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(b) (Vernon 2005).

132. *See* Keene Corp. v. Gardner, 837 S.W.2d 224, 232 (Tex. App.—Dallas 1992, writ denied) (agreeing that it was erroneous for the trial court to order sanctions for noncompliance with an order to mediate that itself did not comply with statutory procedure).

133. 837 S.W.2d 224 (Tex. App.—Dallas 1993, writ denied).

participate in alternative dispute resolution without regard to the ten-day objection period, it renders a portion of the statute meaningless. While the trial court has discretion in determining whether alternative dispute resolution is appropriate, it has no authority to ignore the statute's intent and wording.[134]

B. *Sanctions for Failure to Attend?*

Another area of contention concerns the ability of the trial court to use its authority to order specific persons to attend mediation.[135] Many other states have dealt with this problem, generally imposing sanctions for failure of a party to attend mediation.[136] Clearly, courts take a dim view of attorneys who choose not to attend court-ordered mediation sessions.[137] There seems to be no doubt that courts have the power to sanction parties, attorneys, or both, who fail to attend a mediation.[138] Trial courts may impose sanc-

---

134. Keene Corp. v. Gardner, 837 S.W.2d 224, 232 (Tex. App.—Dallas 1993, writ denied).

135. *See generally* Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation*, 43 A.L.R.5TH 545 (1996) (collecting cases dealing with failure to attend mediations).

136. *See, e.g.*, Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 769 (9th Cir. 2001) (granting sanctions against Lucas for failing to attend mediation); Nick v. Morgan's Foods, Inc., 270 F.3d 590, 592 (8th Cir. 2001) (denying reconsideration of the district court's order that sanctioned an employer for failing to send a corporate representative to mediation); Inmuno Vital, Inc. v. Telemundo Group, Inc., 203 F.R.D. 561, 567 (S.D. Fla. 2001) (upholding sanctions against a producer for failing to appear at a mediation session accompanied by a person with the authority to settle the case); *see also* Bulkmatic Transp. Co. v. Pappas, No. 99Civ.12070(RMB)(JCF), 2002 WL 975625, at *1 (S.D.N.Y. May 9, 2002) (mem.) (imposing monetary sanctions against the party who failed to show up at a mediation conference); Raad v. Wal-Mart Stores, Inc., No. 4:CV97-3015, 1998 WL 272879, at *1 (D. Neb. May 6, 1998) (explaining the appropriateness of sanctions against a defendant who had received notice of the need to send a corporate representative to a mediation session, but did not).

137. *See* Fleet Transp., Inc. v. Butler & Binion, L.L.P., No. 14-99-00500-CV, 2000 WL 963671, at *1 (Tex. App.—Houston [14th Dist.] July 13, 2000, pet. denied) (not designated for publication) ("While we do not address the merits of the cause of action, we take a negative view of attorneys—officers of the court—deciding not to attend a mediation ordered by the trial court. Such conduct is best dealt with by the trial court.").

138. *See In re* K.A.R., No. 14-03-00970-CV, 2005 WL 2076408, at *8 (Tex. App.—Houston [14th Dist.] Aug. 30, 2005, no pet. h.) (explaining that "[t]he failure to comply with a trial court's order to participate in mediation constitutes significant interference with the court's core functions and, therefore, can support an award of sanctions imposed under the court's inherent power to sanction"); Roberts v. Rose, 37 S.W.3d 31, 34-35 (Tex.

tions to discipline an attorney for such improper behavior,[139] as well as for bad faith abuse of the system.[140] Any sanction imposed will be reviewed on appeal under an abuse of discretion standard[141] to determine whether the trial court acted without reference to "guiding rules or principles."[142] The sanction imposed must be just,[143] meaning there should be a causal nexus between the improper conduct and the sanction, and the sanction must be imposed upon the offending party, whether it is the attorney, the client, or both.[144] The sanction should be no more severe than necessary[145] to secure compliance with the law or court order, deter others from failing to comply with the law or court order, and to punish those who violate the law or court order.[146]

In *Seidel v. Bradberry*,[147] the district court ordered all parties to attend mediation.[148] The order stated that the mediation was

---

App.—San Antonio 2000, pet. denied) (upholding sanctions against an attorney for failure to appear at a court-ordered mediation).

139. *See* Lawrence v. Kohl, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ) (agreeing that the trial court had the authority to impose the sanctions merited by the attorney's conduct).

140. *See In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (per curiam) (citing Eichelberger v. Eichelberger, 582 S.W.2d 395, 398-99 (Tex. 1979)) (reprimanding attorneys who had deliberately filed multiple cases—with no intention to prosecute most of them—in search of a sympathetic court by upholding the sanctions the trial court had imposed for that abuse).

141. *Id.*; Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 853 (Tex. 1992) (orig. proceeding).

142. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).

143. TransAm. Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991); Luxenberg v. Marshall, 835 S.W.2d 136, 141 (Tex. App.—Dallas 1992, no writ).

144. Wetherholt v. Mercado Mex. Cafe, 844 S.W.2d 806, 808 (Tex. App.—Eastland 1992, no writ).

145. *TransAm. Natural Gas Corp.*, 811 S.W.2d at 917; *see also* Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding) (clarifying that while severe sanctions can be imposed, they should be reserved for conduct especially meriting the severity).

146. Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (per curiam); *Chrysler Corp.*, 841 S.W.2d at 849.

147. No. 3:94-CV-0147-G, 1998 WL 386161 (N.D. Tex. July 7, 1998).

148. Seidel v. Bradberry, No. 3:94-CV-0147-G, 1998 WL 386161, at *2 (N.D. Tex. July 7, 1998); *accord* Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 769 (9th Cir. 2001) (ordering all parties to the suit to attend mediation); Universal Coops., Inc. v. Tribal Coop. Mktg. Dev. Fed'n of India, 45 F.3d 1194, 1196 (8th Cir. 1995) (requiring all parties involved in the cause to attend mediation); Inmuno Vital, Inc. v. Telemundo Group, Inc., 203 F.R.D. 561, 576 (S.D. Fla. 2001) (stating that each party must attend mediation to attempt to amicably resolve the suit without referring to trial); Raad v. Wal-Mart Stores, Inc., No. 4:CV97-3015, 1998 WL 272879, at *2 (D. Neb. May 6, 1998) (holding that all involved parties must attend mediation).

mandatory, named the parties that were to appear, and ordered the parties to "proceed in a good faith effort to resolve the case."[149] The order further stated that failure to comply with the order would result in sanctions.[150] All nonincarcerated parties other than the defendant, Michael Batten, appeared and settled.[151] When Batten failed to appear at the meditation or to show cause for not appearing, the court imposed an order for sanctions in the amount of $1400, which represented a proportionate part of the plaintiff's mediation expenses and attorney's fees.[152]

"When mediation is ordered under the authority of section 154.021, the trial court may compel disputants to sit down with each other, though it cannot force them to peaceably resolve their differences."[153] However, "[t]he county judge, as presiding officer of a county, like the chief executive officer of a private corporation, [and not himself a disputant] is an important official whose presence at [a] deposition or mediation should not be ordered absent compelling reasons."[154]

The extent of the court's power to require attendance at a mediation is fully shown by the decision of *In re Daley*,[155] where the trial court ordered that all parties, attorneys, partners, principals, or officers of each nonindividual party attend the mediation, and decreed that "[a]ll individuals ordered to attend, must remain in attendance until the mediator declares the mediation concluded, subject only to recesses as declared by the mediator."[156] Daley, an employee of Lumbermens Mutual Casualty Company, which insured the defendant, Arnold, attended the mediation, along with

149. *Seidel*, 1998 WL 386161, at *1.

150. *Id.*

151. *Id.*

152. *Id.* at *3.

153. Nueces County v. De Pena, 953 S.W.2d 835, 836 (Tex. App.—Corpus Christi 1997, orig. proceeding).

154. *Id.* at 837. In *Crown Central Petroleum Corp. v. Garcia*, relied upon by the Corpus Christi Court in *De Pena*, the Texas Supreme Court held that in the context of discovery, a party seeking to depose a high executive of a corporation must show "(1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that less intrusive methods of discovery are unsatisfactory, insufficient or inadequate." Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995).

155. 29 S.W.3d 915 (Tex. App.—Beaumont 2000, orig. proceeding).

156. *In re* Daley, 29 S.W.3d 915, 917 (Tex. App.—Beaumont 2000, orig. proceeding).

Czuchna, an attorney representing Lumbermens.[157] Daley left the mediation at 2:45 P.M., giving Czuchna "authority to decide whether insurance payments would be made by Lumbermens."[158] The next day, Williams, the plaintiff, filed a notice of intent to take the deposition of Daley on the sole question of why he left the mediation.[159] The trial court denied a motion to quash.[160] The court of appeals also denied mandamus relief, with one judge dissenting.[161] Justice Stover, writing for the court, found that:

> Daley, though a non[ ]party, was, by his own admission, a mediation participant, who was given settlement authority by Lumbermens. Furthermore, Daley never objected to attending the mediation . . . and voluntarily attended on behalf of his employer, Lumbermens. In so doing, he voluntarily subjected himself to the jurisdiction of the trial court in its handling of the administrative and procedural matters concerning the mediation.[162]

While dissenting, Chief Justice Walker agreed with the implicit holding of the majority that the trial court "has necessary authority to order the attendance of those persons or entities having authority to settle, whether that be the attorney, the parties, or those holding the settlement purse strings."[163] In *Roberts v. Rose*,[164] the San Antonio Court of Appeals approved sanctions against an attorney for failing to appear at a court-ordered mediation.[165] In *In re K.A.R.*,[166] the Houston court, relying upon *Roberts*, upheld sanctions against an attorney for unilaterally canceling a court-ordered mediation.[167] "The failure to comply with a trial court's order to participate in mediation constitutes significant interference with the court's core functions and, therefore, can support an award of sanctions imposed under the court's inherent power to sanc-

---

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *In re Daley*, 29 S.W.3d at 919.
162. *Id.*
163. *Id.* at 920.
164. 37 S.W.3d 31 (Tex. App.—San Antonio 2000, no pet.).
165. Roberts v. Rose, 37 S.W.3d 31, 33-35 (Tex. App.—San Antonio 2000, no pet.).
166. 171 S.W.3d 705 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
167. *In re* K.A.R., 171 S.W.3d 705, 715 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

tion."[168] Where the failure to attend the mediation is due entirely to the fault of the attorney, it is error to strike the plaintiff's pleadings as a sanction for the failure to attend the mediation.[169]

However, the Dallas Court of Appeals, in *Luxenberg v. Marshall*,[170] upheld the striking of a party's pleadings because of the party's history of discovery abuse, violation of pretrial orders, and failure to participate in a court-ordered mediation.[171] Using similar reasoning, the Austin Court of Appeals, in *Starcrest Trust v. Berry*,[172] imposed sanctions for a frivolous appeal under repealed Rule 84 of the Texas Rules of Appellate Procedure (now codified as Texas Rule of Appellate Procedure 45).[173] One of the reasons for sanctions, along with a confusing and misleading brief and discrepancies between the record and brief, was the failure of the Appellant to comply with the terms of a settlement mediated while the case was pending on appeal.[174]

The court in *Garcia v. Mireles*[175] upheld a trial court's action in striking a plaintiff's pleading and entering a take-nothing judgment as a sanction for the failure of the plaintiff to appear for mediation.[176] There, the trial court ordered the mediation after the plaintiff represented that there had been sufficient discovery to allow an evaluation of the case, and that referral to mediation was appropriate.[177] The sanction was based on the trial court's inherent power to control its docket. In affirming the sanction, the appellate court noted that there was evidence that the plaintiff's failure to obey the order for mediation was "willful or done with conscious indiffer-

168. *Id.*

169. *See* Wetherhold v. Mercado Mex. Cafe, 844 S.W.2d 806, 808 (Tex. App.—Eastland 1992, no writ) (holding that a client should not be sanctioned for failing to attend a mediation that his counsel did not inform him of); *see also* Roberts v. Rose, 37 S.W.3d 31, 34-35 (Tex. App.—San Antonio 2000, no writ) (indicating that a client cannot be sanctioned for failure to attend where it is determined that the attorney was at fault in failing to maintain contact with the client).

170. 835 S.W.2d 136 (Tex. App.—Dallas 1992, orig. proceeding).

171. Luxenberg v. Marshall, 835 S.W.2d 136, 140-41 (Tex. App.—Dallas 1992, orig. proceeding).

172. 926 S.W.2d 343 (Tex. App.—Austin 1996, no writ).

173. Starcrest Trust v. Berry, 926 S.W.2d 343, 356 (Tex. App.—Austin 1996, no writ).

174. *Id.*

175. 14 S.W.3d 839 (Tex. App.—Amarillo 2000, no pet.).

176. *See* Garcia v. Mireles, 14 S.W.3d 839, 843 (Tex. App.—Amarillo 2000, no pet.) (basing the decision on Koslow's v. Mackie, 796 S.W.2d 700 (Tex. 1990)).

177. *Id.* at 840.

ence."[178] "Given such a record, the sanction imposed by the trial court [was] not inappropriate."[179]

In *Federal Deposit Insurance Corp. v. Yang*,[180] similar sanctions were reversed by the court when it found that "[t]here is no authority presented that suggests the failure to mediate can be added on top of one discovery failure to produce the egregious conduct necessary for sanctions which preclude the presentation of the merits of the case."[181] Cases have also been dismissed on appeal for failure to appear for scheduled mediation[182] and for refusal to schedule a mediation as ordered by the court of appeals.[183]

C. *Sanctions for Leaving a Mediation Early*

The issue of whether a person who attends a mediation can leave the mediation before it is terminated and without permission of the mediator was raised in *In re Daley*.[184] The court of appeals determined that it was appropriate and not a violation of mediation confidentiality[185] to order a deposition of Daley, a representative of the defendant's insurer, who left a deposition before it concluded. The Beaumont Court of Appeals, with one judge dissenting, refused to issue a writ of mandamus and allowed the deposition to take place.[186] The majority found no violation of the mediation privilege: "[t]he statute is restricted to those matters occurring during the 'settlement process.' Whether Daley left the mediation

178. *Id.* at 843.

179. *Id.*

180. No. 01-92-00726-CV, 1993 WL 166268 (Tex. App.—Houston [1st Dist.] May 20, 1993, writ denied) (not designated for publication).

181. *See* FDIC v. Yang, No. 01-92-00726-CV, 1993 WL 166268, at *3 (Tex. App.—Houston [1st Dist.] May 20, 1993, writ denied) (not designated for publication) (reversing the trial court's ruling because "[t]he imposition of sanctions is within the discretion of the trial court, but those sanctions must be just").

182. *See* Hockley v. Citizens Bank & Trust Co., No. 14-98-00117-CV, 1999 WL 496991, at *1 (Tex. App.—Houston [14th Dist.] July 15, 1999, no pet.) (not designated for publication) (holding that because appellant failed to attend court-ordered mediation, dismissal was the proper remedy).

183. *See* Bienek v. Exxon Corp., No. 14-98-00717-CV, 1999 WL 418344, at *1 (Tex. App.—Houston [14th Dist.] June 24, 1999, no pet.) (not designated for publication) (granting appellee's motion to dismiss because appellant had cancelled scheduled mediation sessions twice and ultimately failed to reschedule).

184. *In re* Daley, 29 S.W.3d 915, 918-19 (Tex. App.—Beaumont 2000, orig. proceeding).

185. *Id.*

186. *Id.* at 919.

prior to its conclusion without the permission of the mediator is not a matter related to the settlement process itself."[187]

The issue of whether a nonparty can be sanctioned for leaving a mediation early was disposed of by the *Daley* court on a waiver theory: "[Daley] voluntarily subjected himself to the jurisdiction of the trial court . . . [therefore, an objection] at a later date to the mediation order . . . [is] to no avail."[188] The decision in *Daley* finds support in a recent article by Maureen A. Weston, who concludes:

> Parties who submit their dispute to the public judicial system have a legitimate expectation of due process and fair treatment, provided they comply with court orders and procedural rules of law. When they are diverted, however temporarily, into court-connected mediation, the court has an obligation to protect that expectation as well as the parties' financial, emotional, and intellectual investment in mediation. Where courts offer or require parties to use court-connected mediation, the court has some responsibility to prevent abuse of process. Parties avail themselves of the benefits and protections of the judicial system and unless they can persuade the court that a participation requirement should not apply to them, it is reasonable to require parties to comply with ADR conduct rules set forth by the legislature and courts.[189]

In addition to the court's powers just discussed, mediators have an inherent power to deal with recalcitrant participants that is not often discussed.[190] In a court-ordered mediation, it is the media-

---

187. *Id.* at 918.

188. *Id.* at 919.

189. Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 79 (2003) (citations omitted); *see also* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1806 (1995) (commenting on the authority, both express and inherent, of courts to exercise control over many aspects of the adjudication process).

190. *In re* Amendments to the Florida Rules of Civil Procedure, 604 So. 2d 1110, 1179 (Fla. 1992). The Florida Rules of Civil Procedure provide that:

> The mediator may adjourn the mediation conference at any time and may set times for reconvening the adjourned conference notwithstanding [R]ule 1.710(a). No further notification is required for parties present at the adjourned conference. . . . The mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation. Counsel shall be permitted to communicate privately with their clients. In the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.

Id.

tor's responsibility to determine whether the mediation process has succeeded, failed, or is still at work. If a participant insists upon leaving the mediation before the mediator is satisfied that the mediation process has been exhausted, the mediator, at that point, would report to the appointing court that the mediation has been adjourned until the date set to recommence the mediation.

D. *Failure to Bring Authority to Settle*

The federal courts generally have broad power to manage pretrial proceedings,[191] including the power to order parties to attend pretrial mediations and settlement conferences and to bring along settlement authority. As explained in *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*,[192]

> In our view, "authority to settle," when used in the context of this case, means that the "corporate representative" attending the pretrial conference was required to hold a position within the corporate entity allowing him to speak definitively and to commit the corporation to a particular position in the litigation. We do not view "authority to settle" as a requirement that corporate representatives must come to court willing to settle on someone else's terms, but only that they come to court in order to consider the possibility of settlement.[193]

Thus, in *Nick v. Morgan's Foods, Inc.*,[194] the Eighth Circuit, relying upon Rule 16(f) of the Federal Rules of Civil Procedure, held that the trial court did not abuse its discretion in imposing monetary sanctions "for failure to participate in good faith in court-ordered alternate dispute resolution (ADR) and imposing additional sanctions for vexatiously increasing the costs of litigation."[195] Generally, sanctions for failure to bring authority to a court-ordered

---

191. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 62-63 (1991) (stating that the power to sanction granted by the Federal Rules of Civil Procedure did not limit a court's inherent power to sanction for misconduct); Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642 (1976) (stating that an abuse of discretion standard applies to sanction for party that ignored a court order).

