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## Pattie's Reflections

By Pattie Porter

Imagine your dream vacation...think BIG now! It could be an adventure trekking through the Amazon forests, a journey of soul seeking in the Tibetan mountains, or simply a sojourn relaxing on a tropical island. Whatever your dream vacation, it requires a commitment, resources and a traveler's guidebook to get you on the path to making the dream come true.

TAM has a dream...a vision to be a multi-disciplinary, inclusive membership organization honoring mediators from various professional and educational backgrounds. As a statewide organization, we want to provide leadership and embrace the points of view from all mediators: young, new and seasoned with the motto "One viewpoint is not enough." Like any dream, it doesn't become a reality without setting goals, utilizing resources and social networks. We need our own guidebook to help us maneuver into the future.

TAM's travel guidebook is the redevelopment of TAM's strategic plan. After an extensive review of the 2008 Strategic Plan, Board Members are analyzing and revising each of the 4 strategic goals and objectives along with specific measurable tasks. Here is an overview of where we are today.

**Goal #1— Promote and encourage mediation.** The primary objectives include:

- Increase public awareness of TAM and its members
- Educate the public about mediation
- Collaborate with other mediation organizations to educate the public
- Educate other professions about the benefits of mediation and conflict resolution
- Educate our members about legal and legislative public policy matters

**Goal #2 - Promote cooperation and communication among organizations and individuals that affect ADR.** The primary objectives include:

- Increase communication among TAM members and potential members.
- Increase participation and collaboration among TAM members
- Recognize outstanding efforts in the field of

- mediation
- Increase active partnerships with other dispute resolution organizations
- Retain and increase new TAM memberships



**Goal #3 – Promote the ethical practice of mediation.** The primary objectives include:

- Promote comprehensive, high-quality Standards of Practice for mediators.
- Increase awareness of ethical practice for mediators and the public.

**Goal #4 – Sponsor and promote professional development for mediators.** The primary objectives include:

- Sponsor and promote high quality continuing education (CE) programs
- Increase accessibility to CE programs using online technology
- Expand ways to share information about training opportunities
- Offer continuing education credits recognized by other professional organizations
- Provide mediators with mediation-related forms and templates

The Board of Directors invites you to share your ideas or objectives to meet the strategic goals. We are already discussing new objectives such as developing webinars and considering whether to develop a mentorship program. The Board will meet for an in-person retreat on Friday, September 25<sup>th</sup>.

TAM is YOUR organization. We want and need to hear your voice. You are our GPS. What we hear from you informs us of the direction our organization should be moving. You help us create the map to reach our destination.

Send your ideas for TAM's future to me at [pmporter@conflictconnections.com](mailto:pmporter@conflictconnections.com)

# Calling All Mediators

## TAM, the Right Place at the Right Time for ALL Texas Mediators?

Editorial by Linda Gibson

Pattie Porter, Jennifer Ortiz-Prather, Suzanne Duvall, Meg Walker, and Irene Zucker

For many years TAM had a familiar motto that appeared on the back cover of the newsletter, which we have now returned to its customary spot: “[TAM is] A **Multi-Disciplinary Association Because One Viewpoint Is Not Enough.**” We are a very unique organization – the only statewide organization in Texas in which mediators from all professional backgrounds are able to become full members with all the rights and privileges such membership provides, including the ability to become an officer or director of the organization if they so desire and are then elected. The factors that delineate TAM’s three levels of membership (full, candidate, and friend) are not based upon one’s professional discipline, but upon her level of education and experience.

There are other statewide mediator organizations in Texas – the ADR Section of the State Bar, the Texas Attorney-Mediators Coalition (TAMC), the Texas Mediator Credentialing Association (TMCA), and the Texas Mediator Trainers Roundtable. None of these organizations is as inclusive as TAM, however. The ADR Section is now limited to attorney-mediators. TAMC is open to mediators from all professional backgrounds, but attorney mediators join at the “Mediator Member of TAMC” level, paying full dues, while mediators from other backgrounds join at the “Other Professional Mediators” level for half the full membership dues amount.

The third statewide organization, the Texas Mediator Trainers Roundtable, is multi-disciplinary, but it is by its very nature self-limiting. It is designed to serve the needs of those mediators who train others to become mediators. This group is a sub-group of the larger mediation community.

Finally, there is TMCA, which is indeed multi-disciplinary, but which is a credentialing organization, not a member organization. Individual mediators do not “join” TMCA; they pay an annual fee to be credentialed by TMCA. The TMCA Board of Directors consists, not of individuals, but of representatives of member organizations or groups. The representatives from those organizations may change, but the member organizations and groups remain constant: Consumers, TAM, Education, the Center for Public Policy Dispute Resolution, Dispute Resolution Centers Directors Council, Texas Mediator Trainers Roundtable, the Judiciary, Trainers, and the State Bar ADR Section.

So, TAM is unique in that it is the one statewide organization that is open to ALL Texas mediators from diverse professional backgrounds. It has been that way from the very beginning. TAM Founders Florence Kusnetz, Alece Egan, Judy Dougherty, and Don Graul were all family law attorneys from Houston who were trying to attract others in the Houston area to this new field called mediation in the early 1980s. Florence reports “Most of them were mental health workers – lots of social workers and psychologists.” One of those [potential new mediators] in the audience who heard Alece and Florence speak in 1981 was future TAM founder Laury Adams, a financial consultant specializing in family and consumer financial services.

Florence remembers, “By the end of 1982, we had a local family mediation group [in Houston] that met monthly... There was no competition between us – we were all out to help each other make this happen... Marie Mullineaux was a social worker who mediated in Houston and later in Colorado. Susanne Adams was a non-attorney mediator who was very active in Houston, then in Dallas... Bruce Mitchell started in mediation and later went to law school. Maureen Peltier [was] an attorney-mediator who [practiced] in Houston. They were all dedicated, tireless advocates of mediation.”

This same spirit of inclusion and non-competition among members continued with the founding of the statewide mediator association Texas Association of Family Mediators in a basement meeting room of an Austin hospital in 1985. Five years later this organization became even more inclusive when it welcomed non-family law mediators into its fold and changed its name to the Texas Association of Mediators.

So here we are thirty years after our founding in the unique and enviable position of being the only statewide mediator organization in Texas open to ALL professional-level Texas mediators. We are here to serve the needs of our members and of the public who utilize our mediation services. Ideally, our ranks should include all Texas mediators in the ADR Section, all Texas members of AAM, all members of TAMC, all members of the Texas Mediator Trainers Roundtable, all mediators credentialed by TMCA. We have the potential to be HUGE...

But we’re not huge. We’re a good size. Since 2008, we have averaged 350 members annually. At press time we were at 387 members for 2015; however, we clearly don’t include all Texas mediators in our ranks. Why is that? What limits our membership? What do our potential members need that they are not finding in TAM? Do they think TAM is only for mediators who do not have a law degree, or, conversely, only for attorney-mediators? Do they know who we are and what we offer our members? Do they know about our great conferences, our newsletter, our website? Have they not heard about us on Social Media? Are we just not promoting ourselves enough, or have we somehow lost our edge?

We used to be THE innovators – a new organization at the forefront in this new and exciting field of mediation. What are we now? The survey of new and young mediators conducted a few months ago pointed out that TAM is a “graying” association, composed to a large extent of long-time members, who are very happy with the organization, but with a limited number of young and new mediators.

I’m not suggesting that TAM should try to be all things to all people, but I am saying that we should live up to our name. If we are truly THE Texas Association of Mediators, we should be an organization that welcomes and that provides benefits for Texas mediators from ALL professional backgrounds. We should be the ONE mediation organization in Texas that all mediators want to join because we offer things that ALL Texas mediators need, like quality mediation conferences, affordable malpractice insurance, and an informative newsletter and website – all of which we currently do offer.

BUT what are we missing? Do we just need better marketing, or something else?

Before you answer that question, please keep in mind that unlike TAMC, AAM, the ADR Section, and TMCA, TAM is incorporated as a 501 (c)(3) educational organization. As such, TAM gains a number of benefits, including much lower premiums for officers and directors liability insurance and the ability to receive tax-deductible donations to help support our conferences.

*continued on page 3*

**Calling All Mediators  
TAM, the Right Place at the Right Time for  
ALL Texas Mediators?**  
*continued from page 2*

How does this benefit you as a member of TAM? It does so indirectly by keeping your dues and your registration fees for the annual conferences as low as economically possible. At present TAM's maximum dues are \$75 per year, as opposed to \$500 per year for TAMC, \$250 for AAM, \$265 for the State Bar and the ADR Section (plus \$200 per year Attorney Occupation Tax), and \$150 maximum fee for TMCA. Even if we have to have a modest increase in dues during the next few years, we're still way below everyone else. The tax-deductible nature of the donations to our conferences also permits us to continue to offer you a great annual conference each year for lower registration fees than our actual costs in presenting the conference to you and for much lower fees than most other mediation organizations charge for continuing education. Again, even if we have to raise the registration fee for the conference in the near future, it will still be a bargain payment price for top-of-the-line education because the donations do a lot to offset our costs, and we pass that savings on to you.

However, being a 501(c)(3) corporation also means that our primary purpose must be to advance the profession of mediation by engaging in exclusively educational activities. We must focus on education and educational resources in order to maintain our 501(c)(3) status. We can teach you about marketing and we can educate the public about mediation, but we can't market for you. We can inform you about mediation legislation, but we can't lobby, like TAMC can.

Undoubtedly your professional practice can benefit from the knowledge you gain at our conferences, from our newsletter and website, via our social media. However, we **cannot engage in activities that the IRS views as directed primarily at the promotion of the mediation profession**, thus furthering the common business purpose of our members. The examples of forbidden activities below are taken from a 2003 IRS technical manual, which listed activities of a medical society and a bar association that prohibited them from being classified as 501(c)(3) organizations.

Forbidden activities for a 501(c)(3) organization:

- Providing a client referral service for our members

- Maintaining a grievance committee to hear complaints and settle disputes between members
- Lobbying
- Conducting a public relations program to enhance and improve the public image of the profession
- Establishing and promulgating minimum fee schedules

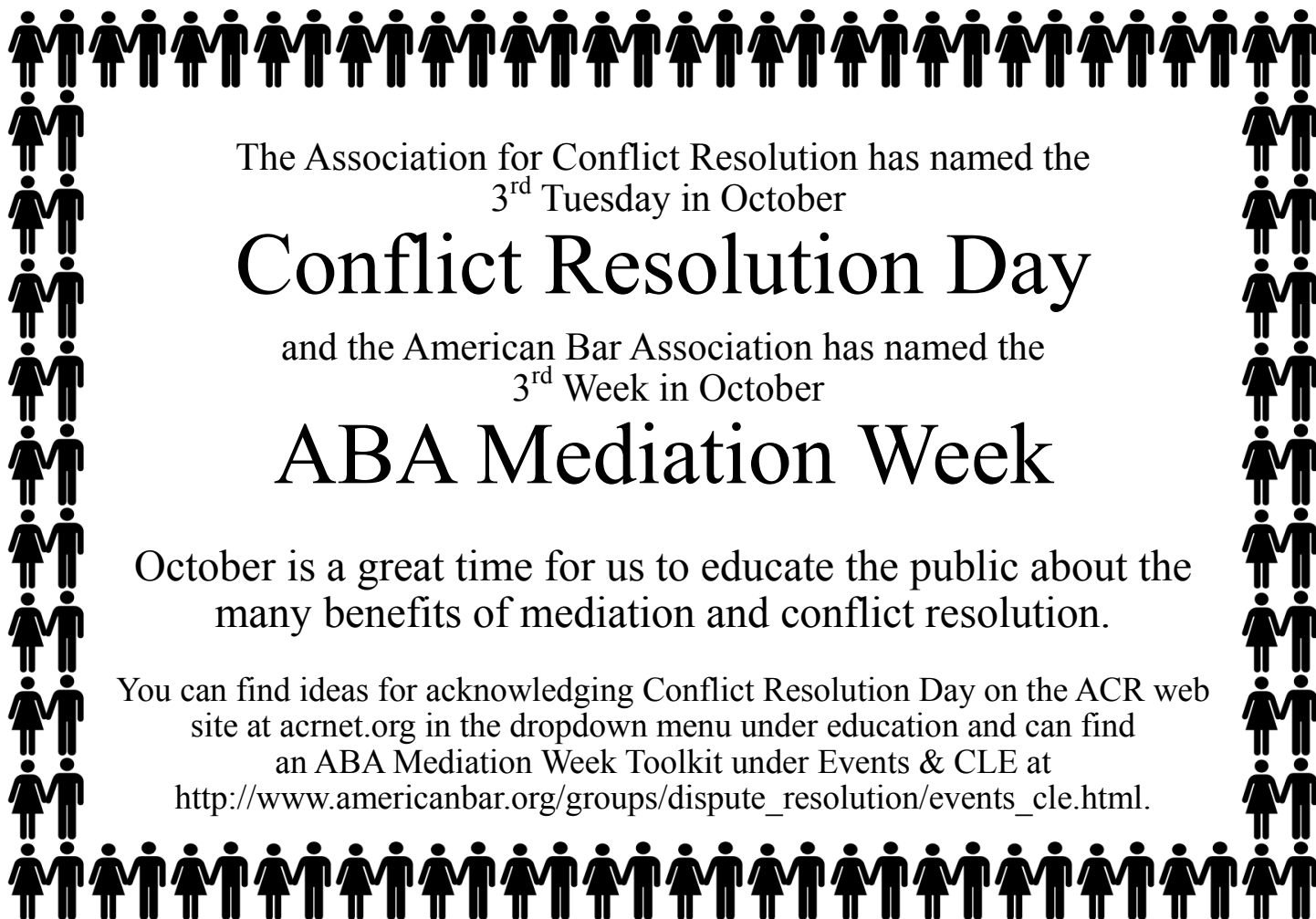
Your board of directors has been attempting to answer the question of how to make sure that TAM is the best it can be for the past year and a half. We welcome your suggestions. What does TAM need to do to be the BEST mediator organization in Texas – the one organization that all Texas mediators want to join?

