



3 of 3 DOCUMENTS

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Texas Tech Journal of Texas Administrative Law

Summer, 2005

6 Tex. Tech J. Tex. Admin. L. 189

LENGTH: 14833 words

ARTICLE: YOUR ADMINISTRATIVE CASE IS GOING TO MEDIATION: ARE YOU READY?

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LEXISNEXIS SUMMARY:

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TEXT:

[*190]

I. Introduction

When your next water rights case or contested permit application takes an alternate path to resolution and heads to mediation, will you be ready to effectively represent your client in that process? Whether your law practice brings you before federal, state, or local governmental entities, alternative dispute resolution (ADR) processes are being used today in these fora to resolve disputes. On the federal level, agencies are authorized and encouraged to use ADR under the Administrative Dispute Resolution Act, first enacted in 1990 and made permanent in 1996. n1 In Texas, as discussed below, legislative enactments have supported the institutionalization of ADR and expressly authorize Texas governmental bodies to use such processes. n2

So, as an administrative law attorney, if you haven't not already participated in an ADR process, your opportunity is just around the bend. With that in mind, this article starts by familiarizing the reader with certain ADR processes and the legal framework that supports their use in Texas government. Then, Part IV addresses issues for attorneys to ponder as they prepare to represent clients in ADR processes, which draw upon a different set of skills than those associated with trial advocacy. n3

II. Putting ADR in Context

A. What is ADR?

One way to view ADR vis-a-vis other conflict resolution processes is to picture a straight-line continuum. n4 At one end of the continuum, parties resolve disputes informally and independently, without the use of an impartial third party. These dispute resolution methods include direct negotiations and some settlement conferences. At the other end of the continuum, a neutral third party such as a judge, administrative law judge (ALJ), or arbitrator hands down a decision after a trial or hearing. "ADR" is a collective term for several processes in between that use an impartial third party to assist the parties in negotiating and hopefully reaching a voluntary, mutually acceptable solution. n5 In these instances, the impartial third party may not compel an agreement, rather she encourages and assists the parties in their resolution. n6 The most [*191] commonly used form of ADR for court-referred cases is mediation. n7 When used in the context of public policy with multiple parties involved, mediation is also called consensus building. n8

B. A Glimpse into the Framework of ADR in Texas

The growth of ADR in Texas may be tracked in part through the enactment of ADR statutes. n9 This is not to say that ADR was not used before its recognition in statutory provisions; it was. n10 However, for governmental bodies, the legislative endorsements and encouragement have helped ease the initial uncertainty of engaging in ADR and signing mediated settlements. n11

One of the earliest ADR statutes in Texas is the Alternative Dispute Resolution Systems and Financing Act "(DRC Act)," n12 enacted in 1983. n13 It authorizes county commissioners courts to establish Dispute Resolution Centers "(DRCs)" and fund them through a specific filing fee on civil suits (currently capped at ten dollars\$ 10). n14 Currently, seventeen DRCs across Texas offer ADR services to their communities and surrounding areas. n15 Under the DRC Act, judges in counties that have established DRCs may, on a party's motion, refer cases to these centers. n16 During the years following its enactment, however, the statute was seldom invoked to refer pending cases to the centers. n17 Then, in 1987, the legislature passed the Texas ADR Procedures [*192] Act, n18 which establishes the framework for referral of court cases to ADR. n19 The Act starts out by making clear that it is the policy of this sState to "encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation . . ." and bestows upon judges the responsibility of carrying out this policy. n20 The Act then sets forth definitions and procedures for carrying out this policy. n21

1. ADR Procedures Defined

Without being limiting, Tthe Act defines, without being limited to, five ADR procedures thatto which a court may refer a case to, on its motion or on a party's motion., The five ADR proceduresto include mediation, a mini-trial, a moderated settlement conference, a summary jury trial, or an arbitration.

Mediation is "a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them." n22 Mediation is likely the best-known ADR procedure and accommodates many types of disputes. The mediator has no independent authority to impose any final decision and works with the parties to structure and apply a process to help them reach agreement on their contested issues. n23

Mini-trials are:

(a) [C]onducted under an agreement of the parties. (b) Each party and counsel for the party present the position of the party, either before the selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations. (c) The impartial third party may issue an advisory opinion regarding the merits of the case. (d) The advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement. n24

A mini-trial works well in an environment where high-level executives have the opportunity to hear other parties' arguments, such as with private organizations and governmental entities. n25 The highly abbreviated cases are [*193] presented informally to these representatives who have the authority to settle the case. n26 Following the presentations, the representatives attempt to negotiate a settlement. n27

Moderated Settlement Conferences are:

(a) [F]orum[s] for case evaluation and realistic settlement negotiations.

(b) Each party and counsel for the party present the position of the party before a panel of impartial third parties. (c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both. (d) The advisory opinion is not binding on the parties. n28

Summary Jury Trials are:

(a) [A] forum for early case evaluation and development of realistic settlement negotiations. (b) Each party and counsel for the party present the position of the party before a panel of jurors. (c) The number of jurors on the panel is six unless the parties agree otherwise. (d) The panel may issue an advisory opinion regarding the liability or damage of the parties or both.

(e) The advisory opinion is not binding on the parties. n29

Arbitration can be either binding or non-binding:

(a) Non-binding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award. (b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as a contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for further settlement negotiations. n30

While these five ADR procedures are specifically mentioned, they are not exclusive. n31 The Act allows for flexibility in structuring ADR procedures, stating generally that cases may be referred to "a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party." n32 Notably, the one element that defines ADR procedures prescribed under the Act is the use of an impartial third party. n33

[*194]

