

Syllabus

University of Houston Law Center Summer 2013

Mediation Advocacy August 14-21, 2013

This course is an advanced study of the issues involved in mediation and negotiation advocacy. Recognizing that mediation is a facilitated negotiation the class will focus on the following topics: the conflict resolution continuum; the life cycle of litigation; effective communication in negotiation; methods of resolution; macro and micro considerations for the design of a settlement and many other elements of mediation advocacy. Students will examine case studies and participate in simulated exercises and discussion on issues in mediation advocacy. Perspectives from experienced mediators will provide "real world" lessons to this advanced class.

Faculty:

Elizabeth W. Trachte-Huber

Required Reading Materials (see assignments below):

Trachte-Huber & Huber, Negotiation & Mediation: Strategies for Law & Business, 2nd Edition 2007, Lexis Nexis

Texas ADR Act (may use e-version or attached—Is this most current – this is a test for your legal research skills?)

Class Expectations:

Attendance: Attendance is required and will be taken for each class. Any student who misses more than 4 hours may not be allowed to complete the course.

Exam Numbers: All students should have an exam number. Use that for paper and exam.

Grading Criteria

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|-----------------------------------|-------------------------------------------|
| Class Participation/ Preparedness | 10% |
| Exam: | 20% |
| In-class presentation/ paper: | 70% (20% outline/ in class and 50% paper) |

In-class presentation/ paper detail

Each student will identify a different topic related to mediation or mediation advocacy and develop a brief outline and presentation for class discussion. The outline will be developed into a paper which will be due September 20 no later than 10 am. Details regarding the method of submission will be provided in class.

The topic must be selected by Friday August 16 and provided to the instructor. (Topics will be selected on first come, first serve basis so there are NO overlapping topics.)

An outline will be presented during class on Monday-Wednesday August 19-21 and should include:

- I. Topic
- II. Summary of Topic
- III. Preparation for Response to Q & A from class
- IV. Grading for Outline presentation (A Grading Rubric will be provided in class)
 - a. Clarity of Topic
 - b. Completeness of outline
 - c. Ability to respond to questions
 - d. Brief presentation on topic (10 minutes)
- V. Work Product should include a written outline which will be turned in at the end of class on January

A paper will be turned in September 20 with the following requirements. At least 10-15 pages with evidence of the following:

- Research on topic evidenced by footnotes and bibliography (demonstrate **you read something outside class** related to the topic you selected)
- Application of matters discussed in class (reference to class discussion and assigned reading)
- Papers will be graded on clarity, style and substance (spelling counts—please proofread)

Topics (suggested—alternatives may be suggested):

- Confidentiality in Mediation
- Defining “Good Faith” Negotiation
- Victim Offender Mediation
- Farmer Lender Mediation
- Mediation of a “Famous Case”—format to be discussed
- Settlement Law Topics
- Admissibility of Settlement Discussions
- Ethics in Mediation
- Mediation: Non-binding Arbitration or a Consensus Process
- Mediation in the labor & management setting
- Mediation in Real Estate

Final Papers due September 20, 2013.

Wednesday August 14, 1-5 pm

Class I:

- Introductory Exercise
- Course Expectations
- Conflict Management & Analysis
- Conflict Theory
- Communication in Mediation & Negotiation
- Exercises & Role Plays

Assigned Readings: Chapter 1, 2, 10 (skim) Text , Texas ADR Act

Thursday August 15, 1-5 pm

Class II:

- Negotiation- The HEART of Mediation
- Negotiation Theory
- Negotiation Exercises
- Negotiation Process
- Exercises & Role Plays

Assigned Readings: Chapter 4, 6 Text

Friday August 16, 1-5 pm

Class III:

- Mediation Process & Practice
- Mediators Opening Statement
- Advocates Opening Statement
- Exercises & Role Plays

Assigned Readings: Chapter 7, 8 Text

Monday August 19, 1-5 pm

Class IV:

- Settlement Considerations
- Mediation Advocacy
- Ethical Consideration in Mediation
- Exercises & Role Plays

Assigned Readings: Chapter 11, 13, 15 Text

Tuesday August 20, 1-5 pm

Class V:

Class Presentations

Wrap-Up Topics in Mediation Advocacy

Assigned Readings: Chapter 11 Text

Wednesday August 21, 1-5 pm

Class VI:

Class Presentations

In-Class Test

TEXAS ADR ACT

TEXAS CIVIL PRACTICE & REMEDIES CODE CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

§154.001 Definitions
§154.002 Policy
§154.003 Responsibility of Courts and Court Administrators

SUBCHAPTER B. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

§154.021 Referral of Pending Disputes for Alternative Dispute Resolution Procedure
§154.022 Notification and Objection
§154.023 Mediation
§154.024 Mini-Trial
§154.025 Moderated Settlement Conference
§154.026 Summary Jury Trial
§154.027 Arbitration