192. 871 F.2d 648 (7th Cir. 1989).

193. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989).

194. 270 F.3d 590 (8th Cir. 2001).

195. Nick v. Morgan's Foods, Inc., 270 F.3d 590, 592 (8th Cir. 2001).

mediation have been approved.[196] However, the power to compel attendance and to bring settlement authority to a mediation does not include the power to compel a party to settle or to make an offer of settlement.[197]

In *Scaife v. Associated Air Center Inc.*,[198] the Fifth Circuit Court of Appeals dealt with sanctions on both a party and the party's attorney, for failing to appear for mediation.[199] The court acknowledged, "[f]ederal courts have inherent powers [these inherent powers are to be distinguished from that power conferred by Rule 16(f) of the Federal Rules of Civil Procedure] which include the authority to sanction a party or attorney when necessary to achieve the orderly and expeditious disposition of their dockets."[200] However, the court found the sanction ordered against the attorney to be overbroad.[201] The court noted that "[s]uch powers [to sanction] may be exercised only if essential to preserve the authority of the court and the sanction chosen must employ the least possible power adequate to the end proposed."[202] The court also noted that when imposed against an attorney, the sanction must be based upon a finding of "bad faith."[203]

In *In re Stone*,[204] the Fifth Circuit Court of Appeals ruled on the actions of the United States District Court for the Northern District of Texas, placing in effect, standing orders requiring representatives of the federal government with settlement authority to appear at all settlement conferences.[205] The court of appeals held that, while mandamus was an available remedy, the trial court had inherent authority subject to an abuse of discretion standard, to require any party including the government to have a representa-

---

196. *See generally* Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367 (2002) (containing examples of sanctions that have been approved in federal courts).

197. Dawson v. United States, 68 F.3d 886, 890-93 (5th Cir. 1995).

198. 100 F.3d 406 (5th Cir. 1996).

199. Scaife v. Associated Air Center Inc., 100 F.3d 406 (5th Cir. 1996).

200. *Id.* at 411.

201. *Id.*

202. *Id.*

203. *Id.* at 412; *see also* Chaves v. M/V Medina Star, 47 F.3d 153, 156 (5th Cir. 1995) ("In order to impose sanctions against an attorney under its inherent power, a court must make a specific finding that the attorney acted in 'bad faith.'").

204. 986 F.2d 898 (5th Cir. 1993).

205. *In re* Stone, 986 F.2d 898, 903 (5th Cir. 1993).

tive with settlement authority present.[206] The appellate court found that the standing order constituted an abuse of discretion.[207] The court did not prohibit such an order in every case, but indicated that the trial court should enter such an order only after considering less drastic steps.[208]

In *In re United States*,[209] the district court ordered:

> [T]hat each party be represented during the entire mediation process by "an executive officer (other than in-house counsel) with authority to negotiate a settlement (the authority required shall be active, i.e., not merely the authority to observe the mediation proceedings but the authority to negotiate, demand or offer, and bind the party represented)."[210]

The Fifth Circuit denied the writ of mandamus filed in an effort to overturn this order.[211] The court did so with reservations:

> Because we find that the district court has not abused its discretion, we deny the Government's petition for a writ of mandamus. However, we request that the district court consider alternatively ordering the Government to have the person or persons identified as holding full settlement authority consider settlement in advance of the mediation and be fully prepared and available by telephone to discuss settlement at the time of the mediation.[212]

In a concurring opinion, Justice Dennis noted that this case was different from the *Stone* case because: "(a) it is an exceptional case rather than routine litigation; (b) it involves specifically ordered mediation rather than a standing order or an ordinary pretrial settlement conference; and [(c)] the government agreed to mediation."[213] The practical problem with ordering a party to appear with settlement authority is the impossibility of determining what that authority should be. At most, courts should only order the attendance of the person having the power to determine whether there should be a settlement.

---

206. *Id.* at 900.
207. *Id.*
208. *Id.* at 905.
209. 149 F.3d 332 (5th Cir. 1998).
210. *In re* United States, 149 F.3d 332, 333 n.1 (5th Cir. 1998).
211. *Id.*
212. *Id.* (citation omitted).
213. *See id.* at 333-34 (Dennis, J., concurring).

E. *Failure to Pay Settlement or Attempt to Repudiate the Agreement*

Sanctions are not available for the failure of a party to pay amounts owed pursuant to a settlement agreement within a reasonable time.[214]

> There is no evidence that appellants mediated in bad faith, and the [R]ule 11 [TEX. R. CIV. P. 11] agreement gave appellees rights that they would not have had absent the agreement. A breach of a settlement contract after mediation is no different than a breach of a settlement agreement without mediation. Mediation is a creative method for dispute resolution and is not another forum to obtain sanctions. Appellants' conduct, although not laudatory, was at worst a breach of an implied contract term concerning reasonably prompt payment.... A breach of contract has never been a ground for judicial sanctions, and it is not one now.[215]

The court in *Rizk v. Millard*[216] seems to agree.[217] "Repudiation of an unsigned settlement agreement forged in mediation is not subject to discovery sanctions under [Rule 215 of the Texas Rules of Civil Procedure]. The options available to a party are either filing suit on the agreement asserting that it is a valid agreement, or continuing with the original suit."[218]

The failure to comply with a mediated settlement agreement reached on appeal as a result of a mediation ordered by the court of appeals is not a basis for dismissal of the appeal for failure to prosecute.[219] The "enforcement of a disputed settlement agreement, even if reached while the action is on appeal, must be determined in a breach of contract cause of action under normal rules of pleading and evidence."[220]

---

214. Island Entm't v. Castaneda, 882 S.W.2d 2, 3 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

215. *Id.* at 5.

216. 810 S.W.2d 318 (Tex. App.—Houston [14th Dist.] 1991, no writ).

217. Rizk v. Millard, 810 S.W.2d 318, 321 (Tex. App.—Houston [14th Dist.] 1991, no writ).

218. *Id.*

219. *See* Bauer v. Jasso, 946 S.W.2d 552, 555 (Tex. App.—Corpus Christi 1997, no writ) (noting that the court could find no authority supporting when the failure to comply with the terms of a mediated settlement agreement was a valid basis for dismissal of an appeal for want of prosecution).

220. *See id.* (relying upon Mantas v. Fifth Court of Appeals, 925 S.W.2d 656 (Tex. 1996)). It is yet to be seen whether *Mantas* will be applied to trial court actions. *Id.*; *see*

A corollary to the prohibition against sanctions for the failure to pay settlements is that sanctions may not be imposed for attempts to repudiate a settlement agreement. In *Hall v. Hall,*[221] one spouse, Diane Hall, sought to repudiate a mediated settlement agreement containing the language provided, in section 6.602 of the Texas Family Code, precluding repudiation of the agreement.[222] The trial court sanctioned the spouse for this attempt to repudiate.[223] The Tyler Court of Appeals reversed the sanction by finding that it presumed her attorney acted in good faith and there was no evidence that "Diane Hall engaged in unique conduct separate from her attorney's representation," and thus, "the trial court erred in granting Jack Hall's motion for sanctions against Diane Hall alone."[224]

F. *Abatement Where Agreement Is Repudiated*

It may be improper to proceed with the main action where a mediated settlement agreement has been repudiated. This is certainly so where the mediation takes place after judgment and while the case is on appeal.[225] This is precisely what occurred in *Mantas v. Fifth Court of Appeals,*[226] where the appellate court, during a mandamus proceeding, stated that "where the dispute arises while the underlying action is on appeal . . . the party seeking enforcement must file a separate breach of contract action."[227] It was not an abuse of the appellate court's discretion to refuse to enforce the settlement agreement, because a party to the settlement agreement had revoked his consent to the settlement before the court of appeals dismissed the suit in accordance with the agreement.[228] The

---

also Wilkerson v. Wilkerson, No. 03-97-00323-CV, 1997 WL 420780, at *1 (Tex. App.—Austin July 24, 1997, no writ) (not designated for publication) (rejecting appellant's argument that he did not timely perfect his motion for a new trial because he was in the midst of mediation).

221. No. 12-03-00417-CV, 2005 WL 1000619 (Tex. App.—Tyler Apr. 29, 2005, no pet.) (mem. op.).

222. Hall v. Hall, No. 12-03-00417-CV, 2005 WL 1000619, at *1-2 (Tex. App.—Tyler Apr. 29, 2005, no pet.) (mem. op.).

223. *Id.* at *2.

224. *Id.* at *5.

225. Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 659 (Tex. 1996).

226. 925 S.W.2d 656 (Tex. 1996).

227. Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 659 (Tex. 1996).

228. *Id.*

reasoning of the court would seem to apply to a proceeding in the trial court; at least where the entire matter is settled by the agreement.

It makes no sense for the court of appeals to expend its resources, and require the parties to expend theirs, on an appeal that may be moot. "Certainly, a ruling on the merits of the appeal before judgment is rendered in the enforcement suit would inject needless uncertainty and confusion into the issues surrounding the settlement."[229]

G. *An Order for Mediation Is Interlocutory; An Order of Dismissal for Failure to Mediate Is Final*

Logically, an order referring a case to mediation does not dispose of the parties or the underlying claims, and thus, is not a final order. In short, an order for mediation is an unappealable interlocutory order.[230] However, an order dismissing a plaintiff's case for failing to participate in, and be personally present at a court-ordered mediation is a final order, requiring a timely appeal.[231] This is so whether the order is viewed as a dismissal for want of prosecution under Rule 165(a) of the Texas Rules of Civil Procedure, or as a sanction.[232] In *Lucas v. Best Pest Control*,[233] the plaintiff's attorney timely filed a motion to reinstate, but failed to timely perfect an appeal under Rule 26.1(a)(1) and (a)(3) of the Texas Rules of Appellate Procedure after that motion was overruled.[234] Thus, the appellate court lacked jurisdiction to consider the questions raised.[235]

---

229. *Id.*

230. Coleman v. GM Auto. Repair Serv., No. 04-98-01013-CV, 1999 WL 62364, at *1 (Tex. App.—San Antonio Feb. 10, 1999, no pet.) (not designated for publication); *see* Materials Evolution Dev. USA, Inc. v. Jablonowski, 949 S.W.2d 31, 33 (Tex. App.—San Antonio 1997, no writ) (stating that "an order compelling arbitration is an unappealable interlocutory order").

231. *See* Lucas v. Best Pest Control, No. 03-98-00511-CV, 2000 WL 13103, at *2 (Tex. App.—Austin Jan. 6, 2000, no pet.) (not designated for publication) (allowing the trial judge's dismissal of the case due to plaintiff's failure to participate in court-ordered mediation).

232. *Id.* at *3.

233. No. 03-98-00511-CV, 2000 WL 13103 (Tex. App.—Austin Jan. 6, 2000, no pet.).

234. Lucas v. Best Pest Control, No. 03-98-00511-CV, 2000 WL 13103, at *3 (Tex. App.—Austin Jan. 6, 2000, no pet.).

235. *Id.*

H. *Failure to File a Mediation Docketing Statement on Appeal*

The failure to comply with an appellate court order to file a mediation docketing statement may result in the dismissal of an appeal.[236]

I. *Misconduct at a Mediation Possibly Constructive Contempt/ Possibly a Sanction; Notice of Contempt Hearing Is Required*

Violations of mediation orders "would necessarily [be] for constructive contempt, not direct contempt, because any violation occurred outside the court's presence."[237] If it is alleged that a party has been guilty of misconduct at a mediation and the trial court seeks to hear evidence on the subject, the party is entitled to full due process, including notice served personally upon the contemnor.[238] A reasonable time before the hearing requires no less than three days notice.[239] Further, if the violation of the mediation order is treated as a sanction proceeding, the proceeding must still comport with "due process of notice and hearing."[240]

J. *Death Penalty Sanctions Must Comply with* TransAmerican

It is improper to enter a sanction for mediation abuse that orders the striking of a party's pleading, without complying with the pro-

---

236. *See generally* Becerra v. Rohan, No. 14-99-00254-CV, 1999 WL 516257, at *1 (Tex. App.—Houston [14th Dist.] July 22, 1999, no pet.) (not designated for publication) (dismissing an appeal for appellant's failure to timely file a mediation docketing statement); Kotov v. Kotov, No. 14-98-01429-CV, 1999 WL 516246 (Tex. App.—Houston [14th Dist.] July 22, 1999, no pet.) (not designated for publication) (dismissing appeal for appellants' failure to timely file a mediation docketing statement); Whatley v. Slattery, No. 14-99-00553-CV, 1999 WL 516281 (Tex. App.—Houston [14th Dist.] July 22, 1999, no pet.) (not designated for publication) (dismissing appeal for appellant's failure to timely file a mediation docketing statement); O'Brien v. Waldroff, No. 14-98-01383-CV, 1999 WL 548330 (Tex. App.—Houston [14th Dist.] July 29, 1999, no pet.) (not designated for publication) (dismissing an appeal for failure to abide by the court's order).

237. *In re* Acceptance Ins. Co., 33 S.W.3d 443, 449 (Tex. App.—Fort Worth 2000, orig. proceeding).

238. *See Ex parte* Herring, 438 S.W.2d 801, 803 (Tex. 1969) (discharging the petitioner from confinement for contempt because he was not personally served with process, thus violating his right to due process).

239. *See* TEX. R. CIV. P. 21 (describing a reasonable time for filing and serving pleadings and motions).

240. *In re Acceptance Ins. Co.*, 33 S.W.3d at 451.

cedure outlined in *TransAmerican Natural Gas Corp. v. Powell.*[241] The court in *Wal-Mart v. Butler*[242] offered an excellent examination of the procedures established by *TransAmerican.*[243]

> First, there must be a direct relationship between the offensive conduct and the sanction. Second, the sanction must not be excessive. . . . Although *TransAmerican* was a discovery sanction case, this [c]ourt has applied the same standards in determining whether death penalty sanctions were appropriate following violations of a pretrial order. . . . Because the trial court did not [first test lesser sanctions], we conclude it abused its discretion in striking Wal-Mart's answer.[244]

V. ENFORCEMENT OF AGREEMENTS REACHED DURING MEDIATION

A. *Mediated Agreements*[245]

1. The Question Raised by *Ames*[246]

A split of authority arose concerning the effect of section 154.071 of the Texas Civil Practice and Remedies Code, which provides in part, that "[i]f the parties reach a settlement and execute a written

---

241. *See* 811 S.W.2d 913, 917 (Tex. 1991) (per curiam) (orig. proceeding) (detailing the procedure for determining whether court-imposed sanctions comply with either paragraphs 2(b) or 3 of the Texas Rules of Civil Procedure as being just).

242. 41 S.W.3d 816 (Tex. App.—Dallas 2001, no pet.).

243. Wal-Mart Stores, Inc. v. Butler, 41 S.W.3d 816, 817-18 (Tex. App.—Dallas 2001, no pet.).

244. *Id.* (citation omitted). The court applied the rule set out by the Texas Supreme Court in *TransAmerican Natural Gas Corp. v. Powell* when dealing with sanctions levied by a trial court. *TransAm. Natural Gas Corp.*, 811 S.W.2d at 917; *see also* Ameri-First Fin. Corp. v. Benemax Employee Leasing, Inc., No. 05-01-00663-CV, 2002 WL 216123, at *2 (Tex. App.—Dallas Feb. 13, 2002, no pet.) (not designated for publication) (discussing the failure of a party to appear at a mediation ordered by the appellate court).

245. *See generally* Allison Ma'luf, *A Mediation Nightmare?: The Effect of the North Carolina Supreme Court's Decision in* Chappell v. Roth *on the Enforceability and Integrity of Mediated Settlement Agreements*, 37 WAKE FOREST L. REV. 643 (2002) (describing the reasoning behind the North Carolina Supreme Court's ruling in *Chappell v. Roth* when dealing with mediated settlement agreements, as well as describing the mediation process as it is applied in North Carolina). The above sources are provided to give the experience of another state in dealing with the repudiation of mediated settlement agreements.

246. *See* George B. Murr, In the Matter of Marriage of Ames *and the Enforceability of Alternative Dispute Resolution Agreements: A Case for Reform*, 28 TEX. TECH L. REV. 31, 35 (1997) (arguing for a change in the statute to conform to the *Ames* decision).

agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."[247]

In *In re Marriage of Ames,*[248] the court held that settlement agreements reached through court-ordered mediation may not be unilaterally repudiated.[249] *Ames* was followed by *In re Marriage of Banks.*[250] However, the same court, deciding *In re Marriage of McIntosh,*[251] made it clear that the *Ames* holding only applied to properly negotiated, completed settlement agreements.[252] There, the parties, but not their attorneys, attended the mediation.[253] The mediated agreement specifically provided that the parties agreed to take the agreement to their attorneys for review.[254] The trial court refused to enforce the agreement over the objection of one of the parties. The court of appeals affirmed, finding that this was nothing more than "uncounseled, preliminary offers or proposals, the acceptance of which were conditioned upon review by legal counsel and later finalization."[255] The court distinguished *Ames* with this language: "[t]here, the existence of a binding agreement was presupposed. Indeed, both parties and their counsel had consented or accepted the agreement before one unilaterally attempted to reject it."[256] The problem with *Ames* was the failure of the Amarillo court to recognize the rule established in *Burnaman v. Heaton,*[257] requiring that under Rule 11 of the Texas Rules of Civil Procedure,

---

247. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071 (Vernon 2005). Further, the Code states: "(b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case. (c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree." *Id.*

248. 860 S.W.2d 590 (Tex. App.—Amarillo 1993, no writ).

249. *In re* Marriage of Ames, 860 S.W.2d 590, 591 (Tex. App.—Amarillo 1993, no writ).

250. 887 S.W.2d 160, 163 (Tex. App.—Texarkana 1994, no writ) (stating that "[n]o party to a dispute can be forced to settle the conflict outside of court; but if a voluntary agreement that disposes of the agreement is reached, the parties should be required to honor the agreement").

251. 918 S.W.2d 87 (Tex. App.—Amarillo 1996, no writ).

