Disclaimer:
The following article on Mediation & Collaborative Law was originally prepared and presented in 2005 for Houston family law paralegals. It is included for general informational purposes only.

What is ADR?

Alternative Dispute Resolution (ADR) generally refers to the use of a neutral third party to facilitate settlement of a dispute outside of a formal court of law. In Texas, a common use of ADR is as a reference to settlement procedures described in and subject to the 1987 Texas Alternative Dispute Resolution Procedures Act.

The Texas Dispute Resolution Procedures Act authorizes a court to refer a pending dispute to an ADR procedure either on the motion of a party or on the Court's own motion. Although a court can compel ADR, the results of ADR are not binding upon the parties unless agreed to by the parties. Generally, the ADR proceedings are confidential.

What is Mediation?

Mediation is one form of Alternative Dispute Resolution. It is widely used in family law cases in Texas. Mediation is a process where the parties to a dispute meet with a neutral trained facilitator, called a "mediator", to try to resolve areas of conflict. The parties, their attorneys, if applicable, and the mediator discuss the goals of each party, the reality of each party's position and explore possible solutions.

The mediator facilitates the exchange of information and settlement alternatives between the parties. Mediation is characterized by a business-like, cooperative climate that sets the stage for constructive communication in the future. Accordingly, mediation is used extensively in family disputes, particularly those involving child custody issues.

The mediator establishes and enforces procedures which are fair and even-handed and which provide all sides a chance to be heard. Mediation also provides an opportunity to express emotions or frustrations that may be blocking negotiations and to address these underlying concerns in a controlled environment. The mediator acts as an agent of reality helping parties think about their claims and ensuring that all parties participate in fashioning any settlement agreement.

Lawyers attend mediation sessions and represent their clients. In most mediations, it is anticipated that the parties themselves will have the opportunity to discuss issues with the other parties and with the mediator. Because the parties actively participate, there is usually a high degree of client satisfaction with any settlement reached and with the mediation process itself.

The length of time needed for a mediation depends on the complexity of the dispute, the commitment and communication skills of the parties and the orientation or limitations of the mediator. Many disputes can be resolved in one mediation session of two to four hours; other cases may require multiple sessions.

Mediation gives the parties more control than a trial; certainty on the result; saves trial costs; helps save the Court's time; and is generally a friendlier process for the parties. Most clients prefer making their own decisions rather than leaving their fate to a judge who does not know them or their children. Another strong selling point of mediation is that the parties do not need to "air their dirty laundry" in a public forum.

Mediators provide a safe and cooperative environment that encourages open and honest discussion. The mediator's role is an impartial one, identifying issues, exploring underlying interests, suggesting options and balancing power. Mediators encourage the parties to put the past behind them and to focus on the present and future.

Mediation is a confidential process. The mediator cannot be called as a witness at trial. If no settlement is reached, the mediator will notify the court but will not include any details. Most mediators destroy all notes taken at the end of mediation. No tape recorders are allowed at mediation. No Service of Process (subpoenas, summons, citations, writs, etc.) is allowed at or near the mediation site.

The parties and their attorneys must sign the mediator's agreement before mediation begins. Additionally, most mediators require that the parties agree before the mediation process begins that if an agreement is reached that it is binding on the parties. This avoids one party from changing his/her mind the next day. The "magic" language is: <u>THIS AGREEMENT IS NOT SUBJECT TO REVOKATION</u>.

The mediator does not have to be an attorney. However, it is usually beneficial to use someone familiar with the Texas Family Code and the Judge assigned to the case.

There are some free mediation services available in the Houston area. These services have guidelines that the couple must meet – such as no domestic violence and income guidelines. If the couple is not eligible then mediation costs range from $500 (half day) to $3,000 (full day). Generally, the parties split the cost of mediation. If one spouse has all of the assets, then that party normally pays all the costs of mediation.

If an agreement is reached at mediation, the parties and the attorneys will sign the document prepared by the mediator. Each party and attorney gets a copy of this binding agreement. The mediator then presents the binding agreement to the court for the file. Normally the petitioner's attorney drafts the documents for the Judge's signature. If there is a dispute in the document, the Judge will usually refer the issue back to the mediator for clarification.

If no agreement is reached, the case will proceed and the disputed issues will be heard by the judge or a jury, if appropriate.

<u>When To Tell Your Client About Mediation?</u>

I recommend discussing mediation on a client's first visit to your office. Encourage them to go on the internet and research mediation. Explain to the client all the benefits of mediation – especially the benefit of saving money and keeping their personal business private. If your client refuses mediation, gently inform the person that it is not an option in Texas. Be prepared to read the local family court rules regarding mediation to your client.