Please let us know what you think by emailing either

President Pattie Porter at  
pmporter@conflictconnections.com  
or

President-Elect Jennifer Ortiz Prather  
at JENNIFER.ORTIZ@EEOC.GOV

We look forward to hearing from you.



The Association for Conflict Resolution has named the  
3<sup>rd</sup> Tuesday in October

**Conflict Resolution Day**

and the American Bar Association has named the  
3<sup>rd</sup> Week in October

**ABA Mediation Week**

October is a great time for us to educate the public about the  
many benefits of mediation and conflict resolution.

You can find ideas for acknowledging Conflict Resolution Day on the ACR web  
site at [acenet.org](http://acenet.org) in the dropdown menu under education and can find  
an ABA Mediation Week Toolkit under Events & CLE at  
[http://www.americanbar.org/groups/dispute\\_resolution/events\\_cle.html](http://www.americanbar.org/groups/dispute_resolution/events_cle.html).





# Courtside With Mike Amis

## 2015 Legislative Session: Looks Like Action For TAMC

By Mike Amis

This 84<sup>th</sup> Regular Session of the Texas Legislature saw increased interest by many diverse business, public, and professional interests, with bills dealing with mediation and mediators ranging from juvenile victim offender mediation, balanced billing issues arising from in-house physicians and other providers ancillary to a hospital or primary physician, denial of a developer's building permit, and out of court mediations conducted by religious organizations. The Texas Attorney-Mediators Coalition (TAMC) followed a total of 49 bills.

TAMC tracked most closely those bills related to the civil trial system. Three of these bills passed. Truly, "many are filed but few are chosen," and I wish to comment on these three. First, **SB 481** authored by Senator Kelly Hancock **gives patients the right to compel mandatory mediation of out of network charges in excess of \$500 by facility-based physicians.** Such mandatory mediation is not unprecedented - taking place under the windstorm damage claims act, for example. "Mandatory mediation" has come to mean in our statutes that there is no discretion by either an agency or a court to deny the right to a requested mediation.

The remaining two bills were both authored by a respected, senior senator from Laredo, Senator Zaffirini: SB 1369 and SB 1876.

**SB 1369** adds Chapter 36 to the Government Code. This addition **codifies existing Supreme Court and Office of Court Administration (OCA) requirements that each court in the state annually report to the Court via the OCA judicial appointments of ad litem and mediators**, identifying and matching cases with the appointees, total cases to which appointed, and amounts of fees for each case, giving annual totals and sources of compensation for each appointee. It provides for public posting at the respective courthouses and on the office's website. Potential monetary sanctions are provided for a court's failure to file a required report, in addition to prior statutory authority for the Attorney General to seek Mandamus relief. This bill to us as mediators seems clearly aimed at, primarily, ad litem appointments, and either potential or actual abuses are the object of concern. Since court appointments of mediators are included, we inquired about any known abuses in mediator appointments and are aware of none. We will be working with the OCA to minimize any burden on individual courts in complying with this statute.

SB 1876 also concerns court appointments of ad litem and mediators. Guardians are also included. In its fifth and final version, **SB 1876** adds Chapter 37 of the Government Code, which **calls for each court to establish and maintain a list of qualified ad litem and a registry of mediators who seek those appointments by each respective court.** For each court using a rotation system, the court is required to proceed down its list, each appointee going to the bottom of the list upon appointment. There are exceptions provided for all these types of appointees based on agreement of the parties. The court must approve agreed ad litem and guardians. **For mediators, the list is only to be used, even if court uses a rotation system, where the parties do NOT agree on their mediator.** Each court must post its lists at the courthouse and on any internet website of the court. The good news for the courts is that a court may request the court's local administrative judge to establish and maintain these lists and make sure the appointments are being done correctly.

Permit me an editorial comment and recommendation for our mediators. We want parties to be able to move for mediation hassle-free should they think it wise; we want courts to issue sua-sponte orders hassle-free in appropriate cases. As a trial lawyer for 19 years, I would never make my client go through a contested jury trial, be it for 2 days, 2 weeks, or 2 months, without it being competently mediated. We have robust attorney and non-attorney mediator organizations in place in Texas and can supply our local administrative judges an up to date list of mediators for the courts in their jurisdiction immediately, and as we go forward we should do that forthwith as a service to our courts. We have reached out along those lines in Dallas County. Please contact me for any question you might have on this.

The basic statute governing the referral and conduct of mediation in the civil trial system, as we know, is Chapter 154 of the Texas Civil Practice & Remedies Code, the Texas Alternative Disputes Resolution Procedures Act - the ADR Act - that statute which enables a court to order ADR, either on its own motion or the motion of a party, to get the litigants to talk things over earlier than on the courthouse steps. We know that there are four other non-binding ADR processes besides mediation: non-binding arbitration, non-binding summary jury trial, non-binding mini-trial, and non-binding moderated

settlement conference. Why is mediation virtually the only one of these five ADR processes employed? The answer is it's cheaper, it's quicker to assemble, it's more effective. It's used most, because it works! Our statute, now in its 25th year of steady usage, is the envy of the other states. We are for whatever preserves, improves, and promotes its use.

I cannot speak knowledgeably about the appointments of ad litem and their fee arrangements, but you can see they are significantly different from parties selecting a mediator based on experience, time to be spent mediating, and a vibrant, competitive market regarding fees to be equally shared. With this final version, we made that case with Senator Zaffirini's staff, the bill initially placing unintentional burdens. As passed SB 1876 is actually beneficial to mediators in that it statutorily, at least indirectly, gives first preference to the parties' selection by agreement of their mediator - which will exempt that case from the reporting requirements which otherwise would be called for. In so doing, as to mediators, it simply codifies the overwhelming practice of trial counsel throughout the state. I know, I speak as one who has been substituted out of a bunch of cases!

In closing, I do want to mention two bills which demanded great attention on our part and which did not get out of committee: HB 3698 authored by Rep. Molly White of Bell County and SB 948 authored by Senator Van Taylor of Collin. Both bills reflected the concern by many legislators and citizens over the potential use of our ADR statute to conduct mediations and non-binding arbitrations among members of religious organizations, which might involve results which would, arguably, involve the introduction and application of foreign law contrary to our U.S. and state constitutions. Specifically, such efforts followed widespread publicity in north Texas of the announcement by a new organization serving the Muslim Community styled "Islamic Tribunal of North Texas" which advertises non-binding mediation and non-binding arbitration services to Muslims and the application of principles of Islamic, or Sharia, law to family and business disputes within that community. Of especial concern to the authors were disclosures to be made to the participants and the

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**Courtside with Mike Amis**  
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potential results in family matters dealing with marital rights and custody of children. The two bills went about these concerns differently, but both sought to amend or add to Chapter 154 by imposing duties of disclosure and other burdens on all mediators of pre-suit matters and which would have a substantial chilling effect, one aspect in HB 3698 actually violating the confidentiality provisions protecting the mediation. There is much pre-suit mediation going on in the employment field. For example, Walmart has a Texas pre-suit slip and fall mediation program, which has been so successful that the company now offers it in Florida as well.

Chapter 154 is the foundation of all mediation of all types done in the state, and we are pledged to further its aims of making it readily available to assist our clients and we who serve them as counsel.

In the time remaining, I want to mention another aspect of our work. Although mediators in our state are not licensed as such, we have effectively governed ourselves voluntarily through the ADR Section of the Bar and three primary statewide organizations; the national Association of Attorney-Mediators for whom we serve as its Texas lobbying organization; the Texas Mediator Credentialing Association whose membership you saw was listed in this the current Texas Bar Journal; and the Texas Association of Mediators, open to both attorney and non-attorney mediators. However, what we DO in conducting mediations is quite regulated by the courts under our enabling statute, Chapter 154 and under the rule-making authority of

the Supreme Court. Not only are we now represented at the legislature, but we also have liaison status with the Court through Justice Debra Lehmann, and we are working closely with the Office of Court Administration.

TAMC was formed following the 2011 Legislature's mandate of expedited trial procedures of cases valued at or under \$100,000. This mandate led to issuance of Rule 169 by the Supreme Court. TAMC was formed to protect the use of court-ordered mediation in those cases and was successful in doing so. Expedited trial procedures seek to make our trial system more readily available and affordable. Texas is out front in that only in Texas are these procedures mandatory. Our Supreme Court has been working on a project to evaluate the use of our Rule 169 expedited trial procedures, and I am privileged to serve as the mediators' representative on the Court's Advisory Board for a study of Rule 169's impact to date. The study is being conducted under the design and implementation of the National Center for State Courts headquartered in Williamsburg, Virginia, with support from our Texas Office of Court Administration.

In addition to reviewing files in a sample of cases processed before and after the new rule went into effect, the study involves an electronic survey of lawyers involved in cases in which the new rule was implicated. Invitations to complete the survey will go out by email later this summer to lawyers enrolled in a sample of cases that were filed after the rule's adoption. This includes 2,500 cases resolved between July 1, 2013 and December 31, 2014 from Harris, Dallas, Travis, Fort Bend, and Lubbock counties.

There will be a stand-alone survey of mediation

results and satisfaction. The National Center tells us a good response rate for this type of survey is 15-18%. We will have more information on this in the near future, and we urge you as either advocate or mediator to urge encourage your colleagues and, if applicable, yourselves to fill out the entire survey. The mediation portion, as I said, is stand-alone, meaning that it is not affected by the other portions, which are uniquely geared to the use of the expedited trial procedures. If you receive the survey, please take a moment and answer it and, mediators, reach out to your counsel clients to encourage and urge them to complete the survey if they receive it. It will be valuable, sound information for all involved.



*Mike Amis is a Co-Chair of TAMC. He has been a full time mediator since 1990 and has mediated over 1,500 cases. He was the 2013 recipient of TAM's Susanne Adams Award for his work in defending and promoting mediation in Texas. For more information*

*on TAMC, contact Mike at [amismedi-at@aol.com](mailto:amismedi-at@aol.com).*

**Please see the letter from TAM President Pattie Porter on page 6 to learn how you can request that TAM give your contact information to TAMC to be included on the Omnibus List of Mediators that TAMC is compiling to assist the courts with compliance with Senate Bill 1876.**

**Deadline for requests to TAM is July 31, 2015**



Dear TAM Member,

As you read in the preceding Courtside with Mike Amis article, the Legislature in this past session passed Senate Bill 1876 which requires each court located in a county with a population of 25,000 or more to "establish and maintain" a registry of mediators, guardians ad litem, attorneys ad litem, and guardians from which the courts will make appointments. The statute also provides ground rules for the court making appointments from its list and exempts mediations conducted by a DRC or other system established under Chapter 152. These requirements go into effect on September 1, 2015, and they will not be implemented the same way in each county. The full text of Senate Bill 1876 is on the TAM website under News and Announcements.

The Texas Attorney-Mediator Coalition (TAMC) actively followed and provided input into the bill, which helped make it more user-friendly for both the courts and the mediators. As a service to the courts and Texas mediators, TAMC is compiling an "omnibus list of mediators" and will supply the list to the Office of Court Administration and the Presiding Judge of each Administrative Judicial Region. If practical, the list may also be provided to the Local Administrative Judge (LAJ) in some counties. Think of it as a "starter list." A court may choose to use the omnibus list or use a list already in place.

