

SABA Pioneers Shape Development of Alternative Resolutions

By Charlie Gonzalez, Don Philbin, and Tommy Smith¹

San Antonio lawyers often have an outsized impact on larger trends, and the development of alternative methods of resolving conflict provides another such case study. When State Senator Cyndi Taylor Krier carried the Texas ADR Act of 1987 through a unanimous Legislature, she had the help of Senators Oscar Mauzy, Lloyd Doggett, and many others. Tommy Smith, Bob Wachsmuth, and other lawyers drafted our Local Mediation Rules (“Rules”), with encouragement from Judge Charlie Gonzalez and others. Our district judges were out front when they adopted the Rules and started Settlement Week. Judge Gonzalez was probably the first judge to order mediation in Bexar County, but local lawyers had been mediating informally for decades. Franklin Spears and John Yates would “work something out” in judicial settlement conferences in the 1950s. Sometimes it took the form of “high-low” agreements prior to trying the remaining issues. Both continued that path as ADR became formalized and they ascended to the bench.

Brief History

People have been resolving disputes informally and through tribal leaders since Biblical times. The English used arbitration for commercial disputes as early as 1224 (nine years after the Magna Carta), and George Washington wrote an arbitration clause into his Will. Labor negotiators long ago adopted mediation and arbitration clauses in collective bargaining agreements.

The Pound Conference of 1976

Many courts had docket problems by the 1970s and were experimenting with alternatives. Philadelphia small claims courts (1969) and Columbus, Ohio, prosecutors (1971)² tried ways to resolve less serious disputes informally. In 1975, Miami set up a program

to resolve citizen disputes through mediation.

By 1976, Chief Justice Warren Burger had scheduled a Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly referred to as the Pound Conference.³ Harvard law professor Frank Sander had written “some musings” about the judicial resolution of various disputes while on sabbatical in Sweden. When they were forwarded to him, Chief Justice Burger invited Sander to give the keynote address at the Pound Conference.⁴

Sander had published books on both tax and family law, and had observed that while the courts handle tax matters well, and labor disputes had long been resolved through arbitration, family disputes had a bumpier ride through the court system. His Pound lecture built the “multi-door courthouse” concept. Judges, he concluded, would triage incoming cases to various appropriate dispute resolution doors. Many would be mediated, some arbitrated, and others adjudicated.

Texas Leads the Way

Within two years, Texas Chief Justice Joe Greenhill charged the Houston Bar Association with “look[ing] into mediation as a way of alleviating its crowded court dockets.”⁵ The group agreed and drafted Justice Frank G. Evans to chair of a committee of lawyers to look at other dispute resolution centers and develop a proposal. The Houston Neighborhood Justice Center opened in 1980 and a similar center followed in Dallas.

Bexar County Takes a Big Role

By 1984, Bexar County had created its own Dispute Resolution Center (“DRC”), and Senator Krier had been asked by a legislative mentor to carry a bill that later became the ADR Act. As

Senator Krier describes it, the “initial idea for ADR legislation did not come from the Legislature, but to it” by lawyers and the judiciary. Justice Evans almost single-handedly wrote a short and intentionally vague bill that was not intended to do much more than voice support for alternative resolutions and provide broad confidentiality protection for those proceedings. Its brevity and planned ambiguity would both garner support and leave room for gradual public policy shaping. By 1987, San Antonio lawyers and judges were working on local rules that would implement what the *Houston Chronicle* proclaimed to be an ADR wave that was “kind of taking the country by storm.”⁶

Charlie Gonzalez Takes the District Bench in 1989

Charlie Gonzalez was elected to the district bench from County Court No. 2 in 1988. He almost immediately initiated and established a district-wide alternative dispute resolution system.⁷ He was a constant and forceful proponent of ADR during his decade on the district court bench and, as a member of the Judiciary Committee, continued that interest while he was in Congress.

Judge Gonzalez worked with a local committee of lawyers to implement the still-nascent system. Tommy Smith and Bob Wachsmuth were among the pioneers who saw promise in alternative dispute resolution. They envisioned and drafted local rules that every District Judge could support in implementing the ADR Act. Just as Justice Evans had done with the ADR Act, these early lawyers wrestled with how specific to make the Rules. The Rules needed to be more than a statement of purpose and support to offer guidance, but the drafters also wanted to leave discretion to the courts. Together, bench and bar contemplated what structure would

implement their mandate to establish an ADR system and produced a Bench Book containing general ADR information, as well as specific biographical pages for the lawyers who had taken training and were willing to assist the court with mediation.

Party Control—*Pro Bono* Opportunities

Since everyone prefers choices that they make for themselves over those that are forced upon them, the drafters wisely devised a system where parties could select their own mediators. The court would appoint a mediator only in those rare instances where the parties could not agree upon one. Many of those mediators were assisting the court and parties by offering *pro bono* mediations. The DRC, which was modeled on the Houston Neighborhood Center, also began to offer mediation training and to maintain a panel of mediators who, upon court order, could assist those without resources.