252. *In re* Marriage of McIntosh, 918 S.W.2d 87, 88 (Tex. App.—Amarillo 1996, no writ) (citing Williford Energy Co. v. Submergible Cable Serv., Inc., 895 S.W.2d 379, 384 (Tex. App.—Amarillo 1994, no writ)).

253. *Id.*

254. *In re Marriage of Ames*, 860 S.W.2d at 591.

255. *Id.*

256. *In re Marriage of McIntosh*, 918 S.W.2d at 88.

257. 150 Tex. 33, 240 S.W.2d 288 (1951).

consent to an agreed judgment must exist at the time the judgment is entered.[258]

2. *Ames* Rejected

A number of other courts of appeals refused to support the entry of agreed judgments based on repudiated mediated settlement agreements (repudiated before the agreed judgment could be entered).[259] Generally, these courts agree that the mediated agreement is still enforceable as a contract.[260]

> We do not determine whether Clopton may repudiate the settlement agreement. Clopton's withdrawing his consent to entry of a judgment does not necessarily make the settlement agreement unenforceable. . . . A party can enforce the agreement even though the other party has withdrawn consent to the judgment. However, the party seeking to enforce the agreement must provide proper pleading and proof to support enforcing the settlement agreement under contract law.[261]

The Amarillo Court of Appeals in *Ames* concluded that several cases applying Rule 11 of the Texas Rules of Civil Procedure were "inapplicable to agreements reached pursuant to alternative dispute resolution procedures described in chapter 154 of the Texas Civil Practice and Remedies Code."[262] The courts above, in rejecting *Ames,* relied upon the same line of cases distinguished by *Ames.*

---

258. Burnaman v. Heaton, 150 Tex. 333, 240 S.W.2d 288, 291 (1951); *see also* Middleton v. Murff, 689 S.W.2d 212, 213 (Tex. 1985) (requiring an objection to preserve error after an agreement has been withdrawn by a party); Kennedy v. Hyde, 682 S.W.2d 525, 528 (Tex. 1984) (reaffirming the decision in *Burnaman*); Leal v. Cortez, 569 S.W.2d 536, 541 (Tex. Civ. App.—Corpus Christi 1978, no writ) (noting that the trial court had no power to charge or alter the agreement of the parties when entering an agreed judgment).

259. *See* Clopton v. Mountain Peak Water Supply Corp., 911 S.W.2d 525, 527 (Tex. App.—Waco 1995, no writ) (rejecting *Ames*); Cary v. Cary, 894 S.W.2d 111, 112 (Tex. App.—Houston [1st Dist.] 1995, no writ) (rejecting *Ames*).

260. *Clopton*, 911 S.W.2d at 527 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon 1995)); *Cary*, 894 S.W.2d at 112 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon 1995)).

261. *Clopton*, 911 S.W.2d at 527 (citations omitted) (quoting Stevens v. Snyder, 874 S.W.2d 241, 244 (Tex. App.—Dallas 1994, writ denied)).

262. *In re* Marriage of Ames, 860 S.W.2d 590, 592 n.1 (Tex. App.—Amarillo 1993, no writ) (citing Burnaman v. Heaton, 150 Tex. 333, 240 S.W.2d 288 (1951); Vineyard v. Wilson, 597 S.W.2d 21 (Tex. App.—Dallas 1980, no writ)); *see* TEX. R. CIV. P. 11 (noting that a consent judgment cannot be entered unless consent exists at the time of the judgment).

Stevens v. Snyder[263] provides the rationale for a suit to enforce a mediated settlement agreement where consent is withdrawn.[264] The court stated:

> Once a party accepts a settlement offer, he cannot withdraw from the agreement arbitrarily. Once a party accepts the agreement, enforcement is by suit upon the contract, either for breach or for specific performance. The party seeking enforcement of the settlement agreement must support it by pleadings and proof.[265]

The Texas Supreme Court, in *Padilla v. LaFrance*,[266] a case involving a settlement agreement but not involving a mediated agreement, reiterated the underlying principles.[267]

> Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.[268]

Because the settlement agreement in *Padilla* did not result from mediation, the express issue presented by *Ames* was not before the court, nor were the questions raised by *Ames* directly answered by *Padilla*. Other courts' decisions expressly rejecting the *Ames* reasoning include the cases discussed below.

In *Martin v. Black*,[269] the plaintiff raised an issue concerning whether the parties intended the mediated agreement to be binding.[270] Because the plaintiff denied that a binding agreement ex-

---

263. 874 S.W.2d 241 (Tex. App.—Dallas 1994, writ denied).

264. *See* Stevens v. Snyder, 874 S.W.2d 241, 243 (Tex. App.—Dallas 1994, writ denied) (relying upon Ortega-Carter v. Am. Int'l Adjustment Co., 834 S.W.2d 439 (Tex. App.—Dallas 1992, writ denied), and Browning v. Holloway, 620 S.W.2d 611 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.)).

265. *Stevens*, 874 S.W.2d at 243; *see also In re* Marriage of Allen, No. 07-96-0195-CV, 1996 WL 686895, at *2 (Tex. App.—Amarillo Nov. 27, 1996, no writ) (not designated for publication) (stating that a party seeking enforcement must plead and prove the agreement, see that it is filed with the court, and must also request that the trial court enforce the agreement).

266. 907 S.W.2d 454 (Tex. 1995).

267. Padilla v. LaFrance, 907 S.W.2d 454, 461 (Tex. 1995).

268. *Id.*

269. 909 S.W.2d 192 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

270. Martin v. Black, 909 S.W.2d 192, 193 (Tex. App.—Houston [14th Dist.] 1995, no writ).

isted, the defendant's motion to enforce the mediated settlement agreement was found to be insufficient to authorize summary enforcement of the settlement.[271] Along the way, the court stated:

> Because a mediated settlement agreement is enforceable under contract law, then the same procedures used to enforce and enter judgment on other contracts should apply to mediated settlement agreements. When the legislature enacted the ADR statute, it did not order the courts to follow a special procedure applicable only to mediated settlement agreements.[272]

In *Cadle Co. v. Castle*,[273] Justice Ovard, writing for the majority of the court, en banc, concluded the following:[274]

> In considering the plain language of section 154.071(b), we do not find support for the argument that the legislature intended to create a "summary" proceeding for enforcement of written settlement agreements. Further, we believe there is another, more reasonable, explanation for the adoption of section 154.071(b). . . . [S]ection 154.071(b) was intended to give a trial judge the discretion to either include, *or exclude*, terms of the written settlement agreement when entering judgment.[275]

Relying on out-of-state authority, Justice James, joined by Justice Wright, dissented from the en banc decision, concluding that "it is proper for a trial court to enforce a mediated settlement agreement through a summary proceeding, and, after notice and hearing, to incorporate the terms of the agreement in the court's final decree disposing of the case."[276] The dissent, however, agreed that the trial judge did not render judgment pursuant to Rule 11 of the Texas Rules of Civil Procedure.[277]

---

271. *Id.* at 195.

272. *Id. Martin v. Black* is now cited for the proposition that "[a] mediated settlement agreement is enforceable in the same manner as any other contract." Hardman v. Dault, 2 S.W.3d 378, 380 (Tex. App.—San Antonio 1999, no pet.).

273. 913 S.W.2d 627 (Tex. App.—Dallas 1995, writ denied) (en banc).

274. Cadle Co. v. Castle, 913 S.W.2d 627, 631-32 (Tex. App.—Dallas 1995, writ denied) (en banc).

275. *Id.*

276. *Id.* at 641 (James, J., dissenting).

277. *Id.*

Davis v. Wickham,[278] following *Martin v. Black*, rejected the trial court action.[279] The court reasoned that *Martin* did not comply with Rule 11 of the Texas Rules of Civil Procedure.[280] The court also refused to treat the trial court action as an attempt to enforce the agreement as a contract, citing *Padilla*: "[a]n action to enforce a settlement agreement, where consent is withdrawn, must be based on proper pleading and proof."[281]

In *Economy Gas, Inc. v. Burke,*[282] the court noted that "the proper method for enforcing a mediated settlement agreement is either by motion for summary judgment or trial on the merits."[283]

The Texas Supreme Court, in *Mantas v. Fifth Court of Appeals*,[284] seems to have settled any doubt concerning the *Ames* questions that might have remained after *Padilla.*[285] There, while the judgment was on appeal, appellant, Mantas, paid $160,000 pursuant to a mediated settlement agreement, which was to constitute full satisfaction of the judgment.[286] However, before the settlement papers could be filed with the court of appeals, the appellee, "Barnett, withdrew his consent to the settlement, revoking Manta[s's] authority to file the settlement documents on Barnett's behalf."[287] The court of appeals refused to enforce the settlement agreement.[288] The Texas Supreme Court agreed that, "[b]ecause Barnett revoked his consent to the settlement before the court of appeals dismissed the appeal in accordance with the agreement,

278. 917 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1996, no writ).

279. Davis v. Wickham, 917 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1996, no writ).

280. *Id.*

281. *Id.* at 416 (citing Padilla v. LaFrance, 907 S.W.2d 454, 461-62 (Tex. 1995)); Econ. Gas, Inc. v. Burke, No. 14-93-01016-CV, 1996 WL 220903, at *3 (Tex. App.—Houston [14th Dist.] May 2, 1996, writ denied) (not designated for publication) (citing *Padilla*, 907 S.W.2d at 461-62).

282. No. 14-93-01016-CV, 1996 WL 220903 (Tex. App.—Houston [14th Dist.] May 2, 1996, writ denied) (not designated for publication).

283. Econ. Gas, Inc. v. Burke, No. 14-93-01016-CV, 1996 WL 220903, at *3 (Tex. App.—Houston [14th Dist.] May 2, 1996, writ denied) (not designated for publication).

284. 925 S.W.2d 656 (Tex. 1996) (orig. proceeding).

285. Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 659 (Tex. 1996) (orig. proceeding). The phrase "seems to have settled," must be used because *Ames* is not cited or discussed in the opinion. *Id.* The result in *Mantas*, however, is inconsistent with *Ames* and thus appears to reject *Ames* by implication. *Id.*

286. *Id.* at 658.

287. *Id.*

288. *Id.*

the court correctly determined that Mantas was required to seek enforcement in a separate suit."[289] The court outlined the procedure to be followed:

> Thus, the party seeking enforcement must pursue a separate breach-of-contract claim, which is subject to the normal rules of pleading and proof. Where the settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number. However, where the dispute arises while the underlying action is on appeal, as in this case, the party seeking enforcement must file a separate breach of contract action.[290]

The Texas Supreme Court in *Mantas* nevertheless issued a writ of mandamus to compel the court of appeals to abate the appeal, pending resolution of the enforcement suit.[291]

In *Pollard v. Merkel*,[292] the Dallas Court of Appeals followed the decision in *Cadle Co. v. Castle*.[293] It held that it was improper to enter an agreed judgment upon a mediated settlement agreement where the settlement had been repudiated before the judgment could be entered.[294] Such a case must be determined in a breach of contract action under normal rules of pleading and proof.[295] The court concluded that a motion for judgment seeking to enforce the parties' settlement agreement was, as in *Cadle*, insufficient to plead a separate and distinct breach of contract claim.[296]

---

289. *Id.* at 659.

290. *Mantas*, 925 S.W.2d at 658-59 (citation omitted).

291. *Id.* at 659.

292. No. 05-96-00795-CV, 1999 WL 72209, (Tex. App.—Dallas Feb. 12, 1999, no. pet.) (not designated for publication).

293. Pollard v. Merkel, No. 05-96-00795-CV, 1999 WL 72209, at *2 (Tex. App.—Dallas Feb. 12, 1999, no. pet.) (not designated for publication).

294. *Id.*

295. *Id.*

296. *Id.*; *accord* Alcantar v. Okla. Nat'l Bank, 47 S.W.3d 815, 819 (Tex. App.—Fort Worth 2001, no pet.) (stating that "once consent is withdrawn, an action to enforce a settlement agreement must be based on proper pleading and proof"); Alvarez v. Martinez, No. 04-99-00770-CV, 2000 WL 1585653, at *1 (Tex. App.—San Antonio Oct. 25, 2000, no pet.) (not designated for publication) (stating that "[t]he settlement agreement alone is insufficient to provide a basis for judgment because it would deprive a party of the right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a judge or jury").

Pfeiffer v. Newman[297] rejected an argument that the settlement agreement amounted to an enforceable stipulation.[298] The court of appeals reasoned that:

> [T]here is a distinction between a stipulation and a contract between individuals. A stipulation is a type of contract between the parties, and also between the parties and the court. Clearly, if the court is party to the contract, then the court is bound to it like any other party. However, a settlement agreement is not a contract between the parties and the court, but rather it is an agreement only between the parties. Thus, the trial court cannot be said to be bound by a settlement agreement in such a way that the court is inescapably required to render judgment on the agreement.[299]

The San Antonio Court of Appeals, in *Garcia v. Wallace*,[300] stated that the generally accepted interpretation of *Padilla* is that once consent is withdrawn, no agreed judgment can be entered, but that once the proponent of the settlement agreement amends the pleadings to allege the agreement and its breach, it is appropriate for the trial court to enter summary judgment ordering specific performance of the agreement.[301] The court noted:

> [T]he judgment against the Garcias [who renounced the agreement] is not an agreed or consent judgment. Rather, the judgment against the Garcias is a judgment for breach of a binding and enforceable contract—the Mediation Settlement Agreement. Accordingly, whether the Garcias withdrew their consent to the settlement agreement before a consent judgment was rendered is immaterial to the propriety of the trial court's judgment.[302]

The language in *Mantas,* indicating that a second suit might be required, was exposed and discussed in *Antonini v. Harris County*

---

297. No. 07-97-0265-CV, 1998 WL 483458 (Tex. App.—Amarillo Aug. 18, 1998, no pet.) (not designated for publication).

298. Pfeiffer v. Newman, No. 07-97-0265-CV, 1998 WL 483458, at *1 (Tex. App.—Amarillo Aug. 18, 1998, no pet.) (not designated for publication).

299. *Id.* at *3 (citation omitted).

300. No. 04-98-00066-CV, 1999 WL 391846 (Tex. App.—San Antonio June 16, 1999, no pet.) (not designated for publication).

301. Garcia v. Wallace, No. 04-98-00066-CV, 1999 WL 391846, at *2 (Tex. App.—San Antonio June 16, 1999, no pet.) (not designated for publication).

302. *Id.* (citation omitted); *accord Pfeiffer*, 1998 WL 483458, at *1 (stating that the "trial court can . . . enforce a settlement agreement even though one party no longer consents to the settlement" (citation omitted)).

Appraisal District,[303] which poses a potential trap.[304] In short, there is a danger of preclusion in filing a second suit. In *Mantas*, the second suit was necessary because the original action was on appeal.[305] However, in *Antonini* that was not the case. Instead, Mr. Antonini failed to file the breach of contract action in the original action, but asserted it in subsequent suits, and was precluded by the final judgment of dismissal for want of prosecution in the second action.[306] No motion to reinstate was filed in a subsequent case; instead, Antonini brought a new action in another court where he alleged that the District breached a settlement agreement in the 1989 case.[307] In the alternative, Antonini sought a bill of review to reinstate the 1989 case, and to require specific performance of the proposed agreed judgment.[308] Subsequently, Antonini filed a third suit "seeking specific performance or damages for [the District's] alleged breach of the proposed agreed judgment in the 1989 case."[309] The second case was tried before the court, but at the close of evidence, Antonini "took a nonsuit on the breach of contract claim[,]" and a judgment was entered denying all of Antonini's claims.[310] The third case was tried several weeks later and judgment was entered that Antonini take nothing.[311] On appeal, the court held that the settlement agreement was not enforceable because Antonini did not seek to enforce the agreement in the original 1989 case.[312]

> It was "possible" to file the papers and hear the breach of contract case in the 1989 case, but it was not done. After appellant allowed the 1989 case to be dismissed for want of prosecution, he did not file a motion to reinstate the case nor appeal the dismissal. Because appellant failed to comply with [R]ule 11 and *Padilla*, and [he] had op-

303. 999 S.W.2d 608 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

304. *See* Antonini v. Harris County Appraisal Dist., 999 S.W.2d 608, 614-15 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (identifying that the breach of contract claim in the first suit is the same as in the subject suit, thereby barring the breach of contract claim due to res judicata).

305. Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 659 (Tex. 1996) (orig. proceeding).

306. *Antonini*, 999 S.W.2d at 614-15.

307. *Id.*

308. *Id.* at 609-10.

309. *Id.* at 610.

310. *Id.*

311. *Antonini*, 999 S.W.2d at 610.

312. *Id.* at 613.

> portunity to assert his breach of contract action in the 1989 case under the original cause number, [the court of appeals found that] the trial court correctly concluded that the settlement agreement was not enforceable.[313]

When the trial court retains jurisdiction of the case at the time the settlement dispute arises, the complaining party must amend the pleadings to raise the breach of the settlement agreement.

> Where the settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should be asserted in that court under the original cause number, such as through an amended pleading or counterclaim. The settlement agreement alone is insufficient to provide a basis for judgment because it would deprive a party of the right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a judge or jury.[314]

The law, as it now stands, is summed up in *Anderton v. Schindler*,[315] a recent decision by the Dallas Court of Appeals.[316]

> The decision of whether a mediated settlement agreement is enforceable is determined in the same manner as any other written contract. An agreement is enforceable if it is "complete within itself in every material detail, and . . . contains all of the essential elements of the agreement." The intent of the parties to be bound is an essential element of an enforceable contract, and is generally a question of fact. However, where that intent is clear and unambiguous on the face of the agreement, it may be determined as matter of law.
>
> "[A] contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook." If an alleged agreement is so indefinite as to make it impossible for a court to fix the legal obligations and liabilities of the parties, it cannot constitute an enforceable contract. In order for a court to enforce a contract, the parties must agree to the material terms of the contract. To be legally binding, the parties must have a meeting of the minds and must communicate consent to the terms of the agreement.[317]

---

313. *Id.*

314. Alvarez v. Martinez, No. 04-99-00770-CV, 2000 WL 1585653, at *1 (Tex. App.—San Antonio Oct. 25, 2000, no pet.) (citations omitted). The court in this case reversed a summary judgment for the complaining party, because the complainant had failed to plead the breach of the settlement agreement. *Id.* at *2.

315. 154 S.W.3d 928 (Tex. App.—Dallas 2005, no pet.).

316. Anderton v. Schindler, 154 S.W.3d 928 (Tex. App.—Dallas 2005, no pet.).

317. *Id.* at 932 (citations omitted).

