



AAM-a-gram

ASSOCIATION OF ATTORNEY-MEDIATORS

President's Message

August 2018

"...to support and promote professional and qualified attorney-mediators who are committed to the proposition that the existing dispute resolution system can fulfill its intended purpose through the use of mediation."

2018-2019
AAM

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Message from Paul Clote . . .

Remember those Virginia Slims commercials? "You've come a long way, baby!" While those commercials were revealing social comments at the time they ran, when viewed today, they make it clear that society still had decades (and a long way) to go before the #MeToo movement, before equal pay for equal jobs, and other social justice goals.

The mediation practice in Texas began in 1987 with the passage of the ADR statute. The Association of Attorney Mediators ("AAM") began 25+ years ago. And although "We've come a long way, baby," there is still great distance to go.

Mediation styles and techniques continue to evolve. Lawyers have learned how to game the mediators. Some clients have become sophisticated consumers of mediation services, and challenge mediators with unrealistic expectations. Over time, psychology may have become more important than ever, so that mediators can understand and deal effectively with differing personalities of clients and lawyers. Statutory and case law continues to evolve, tasking mediators with the need to stay current. And don't even mention the challenges of family law mediations. That is an area foreign to me, and reserved (in my humble opinion) for the most skilled mediators. As far as we have come as a profession, we still have a long way to go.

Our Spring 2018 program in Indianapolis ("The Race for Excellence") was superb. We had 16 quality speakers from Indiana, Illinois, Texas, California, Nebraska, Kentucky and Tennessee. I have, and continue to, greatly value and appreciate our phenomenal speakers. In Indy, we had outstanding contributions from presenters as well as attendees; shared camarade-

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President's Message—Continued

rie and fellowship; "Kissing the Brick" and sauntering through the Indianapolis Museum of Art.

We will continue AAM's reputation for excellent CLE programs with the September 14 "Fly In/Fly Out" program in Houston, Texas. If you are not already registered for the Fall 2018 program, I encourage you to jump on, come for "No More Strike Outs or Fouls!" held September 14th at the Doubletree by Hilton at Hobby Airport in Houston. And then stay and watch the Houston Astros best the Arizona Diamondbacks Friday night (7:10 p.m.) (or Saturday night at 6:10 p.m.).

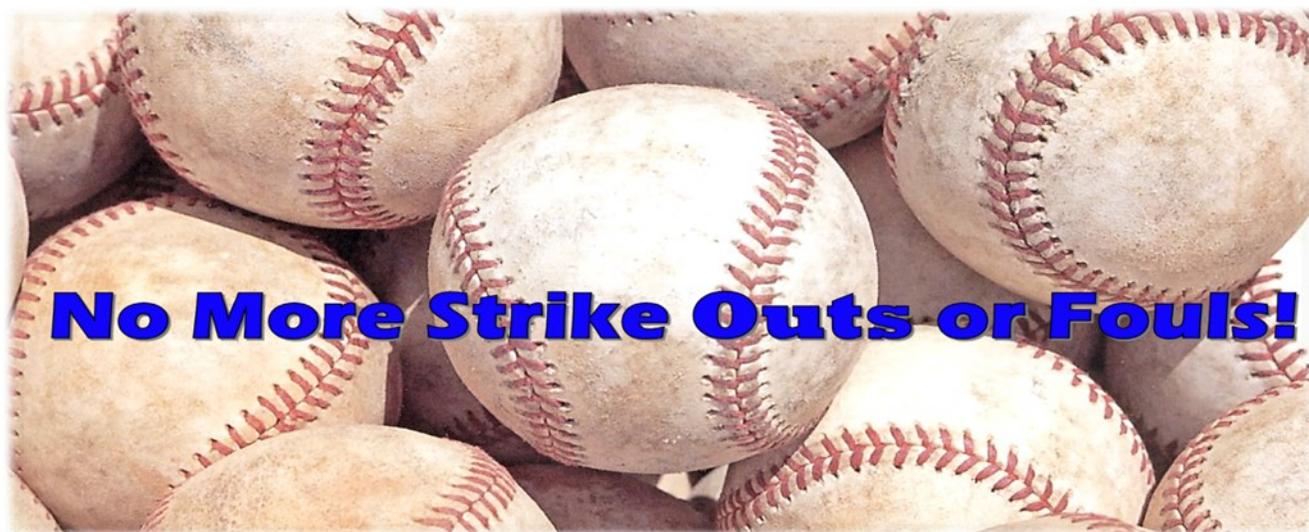
The September 14 program promises – like past programs – to enlighten, educate, even entertain. Come share the day and "stay ahead of the curve." We look forward to seeing you.