2. Other Major Provisions of the ADR Procedures Act

a. Impartial Third Party Qualifications and Immunity

Generally, to qualify for a court appointment, the impartial third party must have completed a minimum number of training hours. n34 The Act requires a minimum of forty40 classroom hours of training in dispute resolution techniques. n35 For disputes relating to the parent-child relationship, a person must complete an

additional twenty-four²⁴ hours of training in the fields of family dynamics, child development, and family law. ⁿ³⁶ The impartial third party must also comply with standards of conduct, including confidentiality principles. ⁿ³⁷ Specifically, an impartial third party may not disclose to other parties, or to anyone else, information given in confidence or communications related to the subject matter of the dispute, unless expressly authorized by the party providing that information. ⁿ³⁸ Additionally, unless the parties agree otherwise, all matters including the conduct and demeanor of the parties and their counsel during the settlement process are confidential. ⁿ³⁹ Impartial third parties acting as volunteers in an ADR process are not subject to civil liability for an act or omission in the scope of their duties. ⁿ⁴⁰

b. Confidentiality of Oral and Written Communications

Confidentiality allows for honesty and openness during an ADR process. While there may be some in other states who question the need for confidentiality in ADR processes, the Texas statute falls squarely on the side of ensuring broad confidentiality. ⁿ⁴¹ The Texas ADR Procedures Act provides statutory confidentiality protections to most oral and written communications that occur during an ADR process. ⁿ⁴² Section 154.073 contains the main confidentiality provisions and protects against discovery or other disclosure of most oral and written communications made during an ADR procedure. ⁿ⁴³ This section also describes exceptions to the general confidentiality provisions. These exceptions prevent parties from using a mediation to protect otherwise discoverable information. ⁿ⁴⁴ They also preserve the governance of [*195] the Public Information Act, formerly the Open Records Act, over agreements in which a governmental body is a signatory; preserve the legal obligation to report information about abuse or neglect of children or the elderly; and provide an opportunity for courts to consider, in camera, the applicability of other legal disclosure requirements to the information provided in an ADR procedure. ⁿ⁴⁵

c. Enforceability of the Settlement Agreement

The ADR Procedures Act gives written settlement agreements the same effect as a written contract and allows the court to incorporate the terms of the settlement in the final decree. ⁿ⁴⁶ Failure to get the court to include the terms of a mediated agreement into a final judgment only means that the agreement is only enforceable as a contract and not as a judgment. ⁿ⁴⁷

III. Integrating ADR in Texas Government

The success of ADR in the private sector and the increasing use of ADR procedures in federal agencies provided impetus in the mid-1990s for a legislative effort to encourage the use of ADR in Texas government. ⁿ⁴⁸ A number of state agencies were already using mediation and other ADR processes; ⁿ⁴⁹ yet, others were reluctant due to lingering questions about how ADR could work within the state administrative framework. ⁿ⁵⁰ Common questions included:

Were Texas agencies allowed to use ADR at all? If so, under what circumstances?

Were mediations of governmental disputes covered by the Texas [ADR] Procedure[s] Act, which contemplates primarily court-referred disputes?

Which records, if any, used during governmental ADR processes become 'open' records under the Public Information Act (formerly known as the Texas Open Records Act)?

Did the confidentiality provisions of the ADR Procedures Act trump the Public Information Act?

[*196]

What were the minimum qualifications, if any, for an impartial third party in a governmental mediation?
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In 1997, the Texas Legislature provided some answers by enacting the Governmental Dispute Resolution Act ("GDR Act") ⁿ⁵² and the Negotiated Rulemaking Act. ⁿ⁵³

A. The Governmental Dispute Resolution Act

The GDR Act, modeled in part on the federal Administrative Dispute Resolution Act, expands on key provisions of the Texas ADR Procedures Act. n54 Notably, it clarifies the authority of governmental bodies to use ADR and addresses legal and procedural matters unique to public entities participating in ADR. n55 The GDR Act begins with the a statement of policy statement "that disputes before governmental bodies be resolved as fairly and expeditiously as possible.. . . ." n56 To further that goal, the GDR Act encourages governmental bodies to develop and use ADR procedures in their operations and programs when appropriate. n57 "Governmental body," as that term is defined today, has the meaning assigned under the Public Information Act. n58 That definition gives the GDR Act broad application beyond state agencies to include counties, municipalities, institutions of higher education, and any part or section of an organization that spends or that is supported in whole or in part by public funds. n59 The judiciary is expressly excluded from the definition of governmental body. The express exclusion from the definition of "governmental body" is the judiciary. n60

Some of the provisions in the ADR Procedures Act are incorporated under the GDR Act, such as third party neutral qualifications, standards and duties, immunity, as well as the definitions of ADR procedures. n61 In addition, as highlighted below, the GDR Act answers how ADR principles can be efficiently woven into the regulatory scheme of governmental entities. n62

[*197]

1. Sovereign Immunity

Does an agency's use of an ADR process waive its rights under the sovereign immunity doctrine? No. The GDR Act generally states that it does not constitute a waiver of sovereign immunity from suit and specifically states that it does not authorize binding arbitration, which could potentially effectuate a waiver. n63 In essence, the GDR Act makes no changes to existing law on this topic. While the statute encourages the use of ADR processes by governmental bodies, it neither expands nor restricts an agency's existing or future authority to waive or assert sovereign immunity. n64 Consequently, an agency that chooses to use an ADR process "must make its own analysis of existing law to determine (1) if and how sovereign immunity issues are relevant and (2) whether the use of the ADR process it selects conforms with [the agency's] ability to assert or waive sovereign immunity." n65

The legislature and the Texas Supreme Court have eased that analysis in certain breach-of-contract claims against the State. n66 In 1999, the legislature enacted Chapter 2260 of the Texas Government Code, whereby units of state government (as defined under that statute) are directed to develop rules to govern the negotiation and mediation of a claim under that chapter. n67 The unit's dispute resolution process must be used in attempting to resolve contract disputes and must be included as a provision in each contract to which the chapter applies. n68 The required use of a dispute resolution process, however, does not threaten the State's sovereign immunity in these contract cases. n69 The statute explicitly provides that the chapter "does not waive sovereign immunity to suit or liability." n70 The Texas Supreme Court has held that when the State contracts with private citizens, it waives immunity from liability but not from suit. n71 In two breach-of-contract cases, the Texas Supreme Court recognized that Chapter 2260 provides an exclusive method for resolving certain contract claims against the State and does not waive the State's immunity from suit. n72

The last provision under the sovereign immunity section of the GDR Act states that "[n]othing in this chapter authorizes binding arbitration as a method of alternative dispute resolution." n73 Just as the Act does not affect an agency's [*198] general authority to assert or waive sovereign immunity, the Act also does not affect an agency's authority to use binding arbitration. n74 Why is binding arbitration specifically mentioned in the sovereign immunity section? Because when parties agree to a binding arbitration process, they are committing to abiding by the arbitrator's final decision. n75 To the extent that the arbitrator's award can include damages against the State, issues of sovereign immunity are raised. n76 The GDR Act provides no "new" authority for governmental bodies under the Act to use binding arbitration. n77 If a governmental body has been delegated the specific authority to use binding arbitration in a specific statute, then the Act

does not preclude it from doing so; similarly, any governmental body lacking authority to enter into binding arbitration does not acquire that authority under the Act. n78