3. Special Considerations in Suits Affecting the Parent-Child Relationship

The Texas Family Code, section 153.0071,[318] was the first statute to apply specifically to the revocation of mediated settlement agreements in suits affecting the parent-child relationship.[319] Under the Code:

> A mediated settlement agreement is binding on the parties if the agreement:
> (1) provides in a separate paragraph an underlined statement that the agreement is not subject to revocation;
> (2) is signed by each party to the agreement; and
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.[320]

Under section 153.0071(e) of the Texas Family Code, "[i]f a mediated agreement meets the requirements of [s]ubsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11."[321]

In *Spinks v. Spinks*,[322] the parties to a divorce entered into a mediated settlement agreement that affected the parent-child relationship.[323] While the agreement "contained a statement in a separate paragraph that the parties stipulated and agreed that the agreement was not subject to revocation[,]" this statement was not underlined, although it did appear in all capital letters.[324] "At trial, the appellant repudiated the agreement."[325] Nevertheless, the trial

---

318. TEX. FAM. CODE ANN. § 153.0071(d) (Vernon 2002).

319. *See* Cayan v. Cayan, 38 S.W.3d 161, 165 n.6 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (recognizing this fact). Note that:

> Prior to enactment of section 153.0071 in 1995, settlement agreements in family law cases were governed by Rule 11 of the Texas Rules of Civil Procedure, Chapter 154 of the Texas Civil Practice and Remedies Code, and general contract law. From September 1, 1995 until August 31, 1997, section 153.0071(f) of the Texas Family Code applied to mediated settlement agreements in divorce proceedings. Effective September 1, 1997, section 153.0071(f) was repealed and replaced with section 6.602.

Id. (citations omitted).

320. TEX. FAM. CODE ANN. § 153.0071(d) (Vernon 2002).

321. *Id.* § 153.0071(e).

322. 939 S.W.2d 229 (Tex. App.—Houston [1st Dist.] 1997, no writ).

323. Spinks v. Spinks, 939 S.W.2d 229, 229 (Tex. App.—Houston [1st Dist.] 1997, no writ).

324. *Id.* at 230.

325. *Id.*

court "rendered a decree of divorce based on the mediated settlement agreement with a few modifications."[326] The court of appeals reversed and remanded, holding that "[the] judgment is clearly not a traditional consent judgment because appellant withdrew her consent before rendition. Moreover, the requirements for non[ ]revocation provided by section 153.0071(d) were not met because the stipulation by the parties that the agreement was non[ ]revocable was not underlined."[327]

In *Glover v. Brazoria County Children's Protective Services Unit*,[328] custody was determined by a mediated settlement agreement.[329] The father "agreed that if he did not comply with the five requirements [in the agreement,] he 'acknowledges that he does not need to have his children returned to him.' The trial court later approved the settlement agreement[,]"[330] but the father "failed to comply fully" with two of the requirements to which he had agreed.[331] On motion of the Brazoria County Children's Protective Services Unit and the Texas Department of Protective and Regulatory Services, "the trial court terminated [the father's] parental rights by rendering a final summary judgment."[332] However, the trial court's judgment was reversed on appeal.[333] The court of appeals found that the father had not "stipulated in the settlement agreement that a termination of his parental rights would be in the best interest of the children."[334] The court concluded that "[i]n light of the severe nature of involuntary termination of parental rights and the constitutional ramifications of such action," it was "unwilling to construe the language of the settlement agreement broadly to reach such a result."[335]

The court in *Glover* did not "reach the question of whether a parent's prospective agreement that it would be in the best interest of the child to terminate the parent's parental rights on the occur-

326. *Id.*
327. *Id.* (citations omitted).
328. 916 S.W.2d 19 (Tex. App.—Houston [1st Dist.] 1995, no writ).
329. Glover v. Brazoria County Children's Protective Serv. Unit, 916 S.W.2d 19, 19 (Tex. App.—Houston [1st Dist.] 1995, no writ).
330. *Id.* at 20.
331. *Id.*
332. *Id.*
333. *Id.* at 21.
334. *Glover*, 916 S.W.2d at 21.
335. *Id.*

rence of some future event would establish as a matter of law the best-interest element of involuntary termination."[336] However, in *Garcia-Udall v. Udall*,[337] the Dallas Court of Appeals concluded that, absent a finding that the agreement was either illegal or violative of public policy, "the trial court had no discretion to enter judgment that varied from the terms of the mediated settlement agreement."[338]

The current provision for enforcement of mediated settlement agreements is found in section 6.602 of the Texas Family Code, which provides that:

> (a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.
>
> (b) A mediated settlement agreement is binding on the parties if the agreement:
>
> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
>
> (c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (d) A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of a marriage to mediation on the basis of family violence having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the par-

336. *Id.* at 21 n.3.

337. 141 S.W.3d 323 (Tex. App.—Dallas 2004, no pet.).

338. Garcia-Udall v. Udall, 141 S.W.3d 323, 332 (Tex. App.—Dallas 2004, no pet.). *But see Glover*, 916 S.W.2d at 21 (identifying that the court did not enforce the mediated settlement agreement in that case due to the potential harsh outcome).

> ties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation.[339]

Under this provision, which the parties must enter into voluntarily[340] with the aid of a mediator,[341] an agreement that complies with section 6.602 of the Texas Family Code may be enforced by the family court without a determination that the agreement is "just and right," as generally required by section 7.006 of the Texas Family Code.[342]

> [T]he language of section 6.602 reflects that when the [l]egislature enacted that section, it definitely and deliberately created a procedural shortcut for enforcement of mediated settlement agreements in divorce cases. Equally apparent is that section 6.602 does not conflict with, but is an exception to, section 7.006. We are similarly persuaded that section 6.602 is also an exception to sections 7.001 and 7.006 in allowing a judgment to be entered on a section 6.602 agreement without a determination by the trial court that the terms of the agreement are just and right. Importantly, however, section 6.602 cannot be imposed on parties against their wishes. Rather, they remain free to enter mediated settlement agreements that do not fall within section 6.602 and, in fact, must take affirmative steps to qualify for section 6.602 treatment.[343]

Stated another way, "[u]nilateral withdrawal of consent does not . . . negate the enforceability of a mediated settlement agreement

---

339. TEX. FAM. CODE ANN. § 6.602 (Vernon Supp. 2005).

340. Domangue v. Domangue, No. 12-04-00029-CV, 2005 WL 1828553, at *2 (Tex. App.—Tyler Aug. 3, 2005, no pet. h.) (mem. op.). The decision emphasized the voluntary nature of such an agreement; the court also noted that the mandatory enforcement provisions may be easily avoided because "[b]oth parties to the instant agreement were free to enter into a mediated settlement agreement not governed by section 6.602." *Id.*

341. Lee v. Lee, 158 S.W.3d 612, 613-14 (Tex. App.—Fort Worth 2005, no pet.). The *Lee* court stated:

> Given that section 7.006(a) of the Texas Family Code, which has been in force for many years, already allows divorcing parties to enter into written agreements without requiring mediation concerning the division of the community assets and liabilities as well as spousal maintenance, we decline to carve a common-law exception into section 6.602(b) that allows an unmediated settlement agreement to morph into a mediated settlement agreement based on mere form. We hold that a mediated settlement agreement necessarily requires mediation and a mediator.

Id.

342. TEX. FAM. CODE ANN. § 7.006 (Vernon 1998).

343. Cayan v. Cayan, 38 S.W.3d 161, 166 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (footnote omitted).

in a divorce proceeding, and a separate suit for enforcement of a contract is not necessary."[344]

The Waco Court of Appeals has held that there must be compliance with both subsections 6.602(a) and 6.602(b) of the Texas Family Code before the mediated settlement agreement becomes enforceable.[345] In other words, the mediated settlement agreement must occur as a result of a court-ordered mediation. The court recognized that its holding was facially inconsistent with three other decisions and identifies that the decisions from the other courts were interpreting section 153.0071 of the Texas Family Code, and not section 6.602 of the Texas Family Code.[346]

In the broader context, it is not necessary that the court order the mediation for a mediated settlement agreement to be enforced pursuant to section 153.0071(e) of the Texas Family Code. It is sufficient that the agreement result from an agreed mediation, which may occur post-litigation.[347] In fact, in one case, a mediated settlement agreement containing the language "the agreement is not subject to revocation" was upheld against an argument that the party attempting to avoid the agreement was not capable of "making an informed, intelligent decision based on her health condition and medication regime."[348]

---

344. Boyd v. Boyd, 67 S.W.3d 398, 402 (Tex. App.—Fort Worth 2002, no pet.) (citing Alvarez v. Reiser, 958 S.W.2d 232, 234 (Tex. App.—Eastland 1997, writ denied)).

345. Lee v. Lee, No. 10-03-00182-CV, 2004 WL 1794473, at *1 (Tex. App.—Waco Aug. 11, 2004, pet. filed) (not designated for publication); *see also In re* Lee, No. 10-04-00286-CV, 2004 WL 2306686, at *1 (Tex. App.—Waco Oct. 13, 2004, no pet. h.) (mem. op.) (finding that the court did not have authority to enjoin a subsequently filed suit to enforce the mediated settlement agreement).

346. *Lee*, 2004 WL 1794473, at *1 (citing Kilroy v. Kilroy, 137 S.W.3d 780 (Tex. App—Houston [1st Dist.] 2004, no pet.)); *In re* Circone, 122 S.W.3d 403, 406 (Tex. App.—Texarkana 2003, no pet.); *In re* J.A.W.-N., 94 S.W.3d 119, 120-21 (Tex. App.—Corpus Christi 2002, no pet.).

347. *See In re J.A.W.-N.*, 94 S.W.3d at 121 (stating that the court need not be involved in the parties' decision to enter into mediation).

348. Domangue v. Domangue, No. 12-04-00029-CV, 2005 WL 1828553, at *1-2 (Tex. App.—Tyler Aug. 3, 2005, no pet. h.) (mem. op.). Section 6.602 of the Texas Family Code provides that:

> A mediated settlement agreement is binding on the parties if [it] (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation, (2) is signed by each party to the agreement, and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

4. Enforcement in Federal Court

When a mediated settlement agreement is breached before the entry of judgment in a federal action, the district court will generally "not exercise its supplemental jurisdiction over the breach of contract counterclaim."[349] In the context of a Title VII dispute, the Fifth Circuit Court of Appeals held that the withdrawal of a settlement agreement does not change the binding nature of the agreement.[350] The appellate court enforced the trial court's decision to enforce the settlement agreement entered during the pendency of the action.[351] The court, after noting that the "Louisiana requirement that settlement agreements be reduced to writing might hamper a significant federal interest" in settling Title VII claims determined that:[352]

> Federal law does not require . . . that the settlement be reduced to writing. Absent a factual basis rendering it invalid, an oral agreement to settle a Title VII Claim is enforceable against a plaintiff who knowingly and voluntarily agrees to the terms of the settlement or authorized his attorney to settle the dispute. If a party to a Title VII suit who has previously authorized a settlement changes his mind when presented with the settlement documents, that party remains bound by the terms of the agreement.[353]

TEX. FAM. CODE ANN. § 6.602(b) (Vernon Supp. 2005). "If [the] mediated settlement agreement meets [such requirements], a party is entitled to judgment on the agreement notwithstanding [other rules of law]." *Id.* § 6.602(c). "[W]hen the [l]egislature enacted [section 6.602], it definitely and deliberately created a procedural shortcut for enforcement of mediated settlement agreements in divorce cases." *Cayan*, 38 S.W.3d at 166.

> In [*Domangue*], the agreement was signed by Peggy, Charles, and their respective attorneys. Furthermore, the agreement provided that it was "not subject to revocation." The statement that the agreement was not subject to revocation was prominently displayed beginning at the top half of the fifth page of the document, just above where the parties and their respective attorneys were to sign. Moreover, the statement was displayed in capital letters, boldfaced type, and underlined. We conclude that the document meets the requirements of section 6.602.

Domangue, 2005 WL 1828553, at *2.

349. *See* Allen v. Leal, 27 F. Supp. 2d 945, 949 (S.D. Tex. 1998) (finding that "[t]he fact patterns for each cause of action [were] clearly distinct and separable").

350. Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. Dec. 1981).

351. *Id.* at 1210.

352. *Id.* at 1209.

353. *Id.*; *see also* Sanders v. Mary Kay Inc., No. Civ. A. 3:98-CV-1077-D, 1999 WL 20834, at *1 (N.D. Tex. Jan. 13, 1999) (exemplifying another Title VII case in which *Fulgence* is followed). "An oral agreement is enforceable against a plaintiff who knowingly and voluntarily agrees to the terms of the settlement." *Id. See generally* Scott H. Hughes,

Furthermore, the United States Supreme Court, in *Alexander v. Gardner-Denver Co.*,[354] held that an employee must knowingly and voluntarily consent to a settlement agreement under which he waives his right to pursue a Title VII action.[355] In *Allen v. Leal*,[356] a civil rights action, Judge Hittner indicated that when the mediated settlement agreement is repudiated, a suit on the settlement contract is the proper avenue for relief.[357]

B. *Mediated Contracts to Contract or Final Agreements?*

1. Intent to Be Bound by Agreement

An agreement to settle is subject to enforcement if it is "complete within itself in every material detail, and . . . contains all of the essential elements of the agreement."[358] If the intent to be bound by the agreement is clear on the face of the memorandum, the intent to be bound may be determined as a matter of law.[359] If the parties exchange letters agreeing to a settlement but make it subject to satisfactory legal documentation, the "subject to" language will raise a fact issue as to whether the parties' meant the settlement to be binding.[360] Likewise, a settlement memorandum prepared at the conclusion of a mediation indicating that "the parties' understandings are subject to securing documentation satisfactory to the parties" raises a fact issue on whether the parties intended to be bound by the agreement.[361]

Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One, 59 ALA. LAW. 246 (1998) (describing the process of mediation).

354. 415 U.S. 36 (1947).

355. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1947).

356. 27 F. Supp. 2d 945 (S.D. Tex. 1998).

357. Allen v. Leal, 27 F. Supp. 2d 945, 948 (S.D. Tex. 1998).

358. Padilla v. LaFrance, 907 S.W.2d 454, 460 (Tex. 1995).

359. *Cf. id.* at 461-62 (stating that a court can enforce a settlement agreement that complies with Rule 11, even if one party no longer consents); *cf. also* Edwards v. Lone Star Gas Co., 782 S.W.2d 840, 841 (Tex. 1990) (holding that the interpretation of unambiguous contracts is a question of law); Coker v. Coker, 650 S.W.2d 391, 394-95 (Tex. 1983) (noting that under the rules of contract construction, the determination of unambiguous terms and their effects is a question of law left to the court, but if the terms are ambiguous the court must look to the true intent of the parties).

360. *See* Foreca, S.A. v. GRD Dev. Co., 758 S.W.2d 744, 746 (Tex. 1988) (stating that the "subject to legal documentation" phrase in an agreement leads to a fact issue to be submitted to the jury).

361. *See* Martin v. Black, 909 S.W.2d 192, 197 (Tex. App—Houston [14th Dist.] 1995, writ denied) (identifying that the parties developed two handwritten documents that con-

On the other hand, in *Hardman v. Dault*,[362] a memorandum of settlement provided for the dismissal of the action with prejudice and set a specific amount to be paid at a specific rate, and concluded with the statement: "[f]inal documents to be signed by 1-1-97."[363] The agreement was found to be enforceable as a matter of law, as explained by Justice Green, writing for the court:

> There is no "subject to" language in the settlement memorandum in this case, however. The "final documents" provision neither suggests nor infers that the parties intended that the agreement was to be subject to any subsequent action by the parties, or that the signing of documents was to be a condition precedent to the formation of an enforceable contract. Thus, since the settlement agreement contains all essential terms, and there being no fact issue concerning whether the parties intended the settlement agreement to be binding, the partial summary judgment enforcing the written settlement agreement is affirmed.[364]

Where the agreement entered at meditation is an enforceable agreement, it should be considered in interpreting final settlement papers later drafted, signed, and used to terminate the case.[365] If multiple documents control the same transaction, they are read together, even if executed at different times.[366]

The withdrawal of consent to the entry of an agreed judgment is ineffective if it occurs after the agreed judgment is entered, at least where the settlement agreement is not a contract to contract. In *Clayton v. Henry*,[367] the parties, as the result of a mediated settle-

---

tain some of the terms of the agreement, which resulted in a fact issue to determine whether the parties planned to be bound by the agreement).

362. 2 S.W.3d 378 (Tex. App.—San Antonio 1999, no pet.).

363. Hardman v. Dault, 2 S.W.3d 378, 380-81 (Tex. App.—San Antonio 1999, no pet.).

364. *Id.* at 381.

365. *See* Hurst v. Am. Racing Equip., Inc., 981 S.W.2d 458, 462 (Tex. App.—Texarkana 1998, no pet.) (providing that, because the parties entered into a "Memorandum of Settlement" that was claimed to be all-inclusive of any additional agreements, the settlement would eliminate subsequent claims).

366. *See* Mem'l Med. Ctr. of E. Tex. v. Keszler, 943 S.W.2d 433, 434 (Tex. 1997) (concluding that an agreement and release should be read together to glean the intent of the parties); Board of Ins. Comm'rs v. Great S. Life Ins. Co., 150 Tex. 258, 239 S.W.2d 803, 809 (1951) (identifying that "[w]here several instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together although they do not expressly refer to each other" (citation omitted)).

367. No. 05-96-01898-CV, 1999 WL 89945 (Tex. App.—Dallas Feb. 24, 1999, no pet.) (not designated for publication).

ment agreement, had the trial court enter an agreed judgment calling for three payments on stated dates.[368] The judgment provided that there would be no execution on the judgment if payments were timely received.[369] When the first payment was not timely received, "[t]he Claytons filed a motion for new trial asking the court to withdraw or modify the agreed judgment on the grounds of failure of consideration, impossibility of performance, ambiguity in the agreement, or equity."[370] The motion was denied.[371] The court of appeals affirmed the trial court's order, "[b]ecause the signing of the agreed judgment was not a condition precedent to the Claytons' performance under the settlement agreement, [and therefore,] the trial court did not err in refusing to grant them a new trial."[372]

2. Contract Incomplete—Terms Missing

In *Soliman v. Goltz*,[373] as a result of mediation, Goltz agreed to pay money to Soliman, and Soliman agreed to release Goltz, but the memorandum of the agreement provided for "Goltz to draft certain documents, including a confidentiality agreement and an agreement of release."[374] After the mediation, the parties could not agree on the terms of the documents contemplated by the mediation memorandum.[375] Soliman then sued Goltz on the mediation memorandum, as a contract.[376] The court of appeals affirmed the trial court's conclusion that the memorandum was an agreement to agree, and not enforceable as a contract.[377]

---

368. Clayton v. Henry, No. 05-96-01898-CV, 1999 WL 89945, at *3 (Tex. App.—Dallas Feb. 24, 1999, no pet.) (not designated for publication).