Please encourage your friends and colleagues in the mediation profession to consider joining AAM. We have sustained a strong membership over the years. But we should strive for inclusion of new members, expanding diversity, and bringing younger mediators into the organization. New faces, new thoughts and ideas, new speakers and attendees will benefit us all. And the free insurance that comes with membership makes it a no-brainer.

For me, it was a gift to be trained by original AAM members. It is a continuing gift to be associated with this marvelous organization, a tremendous Board of Directors, and a superlative Executive Director that makes the organization run. I hope to see you in Houston, but if not, for sure come to Charleston, South Carolina next April for AAM's Spring program!

Paul Clote, AAM National President

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ASSOCIATION OF ATTORNEY-MEDIATORS

presents

Advanced Attorney-Mediator Training and CLE Seminar

Houston, TX ~ Friday, September 14, 2018

With an awesome line-up of trainers and topics, you will walk away with more than you ever thought possible! In this lively interactive day of training, you will learn new techniques, communication skills, overcoming obstacles in your mediation, ethical practices for every day, and practical tips sure to give you that extra something to prevent **STRIKE OUTS** and **FOULS** in your mediation practice!

Our venue will be the **DoubleTree by Hilton Hotel Houston Hobby Airport** for a full one-day event – beginning at **8:30 am** and ending at **5:15 pm**. You are invited to stay after for the networking reception ending at 6:00 pm. The DoubleTree offers free airport shuttle to and from the terminal. Parking at the DoubleTree is free! An easy fly-in, fly-out day for most! Breakfast, lunch, and the reception are included in the low registration fee of \$250 for members and \$375 for non-members. We hope you will join us and add these specialty items to your playbook.

We have received MCLE credits in Alabama, Arkansas, Arkansas CME, Colorado, Illinois, Indiana, Indiana CME, Kansas, Louisiana, Mississippi, Missouri, New Mexico (pending), Oklahoma, Pennsylvania, Tennessee, Tennessee CME, and Texas.

Email aam@attorney-mediators.org.

See the Agenda and Speakers here: [CLE18Agenda.pdf](#)

Brutsche´ Award Recipient 2018

Michael J. Leech

The **Brutsche´ Award** is the most prestigious award given by the Association. It is “Given to the person(s) personifying the principles of service and commitment to the profession that are the foundation of the ADR movement.”



The **2018 Brutsche´ Award** has been awarded to **Michael J. Leech of Chicago, Illinois**, and recently of Philadelphia, PA. Mike Leech joined the AAM organization in 2006. At that time, he had already been an active commercial mediator in Chicago, with particular emphasis on labor and employment matters, for over 20 years. Mike was excited to see AAM transition to a national organization and began spreading the word about AAM’s advanced mediation training, which he regarded as a particularly outstanding feature of membership, and the advantages to mediators of being members of a group with so many outstanding and active mediators. He began recruiting friends and colleagues to form an Illinois Chapter of AAM, and in 2009 he succeeded in obtaining enough members to form such a Chapter. He acted as the Chapter’s first president. His vision and energy led the Chapter’s executive committee to initiate and support a number of chapter programs—luncheon meetings centered on presentations on topics of interest to mediators, and programs intended to support and promote the use of mediation in Illinois. Mike moved with his family to Philadelphia a few years later and today commutes between Chicago and Philadelphia. The Illinois Chapter continues to hold CLE luncheon meetings in much the same pattern Mike’s vision put in place in the beginning. Mike was elected to the AAM Board in 2012 and was selected President-elect of AAM in 2013 and served as President the following year, 2014. Mike was the first AAM President from outside the state of Texas. *You can see his respect for AAM’s roots in the photo where Mike is wearing his cowboy hat to make a presentation during his service as President!* Mike co-authored the legal treatise Holloway & Leech, *Employment Termination: Rights & Remedies* (BNA 1985; 2d ed. 1992; Supp. 2002). A distinguished fellow in the International Academy of Mediators, he is also a longtime fellow of the College of Labor & Employment Lawyers and was its liaison for the Restatement of Employment Law project. Mike received his B.A. (1973) and J.D. (1976) from the University of Virginia. Mike can be reached by e-mail to mleech@talk-sense.com. Congratulations!