By way of illustration, the legislature specifically granted the Department of Health the authority to elect arbitration for the resolution of disputes surrounding the licensing of convalescent and nursing homes and other related institutions. n79 The legislature also made the arbitrator's award binding upon the parties. n80 Thus, for these particular cases, the Department of Health has the statutory authority to agree to binding arbitration for the resolution of those issues. n81

Because binding arbitration clauses are so prevalent in consumer contracts, it would not be extraordinary for such a clause to surface in a state contract. Would the state agency then be required to engage in a binding arbitration process? Without specific legislative authority allowing an agency to submit to binding arbitration, under current court rulings, the agency would likely not be bound by a contractual provision. n82 In a 2002 decision, the Texas Supreme Court addressed whether the Texas Natural Resource Conservation Commission (TNRCC) had waived its immunity from suit by entering into a contract that had a "remedies provision" allowing for arbitration. n83 The court noted that while federal cases recognize Indian tribes' and foreign governments' right to contractually waive immunity from suit, "Texas law is clear . . . [o]nly the Legislature can waive sovereign immunity from suit in a breach-of-contract claim." n84 The court noted that administrative agencies (like [*199] the TNRCC) were part of the executive branch and therefore could not waive immunity. n85 "It also follows that administrative agents-even those who have authority to contract on the agency's behalf-cannot waive their agencies' immunity from suit." n86 Thus, the court rejected the argument that the TNRCC had waived sovereign immunity by contract. n87

From a statutory perspective, each governmental body then must examine its own specific governing statutes to determine whether it has the authority to enter into binding arbitration. n88 If that specific authority is lacking, the general statutes allowing dispute resolution cannot be used to fill the void. n89

2. Affect on Due Process Rights

The GDR Act makes clear that ADR procedures developed by governmental bodies are supplemental in nature. These procedures do not limit other dispute resolution procedures available for use by a governmental body, such as negotiations or hearings. n90 Nor may the GDR Act be applied in a manner that denies a person's rights under other federal, state, or local law, including a right to a judicial or administrative hearing. n91

3. Agency Procedures and Budget

Under the GDR Act, state agencies that adopt ADR procedures to manage internal or external conflicts must ensure that those procedures comply with the Texas ADR Procedures Act and, where applicable, the Administrative Procedures Act. n92 The GDR Act also authorizes the State Office of Administrative Hearings (SOAH) to issue model guidelines concerning the use of ADR by state agencies. n93 SOAH has developed such model guidelines, which are available through SOAH's website. n94 The [*200] guidelines provide information on ADR procedures as well as links to useful ADR resources. n95

The GDR Act also grants broad fiscal discretion to governmental bodies seeking to implement ADR initiatives. n96 For example, Ssubsection 2009.004(a) clarifies that governmental bodies have budgetary authority to pay for costs incurred in developing and using ADR processes and evaluating their performance. n97 A non-exclusive list of possible expenditures-"reasonable fees for training, policy review, system design, evaluation, and the use of impartial third parties"-covers many foreseeable items, but other costs necessary to achieving the objective of the GDR Act are certain to arise and are authorized by this language. n98

4. Confidentiality

The confidentiality provisions in the GDR Act are similar to those provided for private disputes under the Texas ADR Procedures Act but are more limited to strike a balance with the tenets of open government.

n99 While establishing an exception to the Public Information Act disclosure requirements by declaring certain information "confidential," the provisions also recognize that final written agreements involving a governmental body need distinct treatment. n100 When a governmental body is a signatory to a final written agreement reached as a result of a dispute resolution procedure under the GDR Act, the information in the agreement will be subject to disclosure in accordance with the Public Information Act. n101 That specific treatment ensures that final agreements involving a governmental body will not be withheld from disclosure simply because they resulted from a dispute resolution procedure. n102 The Public Information Act or other applicable law will govern the confidentiality of all or part of these agreements. n103

B. A Consensus Building Framework

When considering what a public input process might look like, a good place to start is with an overview of the Texas Negotiated Rulemaking Act (the "Texas NR Act"). n104 When enacted in 1997, the Act was a bipartisan effort [*201] to formally advocate the use of negotiated rulemaking by Texas agencies in the appropriate circumstances. n105 Negotiated rulemaking, also known as regulatory negotiation, is a consensus-based decision making process that agencies may use to assist them in developing proposed rules. n106 The strength of the process comes from the opportunity of the agency to join with stakeholders- interested parties in the proposed regulation-in an intensive, facilitated negotiation to develop a better rule than might otherwise derive from individual efforts. n107 Federal agencies, such as the Environmental Protection Agency and the Federal Energy Regulatory Commission, have successfully used negotiated rulemaking since the 1980s. n108 The general framework set forth in the statute can also be used more broadly to address public policy conflicts or potential conflicts. n109

Under the Texas NR Act, the negotiated rulemaking process involves several steps. n110 The major ones include: the appointment of a "convener" (usually by the agency who is involved in the conflict), who will analyze the conflict, determine whether the matter is appropriate for the negotiated rulemaking process, and identify the interested parties that should be included in the process. n111 The convener then gives the agency or /sponsor a report summarizing her findings. n112 Based on the report, the agency or /sponsor forms a negotiated rulemaking committee of interested parties and appoints a neutral facilitator to assist the committee. n113 The committee negotiates toward a consensus rule and reports its results to the agency in a final report. n114 If the committee reaches consensus on a proposed rule, the report shall contain the text of the proposed rule. n115 If no consensus was reached on a proposed rule, the report shall specify issues on which consensus was reached, unresolved issues, and any other information or recommendation that the committee deems important. n116 The use of negotiated rulemaking does not obviate an agency's rulemaking requirements under the Administrative Procedure Act. n117 However, an agency that chooses to proceed with a proposed rule after receiving the committee's report must announce in its notice of proposed [*202] rule-making that negotiated rulemaking was used in developing the proposed rule. n118