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* at *2.

373. No. 05-93-00008-CV, 1993 WL 402740 (Tex. App.—Dallas Oct. 6, 1993, no writ) (not designated for publication). Under the Texas Rules of Appellate Procedure, opinions that are designated as "unpublished" cannot be cited as authority. TEX. R. APP. P. 47.7. This opinion and the other Texas Rules of Appellate Procedure Rule 47.7 cases contained in this paper are included because of their instructional value—not as precedent.

374. Soliman v. Goltz, No. 05-93-00008-CV, 1993 WL 402740, at *1 (Tex. App.—Dallas Oct. 6, 1993, no writ) (not designated for publication).

375. *Id.* at *2.

376. *Id.*

377. *Id.* at *8.

> Accordingly, we conclude that the written memorandum, manifesting the terms of the mediation agreement by including, among other terms, price and time for payment, was not definite enough to constitute a binding contract. There is no enforceable contract where, as here, the agreement of the parties leaves essential terms-the agreement of release and confidentiality-for later determination and these terms are never satisfactorily determined. If the nature and extent of the essential terms are not determined by the preliminary agreement, but are left to be defined and determined by future agreement of the parties, no binding contract exists.[378]

A similar holding is found in *Castano v. San Felipe Agricultural, Manufacturing & Irrigation Co.*,[379] where Justice Green found:

> In the instant case, Castano refers to language regarding "final documentation;" however, this language simply refers to the time period in which San Felipe was obligated to pay Castano the agreed upon sum as compensation for her mental anguish: "upon execution of final documentation." The original MSA also references "additional documents" but only insofar as these documents are necessary to "implement the provisions and spirit of" the agreement. In fact, the agreement goes on to say that "notwithstanding such additional documents the parties confirm that this is a written settlement agreement as contemplated by [s]ection 154.071 of the Texas Civil Practice and Remedies Code." The statements referring to "closing" and performance "subject to" further action are also taken out of context. Unlike *Foreca,* none of these statements suggests or infers that the parties intended the agreement to be subject to any subsequent action by the parties or that these events were to be conditions precedent to the formation of an enforceable contract. The language, therefore, fails to raise a fact issue as to whether the parties intended to be bound under the terms of the MSA.[380]

The terms of the Mediated Settlement Agreement (MSA) were such that "[a] mediated settlement agreement is enforceable in the same manner as any other contract."[381] "An agreement is enforceable if it is 'complete within itself in every material detail, and . . .

---

378. *Id.* (citations omitted).

379. 147 S.W.3d 444 (Tex. App.—San Antonio 2004, no pet.).

380. Castano v. San Felipe Agric., Mfg. & Irrigation Co., 147 S.W.3d 444, 448 (Tex. App.—San Antonio 2004, no pet.) (footnote omitted).

381. Hardman v. Dault, 2 S.W.3d 378, 380 (Tex. App.—San Antonio 1999, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon 1997)).

contains all of the essential elements of the agreement.'"[382] "The intent of the parties to be bound is an essential element of an enforceable contract."[383] Although this intent is often a question of fact, where it "is clear and unambiguous on the face of the agreement, it may be determined as a matter of law."[384] As stated above, the intent of the parties to be bound is evident from the wording and context of the MSA. The only question remaining has to do with the applicable terms of the contract.

Where the settlement agreement is "subject to" action of one side, and that action is not taken, the other side is released from performance.[385] This may allow one party to treat a finalized agreement as repudiated, while suing to enforce under the agreement originally executed.[386]

Thornton v. Ventura[387] presents an interesting interpretation of a mediation form in common use by the mediators of Texas.[388] The case involved a mediated settlement agreement, which provided that the defendants would transfer the land in question back to Ventura for the payment of $1.9 million.[389] The agreement also required that Ventura assume a "note payable to Guaranty Federal by some or all Defendants and secured by lessee's interest in the Property on a State Bar of Texas approved form with the following terms."[390] The parties could not agree on a form for the note. "At the trial before the court, appellants presented two State Bar of

382. Padilla v. LaFrance, 907 S.W.2d 454, 460 (Tex. 1995) (quoting Cohen v. McCutchin, 565 S.W.2d 230, 232 (Tex. 1978)); *Hardman*, 2 S.W.3d at 380 (quoting *Padilla*, 907 S.W.2d at 460).

383. *Hardman*, 2 S.W.3d at 380.

384. *Id.*

385. *See* Hohenburg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976) (explaining that one party has no right to immediate performance unless the other party fulfills the conditions precedent); *see also* D.E.W., Inc. v. Depco Forms, Inc., 827 S.W.2d 379, 382 (Tex. App.—San Antonio 1992, no writ) (stating that in Texas, reciprocal promises "are presumed to be mutually dependent and [a] breach of one will excuse the performance of the other").

386. *See* Shaw v. Kennedy, Ltd., 879 S.W.2d 240, 247 (Tex. App.—Amarillo 1994, no writ) (concluding that the appellant was entitled to repudiate the contract because appellee did not fulfill his end of the agreement).

387. No. 05-95-00113-CV, 1996 WL 132237 (Tex. App.—Dallas Mar. 20, 1996, writ denied) (not designated for publication).

388. Thornton v. Ventura, No. 05-95-00113-CV, 1996 WL 132237 (Tex. App.—Dallas Mar. 20, 1996, writ denied) (not designated for publication).

389. *Id.* at *1.

390. *Id.*

Texas forms" containing indemnity provisions "for a warranty deed with assumption of a note."[391] The court ruled that indemnity "was not part of the settlement agreement."[392] The court required the parties to execute "a warranty deed with [a] note assumption that did not include an indemnity" agreement.[393] The court of appeals affirmed, finding "that the trial court did not err in concluding that the indemnity provision was not incorporated by reference into the settlement agreement."[394] "The reference to use of a State Bar of Texas approved form is not sufficiently specific to incorporate by reference any particular form. . . . We hold that the settlement agreement's lack of a specific reference to a particular document prevents the application of incorporation by reference in this case."[395]

In *Montanaro v. Montanaro*,[396] the appellate court reversed a trial court's action in setting aside a settlement agreement as a contract to contract.[397] The agreement provided for a note, specified the interest rate and the terms of repayment, and noted that there had been partial performance.[398] The court considered all the elements surrounding the transaction and held, as a matter of law, that the agreement was binding and enforceable.[399]

> A final judgment that is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement. In a judgment by consent, "the court has no power to supply terms, provisions, or essential details not previously agreed to by the parties." The court can merely approve or reject the agreement. . . . [and] if the trial court goes beyond the terms of the parties' agreement, the proper course is to reverse the judgment and remand the case to the trial court.[400]

---

391. *Id.*

392. *Id.*

393. *Thornton*, 1996 WL 132237, at *1.

394. *Id.* at *3.

395. *Id.* at *2 (citation omitted).

396. 946 S.W.2d 428 (Tex. App.—Corpus Christi 1997, no writ).

397. Montanaro v. Montanaro, 946 S.W.2d 428, 430-31 (Tex. App.—Corpus Christi 1997, no writ).

398. *Id.* at 429, 431.

399. *Id.* at 431.

400. Buck v. Keats, No. 05-01-00612-CV, 2002 WL 523559, at *1 (Tex. App.—Dallas Apr. 9, 2002, no pet.) (citations omitted) (not designated for publication) (quoting *In re* Marriage of Ames, 860 S.W.2d 590, 593 (Tex. App.—Amarillo 1993, no writ)).

In certain instances, particular specificity is required, as in a mediated settlement agreement that purports to constitute a family settlement agreement of a decedent's estate. In *In re Estate of Halbert*,[401] the court invalidated a family settlement agreement.[402] To be enforceable, such agreements must include an agreement not to probate a will, and an agreement providing for the distribution of the deceased's property; this agreement did not meet those requirements.[403] In *Halbert,* the court concluded that "[p]erhaps, the most sound reading of the MSA would be that the parties contemplated probating no will, but would instead resolve the dispute by a future agreement."[404]

C. *Grounds Used to Avoid Mediated Agreements: Duress*

Duress was raised as an affirmative defense in an action seeking specific performance of a mediated settlement agreement in *Randle v. Mid Gulf, Inc.*[405] In reversing the trial court's summary judgment for the plaintiff, the court of appeals found a fact issue raised by Randle's affidavit statements that he was told he could not leave the mediation until he had settled the case, despite fatigue and chest pains.[406] Because the court recognized that "communications between parties and their attorneys are privileged and not subject to disclosure[,]" the court found that "confidentiality does not prevent a party from bringing suit for breach of a mediation agreement."[407]

---

401. No. 06-04-0074-CV, 2005 WL 1981110 (Tex. App.—Texarkana Aug. 18, 2005, no pet. h.).

402. *In re* Estate of Halbert, No. 06-04-0074-CV, 2005 WL 1981110 (Tex. App.—Texarkana Aug. 18, 2005, no pet. h.).

403. *In re* Estate of Morris, 577 S.W.2d 748, 756-57 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.); *see also* Cook v. Hamer, 158 Tex. 164, 309 S.W.2d 54, 56 (1958) (indicating that there was an agreement between heirs waiving the provisions of the testatrix's will); Hopkins v. Hopkins, 708 S.W.2d 31, 32 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (asserting that an agreement to forego probating a will is invalid unless a distribution of property is included in the agreement).

404. *In re Estate of Halbert*, 2005 WL 1981110, at *7.

405. No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex. App.—Houston [14th Dist.] Aug. 8, 1996, writ denied) (not designated for publication).

406. *Id.* at *2.

407. *Id.* at *1 (citations omitted); *see also* Frazin v. Grunning, No. 05-01-00492-CV, 2002 WL 84457, at *2 (Tex. App.—Dallas Jan. 23, 2002, pet. denied) (not designated for publication) (reversing a summary judgment order due to a mediation settlement agreement entered into under extreme duress and distress).

An agreement that a mediator's report could be submitted to the trial judge in a suit to terminate parental relations, did not constitute a waiver of the "right under section 154.073(a) that it [the mediator's report] 'may not be used as evidence against the participant in any judicial . . . proceeding.'"[408]

A statement[409] that a party suffering from fatigue and chest pains could not leave the mediation until a settlement was reached raises, at least, a fact question as to duress that is potentially sufficient to avoid specific enforcement of a mediated settlement agreement.[410] The court in *Randle* indicates that duress is "a threat to do some act which the threatening party has no legal right to do."[411] According to the court, the threat must destroy the free agency of the threatened party, and cause that party to do something that would not otherwise be done.[412] "The restraint caused by the threat must be imminent" and the threatened person must have no means of protection.[413] The *Randle* court then concludes: "Further, duress can be pled as an affirmative defense and, if proven, would nullify an award, contract or obligation."[414]

Lype v. Watkins[415] was a personal injury case in which the Lypes filed suit for personal injury damages.[416] Ronald Lype and his daughter, Amy, appeared at the court-ordered "mediation with an attorney, whom they later discharged."[417] "The mediation resulted in a handwritten document" purporting to settle all claims.[418] Following the mediation, the Lypes refused to sign the release papers called for in the settlement agreement.[419] In defending the action on the settlement agreement, the Lypes filed affidavits asserting

---

408. *In re* T.T., 39 S.W.3d 355, 360 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

409. *See Randle*, 1996 WL 447954, at *2 (failing to disclose who made the statement).

410. *Id.*

411. *Id.* (citing Creative Mfg., Inc. v. Unik, Inc., 726 S.W.2d 207, 211 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.)).

412. *Id.*

413. *Id.*

414. *Randle*, 1996 WL 447954, at *2.

415. No. 01-98-00051-CV, 1998 WL 734429 (Tex. App.—Houston [1st Dist.] Oct. 22, 1998, no pet.) (not designated for publication).

416. Lype v. Watkins, No. 01-98-00051-CV, 1998 WL 734429, at *1 (Tex. App.—Houston [1st Dist.] Oct. 22, 1998, no pet.) (not designated for publication).

417. *Id.* at *1.

418. *Id.*

419. *Id.*

that their attorney coerced them into settling the case.[420] The trial court entered summary judgment for the defendants, requiring the Lypes to execute releases upon receipt of the settlement proceeds, as called for in the mediated settlement agreement.[421] The court of appeals affirmed, disposing of their claim of coercion by pointing out that to be effective as a defense, the coercion must come "from one who is a party to the contract."[422]

> Duress or undue influence can suffice to set aside a contract, but it is well-settled that these must emanate from one who is a party to the contract. Courts will not invalidate contracts on grounds of duress when the alleged duress derives from a third person who has no involvement with the opposite party to the contract.[423]
>
> Query: Does this mean that a mediator can never be guilty of coercion or duress? Surely not.[424]

It has been found to be error to enter summary judgment in an action to enforce a mediated settlement agreement where the opponent has raised a fact issue about the mental capacity of the party seeking to avoid that agreement.[425] That argument did not prevail in *Domangue v. Domangue*,[426] a family law case containing the statutory language making the agreement nonrevocable.[427]

---

420. *Id.*

421. *Lype*, 1998 WL 734429, at *1.

422. *Id.* at *3.

423. *Id.* (citations omitted). *Contra* Vitakis-Valchine v. Valchine, 793 So. 2d 1094, 1099 (Fla. Dist. Ct. App. 2001) ("We hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures.").

424. The problem of coercion, customarily an issue of contract law, is treated as a matter of "ethical conduct of parties, attorneys, and the mediator himself." Phyllis E. Bernard, *Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 MARQ. L. REV. 113, 140 (2001).

425. *See* Lerer v. Lerer, No. 05-99-00474-CV, 2000 WL 567020, at *2 (Tex. App.—Dallas May 3, 2000, no pet.) (not designated for publication) (analyzing mental incapacity and whether it can bind a party in mediation).

426. No. 12-04-00029-CV, 2005 WL 1828553 (Tex. App.—Tyler Aug. 3, 2005, no pet. h.) (mem. op.).

427. Domangue v. Domangue, No. 12-04-00029-CV, 2005 WL 1828553, at *2 (Tex. App.—Tyler Aug 03, 2005, no pet. h.) (mem. op.); *see* TEX. FAM. CODE ANN. § 6.602 (Vernon Supp. 2005) (containing the statutory language); Cayan v. Cayan, 38 S.W.3d 161, 164 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (indicating the appellant argued "that because section 6.602 is silent regarding enforcement of mediated settlement agree-

VI. Incidental Effect of Mediation Orders

An order for mediation to take place within 150 days, when also accompanied by a trial date, does not supersede an existing docket control order.[428] On appeal during mediation, if the mediation fails the appellate timetable is suspended and may be restarted.[429] Failure to comply with the recommended timetable will result in dismissal for want of prosecution, at least after an opportunity to cure.[430] Likewise, the failure to report the status of a case after it is referred to mediation may be grounds on appeal for dismissal for want of prosecution after an opportunity to cure is provided.[431]

VII. Time to Mediate

That a case is ordered to mediation does not always guarantee the delay of the case. If the court seeks to proceed while the mediation is ongoing, any error is waived, unless the complaining party seeks an order staying the proceeding pending the outcome of the mediation.[432] Further, that a case is tentatively settled does not excuse a party from diligently prosecuting or defending a pending case.[433] In other words, any tentative settlements should be timely

---

ments, the agreement in this case must be enforced in the same manner as any other written contract").

428. *See* Feldman v. NationsBank of Tex., N.A., No. 01-94-01018-CV, 1995 WL 389710, at *3 (Tex. App.—Houston [1st Dist.] June 29, 1995, writ dism'd) (not designated for publication) (refusing the appellant's argument that the mediation order superseded the docket control order when the judge wrote the trial date on the mediation order).

429. *See* Wells Fargo Bank, N.A. v. Aguilar, No. 08-04-00142-CV, 2004 WL 3017287, at *1 (Tex. App.—El Paso Dec. 30, 2004, no pet.) (mem. op.) (not designated for publication) (noting that the appellate timetable is suspended pending the mediation, and that after the failure of the mediation, the timetable is restarted); Boone v. Burr, 115 S.W.3d 802, 802 (Tex. App.—Dallas 2003, no pet.) (per curiam) (holding that the appellate timetable was suspended during mediation).

430. Wells Fargo Bank, N.A. v. Aguilar, No. 08-04-00142-CV, 2004 WL 3017287, at *1 (Tex. App.—El Paso Dec. 30, 2004, no pet.) (mem. op.) (not designated for publication).

431. Peiskee v. City of Hearne, No. 10-02-00218-CV, 2004 WL 2363787, at *1 (Tex. App.—Waco Oct. 20, 2004, no pet.) (mem. op.) (not designated for publication).

432. *See* Phoenix Bit & Tool, Inc. v. Texaco, Inc., 879 S.W.2d 277, 279 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (declaring that summary judgment was proper when the appellant waived his argument by not presenting it at trial and by not seeking to stay the summary judgment proceedings until the final outcome of mediation).

433. *See* Fed. Lanes, Inc. v. City of Houston, 905 S.W.2d 686, 689-90 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (describing a case where the trial court refused to reinstate upon an unverified joint motion of the parties, but the court of appeals reversed and remanded).

implemented or repudiated. Parties who repudiate settlement agreements are particularly at risk. The plaintiff in *Ellmossallamy v. Huntsman*[434] was successful in obtaining reinstatement of a case dismissed for want of prosecution after he demonstrated that his failure to pursue the case was not due to conscious indifference or any intentional acts of the party, but was due to mistake or misunderstanding.[435] Emphasizing the trial court's discretion, the court in *Federal Deposit Insurance Corp. v. Kendrick*[436] affirmed a trial court's refusal to reinstate an action dismissed for want of prosecution.[437] There, the FDIC's delay in deciding whether to accept a settlement offer was fatal.[438] It should be remembered that neither settlement activity nor the passivity of the opponent excuses a want of diligence.[439] In *Pickell v. Guaranty National Life Insurance Co.*,[440] a mediated settlement agreement was not enough to relieve a defendant of the need to appear at trial and did not preclude a post-answer default.[441] The agreement should be brought to the court's attention by amended pleadings or motion for summary judgment.