AAM Annual Meeting and Advanced Attorney-Mediator Training 2019
Charleston, South Carolina
April 26 & 27, 2019

The AAM Board asks for suggestions for future locations of the CLE trainings on the evaluation forms provided at each advanced training. This year, the board decided to request input from members on the four most “requested” locations on recent evaluations: San Antonio, Charleston, Denver, and St. Louis. Those members that have attended or “might” attend were asked to cast their votes. The outcome was great. Charleston and San Antonio came in the top two contenders only a handful of votes apart. The other cities will still be considered in future years.

The runoff vote was between Charleston and San Antonio. After the second round of votes came in, **Charleston carried the vote and we are off to Charleston, South Carolina.**

Although April is peak season for Charleston, we found a lovely historic hotel with room for everyone and within walking distance to all of the sights and fun. **The Francis Marion Hotel** has offered our group the best room rate available for the area over our dates.

Emails will be sent when we begin the agenda planning – please be thinking about whether you would like to be a presenter. The speaker’s proposal will go out after the fall CLE. Also, rumor has it that new non-stop travel will be added from Dallas, Chicago, and a few other cities around the end of the year.



You can now add a second email address to your AAM profile! If you wish to have your assistant or optional email copied—just input it on your profile!

NIGHTMARE ON MEDIATION STREET

Tommy Smith, San Antonio, Texas

You mediate a case where the Plaintiff is suing on a \$100,000.00 debt. Plaintiff is also asking for attorney's fees. During the course of the mediation, due to the expenses of litigation and the questionable solvency of the Defendant, Plaintiff agrees to accept a \$50,000.00 offer from the Defendant. The parties, the lawyers and the mediator stay late and draw up an absolutely airtight settlement agreement whereby the Defendant agrees to pay \$50,000.00 within ten days. The lawyers and both parties sign the agreement. Everyone thanks the mediator and goes home.

The next morning you have receive a fax from the Defendant's attorney at 7:45 a.m..... "my client has changed his mind and withdraws his agreement to settle."

What happens next?

STATUTES

ADR STATUTE

Section 154.071 of the ADR statute states in part:

"(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."

TEXAS RULES OF CIVIL PROCEDURE

Rule 11 states:

"Unless otherwise provided by these rules, no agreement between attorneys or parties touching on any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record..."

TEXAS FAMILY CODE

Section 6.602 of the Texas Family Code states in part:

"(b) A mediated settlement agreement is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined that the agreement is not subject to revocation.

- (2) is signed by each party to the agreement; and
- (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.”

Section 153.0071 adds an additional element.

“(e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:

- (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
- (2) the agreement is not in the child's best interest.”

CASES

Section 154.071 of the ADR statute, Rule 11 and Section 153.0071 of the Family Code have given rise to an interesting series of Texas cases.

