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MEDIATION:
Working it all out

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Mediation is a well known form of alternative dispute resolution. But not everyone knows exactly how to find a mediator or how to prepare for mediation. So the Texas Lawyer business department gathered mediators from across the state and country to discuss the ins and outs of mediation. On one hand mediators have to be good listeners and some would say coaches or shamans of the legal world, on the other they have to be decisive and well versed in the law. Whatever your feelings are on the topic, it is a legal avenue that is here to stay. And with growing economic turmoil within our nation, it may be growing in popularity. The following discussion has been edited for length and style.

HEATHER D. NEVITT, moderator, attorney, editor of Texas Lawyer Books, Dallas: *I want to start off today by having everyone tell me not only your name and where you work but a little bit about what you do on a daily basis. So Heather, we can start with you.*

HEATHER FITZENHAGEN, mediator, Resolution Strategies, LLC, Fort Myers, Florida: I am a member of the Texas and Florda Bars. The focus of my ADR practice is securities disputes. I have been mediating and arbitrating these types of cases since 1997. One of the exciting things about this practice niche is that there are frequent newsworthy market events, new rule filings and award announcements, et cetera. that keep me very engaged in the topic even when I'm not mediating or arbitrating on a given day.

SUSAN S. SOUSSAN, attorney-mediator/arbitrator, Houston: I've been licensed to practice law since 1977. I have been mediating cases since 1990 except 1994 when I became a Texas State District Judge. I have my own mediation and arbitration practice. I mediate all types of civil cases, commercial, intellectual property, personal injury, mass torts, labor law and product liability cases pending in Federal or State Courts all over the country. I am generally involved in the plant explosion cases in Texas, as well.

GARY MCGOWAN, mediator/arbitrator, Houston: I've been mediating and arbitrating for 18 years. I have a practice that takes me all over the country as well, both mediation and arbitration. I do mostly business cases, including class actions, IP, securities, oil and gas, refinery disputes and the like.

MEL WOLOVITS, mediator and negotiation consultant, WOLOVITS Dispute Resolution, Dallas: I am a full-time mediator, primarily mediating business, commercial, employment and construction cases, but also professional liability /personal injury and some family law cases. When I am not mediating I am preparing for my next mediation or following-up on those cases which may have not settled at a previous mediation session. I was a trial attorney for 34 years and I have mediated cases since the early 1990's. When not mediating I keep busy as the President of the Association of Attorney-Mediators, No. Texas Chapter; and as Chairman of the ADR Section of the Collin County Bar Association. Mediation as a multi-disciplinary process gives me the opportunity to apply my education, training and experiences in accounting (numbers), education (psychology) and as a trail attorney (risk assessment). I prepare for and look forward to each mediation and the opportunity to help parties figure out the puzzle to settle their dispute.

DANA MCARTHUR, attorney-mediator/arbitrator, Marley McArthur Mediation, Dallas: I have been a licensed attorney in Texas since 1987. I have tried cases on both sides of the docket and have been a mediator since 1995. At this time in my career, I am a full time mediator/arbitrator. The focus of my practice is residential and commercial construction, medical malpractice, product liability, any kind of personal injury case and a fair amount of business and commercial litigation as well.

CECILIA H. MORGAN, mediator/arbitrator, JAMS, Dallas: I am also one of those mediator arbitrators like many here at the table who started in 1991. We were trained initially by Steve Brutsché, who was based here in Dallas. Now I'm with JAMS, a national mediation and arbitration provider. I'm one of 200 mediators from across the country. I was a commercial litigator and then a mediator. I finally reached that point in November where I've done one as long as I've done the other. So this is the first time that I've looked up and realized that I've been mediating for as long as I did commercial litigation. My practice is nationwide as well. I mediate employment, healthcare and business/commercial cases. I started my mediation practice doing a lot of cases out of the Resolution Trust Corporation and the FDIC. Initially I did business cases

HEATHER FITZENHAGEN

brings a unique skill set to the mediation table. She is both an attorney and a securities industry professional with over fifteen years of experience. She also served as an NASD arbitrator and chairperson for more than seven years. Fitzenhagen's extensive involvement with securities law and financial industry practices, coupled with the delicate skill required for successful mediation, has given her that unique perspective that is necessary for a client's fair resolution. She is an attorney with years of experience and as a regional manager for a global financial services company. Her credentials in the securities industry speak for themselves and foster successful mediations.

and then it evolved into some personal injury for a period of time because that's what the dockets required. And now, I anticipate it's going to swing back to business and commercial with the economic downturn.

NEVITT: *And I am sure we will get into that a little later. But I want to start out with kind of a general question: Since this will run in* Texas Lawyer, *can you give the audience a little insight about your approach to mediation? Each one of you probably has a little bit of a different approach, am I right?*

MORGAN: My approach to mediation is from a coaching standpoint. I like to analogize it as if I'm Mrs. Williams and I have the two best women tennis players in the United States playing in the U.S. Open final. One of my daughter's is named Venus and the other one's named Serena. And one of them has a great backhand and the other one has a killer serve. I see myself coaching the parties to optimize their opportunities and maximize their results. If they didn't need us, they wouldn't hire us. But they don't need somebody to tell them what they do; they need to have somebody help them understand what their best opportunities are. And that's how I see my practice.

MCARTHUR: I would say my style is informal. I think people who are at mediation are under a great deal of stress, and I try to put them at ease and really make a personal connection with them. I prefer not to use the position as a bully pulpit; although there are certainly times when you have to do that to get a case resolved. Building trust is the main goal and I find I can do that most effectively by treating people respectfully, and interjecting some laughter into the process when appropriate to ease the tension. The trust relationship lays the foundation for being assertive later in the process.