C. ADR Within Texas Government

While the GDR Act and the Texas NR Act give governmental bodies the general authority to use ADR, certain governmental entities have developed and adopted their own ADR procedures. n119 One set of ADR rules with which you may be familiar is the one adopted by the SOAH. n120 If you have a contested case pending at SOAH, the parties may choose to pursue ADR before engaging in a hearing on the merits. n121 Either party may request a mediation, which SOAH refers to as a Mediated Settlement Conference (MSC). n122 As defined in SOAH's rules, an MSC is a confidential conference in which parties in a contested case explore the possibility of resolving pending disputes with the assistance of a third party neutral (mediator). n123 Parties may also request mediation before a contested case has been filed at SOAH, or outside of the context of APA contested cases. n124

More state agencies may be incorporating ADR provisions in their rules since "the Texas Sunset Advisory Commission adopted an across-the-board (ATB) recommendation in 2002 that directs state agencies to develop and use ADR processes." n125 Building on provisions and principles in the GDR Act and the Texas

NR Act, the ATB directs agencies to develop a policy for the appropriate use of ADR for internal and external disputes, such as employee grievances, interagency conflicts, contract disputes, and actual or potential contested matters. n126 The ATB also requires agencies to designate a trained person to act as an ADR coordinator to implement the ADR policy, schedule [*203] trainings, and collect data on the effectiveness of the ADR programs. n127 The ATB points agencies to SOAH's ADR model guidelines for assistance in designing ADR programs. n128 During the 2003 legislative session, eighteen agencies acquired part or all of the ATB language in their statute prescribing ADR use, including the newly reorganized Health and Human Resources Commission. n129

In addition to state agencies, other governmental entities such as Dripping Springs, Hays County, and the Lower Colorado River Authority consider ADR procedures when seeking a more collaborative approach to resolving perennial public policy issues, such as urban growth and water quality. n130 ADR is particularly well suited for public policy matters that have varied options, and parties who are ready to try a different approach to resolving them. n131

IV. The Lawyer's Role in ADR

What the preceding sections have accomplished, hopefully, is to impart the notion that ADR procedures have been instilled in Texas as true options to the traditional ways that people resolve both private and public disputes. n132 So, how best can we, as lawyers, prepare ourselves to be an effective client representative in an ADR process? I submit that we make a deliberate switch from "trial mode" to "ADR mode," realizing that ADR is a distinct environment that calls upon a distinct set of skills.

One commentator expressed the switch in terms of changing from a binary view of the conflict resolution process to one of pluralism. n133 In the binary view, we see the world in "dichotomous categories." n134 We look upon human conflict "as the confrontation of good and evil, the just and unjust, competition and cooperation, the rich and the poor, plaintiffs and defendants, as if there were null sets in all those places in between categories." n135 This view and way of thinking meshes well with our adversary legal system. n136 Yet, when we consider our modern conflicts, such as civil rights issues, [*204] environmental issues, and mass torts, more than two parties are usually affected, and the binary view is too limiting. n137

To the extent that multiple parties have claims, needs, interests and "rights" in a legal action, the concept of "hearing both sides" may be falsely reductionist in assuming that all parties can align themselves on one or the other side of the "v." and that any resolution favoring one side over the other will solve the problem, conclude the litigation, or end the conflict. n138

When traditional legal processes fail to resolve the conflict, we must look to other more varied techniques and processes, such as mediation and consensus building, to achieve social justice. n139 To move from the traditional role of advocate to one of party representative in a creative ADR process, the "modern lawyer needs to learn how to be "inside" these new processes." n140

The skills that enable the modern lawyer to be effective in an ADR process can be characterized as those of an "ideal legal problem solver." n141 Such skills include: "question framing, investigative skills, quantitative skills for valuation of cases and issues, listening and hearing," "creativity," "emotional awareness," and "empathy." n142 To illustrate how these skills may be applied, below are a few practical considerations for the prospective attorney-representative preparing for an ADR process.

A. Inform Your Client

With your knowledge of ADR processes, you want to seize the opportunity to yet again impress your clients with your depth of options when it comes to representing their interests. The Texas Rules of Professional Conduct do not specifically address ADR disclosure, but attorneys are strongly recommended to do so. n143

The Texas Lawyer's Creed-promulgated in 1989 by the Texas Supreme Court and the Texas Court of Criminal Appeals-is an aspirational statement regarding the standards for practicing law in Texas. n144 Out of eleven commitments regarding the manner in which a lawyer works with a client, at least three are relevant to advising clients in mediation:

[*205]

1) "I will endeavor to achieve my client's lawful objectives in legal transactions and litigation as quickly and economically as possible." n145

2) "I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice." n146

3) "I will advise my client regarding the availability of mediation, arbitration and other alternative methods of resolving and settling disputes." n147

Also, the ABA Ethics 2000 Commission, in developing proposed amendments to the ABA Model Rules of Professional Conduct, added a statement recommending that lawyers inform their clients of ADR options. n148 Model Rule 2.1 states, "[w]hen a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." n149 "The advice should take place at the earliest appropriate stage" and at any time thereafter when ADR seems like a reasonable alternative. n150

B. Assess Your Case

Having told your client about ADR processes, you will both want to assess whether ADR is in fact appropriate for your particular case. A much heralded benefit of ADR is that it saves time and money. n151 Although clients are often interested in saving time and money, other factors contribute to determining whether a case is appropriate for ADR. n152

ADR is more likely to be appropriate in the following situations:

- when multiple issues have to be resolved,
- when the parties do not seek to establish precedent,
- when there is no single right solution,
- when issues are complex and negotiable,
- when direct communications have broken down,
- when confidentiality is important, and

[*206]

when the parties want or need to maintain an ongoing relationship. n153

ADR is less likely to be appropriate in the following situations:

- when the parties need precedent to clarify the law or guide future conduct,
- when the resolution will substantially affect third parties not represented in the process,
- when one party may have the power it needs to get the solution it wants without negotiating,
- when one party wants to delay a resolution,
- when there is a need to focus public attention on a bad actor, and
- when an emergency situation does not allow time for negotiation. n154

If the lawyer and client decide to participate in an ADR process, the lawyer and client will then engage in a conversation that will take them beyond the traditional framing of legal issues. n155 The task of getting beyond legal positions and delving into the parties' underlying interests and needs is a tenet of effective negotiation and mediation. n156