While mediation is a flexible process, and can usually be arranged quickly and with little notice, there are limits on the timing of a court-ordered mediation. A party must be allowed ten days after receipt of notice of the mediation order to object to the refer-

434. 830 S.W.2d 299 (Tex. App.—Houston [14th Dist.] 1992, no writ).

435. *See* Ellmossallamy v. Huntsman, 830 S.W.2d 299, 301-02 (Tex. App.—Houston [14th Dist.] 1992, no writ) (recognizing that appellant's apparent failure to prosecute with due diligence was not intentional).

436. 897 S.W.2d 476 (Tex. App.—Amarillo 1995, no writ).

437. *See* FDIC v. Kendrick, 897 S.W.2d 476, 482 (Tex. App.—Amarillo 1995, no writ) (holding that the trial judge was within his discretion in refusing to reinstate the action).

438. *Id.*

439. Tex. Soc., Daughters of Am. Revolution v. Estate of Hubbard, 768 S.W.2d 858, 862 (Tex. App.—Texarkana 1989, no writ).

440. 917 S.W.2d 439 (Tex. App.—Houston [14th Dist.] 1996, no writ).

441. *See* Pickell v. Guar. Nat'l Life Ins. Co., 917 S.W.2d 439, 443 (Tex. App.—Houston [14th Dist.] 1996, no writ) (upholding a default judgment against appellant even though the judge was aware of a mediated settlement agreement prior to issuing the default judgment).

ral to mediation.[442] Furthermore, mediation should not be ordered during a period of statutory abatement.[443]

VIII. Effect of Mediated Agreement on Pending Action

It should not be forgotten that where there is a settlement agreement by the parties and the consent to that settlement is not withdrawn, the court may enter judgment on the agreement. If a settlement is reached while a case is on appeal, the cause becomes moot.[444] "When a cause becomes moot while on appeal, all previous orders and judgments should be set aside and the cause, not merely the appeal, dismissed."[445]

Some courts of appeals, however, do accede to the parties' requests to reverse and remand to the trial court for entry of an order of dismissal,[446] or to reverse and remand for entry of an agreed

---

442. Tex. Civ. Prac. & Rem. Code Ann. § 154.022(b) (Vernon 2005); *see also* Keene Corp. v. Gardner, 837 S.W.2d 224, 232 (Tex. App.—Dallas 1992, writ denied) (stating that an order for sanctions for failure to participate in a mediation ordered with less than ten days notice was erroneous).

443. Permanente Med. Ass'n of Tex. v. Johnson, 917 S.W.2d 515, 517 (Tex. App.—Waco 1996, no writ).

444. Johnson v. Gest, No. 03-96-00352-CV, 1996 WL 627387, at *1 (Tex. App.—Austin Oct. 30, 1996, no writ) (not designated for publication); Panterra Corp. v. Am. Dairy Queen, 908 S.W.2d 300, 300 (Tex. App.—San Antonio 1995, no writ).

445. *See Panterra*, 908 S.W.2d at 300 (quoting Freeman v. Burrows, 141 Tex. 318, 171 S.W.2d 863, 863 (1943)); *see also* Speer v. Presbyterian Children's Home & Serv. Agency, 847 S.W.2d 227, 228 (Tex. 1993) (holding that petitioner's cause was rendered moot on appeal when respondent withdrew from the services that petitioner sought injunctive relief against); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hughes, 827 S.W.2d 859, 859 (Tex. 1992) (per curiam) (holding that when the parties settled by joint motion to dismiss, the appeal was mooted); Freeman v. Burrows, 141 Tex. 318, 171 S.W.2d 863, 863 (1943) (stating that "when a cause becomes moot on appeal, all previous orders and judgments should be set aside . . . and the cause . . . dismissed"); Kennedy v. Artyn, Inc., No. 14-00-000376-CV, 2000 WL 1472432, at *1 (Tex. App.—Houston [14th Dist.] Oct. 5, 2000, no pet.) (not designated for publication) (granting a motion to dismiss the appeal after successful settlement was reached through mediation); Toothman v. Bexar County Hosp. Dist., No. 04-96-00591-CV, 1997 WL 13645, at *1 (Tex. App.—San Antonio Jan. 15, 1997, no writ) (not designated for publication) (holding that after the parties successfully mediated the dispute, the appeal was moot).

446. *See* Comprehensive Investigations & Sec. v. Perry, No. 14-98-00427-CV, 1999 WL 649118, at *1 (Tex. App.—Houston [14th Dist.] Aug. 26, 1999, no pet.) (not designated for publication) (granting a joint motion to reverse and remand the cause to the trial court to dismiss the cause in order to effectuate the settlement agreement); Alloju v. Townewest Homeowners Ass'n, No. 01-96-0394-CV, 1996 WL 434185, at *1 (Tex. App.—Houston [1st Dist.] Aug. 1, 1996, no writ) (not designated for publication) (reversing the judgment and remanding the cause to the trial court to dismiss the cause after the parties filed a joint

judgment,[447] or for proceedings "not inconsistent with this opinion."[448] The conflict between dismissal and remand is fully illustrated by the majority and dissenting opinions in *Panterra Corp. v. American Dairy Queen*.[449]

Another decision, *Hudson v. Small*,[450] involved a case on appeal where the court ordered the case to mediation.[451] Subsequently, the mediator reported that the case had settled before the mediation.[452] The parties were queried on whether the case had settled, and if not, were asked to inform the court of the status of the appeal, including the status of the reporter's record.[453] Upon receiving no response, the court of appeals dismissed the case.[454] Also note that an agreement to mediate, before submitting a case to arbitration, does not waive a party's right to arbitration.[455]

IX. CONFIDENTIALITY OF MEDIATION

In addition to Rule 408 of the Texas Rules of Evidence,[456] protecting settlement discussions,[457] there are several provisions in the

---

motion requesting such action); Nat'l Union Fire Ins. Co. v. Apache Corp., No. 01-96-0173-CV, 1996 WL 404033, at *1 (Tex. App.—Houston [1st Dist.] July 18, 1996, no writ) (not designated for publication) (granting a joint motion to vacate the trial court's judgment and remand because of settlement).

447. State v. Stone, No. 01-96-01020-CV, 1996 WL 680114, at *1 (Tex. App.—Houston [1st Dist.] Nov. 21, 1996, no writ) (not designated for publication).

448. *Nat'l Union Fire Ins. Co.*, 1996 WL 404033, at *1.

449. 908 S.W.2d 300, 300 (Tex. App.—San Antonio 1995, no writ) (holding that because the court cannot affirm the judgment of the lower court and dismiss the appeal, all previous orders and judgments are set aside and the cause dismissed). Justice Duncan argues in her dissent that a final judgment should be entered so as to preserve the appellee's potential res judicata defense. *Id.* at 303 (Duncan, J., dissenting).

450. No. 05-98-00081-CV, 1998 WL 462539 (Tex. App.—Dallas Aug. 11, 1998, no pet.) (not designated for publication).

451. Hudson v. Small, No. 05-98-00081-CV, 1998 WL 462539, at *1 (Tex. App.—Dallas Aug. 11, 1998, no pet.) (not designated for publication) (reiterating the court's insistence that the parties mediate the case).

452. *Id.*

453. *Id.*

454. *Id.*

455. Tex. Residential Mortgage, L.P. v. Portman, 152 S.W.3d 861, 863 (Tex. App.—Dallas 2005, no pet.).

456. TEX. R. EVID. 408.

457. *See generally* Wayne Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988) (discussing how evidentiary rules may protect the confidentiality of settlement discussions); Jon R. Waltz & J. Patrick Huston, *The Rules of Evidence in Settlement*, 5 LITIG. 11 (1978) (illustrating the effects of evidentiary rules on

Texas ADR Act that require mediation proceedings to be confidential, beginning with section 154.053(b), which relates to standards and duties of impartial third parties.[458] This provision requires that the mediator keep confidential any information given up in confidence during mediation, unless expressly authorized by the disclosing party.[459] Section 154.053(c) is even broader, requiring that "[u]nless 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."[460]

Section 154.073 is subject to two exceptions that provide safeguards of confidentiality regarding communications and recordings during mediation proceedings and grant broader statutory protection than those discussed above.[461] From a plain reading of the statute, section 154.073 is much broader than section 154.053, and

---

settlement negotiations); Sonja A. Soehnel, Annotation, *Evidence Involving Compromise or Offer of Compromise As Inadmissible Under Rule 408 of Federal Rules of Evidence*, 72 A.L.R. FED. 592 (1985) (describing Rule 408's impact on settlement offers and discussions).

458. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (Vernon 2005).

459. *Id.*

460. *Id.* § 154.053(c).

461. *Id.* § 154.073. This section states:

> (a) Except as provided by [s]ubsections (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 part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.
>
> . . . .
>
> (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.

Id.

appears to apply to the neutral third-party mediator.[462] While section 154.053 appears to be waivable by the parties, the right to protect the confidentiality of the process belongs to the mediator. The right vested in the mediator by section 154.073 should not be waivable by the parties without wrongdoing by the mediator.

It is surprising that there have been so few decisions relating to the issue of confidentiality in the years following the passage of the Texas ADR Act. Many commentators have discussed, generally, the scope of the confidentiality provisions and the potential questions raised by these provisions during mediation proceedings.[463] Mediation participants in Texas, whether in court-ordered or consensual mediations,[464] expect what is said and done in the mediation to be kept confidential, just as a penitent expects a clergyman

---

462. *See* JEROME S. LEVY & ROBERT C. PRATHER, SR., TEXAS PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION §§ 11:12-15 (describing a mediator's role as it pertains to confidential information). According to the guide, "the statute ([s]ection 154.073(b)) provides that the mediator may not be compelled to testify as to anything that was stated at the mediation by any of the participants." *Id.* § 11:12. Moreover, "it would appear that the confidentiality privilege belongs to the mediator and, as such, even if the parties agree to waive confidentiality, the mediator cannot be compelled to discuss what transpired." *Id.* § 11:14.

463. *See generally* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 25 U.C. DAVIS L. REV. 33 (2001) (discussing loss of confidentiality when disputes concerning settlement agreements reached during mediation arise); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 79-85 (2001) (discussing the need for uniform mediation rules regarding confidentiality); Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986) (discussing the confidentiality requirement); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25 (1992) (discussing confidentiality broadly and then analyzing it from a moral perspective); Eric D. Green, *A Heretical View of a Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986) (discussing the confidentiality requirement); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715 (1997) (discussing the problems associated with ADR confidentiality); Philip J. Ritter, *ADR: What About Confidentiality?*, 51 TEX. B.J. 26 (1988) (analyzing confidentiality in ADR); Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541 (1997) (describing the confidentiality requirement); Gary Joseph Kirkpatrick, *Should Mediators Have a Confidentiality Privilege?*, MEDIATION Q., Sept. 1985, at 85 (commenting on ADR confidentiality).

464. *See In re* Cartwright, 104 S.W.3d 706, 714 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (indicating that the confidentiality provisions apply to both consensual and court-ordered mediations).

to keep any communication confidential.[465] As one commentator, Brian D. Shannon, wrote: "One of the cornerstones of the enactment was the statute's broad confidentiality protection. . . . Hence, taken together these various provisions place limits on future testimony in later adjudications and require confidentiality outside of other legal proceedings."[466]

Despite the clarity of the Texas ADR Act, the general agreement that confidentiality is at the heart of the mediation process, and the acceptance of confidentiality by Texas mediators and attorneys, the issues concerning confidentiality have not been clearly defined or properly addressed by the judiciary.

The first case on confidentiality under the Texas ADR Act, *Williams v. State*,[467] was a criminal case which properly held that a court could not consider any evidence from a dispute resolution procedure, even in a criminal case.[468] However, the court required that a party complaining of the disclosure of confidential information obtained during a mediation must, to obtain relief on appeal, specify what results of the mediation (other than that the case settled) were reported to the trial court, "the manner in which the results were reported, or how the results were allegedly considered by the trial court."[469]

---

465. *See* TEX. R. EVID. 505 (establishing a privilege between penitent and priest that may only be dismissed by consent). As with the clergy-penitent privilege, the mediation statute recognizes no exceptions to the privilege, except by consent of the parties, unless it be found in the Texas Civil Practices and Remedies Code, section 154.073(d). Thus, the holding in *Nicholson v. Wittig*, 832 S.W.2d 681, 686 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding), is relevant to the interpretation of the statutes in question:

> In fact, no exceptions to the privilege are set forth in [R]ule 505 of the Texas Rules of Civil Evidence. Rule 505 bears no relationship to the attorney-client, Tex. R. Civ. Evid. 503, physician-patient, Tex. R. Civ. Evid. 509, or mental health professional-patient, Tex. R. Civ. Evid. 510, privileges, all of which set forth specific exceptions. In particular, the attorney-client privilege, Tex. R. Civ. Evid. 503, focuses, as does the dissenting opinion, on the nature of the communication. Rule 505 makes no reference to the content of the communication; rather, the rule focuses on the counseling opportunity. The rule is intended to shroud a confidence of a communicant in the privilege.

Id.

466. Brian D. Shannon, *Dancing with the One That "Brung Us"—Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. DISP. RESOL. 197, 201-03 (2003).

467. 770 S.W.2d 948 (Tex. App.—Houston [1st Dist.] 1989, no pet.).

468. Williams v. State, 770 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1989, no pet.).

469. Parmer v. Pre-Fab Constr., Inc., No. 14-95-00752-CV, 1997 WL 7020, at *5 (Tex. App.—Houston [14th Dist.] Jan. 9, 1997, no writ) (not designated for publication).

The first major decision concerning confidentiality protections for mediation in Texas occurred in federal court.[470] Applying Texas law, the court in *Smith v. Smith*[471] stated that "comity and the expectations of the [m]ediator and the parties at the time the mediation was conducted required [that it] give due deference to the Texas law and rules."[472] The court refused to compel the mediator to testify on the issue of whether the defendants, in the mediation, defrauded the plaintiff into signing the mediated settlement agreement.[473] This decision gives a full discussion of the Texas statute, but draws few conclusions.

Until recently, the other Texas decisions have provided little illumination on the meaning of the statute. For example, in *J.B.J. Distributors, Inc. v. Jaikaran*,[474] the court noted:

> The referral order directed that the Moderated Settlement Conference was to be conducted pursuant to the provisions of the Act, and that all matters, including the conduct and demeanor of the parties and their counsel, would remain confidential and would not be disclosed to anyone, including the court. We conclude that the settlement conference was duly conducted pursuant to the provisions of the section.[475]

The first negative decision on confidentiality arising in Texas came in *In re Grand Jury Subpoena Dated Dec. 17, 1996*.[476] Considering the Texas ADR Act inapplicable to the case, the Fifth Circuit Court of Appeals, in what some commentators consider to be a poorly reasoned opinion,[477] held that 7 U.S.C. § 5101(c)(3)(D),

---

470. *See* Smith v. Smith, 154 F.R.D. 661, 669 (N.D. Tex. 1994) (implying that the confidentiality of the mediation could be breached where there is fraud).

471. 154 F.R.D. 661 (N.D. Tex. 1994).

472. Smith v. Smith, 154 F.R.D. 661, 664 (N.D. Tex. 1994).

473. *Id.* at 674-75.

474. 744 S.W.2d 379 (Tex. App.—Houston [1st Dist.] 1988, no writ).

475. J.B.J. Distrib., Inc. v. Jaikaran, 744 S.W.2d 379, 380 (Tex. App.—Houston [1st Dist.] 1988, no writ) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.051 (Vernon 1986)).

476. 148 F.3d 487 (5th Cir. 1998).

477. *See* Charles Pou, Jr., *Gandhi Meets Elliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR*, ADMIN. & REG. L. NEWS, Spring 1999, at 5 (criticizing the Fifth Circuit's decision in *In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487 (5th Cir. 1998)); *see also* Joshua J. Engelbart, *Federal Mediation Privilege: Should Mediation Communications Be Protected From Subsequent Civil and Criminal Proceedings?*, 1999 J. DISP. RESOL. 73, 82 (1999) (grappling with the problems of recognizing a federal mediator's privilege through case analysis).

requiring "a state agricultural loan mediation program to provide that mediation sessions shall be confidential in order to qualify for federal funding,"[478] did not create "an evidentiary privilege that protects information relating to mediation sessions from disclosure in grand jury proceedings . . . [but rather it] requires only that mediation sessions remain 'confidential.' 'Confidential' does not necessarily mean 'privileged.'"[479] The court observed that because the release of information was to the grand jury, the information would not be severely compromised unless an indictment was returned.[480]

In *Allen v. Leal*, a federal civil rights action, the plaintiff repudiated the settlement agreement, alleging that the mediator had forced the settlement.[481] The trial court released the parties, and the mediator, from the confidentiality requirements of Rule 201 of the Local Rules for the Southern District of Texas.[482] In releasing the mediator from the rules of confidentiality, Judge Hittner noted:

> The [c]ourt fully recognizes the importance and gravity of the rules of confidentiality governing mediation. However, because the plaintiffs, in this particular situation, actually "opened the door" by attacking the professionalism and integrity of the mediator and the mediation process, the [c]ourt was compelled, in the interest of justice, to breach the veil of confidentiality.[483]

In *Zidell v. Zidell*,[484] the appellate court upheld the trial court's exclusion of evidence concerning statements made in the course of mediation, where no agreement was reached.[485]

> [T]he confidentiality provision works as it was designed—to protect communications made during mediation that do not result in a bind-

---

478. *In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 491 (5th Cir. 1998).

479. *Id. at* 492.

480. *Id.* at 493. This case, and other cases grappling with the problems of recognizing a federal mediator's privilege, are discussed in Joshua J. Engelhart, *Federal Mediation Privilege: Should Mediation Communications Be Protected from Subsequent Civil & Criminal Proceedings*, 1999 J. DISP. RESOL. 73, 77 (1999). *See also* ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 2001 app. e (2001).

481. Allen v. Leal, 27 F. Supp. 2d 945, 945 (S.D. Tex. 1998).

482. *Id.* at 947.

483. *Id.* at 947 n.4.

484. No. 05-96-00052-CV, 1997 WL 424429 (Tex. App.—Dallas July 30, 1997, no writ) (not designated for publication).

485. Zidell v. Zidell, No. 05-96-00052-CV, 1997 WL 424429, at *9 (Tex. App.—Dallas July 30, 1997, no writ) (not designated for publication).