WOLOVITS: I would agree with Cecilia that my main role is that of a coach. And I start that process once I get the agreement to mediate or I get the assignment from the Court. I try to communicate with the attorneys to get a sense of the issues and possible roadblocks and to start to develop. In the mediation sessions, I'm really very improvisational. Depending who the parties are and how they're behaving, I may keep everyone together for a whole session, like in a construction case I did last night. We were together just about the whole session and we got it done. In other cases, particularly where there's no ongoing relationship and potential ongoing relationships and it's just essentially money and emotions, then we'll probably break into caucuses. So I perceive my role as the facilitator, though at points along the way, if necessary, I certainly would give an evaluation, if asked and if necessary, and usually with good questions. And I bring to the table my trial experiences, to help a lot of people understand what the risks are in the courtroom.

SOUSSAN: My approach is a little bit different. I am not the type of mediator who just facilitates going back and forth. In my opinion, people will come to me for my opinions and for my thoughts. In that regard, I will work very hard to understand what the case is about and understand the parties' positions in advance of the mediation. After carefully listening to the positions of the parties and asking appropriate questions to drill down to the real issues at hand, I'll often share my thoughts and opinions with parties on their causes of action and chances on a Motion for Summary Judgment, discussing the risks each party may face. Timing is very important. I do not offer my thoughts and opinions until I feel comfortable in doing so, this is usually after I have heard from the parties directly in caucus and have read any case law, if provided. But I am extremely opinionated and think that is really what sophisticated parties look for these days. However, each case is unique and there is no "one-way" to approach all cases, especially a sophisticated commercial case. First and foremost, you've got to listen; you've got to be sympathetic and empathetic.

MORGAN: When you say, though, that what you've just described is how

mediation has evolved, I think initially we were all trained to be more facilitative. I think as mediation has changed there's an expectation of us being not opinionated, but giving parties more information, helping them understand their cases better. A lot of times the attorneys are pulling us outside and saying, "Would you really tell my client what's going to happen on that motion for summary judgment?" And we are used to raising the critical issues, and that happens more and more.

MCARTHUR: I have found that having worked as an arbitrator helps you in mediation when you can say, "Look, I arbitrated a case like that and here's the way I saw the issues; you need to consider what an arbitrator is going to do with this."

SOUSSAN: Absolutely and I am fortunate to be able to say, "When I was on the bench...." However, you really want to help guide the parties to a resolution that they define for themselves based upon the discussions of risk analysis through out the day. It is important in mediation to have the parties feel that they have determined the final outcome to their dispute. Albeit a push and nudge is usually necessary.

FITZENHAGEN: I was just going to ask for input regarding use of a facilitative versus evaluative approach. In my speciality area parties they typically like a more evaluative approach. However, the mantra for most general circuit cases remains "be facilitative." I am conflicted because while I understand the concept of being neutral there is nonetheless real value in a more evaluative approach for certain cases. I don't know if anyone else feels similarly.

WOLOVITS: Yes, really being evaluative, you could ask a lot of questions, right? And lead people to what the conclusions that they probably need to come to versus just telling them. So that's my approach. My approach is that through questioning — sometimes cross-examination type questions — to lead people to the path that ultimately leads to them coming up with the conclusion that, "Hey, I'm going to lose this motion for summary judgment."

MCGOWAN: I think every mediator has to use the style that fits that mediator's personality, background and experience. The polar extremes range from pure facilitator — when I started mediating 18 years ago, mediation had evolved out of community-based mediations, where nonlawyers were mediating. Caucusing was thought to be a bad thing and meeting with people privately and giving any sort of opinion was thought to be a bad thing. And the other extreme is what I call the judicial approach, where it's: "You're going to win, you're going to lose, here's how much I think you should pay, here's how much you should accept." Some people can pull that off and some people can't. In my practice, even though I have an extensive trial background experience, I try to avoid opinionating because I think you risk compromising in your neutrality and you risk losing your effectiveness. If one side or the other thinks, "Well, he's against me, he's prejudiced," then you've lost them. A mediator does two things: one, he or she helps the parties — and I tell people this in the joint session — with case evaluation. I'm a real believer in the mediator learning and digging into the merits of the case, understanding the key issues and the evidence and law pertaining to those issues so that he can effectively, as Mel was saying, ask good questions to get the parties focused on risk, on what their risk is on those issues. And the mediator should learn a party's strengths to communicate risk to the other party. So, case evaluation. The second thing the mediator does is help the parties negotiate. Those are the two main things. My starting approach is I'm going to facilitate to begin with and ask good questions. And if the negotiation is going smoothly, if it ain't broke, don't fix it. Don't get aggressive on people when it's working. On the other hand, if it looks like the settlement train is going to derail or stall, you then have to start injecting your-

DANA MCARTHUR

is currently a partner at Marley McArthur Mediation. She has been a licensed attorney in Texas for 21 years and has conducted thousands of mediations and arbitrations since her certification in 1995. As a litigator who has tried cases on both sides of the docket, she brings experience in case evaluation and client management to the mediation table. Her mediation practice consists primarily of complex civil litigation with notable expertise in the areas of residential and commercial construction, product liability, medical malpractice, oil and gas, premises liability, and contract disputes. She is also an approved arbitrator with AAA. Ms. McArthur received her J.D. from the University of Tulsa where she was Managing Editor of the *Energy Law Journal*. She began her litigation career at Strasburger & Price in Dallas. She has served as an adjunct professor of Product Liability at Texas Wesleyan University, and as a member of the DBA Fee Dispute Committee and the host committee for Attorneys Serving the Community.