C. Become Familiar With Interest-Based Negotiations

In their book called *Getting to Yes: Negotiating Agreement Without Giving In*, Roger Fisher, William Ury, and Bruce Patton illustrate how focusing on interests rather than positions allows more options for agreement. n157 Each of us negotiates everyday, whether at home, at work, or at play. n158 As attorneys, we negotiate frequently, be it working on leases, mergers, rates, lawsuit settlements, or discovery schedules. Fisher sees negotiation as "a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed." n159 He admits that negotiating well is hard to do and that most people believe that they have to choose between a "hard" or "soft" way to negotiate; each method has its own frustrations. n160 Proposing a third method, [*207] which is both hard and soft, Fisher, et al. build on the "principled negotiation" method developed by the Harvard Negotiation Project. n161 A major principle of that method is to focus on interests, not positions. n162

The challenge in negotiation lies not in conflicting positions but in the conflict between each party's needs, desires, concerns, and fears. n163 Needs, desires, and concerns are what Fisher et al. call "interests." n164 "Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide." n165 Whereas differing positions may be incompatible and lead to stalemate, looking behind positions may reveal shared and compatible interests, as well as conflicting ones. n166

Reconciling interests rather than positions works for two reasons. First, for every interest there usually exist several possible positions that could satisfy it When you do look behind opposed positions for the motivating interests, you can often find an alternative position which meets not only your interests but theirs as well Reconciling interests rather than compromising between positions also works because behind opposed positions lie many more interests than conflicting ones. n167

Asking the questions "Why?" and "Why not?" will help you discern your client's interests as well as anticipate the other parties' interests. The purpose is not to seek justification of a statement, but to understand the motives for initial statements. n168 Then, during the negotiation, communicate your interests, actively listen to others, talk about common goals, and keep an open mind for possible solutions. n169 These techniques are useful during direct negotiations as well as negotiations that occur within a mediation. n170

D. What To Expect During a Mediation

Some of you may have participated in an ADR process, such as a mediation, that did not involve the phases noted below. As mentioned before, a big advantage of ADR is its flexibility and ability to be molded to fit different scenarios. n171 Nevertheless, you should be aware of the general flow [*208] of a mediation, which is used here for purposes of illustration, to better prepare yourself and your client. n172

1. Some Preliminary Matters

Who will be the mediator? Once the parties have agreed to seek mediation, a logical, subsequent decision concerns who will serve as the mediator. n173 The parties may want someone who is knowledgeable in the subject matter in dispute, but mostly the mediator should be well versed in the mediation process itself. How do you determine if a mediator is well suited to your case? Mostly, this is determined by speaking with potential mediators, reviewing their experience, and getting some references. To date, there are no national requirements for mediator training or national credentials indicating proficiency with the process. On the state level, the Texas ADR Procedures Act sets forth minimum training requirements for mediators who may accept court-referred matters. n174 The Act requires a mediator to undergo a minimum of forty classroom

hours of dispute resolution training by a court approved training organization. n175 To mediate a court referred family law matter, the mediator must undergo an additional twenty-four hours of specialized training. n176 The GDR Act has incorporated by reference the Texas ADR Act training requirements for impartial third parties (mediators). n177 SOAH's rules also provide that cases referred to mediation will be conducted by qualified judges. n178 Regarding credentialing of mediators, Texas is among a few states that have addressed mediator licensing or credentialing. n179 In 2004, the Texas Mediator Credentialing Association launched a voluntary mediator credentialing process. n180

Other matters, such as mediation fees, location, dates, and times, are usually decided among the parties with the assistance of the mediator. n181 Prior to the mediation, the mediator often talks to each party, either in person or over the phone, to gather information about the case and start a dialogue. n182 This is also an opportunity for parties to ask the mediator questions [*209] concerning the process, as mediators have their own style and way of organizing the mediation. n183

2. Mediator's Introduction

During her introduction, the mediator sets the stage for the mediation. n184 This is her opportunity to share her background, the information that she gained about the case, and her expectation for the mediation. n185 In addition to introducing herself, the parties, and their representatives, the mediator explains the process, the agenda for the day, and any ground rules that will facilitate the discussion. n186 She offers to answer any questions. n187

3. Parties' Opening Remarks

Before the day of the mediation, attorney and client need to determine who would like to give the opening remarks to tell their side of the story. n188 Unlike in a trial or hearing, a party in a mediation should be allowed to take as active a role as he would like. n189 If the party is comfortable speaking in front of the other parties, then he should do so. Because the mediation is not just about legal issues, the party should have the opportunity to explain how he sees the case, including his interests, his hopes for the outcome, and his emotional needs, if any. n190

4. Information Gathering

Once the parties have made their opening statements, the mediator may ask open-ended questions to supplement the understanding of the dispute. n191 Often, the parties present their side of the story in a scripted fashion. The mediator's questions and the subsequent sharing of information among all the [*210] parties help set a more informal tone and may engender a dialogue among the parties to address the facts. n192

5. Issue and Interest Identification

When information about the case has been exchanged, the mediator will seek to identify the issues in dispute and to be resolved. n193 Mediators use varying styles and techniques in their effort to have the parties fully explore disputed issues. n194 Issues may or may not be the same as the parties' underlying interests. n195 If needed, the mediator may continue the open-ended questioning to uncover the interests at stake. To the extent that parties are still articulating their positions, the mediator can assist them in reframing their statements in more neutral terms. n196

6. Generation of Options

With issues and interests identified, the mediator can then ask the parties to contribute ideas and options for resolving each issue in the case. n197 The mediator at this point usually reminds the parties that this is their opportunity to be creative and, to just brainstorm. n198 Options are not restricted to legal remedies, and no offered option is to be criticized. n199 By taking part in creating their own options, parties are more likely to fashion a solution with which they will be satisfied. n200

7. Individual Caucus, if Needed

The mediator or a party may request to meet privately at any time in an individual caucus. n201 The purpose may be that a party wants to meet privately with his attorney or that a party wants to meet privately with the mediator. n202 Similarly, the mediator may desire to meet individually with each party to clarify statements, to allow some reality checking, or to allow emotions to cool. n203 Generally, each caucus is confidential, and the mediator will only share with the other party the information that she has been given permission [*211] to divulge. n204 To the extent possible, however, parties should have the opportunity to engage in joint problem solving. n205

