



# Alternative Resolutions

State Bar of Texas

Alternative Dispute Resolution Section

*Erich Birch, Chair, ADR Section*

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## Chair's Corner

They say time flies, but it seems to be on adrenaline these days. We are at the end of another Texas Bar year, and the ADR Section continues to do much in meeting its commitment to educate the public and be a resource about the proper role of alternative dispute resolution in our society. In the 2015-2016 year the ADR Section implemented changes that will keep

the Section on track for improving its service into the future.

The most visible change this year was in January, when the Section held its first Annual Meeting in conjunction with the Section's Annual CLE. The move required some quick action by the Council after the last Annual Meeting in June, because in this transition year the timing for nominations of new Council members, officers, and candidates for the Frank Evans Award was significantly compressed from previous years. In fact, there was actually only one Council meeting between the two Annual Meetings.

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# Mediation Facilities: 3 Questions to Get Mediators Started

by John DeGroot

“What's the wireless passcode again?” “*Will we be going out for lunch?*” “Is there somewhere I can print?” As a mediator I encourage everyone in the room to ask questions, but none of these get us any closer to settlement.

Yet with just a little empathy, focus, and effort, you and your mediation facilities can help clients get past these questions, so they'll have the comfort and confidence to get a deal done.

Environmental details matter, and the success of your next mediation could depend on them.<sup>1</sup> Before you decide to use that interior conference room or to put off lunch just a little longer—or paint your conference

room  
green  
o r  
hang  
a



picture  
of a lone deer or put red markers near your whiteboard—recognize that these choices have consequences.

It's the mediator's job to provide for the parties' comfort and to consider “the messages the mediation environment broadcasts and the frame of mind it invites.”<sup>2</sup>

Concrete suggestions for mediation facilities are few and far between,<sup>3</sup> but a class<sup>4</sup> I took a few years ago from Douglas Noll<sup>5</sup> and Don Philbin<sup>6</sup> helped me recognize the

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<sup>1</sup>[\*I Hear What You Say, But What Are You Telling Me?: The Strategic Use of Nonverbal Communication\*](#), 99 (Barbara G. Madonik, 2001)(“The environment in which the mediation occurs can strongly influence the success of the mediation.”).

<sup>2</sup>Barbara G. Madonik, [\*Managing the Mediation Environment\*](#) (undated), Mediate.com at <http://www.mediate.com/articles/madonik.cfm>.

<sup>3</sup>Paula Young, [\*The Where of Mediation: Choosing the Right Location for a Facilitated Negotiation\*](#) (2007), Mediate.com at <http://www.mediate.com/mobile/article.cfm?id=2385>.

<sup>4</sup>[law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/tactical-interventions.htm](http://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/tactical-interventions.htm)

<sup>5</sup> [dougnull.com](http://dougnull.com)

<sup>6</sup> [www.donphilbin.com](http://www.donphilbin.com)

value of natural light, low-glycemic snacks, and more as we negotiate. This class, and the work of Barbara Madonik, have helped guide my facilities choices, but is there more out there to guide mediators as they choose what our mediation environment will be like?

While Part II will explore mediation facilities in more detail, the 3 questions here in Part I can start the conversation as mediators decide how they'll manage where we mediate.

### Do the Parties Know What To Expect?

Managing expectations is nothing new to negotiation,<sup>7</sup> and helping parties and counsel visualize their physical surroundings before mediation day is an easy way to start.

Madonik suggests that mediators “[i]nvite parties to visit the location before the mediation to become more comfortable about driving the route and meeting at the facility.”<sup>8</sup> There's no question that an advance visit can make participants feel more at home when mediation day arrives.

In today's digital world, however, physical visits aren't as important as they once were. Mediators can take several steps that are even easier and almost as helpful:

- Invest in a mobile-friendly, easy to find [website](#);
- Include a reader-friendly [bio](#);
- Include photos (and, for today's audience, [videos](#)) of the mediator; and
- Give some [additional resources](#) that allow participants to explore how the mediator approaches negotiation and settlement;
- Send all participants a [map](#) with directions before the mediation, including a picture of the facility and a phone number; and
- Offer a [mediation center tour](#) for those who don't come to the mediation facility before mediation day.

Providing these details in advance can give participants a sense of control,<sup>9</sup> and that's good for everyone involved.

### What First Impression Does Your Space Give?

As a longtime mediation client, I learned that there is a difference in the services mediators provide, and how and where they provide it. The sense clients get when they first walk in the door to your facility may not be their first impression of you, but it can be the most impactful.