GARY MCGOWAN,

a leading national provider of neutral services, specializes in complex, high-stakes legal disputes. He has arbitrated over 40 matters and mediated over 2000. After graduating from UT Law School(1973), McGowan practiced business litigation and was a founding partner of Susman, Godfrey & McGowan. Shifting to ADR in 1990, he developed a reputation for effectiveness, thorough preparation, and an ability quickly to grasp the pivotal points of a dispute. He is a member of the Texas Panel of Distinguished Neutrals for the International Institute For Conflict Prevention and Dispute Resolution ("CPR"), CPR's national Energy, Oil and Gas Panel, and its national Insurance/ Policyholder Coverage Panel. Law Dragon named him as one of the best judges in the US, and the *Texas Lawyer* picked him as one of five "GoTo" abitrators and mediators in Texas. *Texas Monthly* has selected him as a "Texas Super Lawyer" for the last six years.

self more. And I don't mean by saying, "You're going to win and you're going to lose." It's, "Well, have you thought about this, have you thought about that." Suggest a move. "Why don't you try a big move down or a big move up, see if we can jumpstart this thing?" Or I'll suggest a bracket approach. You start intervening. You might, at the appropriate time, say, "What you're offering here is 10 percent of your exposure. Are you telling me you got a 90 percent chance of winning this case?" So there is wisdom in the view that opinionating is to be done very carefully and sparingly.

MORGAN: A lot of those evaluative mediators have left the marketplace. Those mediators who were so directive that all they did was evaluate, lost their neutrality and effectiveness. In addition to being coaches and evaluators of risk, there are two other roles that mediators fill. We are the shaman of the legal profession who keep the confidences of the legal profession and of the parties who appear before us. Second, we are the risk evaluators who analyze their cases in a confidential setting such that they have the confidence that they can settle a case without it being on the front page of the *Dallas Morning News*, that they have that protection within the parameters of our conference rooms.

FITZENHAGEN: I agree with what you're saying in terms of what I mean by "evaluative." It is really helping the parties walk through the major issues on the table. And it is not so much expressing what your opinion is on an outcome, but rather highlighting the issues in the case that may bring about a better understanding. An ancillary benefit to handling the mediation this way is that you can help the attorneys manage client expectations of the process. Helping the parties delve into different perceptions of key issues in a case is essential as the mediator.

WOLOVITS: Cecilia mentioned that we're the shaman for the process. I frequently have conversations with judges and I remind them that really mediators are the face of justice. Very few people get to meet the judge in the case; very few people end up in that courtroom, but many people come before mediators and walk out of that mediation process either feeling that the process and the judicial system is fair or not fair or was helpful or not helpful. So as mediators, the trust that we build, the way we approach the parties in that mediation become very important for us as the face of justice.

SOUSSAN: What you are talking about is the rapport building during mediation and it takes time. We must listen to the parties because often it is the very first time that they have the opportunity to vent. One advantage I have is that I'm fluent in Spanish. I am able to conduct mediations totally in Spanish, if necessary. I have found this immediately puts Spanish -speaking clients at ease with the process and with me. Listening and talking to the individual parties, as opposed to just talking to the lawyer, is so very important, and often actually gets the case closer to resolution. With permission of counsel, I'll take the business people out of their respective conference rooms and let them talk directly with each other, which is often the first time since the dispute blew up. There's just so much that we can do to facilitate discussion and then give thoughts and opinions. I'm often asked, "Well, what do you think?" When I give an answer, it's, one, well thought out and, two, the timing has to be right.

MCARTHUR: You have to build that relationship before you can start offering opinions. And usually, if you build that relationship, at some point in the mediation, the client will ask you, "What do you think?" I love that point in the process where you can really start to craft the endgame. Susan just said something I think is very important, and that is we must let the real people talk in mediation as opposed to the lawyers. The lawyer's motivations oftentimes are so different from their client's motivations. Early on in the process, I like to get the litigants themselves talking. In the end, it's their life and their decision about whether the case is resolved.

NEVITT: *That kind of dovetails into*

the next question, which is: What are some other tips you can give lawyers to help facilitate this process besides letting their clients do some talking?

MORGAN: Number one, prepare and prepare the mediator. Since less than two percent of the cases that are filed in Texas ever go to a judge and a jury, 98 percent of the cases are resolved some other way. And I would submit that the mediators in this room know that we resolve significantly more cases in our conference rooms than are resolved at the courthouse. However, we do all these seminars on how to take depositions, when we ought to be doing seminars on how to do the mediation memorandum and negotiate at the mediation. I would say in less than 60 percent of the cases, I receive a memorandum in advance of the mediation. It just amazes me that somebody would come to mediation without sending me something that tells me what their case is about, what the law is, how much money is involved, and what the demands have been. Number one thing: Prepare. Prepare yourself, prepare your client and prepare the mediator.

FITZENHAGEN: I agree with that. I also think it's important for the attorneys to coach their client, or counsel them a little bit before they arrive to be in the mediation mindset. If you're coming to mediation, you need to have a whole different way of thinking. You need to be more open minded, understanding that this isn't the venue where either side is going to get out there and slay each other. Instead, you have to be ready to do some work, face disappointments and maintain the ability to walk away without the "perfect" outcome for yourself.

SOUSSAN: I will call counsel and ask for the memorandum. So, in the majority of the cases I mediate I do get memoranda ahead of time, which allows me to contact counsel if I have any questions prior to the mediation session. In a complex case, I'll often tell the lawyers to send me briefs, motions and documents in order to better prepare myself for the mediation. The lawyers, who know me well, know I will read everything they send me. Sometimes I'll meet with the lawyers in advance of the mediation to discuss critical issues and potential roadblocks. This review of documentation and meetings with counsel are all done in an effort to be as prepared as possible for the mediation. And if the lawyer has prepared me it means the lawyer is also going to be prepared and hopefully his client as well.

