# Mediation BENCHBOOK

SECOND EDITION


TEXAS MEDIATOR CREDENTIALING ASSOCIATION

TMCA est. 2001

Promoting Quality Mediation Throughout Texas

www.txmca.org


*Published October 2017*

# Why Use a TMCA Credentialed Mediator?

Because professionalism matters. TMCA Credential holders meet specific training, continuing education, and experience requirements. Credential holders are bound by a mandatory Code of Ethics and a grievance process. The TMCA Credential demonstrates the mediator's commitment to delivering quality mediation services. *Insist on a TMCA Credentialed mediator as you appoint or consider mediators for cases in your Court.*

To search for mediators in your county or for a list of all TMCA Credentialed mediators, go to www.txmca.org.

# Introduction

The mission of the Texas Mediator Credentialing Association (TMCA) is to promote quality mediation throughout Texas. This *Mediation Benchbook* is published to promote that mission by serving as a resource to assist the Judiciary in carrying out the State and Federal policy to encourage alternatives to litigation.

The first edition of the *Benchbook* was published to the Judiciary in 2011. Both that publication and this second edition of the *Benchbook* have been made possible through funding by TMCA and the James W. Gibson Fund. This 2017 edition is intended to replace the 2011 publication and contains an insert with the identification of current TMCA Credential holders. Although the names of current Credentialed mediators can be found at txmca.org ongoing, the identification of Credential holders will also be provided to you periodically through a supplemental insert to the *Benchbook*.

TMCA is a Texas nonprofit organization supported by the broadest possible representation of the interests of providers and consumers of mediation services in Texas. The TMCA Board of Directors is composed of five representatives appointed by leading nonprofit mediator organizations in Texas and four Board members elected by the five appointed representatives to represent relevant constituent interests in the field of mediation.

The nine Board positions are as follows:

- Texas Association of Mediators
- Center for Public Policy Dispute Resolution, The University of Texas School of Law
- Texas Dispute Resolution Centers Directors Council
- Association of Attorney Mediators
- State Bar of Texas, ADR Section
- Consumers
- Education
- Judiciary
- Trainers

More about TMCA, the members of the Board of Directors, credentialing of mediators, and a current list of Credentialed mediators, may be found at the Association's website: txmca.org.

**Judiciary Contact**

TMCA provides the following contact information to the Texas Judiciary as a resource for questions and information regarding mediation and TMCA:

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Relevant Statutes:

Texas Civil Practice and Remedies Code, Sections 154.001, 154.002, 154.003,
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# COURT-APPOINTED MEDIATOR QUALIFICATIONS AND MEDIATOR CREDENTIALING *by Judge John Coselli*

Texas law requires that all State Courts be active in promoting alternative dispute resolution, and authorizes the Courts to refer cases to mediation and appoint mediators. Issues regarding mediator qualifications and ethics have resulted in mediator credentialing in Texas in an effort to assist the Courts, attorneys, and the public in identifying mediators who have accomplished a meaningful level of mediator training and experience, and who have committed themselves to practice standards and rules of ethics for mediators enforceable through a grievance procedure.

This paper will provide Judges with the following important information about the significance of mediator credentialing to the work of the Courts in referring cases to mediation:

1. The Court's statutory obligation to make referrals to mediation.
2. The statutory criteria the Court must consider when appointing mediators.
3. The nature and significance of mediator credentialing to the Court in making referrals of cases to mediators.

**1. The Court's statutory obligation to make referrals to mediation.**

As the Texas legislature has required Courts to encourage the use of ADR, mediation has become a significant part of the resolution of litigation and the administration of justice in Texas. Judges have been appointing mediators and referring cases to mediation for many years. Although the Courts have broad discretion in the matter, the Texas legislature has established criteria in the Texas Alternative Dispute Resolution Procedures Act (Chapter 154 of the Civil Practices and Remedies Code) for the Court to consider in making such referrals and appointments.