When Is Mediation Not Appropriate?

If there has been domestic violence or if there is an outstanding protective order, most courts will waive mediation. At your first meeting with your client, ask questions to determine if any physical violence has occurred or if there is a threat of violence. Many people will initially deny that any violence has occurred. Thorough and gentle questioning is helpful at this stage. If you suspect that violence has occurred, bring this to the attention of the attorney.

If there are allegations of child abuse, mediation is usually not appropriate. If a mediator becomes aware that a child is being physically or mentally abused it is a class C misdeamer not to report it to CPS or a local law enforcement agency.

If a client is mentally unstable, mediation is not a good idea. A person must be mentally competent to knowledgeably enter into a binding legal agreement.

What To Do Before Mediation?

Do not wait until the last minute to begin preparing for mediation.

Approach mediation with the seriousness of a trial. It is an opportunity to learn more about your opposition's case. On the other hand, sometimes you don't want to reveal "your hand" entirely at mediation.

Prepare your client! Most clients are terrified of mediation. Encourage them to do research on the internet regarding mediation. Explain the process to them in detail. Be sure they are aware that the attorney will be with them – they are not going into this alone! Reassure your client that this is a "safe" environment. Develop a signal if your client wants a break.

Explain definitions that will be used at mediation. Your client needs to understand the meaning of terms such as a Texas Standard Possession Order – long distance access, visitation for children under 3, separate property, community property, parental rights and duties, etc.

Inform your client that the mediator sets the pace of the mediation. The mediator is in charge. Encourage your client to trust the mediator and the process. If you have used the mediator in the past successfully, let the client know. Your client will be interacting closely with the mediator and your client needs to be prepared for this interaction. Your client must be clear if he/she is asked "what do you want?" Sometimes role-playing is helpful and reduces the client's anxiety. Meet with the client prior to mediation – don't put it off until the day before mediation in case you discover that you need additional information or the client needs more preparation.

Before mediation, your client needs to provide you with a Financial Information Statement, 2-3 recent paystubs, 2 years tax returns along with W-2's, information on all assets and debts. Determine fair market values for assets such as real estate and vehicles – the internet is very helpful on determining values. Get copies of recent outstanding debts such as credit cards balances, vehicles and mortgages. Be sure you have information on other assets, including

cash value life insurance, health insurance, retirement plans, expected tax refunds, claims, frequent flyer miles, vacation timeshares, etc. Make two (2) copies of everything – one for the mediator and one for the opposing party.

Be sure that your client brings everything (pictures, emails, paperwork, etc.) that they think they need to mediation. The client can leave the items in the car, but they need to be available if needed.

If a child has special needs, have documentation to back up your claims. Documents such as report cards, teacher reports, doctor statements can be of assistance.

Ask your client to write down their list of issues and goals and review these lists with them before mediation. Ask your client to be prepared to do the talking at mediation. If your client wants custody, have them prepare a list of why they should be the custodial parent and why the other parent should not. If your client's goals are unrealistic, mediation is more difficult. Prior to mediation, meet with the client and review their lists and their expectations of mediation. Try to work through any "emotional issues" so that your client can focus on mediation.

Most mediators request a short statement about the issues in the case before the parties arrive. They also like a copy of all active pleadings in the case. If there has been a social study or any other evaluation, be sure to include that document. I strongly encourage you to write a concise summary regarding the parties, the children and all possible issues. It is a good idea to include possible solutions to the issues. The mediator is a "clean slate". Use this opportunity to get your client's concerns and goals known before the mediator meets the parties. It is often helpful to let the mediator know what offers have been made and rejected.

Make sure that all necessary parties are notified of mediation and that everyone can attend. It is a waste of time and money to set up a mediation if the attorney/guardian ad litem is not available.

Confirm mediation dates via telephone, fax and mail, if necessary. Keep proof of the faxes being received by all parties.

Remember –
Thorough preparation is vital to effective mediation
Know your case backwards and forwards
Know all facts, issues, arguments, strengths and weaknesses
Re-read all pleadings
Review all materials from the opposing attorney and all case notes

If possible, agree in advance in writing with opposing counsel what issues are not in dispute. Try to narrow the issues for mediation.

Have a neat binder for the attorney to use at mediation – make it easy to find pleadings, discovery, social study, psychological reports, the values of assets and liabilities, etc. (If the case does not settle at mediation, you have begun your trial notebook.)