The first Court to write on this issue was the Amarillo Court of Civil Appeals in 1993, in Matter of the Marriage of Ames, 860 S.W.2d 590, no writ history. The Court there cited Section 154.071 (a) and stated that “a party who has reached a settlement agreement disposing of a dispute through alternative dispute resolution procedures may not unilaterally repudiate the agreement.” The Court, by implication, held that a Motion for Entry of Judgment in the trial court was the proper remedy. The Ames decision was later followed by the Texarkana Court of Civil Appeals in The Marriage of Banks, 887 S.W.2d 160, 1994, no writ history, and In the Marriage of Macintosh, 918 S.W.2d 87, Amarillo 1996, no writ history.

Subsequent appellate courts moved away from the reasoning expressed in the Ames case and refused to support the entry of a judgment, based on a repudiated settlement agreement reached at mediation. In Cadle Co. v. Castle, 913 S.W.2d 627 (Tex.Civ.App.—Dallas 1995, writ den.), the majority opinion disallowed a “Motion to Enforce Settlement Agreement.”

The Court, at page 632, held, “we do not believe the legislature intended Section 154.071(b) to be used to enter a judgment on the merits of a cause of action without a party having the right to be confronted by appropriate pleadings, have an opportunity to conduct discovery and assert defenses, or a chance to have a dispute determined by a judge or jury.” The Court also pointed out that the ADR Statute gives the trial court “discretion.”

Justice James, in what I consider to be a well-reasoned dissent concluded that a trial court should be allowed to enforce a mediated settlement agreement (“MSA”) through a summary proceeding, i.e., a Motion to Enforce Settlement Agreement. Justice James reads Section 154.071(b) to mean that the legislature intended courts to be able to enforce a settlement agreement through a summary proceeding without filing a separate action. To conclude otherwise would take away the plain meaning and purpose of this section and undermine the policy of this state.

A subsequent series of appellate decisions sided with the majority in the Cadle case, thus setting the stage for the Texas Supreme Court.

In 1996, the Supreme Court finally resolved the conflict between the various courts of civil appeals in the case of Mantas v. the Fifth Court of Appeals, 925 S.W.2d 656 (Tex. 1996). The Supreme Court sided with Cadle in holding that the enforcement of a disputed settlement agreement, even if reached at court ordered mediation, must be determined in a breach of contract cause of action under normal rules of pleading and evidence.

Interestingly, the Mantas decision arose out of a MSA reached while the case was on appeal. The Court held that when the dispute over enforcement arises while the underlying action is on appeal, as in the Mantas case, the party seeking enforcement must file a separate lawsuit in District Court.

There remains some confusion as to exactly what procedures should be used if a MSA is reached while a trial court still has jurisdiction. This author’s opinion is that you need not file a new suit. You need only amend your existing pleadings, alleging a breach of the MSA and the Court will likely grant a summary judgment...if there is sufficient evidence of a binding contract.

Some of this confusion could be eliminated if the Texas Legislature would amend the ADR Statute to read more in line with the Family Code. The ADR Statute states that the agreement is enforceable “as any other written contract,” whereas the Family Code states that a settlement “is binding on the parties.” An article in the Texas Tech Law Review argues for such a reform. 28 Tex. Tech. L. Rev. 31 (1997).

In summary, the Courts have all agreed that Mediated Settlement Agreements are enforceable. The only issue is...how and where? The short, simple answer is as follows:

1. Presuit Mediation. If the settlement comes as a result of a pretrial mediation, the only remedy available is to file a lawsuit for breach of contract.
2. Mediation at District Court Level. If the settlement comes after suit is filed, but before the trial court loses jurisdiction (whether by dismissal or appeal), you can file with the trial court, a pleading basically asking that the Court enforce the MSA on breach of contract grounds, and you must be prepared to show that your MSA has the basic elements of a contract. See article by Professor L. Wayne Scott, 37 St. Mary’s Law Journal 327 (2006)

3. Mediation on Appeal. If the case has been settled, like the Mantas decision, while on appeal, you will have to go back and start all over, filing a new breach of contract suit in the District Court.