> ing and final settlement of all or part of a lawsuit. Based on this record, we conclude that the trial court did not abuse its discretion when it applied section 154.073 to exclude communications made during mediation.[486]

Similarly, the Austin Court of Appeals in *Texas Parks & Wildlife Department v. Davis* held that "section 154.073 requires that communications and records made in an ADR procedure remain confidential; consequently, the manner in which the participants negotiate should not be disclosed to the trial court."[487]

A majority of the Beaumont Court of Appeals in *In re Daley*, however, rejected the argument that this holding meant that "all communications, conversations, and records made in an ADR proceeding remain confidential."[488]

> Rather than a blanket confidentiality rule for participants, the statute renders confidential "a communication *relating to the subject matter of any civil or criminal dispute* made by a participant in an ADR procedure." We do not find the questions—whether Daley attended the mediation and whether he had the mediator's permission to leave when he did—concern the subject matter of the underlying suit or the manner in which the participants negotiated.[489]

The court concluded that the question of whether Daley, the insurance company's representative, had left the mediation before it ended, concerned "only the procedural issue of attendance, not the subject matter of the dispute being mediated. Therefore, we hold the trial court's order [allowing Daley to be deposed on whether and when he left the mediation] is not in violation of the Alternate Dispute Resolution statute."[490]

The Dallas Court of Appeals, in *Avary v. Bank of America, N. A.*,[491] dealt with another facet of the confidentiality of mediations:

---

486. *Id.*

487. Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 375 (Tex. App.—Austin 1999, no pet.).

488. *In re* Daley, 29 S.W.3d 915, 918 (Tex. App.—Beaumont 2000, orig. proceeding).

489. *Id.* (emphasis added).

490. *Id.*; *see also* Phyllis E. Bernard, *Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 MARQ. L. REV. 113, 124 n.33 (2001) (stating that the court in *Daley* held "where the trial court had ordered parties to attend mediation, the mediator could be examined on the limited question of whether the mediator had given permission for the party to leave"). This statement appears to be in error in that no effort was made in the *Daley* case to depose the mediator. *See In re Daley*, 29 S.W.3d at 915-18.

491. 72 S.W.3d 779 (Tex. App.—Dallas 2002, pet. denied).

whether it protects mediation communications when they form the basis of a separate and unique action?[492] There, in the process of negotiating the settlement of a personal injury case, Bank of America (the Bank), as representative of two estates, purportedly made a decision during mediation, with regard to a settlement proposal, without considering the estates' tax liability.[493] After the suit that was the subject of the mediation was settled, Avary, as guardian of the minors whose estates were represented by the Bank, sued the Bank for breach of a fiduciary duty, claiming that the "rejection of the $450,000 offer and the acceptance of a smaller allocation was a breach of [fiduciary duty]."[494] The trial court refused to allow Avary to conduct discovery to establish the breach of fiduciary duty claim on the basis that all communications that occurred during the mediation were confidential or privileged under section 154.073 of the Texas Civil Practice and Remedies Code.[495] Having precluded the development of Avary's case, the trial court then entered a "no evidence" summary judgment for the Bank.[496] The court of appeals reversed and remanded, finding the Bank was a fiduciary, and as such, had a duty of full disclosure to the beneficiary.[497] That duty of disclosure, which formed the basis of this new lawsuit, allowed the trial court to conclude under section 154.073(e) that in light of the conflict of the "facts, circumstances, and context," disclosure was warranted.[498]

Specifically, the Dallas court held:

> We are not presented with the question whether discovery of mediation communications would be appropriate if sought in the same case in which mediation had failed, and in which the parties were proceeding to trial on their original claims and defenses. Nor are we presented with the questions whether a mediator can be compelled to testify or respond to discovery. We conclude only that where 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

492. Avary v. Bank of Am., N.A., 72 S.W.3d 779, 803 (Tex. App.—Dallas 2002, pet. denied).

493. *Id.* at 785.

494. *Id.*

495. *Id.* at 786.

496. *Id.*

497. *Avary*, 72 S.W.3d at 803.

498. *Id.* at 803.

> where the trial judge finds in light of the 'facts, circumstances, and context,' disclosure is warranted.[499]

Upon remand, the trial court did order disclosure. The court of appeals denied the subsequent request for a protective writ of mandamus. The party seeking to protect the information from disclosure sought a writ of mandamus, but settled the case while that petition was pending.[500] This simplistic decision by the Dallas court, made without extensive examination of the subject, represents a complete lack of understanding of the importance of confidentiality in the mediation process, to the mediator, and to the parties. That the disclosure is to occur in a subsequent proceeding, nonetheless, chills the process, and places a formidable obstacle in the path of successful mediations.

In *Allison v. Fire Insurance Exchange*,[501] the Austin Court of Appeals refused to allow an insurer to put on evidence that, during a mediation, it had made an offer to settle in good faith.[502] The trial court's exclusion of the evidence was affirmed, and *Avary* was distinguished because it concerned a bank's breach of fiduciary duty in rejecting a higher settlement offer during mediation. The *Avary* court allowed evidence of the bank's conduct during mediation because it went to the heart of the parties' dispute.[503] In *Allison*, however, the district court excluded this evidence primarily because Fire Insurance Exchange's conduct was at issue.[504]

---

499. *Id.* at 802-03; *see also* Rebecca H. Hiers, *Navigating Mediation's Uncharted Water*, 57 RUTGERS L. REV. 531, 575 (2005) (concluding that courts are willing to create exceptions to the confidentiality requirement in meditations when the alleged misconduct results in an unfair agreement); Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened*, 2003 J. DISP. RESOL. 135, 154 n.147 (stating, "whether a duty of disclosure exists, nondisclosure (as opposed to affirmative misrepresentation) can be treated as grounds to invalidate a contract. Therefore, misrepresentation or concealment may be grounds to invalidate a contract.").

500. *See* Brief for Ass'n of Attorney Mediators As Amici Curiae Supporting of Petition for Writ of Mandamus, *In re* Bank of Am., N.A., No. 04-0544, 2004 WL 1811113, at *1, *16 (Tex. July 27, 2004).

501. 98 S.W.3d 227 (Tex. App.—Austin 2002, pet. granted) (noting that this judgment was vacated and remanded by agreement on Mar. 26, 2004).

502. Allison v. Fire Ins. Exch., 98 S.W.3d 227, 259 (Tex. App.—Austin 2002, pet. granted).

503. *Avary*, 72 S.W.3d at 796.

504. *Allison*, 98 S.W.3d at 260.

The *Allison* court also declined to admit evidence from the mediation.[505] The court took this approach because, in similar cases where the entire basis of the claim was the amount of the insurance company's settlement offer, it was necessary for the court to admit settlement negotiation evidence.[506] These "similar cases" did not involve mediated settlement negotiations. The Austin Court of Appeals in *Allison* reasoned that:

> Here, although the district court could have admitted evidence of Ballard's demands at mediation for the purpose of countering her contention that [Fire Insurance Exchange] unduly delayed in paying her claims, he excluded the evidence because of the danger of unfair prejudice and because of the general rule that settlement discussions are confidential. In light of the standard of review, we decline to breach the "cloak of confidentiality" that exists to encourage settlement discussions. Accordingly, we hold that the district court did not act in an unreasonable or arbitrary manner or without regard for any guiding rules or principles in excluding evidence of settlement offers made during mediation.[507]

In the context of a divorce mediation, the Fort Worth Court of Appeals in *Boyd v. Boyd*[508] held that "[w]here a person is under a duty to disclose material information, refrains from doing so, and thereby leads another to contract in reliance on a mistaken understanding of the facts, the resulting contract is subject to rescission due to the intentional nondisclosure."[509] For this reason, the court concluded that the mediated settlement agreement was unenforceable, even though it complied with section 6.602(b) of the Texas Family Code.[510]

---

505. *Id.* (basing its decision on U.S. Fire Ins. Co. v. Millard, 847 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding), and State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding)).

506. *See* U.S. Fire Ins. Co. v. Millard, 847 S.W.2d 668, 672 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (stating that evidence of settlement agreements is inadmissible under the rules of evidence); State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (finding that evidence of settlement offers are excluded because "such evidence does not represent a party's actual position, but is an amount he is willing to give or take to avoid the expense or annoyance of litigation" (quoting Krenek v. S. Tex. Elec. Coop. Inc., 502 S.W.2d 605, 609 (Tex. Civ. App.—Corpus Christi 1973, no writ))).

507. *Allison*, 98 S.W.3d at 260.

508. 67 S.W.3d 398 (Tex. App.—Fort Worth 2002, no pet.).

509. Boyd v. Boyd, 67 S.W.3d 398, 404 (Tex. App.—Fort Worth 2002, no pet.).

510. *Id.* at 403.

In *In re Acceptance Insurance Co.*, the Fort Worth Court of Appeals addressed a specific request for disclosure of mediation communications and found those materials to be confidential.[511] Clearly, "the manner in which participants negotiate should not be disclosed to the trial court."[512]

In *In re Learjet Inc.*,[513] videotapes, not made to facilitate the rendition of legal service but to present factual information to the opposing parties in a mediation proceeding, were found not to be protected by section 154.073(a) of the Texas Civil Practice and Remedies Code.[514] Rather, the court relied upon section 154.073(c), which states that "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."[515] In addition, the court found that the videotapes were neither protected by the attorney-client privilege, nor the nontestifying expert privilege, and thus were discoverable.[516] This holding finds support in Rule 192.3(b) of the Texas Rules of Civil Procedure, which allows for the discovery of photographs and videotapes, whereas, had the subject of the disclosure been a written document, the result should have been very different.[517]

The dangerous significance of the *Avary* decision became evident when it was cited as authority in *Alford v. Bryant*[518] for the proposition that a mediator may be called to testify to disclosures allegedly made (or not made) by an attorney during mediation.[519]

---

511. *In re* Acceptance Ins. Co., 33 S.W.3d 443, 452 (Tex. App.—Fort Worth 2000, orig. proceeding).

512. *Id.* In this situation the court prohibited questions about an insurance adjuster's conduct during a mediation, and in particular, whether the adjuster used a cell phone during the negotiation. *Id.* at 453.

513. 59 S.W.3d 842 (Tex. App.—Texarkana 2001, orig. proceeding [mand. denied]).

514. *In re* Learjet Inc., 59 S.W.3d 842, 844 (Tex. App.—Texarkana 2001, orig. proceeding [mand. denied]).

515. TEX CIV. PRAC. & REM. CODE ANN. § 154.073(c) (Vernon 2002).

516. *In re Learjet*, 59 S.W.3d at 846.

517. *See* Rojas v. Superior Court, 93 P.3d 260, 270 (Cal. 2004) (holding that the statutory privilege for written communications pertaining to a mediation proceeding were not subject to a "good cause" exception).

518. 137 S.W.3d 916 (Tex. App.—Dallas 2004, pet. denied).

519. Alford v. Bryant, 137 S.W.3d 916 (Tex. App.—Dallas 2004, pet. denied). One student commentator has said of this decision: "[r]ecently, a Texas state court added to the confusion surrounding its mediation confidentiality protection by creating a judicial exception in a legal malpractice case." Joshua S. Rogers, Comment, Riner v. Newbraugh: *The*

Alford involved an action for attorney malpractice, purportedly committed during the course of mediation.[520] At trial, the court refused to allow the mediator to testify. The Dallas Court of Appeals reversed and remanded, holding that the mediation privilege could not be used offensively.[521] Thus the district court erred by ordering the mediator to testify.[522]

The district court failed to consider that the mediator had not made use of the information and failed to recognize the mediator's own privilege not to testify.[523] The *Alford* decision clearly contravenes the plain wording of the broad "iron clad" Texas statute and would not be admissible even under the UMA, which does recognize some exceptions to confidentiality in mediations. Under the UMA, subsection 4(b), both the mediation party (4(b)(1)) and the mediator (4(b)(2)) "may refuse to disclose . . . a mediation communication."[524] Section 6(a) of the UMA provides an exception to the privilege: "There is no privilege . . . except as otherwise provided in subsection (c) . . . for a mediation communication that is offered to prove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or repre-

---

Role of Mediator Testimony in the Enforcement of Mediated Settlement Agreement, 107 W. VA. L. REV. 329, 345 (2004).

520. *Alford*, 137 S.W.3d at 918.

521. *Id.* at 922.

522. *See id.* at 919 (basing the refusal on one of the confidentiality provisions in the alternative dispute resolution proceedings for Texas).

523. *See generally* Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come Into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 257-61 (2002) (discussing the complexity of issues arising concerning privileges that were not considered by the courts in *Alford* and *Avary*); Edward Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317–37 (2003) (examining weaknesses in Wigmore's instrumental theory as well as the use of the other potential bases such as the right to informational privacy and the general right of privacy); Edward Imwinkelried, *The Rivalry Between Truth and Privilege: The Weaknesses of the Supreme Court's Instrumental Reasoning in* Jaffe v. Redmond, 518 U.S. 1 (1996), 49 HASTINGS L.J. 969, 974-82 (1998) (questioning the accuracy and use of empirical data by the Supreme Court in establishing a federal psychotherapist-patient privilege); *Modes of Analysis: The Theories and Justification of Privileged Communications*, 98 HARV. L. REV. 1471, 1493-98 (1985) (considering the application of the power theory, which states that privilege law does not protect the privacy of all, merely the elite); Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537 (2004) (discussing the use of privilege in mediation and how the justifications for privileges differ based on whether designed to enhance specific relationships or protect certain information).

524. UNIF. MEDIATION ACT § 4 (2002).

sentative of a party based on conduct occurring during a mediation."[525] However, subsection (c) directly contradicts *Alford* by stating that "[a] mediator may not be compelled to provide evidence of a mediation conference referred to in subsection (a)(6) or (b)(2)."[526]

A. *The Out-of-State Authorities*

The California Supreme Court has adopted the position that the mediation process is confidential, and that the courts may not invade that confidentiality.[527] In *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*,[528] the court held that "[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme, which includes sections 703.5, 1119, and 1121, unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception."[529]

In a subsequent decision, *Rojas v. Superior Court*,[530] the California Supreme Court additionally held that documents, prepared only for presentation in mediation, were protected under the California statutes.[531] In *Nielsen-Allen v. Industrial Maintenance Corp.*,[532] the court, citing *Foxgate*, stated: "A majority of jurisdictions recognize and enforce such a privilege. . . . [There are] no exceptions to the confidentiality of mediation communications. . . .

---

525. *Id.* § 6.

526. *Id.*

527. Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001).

528. 25 P.3d 1117 (Cal. 2001).

529. Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001). A number of cases in agreement with *Foxgate* have been decided. *See* Nat'l Union Fire Ins. Co. v. Price, 78 P.3d 1138, 1141 (Colo. Ct. App. 2003) (stating that "[t]aken together, these sections express the legislature's intent to create a blanket prohibition against disclosing mediation communication, whether or not the communication concerns a settlement, unless the parties consent or an exception applies"); *see also In re* Anonymous, 283 F.3d 627, 634 (4th Cir. 2002) (federal mediation privilege did not violate due process rights, therefore, permission was denied to allow a mediator to testify); Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000) (recognizing federal mediation privilege); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1181 (C.D. Cal. 1998) (recognizing a federal mediation privilege); *In re* RDM Sports Group, Inc., 277 B.R. 415, 430 (Bankr. N.D. Ga. 2002) (recognizing a federal mediation privilege).

530. 93 P.3d 260 (Cal. 2004).

531. Rojas v. Superior Court, 93 P.3d 260, 265 (Cal. 2004).

532. No. Civ. 2001/70 FR, 2004 WL 502567 (D. V.I. Jan. 28, 2004).

Neither a mediator nor a party may reveal communications made during mediation."[533]

In *Sonenstahl v. L.E.L.S., Inc.*,[534] the Minnesota Court of Appeals faced a situation similar to the one in *Avary*.[535] There, in a prior union negotiation, statements had been made by the union negotiator that "'flagrantly misrepresented' the detectives' interests and 'continuously rejected' offers from the county regarding the parity issue."[536] The plaintiffs, members of the union, sought relief in a subsequent action for the union's breach of the duty of fair representation.[537] The plaintiffs sought to call the mediator to testify to the misrepresentations.[538] The trial court, in quashing the subpoena for the mediator, observed that "the proffered reasons for [the mediator's] testimony are insufficient to overcome the compelling need for a mediator to maintain the confidences of the parties and the appearance of impartiality."[539]

The appellate court affirmed and adopted the language of the trial judge based on the subsequently adopted Minnesota mediation confidentiality statute, which appears to presage the approach adopted by the Texas Legislature that "[a] person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate."[540] At a minimum, the courts must recognize that Texas Civil Practice and Remedies Code, subsections 154.053(b) and (c), and subsection 154.073(a), create a separate confidential right in the mediator (as opposed to the parties) that precludes the testimony of the mediator.[541] The statutes could not be any more plain.

---

533. Nielsen-Allen v. Indus. Maint. Corp., No. Civ.2001/70 FR, 2004 WL 502567, at *1 (D. V.I. Jan. 28, 2004) (citation omitted).

534. 372 N.W.2d 1 (Minn. Ct. App. 1985).

535. Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1, 2 (Minn. Ct. App. 1985).

536. *Id.* at 6.

537. *Id.* at 3.

538. *Id.* at 2.

539. *Id.* at 6.

540. *Sonenstahl*, 372 N.W.2d at 6.

541. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(b), (c), 154.073(a) (Vernon 2005).

B. *Proposed Resolution*

Because this Article is intended to be a collection of decided cases, it is beyond its purview to resolve the issue of confidentiality. The author is convinced that the decision in *Alford*, and its predecessor *Avary*, require an early resolution of the scope of confidentiality in Texas mediations. The issue of confidentiality should not be hard to decide in Texas. The question seems to be whether the Texas ADR Act provides blanket confidentiality to all participants, as found by the California court in *Rojas*,[542] and to all statements made in the mediation or documents not otherwise discoverable but prepared for use in the mediation. If it is found that the Act provides blanket confidentiality, there would still be statutory exceptions, for example, reporting child abuse. Additionally, there would be waivers of protection; for example, waiver because of wrongdoing by the mediator (coercion) as to parties. There would also be waiver as to the parties' confidentiality if, for example, one party repudiates the mediated settlement agreement and another party seeks to enforce that agreement.