To alleviate the administrative burden on TAMC, TAM is assisting with collecting contact information from individuals in our database. The omnibus list will automatically include members of TAMC, mediators that are credentialed by TMCA and members of the Association of Attorney Mediators (AAM). However, unlike these other organizations, TAM is a 501(c)(3) educational non-profit organization and is prohibited from activities designed to promote the common business interest of its members; therefore, TAM cannot do this automatically for all its members. TAM members who wish to be placed on the omnibus list must complete the process outlined below or submit their information directly to TAMC.

If you would like your information to be provided to TAMC to be included on the registered mediator list **that TAMC** (and not TAM) will provide to the courts, **you must do the following no later than July 31, 2015:**

1. Log into the TAM Member Center <http://www.txmediator.org/members/> on the TAM website to access your membership record
2. Select **EDIT CONTACT INFO** from the right side of the page
3. Check the box at the bottom of the page that reads: *By checking this box, you are authorizing the Texas Association of Mediators to provide your contact information to the Texas Attorney-Mediators Coalition (TAMC) on August 3, 2015. TAMC will include your name and contact information on a list of mediators that will be provided to the Office of Court Administration and the Presiding Judge of each Administrative Judicial Region in Texas to assist with compliance with Senate Bill 1876.*

Remember that if you are already on the TAMC, TMCA or AAM list you do not need to be added to the list again.

**PLEASE NOTE:** TAMC has not contemplated a continuing role with this list. Any individual mediator could register at any time with, presumably, any court - which may direct him or her to that court's regional or local administrative judge.

Please email Mike Amis, TAMC, at [amismediat@aol.com](mailto:amismediat@aol.com) with any questions.

Very truly yours,

Pattie Porter  
TAM President

**DEADLINE FOR SUBMISSION TO TAM WEBSITE FOR  
INCLUSION ON THE TAMC OMNIBUS LIST: JULY 31, 2015**

# Texas Mediator Credentialing Association Update

By Melanie E. Grimes

We have announced the date for the 11<sup>th</sup> Annual TMCA Symposium—Saturday, October 17<sup>th</sup>—which will be held at the Thompson Conference Center at The University of Texas, Austin. Thank you to all who took part in TMCA's January survey. You helped us ensure Austin is your location of choice for our annual Symposium and provided us direction regarding content. If you would like to see survey results (excluding individual answers to questions to maintain privacy), you will find these on our website at [www.txmca.org](http://www.txmca.org).

The theme of our upcoming Symposium is "Emotion-full Negotiations: Bridging Troubled Waters." We know it is impossible to eliminate emotions and cultural biases from a mediation, and we can learn effective ways to deal with them when they arise. Through a mixture of plenary and interactive concurrent breakout sessions, talented and experienced speakers will give us tools that you will be able to use in your next mediation.

If you are not credentialed by the Texas Mediator Credentialing Association (TMCA), I invite you to consider how credentialing can serve you and the mediation field. Know that, if you are credentialed by September 1<sup>st</sup>, your name will appear in the 2015 supplement to our *Mediation Benchbook* mailed in late September. This Supplement keeps TMCA's Credential holders in front of the same approximately 1200 District, County, Federal and Supreme Court judges who received the *Benchbook* and its subsequent annual Supplements. Credential holders are listed by county so judges can easily find Credentialed mediators within their counties/regions.

Why become a Credentialed mediator? Because professionalism matters. A TMCA credential tells the public/your clients that you meet specific training, continuing education and experience requirements. It indicates your willingness to be accountable through a mandatory Code of Ethics enforced by a grievance

process. The TMCA credential demonstrates your commitment to delivering quality mediation services. You can renew your credential or apply for credentialing at [www.txmca.org](http://www.txmca.org).

TMCA's mission is to promote quality mediation throughout Texas. Thank you for helping us do that!

Kind Regards,

Melanie E. Grimes



*Melanie E. Grimes is blessed with a private mediation practice in Dallas, which encompasses family and civil law matters. She is a TMCA Credentialed Distinguished Mediator and was honored with the Louis Weber Award as "Outstanding Mediator of the Year." Melanie serves as the TAM representative to the TMCA Board of Directors.*

## SAVE THE DATE!



**Saturday, October 17<sup>th</sup>**  
**8:30 am to 5:00 pm**

Thompson Conference Center,  
The University of Texas, Austin

We know it is impossible to eliminate emotions and cultural biases from a mediation, and we can learn effective ways to deal with them when they arise. We will do just that during TMCA's 11<sup>th</sup> Annual Symposium, entitled "**Emotion**-full Negotiations: Bridging Troubled Waters." Through a mixture of plenary and interactive concurrent breakout sessions, talented and experienced speakers will give us tools that you will be able to use in your next mediation.



# Drafting the Mediated Settlement Agreement: The Ideal vs. the Reality

By Josefina M. Rendón

Several years ago I wrote a piece for *The Texas Mediator* on Drafting the Mediated Settlement Agreement. The article called for a mediator's proactive approach in drafting the agreement. It advised the mediator to make sure that, not only was the agreement complete, but that it also reflected a sense of cooperation and true agreement that would encourage the parties to follow suit. The article was well received for its skills-based, how-to advice, and I still believe in its message. However, I now believe it should be accompanied by a warning:

## ***"Be Careful Your Actions Are Not Considered the Practice of Law."***

As such, this article will discuss a list of considerations that this author believes should go into the drafting of the agreement. At the same time, the article will discuss the fine line between drafting the agreement as part of mediation and drafting it in a way that will avoid it being considered the practice of law. **This is an important warning to all mediators, but especially so for those who are not licensed to practice law.**

Josefina M. Rendón

## **The Ideal Agreement**

The following is a checklist of questions that, in this author's opinion, mediators should ask before drafting the agreement:

### **1. Is the Agreement Specific?**

The agreement should specify who does or gives what to whom, when, where and how.

The best agreement generally answers the following questions:

**a. Who or to whom?** - It is usually better to personify and use the parties' names instead of using general terms such as: "the parties", "the defendant", "the husband."

**b. What?** - Avoid ambiguity by specifying the item rather than using general terms like "the house", "the car". If a house, write the property's full address or legal description. If a motor vehicle, include the vehicle identification number (VIN).

**c. How much?** -The agreement should specify the numbers or amounts.

**d. Where?** - Specify address, apartment number, suite number, etc.

**e. When?** - Include complete dates (including year), and time (if applicable), or, if the agreement is for a specific period of time, specify beginning and ending dates.

**f. How?** - Explain in what manner the agreement will be implemented, such as: "reimbursement by certified check", "cash" or payment to be "by mail, in person, at the offices of ..."

**g. Why?** - This is a tricky one because it can be used to blame a party. Therefore, it should be avoided. However "why" can be useful as explanation. For example, some parenting plans explain the "why" of the agreement as follows: "We are entering into this agreement out of respect for each other and shared love for our children."

### **2. Is It Balanced?**

The agreement should avoid charging one party with too many obligations without mentioning the other party's obligations. Even if there is absolutely no obligation on one side, the mediator can include language such as "Mary will pay, and Joe will accept x amount of money."

### **3. Is It Positive?**

As stated earlier, the agreement should avoid the negativity of placing blame on a party. It is also generally better to specify what the parties will do rather than what they will not do. Finally, it is a good habit to include words such as "collaboration," "cooperation," "share" and "mutual". "The parties agree to cooperate with each other in ..." is an example of this positive language. Though these words may not necessarily be legally binding, they set a positive tone and encourage the parties to continue cooperating.

### **4. Is It Easily Understood?**

Many mediators (not just the lawyers) like to use legalese and formality in their agreements. Depending on the type of case, formality may be necessary. However, most parties do not deal with mediation and legal matters very often, and even simple mediation words such as caucus and closure are not as easily understood as they appear on the surface.

The best agreement is often the one that uses simple and clear language. When there is a choice of words, it is often better to use the Anglo-Saxon word over the Latin or Greek word. For example, it is generally better to use the word "help" than "facilitate." Similarly, some colleagues may find it preferable to conclude the above while utilizing the term "amicable". Other mediators think it's better to use the word "friendly" at the end.

### **5. Is It Complete?**

The mediator should insure that all the issues are covered. He or she should always ask questions such as: "Did we forget something?" "Did we cover all the issues?" "Anything else?"

It is also important to make sure that the proper language and elements are included in the agreement such as: date and place of the agreement, parties' names and signatures, etc.

### **6. Is It Conclusive?**

The mediator wants to make sure that the agreement closes the book on the dispute. A mutual release may be as simple as "The parties agree to settle all claims and controversies between them in this matter. The release could also be more thorough, such as: "The Parties release, discharge, and forever hold the other harmless from any and all claims, demands or suits known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the above case, as of this date, arising from or related to the events and transactions which are the subject matter of this case."

### **7. Is It Enforceable?**

Many articles have been written just on the topic of enforceability of the agreement as a legal contract. In this article we discuss enforceability as the ability of the parties to carry out the agreement.

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## Drafting the Mediated Settlement Agreement: The Ideal vs. the Reality *continued from page 8*

The mediator may explore whether the parties are able to carry out the agreement. The agreement should only involve or obligate only those persons who participated in the mediation and/or who signed the agreement, not absent people. The statement: "The District Attorney will dismiss the charges against Mary" is an example of an agreement that cannot be enforced (unless the District attorney is present and agrees). Instead, "Joe agrees to request the District Attorney to dismiss the case" is more appropriate.

Enforceability of the agreement is sometimes not a matter of law, but of reality. At times parties may agree to do something that they realistically cannot accomplish. For example, a party agrees to make large payments, and he or she is about to become unemployed; or parents agree on cumbersome visitation provisions that the children may resist. The mediator should do some reality testing to make sure that the agreement is realistically enforceable.

### 8. Does It Plan for the Future?

The agreement should include language that anticipates what the parties will do if any conflict arises regarding the agreement, such as interpretation or modification of the agreement. An example is: "Before considering litigation, Cindy and Tom agree to try to resolve any future conflict through mediation." A more thorough agreement could include even more details, such as the following:

"If one or more disputes arise with regard to the interpretation and/or performance of this agreement or any of its provisions, the parties agree to attempt to resolve same by phone conference with the mediator who facilitated this settlement. If the parties cannot resolve their differences by phone conference, then each agrees to schedule one day of Mediation with the Mediator within thirty (30) days to resolve the disputes and to share the costs of same equally. If a party refuses to mediate, then that party may not recover attorneys' fees or costs of any litigation brought to construe or enforce this agreement. Otherwise, if mediation is unsuccessful, then the prevailing party shall be entitled to recover reasonable attorneys' fee and expenses, including the cost of the unsuccessful mediation."

Again, it is important to remember that the mediator should not impose his/her own language into the Mediated agreement. At the

same time, it is important that the mediator help the parties memorialize what was agreed.

## The Reality Around Drafting of the Agreement

Though mediation has generally been considered as not being the practice of law, there may be a thin line when it comes to the writing of the mediated settlement agreement. Therefore, the mediator should be watchful not to inadvertently cross that line. For example, the "practice of law" in Texas is partly defined as "the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument." Consequently, it has been argued that the writing of a settlement agreement may be considered the practice of law if the mediator does more than what the parties agreed to and adds language not specifically requested or agreed to by the parties.<sup>2</sup>

At the same time, writing the agreement is obviously part of what the mediator does. For example, Guideline 14 of the 2011 Texas Supreme Court Mediator Guidelines states "A mediator should encourage the parties to reduce all settlement agreements to writing." The Guidelines also give us some clues as to what is expected of the mediator when it comes to agreement writing. Guideline 1 defines mediation as "a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding."<sup>3</sup> But this guideline also warns "A mediator should not render a decision on the issues in dispute," and "The primary responsibility for the resolution of a dispute rests with the parties." Guideline 1 is also followed by a comment stating: "A mediator's obligation is to assist the parties in reaching a voluntary settlement. The mediator should not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves."

In light of these guidelines, Professor Walter Wright, a former president of TAM, as well as other mediators, are of the opinion that a mediator who agrees to draft a settlement agreement should include only the language proposed by the parties.<sup>4</sup> It is also recommended that the mediator not include in the agreement any items without the parties' approval.

In spite of these warnings, this author believes that we as mediators also have the obligation to do the best job possible during all stages of mediation. This, to me, would include assisting the parties in arriving at the best settlement agreement possible for their specific circumstances. However, at all appropriate times, the mediator should remind the parties that he or

she is not acting as a lawyer and that he/she is not offering legal advice. In addition, any possible additions to the agreement should be presented to the parties as much as possible in question form, not statements or suggestions that could be misconstrued as the mediator giving legal advice or imposing his/her own terms. Of course, if the parties have attorneys, the mediator may want to let the attorneys draft the agreement and the mediator limit his/her role to reality testing and questions.