DISCUSSION POINTS

1. What role does the Mediator play in “preparing” the Mediated Settlement Agreement?
2. If one party to the MSA repudiates and the other seeks enforcement in the Courts, is the MSA admissible in that proceeding?
3. Can the Mediator be called as a witness in such enforcement proceeding?
4. In a divorce case, does the Court have the right to set aside a MSA if one of the parties was mistaken as to an important point of law?
5. In a divorce case, can a Court set aside a MSA if it is not in a child’s best interest?
6. What is an “Agreed Judgment to securitize performance under a MSA”?
7. Should a Mediator ever agree to serve as an Arbitrator if the MSA unravels?

Link to Example of the Mediated Settlement Agreement: <https://www.attorney-mediators.org/resources/Documents/Example%20Mediated%20Settlement%20Agreement.pdf>. It also may be viewed on the AAM website <https://www.attorney-mediators.org/articles>



Now accepting newsletter articles for review and possible inclusion in a future issue of the AAM-a-gram.

***Please send electronically to
aam@attorney-mediators.org***

**Race for Excellence
Indianapolis, IN
April 20 & 21, 2018**

AAM's Annual Meeting and Advanced Attorney-Mediator Training

We traveled to Indianapolis to enjoy time at AAM's Annual Meeting and Advanced Attorney-Mediator Training. The Westin Hotel in downtown was an excellent place for the event. The rooms were very nice, the meeting space was nice and it was connected to lots of good eating and shopping by an enclosed corridor and mall. .

We want to thank **John Trimble, Ross Stoddard, John Van Winkle, Kimberlee Kovach, Laura Josephson-Bernat, Mike Leech, Courtenay L. Bass, Trey Bergman, Thomas R. Woodrow, Mari Frank, Jeff Kilgore, Randy Rapp, Karen Vervaecke, Hank Jones, Rebecca Simpson, and Jay Zeleskey** for making this a big hit! We may have gone a little overboard with the race theme, but it was fun for everyone.

We welcomed twenty-two mediator colleagues from the Indiana area and we enjoyed meeting them and learning from their interaction during the conference and during our one on one conversations at the networking reception and dinner. **We had a great time at the cocktail reception sponsored by Book Mediation.** It was a very enjoyable gathering with great hord'orves and a variety of adult beverages.

Members, spouses and friends enjoyed the cool air in the short two block walk to the Weber Grill Restaurant. Awaiting was a delicious dinner of smoked prime rib and smoked chicken. Wine was offered tableside as the conversations with mediator colleagues continued. **A very special thank you to Lewis Wagner LLC, for sponsoring this lovely dinner and wine.**

We were delighted to partake in a private tour of Indianapolis, including the Art Museum and the Speedway **by Circle City Tours**. The tour was enjoyed by several out of state attendees and we ended the afternoon with a relaxing cocktail time together before parting for dinner in various groups. The tour was very informative and introduced us to an area of the country with which we were not familiar. We learned the rich history of Indianapolis and saw many sights along the way.



President -elect, Paul Clote—
Master of Ceremonies

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Indianapolis—AAM Annual Meeting 2018



Courtenay Bass, Ross Stoddard, Tom Woodrow
and Trey Bergman



Laura Josephson-Bernat



Ross Stoddard and John Van Winkle



Mike Leech



John Trimble



Mari Frank, Karen Vervaecke, Jeff Kilgore and
Randy Rapp

Thank you to all of the speakers that keep us enlightened and current on mediation topics. (Not all speakers are pictured here.)

Welcome AAM New Members

We are pleased to welcome the following new AAM members as of the last newsletter printing:

Elizabeth Cantu, McAllen, TX
Misti Carter, College Station, TX
Lula Cole, Leeds, AL
Robert Edwards, Granger, IN
Simone Haberstock, St. Louis, MO
Michael Hawash, Houston, TX
Thomas Hays, Indianapolis, IN
Dirk Jordan, Austin, TX
Alan King, Chicago, IL
Burns Logan, Highlands Ranch, CO
Erin Lunceford, Houston, TX
Patricia McCrory, Indianapolis, IN
Lynne Nash, Dallas, TX
Sarah Nicolas, Austin, TX
Sofia Ramon, McAllen, TX
Charles Reed, Wallingford, CT



We welcome you to the **Association of Attorney-Mediators** and look forward to your active participation within this organization! Please let an officer of a local chapter or a member of the national board know what AAM can do for you and how you would like to become involved in AAM's activities.