C. *Solution One: Blanket Confidentiality*

It seems that the first solution is the simple one, and one that current evidentiary law demands. This result is compelled by both the confidentiality statutes and the Texas Supreme Court's decision in *Thapar v. Zezulka*.[543] Here, the Texas Supreme Court dealt with the duty to warn issue and expressly refused to follow *Tarasoff v. Regents of University of California*.[544] The Texas Supreme Court declined to adopt a duty to warn, because the Texas confidentiality statute governing mental health professionals makes it imprudent to recognize this common law duty.[545] "The [l]egislature has chosen to closely guard a patient's communications with a mental[-]health professional."[546]

It is generally agreed that the Texas ADR Act contains the broadest provision of any state's statute to protect communications made during a mediation. Clearly, as currently practiced in Texas,

542. Rojas v. Superior Court, 93 P.3d 260, 265 (Cal. 2004).
543. 994 S.W.2d 635, 638 (Tex. 1999).
544. 551 P.2d 334, 347 (Cal. 1976).
545. Thapar v. Zezulka, 994 S.W.2d 635, 638 (Tex. 1999).
546. *Id.*

the participants in a mediation, whether court-ordered or conducted by consent, expect what is said and done in the mediation to be kept confidential.[547] It is absolutely essential to the continued success and viability of mediation in Texas that the mediator's promise of confidentiality be validated by court decision. It would seem that all mediation communications, with limited exceptions,[548] should be treated as confidential, privileged, or both.

Because the Texas provisions for confidentiality appear to be broader than those in other jurisdictions,[549] out-of-state decisions

---

547. *See* Brian D. Shannon, *Dancing with the One that "Brung Us"—Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. DISP. RESOL. 197, 201-02 (2003) ("One of the cornerstones of the enactment was the statute's broad confidentiality protection. . . . Hence, taken together these various provisions place limits on future testimony in later adjudications and require confidentiality outside of other legal proceedings.").

548. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2005). An exception to mediation confidentiality applies if the information is otherwise discoverable. *Id.* If the information is otherwise subject to discovery, it is clear that the information is not protected by the statutes (although section 154.0073 precludes the mediator from being called to testify even to unprotected information disclosed in a mediation). *Id.* Thus, if a person says in the course of an automobile-personal injury mediation, "I ran the stop sign," the party can be asked at a deposition, "did you run the stop sign." The statutes, however, without the consent of both parties, preclude the discovery inquiry of, "did you say in the mediation that you ran the stop sign." There are, of course, other statutory exceptions requiring the reporting of such things as child or elder abuse, but these are clearly defined and limited. *Id.* Additionally, "[s]ection 154.073(c) excludes from protection matters which are independently discoverable or admissible, while section 154.073(d) acknowledges that other unspecified legal requirements may compel disclosure to the court." Irene Stanley Said, Comment, *The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute*, 36 S. TEX. L. REV. 579, 586 (1995). Information outside of the subject matter of the mediation may be subject to disclosure through parties other than the mediator. *See In re* Daley, 29 S.W.3d 915, 918 (Tex. App.—Beaumont 2000, orig. proceeding [mand. denied]) (allowing a participant in the mediation to be deposed about whether he left the mediation). Finding that this related to something other than the subject of the mediation, the court allowed the testimony:

> Rather than a blanket confidentiality rule for participants, the statute renders confidential a "communication *relating to the subject matter of any civil or criminal dispute* made by a participant in an ADR procedure." We do not find the questions—whether Daley attended the mediation and whether he had the mediator's permission to leave when he did—concern the subject matter of the underlying suit or the manner in which the participants negotiated.

Id.

549. *See* Joshua J. Engelhart, *Federal Mediation Privilege: Should Mediation Communications Be Protected From Subsequent Civil & Criminal Proceedings*, 1999 J. DISP. RESOL. 73, 77-78 (1999) ("The Texas ADR Statute has been considered one of the most comprehensive in providing the protection of confidentiality of written and oral communications made during the mediation process.").

usually associated with the enforcement of mediated settlement agreements are of questionable value. Many of the federal decisions are encumbered with "the tangled issues of choice of law"[550] and the United States Supreme Court's reluctance to create new privileges.[551] Several recent cases from other jurisdictions demonstrate the conflicting results occurring in other jurisdictions.[552]

X. CONDUCT OF MEDIATION

A. *Coercive Mediation Prohibited*

Judge Hittner, in *Allen v. Leal*, directly condemned coercive mediators.[553] In *Allen*, the plaintiffs contended that they had been compelled by the mediator to settle the case.[554] In considering the question, the Texas Association of Attorney-Mediators (AAM) filed an amicus brief discussing the issues of the case, but did not take a position as to the outcome of the case.[555] Nevertheless, one

---

550. *See* Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 556 (1997) (suggesting that the broad protections afforded by the Texas confidentiality provisions might not be available in federal courts).

551. *See* Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (stating that the Court does not apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence" (quoting Trammel v. United States, 445 U.S. 40, 47 (1980))).

552. *Compare* Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1132-33 (N.D. Cal. 1999) (balancing the benefits of justice of receiving the evidence despite a privilege of the parties and the mediator, and the mediation process, and concluding the benefit was great and the burden was modest), *with* Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992) ("revealing statements or comments made at a settlement conference is a serious breach of confidentiality"). *See generally* Christopher DeMayo, *The Mediation Privilege and Its Limits:* Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999), 5 HARV. NEGOT. L. REV. 383 (2000) (arguing for a narrow interpretation of statutes to allow only compelled testimony regarding legitimacy of mediation process or legal claims unconnected to that addressed in the mediation); Mindy D. Refenacht, *The Concern over Confidentiality in Mediation: An In-Depth Look at the Protection Provided by the Uniform Mediation Act*, 2000 J. DISP. RESOL. 113 (2000) (examining the historical issues arising related to confidentiality and mediation and addressing the Uniform Mediation Act's proposed remedies); Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157 (1994) (advocating for a broad privilege that would be uniformly applied on both the federal and state levels); Kate Hollenbeck, *The Sounds of Silence: Compelling Mediator Testimony in* Olam v. Congress Mortgage Co., CONFLICT RESOL. Q., Fall 2002, at 5, 5-21 (discussing the benefits of confidentiality in mediation and noting that policy favors nondisclosure).

553. Allen v. Leal, 27 F. Supp. 2d 945, 947-48 (S.D. Tex. 1998).

554. *Id.* at 947.

555. *Id.*

of the authors of the brief, the president of the Houston Chapter of the AAM, John Lee Arellano, was publicly quoted as saying, "[w]hat some people might consider a little bullying is really just part of how mediation works."[556] Judge Hittner, after quoting this statement, continued:

> This egregious statement, directed to the public, made by the president of the AAM, outside of the courtroom and in a local newspaper, is especially deplorable given that, pursuant to the standards governing the conduct of mediators in Texas, '[a] person appointed to facilitate an alternate dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.'. . . Coercion or 'bullying' clearly is not acceptable conduct for a mediator in order to secure a settlement, notwithstanding the statement of the president of the AAM.[557]

There is a good deal of merit in Judge Hittner's conclusion, given the definition of mediation in the Texas ADR Act, which states: "Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them" and "[a] mediator may not impose his own judgment on the issues for that of the parties."[558] The standards of mediation adopted by the Alternate Dispute Resolution Section of the State Bar of Texas and by the Texas Supreme Court also support Judge Hittner's conclusion:

> Professional Advice. A mediator should not give legal or other professional advice to the parties.
>
> *Comment (a).* In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during, or after the mediation process.
>
> *Comment (b).* A mediator should explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.[559]

---

556. *Id.*

557. *Id.* at 948 (footnote omitted).

558. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a), (b) (Vernon 2005).

559. State Bar of Texas, Alternative Dispute Resolution Section, Ethical Guidelines for Mediators, http://www.texasadr.org/ethicalguidelines.cfm (last visited Oct. 21, 2005) (on file with the *St. Mary's Law Journal*).

Many mediators, particularly those doing personal injury mediations, feel compelled to evaluate the case for the parties under strict time constraints. Bluntly, this is not mediation. Rather, it is a mediated settlement conference (i.e., a one-person moderated settlement conference).[560] There is nothing wrong or illegal about this, but it is not mediation. Section 154.025 of the Texas Civil Practice and Remedies Code describes the moderated settlement conference in terms that describe the forceful evaluative proceedings that go under the name of mediation:

> (a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.
> (b) Each party and counsel for the party present the position of the party before a panel of impartial third parties.
> (c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.
> (d) The advisory opinion is not binding on the parties.[561]

B. *The Mediator May Not Later Be Appointed As an Arbitrator or Guardian Ad Litem*

The Ethical Guidelines for Mediators developed by the Alternative Dispute Resolution Section of the State Bar of Texas and the Supreme Court of Texas[562] state that "[a] person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation."[563] That provision was enforced in *In re Cartwright*.[564] There, the court of appeals held invalid a trial court's order appointing an arbitrator other than

---

560. *See generally* John G. Mebane, III, Comment, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C. L. REV. 1857 (1993) (discussing the benefits and pitfalls to mediation).

561. TEX. CIV. PRAC. & REM. CODE ANN. § 154.025(a)-(d) (Vernon 2005).

562. Tex. Sup. Ct., Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (June 13, 2005), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf (on file with the *St. Mary's Law Journal*); *see also Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 857-58 (2005) (announcing and discussing the guidelines).

563. *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 858 (2005).

564. *See In re* Cartwright, 104 S.W.3d 706, 714 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding) (recognizing problems with regard to confidentiality in allowing the mediator to serve as arbitrator).

the one named in the parties' agreement to arbitrate, who had acted as a mediator in the same parties' dispute regarding possession of their child.[565]

> The mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator. It is the potential for the use of that confidential information that creates the problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties' dispute, it is also improper for the mediator to act as the arbitrator in the same or a related dispute without the express consent of the parties.[566]

In *Isaacson v. Isaacson*,[567] a New Jersey court used similar reasoning to disqualify a guardian ad litem who attempted to act as mediator.[568] By doing so, the individual was disqualified as both an ad litem and as a mediator.[569] It seems clear that the same result would occur under the Texas ADR Act.

XI. COST OF MEDIATION

A. *Mediation Costs Taxable in State Court*[570]

Chapter 154 of the Texas Civil Practice and Remedies Code requires the court to "tax the fee for services of an impartial third party as other costs of [the] suit."[571] In *Texas Parks & Wildlife Department v. Davis*, the trial court, in its judgment, appropriately

---

565. *Id.* at 708-14; *accord* Bowden v. Weickert, No. S-02-017, 2003 WL 21419175, at *3-4 (Ohio Ct. App. June 20, 2003) (finding the arbitrator exceeded the scope of his powers by first acting as the mediator in a contract dispute).

566. *In re* Cartwright, 104 S.W.3d 706, 714 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding) (footnote omitted).

567. 792 A.2d 525 (N.J. Super. Ct. App. Div. 2002).

568. *See* Isaacson v. Isaacson, 792 A.2d 525, 528 (N.J. Super. Ct. App. Div. 2002) (finding that the roles of guardian ad litem and mediator are so inherently incompatible as to make it imprudent for one person to serve as both).

569. *See id.* at 535-36 (noting that though the mediator was effective, one cannot serve as both mediator and guardian ad litem because of the corresponding conflicting obligations).

570. *See* Brad A. Allen & John E. Ellis, Jr., *What Are Taxable Court Costs in Texas?*, HOUS. LAW., Sept.-Oct. 1998, at 14, 15 (listing "alternative dispute resolution fees charged by an appointed mediator or arbitrator" as acceptable taxable court costs).

571. TEX. CIV. PRAC. & REM. CODE ANN. § 154.054(b) (Vernon 2005).

"awarded Davis all original costs associated with the suit."[572] The court noted that "because the $250.00 mediation fee is an original cost under section 154.054(b), and because the trial court properly awarded Davis the costs expended for the suit, there was no error in taxing the mediation fee against the Department."[573]

Note that it has been held that a party does not have standing to complain that mediation costs were taxed against the party's attorney, even though section 7.011 of the Texas Civil Practice and Remedies Code provides that "[a]n attorney who is not a party to a civil proceeding is not liable for payment of costs incurred by a party to the proceeding,"[574] and the attorney failed to perfect an appeal to the court of appeals, and thus could not complain of the assessment of costs against him.[575]

B. *Mediation Costs May Not Be Taxable As Costs in Federal Court*

In *Scribner v. Waffle House, Inc.*,[576] the plaintiffs moved for attorneys' fees and reimbursement for other specified expenses, including costs of filing, depositions, and other fees.[577] Additionally, the plaintiffs requested payment for travel expenses, subpoena costs, and many other expenses—most of which were not compensable.[578] The court concluded that mediation costs, among others, were not compensable in federal court.[579] This premise was recently followed in *McCoy v. Hernandez*.[580] In *McCoy*, the defendants filed an extensive bill of costs.[581] The court listed several statutorily recoverable costs and the plaintiff objected that many of

572. Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 376 (Tex. App.—Austin 1999, no pet.).

573. *Id.*

574. Palmer v. Diversified Fin. Sys. Inc., No. 14-97-00529-CV, 1998 WL 322694, at *1 (Tex. App.—Houston [14th Dist.] June 18, 1998, no pet.) (not designated for publication).

575. *Id.*

576. No. CA 3-91-CV-2667-R, 1998 WL 47640 (N.D. Tex. Feb. 2, 1998).

577. Scribner v. Waffle House, Inc., No. CA 3-91-CV-2667-R, 1998 WL 47640, at *1 (N.D. Tex. Feb. 2, 1998).

578. *Id.*

579. *Id.*

580. *See* No. 3:96-CV-2694-R, 1999 WL 38161 (N.D. Tex. Jan. 15, 1999) (discussing which mediation costs are awarded and which are not).

581. McCoy v. Hernandez, No. 3:96-CV-2694-R, 1999 WL 38161, at *3 (N.D. Tex. Jan. 15, 1999).

the filed costs were noncompensable, including mediation fees.[582] The court agreed with the plaintiff's objection concerning mediation fees and ruled that, following *Scribner*, these fees were not compensable.[583]

XII. The Effect of Mediation upon Limitations

An interesting question was raised, although not directly decided, in *A & A Insulation-Contractors v. Professional Services Industries, Inc.*[584] The question is: Does an agreement to mediate, or participate in a mediation process, or both toll the applicable statute of limitations?[585] The court in *A & A Insulation-Contractors* does not decide the question because the plaintiff had declined to accept the settlement.[586]

XIII. Disclosure of Evidence During Mediation

The disclosure of the identity and report of an expert witness during the course of a mediation does not relieve the party from formally complying with the requirements for supplementing interrogatories and disclosing the identity of an expert as soon as practical, at least where the trial court chooses to exclude the testimony of the expert.[587]

XIV. Mediator Liability

There are few reported Texas cases where actions have been filed against mediators, and none where a mediator has been held liable for any act or omission connected with the conduct of a mediation. It is unlikely that there will be many such cases, because

582. *Id.*

583. *Id.*

584. No. 03-96-00642-CV, 1997 WL 250514, at *1 (Tex. App.—Austin May 15, 1997, writ denied) (not designated for publication).

585. *Id.* at *3.

586. *Id.* at *3-4; *see also* Woodlands Christian Acad. v. Logan, No. 09-97-348-CV, 1998 WL 257002, at *4 (Tex. App—Beaumont May 21, 1998, no pet.) (not designated for publication) (affirming the trial court's denial of arbitration/mediation).

587. *See* Cruz v. Furniture Technicians of Houston, Inc., 949 S.W.2d 34, 35-36 (Tex. App.—San Antonio 1997, writ denied) (rejecting the excuse that the failure to formally designate the expert witness as soon as practicable was based on the belief, albeit mistaken, that the case would settle).

any plaintiff will have to show that an act or omission of the mediator caused some legal injury.[588]

In *Lehrer v. Zwernemann*,[589] the plaintiff sought to hold his two attorneys and the mediator liable for malpractice.[590] Among the grounds alleged by the plaintiff was one based upon the failure of the mediator to disclose prior relationships with the opposing attorney. The trial court sustained a "no evidence" motion for summary judgment for the mediator.[591] The appellate court affirmed, finding that the plaintiff had failed to produce evidence that he had suffered legal injury as a result of the mediator's actions at the mediation.[592] The court of appeals, pointing out that the mediator had facilitated a settlement that resulted in the plaintiff signing a voluntary settlement agreement, found the plaintiff's assertion, that he would not have used the mediator if he had known of the prior relationship, to be insufficient.[593] "However, appellant did not state that he would not have entered into the settlement agreement[,]" and thus neglected to show that the failure of the mediator was a legal cause of the injury.[594] Two alternative grounds for the holding were advanced: (1) there was evidence that the plaintiff's attorney knew of the prior relationship; and (2) there was no evidence offered of any specific injuries or damages caused by the mediator.[595]

---

588. *See, e.g.*, Hay v. Shell Oil Co., 986 S.W.2d 772, 776 (Tex. App.—Corpus Christi 1999, pet. denied) (stating that as a rule, when a wrongful act causes legal injury, a cause of action accrues); *see also* Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 148 (2003) ("In the absence of formal quality control mechanisms, private lawsuits offer a theoretical vehicle for controlling mediators' practices."). "In reality, however, it is extraordinarily difficult to sue a mediator successfully for her mediation conduct. As an empirical matter, few former clients have sued mediators for injuries stemming from mediation-specific conduct, and none of those suits has resulted in an enforced legal judgment for the former client." *Id.* (footnote omitted).

589. 14 S.W.3d 775 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

590. Lehrer v. Zwernemann, 14 S.W.3d 775, 776 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

591. *Id.*

592. *Id.* at 778.

593. *Id.* at 777-78.

594. *Id.* at 777.

595. *Zwernemann*, 14 S.W.3d at 778.

XV. CONCLUSION

In reality there can be no conclusion to an article purporting to collect the opinions on a subject. The moment the article is published, it will become outdated by the next judicial decision reported on the topic. Nevertheless, it seems appropriate to attempt to summarize the current state of the law in Texas concerning mediation. With almost two decades of experience, the law of mediation is fairly clear. The Texas courts, with the exception of the opinions on confidentiality and the early mis-steps on enforcement of settlement agreements, have done a good job in interpreting and applying the Texas ADR Act insofar as it applies to mediation.

It remains to be seen whether Texas will continue to lead in the field of mediation or be dethroned from that position. The future turns on the confidentiality decisions and the continued acceptance by the Texas Legislature that additional statutory "fiddling" is not required.