The above checklist for what this author believes would be conducive to the "ideal agreement" is all in question form. Is the agreement specific; is it easily understood; is it complete; etc.. These and all of the above questions would help the parties think of, and probably include, as many available possibilities as they can to make a good agreement that will address their needs.

Good mediators are skilled in asking the right questions while reality-testing with the parties and during most of the process. Similarly, a good mediator should insure that he/she asks the right questions so that the agreement memorializes all that the parties intended. I also believe that the mediator should be able to encourage cooperative language in the agreement. Chances are that, done in proper question form, the mediator would be doing the best job possible as a mediator without crossing the line into the practice of law.

<sup>1</sup> Tex. Govt Code Sec. 81.101. (a)

<sup>2</sup> Wright, Walter "Unauthorized Practice of Law" paper presented to the Texas Mediation Trainers Roundtable (2011).

<sup>3</sup> Supreme Court of Texas "Ethical Guidelines for Mediators." Adopted June 13, 2005, by Misc. Docket No. 05-9107, amended April 11, 2011, by Misc. Docket No. 11-9062 This follows the definition of mediation under Chapter 154 Texas Civil Practice & Remedies Code.

<sup>4</sup> Wright, supra. Note 2.



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# Celebrating 25 Years of Mediation Innovation at Innovative Alternatives, Inc.

By Sharon Bayus

I am the founder of Innovative Alternatives, Inc., which has created some cutting edge forms of the mediation process with clinical applications in the psychotherapy world. I also had the honor of serving as the founding President of the College of Texas Mediators which formed for only a few years in order to work on the organizational structure of a credentialing organization after the State Bar of Texas (SBOT) came out with its original credentialing standards. Since the non-attorneys would not join the SBOT, and the attorneys would not join the College of Texas Mediators, the Texas Mediator Credentialing Association (TMCA), a neutral organization, finally garnering the participation of both camps, was formed. I was pleased to serve as founding Treasurer and Board Member of TMCA, which allowed the College of Texas Mediators to dissolve, having achieved its mission to promote a multidisciplinary organization to credential mediators in the state through TMCA.

Innovative Alternatives, Inc. (IA) recently celebrated 25 years of innovation in the mediation field. IA got started in 1989 with **Victim-Offender Mediation** programs in the adult criminal courts. This powerful program provides very therapeutic opportunities for both victims and offenders. IA's very first programs were counseling and Victim Offender Mediation (VOM) for the adult criminal courts in Harris County. While this program only runs on request and is no longer a full blown program, due to the difficulty in funding it, IA's extensive experience in VOM has benefitted all the other types of mediation developed thereafter -- particularly the importance of individual screening meetings in all forms of family mediation to prepare clients for successful interaction in mediation.

**School-Based Violence Prevention Programs** of IA include placing Peer Mediation, Conflict Resolution Skills Training and Bully-Proofing Programs on campuses. Our approach with all these programs is to build a systemic program within a campus and/or full district. IA provides each campus at least two years of consultation support to stabilize the infrastructure, develop Implementation Teams (cross section of faculty, staff administrators), internal campus coordinators (2 of them in case one leaves) and to do all the training year one, co-train with internal coordinators in year two, and move on to new schools the next year. We create 'Caring Cultures' on school campuses that do not allow mistreatment of any person—student or teacher! IA works mostly with bystanders, teaching them

- 1) to accurately identify bullying behaviors which increases an average of 67.5%;
- 2) to increase caring behaviors toward

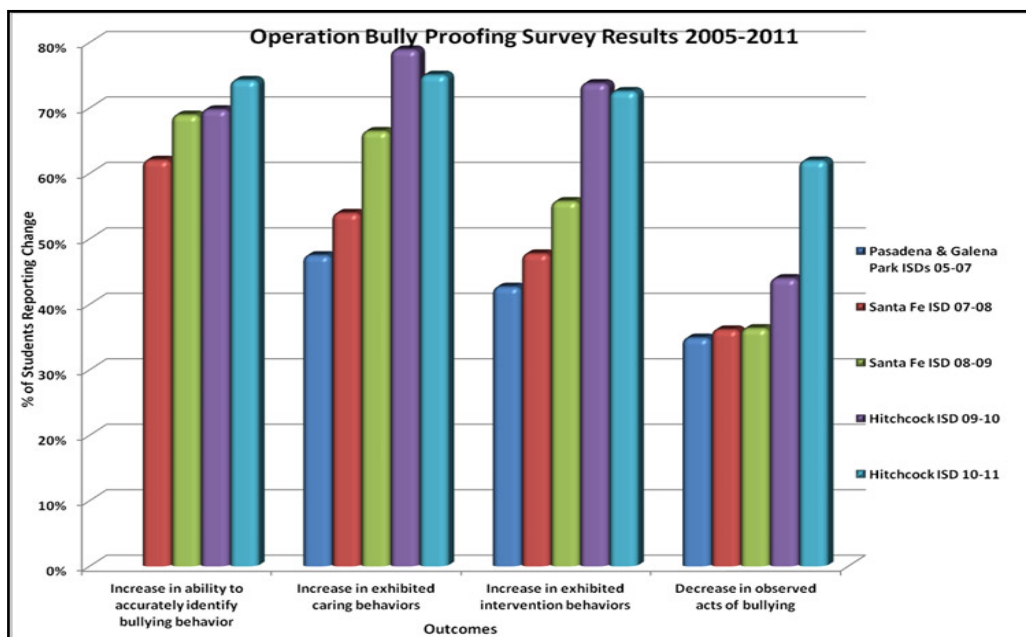
As a result, actual bullying behaviors were measured to have dropped by 39.9%! These statistics were averaged from four different districts, over nine grades and the responses are directly from student observation of change! <http://www.innovativealternatives.org/vapresults.asp>

Talk about statistically significant numbers! IA applies mediation principles of empowerment and choice and techniques of brainstorming during the entire implementation process so that the system and people within which we are implementing programs does not reject or resist the systems.

**Corporate Service 'Innovations'** include **Mediating 'Team Norms'** through a large group mediation process to bring positive team cultures to businesses. This process is definitely cutting edge, and is used as either intervention in negative workplace cultures which have on-

going and well-developed conflicts and/or prevention of any escalation of normal workplace conflicts into fully negative and conflicted cultures which cost untold thousands of dollars to corporations every day in America. There isn't a manager around who is not aware of the costs of negativity and divisiveness in the workplace. This process has successfully resolved 3-year conflicts

between departments and a 10-year conflict which had run off 6-8 directors, depending upon who you were speaking to and how long they'd worked there! The informal power of the trouble-makers was tremendous, but broken by the power of the group when the department was taken from a 'conflict management' to a 'conflict resolution' philosophy of accountability. Employees make their own guidelines of



children who might otherwise find themselves isolated and ostracized and easy targets for bullies. Caring behaviors increased by 62.6

3) intervention behaviors are taught on a continuum, from which any student can select an intervention based upon comfort level for their personality. Intervention behaviors increased by an average of 56.7

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**Celebrating 25 Years of Mediation Innovation at Innovative Alternatives, Inc.**  
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interaction and commit—in writing—to hold one another accountable to them! Management can focus on the product or service the company produces rather than putting out people fires from then on! IA has created a ‘Conflict Survey’ for times when a corporation is well-entrenched in conflict and cannot easily determine the causes. This can replace costly interviewing and assessment screening processes with multiple people.

Additionally, IA has developed a large group process of mediation to teach diversity, in which everyone is both teacher and student simultaneously, in a process called ‘**Multicultural Mediation.**’ This is an all-day process which is an excellent training, communication skill-building and team building process all in one! We use many aspects of typical mediation to bring break-out groups to make ‘I-statements’ about stereotypes, feelings and behavioral reactions to them by groups based on gender, ethnicity, religion, roles of authority, age, sexual preference, whatever aspect of culture that people would care to examine. We attack diversity head-on with fun, laughter, and serious reflection! Everyone loves this process, but it is not for the faint of heart or those uncomfortable with large groups and strong feelings!

Innovative Alternatives, Inc. lives up to its name in the applications of family mediation processes called, ‘**Family Reconciliation Mediation**’ [FRM] (which is also offered as an optional phase prior to proceeding with divorce & custody mediation if a couple is reticent about divorce). In counseling, people go round and round, not even agreeing on the problems to resolve, while counselors try to get a handle on the major issues—we are not mind-readers after all. After about three weeks, one of the spouses asks—and legitimately so—why are we paying to argue in her office when we can do it for free at home? What is missing? The structure that mediation brings! FRM quickly allows for identification of all strengths and weaknesses of the relationship and individuals in it, as well as a list of everything that needs to change to make this a fulfilling relationship. Doing so can take weeks or months in counseling, but is achieved in the first hour of this form of mediation! (Both/all parties have previously had individual screening sessions and possibly ‘Threat Assessments’ (also developed here at IA and available for sale and use by other mediators) prior to beginning conference-style mediation or the determination of the need for caucus (rarely used at IA) or even a remote electronic mediation in some cases.

I am both a mediator and a Licensed Professional Counselor, but I firmly believe that counseling is much more fruitful, when preceded by

mediation to bring clients to

- 1) agree on the end-goal of the relationship when people come in feeling differently about wanting to save the relationship or divorce
- 2) agree on the problems to resolve—which can also prove a circular form of arguments if the structure of mediation is not applied
- 3) agree on process and provider
- 4) agree on treatment plans.

Otherwise, counselors are often met with tremendous resistance from one or both parties and little progress is made in counseling. However, after mediation, couples walk into counseling with a list of agreed issues to resolve and skills they need to learn! Counselors rejoice, and progress is immediate!

Unfortunately, the weakness of mediation, as well as the reason that some couples or families cannot keep agreements they make in mediation, is due to undiagnosed mental health issues, and mediators cannot make diagnoses when remaining neutral, even if they are otherwise licensed to do so. ‘**Family Intervention Mediation**’ [FIM] is automatically used if the screening session reveals a history of any 1) volatility or stalking, 2) substance abuse, 3) childhood histories of abuse of any kind—including having been raised in a domestic violence home, or 4) when the relationships of one of the parties are routinely chaotic and filled with drama. These are all likely indicators, but not guarantees, of a diagnosis which is potentially affecting the relationship. Undiagnosed and untreated, such mental health issues naturally prohibit some people from having the ability to act in good faith, even though the desire is there to do so! FIM looks exactly like Family Reconciliation Mediation in its stages, but uses a co-mediation model in which one person remains neutral and the other, a mental health mediator, can make diagnoses which become readily apparent in one or both parties during the dynamic of their interactions in mediation within very conflicted marriages or families. Hearing an individual in counseling describe their ‘crazy spouse’ a therapist may think to themselves, “Wow, poor thing is probably married to a personality disordered spouse!” Then you get them into mediation later and say, “Oh my, gosh! It’s not your spouse doing all those things, it’s you!” Many of you who are attorneys have witnessed what seem to be irrational, ‘cut off your nose to spite your face’, kinds of behaviors which are likely personality disorders, but just didn’t know what to call it, other than ‘crazy’.

The parties give permission for this form of mediation—FIM—during their initial screening and are told how the mental health mediator makes any diagnosis noted during the process, and makes clients aware that if a treatment plan is not mediated along with other areas of conflict, that they are not likely to become success-

ful in carrying out the mediation agreement they will work so hard to create in order to save their marriages. People get it. Once the diagnosis is made, the mental health mediator remains in the therapeutic consultation role (since clients can no longer see them as neutral) to assist in making recommendations for treatment. ***This form of mediation has completely eliminated the weaknesses of family counseling, which are many, as well as the weakness of mediation, in order to gain greatest benefit for the clients and their families!*** Many people who come in believing they have tried counseling before without success and just must get divorced, actually try this form of mediation with great success! If they cannot find solutions or keep agreements once they do, then at minimum they feel closure, knowing they have done everything possible to save the marriage and cannot. They have also often learned to work together in ways they never had before for the benefit of their children and have created a real parenting plan—what IA has done for 25 years before they started calling divorce and custody mediation plans a parenting plan. IA creates Parenting Norms for interaction with each other that are most beneficial to the children—how will we treat one another, talk about one another in front of the kids, decide major issues together about their welfare together, introduce new people into their lives, etc. This stage of mediation for divorcing parents is not optional at IA—we’ve seen too much damage to children resulting from divorcing parents who cannot act like adults for the sake of their children. If they do not wish to develop these standards of interaction, they are welcome to mediate elsewhere. It is too important to skip.