SUBCHAPTER C. IMPARTIAL THIRD PARTIES

§154.051 Appointment of Impartial Third Parties
§154.052 Qualifications of Impartial Third Parties
§154.053 Standards and Duties of Impartial Third Parties
§154.054 Compensation of Impartial Third Parties
§154.055 Qualified Immunity of Impartial Third Parties

[Sections 154.056 to 154.070 reserved for expansion]

§154.071 Effect of Written Settlement Agreement
§154.072 Statistical Information on Disputes Referred
§154.073 Confidentiality of Communications in Dispute Resolution Procedures

SUBCHAPTER A. GENERAL PROVISIONS

§154.001. Definitions.

In this chapter:

- (1) "Court" includes an appellate court, district court, constitutional county court, statutory county court, family law court, probate court, municipal court, or justice of the peace court.
 - (2) "Dispute resolution organization" means a private profit or nonprofit corporation, political subdivision, or public corporation, or a combination of these, that offers alternative dispute resolution services to the public.
- Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.002. Policy.

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and

the early settlement of pending litigation through voluntary settlement procedures.
Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.003. Responsibility of Courts and Court Administrators.

It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002.

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

SUBCHAPTER B. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

§154.021. Referral of Pending Disputes for Alternative Dispute Resolution

Procedure. (a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:

- (1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);
 - (2) a dispute resolution organization; or
 - (3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.
- (b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.
- Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.022. Notification and Objection. (a) If a court determines that a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.

- (b) Any party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral.
 - (c) If the court finds that there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.
- Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.023. Mediation.

- (a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them,
 - (b) A mediator may not impose his own judgment on the issues for that of the parties.
 - (c) Mediation includes victim-offender mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure.
- Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987; amended Acts 2001, 77th Leg., ch. 1034, §11; eff. September 1, 2001.

§154.024. Mini-Trial. (a) A mini-trial is conducted under an agreement of the parties.

- (b) Each party and counsel for the party present the position of the party, either before 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.
- Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.025. Moderated Settlement Conference. (a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.

(b) Each party and counsel for the party present the position of the party before a panel of impartial third parties.

(c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

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

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.026. Summary Jury Trial. (a) A summary jury trial is 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 damages of the parties or both.

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

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.027. Arbitration. (a) Nonbinding 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 any 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 the parties' further settlement negotiations.

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

[Sections 154.028 to 154.050 reserved for expansion.]

§154.051. Appointment of Impartial Third Parties. (a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under Section 154.021, the court may appoint an impartial third party to facilitate the procedure.

(b) The court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter.

(c) The court may appoint more than one third party under this section.

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.052. Qualifications of Impartial Third Party. (a) Except as provided by Subsections (b) and (c), to qualify for an appointment an impartial third party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.

(b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law.

(c) In appropriate circumstances, a court may in its discretion appoint a person as an

impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute

resolution processes.

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

§154.053. Standards and Duties of Impartial Third Parties.

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987; amended Acts 1999, 76th Leg., §1150, eff. September 1, 1999.

§154.054. Compensation of Impartial Third Parties. (a) The court may set a reasonable fee for the services of an impartial third party appointed under this subchapter.

(b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of court.

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987.

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

(b) This section neither applies to nor is it intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty.

Acts 1993, 73rd Leg., ch. 875, § 1, eff. September 1, 1993.

* Section 2 of HB 2287 (chapter 875, Acts 1993, 73rd Leg.) provides: "This Act takes effect September 1, 1993, and applies to all acts or omissions alleged against an impartial third party occurring in connection with an alternative dispute resolution proceeding on or after that date. Causes for which the original petition was filed before the effective date of this Act are covered by the law as it existed on the date the case was filed, and that law is continued in effect for that purpose."

[Sections 154.056 to 154.070 reserved for expansion.]

§154.071. Effects of Written Settlement Agreement. (a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.

(b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.

(c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

Acts 1987, 70th Leg., ch. 1121, § 1, eff. June 20, 1987.

§154.072. Statistical Information on Disputes Referred. The Texas Supreme Court shall determine the need and method for statistical reporting of disputes referred by the courts to alternate dispute resolution procedures.

Acts 1987, 70th Leg., ch. 1121, § 1, eff. June 20, 1987.

§154.073. Confidentiality of Certain Records and Communications.

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

Acts 1987, 70th Leg., ch. 1121, §1, eff. June 20, 1987; amended Acts 1999, 76th Leg., ch. 1150, §30, and ch. 1352, §6, eff. September 1, 1999; amended Acts 2001, 77th Leg., ch. 1034, §12, eff. September 1, 2001.