MCGOWAN: Most people do send me a mediation memo. Settlements are generally driven by two things: cost of litigating is one. But probably more important, in most cases, is an assessment of the risk of losing a case. A party's fear of losing is a big driver. Counsel miss an opportunity if they don't prepare an effective mediation memo and send it to opposing counsel. I encourage counsel to share their mediation memos with each other, exchange them, when they send them to me. When I started mediating, the practice was always ex parte —

FITZENHAGEN: And what kind of response do you get? Is it favorable?

MCGOWAN: Generally, they share it.

MORGAN: And you get them to send you a separate letter that says, "This is the thing that I didn't share, but this is important."

MCGOWAN: What I tell them in my standard letter setting up the mediation is I encourage you to share them; I can't make you, but I encourage you to share them. And if there's something you want to tell me in private, send me a letter ex parte or call me. There are some people who just won't do it. The reason I started asking for that is, I had a lot of mediations where the people would show up on one side or the other and would say, "Oh, we've got you on this legal defense or we've we've got a case that kills your defense or kills your claim." And the other lawyer says, "I didn't know about that. I haven't read that case. I haven't done any research. How am I going to evaluate this case today?" I mean, it was a total waste of time. And we ended up having to come back later or scratch the whole mediation process. The mediation memo is a good oppor-

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is a full-time mediator and arbitrator with JAMS. She is the immediate Past Chair of the ADR Section of the State Bar of Texas. With a background in commercial litigation in courts from the Texas trial courts to the U.S. Supreme Court, she resolves disputes in a variety of areas including employment, business commercial and healthcare and has conducted ADR proceedings in over 20 states. Adept at reconciling the irreconcilable and known for her follow-up, one of her clients describes her as a "tireless worker who intuitively knows when and how to apply pressure to obtain the deal." She has 30+ years of experience as an attorney and ADR professional and is a respected member of JAMS' employment and healthcare practice groups. Texas Mediator Credentialing Association has designated Ms. Morgan a credentialed distinguished mediator. She may be reached at cmorgan@jamsadr.com.

SUSAN S. SOUSSAN

is a full time Attorney-Mediator/Arbitrator having mediated in excess of 6000 cases and arbitrated in excess of 100 disputes since 1990. Soussan is a former Texas State District Judge and was a partner in a commercial litigation firm from 1977 to 1994. Her mediation practice involves complex intellectual property cases, class action cases, energy cases, labor law, construction, personal injury, wrongful death, insurance/bad faith, environmental issues, business, and securities. Demands & settlements in these cases have ranged from 4 to 8 dollar figures. Soussan has arbitrated multi-billion and multi-million dollar intellectual property cases, class actions, contract disputes, hardware and software issues, energy cases, employment cases, insurance coverage, trade secret and product liability cases. Soussan is fluent in Spanish and has conducted mediations in Spanish. She has been selected as a "Super Lawyer" and is a member of the International Academy of Mediators, College of Commercial Arbitrators and CPR International Institute for Conflict Prevention and Resolution. Soussan received her J.D. from the University of Houston and is also a frequent lecturer on topics of ADR.

tunity to have an impact on your opponent's fear of losing. You' craft it, knowing their client is probably going to read it, and you lay out some of your best points in the case, legal and evidentiary. And then the other thing you can do is make a presentation in the joint session that is a meaningful presentation. I think it's really a mistake for a lawyer to say, "Oh, we all know what this case is about. Let's just go to private caucus, I'm not going to say anything."

FITZENHAGEN: I don't find that happening very frequently. I typically have people make substantive opening statements that are worthwhile.

MCGOWAN: Well, I do, too, but sometimes they don't.

MORGAN: I think that's ebbed and flowed. People have said, "Well, let's not have a joint session." But now I think we're back to conducting opening sessions because enough attorneys have learned how to best make an effective opening statement. It doesn't have to be touchy-feely. It can be a substantive discussion because, with the exchange of the mediation memos in advance, a lot of the sting is taken out. So the first time at the table the client is not hearing, "This is the death knell to your case." But there is still a problem: a lot of attorneys don't understand that the opening session is their one time to show what a great attorney they are and get their client on board with them and adjust some of their client's expectations.

MCGOWAN: I've had cases — and this has happened a lot — where the joint session occurs and let's just say it's the plaintiff's lawyer who either says, "We all know what it's about, let's get to work," or gives sort of a general, nondescript, marshmallowy statement. Several times the defense lawyer later says sarcastically to me in private, "Thanks a lot to the plaintiff's counsel. I needed his help to get the insurance company's attention. And he doesn't say anything in the joint session."

SOUSSAN: I still have the joint session in a majority of my cases. But if you're getting a case that's been mediated two times already and you're now the third mediator, a joint session may not be necessary unless there are new people engaged in the process. Then there's some merit to it. So again, it is case specific. I find great merit in the joint session for me, even though I've read everything submitted twice and the lawyers know I have by my comments.

WOLOVITS: In multiparty cases, to get people prepared, I frequently have brought them together for a two-hour session, generally at the beginning when I get assigned or there is an agreement to mediate, just as a planning session. And it's when we think everybody can get together, do a schedule, and ultimately be able to come to mediation, where everyone is going to be prepared. And the effect of that has been that people are more prepared. Then there are opportunities right at the beginning to start the negotiating process. And I've had cases that settle very early that way, which saves the parties a lot of money. And it turns out to be a much more efficient way. Ultimately, when they come to session, it took a lot fewer hours of my assistant's time of scheduling it, too. And I think the parties appreciate the fact that I was willing to intervene and join the process at an early stage.