The preliminary evidence from the limited studies on restorative justice programs that address family violence demonstrates that it may be more effective than incarceration-based approaches. (Hopkins et al., 2004) Domestic violence and child protection response systems and the criminal justice system frequently function independently and in conflict with each other. (Merkel-Holguin, et al, 2003) Restorative justice practices, in particular family group conferencing, provide both systems with a cohesive, integrated approach. (Ferguson, Criminal Law Brief, 2009)

IA offers all its services in English or Spanish, secular or faith-based formats based upon the request and definition of the client, and has developed a structured Forgiveness Model, for family or church-based mediation to assist in resolving impasse. Clients identify how they have hurt their spouse or other family member and not only ask forgiveness for the behavior, but also the impact of the behavior. Most people brush over the impact—humiliation, betrayal, etc., so it is hard for a person to forgive everything and not continually bring up the issue over and over. Even secular psychologists have

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# Mediator Ethics in Action

## Why Case Analysis Is Not Enough

By John Kenyon

*Editor's Note: This is the first installment of Mediator Ethics in Action, a new column dealing with the ethics of mediation that we all face on a daily basis. This is the first in a series of four ethics articles by John Kenyon. In future issues of The Texas Mediator John plans to discuss What's So Wrong with Peace, Fairness and Justice? Whose Mediation Is it Anyway? and When Is Enough Enough?*

Mediators help people in conflict: people facing life changing decisions, people under great stress, or people who may be highly vulnerable. The mediator's ethical code embodies a commitment to the public to do the right thing at the right time. To honor that trust mediators must think through challenging ethical issues and act appropriately in highly charged circumstances. However, much of our ethics training centers on abstract analysis of the codes and does not address the real-time issues many mediators encounter.<sup>1</sup>

Mediators face an extensive array of ethical issues such as process fairness, market pressures, and personal fallibility.<sup>2</sup> Research has been done on various human traits and the circumstances that drive certain behaviors.<sup>3,4,5</sup> This article will highlight the risks of over-reliance on ethics case analysis and it will cover four behavioral traits, which if overlooked, could lead to improper conduct. The purpose of this article is to start a discussion on how our field thinks about ethics and what it takes to become a competent mediator.

### Ethical Case Analysis

Business schools had to re-think the way they taught ethics after the 2001 Enron bankruptcy.<sup>6</sup> Enron CEO Jeff Skilling and CFO Andrew Fastow both had MBAs and, at the height of the company's fortunes, they hired over 250 MBAs per year.<sup>7</sup> As students, every one of those MBAs had taken case-based ethics courses at their business school. Daryl Koehn from the Center for Business Ethics has commented that although students are good at analyzing corporate ethical missteps, they are "absolutely clueless" about how to apply that analysis to their own behavior.<sup>8</sup>

There were both ethical standards and training at Enron. In the forward to the updated code of ethics in 2000, Enron chairman Ken Lay stated,

"... we are all responsible for conducting the business affairs of the Company in accordance with all applicable laws and in a moral and honest manner."<sup>9</sup> Nevertheless, the behavior of Skilling, Fastow and many of those MBAs could not be further from their legal, contractual and moral obligations. This disparity is epitomized in the documentary "Enron: The Smartest Guys in the Room" when one employee admiringly says to his colleagues: "All that money you guys stole from those poor grandmothers in California."<sup>10</sup>

There are big differences between being a mediator and an Enron employee, but the parallel is the circumstances that can affect job performance. The fast-paced, pressure-cooker atmosphere at Enron was a major contributor to its employees acting unethically.<sup>11</sup> Face-to-face mediations can be high-stakes, emotional, and extremely dynamic. The Enron collapse harmed a lot of people directly and indirectly. The failure by a mediator to act ethically may not have the same wide-spread impact but it does have the potential to seriously hurt people.

The mediation field needs its own ethics code because there are unique aspects to our work. The code provides general guidance on aspects such as conflict of interests, confidentiality, and impartiality but does not give practical solutions to a mediator's day-to-day challenges.<sup>12</sup> Case analysis allows mediators to rationally assess the potential ethical traps but does not simulate the circumstantial factors that impact performance.

TAM has adopted the ethical guidelines of the State Bar of Texas ADR Section. The preamble to the ADR Section Guidelines states "They are not intended to be ... a code of conduct. Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly."<sup>13</sup> We are individually and collectively obliged to deal with the possibilities of unethical mediator performance whatever its source.

### In-group Alignment

Those Enron employees fell afoul of the deep human need to be accepted by the group. The company culture was highly competitive and used peer pressure to stifle dissenters.<sup>14</sup> We are not immune to the need to be part of a group and that entails accepting the norms for our

field. What is an acceptable settlement rate for mediation? Many factors influence the chances of an agreement including; type of case, when the case was mediated, and number of parties. Settlement rate percentages should be treated with caution yet they are often proposed as a benchmark of mediator performance.<sup>15</sup>

Some administrators are measured on the overall settlement rate for their organization.<sup>16</sup> Administrators might be encouraged to use one form of mediation to achieve those targets.<sup>17</sup> They could give more work to mediators with better settlement rates. Neither of these choices is inherently problematic, but if those preferences are not openly considered, the parties may be disadvantaged. High settlement rates are not necessarily an indicator of good quality.<sup>18, 19</sup>

If mediators believe administrators use settlement rates as a selection criterion, there are consequences. In a competitive marketplace mediators may feel pressure to improve their statistical average.<sup>20</sup> That tension could make mediators reluctant to take difficult cases; even worse, mediators might be tempted to use arm-twisting tactics to force parties into an agreement.<sup>21</sup>

Using settlement rates in our field increases the risk that mediators focus on avoiding an impasse rather than what is best for the parties. The well-respected mediator, Lee Jay Berman, has written articles and runs training courses titled "Impasse is a fallacy."<sup>22</sup> If mediators come to believe the objective of mediation is settlement, there is potential for harm. Not every case should be settled. Bernie Mayer suggests a mediator's worst nightmare is a mediation where they settle a dispute between a woman and a bus company, only to find the woman's name is Rosa Parks.<sup>23</sup>

Another norm for the field is that mediations, for good practical reasons, are scheduled in blocks of time. Many private practices have a schedule of rates with the costs for half-day or one-day mediations. The way mediators and organizations publish the opportunities to mediate sets the parties' expectations of how long it should take to reach an agreement. If we start to frame mediations as fixed in set time periods, they can become self-imposed constraints. If we, or the parties, start to force the pace to meet

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## Mediator Ethics in Action

### Why Case Analysis is Not Enough

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arbitrary deadlines we risk producing an ill-considered settlement, unnecessary impasse or low participant satisfaction.

How mediators act depends on their character, training, understanding of the codes and the culture where they mediate. The mediation field is still developing but its norms are starting to be established. What may seem at first to have

no impact on ethical conduct may have unintended consequences. We cannot assume we mediate in isolation and are unaffected by how our colleagues operate. To ensure the public has confidence in mediation we need to look at how mediation is typically conducted across the field and how that influences mediators, administrators and the public.

#### Structural Compliance

The ability of humans to quickly comply with and enforce structural norms is most starkly shown in the Stanford prison experiment. In 1971 twenty-four college graduates applied for an unspecified psychology experiment. They were split into two groups and appointed either as guards or prisoners. The plan was to run the experiment for two weeks. There was a prison riot on the second day and as the days passed the guards became increasingly sadistic and the prisoners more depressed. After 6 days the experiment was stopped but the reverberations have lasted for decades. It was surprising how quickly the graduates fell into the stereotypical roles. However, the most shocking aspect was how far the supervisors and parents became entangled in the artificial set-up and struggled to keep a sense of perspective.<sup>24</sup>

Almost all mediators consider the foundation of mediation to be the parties' right to self-determination.<sup>25, 26</sup> Consider the situation where, on the day of the hearing, it is the judge's practice to tell claimants they have the option to mediate before they will get a hearing. Pro se parties, already keyed up about appearing in court, are likely to be taken unawares. Even if the judge states that mediation is voluntary, how many parties will refuse the judge's clear preference? How voluntary is mediation when "recommended" by a figure in authority? Eliminating that issue could be as simple as changing the pre-hearing notices. However, this type of approach requires our field to recognize structural problems and work with groups to mitigate ethical concerns.

The timing of a mediation can be critical, particularly when there is an ongoing legal action. If the mediation is scheduled near the court date, the parties may have an adversarial mindset.<sup>27</sup> Many mediators argue that early intervention produces much better outcomes for the

parties.<sup>28,29</sup> Conversely, if the mediation is done before key facts are known, it could be difficult to achieve anything worthwhile.<sup>30</sup> Where the timing of mediation is outside the control of the mediator or the parties, there is potential for suboptimal outcomes.

A group may have good reasons for setting a mediation protocol and design it to benefit both the group and the parties. We know each mediation is unique because the people and issues are always different, and that means the protocol may not always be appropriate. The risk of working within a structure is becoming inattentive to the outliers and to assume the system will always protect the parties. When a group's conflict management system interferes with mediating effectively we should ask if doing that mediation is ethical.

The workplace, organization or court can constrain how a mediation is conducted. Examples include: an in-house company mediation program that limits the outcomes available; a court prescribing the time allowed for the parties to reach agreement; or a government agency with a pre-set agreement format. Mediation is regularly conceived, taught and applied as a process with the mediator as its guardian. If any part of that process is co-opted by another body there is a potential for misalignment.

As mediators we need to determine if any constraints impact our ability to meet our ethical obligations. Furthermore, it is essential to do an assessment before we start working for that group. As the Stanford experiment showed it is very hard to be objective once you are inside the system.

#### Bystander Effect

Another potential behavioral ethical trap is the 'Bystander Effect' where the more people there are, the less likely any one of them will act. The circumstances are the key to why a person does nothing when they could help someone in distress.<sup>31</sup> The 'Bystander Effect' typically takes two complimentary forms: pluralistic ignorance and diffusion of responsibility. The first way people can be incapacitated is the rationalization "If no one else is helping, the endangered person does not really need help". The second disabling thought process is "Only one person needs to intervene; with so many other people around, someone else is sure to act."<sup>32</sup>

Large complex cases can involve numerous other professionals who may be obliged to deal with the same ethical questions as the mediator. These sorts of cases include mediations where children's welfare is decided, relationships hang in the balance, natural resources are disputed, violence is a real danger, or historical oppression is a factor. Mediators have statutory requirements to report child and elder abuse, but there are other less clear-cut ethical obligations. What would you do if it is an open secret

that the maintenance money is being funded from drug money? Reporting the issue could result in the spouse not getting essential financial support, yet witnessing the agreement could be tacitly endorsing a crime.

The mediator has the difficult task of managing all the competing interests at the mediation table. If an ethical quandary arose during a multi-party mediation would a mediator's training prepare him to counter the "Bystander Effect?" Equally, should a mediator advise other professionals of the risks associated with this behavioral trait? We have an ethical duty to prevent foreseeable missteps that might occur during a mediation, whether by a mediator or some other professional.

A wide-range of organizations have implemented "active bystander" training to help their staff avoid this problem and to promote positive behaviors.<sup>33</sup> These concerns are probably only relevant to a few mediations, but in those instances the potential for profound harm is significant. We need to consider this issue as a field and give guidance to mediators before they take on this type of case.

#### Distractions

How people act is also driven by whether they can concentrate at critical moments. In 1993 Daniel Gilbert and colleagues examined whether people can read a statement without believing it is true. Seventy-one participants were given both true and false statements about two robberies and asked to recommend jail sentences. The participants knew the true statements were in green and the false ones in red, but half the participants were distracted when shown the false statements. When the false statement made the crime seem worse the distracted participants gave almost twice the jail time as their counterparts. The study showed how difficult it is to critically evaluate written statements if you are not able to focus.<sup>34</sup>

Our responsibility is to support the parties throughout the mediation process to achieve the best way forward. All sorts of things in our personal or work life can distract us during a mediation. How much basic mediation training covers the skills to block out external "noise" and maintain concentration? The proponents of mindfulness mediation consider "being present" as essential to good practice and as capable of being taught.<sup>35,36</sup> In the wider mediation community mindfulness is not considered a core skill; however, there are many cases where not being distracted is critical to staying neutral and impartial.