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<sup>7</sup>See, e.g., <http://settlementperspectives.com/2008/09/managing-expectations-an-unexpected-lesson-on-the-bus-to-hertz/>

<sup>8</sup>Madonik, [Managing the Mediation Environment](#).

<sup>9</sup>Madonik 2001 at 104.

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Mediators need to recognize that environments send messages. They must create a place where people are able to approach, rather than freeze, flee, or fight.

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I recommend mediators walk in from the parking lot like they have never been to their mediation center before, and consider “the messages the mediation environment broadcasts and the frame of mind it invites.”<sup>10</sup> They should ask themselves:

- What is my first impression as I approach the front door?
- As I open the door, is it calm or chaotic inside?
- Am I greeted immediately?
- Is it clear where I should sit?
- If I wanted to sit, would I be asked to sit with my opponent?
- Is the paperwork handled smoothly and discreetly?
- Does what I see inspire confidence?

## Do You Provide the Basics?

Like it or not, no mediator gets it all right. While a comprehensive list is beyond the scope of this article, the physical basics certainly include:

- A conference room and table large enough to accommodate the mediation, with a shape consciously chosen by the mediator to fit his or her practice and style;
- Adjustable conference room chairs that swivel;
- Power outlets;
- A comfortable temperature (maintained throughout the day);
- Natural light; and
- Noise abatement between caucus rooms;

Physical comfort isn't all that matters, of course. Modern businesspeople need access to many things to be at ease:

- Wireless access;
- A cellular signal for mobile calls;
- A private place to make phone calls;
- Coffee, beverages and snacks;
- Private caucus rooms;

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<sup>10</sup>Madonik, [Managing the Mediation Environment](#).

- A speakerphone (to call the occasional absent decisionmaker);
- A printer, a fax machine, and other support; and
- The right to stay in the space as long as necessary, with no artificial deadline.

At this point expectations have been managed, first impressions have been set, and the basics have been covered. More important, we understand that “[e]nvironments send messages,”<sup>11</sup> and that mediators “must create a place where people

are able to approach, rather than freeze, flee, or fight.”<sup>12</sup>

In the second half of this essay we'll discuss food choices, caucus rooms, and other details—and the one question that ties it all together. Come back for Part II. You'll be glad you did.



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<sup>11</sup>Madonik 2001 at 99.

<sup>12</sup>Douglas Noll, [Ten Principles of Peacemaking](http://www.mediate.com/articles/noll5.cfm) (undated), Mediate.com at <http://www.mediate.com/articles/noll5.cfm>.



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Alternative Dispute Resolution Section

*Lionel M. Schooler, Chair, ADR Section*

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## Chair's Corner



This is my inaugural column as Chair of the Alternative Dispute Resolution Section. I hear it frequently said by persons assuming the helm of an organization like this one that they “have a hard act to follow.” In my case, that is not merely a throwaway phrase: I am following in the footsteps of the latest group of outstanding

Section leaders—Ronnie Hornberger, Hon. Alvin Zimmerman, Don Philbin and Erich Birch. Individually and collectively, they are a very hard act to follow and each, in his own way, has left big footprints for me to fill. I hope to do so. Luckily, I have the good fortune to take the reins at a time when the Section is functioning very well, and when I am very ably supported by a stellar Council.

**Service to the Section.** My first priority is for the Council to provide service to the Section. To further that goal, I am presently discussing with

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# Mediation Facilities, Part II: The One Question that Should Guide the Rest (and More)



by John DeGroot

As I lay back in my dentist's chair a few years ago, I immediately noticed the ceiling. The exposed beams—and everything I could see while looking straight up—was *spotless*. The light fixtures were clean, the wiring was tucked away, and the soft lighting trained on the woodwork detail made it clear she had considered my perspective as she finished out her office.

With that experience in mind, I took another look at my own mediation center from the client's point of view. This perspective led to many of the tips found **Mediation Facilities, Part I: 3 Questions to Get Mediators Started**,<sup>1</sup> including how to manage pre-arrival expectations, how to ensure that first impressions put your mediation on the right path, and a few “must-haves” for any mediation center.

## Be Guided by One Question

Beyond the basics, mediators can, and should, do more. If we want to make clients and counsel more comfortable and productive, our next steps should be guided by one question:

### ***Should they have to ask?***

Think for a moment about your last visit to a truly nice hotel. What set it apart? Sure there was a marble lobby and a shrimp buffet, but there was something else. The umbrella at the bell stand, the robe behind the door, and the sewing kit in the bathroom were there just in case you needed them—and you didn't have to ask.