Welcome New Board Members

The Annual Meeting was held on Saturday, April 21, 2018, in Indianapolis, Indiana. The following board members were elected and we welcome them to the board of directors! They will serve a three year term.

Danielle Hargrove practices in San Antonio, TX and has been an AAM member since 2003, returning in 2017 after a brief absence. For more information about Danielle, please see her bio. [Danielle Hargrove Bio.pdf](#)

Francis (Frank) Neuner practices in St. Louis, MO and has been an AAM member since 2012. For more information about Frank, please see his bio. [Frank Neuner Bio.pdf](#)

Carlos (Charlie) Ochoa practices in McAllen, TX and has been an AAM member since 2008. For more information about Charlie, please see his bio. [Charlie Ochoa Bio.pdf](#)



Special Thank You to AAM Outgoing Board Members

The AAM Board volunteers their time for three year period. Members attend the CLE trainings and board meetings throughout the year. A special thank you to the outgoing AAM National Board Members, **Jeff Kilgore**, Galveston, TX, (*Past President*), **Kim L. Kirn**, St. Louis, MO, (*Secretary*) and **Jay Zeleskey**, Dallas, TX (*Treasurer*). **Thank you for volunteering your time and energy to the AAM Board. We greatly appreciate your willingness to serve in these capacities!**

Debra Leo was also thanked for her term as President and Paul Clote gifted her with a small silver kaleidoscope necklace as a special surprise.

President's Award 2018

Each year the President has the opportunity to award a “special” award to anyone he or she chooses. **Debra Leo, outgoing AAM President**, presented the President's Award to **Brenda Rachuig, AAM Executive Director**, at the Annual Meeting 2018 in Indianapolis. In Debra's “spare time” from her daily life as an attorney-mediator-arbitrator, she creates beautiful works of art from stained glass. She created a stained glass kaleidoscope and presented it to Brenda with this message:

“Kaleidoscope: A Metaphor for Life”

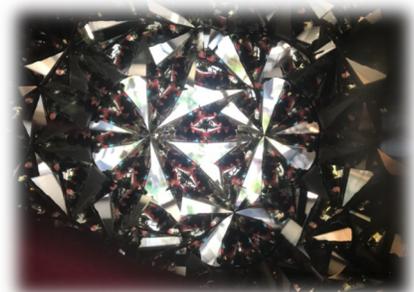
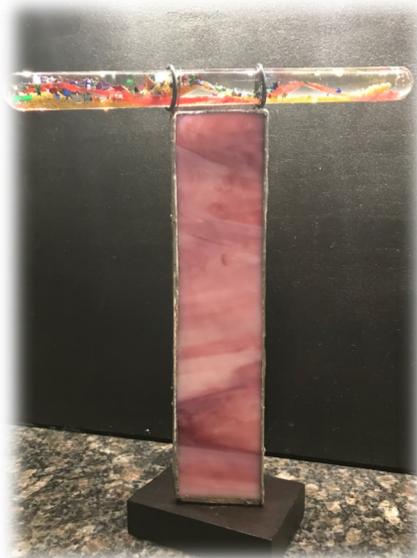
Eye piece - How we see our world

Object Chamber - What we choose to see

Outer Body - What others see

Inner Body - What we mirror to the world

These pictures show the beautiful design of the kaleidoscope and some interior photos from the viewer's perspective.



Debra also created small glass “artist palette” key chain ornaments, for each board member to commemorate her year as chair of the Annual Meeting in Santa Fe, “Advancing the Art of Mediation” in Spring of 2017.

Fun in Indy