The parties' need for the services of a mediator may be very different from case to case. The mediator's background can affect her ability to meet those parties' need. Judges and lawyers

*continued on page 14*



## Mediator Ethics in Action

### Why Case Analysis is Not Enough

*continued from page 13*

are trained to analyze the merits of differing legal positions. If lawyers and judges become engaged with the legal merits of the case, consciously or not, they could push the parties towards the likely court outcome. Consider this hypothetical situation. A party only makes a claim for money to get their neighbor to address and resolve their dispute. The mediator is drawn into the legal positions and brokers a cash settlement but in doing so escalates the dispute. Whenever the service provided is not aligned with the parties need, there is potential for harm.<sup>37</sup>

Getting distracted by your own expertise is not just an issue for the legal profession. When we mediate we bring all of our personal and professional experience. Some parties want mediators with specific backgrounds because they are better equipped to focus on the details of the dispute, ask pertinent questions and suggest practical solutions. In those circumstances the mediator must walk the line between being highly effective and overly prescriptive. Bringing expertise to the mediation table puts the mediator at risk of subverting the parties' wishes. Mediators need to develop an awareness of their power and tailor it to serve the parties' interests.<sup>38</sup>

Most people have "hot button" issues that produce an immediate emotional reaction. Politics, religion, injustice and cruelty are rich sources of the disputes we mediate as well as these reflexive responses. A mediator caught unawares by a sensitive issue may lose focus at a critical time. In theory a mediator who gets triggered can suggest the parties take a break. In practice this approach can have negative consequences. Stopping the parties' mid-flow may make the parties reluctant to talk on resumption. An ill-judged intervention by the mediator could cause one party to question their impartiality.

The nature of our work means an issue can be raised during mediation that was never apparent in the pre-session paperwork. To be prepared, mediators should to take the time to examine what might trigger them, how they would react, and what to do in those circumstances.

Mediators work with all sorts of people and on a wide-range of disputes. The ethical issues we face can be varied, unpredictable and nuanced, with a real possibility of harm. Mediators come from all sorts of backgrounds and with different experiences but we all have to perform effectively in contentious surroundings. The ability of the mediator to remain focused on the party's need for their services is critical to avoiding improper conduct.

## Conclusion

This article has outlined how in-group alignment, structural compliance, the "Bystander Effect" and distractions could impact mediator performance. The competency of a mediator depends on her ability to perform effectively under pressure. The business schools learned from the Enron failure that case-analysis ethics training does not provide the necessary skills to handle circumstantial factors. Using cases to explore ethical issues is a good way to understand a mediator's obligations under the codes however, over reliance on case-analysis leaves us unprepared to make critical decisions on how we conduct mediations.

The failure by a mediator to act ethically not only harms the parties but impacts the whole mediation field. Now we have an opportunity to examine a range of behavioral traits and the potential circumstances that might lead to unethical mediator conduct. For our field to maintain public confidence in mediation, we must consider ethical concerns from whatever source and put in place suitable safeguards.



*John Kenyon has been a mediator in Houston since 2001 and is a past president of ACR Houston. He has a B.Sc. from Bristol University, UK and a 25 year career negotiating commercial contracts in the Oil & Gas business. He has designed and delivered mediation training for new and experienced practitioners as well as presented papers at TAM and ACR National Conferences.*

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# Membership News

By Don Swift  
Membership Chair

Hello Everyone – My name is Don Swift. I am the new Membership Chair for the Texas Association of Mediators. I live in Wichita Falls, Texas, where I own a management consulting and dispute resolution and training business. My main areas of mediation are workplace mediation, church mediation – especially pre-divorce, pre-lawyer couples – civil mediation, and historically I have worked in victim/offender reconciliation mediation for the Indiana Courts.

I wanted to tell you all why I decided to become a member of TAM. I didn't join until about 4 years ago when a good friend, Gene Roberts, asked if I would be interested in finding out more about it. He really peaked my interest, so I researched it and joined. It just so happened that the Annual Conference held in Dallas came along shortly after that, and I saw the conference as a great opportunity to go, learn, network, and start using my membership to bolster my professional credentials as well as my knowledge and skills base.

I belong to two other large organizations – the American Society for Quality (ASQ) and the Society for Human Resources Management (SHRM) – and have known for a long time the kinds of support organizations like these can give to the individual practitioner. Through those memberships I have found great resources both for best practices as well as research and excellent credentialing. So, I reasoned, if these things were true of ASQ and SHRM, why would they be less true of TAM?

I found that when I did not belong to TAM, it

was lonely out there. It is hard to have that “professional friend” you can use to talk with, rely upon, check decisions with, or even socialize with, if you do not have a group for that level of identification. Since joining TAM, I am steadily gaining these “professional friends,” and I feel better connected in my practice.

Membership affords the following benefits for all:

- Networking opportunities with a multidisciplinary group of highly trained and experienced mediators.
- Annual conferences featuring workshops taught by experts of national and international stature.
- *The Texas Mediator*, a first-rate quarterly newsletter, featuring:
  - informative “how-to” articles for mediators
  - a continuing education calendar
  - pending legislation affecting court-annexed mediations
  - news about international peacemakers
  - social media tips
  - TMCA updates
  - TAM Conference highlights
  - announcements and more
- Access to malpractice insurance designed

especially for mediators available through Complete Equity Markets.

- A user-friendly website with:
  - A Member Locator available to the public
  - Access to resources for mediators including a Mediation Forms Library for members only
  - A calendar of upcoming mediation trainings and other events

I just want to say thank you for your membership and to ask you to “spread the love” – ask your friends and colleagues to check us out and possibly join as well.



For 46 years **Don** has worked in *Quality Management and Human Resources* in various industries including automotive, office products, large equipment manufacturing, criminal justice (VORP Mediation), graphite manufacturing, and household goods moving. He has served as project manager for the implementation of ISO 9001/AS9100 for 5 companies. Today Don owns and operates his own consulting, training, and dispute resolution services business, *Don Swift and Associates, LLC*, which focuses on “*The Human Side of Quality*.”

## Celebrating 25 Years of Mediation Innovation at Innovative Alternatives, Inc. *continued from page 11*

hundreds of books about the power of forgiveness. The process we use is the same, whether secular or faith-based, except in the Christian version, we give references and credit to the writings of the author of the process!

I think I aptly named the organization ‘Innovative Alternatives, Inc.’ because we have really done our best to live up to the name. I have to give credit to God, however, because He called me to do this work, when I had no desire to run an organization and He has strengthened me for 25 years to do it. True confession—I stole most of the ideas from Him—as the real Innovator of everything good

that works in relationships! I absolutely love this work and training other mediators! Please call us if any of these models are of interest to you! 713-222-2525

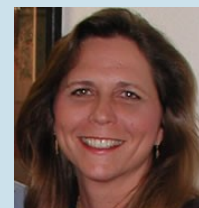
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**Sharon Bayus, MA, LPC-S** is the President/CEO & Founder of Innovative Alternatives, Inc. Sharon is a TMCA Distinguished Mediator





# INTERNATIONAL PEACEMAKERS

## PRODIÁLOGO CO-ORGANIZES THE XI WORLD MEDIATION CONGRESS IN LIMA, PERU

By Walter A. Wright

In the Summer 2014 issue of this newsletter, I wrote about ProDiálogo, a Peruvian organization that works to prevent and resolve complex multi-party disputes in that country. This article highlights ProDiálogo's current efforts to co-organize and sponsor the XI World Mediation Congress in Lima later this year.

### *History of the World Mediation Congresses*

The World Mediation Congresses have their deepest roots in the Mexico. From the beginning, each Congress has resulted from the collaborative efforts of the University of Sonora, the International Center of Studies on Democracy and Social Peace, and the Mediation Institute of Mexico, all located in the Mexican State of Sonora. The common denominator of all three organizations is Dr. Jorge Pesqueira Leal, a distinguished leader of [in](#) the development of mediation in Mexico. Dr. Pesqueira Leal [is](#) currently is coordinator of postgraduate legal studies at the University of Sonora, a researcher at the Center of Studies on Democracy and Social Peace, and president of the Mediation Institute of Mexico. His active involvement in organizing each Congress has been a key to their success.

Four of the previous Congresses have taken place in Mexico. With one exception, the other six conferences have taken place in Latin American countries (Chile, Bolivia, Paraguay, Argentina and Brazil). The exception was the 2014 Congress, which took place in Italy. ProDiálogo and its president, Iván Ormachea, have been actively involved in the organization of some of the earlier Congresses.

### *The XI World Mediation Congress*

Activities related to the XI World Mediation Congress will take place in Lima, Peru on September 21-26, 2015. On September 21, twenty-two simultaneous,

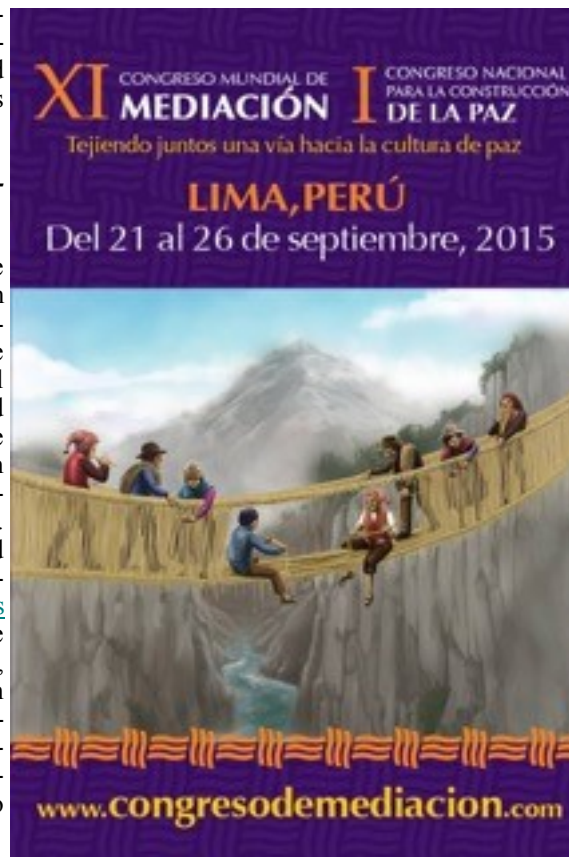
ten-hour workshops will take place on twenty-two different subjects, including narrative mediation, school mediation,

which will be followed by a keynote address from [by](#) Dr. Pesqueira Leal on citizen security, peace and mediation. In the afternoon, presentations and signings of books will be followed by a third keynote address on the subject of social conflict, institutional dialogue and mediation, this one presented by Rolando Luque of the Public Defender's office of Peru and Pablo Ruiz of the United Nations Program for Development.

On September 24, the day will open with a keynote address by a UNESCO representative on the subject of communication and a culture of peace. The remainder of the morning and much of the afternoon will be occupied with six "forums of dialectical analysis" on topics as varied as mediation in family conflicts, mediation in schools, community mediation, and social conflict and transformative dialogue. The day's activities will continue with an address from Pablo Morán and Carlos Portugal (both from Peru) on the subject of government experiences and their contributions to conciliation and a culture of peace and a roundtable discussion of mediation, art and intrapersonal healing; roundtable participants

will come from Thailand, Senegal, Colombia and Peru. The day will conclude with an address from Carmen Romero (Spain) and Cecilia Ramos Mejía (Argentina) on peer mediation in schools.

The next day of the conference, September 25, will begin with a speech from Marínés Suares (Argentina) and Alexandre Morais (Brazil) on family mediation with a restorative focus and healing emotional wounds. Next, there will be two hours of presentations on successful mediation projects around the world,



transformative dialogues, building consensus in legislatures, and commercial mediation. On the morning of September 22, Dr. John Paul Lederach, a prominent U.S. author and Professor of International Peacebuilding at the University of Notre Dame, will conduct a half-day workshop on the subject of conflict transformation. During the afternoon of September 22, Dr. Pesqueira Leal will conduct a half-day workshop on mediation and restorative dialogue.

The Congress-in-chief will begin on September 23 with a keynote address from by Dr. Lederach on conflict transformation, dialogue and mediation,

*continued on page 17*



# Social Media Update

By Lori Ann Shaw  
Social Media Chair

## Special Thanks



Arlaine Decrevel

Special thanks to Arlaine Decrevel for her time and effort in helping me transition into the role of Social Media Chair. Arlaine expanded and organized TAM's social media presence, and we will benefit from her work for years to come.

## Follow TAM on Instagram

See new photos from the 2015 Annual Conference by following TAM on Instagram (@TxMediator). If you are new to Instagram, it is a mobile photo-sharing service. To join, download the Instagram app on your smart phone or tablet. We look forward to sharing many photos here!

## LinkedIn Company Page Coming Soon

LinkedIn is one of TAM's most popular social media outlets. This summer TAM's LinkedIn

group (Texas Association of Mediators TAM) grew to over 1,000 members. To accommodate the interest TAM is receiving on LinkedIn, we are adding a LinkedIn company page. While TAM's LinkedIn group will continue to function as usual, the company page will be used (1) as a landing page within LinkedIn to educate users on TAM, and (2) to invite LinkedIn users to engage in TAM's LinkedIn group. Stay tuned for a social media announcement when the company page goes live!

## Updated Social Media Guidelines

TAM recently updated its Social Media Guidelines. To review the updated Social Media Guidelines, please see the link on the bottom right corner of the website (txmediator.org).