Whether we like it or not, in mediation customer service goes beyond one's skill in the conference room. As a client, I once watched 6 lawyers try to

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<sup>1</sup> John DeGroot, [Mediation Facilities, Part I: 3 Questions to Get Mediators Started](#), *Alternative Resolutions* Spring 2016: Vol. 25, No. 2 (2016) 9.

share 4 outlets. I have seen attendees sheepishly ask to borrow paper, and I myself have looked for a shredder to rid myself of unnecessary litigation ballast.

There's no doubt that mediation attendees are stressed during mediation, and satisfying their needs in advance can reduce this stress. Neither clients nor counsel should ever have to ask for a power strip, a legal pad, a shredder, a flash drive, or anything else that mediators provide on a weekly basis.<sup>2</sup> With an eye toward customer service, these can be the easy points any mediation facility can make.

### Food Choices

Mediation attendees are (i) in a strange place, (ii) meeting with people they (often) don't want to be around, (iii) with money, careers, ego, and more on the line. Whether it's a half day mediation with just coffee and cold drinks, or a full day mediation that might run late, mediators can set themselves apart:

- by what they serve;
- by how they serve it; and
- by letting clients and counsel know in advance what will be available when.

There isn't enough literature available on what food to serve at mediation,<sup>3</sup> but the food that mediators offer is a frequent topic of discussion among attendees. Separately, any parent knows the contrast between a child who has had a donut versus one who has just eaten a balanced meal. These 2 simple concepts, paired with the notion that attendees shouldn't have to ask, have led us to offer:

- fajitas from [a well-known Mexican restaurant](#);
- an option to accommodate special dietary needs in advance;
- top-shelf coffee, decaf, tea, sodas, and juices;
- fresh fruit;
- low-glycemic and other snack options; and
- something (else) to eat when your mediation or the drafting of your Mediated Settlement Agreement slides past dinnertime.

Far from viewing food as a chore or an expense, our mediation center has openly embraced the food choices we have made, and we feature both prominently in our Mediation Agreement correspondence and [collateral materials](#).

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<sup>2</sup>Today's mediators should add to this list Apple TV-equipped televisions. The days of the projector and screen are almost at an end, and iPads and iPhones are giving mediation attendees a seamless, easy way to present material with little to no connection stress.

<sup>3</sup> But see Paula Young, [The Where of Mediation: Choosing the Right Location for a Facilitated Negotiation](#) (2007), Mediate.com at <http://www.mediate.com/mobile/article.cfm?id=2385>.



## Caucus Rooms

As a veteran of hundreds of mediator caucus rooms, I can tell you they aren't fungible; there is a difference. I have been in conference rooms that were too hot, too crowded, and too small—and many that had no windows at all. Barbara Madonik tells

- windows;
- individual temperature controls;
- paper;
- colored markers;
- calculators; and



us that "[c]aucus rooms provide a safe environment in which parties can find privacy."<sup>4</sup> This safe environment merits real attention. Madonik's list of things for mediators to consider for their conference rooms includes:

- tissues.<sup>5</sup>

In addition to these important points, our experience has added a few more, including:

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<sup>4</sup> Barbara G. Madonik, [Managing the Mediation Environment](http://www.mediate.com/articles/madonik.cfm) (undated), Mediate.com at <http://www.mediate.com/articles/madonik.cfm>.

<sup>5</sup>*Id.*

- Adequate room between the back of the chair and the wall (so no one feels trapped);
- Chairs that will still be comfortable after 8:00 p.m.;
- Natural light in every room;
- White noise makers; and
- Presentable space heaters and fans, for those who'd like more influence over their own environment.

## Control

No doubt the world is changing, and perhaps trends set by outfits like [airbnb](#) and [Regus](#) signal the end of the dedicated mediation space. But before that happens, I am reminded of the story of a Dallas lawyer who was "just this close" to settling, when his mediator's access to the conference rooms he shared ended. Sure, the parties promised to close the gap sometime soon, but momentum was lost; the hope for

settlement quickly dimmed.

Before we focus on the finer points of mediation facilities, like whiteboards and speakerphones and [Kind bars](#), perhaps it needs to be said that we should start with the idea that mediator control of the mediation facility is key. As I close this article, I'm reminded that there are dozens of other tips to include, like conference tables that can be configured to taste, [sound absorbing art](#), and more.

Instead, I'll close with the question that ties it all together: "[Should they have to ask?](#)"



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