MORGAN: Do you do that in person and not by conference call? Because I can't imagine a multiparty case that we don't have some kind of conference call in advance, but physically getting five or more parties together is one of the most difficult parts of the whole mediation process.

WOLOVITS: I've done it both ways. And certainly bringing them together face-to-face is the most effective. Whenever anyone comes face-to-face you get a lot more done because a lot more information is being transferred because everybody gets to look at each other. But it's effective both ways. Certainly, once they're in that session, I am shocked to see that attorneys don't address or parties don't address the people who make the difference. They address me. I keep telling them, "Okay, I'm the mediator. You paid me.

I'm not going to pay you, all right. And it's time that you talk with the people who really make the difference." And there are cases where video depositions may be appropriate. If it's a case involving insurance, you want to raise the little hairs on the back of the adjuster's head so that they really feel that they're at risk. And very few lawyers come prepared showing important parts of depositions.

MORGAN: You raise an interesting point. I probably do more re-mediation nowadays than I do the initial mediation. I don't get to see the parties for the first mediation; they've already been somewhere else. They've already had a joint session. But you had raised the fact that a lot of times we don't have the right people there at the first mediation, and it's the re-mediation when the real players come and when the real money shows up — particularly in these multiparty cases. And that's another thing that's developed over time in our profession: when we all started, we got to do the first mediation and a high percentage of those cases settled. Now, as the cases have gotten larger, more complicated and with more people, we're doing more and more re-mediation.

NEVITT: *I think that's a real good segue into, who do you bring to a mediation?*

SOUSSAN: That is an important question. Lawyers need to get their hands around the idea that if the other side is going to bring, for example, their general counsel; he/she ought to have someone of the same caliber at mediation. If not it can be considered an insult and the mediation will fail. So what do you do? You get the other general counsel on the phone, but it's not the same. So often, we have to recess in order to allow the two GCs to get together. If you're going to have a sophisticated case, and you're going to have a decision-maker on one side, then I think it's incumbent upon the lawyers to make sure they've got a decision-maker with them as well. As we discussed before, to get a real decision-maker at mediation is a blessing and makes our job so much easier. Unfortunately the real decision maker rarely attends the mediation which is a continual problem with the process.

FITZENHAGEN: I have a question I was just going to throw out to you-all, speaking about whom to bring to the mediation. I've seen in my practice, more and more frequently, attorneys bringing an expert witness to mediation. I am finding it beneficial to have an expert at the table when he or she can either run some numbers or provide insight on an a matter that is beyond the scope of my abilities. Have you encountered this?

MCARTHUR: Yes. More often than not I'm getting expert reports, expert depositions or an expert available by phone. It's rare for experts to actually come to the session due to the expense. But that expert information is invaluable in getting a case resolved. It's essential for getting the mediator prepared to tackle the issues. I also wanted to touch on something that all three of you were talking about and that is client preparation for mediation. There are times when I meet parties that have no idea what tort reform changes have gone on in the law. They have not had any discussion about the impact of venue on the value of their case. They just know what happened to them, and that if justice prevails, they're going to get what they want. Mediation always brings a big dose of reality to the parties, but it is incumbent upon the lawyer to lay the predicate for mediation by preparing them on those important issues. The mediator has to back it up, for sure, but the lawyer needs to be providing some of that information prior to the session as well.

WOLOVITS: My role as mediator, particularly in those situations where people aren't familiar with the process, is to meet with those people at the beginning. And I will sit very close to them and have a very nice conversation with them in terms of preparing to establish my relationship with them so that they could learn that I'm sort of on their side, in a sense, in that process. But ultimately, for both the attorney and for the mediator, it's

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HEATHER D. NEVITT

is the acquisitions book editor for Texas Lawyer. For three years she has been in charge of the legal book department, which consists of 12 titles that publish annually. She handles all aspects of a book's creation from acquisition, to editing, to layout, design and production. She was also an associate editor for the *Texas Lawyer* newspaper and an editor for *The Journal of Medicine and Law* at Michigan State University College of Law. Before her position with *Texas Lawyer* she practiced law with a focus on class action litigation. She received her J.D. from Michigan State University College of Law in 1999.

a question of expectation. What do those people coming to that mediation really expect and is it realistic? And hopefully, there are some good lawyers who are representing those people who talk about expectations and lower people's expectations. If not, it ends up being the mediator's job to play the role to discuss expectations, and along the process, to prepare people what's going to happen next. So that people flow with the process.

MCGOWAN: You should have a sense halfway into the process whether a particular party rep is clued in to the case and the issues upon which settlement is likely to turn. And it's usually two or three. It's usually not that hard. Even in a complex case. It usually comes down to a few documents and a few cases and a few issues. And it's your job to pick through the haystack and find those needles. And if your sense is the client is really not sophisticated or they may be sophisticated but their lawyer hasn't really talked much about those issues, you ask the lawyer pointblank, "Now, tell me what you have to prove to show fraud, what are the elements?" And sometimes, it's easier for me to just say, "Let me tell you what I understand the elements of a fraud case to be, and, John Lawyer, if I get it wrong let me know."

MORGAN: Or take a deposition.

MCGOWAN: Yes. And then I'll walk through the elements. And that's not opining on anything. That's just "Here are the elements of fraud that are well established in Texas. And now tell me how you're going to prove reliance in this case? Isn't true that you went into this deal before the misrepresentation was made? So how could it be reliance?" That's one way you correct the problem of the lawyer not having schooled the client very well.