8. Negotiation and Bargaining

After options for resolution have been generated, the parties engage in negotiations, hopefully following some interest-based negotiation techniques mentioned above. n206 Options are evaluated based on how well they address and meet the parties' interests. The mediator helps the parties with the negotiations and evaluations, keeping the discussions on track and helping the parties analyze options that will best meet their needs. n207

9. Agreement and Closure

If the parties are successful in negotiating solutions to the disputed issues, the mediator will capture these solutions to confirm all parties' understanding of the agreement. n208 While the contents of the agreement belong to the parties, the mediator has a role in completing the details of the mediation agreement. n209 Generally, mediators will take part in the actual drafting of the agreement. n210 However, if attorney-mediators in particular are concerned that unrepresented parties are relying on their expertise to review the agreement for legal sufficiency, mediators may urge the parties to seek independent legal advice. n211 In any case, the parties ought to include a detailed implementation plan in the agreement to help assure compliance. n212

V. Conclusion

The antipathy that some attorneys may still feel towards ADR is due, I will posit, to its various qualities, including flexibility and openness. For attorneys who are trained to rely on facts and rules, ADR may seem too amorphous. Yet, as you delve into ADR, you will find that it has its own pattern and rhythm and can be very successful in situations where traditional [*212] legal processes have failed. As ADR spreads, the challenge becomes not only education about ADR processes but also sound analysis of the case for the appropriate use of ADR. Once you learn how ADR can work in the administrative law sector, you will be that much more effective in advising and representing your client toward a process for resolution that best suits their case.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Alternative Dispute Resolution Civil Procedure Alternative Dispute Resolution Mediations Governments Courts Court Records

FOOTNOTES:

n1 See Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, *104 Stat.* 27386 (1990) (current version at 5 *U.S.C.A.* §571 (2000/1996)).

n2 *Tex. Civ. Prac. & Rem. Code Ann.*, Chapter §§ 154.001-.073 (Vernon 1997); *Tex. Gov't. Code Ann.* §§ 2008.001-.058, 2009.001-.055 (Vernon 2000).

n3 See discussion infra Part IV.

n4 This straight-line continuum concept is attributed to CDR Associates, Boulder, Co.

n5 *Tex. Civ. Prac. & Rem. Code Ann. § 154.021* (Vernon 1997).

n6 § 154.053(a).

n7 Alan Scott Rau et al., Edward F. Sherman, & Brian D. Shannon, Rau, Sherman and Shannon's Texas ADR & Arbitration: statutes and Commentary at 19 (West Group 2000) [hereinafter Rau's & Sherman's Texas ADR & Arbitration: Statutes and Commentary].

n8 Kimberlee K. Kovach, *Mediation, Principles and Practice* at 14 (2d Eed., West Group 2000) [hereinafter Kovach, *Mediation, Principles and Practice*]. "Consensus building may be thought of as an extended mediation, involving large groups and a number of conflicts." *Id.*

n9 Rau's, Sherman and Shannon's Texas ADR & Arbitration: sStatutes and Commentary, supra note 7, at VII.

n10 See *id.* at 68 (quoting a letter from Judge Frank Evans to Kevin Casey that recounts how the first community dispute resolution center in Texas was opened in Houston in 1980 -- three years before the enactment of the statute that would promote the establishment of community dispute resolution centers.).

n11 Center for Public Policy Dispute Resolution, *Commentary on the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act*, Public Resource Series # 7 (Summer 2002) at 14-15, available at <http://www.utexas.edu/law/academics/centers/cppdr/resources/publications.php> [hereinafter Commentary].

n12 *Tex. Civ. Prac. & Rem. Code Ann. § 152.002* (Vernon 1997).

n13 *Alternative Dispute Resolution Systems and Financing Act*, 68th Leg., R.S., ch. 26, p. 118, 1983 Tex. Gen. Laws 118.

n14 *Tex. Civ. Prac. & Rem. Code Ann. § 152.004*. Legislative efforts, including proposed bills in the 2005 legislative session, seek to raise the cap to fifteen dollars\$ 15 in consideration of the DRCs' rising costs over the past twenty-two22 years. *Id.*

n15 Center for Public Policy Dispute Resolution, *List of Dispute Resolution Centers*, (April 8, 2005) available at http://www.utexas.edu/law/academics/centers/cppdr/resources/adr_drcs.php (last visited May 15, 2005).

n16 § 152.003.

n17 Rau's & Sherman's Texas ADR & Arbitration: sStatutes and Commentary, supra note 7, at 8.

n18 Tex. Civ. Prac. & Rem. Code Ann., Ch.§§ 154.001-.073 (Vernon 1997).

n19 Rau's & Sherman's Texas ADR & Arbitration: Statutes and Commentary, supra note 7, at 8. Although ten years would elapse before the legislature adopted an ADR statute specific to governmental entities, the Texas ADR Procedures Act is the building block for governmental ADR as well as private, court-referred ADR. Commentary, supra note 11, at 15.

n20 *Tex. Civ. Prac. & Rem. Code Ann. § 154.002.*

n21 *Id.* at ch. §§ 154.001-.073.

n22 § 154.023(a).

n23 Rau's & Sherman's Texas ADR & Arbitration: Statutes and Commentary, supra note 7, at 19-20.

n24 § 154.024(a)-(d).

n25 Rau's & Sherman's Texas ADR & Arbitration: Statutes and Commentary, supra note 7, at 21.

n26 *Id.* at 21-22.

n27 *Id.* at 22.

n28 § 154.025.

n29 § 154.026.

n30 § 154.027.

n31 § 154.021.

n32 § 154.021(a)(3).

n33 Rau & Sherman's Texas ADR & Arbitration: sStatutes and Commentary, supra note 7, at 9.

n34 *Tex. Civ. Prac. & Rem. Code Ann., § 154.052.*

n35 § 154.052(a).

n36 § 154.052(b).

n37 § 154.053.

n38 § 154.053(c).

n39 § 154.053(b).

n40 § 154.055.

n41 Rau & Sherman's Texas ADR & Arbitration: sStatutes and Commentary, supra note 7, at 45-46.