What To Wear to Mediation and Other Basic Questions

Encourage your client to wear comfortable clothing since he/she will be there for several hours. Encourage your client to bring a sweater or a fan if he/she gets hot or cold easily.

The parties need to turn off their pagers and cell phones and focus on the mediation. They can bring reading material to help pass any "down" time. Be sure the client has cigarettes if they smoke. Remind them to eat before they arrive. If they take medication, remind them to bring it with them.

Normally friends and/or family members are not allowed at mediation unless all parties and the mediator agree. However, if one of the parties has re-married, the new spouse is usually allowed into the mediation. If the new spouse is "the problem", perhaps the new spouse should not be present at mediation.

Children are not allowed at mediation unless the mediator requests they attend. If children attend, the mediator will usually ask that a third party be there to drive the children home after the mediator meets with them. Make these arrangements in advance to avoid any confusion.

Be sure your client has made babysitting and transportation arrangements for the children.

Make sure your client has a map to the mediator's office. Encourage them to drive by the office in advance. Remind them to arrive on time. Be sure they can stay longer than the scheduled time – often it takes awhile for the mediator to type the agreement and get everyone to sign. Remind your client not to leave until the mediator releases them.

Make certain that your client understands the importance of attending mediation. If your client does not attend mediation, the mediator will report their absence to the court.

If your client informs you that the other party will not attend mediation, tell your client to show up anyway. The mediator will release your client within an hour and notify the court that the other side did not appear at mediation.

Language Used at Mediation

Remind your client to avoid the following:

1. Making insulting comments – "jerk" or "moron" or "deadbeat"
2. Making impulsive comments – "I hate you!"
3. Making "always" and "never" statements
4. Expecting everyone to read their minds
5. Interrupting when someone else is talking
6. Making statements to push the other person's button
7. Expecting mediation to be over in one hour
8. Minimizing the other person's feelings – "what's the big deal?"
9. Misrepresent or omit relevant facts
10. Speaking in a condescending or sarcastic tone
11. Demanding the other party admit all of their wrong-doings

Encourage your client to do the following:

1. Use “I” statements – rather than “you” statements
2. Ask open-ended questions – “what do you think?”
3. Ask for a break if they feel overwhelmed
4. Ask to speak to his/her attorney alone for a few minutes
5. Be patient
6. Be truthful
7. Think creatively
8. Be open to new ideas
9. Be respectful of everyone present
10. Thank the other party for being a good parent
11. Apologize if they might have done anything to hurt the other party

(I settled a nasty case once when I had a father say “You are a good mother and I’m sorry if I did anything to hurt you.”)

Ask your opposing counsel open-ended questions. Sometimes you can learn a lot about your opposing counsel’s case. Attorneys like to talk – let them!

Selecting A Mediator

If you are using free mediation services, your choice of a mediator is limited. I prefer to use an attorney with family law experience. Always ask if an attorney with family law experience is available.

Eventually you will get to know the mediators that work best with you. You get to know their styles and can better prepare your client for mediation. Each mediator is unique. Choose a mediator based on the parties personalities. If a client is difficult and argumentative, then a mediator with a strong take-charge personality is helpful. If the clients are religious, try to locate a mediator that can work within that framework. You must know the personalities of all parties involved in order to select the right mediator for your client.

Oops!

At the end of mediation, everyone is tired. Everyone, including the mediator, thinks that every issue has been settled. The next day someone notices that a major/minor point has been omitted from the binding mediation agreement. Don’t panic! Usually a phone call to opposing counsel and/or the mediator will straighten everything out.

If necessary, many mediators will offer a short second mediation at a reduced rate to “iron out” any missed issues.

Divorce and Emotions

Divorce is the “death” of your client’s marriage. It is the death of your client’s hopes and dreams. It is usually the most stressful period of your client’s life. They are upset and sometimes on an emotional roller coaster. Often your client feels abandoned and abused (physically and/or emotionally). Often your client feels alone, scared and vulnerable.

Often clients look to us as counselors and advisors. If you are not trained in counseling, do not attempt to assist them. Encourage them to seek professional assistance. There are some sliding fee scale mental health providers in the Houston area. Develop a list of such individuals. The United Way is a good place to start. A client should not use lack of money as a reason to avoid professional assistance.

Additionally, many times children are deeply affected by their parents divorce, but the parents aren't aware of their problems. If you suspect that the children need assistance, encourage your client to seek professional assistance for the family.

Winners and Losers

Many clients think of terms of being a winner or loser. Your challenge is to get your client to think beyond winning or losing. I always tell clients that the biggest losers in a divorce are the children. I try to get beyond this issue early in the case.