MORGAN: But many times, the attorneys have, in effect, hired us to ask those questions. There are times for example, if late in the mediation you don't really have some offers generated, and you don't really have some discussions going on, then you might have to go into "deposition mode" and say to the plaintiff, "Tell me what you relied on and when." Then you revert to your litigation experience and ask those questions, hoping that the attorney picks up and follows through when you leave the room.

SOUSSAN: I was thinking about the ERISA cases that I've done in which there is a third-party administrator reviewing the file and making a decision. The decision of the third party administrator only will be reversed by a Federal Judge (no jury) if the decision is determined to be arbitrary and capricious. It is a very difficult standard. If it's a disability policy, for example, and the plaintiff really can no longer work, has received disability for a couple of years, and all of a sudden the disability carrier says, "You know what? I think you can go back to work," you have a difficult and emotional case to mediate. We have to be sympathetic and empathetic, but we also have to know the law. Too often I have seen lawyers not understanding their burden of proof and I find myself explaining what in my opinion he/she must prove to get a Judge to determine the administrator's actions were arbitrary and capricious. Then all of a sudden the Plaintiff realizes the true risks involved and we go from there. Of course when knowledgeable lawyers are with me, we focus on the benefits of resolution due to the uncertainty of taking it before a Judge and the client's immediate needs.

MORGAN: And how many times have you had the client tell you, "Oh, yes, I talked to Texas Rehab about that the other day, and I've been making an application every 30 days, and they still won't hire me." Well, why didn't you tell your attorney that? It would be very helpful for your attorney to know the efforts that you've made. And there's so many times that we facilitate those conversations between the attorney and their client on evidence that the attorney never even thought to ask. It's back to our job. We're there to facilitate, ask questions and help them see all their options.

MCARTHUR: As a mediator, you have so many things to accomplish in an eight- or ten-hour period. You have

to get to know people, understand the facts and the law of the case and then figure out what motivates all these different personalities. The mediator must absorb a lot of emotion and a lot of information. It takes a great deal of physical and mental stamina. And a lot of coffee.

MORGAN: You have to be physically fit. We are never off. At least when we sat as trial counsel most of us had a notebook and most of us could flip through the notebook and knew essentially what questions were going to be asked. As a mediator, we are on from the moment we walk in that door to the time that we close the door at the end of the day. And many times, we're picking up the coffee cups. I mean that's the difference. You really have to be mentally and physically engaged from the minute you walk in the door to the minute you leave.

FITZENHAGEN: Well, and you have to absorb so much emotion. And even from the attorneys who are geared up for mediation. They've got their advocate "I want to pound the table attitude" at mediation. And you're absorbing that and trying to temper it over the course of the day. It's exhausting.

NEVITT: *Let's address another topic. This is a very topical issue facing our nation right now. A lot of the legal industry is preparing for litigation fallout from all the credit problems, foreclosures and general economic downturn. What types of litigation do you expect to be coming down the pike and how will mediation play a role in that?*

SOUSSAN: Assuming there's money.

NEVITT: *Right. That's a big assumption.*

WOLOVITS: In a lot of these cases involving people who have houses or credit issues, earlier is better to get people to a mediation table where they can sit down and try to work out their problems about their house or about their credit. It will cost less and be more efficient and to all parties involved. So in terms of what's coming down the pike, if they're economic, financial type issues, certainly, early mediations before litigation. I think a lot of insurance companies are seeing that it's to their advantage to try to get the cases mediated before they have to invest a lot of money into their cases. So I think that's one point.

FITZENHAGEN: There's going to be an explosion in two areas that I know of. One would be the securities arbitrations, the filing of those claims are going to go way up now that we've had all the debacles with the banking and the brokerage houses. The problem will be collecting judgments from cash strapped financial institutions.

WOLOVITS: Well, they have insurance, too.

FITZENHAGEN: The other area is the real estate market, that I'm seeing things start to percolate up to the top, are in condominium and homeowner associations, where you've got a lot of defaults and foreclosures that have taken place in the community, and then you've got a certain number of people that are still paying their assessments and are still paying their mortgages that are now fully responsible for operating those communities. The operation cost is all on their shoulders. So I think you're going to see a lot of push-back from those people in terms of having to maintain those assessments and maybe to make changes in the community documents to allow some flexibility under these trying financial times.

MCARTHUR: I've been seeing that in the Dallas market for a couple of years

now, an increase in litigation in residential and commercial construction cases, lease disputes, contract disputes related to the construction industry. And Mel is absolutely right. Those cases need to be mediated early before the costs and expenses get to the point where you can't settle the case. But it then becomes incumbent on the mediator to be creative because we don't have all the numbers. We don't have that level of preparation that we'd all love to see in a case before we mediate it. And it takes creativity to convince the parties to accept some additional risk, as opposed to accepting additional expense in the development of the litigation.

MORGAN: You're absolutely right. I think you're also going to see more business-to-business disputes. Texas experienced the savings and loans crisis and we got to deal with Resolution Trust Corporation. We got to deal with the FDIC. A lot of our mediation initially was out of bankruptcy court. We did disputes involving some of the securitization of mortgage debt. I think we're going to see a rise in both commercial and residential real estate cases at the same time. There are several state programs, including a new program in New Jersey, to do mediation of homeowner foreclosure disputes. But on the commercial side, I think we're going to see the government back into the fray, and we're going to be dealing with these government entities. The biggest problem we had during the last big economic downturn was getting the right person from the RTC to come to the mediation. Somebody from Washington had to help us figure out how we are going to resolve the dispute when there's millions of dollars involved that impact all these different layers of people. It's going to percolate through the system. I just don't know when it's going to happen, but it's going to happen.