According to current DRC Director Al Cortez, the DRC processed 5,600 intakes and set more than 2,600 mediations in fiscal year 2016.⁸ Of those cases mediated at the DRC, 85% settled. Mr. Cortez estimates that those dispositions saved the county \$2.3 million, using what he feels is a conservative assumption that each jury case costs the county at least \$5,000. The DRC and ADR-related court activities are funded by a small portion of every civil filing fee.⁹ The DRC surveys all participants, and Mr. Cortez reports high satisfaction levels: 75% indicated that mediation kept their case from going to court, and 98% were satisfied with their staff services and case management.

ADR Docket—No Weakness Shown

The District Court ADR Docket is currently managed by lawyer and former major company General Counsel, Carolyn Walker. Since every civil case appears on the ADR Docket, and there have been roughly fifty thousand new civil and family cases filed in each of the last five years,¹⁰ Ms. Walker has a full docket and an efficiently run office. Her predecessor Marge Lyro was instrumental in developing these procedures as everyone figured out how to run this new project.

A large part of the genius of both the

Act and the Rules was the inclusion of opt-out provisions. By simply requiring that all jury cases be scheduled for an ADR hearing before trial, with a presumption that ADR will be ordered, the Rules relieved lawyers of “having to show weakness” if they thought a case should be set for mediation.¹¹ The power of opt-in versus opt-out rules has been empirically studied.¹² Twice as many people donate organs or participate in 401(k) plans if the default is to participate and the individual must take affirmative action to opt-out. The opt-out structure of the Rules reduced cognitive biases against showing weakness and converted holdouts through exposure.

Fourth Court Takes Opt-In Approach

As might be expected, appellate courts are in a different position than trial courts. Some appellate cases have been mediated below, and all have been pursued to judgment. As a result, the Fourth Court of Appeals decided that it is best to poll parties at the outset of an appeal, to determine whether the case has previously been mediated and whether the time is right to take a fresh look at a consensual resolution.¹³ While the Fourth Court “may refer” a case to ADR according to Local Rule 2, the Court’s Internal Operating Procedure 7.f. spells out when and how it will do so.¹⁴ As Justice Marialyn Barnard—the ADR Justice administering the ADR docket—explained, pursuant to recent changes in the Fourth Court’s ADR procedures, the Court does not maintain a list of mediators or appoint mediators. Instead, the parties may opt in to mediation by agreeing to mediate and selecting their own mediator.¹⁵ If one party agrees to ADR but others do not, the ADR Justice may refer the case,¹⁶ unless any party objects.¹⁷

Early Challenges

Even though the Legislature unanimously passed the ADR Act with strong bipartisan support, and the Rules were a cooperative effort of bench and bar, court-ordered mediation did present a change and drew a few early detractors. A prominent Dallas lawyer first attacked court-ordered mediation as a violation of the Open Courts provision of the Texas Constitution by imposing fees to be paid by the litigant as a condition of exercising his or her

Seventh Amendment rights. *Pro bono* mediations and DRCs reduce the impact of that objection.

Tommy Smith has kept examples of these early challenges. In a 2003 letter to the Court, one lawyer wrote:

Your Honor,

Last month I appeared before you on a Motion to Compel Mediation. I argued long and vociferously against any such frivolous delay. Despite my protestations, you ordered me to mediation. I stated in open court that “you can lead a horse to water, but you can’t make him drink.” Well, Your Honor, I attended the mediation with Mr. Smith, and I’m pleased to tell you that this old horse was wrong. I not only drank from the mediation well, but I enjoyed the drink. The process worked. My case settled. My client was happy, and I am now a fan of mediation. I will be filing my own motions to compel mediation in the future, and I hope you will be inviting others to join me in drinking from the same fountain.

Good Faith Collides with Confidentiality

The more enduring issues turned on confidentiality and good faith, which often rub together to spark issues. The policy for both was straightforward. First, if people are going to speak freely and reveal what they really want and need to craft a deal, those conversations had to be cloaked with broad confidentiality, lest they provide high and low watermarks at the next hearing. Second, even if the definition of “good faith” is elusive, people sent to mediation wanted to know that the other side would participate in good faith.

The legal question became how you could prove the second in light of the first? Surely you could tell the court how obstinate the insurance company was, but would that expose your own confidential demands? Various jurisdictions (including Bexar County) required the parties not only to attend mediation, but also to mediate in good faith once there. The result became a opening phrase in every mediation to this effect: “We’re here to mediate in good faith, but [insert reason why the other side needs to see the light and

take our “good faith” position.”] Still, setting an aspirational goal turned out to be good policy, even if it was hard to enforce. Cases worked their way through the courts, resulting in law to this effect: “[Y]ou can make me go, but not prove what I did while there.” *See, e.g., In re Acceptance Ins. Co.*, 33 S.W.3d 443 (Tex. App.—Fort Worth 2000) (orig. proceeding).

Justice Evans and the Texas ADR Act drafters intentionally wrote a short, broad, and potentially ambiguous confidentiality protection that Evans later said was “an act of genius” because it allowed narrow exceptions to emerge over time, in the context of actual cases. The Texas statute is broader than the later ABA Model Statute, and has allowed courts to create by common law the few exceptions that have developed.