## Expanding TAM's Reach

Your likes, shares, comments, tweets, and mentions are continuing to expand our reach. The chart below shows TAM's growth from March 2015 to June 2015 for each social media platform:

Social Media	March 2015	June 2015	Growth
Facebook	280 page likes	295 page likes	5.3%
Twitter	158 followers	190 followers	20.0%
LinkedIn	895 members	1041 members	16.3%
Google+	6093 views	7248 views	18.9%
YouTube	32 views	69 views	115.6%
Instagram	0 followers	48 followers	Just activated!

## Find TAM on Social Media

We invite you to keep this momentum going. You can follow, share, and like us at any of TAM's social media channels by visiting TAM's website (txmediator.org) and clicking on the social media icons in the bottom right corner.



**Lori Anne Shaw** has been the assistant director for program development at Abilene Christian University's Duncum Center for Conflict Resolution since 2007. She is a mediator specializing in employment disputes in higher education settings and non-profit organizations. Lori Anne's role also includes serving as practicum coordinator for the master's program, assistant director of Residency Session, providing training, and managing the center's online presence and public communications. She also currently serves as webmaster for the Texas Mediation Trainers Roundtable.

## International Peacemakers: Prodialogo Co-Organizes The XI World Mediation Congress In Lima, Peru *continued from page 16*

followed by two hours of presentations of reports on mediation topics of general and specialized interest. In the late afternoon, a speech from Iván Ormachea and Omar Varillas (both from Peru) will focus on mediation, dialogue and transformation of social-environmental conflicts. The day will conclude with philosophical dialogues, involving participants from Italy, Colombia, Argentina and Mexico, on the ontology of mediation and social change.

The final day of the conference, September 26, will consist of an address from Ulf Christian Eiras (Argentina) and Miguel Ángel Soto (Mexico) on restorative justice and a final address from Fadhila

Juan Ávila and Meza the

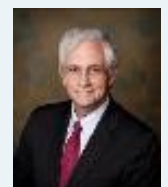


vantages of mediation among public, private and social actors with rural and indigenous communities. The conference will close in the mid-afternoon.

Mammar (Tunisia), Manuel (México) Fernando (Peru) on ad-

As the above agenda indicates, the XI World Mediation Congress focuses mostly on activities in Latin America, but it also illustrates the depth of mediation's penetration in the countries south of the U.S. border and the high level of sophistication that Latin Americans are achieving in our mutual field of interest—mediation.

*\*Walter A. Wright is an Associate Professor in the Legal Studies Program of the Department of Political Science at Texas State University in San Marcos. He is a former President of TAM.*



# The Mediator's Toolbox

## How To Overcome Impasse at Mediation

By Fran Brochstein



As negotiations proceed, parties sometimes "hit a wall," and negotiations stop -- often not due to actual conflict, but rather due to resistance to possible solutions, perhaps because it's something they've never thought about before. While the impasse might signal that the dispute is "unresolvable" in mediation, the mediator may believe that an agreement is still possible. The following are some techniques to get negotiations moving.

Remember, though, that the goal isn't to overcome impasse, but to help the parties analyze and negotiate constructively. A party is free to stick with a position. After all, there may be a legitimate reason for impasse, and it's not your job as a mediator to pressure the parties into a settlement!

### Techniques for Overcoming Impasse

1. Take a break. Often, things have a way of looking different when you return. Suggest everyone get a snack. Sometimes low blood sugar makes people "grumpy".
2. Ask the parties if they will agree to set the issue aside temporarily, and then the mediator should select something else to discuss - preferably an easier issue.
3. Ask the parties to explain their perspectives on why they appear to be at an impasse. Sometimes, the parties need to look at the issue from a different angle. The mediator needs to ask lots of questions such as "Why?" "What does that look like to you?" "If you get off of work at 7:30 pm how can you pick up from your children at 6:00 pm?" "If you make \$900 month how can you make at \$700 car payment?"
4. Ask the parties, "What would you like to do next?" Or, say, "Frankly, it looks like we're really stuck on this issue. What do you think we should do?" These questions help the parties actively share in the burden of the impasse.
5. Ask each party to describe his/her fears (but don't appear condescending, and don't make them defensive). Really listen to what the each party is saying. Get specific details -- don't let them to give vague responses.
6. Give a concise summary of both parties' sides and what they've said so far. Summarize the case so that the parties can see the part they're stuck on in overall context. Sometimes, the impasse issue will then seem less important. Try to use the same terminology the parties used.
7. Briefly review all the areas they the parties have agreed to so thus far, ; praise them for their work and accomplishments, ; and validate that they've come a long way. Then, ask something like "Do you want to let all that get away from you?"
8. Ask the parties to focus on the ideal future. For example, ask each, "Where would you like to be [concerning the matter in impasse] a year (or 5 years) from now?" Follow the answers with questions about how they might get there.
9. Suggest a trial period or plan; e.g., "Sometimes, folks will agree to try an approach for six months (or more) and then meet again to discuss how it's working."
10. Help the parties define what they need by developing criteria for an acceptable outcome; say, "Before we focus on the outcome itself, would you like to try to define the qualities that any good outcome should have?"
11. Be a catalyst. Offer a "what if" that is only marginally realistic or even a little wild, just to see if the parties' reactions gets them unstuck. Say, "Let me suggest a totally new and outrageous solution," then observe their response.
12. Offer a model; say, "Sometimes, we see parties to this kind of dispute agree to something like the following . . ."
13. Try role-reversal. Say, "If you were [the other party], why do you think your proposal wouldn't be workable?" or "If you were [the other party], why would you accept your proposal?"
14. Another role-reversal technique is to ask each party to briefly assume the other's role and then react to the impasse issue. You also can also ask each party to be a "devil's advocate" and argue against their own position. Or, you as the mediator play "devil's advocate".
15. Ask the parties if they would like to try an exercise to ensure they understand each other's position before mediation ends. Ask party A to state his/her position and why, ask. Ask party B to repeat what B heard, and then ask A if B's repetition is accurate. Repeat for B. Listen and look for opportunities to clarify.
16. Ask, "What would you be willing to offer if [the other party] agreed to accept your proposal?" Or, "What is keeping you from doing..." Sometimes the person sees a small pebble as a mountain.
17. Use reality-checking. For example, "What do you think will happen if this goes to court?" Draw out the emotional, financial, and other costs of litigation and delay.
18. If all else fails, suggest (or threaten) ending the mediation. Parties who have invested in the mediation often won't want it to fail, and may suddenly become unstuck. This approach is useful where one party may be hanging on because he/she enjoys the attention the process provides, or enjoys the other party's discomfort. Say, "I am thinking of declaring an impasse, do you have any ideas on how to settle this case?" Sometimes when the people see that failure is imminent then they become more flexible.

*continued on page 19*



# Spotlight on TAM President-Elect, Jennifer Ortiz Prather

By Lori LaConta

TAM is pleased to have Jennifer Ortiz Prather as our President-Elect for 2015 and as Co-Chair of our 2016 Annual Conference. Jennifer has served on the TAM Board for a year and half and brings a wealth of conflict resolution knowledge and expertise to our organization. She holds a very prestigious position as the Supervisory Attorney and Program Manager for the Equal Employment Opportunity Commission's (EEOC) ADR/Mediation program serving the greater Houston and New Orleans areas. Jennifer mediates private sector employment discrimination disputes, and she manages a mediation program that has conducted over 2,000 mediations. Under her leadership, the EEOC ADR/Mediation program maintains an average settlement rate over 70% and has produced over \$20 million dollars in monetary settlement benefits for charging parties (complainants) who have sought recourse through the program.

In addition to achieving incredible gains for the EEOC ADR/Mediation Program, Jennifer has done her part to assist mediators develop and advance their mediation practices. When she joined the EEOC in 2010, she revitalized and expanded the organization's Pro-Bono Mediation Program, which gave mediators more opportunities to mediate employment cases. In 2011, Jennifer established Academic Partnerships between the EEOC Houston and Mediation Clinics at South Texas College of Law, University of Houston Law Center, and Thurgood Marshall School of Law. Through these liaisons, qualified law students have opportunities to practice their newly-acquired mediation skills by co-mediating employment cases with their Mediation Clinic Directors. In 2014, Jennifer updated the Contract Mediator Panel, allowing mediators with demonstrated experience in handling employment disputes the opportunity to bring their talents, skills, and

expertise to the EEOC ADR/Mediation Program. This past year, she was recognized for her efforts when she won the prestigious EEOC Chair's Award for her work with the Pro Bono Mediation Program, which had accomplished 240 mediations and captured over \$1.5 million in monetary benefits in only 3.5 years.



**Jennifer Ortiz Prather**

Prior to joining the EEOC, Jennifer served as a Commissioner with the U.S. Federal Mediation & Conciliation Service (FMCS) in the Office of International & Dispute Resolution Services, where she mediated hundreds of labor, EEO, and workplace disputes for multi-national corporations and various Federal government agencies, including NASA, the FBI, the Department of Veteran's Affairs, and the Small Business Administration. She was also responsible for program development and project management, which included consultation, systems design, conflict training and mediation/

facilitation for both domestic ADR programs and international clients. Jennifer has also conducted hundreds of workshops, trainings, and conflict intervention programs for domestic and international audiences. She has enjoyed extensive international travel, conducting mediation trainings in Beijing and Shenyang, China in 2009; and she has worked on projects with the 21 Pacific-rim economies of the Asian Pacific Economic Cooperation (APEC), the International Labor Affairs Bureau of the U.S. Department of Labor, and the U.S. Embassies in Bridgetown, Barbados and Belgrade, Serbia.

Jennifer received her B.A. from the University of Southern California in International Relations with a minor in Environmental Studies and her J.D. from Vermont Law School. She has served on the boards of several ADR organizations, including the Association of Conflict Resolution Houston Chapter, and she currently serves on the Boards for both the Labor and Employment Relations Association Houston Chapter and the Texas Labor Management Conference.



**Lori LaConta** is co-chair of the 2016 TAM Conference. She is an attorney, arbitrator, mediator, & adjunct professor of human resource management. Lori has mediated hundreds of cases involving labor, employment, commercial, family law, real estate, and personal injury disputes. The Harris County DRC recognized her as one of the Top Volunteer Mediators every year from 2007 to 2012.

## The Mediator's Toolbox: How to Overcome Impasse at Mediations *continued from page 18*

19. Offer to do a "partial settlement."
20. Offer to do a second session. Sometimes if people "sleep on it" resolution can easily be reached at the second session.



**Fran Brochstein** is a Houston Texas family law attorney, mediator, arbitrator, and parenting coordinator. Licensed to practice law since 1991, her practice gradually evolved into a full-time mediation practice. She assists in training new family law mediators with the DRC-Houston and with Manoussou

Mediation & ADR Training. Fran is a TMCA Credentialed Distinguished Mediator. Houstonia Magazine named her in their December, 2013 and 2014 issues as one of the outstanding family law attorneys in Houston. She is President-Elect of ACR-Houston and is a volunteer at the DRC-Houston, Houston Volunteer Lawyers, and Aid to Victims of Domestic Abuse.

# Members on the Move

By Linda W. Gibson



*Editor's Note: Members on the Move is a new permanent feature in The Texas Mediator. Designed to highlight TAM members' professional and/or physical moves. Do you have a new job? Have you moved to a different city? Did you earn another degree? Did you receive an award? Have you celebrated a professional anniversary? We welcome you to share your good news with other members of TAM by emailing the details to [lindawgibson@gmail.com](mailto:lindawgibson@gmail.com). Please include a very short bio, your contact information, and a recent photo. All submissions should be in the form of an announcement, not an advertisement. In the unlikely event that any submission is determined to be inappropriate for publication, we reserve the right to edit or exclude it.*



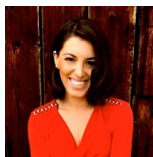
**Barbara Ann Allen** announced that the mediation firm she founded, Austin Texas Mediators LLC, is expanding and will be providing mediation services throughout Texas and changing its name to Mediators of Texas. The mediation training division will be called the Institute of Mediation Training. Barbara has been busy training new mediators and providing basic and advanced family classes in Georgetown and Austin with a priority on providing courses that prepare mediators for real world situations, including topics on how to start and build a mediation business. On September 18, Barbara will be speaking at the AAM training in San Antonio. The presentation is entitled: Co & Gender Balanced Mediations: Pros and Cons.



**Sharon Bayus** and the staff of Innovative Alternatives, Inc. (IA) recently celebrated 25 years of innovation in the mediation field. IA held a **Totally Texan 25<sup>th</sup> Anniversary Blast** at the Greater Houston Gun Club with a fundraiser that included a Sporting Clay Shoot, Cowboy Casino Night, Longhorn Steak dinner and a Legacy of Leadership award to Honoree Tim Miller, Director of Texas Equusearch Mounted Search & Recovery Team. IA started with Victim Offender Mediation and has always had a Victim Assistance Program to provide 6 months of free counseling to crime victims. A full article about Innovative Alternatives, Inc. and all its cutting edge approaches to numerous forms of mediation can be found beginning on page 10 of this newsletter.