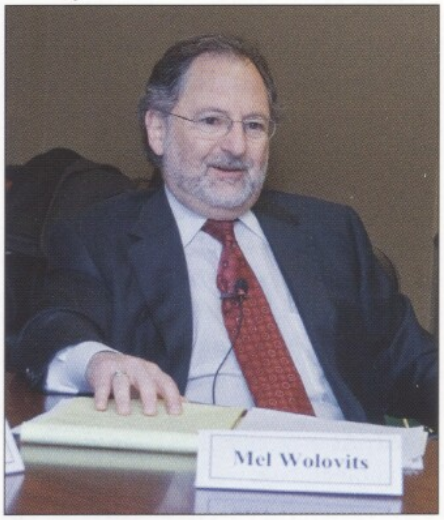
SOUSSAN: I've already had several mediations involving faulty loans with

a lender, a developer, a mortgage broker and a title company. The out-of-state lender gives money to a developer who finds a straw buyer and takes him to the mortgage broker. The developer and mortgage broker are in cahoots with the mortgage broker giving kickbacks to the developer. Then the buyer defaults, of course and the developer vanishes with all of the money. Out-of-state lender then sues the title company, the only deep pocket, claiming its closer did not see that the transaction between the developer, mortgage broker and buyer did not pass the smell test. Very difficult cases because most of the players are in jail.

MCARTHUR: A lot of that was new construction at the market entry level, so you also have in the middle of that a bankrupt builder and a house with construction or foundation issues. The homeowner has very little recourse because there are no resources to settle the case.

MCGOWAN: Historically, you can look at Texas when we had the oil and gas recession of the late '80s, which led to the real estate recession in the late '80s, and then the S&L problem that occurred around the same time, business litigation picks up. The corporate lawyers in the big firms don't have as much to do and litigators have a lot to do. So that's been the historical trend. If the economy is sliding downhill as badly as some people say, there's going to be a lot more bankruptcies. So if you do bankruptcy mediations that's a good place to be. There will be a lot more adversarial litigation coming out of bankruptcies that are more like a conventional mediation. And even companies that aren't in bankruptcy, for example, if the oil prices go low and stay low for a while, there will be a lot of cash flow pressure on oil and gas companies to get out of deals, to default, and that results in litigation.

NEVITT: *So I'm hearing continued job security.*



MCGOWAN: And the broker dealer cases will increase, and the class action and securities fraud cases will increase.

NEVITT: *Let's shift gears and discuss how cultural differences effect mediation.*

SOUSSAN: I do a lot of mediations where there are cultural differences among the parties. My first question to myself or to the attorney is: will my being a woman affect your client. I want to put it out there, determine

if there would be an impediment. Fortunately it never has been; however, we need to be sensitive to such issues. We need to appreciate cultural differences and respect the same.

FITZENHAGEN: And how do you ensure ahead of time that you have the sensitivity to those cultural differences? Do you overtly ask? How do you uncover that?

SOUSSAN: That is an easy answer. Ask the attorney because he/she has the same issues in dealing with a foreign culture.

WOLOVITS: Certainly, reaching out to the communities that you're going to be mediating in, there are people that know people within that community and having a discussion with that type of person from that community about what is proper, what is not proper, and start the learning process, which is good for our society and certainly good for our mediation.

MCARTHUR: The interaction of a husband and a wife from a different culture can be a very interesting thing at mediation. There are definitely differences in the spousal relationship in other cultures that impacts the course of the mediation process.

NEVITT: *Speaking of other cultures, is Texas different than other states in mediation process?*

MORGAN: This year was the 20th anniversary of the ADR statute for the state of Texas. And we started mediating here just a little bit after Florida and California, but we've been mediating here for 20 years in a very active way. And there is a difference. I think I counted the other day that I've mediated in 22 states, each with a different culture. For example, there's a huge difference in how mediation confidentiality is handled in different states. In Texas we have a confidentiality statute that is what I call a blanket approach. Everything's confidential unless there's an exception. In other states there are individual evidentiary privileges but you must prove confidentiality. So it's important whenever you mediate outside of Texas to recognize that there's not only different cultures, there's different laws. For instance, some states don't have joint sessions.

FITZENHAGEN: Right. And it's hard because there's different credentialing. There are different approaches. There are different model rules or different state rules that people are following in terms of ethics or confidentiality. So it can be difficult to grapple with that, if you're working outside of your state.

MORGAN: But it's not the practice of law. That's one thing that we learned, at least our Supreme Court told us, back in 1991, that it's not the practice of law. So we're not practicing law across borders and going to get in trouble for that.

MCGOWAN: I will say it's interesting that you've seen those differences because I really haven't. I go to New York a fair amount to mediate. And it used to be 18 years ago, when I would either go to New York or they would come here, and when they did, you could tell they weren't familiar with the process. They would call, "Gee, what are we going to do? Tell me what's going to happen." I don't

get those calls anymore. They're pretty used to the process. I go up and I do my normal deal and they just fall right into line like it's what they're used to.

SOUSSAN: That's what I do. And if the law is different, then they'll tell me.

MCGOWAN: Nobody's ever made an issue of confidentiality in another state. It's good to know that that could be an issue, but nobody's ever really raised it with me. But I find we were way ahead of the country initially, and I think the level of sophistication has really risen around the country now.

MORGAN: But I do think that there are some subtle differences.

MCGOWAN: There may be. I remember hearing that for years Florida had something they called mediation, which was a two-hour process. I don't really know what it involved. It sounded pretty truncated. Then they had something in Michigan and it was called mediation, but it really wasn't. It was more of an advisory opinion process.

FITZENHAGEN: Yes. I definitely think Florida, Texas, and California,

have been the leaders in the whole mediation process, and they've taken it a long way. So that's good.