Your Role

Remain optimistic, calm and creative. It is often difficult not to get emotionally involved in a difficult family law case. However, if you get "personally invested" you often lose objectivity and cannot help your client. Your client is looking to you for guidance. You need to be able to remain objective.

This is your client's life. It is your role to be their advocate.

Always be willing to go to trial. Don't be afraid of trial. If opposing counsel knows that your firm is willing to go to trial, you are in a stronger negotiation position. I settle most of my cases because I'm willing to go to trial.

Don't burn out! Too many people take their client's problems home at night. Develop rituals to relax when you get home – exercise, garden, read, anything that relaxes you!

Develop a sense of humor and don't take everything your client says too seriously – there are always 2 sides to every story!

Develop client control. If your client is a "loose cannon", you are headed for disaster.

Do not burn bridges with any opposing counsel or mediator. Always treat everyone you come in contact with in a professional and courteous manner. You will probably have to deal with these people in the future. Develop a reputation for being efficient, calm and reliable.

What is Collaborative Law?

Collaborative Law is a newer and alternative process where both parties and their legal counsel commit themselves to resolving their differences justly and equitably without resort, or threat of resort, to the courts. The attorneys hired for Collaborative Law cannot represent the client at trial. The attorneys must withdraw if the case is not settled and the parties decide go to trial. Therefore, the parties and their attorneys are motivated to reach a settlement without court intervention. The parties and the attorneys all sign a Collaborative Law Participation Agreement before beginning the process.

It is becoming the preferred method of family law dispute resolution in some jurisdictions because the process is more humane and promotes the post-divorce spiritual, psychological and financial health of the restructured family.

Collaborative Law relies on an atmosphere of honestly, cooperation, integrity and professionalism geared toward the future well-being of the family. The parties engage in a series of meetings with their attorneys to discuss all issues and concerns, coordinate necessary research, retain the services of any necessary experts and discuss the future needs of the parties. It is hoped that through honest and open communication the parties, with the assistance of their attorneys, will reach a mutually beneficial agreement.

Collaborative Law requires each party and each attorney to take a reasoned position on all issues. Where such positions differ, all participants use their best efforts to create proposals that meet the fundamental needs of both parties, and, if necessary, to compromise to reach a settlement of all issues.

It works best if the lawyers are trained in the Collaborative Law process, even though such training is not required.

Collaborative Law is suitable for many types of law but most often occurs in the domestic area. There is also a team approach using a counseling team and financial advisor to work with the family in a collaborative process. There is training available for all Collaborative Law professionals – attorneys, counselors and financial advisors.

The State of Texas passed legislation regarding Collaborative Law in 2001 (Family Code Section 6.603) and Texas was the first state to pass such legislation.

Some General Principals and Guidelines of Collaborative Law

Negotiation through cooperation rather than adversarial strategies.

Practicing law through problem-solving negotiations in which the parties are proactive, seek to understand and to be understood.

The parties are responsible for the action and the outcome.

The parties develop common ground rather than focus on differences.

The parties seek to understand the other person's interests and concerns that will lead to creative solutions to problems.

The parties seek to resolve issues and concerns with each accepting and supporting the other person's opinions.

The attorneys should…

- Take the Collaborative Law training and follow the training.
  If you are not willing to follow the Collaborative Law guidelines, then don't accept these cases, it is a disservice to the clients. YOU have to shift your entire thought process in the Collaborative Law legal practice.
- Advise the clients of the law that applies to their circumstances.
- Be a model for their clients acting in a cooperative, honest and dignified manner with mutual respect to everyone involved in this process.
- Guide their clients through the process using active listening and respecting each party's opinions and concerns.
- Always use neutral language in speaking and writing.
- Bring stability and reason to emotionally charged situations.
- Work together to provide all discovery and disclosure so that the parties can make informed decisions.
- Avoid using adversarial techniques or tactics.
- Bring in any other needed professionals (appraisers, financial consultants, communication specialists) to assist the parties in reaching agreement and to overcome any impasses.
- File documents with the Court that are prepared with the mutual agreement of all parties. For example, some parties have filed a "Joint Original Petition for Divorce".

Clients should…

- Be honest.
- Take responsibility for the outcome of the issues that are not resolved.
- Adhere to the principles and guidelines of the collaborative approach.
- Explore differences in perspective, interests and desired outcomes rather than react to them.
- Look for creative solutions to their problems.
- Actively listen to their spouses' concerns. Recognize the needs of the other spouse. Treat their spouse with respect and patience.
- Respect everyone involved in the Collaborative Law process.
- Be patient with the Collaborative Law process.