n42 *Tex. Civ. Prac. & Rem. Code Ann. § 154.073*. Confidentiality protections for governmental ADR processes are slightly different to balance open government principles. See *infrasupra*, Part III. A. 4.

n43 *Id.* § 154.073.

n44 § 154.073(c).

n45 § 154.073(c)-(f).

n46 § 154.071; see also *Compania Financiară Libano, S.A. v. Simmons*, 53 S.W.3d 365, (Tex. 2001).

n47 Rau & Sherman's Texas ADR & Arbitration: Statutes and Commentary, supra note 7, at 44-45; see also *Compania Financiară Libano, S.A. v. Simmons*, 53 S.W.3d 365, (Tex. 2001) (holding that "settlement terms need not be incorporated into a judgment to be enforceable").

n48 Commentary, supra note 11, at 10.

n49 *Id.* at 10, n.1.

n50 *Id.* at 10.

n51 *Id.* at 11.

n52 *Tex. Gov't Code Ann. § 2009.001-.055* (Vernon 2000).

n53 Tex. Gov't. Code Ann. § 2008 .001- .058(Vernon 2000).

n54 Commentary, supra note 11, at 11.

n55 *Tex. Gov't. Code Ann.*, § 2009.051.

n56 § 2009.002.

n57 Id.

n58 § 2009.003(2); *Tex. Gov't. Code Ann.* § 552.003 (Vernon 1992004).

n59 § 552.003(1)(A).

n60 § 552.003(1)(B).

n61 §§ 2009.003(1)53(d), .053(d)03(1).

n62 See infra Part III.A.1.

n63 § 2009.005(a), (c).

n64 Commentary, supra note 11, at 15.

n65 Id.

n66 See *Tex. Gov't Code Ann.* §§ 2260.001- .056 (Vernon 2000 & Supp. 2005).

n67 § 2260.052(c).

n68 § 2260.004.

n69 § 2260.006.

n70 Id.

n71 *Fed. Sign v. Tex. S. Univ.*, 951 S. W. 2d 401, 408 (Tex. 1997).

n72 *Gen. Services. Comm. v. Little-Tex Insulation Co.*, 39 S.W. 3d 591, 595 (Tex. 2001).

n73 *Tex. Gov't Code Ann.* § 2009.005(c) (Vernon 2000).

n74 Commentary, *supra* note 11, at 19.

n75 See Rau & Sherman's Texas ADR & Arbitration: Sstatutes and Commentary, *supra* note 7, at 24-25 (whether the arbitration would be conducted under the Texas ADR Procedures Act or under the Texas General Arbitration Act is an interesting question, but not one that needs to be addressed here).

n76 Commentary, *supra* note 11, at 19.

n77 *Id.* at 20.

n78 *Id.*

n79 *Id.*; *Tex. Health & Safety Code* § 242.251- .269 et seq. (Vernon 2001).

n80 § 242.265.

n81 § 242.251-.269 et seq.

n82 See *Tex. Nat'l. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002).

n83 *Id.* at 851.

n84 *Id.* at 858 (citing *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997)).

n85 *Id.* This executive-legislative distinction gives the implication that it would be a more difficult situation if the agency that purported to waive immunity were an arm of the legislative branch.

n86 *Id.*

n87 *Id.* However, it is important to note that four members of the court concurred in the IT-Davy judgment but wrote to express their concern that they could not "absolutely foreclose the possibility that the State may waive immunity in some circumstances other than by statute." See *id.* at 862 (Hecht, J. concurring).

n88 Commentary, *supra* note 11, at 15-16.

n89 *Id.* at 20.

n90 *Tex. Gov't. Code Ann.* § 2009.052(a) (Vernon 2000).

n91 § 2009.052(b).

n92 § 2009.051(a)-(b).

n93 § 2009.051(b).Id

n94 State Office of Administrative. Hearings, Guidelines for the Use of Alternative Dispute Resolution by T e x a s . S t a t e A g e n c i e s , a t <http://www.soah.state.tx.us/AboutUS/ADR/modelguidelines.htm> (last updated Sept. 29, 2004).

n95 Id.

n96 See § 2009.004(a).

n97 Id.

n98 Id.

n99 Commentary, supra note 11, at 24-25.

n100 *Tex. Gov't. Code Ann. § 2009.054.*

n101 § 2009.054(c).

n102 Commentary, supra note 11, at 24.

n103 Id.

n104 *Tex. Gov't. Code Ann. §§, Chapter 2008.001-2008.058.*

n105 Commentary, supra note 11, at 10.

n106 Id. at 39.

n107 See id.

n108 Id.

n109 Id. Commentary, supra note 11, at 48.

n110 Id. Commentary, supra note 11, at 46.

n111 Id.

n112 *Tex. Gov't Code Ann. § 2008.052(d)* (Vernon 2004).

n113 § 2008.054-.055.

n114 § 2008.056(d).

n115 § 2008.056(d)(1).

n116 § 2008.056(d)(2).

n117 Commentary, *supra* note 11, at 60.

n118 *Tex. Gov't Code Ann. § 2008.053(b)*.

n119 See *Tex. Gov't Code Ann. § 411.0072-.0073* (Vernon 1998 & Supp. 2005) (Department of Public Safety's use of ADR for employee grievances); see *30 Tex. Admin. Code § 11.101-.108* (West 2004) (codifying Texas Commission on Environmental Quality's use of ADR for contested cases). ; s See also Justin Wayne Beam, Cutting the Knot: The Use of ADR in Texas Agencies, *3 Tex. Tech. J. Tex. Admin. L. 125* (2002), for a discussion on how certain state agencies, including SOAH, DPS, and TNRCC, use ADR.

n120 See *1 Tex. Admin. Code §§ 163.1-.67* (West 2004); State office of Admin. Hearings, Alternative Dispute Resolution at the State Office of Admin. Hearings, available at www.soah.state.tx.us/AboutUS/ADR/index.htm.

n121 *1 Tex. Admin. Code § 155.37(a)*. A SOAH judge also has the authority to refer a case to ADR. Id.; see also, *Tex. Gov't Code Ann. § 2003.042(a)(5)* (Vernon 2004).

n122 *1 Tex. Admin. Code § 155.37(a)*. Id.

n123 *1 Tex. Admin. Code § 155.5(11)*.

n124 *1 Tex. Admin. Code § 155.37(c)*.