MCARTHUR: Even the international community is now looking to the U.S. and our mediation and arbitration processes, as their legal systems develop and become more like ours. I've had inquiries from the international community about how do you go about doing this, what are the ethical rules, how do you deal with confidentiality.

NEVITT: *Interesting. Okay. We have about ten minutes left. And I want to kind of do a crystal ball question on what you foresee mediation growing into or any other trends that are going to be coming up in the near future what we haven't touched on.*

MORGAN: This financial situation is going to impact what we do. We will see more commercial cases. I, like Mel, hope that we see them earlier, rather than later, because I think there's an opportunity to help the parties craft a resolution early without so much of the expense involved. Litigation budgets are decreasing as organizations and companies of all types are tightening their belts. Mediation and arbitration will provide attorneys' clients with the most cost-effective way to resolve their disputes early. In Austin recently, there was a conference and one of the things they talked about was "deal" mediation. And I do think that there is some opportunity for some deal mediation that is essentially workout mediation. I anticipate we will start doing some of that financial reorganization workout mediation.

WOLOVITS: A trend can be for corporations or institutions to be using mediators in a lot of different ways. Deal mediation, where parties are trying to reach an agreement, and for some reason, they just can't reach that agreement, to bring in a mediator who is knowledgeable about the process of bringing people together to consummate the deal. And employment cases, there's a place for mediators early in the process, and corporations to facilitate disputes even at the board levels of corporations, there are opportunities for mediators to be working with boards to help resolve problems at the board level. And so I think that in the future, corporations and institutions will find that using mediators will cost them less, financially, emotionally, from as an opportunity cost, and mediation is more efficient than continuing the disputes, or not getting resolution on certain disputes which are very important to their institution.

FITZENHAGEN: I think too, there is going to be a trend to continue enhancing and standardizing mediator credentialing and standards of professionalism.

WOLOVITS: That's certainly true in Texas. Texas has the Texas Mediation Credentialing Association. I know Cecilia and I are distinguished mediators on that panel.

MORGAN: It actually grew out of the Texas Supreme Court suggesting in a very positive way to the mediation community that if we didn't police ourselves, they might police us. And so the Texas Mediator Credentialing Association is alive and well and has been publishing the list of credentialed mediators now in the Bar journal and in different publications over the last two years.

FITZENHAGEN: In Florida we don't have guidelines but rather rules, hard and fast. The Supreme Court of Florida administers and oversees the mediator certification process (in lieu of credentialing) continuing education for certified mediators and adherence to a mediator code of ethics and professionalism. Florida requires that you meet specific certification criteria before you may be referred any cases from the courts.

WOLOVITS: I suppose another trend is mediators providing pro bono services to those people who in our economic times won't be able to afford lawyers, let alone mediators. And certainly, I'm president of the Association Attorney Mediators here in Dallas, and we've just developed a program along with the Dallas Volunteer Attorney Association. We're going to provide pro bono services to those people. And I assume based upon the economics, that we're going to be used a lot more than we have before. So that's a one other trend.

MCGOWAN: I don't know if it's a

trend or not but it's something that I've seen in the last five to ten years that I think will probably continue to grow. And that is, parties to significant contracts are providing for mediation as a prerequisite to filing a lawsuit. Some of those agreements are quite elaborate in terms of procedure. You have to have the vice presidents of each division get together informally. If that doesn't work, then they get together with the lawyers. And then they have a mediation. Sometimes they'll provide the method for choosing a mediator; sometimes they won't. I've seen a fair number of those, and I think those provisions will become more standard in major contracts. Those cases can be challenging because there's no discovery to speak of and they tend to involve lots of money. But it's worth the effort. Often you'll mediate it, it doesn't work, and then six months later you mediate it again after they've had some discovery. Also, the arbitrations continue to increase at the expense of the courthouse. More and more cases are getting moved over into arbitration because of contracts. I've mediated quite a few cases that are in arbitration. It's really not any different. Except there is a different decision-maker in the case. We'll continue to see a growth in mediated cases in arbitration.

SOUSSAN: I think we'll see growth in the area of intellectual property mediation. These complex cases continue to be filed daily and the courts are requiring them to be mediated. I also believe we will see the use of more technology in mediations — use of the Internet and video-conferencing especially when parties are from different countries. And along those lines, I believe there will be an increase in mediation globally.

MORGAN: As articles like the recent one in the New York Times stated, studies show that settlement is much better than trial. This study goes back to the 1940s and analyzes more than 9,000 settlement offers versus trial results. In over 60 percent of the cases, the Plaintiff's settlement offer was better than the trial results. I think we've always known that a good settlement is better than a bad trial. A more informed public will realize that settlement is not a bad thing and it might be the best thing they can do.

NEVITT: *And that's up to the lawyers to educate.*

MORGAN: I think lawyers have learned. Many lawyers prepare their cases now for mediation. They don't necessarily prepare their cases for trial.

MCARTHUR: I do think cases are going to be settling at an earlier stage in litigation because businesses are going to be looking at their bottom line so carefully now. The costs of going forward are increasing every day. The risk is always there at trail or at the arbitration table, but it's going to be the expense of litigation that gets folks to the mediation and arbitration table earlier. It's good thing for the parties, but certainly harder for the mediator since we will be dealing with more unknowns.

WOLOVITS: Actually, cases have always settled. There have always been a high percentage of cases settled with or without mediation. The advantage of mediation is that you can get the people together and help them understand the process so that they can participate in the process and come to feel that they've have some effect on that ultimate decision, whereas when it was just lawyers dealing with each other they feel outside the process. Some of the best points in my mediation is when the parties have this hot dispute, but at the very end they're able to shake hands and walk out together. So that is what mediation brings to the process. ❖