Mediation Finality Collides with Other Statutes

Charles Hardy and other family lawyers took leading amicus positions as the rough edges of mediation finality collided with the “child’s best interest” standard, when a trial judge refused to enter judgment on a mediated settlement agreement. The first paragraph of the Supreme Court opinion explains the collision:

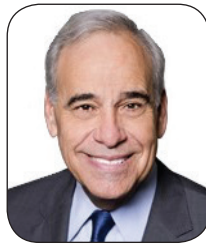
If a mediated settlement agreement meets [certain requirements], a party is entitled to judgment on the mediated settlement agreement notwithstanding . . . another rule of law. TEX. FAM. CODE § 153.0071(e) (emphasis added). We are called upon today to determine whether a trial court abuses its discretion in refusing to enter judgment on a statutorily compliant mediated settlement agreement (MSA) based on an inquiry into whether the MSA was in a child’s best interest. We hold that this language means what it says: a trial court may not deny a motion to enter judgment on a properly executed MSA on such grounds. Accordingly, we conditionally grant the writ of mandamus.

In re Stephanie Lee, 411 S.W.3d 445, 447 (Tex. 2013).

It Has Worked

Thanks to trailblazing efforts by so many San Antonio lawyers, judges, and legislators, the ADR Act has become a

model for short, plain statements of policy that evolve through practice. The consensual nature of mediation has allowed development of a variety of styles of mediation, so parties can decide which mediator might fit the fuss and be able to relate to the parties. Because the local courts have fostered that choice and innovation, most cases are resolved consensually. That would not happen, though, without the active case management that courts provide. Nothing focuses attention like a firm trial setting, and all it takes for that to occur is one party saying they want to exercise that trial option. ❀



Charles A. Gonzalez has served the San Antonio community as a lawyer, judge, and U.S. Representative. He received his B.A. from the University of Texas and his J.D. from St. Mary’s University School of Law. After leaving Congress in 2013, Mr. Gonzalez returned to private practice at Ogletree Deakins.



Don Philbin was named “Lawyer of the Year” in San Antonio by Best Lawyers® (2014, 2016), was recognized as the 2011 Outstanding Lawyer in Mediation by the San Antonio Business Journal, is one of eight Texas lawyers listed in The International Who’s Who of Commercial Mediation, and is listed in Texas Super Lawyers. He is an elected fellow of the International Academy of Mediators, the American Academy of Civil Trial Mediators, and the Texas Academy of Distinguished Neutrals.



Thomas J. Smith attended the University of Texas, where he received both his B.A. and LL.B. degrees. He practices law primarily in the Business and Real Estate areas and has concentrated on Mediation and Arbitration for the past twenty years.

ENDNOTES

¹While Messrs. Gonzalez and Smith contributed substantially to this article, they did not write any of the text about themselves.

²Austin mediator and law professor Kim Kovach mediated in the Columbus, Ohio, program and later teamed with Justice Evans to conduct the first forty-hour training in Texas and formed the program at South Texas College of Law’s Frank Evans Center for Conflict Resolution. Her book, *A Small Snapshot of National and State History of the Modern Mediation Movement*, is forthcoming.

³April 7-9, 1976, in Minneapolis, Minnesota.

⁴Michael L. Moffit, *Before the Big Bang: the Making of an ADR Pioneer*, 22 NEGOTIATION J. 437 (2006).

⁵Lisa Weatherford, *History of the Texas ADR Act*, ALTERNATIVE RESOLUTIONS 16:2 (Summer/Fall 2007).

⁶*Id.* at 2 (citing Ralph Bivins, *Alternatives to Courtroom Battles Gaining Popularity*, HOUSTON CHRONICLE (Dec. 13, 1987)).

⁷Charles A. Gonzalez biography, available at <http://ogletreedeakins.com/people/charles-a-gonzalez>.

⁸Al Cortez, Bexar County Dispute Resolution Center Overview, Texas Association of Mediators Newsletter, with updated figures by interview.

⁹TEX. CIV. PRAC. & REM. CODE § 152.004. Bexar County Commissioner’s Court has gradually implemented the fee, which is currently \$15 of each civil filing.

¹⁰Donald R. Philbin, Jr., *Recent Bexar County District Court Statistics*, SAN ANTONIO LAWYER 8 (July/Aug. 2016).

¹¹Local Rules for the Bexar County Civil District Courts, approved March 22, 2016, available at http://home.bexar.org/dc/Downloads/Bexar_County_Local_Civil_Rules_Part3.pdf.

¹²Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Penguin Books, 2009).

¹³Alternative Dispute Resolution Addendum to Civil Docketing Statement, available at <http://www.txcourts.gov/media/495825/adraddendum.pdf>.

¹⁴Internal Operating Procedures for the Handling of Cases (“IOP”), available at <https://www.txcourts.gov/media/1385307/4th-CoAs-IOP-2016-revision-signed-5-13-16.pdf>.

¹⁵IOP 7.f.iii.

¹⁶IOP 7.f.iii(3).

¹⁷IOP 7.f.iii(1).