n125 Center for Public Policy Dispute Resolution, 2003 Texas ADR Legislative Report, Public Resource Series No. 8 at 4, available at <http://www.utexas.edu/law/academics/centers/cppdr/resources/publications.php> (August 2003).

n126 Id.

n127 Id. at 22.

n128 *Id.* at 4.

n129 *Id.* at 5.

n130 See Jeremy Schwartz, *Varying Visions for Land in Hays Regional Planning Might Be Answer to the Tricky Aquifer Question*, *Austin-American Statesman*, May 13, 2003, at B1.

n131 Policy Consensus Initiative, *A Practical Guide to Consensus 11* (Kate Kopisehke ed., Roller Printing 1999) at 11.

n132 See *supra* Part III.

n133 Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, *10 Wash. U. J.L. & Pol'y* 37 (2002).

n134 *Id.* at 39.

n135 *Id.*

n136 *Id.*

n137 *Id.* at 40.

n138 *Id.*

n139 *Id.* at 50.

n140 *Id.* at 60.

n141 Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, *28 Hofstra L. Rev.* 905, 910 (2000).

n142 *Id.* at 910-11.

n143 See *infra* notes 1481-494.

n144 State Bar of Texas, *Texas Lawyer's Creed*, available at [http://www.texasbar.com/Content/ContentGroups/State Bar/Rules and Procedures/Texas Lawyers Creed/ Texas Lawyer s Creed.htm](http://www.texasbar.com/Content/ContentGroups/State%20Bar/Rules%20and%20Procedures/Texas%20Lawyers%20Creed/Texas%20Lawyer%20s%20Creed.htm) (last visited May 16, 2005). (emphasis added)

n145 *Id.*

n146 Id.

n147 Id.

n148 Model Rules of Prof'l Conduct R. 2.1 cmt. 5 (2002).

n149 Id.

n150 See Alan Scott Rau et al., Edward F. Sherman, & Scott R. Peppet, *Processes of Dispute Resolution: The Role of Lawyers* at 431 (3d ed., Foundation Press 2002) [hereinafter *Role of Lawyers*].

n151 Kovach, *Mediation, Principles and Practice*, supra note 8, at 52.

n152 See, Policy Consensus Initiative, *A Practical Guide to Consensus* at 11-12 (Kate Kopisehke ed., 1999); see also Kovach, *Mediation, Principles and Practice*, supra note 8, at 52- 53 (illustrative list of eleven factors indicating that a case is appropriate for mediation).

n153 Policy Consensus Initiative, *A Practical Guide to Consensus* 11-12 (Kate Kopisehke ed., 1999); Kovach, supra note 8, at 52-53. Id.

n154 Policy Consensus Initiative, *A Practical Guide to Consensus* 11-12 (Kate Kopisehke ed., 1999); Kovach, supra note 8, at 52-53. Id.

n155 Kovach, *Mediation, Principles and Practice*, supra note 8, at 86-88.

n156 Roger Fisher, et al., *Getting to Yes: Negotiating Agreement Without Giving In* 40-41 (2nd ed. 1991) at 40-41.

n157 Id. at 56-80. The book is short and an easy read; it is a worthwhile investment of time.

n158 See Deborah M. Kolb & Judith William, *Everyday Negotiation* (Jossey-Bass 2003).

n159 Roger Fisher, et al., supra note 156, *Getting to Yes: Negotiating Agreement Without Giving In*, at xvii.

n160 Id. at xviii.

n161 Id. at xviii.

n162 See id. at xviii-xix, 10.

n163 *Id.* at 40.

n164 *Id.* at 40-41.

n165 *Id.* at 41.

n166 *Id.* at 42.

n167 *Id.*

n168 *Id.* at 44.

n169 See *id.* at 55.

n170 See *id.* at xvii-xix.

n171 See discussion *supra* Parts II-IV.C.

n172 Kovach, *Mediation, Principles and Practice*, *supra* note 8, at 31.

n173 See *id.* at 89-91.

n174 *Tex. Civ. Prac. & Rem. Code Ann. § 154.052.*

n175 § 154.052(a).

n176 § 154.052 (b).

n177 *Tex. Gov't Code Ann. § 2009.053* (Vernon 2004).

n178 *1 Tex. Admin. Code § 155.37* (2004).

n179 Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediate Quality*, *2004 J. Disp. Resol. 303, 315-21 (2004)* (giving an overview of states' quality assurance initiatives for mediators).

n180 *Id.* at 316. ; The TMCA history and description is also available at www.txmca.org.

n181 Kovach, *Mediation, Principles and Practice*, *supra* note 8, at 94-95.

n182 Id. at 96-98.

n183 Id.

n184 Id. at 106.

n185 Id. at 107-09.

n186 Id. at 109.

n187 Id.

n188 The decision of who will give the opening remark is subsumed in the broader discussion of how best to divide mediation responsibilities between attorney and client. While that decision will be made on a case-by-case basis, Jean Sternlight proposes guidelines for determining the respective roles of attorney and client. Jean Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 *Ohio St. J. on Disp. Resol.* 269, 354 (1999).

n189 Id. at 355-56.

n190 Id.

n191 *Role of Lawyers*, supra note 150, at 347.

n192 Id.

n193 Id. at 349.

n194 Id. at 349-52, 415-19.

n195 Kovach, *Mediation, Principles and Practice*, supra note 8, at 137.

n196 Id. at 138-41.

n197 *Role of Lawyers*, supra note 150, at 358.

n198 Id. at 358-62.

n199 Id. at 362-63.

n200 Kovach, *Mediation, Principles and Practice*, supra note 8, at 168.

n201 Id. at 164.

n202 Id.

n203 Id.

n204 Id. at 165.

n205 Id.

n206 See *supra* Part IV. C.

n207 Kovach, *Mediation, Principles and Practice*, *supra* note 8, at 176-77.

n208 Id. at 230-31.

n209 Id. at 234.

n210 Id. at 240.

n211 Id.

n212 Id. at 235. NOTE: When the government is a party to the agreement, all parties need to have a clear understanding as to what needs to happen for the agreement to be approved by the governmental body. The agreement may need to be approved in a Commission open hearing, or it may need to be ratified by a Board. This issue should be discussed at the outset of the mediation, and then again at the closure/implementation stage.