**David Cabello** reports the intellectual property law firm Wong, Cabello, Lutsch, Rutherford & Brucculeri LLP recently combined with Blank Rome. The twenty attorneys and additional staff formerly of Wong, Cabello are moving to 717 Texas Ave. Suite 1400, Houston, TX 77002. David will take on the role of co-chair of the intellectual property practice group and will continue to offer mediation services in the intellectual property area.



**Melissa Back McAlpine** was recently elected the President of the Houston Chapter of the Association for Conflict Resolution. At 31 years old, she is one of the youngest, if not the youngest, president of any Association for Conflict Resolution chapter internationally. Melissa is a mediator and arbitrator with contracts that include Harris County and district courts, the Houston EEOC, and the AutoLine Arbitration program with the Better Business Bureau. She also is a co-trainer at Manouso Mediation & Arbitration, LLC, as well as adjunct faculty at the University of St. Thomas with Dr. Barbara Manouso, teaching Global Conflict Management.



**Adam McGough** was recently elected to Place 10 on the Dallas City Council. Adam is the Director of Conflict Management at El Centro College and is an Adjunct Faculty member at SMU in Dispute Resolution. He has served on the Board of Directors for numerous organizations including TAM. Adam was a co-chair of the 2013 TAM Annual Conference and is the Immediate Past Chair of the ADR Section of the Dallas Bar Association.



**Josefina Rendón** was recently re-appointed for another two-year term as an Associate Judge for the City of Houston. She has been a Municipal Court Judge for 27 of the last 31 years. Josefina served as TAM president in 2005. She has been a mediator since 1993. Josefina is also the former judge of the 165th Civil District Court.



**Sandra Warstler** recently joined the Small Business Administration's Office of Disaster Assistance as a Liaison/Analyst. Sandra serves as the Liaison between the Office of Disaster Assistance, Office of Disaster Planning, and Office of Entrepreneurial Development. Sandra was also recently selected to receive the 2015 Federally Employed Women's (FEW) Leadership Certificate Scholarship. Sandra has been with the federal government for over 25 years and has served in multiple agencies, including the Small Business Administration, Consumer Financial Protection Bureau, Department of Homeland Security, U.S. Department of Agriculture, and Department of Defense. She has extensive experience in federal contracting, budgeting, consulting, investigations, auditing, quality assurance, contractor oversight, and EEO and family mediation. Sandra has a Criminal Justice B.A. and a J.D. and enjoys spending her free time with family, volunteering, and traveling.





# SAVE THE DATE

## 2016 Annual TAM Conference

Thursday & Friday, Feb. 25 & 26  
Norris Conference Centers -  
Houston

Key



C. Richard Barnes



Nina Meierding

Notes



Mike McMillion



Joe Bontke



For more information  
visit the TAM website:  
[www.txmediator.org](http://www.txmediator.org)

Hotel Accommodations at Hotel Sorella  
<http://www.hotelsorella-citycentre.com>  
866-842-0100

Group Rate: \$169 per night (before taxes)

# Calendar of Events

The Texas Association of Mediators offers this calendar of upcoming trainings and events as a service to its members and the community. TAM does not recommend or endorse any specific provider, model or training. The information listed below has been submitted to TAM by the providers. TAM does not verify credentials or any of the claims stated in the information. Additional details about each event can be found on the TAM website calendar. Please contact the provider for further information or to register.

**NOTE:** Training courses and other events that would be of interest to TAM members must be submitted on the TAM website Calendar of Events page: [www.txmediator.org/training](http://www.txmediator.org/training).

## **THE NEXT NEWSLETTER SUBMISSION DEADLINE IS SEPTEMBER 1, 2015.**

Conflict resolution trainings and events in Texas can also be posted to the Texas Association of Mediators (TAM) Linked In subgroup called “*Conflict Resolution Events / Resources in Texas*.” Join the subgroup and post. You can join the subgroup by simply typing in the subgroup name while in Linked In using the search engine box in the top right-hand corner. Make sure to use the drop down box to select “groups,” type the subgroup name and hit enter. The subgroup will pop up and select it.

### **DALLAS/FORT WORTH AREA**

**Conflict Connections, Inc.,** (210) 880-4440, [www.conflictconnections.com](http://www.conflictconnections.com)

- *CINERGY™ Conflict Management Coaching Course* at SMU — 8/7/2015 - 8/23/2015

**Dispute Resolution Services of North Texas Inc,** (817) 877-4554, [www.drsnorthtexas.org](http://www.drsnorthtexas.org),

- *Understanding Diversity & Cultural Competency in Mediation* — 08/07/2015 - 08/07/2015
- *40-Hour Basic Mediation Training* — 9/10/2015 - 9/26/2015
- *30-Hour Family Mediation Training* — 10/9/2015 - 10/23/2015

**Mediation Worlds** - 817-729-0543, [www.mediationworlds.com](http://www.mediationworlds.com)

- *Mediation of Domestic Violence Issues* — 10/22/2015 - 10/23/2015

**Professional Services & Education,** (214) 526-4525, [www.conflicthappens.com](http://www.conflicthappens.com)

- *Basic Mediation Training* — 7/21/2015 - 7/24/2015
- *Family Mediation Training* — 9/21/2015 - 9/23/2015
- *Basic Mediation Training* — 11/17/2015 - 11/20/2015

**Richland College,** 972-238-6918, [www.worldmediationsymposiadallas.com](http://www.worldmediationsymposiadallas.com)

- *Mediating Global Civility and Public Policy* - World Symposium — 10/15/2015 - 10/17/2015

### **DALLAS/FORT WORTH AREA (CONT.)**

**Richland College,** 972-238-6918, [www.worldmediationsymposiadallas.com](http://www.worldmediationsymposiadallas.com)

- *Mediating Global Civility and Public Policy* - World Symposium — 10/15/2015 - 10/17/2015

**University of Texas at Arlington,** 817.272.2581, [uta.edu/ded](http://uta.edu/ded)

- *Child Protective Services Mediation Course* — 5/30/2015 - 6/6/2015

### **HOUSTON AREA**

**Manousso Mediation Training and ADR Services** - (713) 840-0828, [www.manousso.us](http://www.manousso.us)

- *Basic Mediation 40 hours* — 5/21/2015 - 5/24/2015
- *Advanced Family (Divorce Child Custody) Mediation Training* — 5/13/2015 - 5/15/2015
- *Elder and Adult Care Mediation* - 5/14/2015 - 05/16/2015
- *Arbitration Training* — 5/16/2015
- *Arbitration 101* — 6/4/2015 - 6/4/2015
- *Parenting Coordination and Facilitation Training* — 6/5/2015 - 6/6/2015

*continued on page 23*



**HOUSTON AREA**

**TAM ANNUAL CONFERENCE**  
**Thursday, February 25 and Friday February 26, 2016**  
**Norris Conference Center - Houston CityCentre - 800 Town and Country Blvd**

**KERRVILLE**

**Hill Country DRC**, (830) 792-5000, [www.hillcountrydrc.org](http://www.hillcountrydrc.org)

- *Family Mediation Training Course* – 10/8/2015 - 10/10/2015

**LUBBOCK**

**Lubbock County - Office of Dispute Resolution**, 806-775-1720

- *Family Mediation Training* – 8/18/2015 - 8/20/2015

**SAN MARCOS**

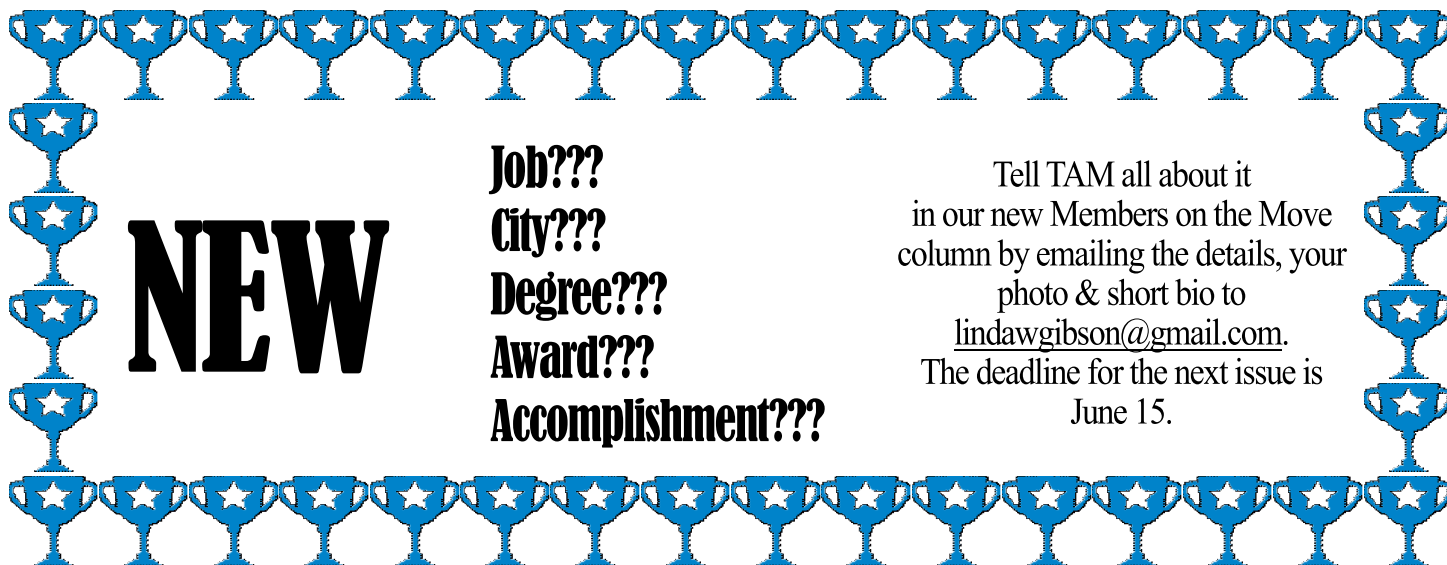
**Central Texas Dispute Resolution Center**, (512) 878-0382, [www.centexdrc.org](http://www.centexdrc.org)

- *30-Hour Family Mediation Training* – 9/9/2015 - 9/18/2015
- *CPS Mediation Training* – 10/5/2015 - 10/6/2015
- *40-Hour Basic Mediation Course* – 11/11/2015 - 11/21/2015

**ONLINE WEBINAR**

**Conflict Connections, Inc.**, (210) 880-4440, [www.conflictconnections.com](http://www.conflictconnections.com)

- *Summer 2015 CINERGY™ Conflict Management Coaching Webinar* – Thursdays 7/2/2015 - 9/3/2015



**NEW**

**Job???**  
**City???**  
**Degree???**  
**Award???**  
**Accomplishment???**

Tell TAM all about it  
in our new Members on the Move  
column by emailing the details, your  
photo & short bio to  
[lindawgibson@gmail.com](mailto:lindawgibson@gmail.com).  
The deadline for the next issue is  
June 15.

**TAM Welcomes New Members**

**Full Members**

Deborah R. Weems, *Cedar Park*  
Gregory Y. Jones, *San Antonio*  
Leslie Thomas Hume, *Austin*  
Sherita Todd Lynch, *Weatherford*  
James William Upton, *Corpus Christi*

**Candidates for Membership and Friends of TAM**

Alma T. Ingram, *Round Rock*  
Morgan Dane Boyles, *Midland*  
Kim Jackson Battaglini, *Austin*  
Karen Mayer Cunningham, *Katy*  
Maranatha N. Lingerfelt, *Houston*  
Alma Bernard Adriano, *Houston*  
Linda D. Herrera, *Austin*  
Elaine Garcia, *Kaufman*  
Ira King, *Dallas*  
Joe L. Clawson, *Granbury*

**The Texas Mediator**  
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# ***A Multi-Disciplinary Association Because One Viewpoint Is Not Enough***

## **Officers And Directors**

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pmporter@conflictconnections.com, 210-880-4440

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Jennifer Ortiz Prather, Houston  
Jennifer.Ortiz@eeoc.gov, 713-651-4931

#### **Secretary**

Kathleen Dial, Denton  
Kathleen\_dial@msn.com, 860-798-9367

#### **Treasurer**

Meg Walker, Galveston  
TAMadmin@gmail.com, 409-744-2449

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Ralph E. (Gene) Roberts Jr., Huntsville  
gene.roberts@shsu.edu, 936-294-1717



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