Texas law provides that it is the policy of the State to promote ADR (Sec.154.002 of Title 7 of the Act), that the courts have responsibility to carry out the policy (Sec. 154.003 of the Act), that the Courts may refer cases to mediation and appoint mediators in implementing the policy (Sec. 154.021 of the Act), that mediators appointed by the Courts must be qualified (Sec. 154.052 and Sec. 154.053 of the Act), that the Court may set reasonable mediator fees (Sec. 154.054 of the Act), and that volunteer mediators appointed by the Court are immune from liability under certain circumstances when the Court appoints a mediator (Sec. 154.055 of the Act).

**2. The statutory criteria the Court must consider when appointing mediators.**

A mediator appointed by the Court must be impartial and qualified under the Act (Sec. 154.051 of the Act).

To be qualified, the mediator must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course approved by the statute, or have legal or other professional training or experience in mediation approved by the Court. To be qualified for appointment in a case involving the parent-child relationship, the mediator must have completed an additional 24 hours of training in the fields of family dynamics, child development and family law, including a minimum of four hours of family violence dynamics training developed in consultation with a statewide family violence advocacy organization, or have legal or other professional training or experience in mediation approved by the Court (Sec. 154.052 of the Act).

The statute also establishes standards for mediator conduct that the Court should attempt to protect by appointing only qualified mediators. Mediators must be neutral and impartial in the matter being mediated, must assist the parties in reaching a resolution of their dispute in an appropriate manner, may not compel or coerce the parties, must protect the parties' confidential information shared with the mediator, and must report child and elder abuse (Sec. 154.053 of the Act).

**3. The nature and significance of mediator credentialing to the Court in making referrals of cases to mediators.**

The State of Texas does not license, certify, or credential mediators. With the exception of the statutory criteria the Courts should use in appointing mediators, mediators and mediation in Texas are, for the most part, unregulated. The only meaningful mechanism for policing mediator conduct in cases where the Courts appoint mediators is the diligence of the Courts in appointing qualified mediators.

With an ever-increasing number of mediators seeking selection by the parties and appointment by the Courts to mediate cases, there has been a corresponding concern about the qualifications, experience, and reputation of mediators. It has generally been only by word of mouth, personal experience, or mediator advertising that attorneys, the Courts, and the litigants have been able to identify what appear to be qualified mediators.

Mediators appointed by the Courts have the authority of the appointing Court and the State of Texas to be trusted with and handle the parties' most sensitive and confidential information during mediation. The Court's appointment charges the mediator with the responsibility of neutral and impartial conduct and with the responsibility of conducting herself/himself in a manner that will not only protect the confidences of the parties, but in a manner that will protect and enhance the opportunity of the parties to resolve their litigation during the mediation process. The importance of the Court placing this authority only in qualified mediators cannot be overstated. When a Court appoints a mediator, the appointment carries with it a representation by the Court that the mediator is qualified for the appointment.

The trust and confidence of attorneys and their clients in the capabilities and ethics of Court-appointed mediators must be protected by the judiciary.

It is reasonable to believe that the level of a mediator's training and experience has a meaningful relationship to the mediator's qualifications. It is also reasonable to believe that mediators who adopt rules of ethics in their practice, and who are accountable for their conduct through a grievance process, would be perceived as having a greater level of commitment to their work and accountability for their conduct.

If mediators held credentials that were recognized in connection with specific levels of training, experience, and commitment, such credentials would be helpful to the Courts in identifying qualified mediators for appointment to cases referred to mediation informally or by Court order.

With the Texas legislature having mandated that the Courts should promote ADR, the Texas Supreme Court has expressed concern about the qualifications, conduct, and ethics of mediators who are appointed to mediate pending litigation. On May 7, 1996, the Supreme Court signed an order creating an Advisory Committee on court-connected mediation. In that Order, the Court expressed its intent by writing that:

> "The Court has determined that, at a minimum, ethical rules governing court-annexed mediations and mediators should be implemented and enforced. The Court is also considering whether some level of credentialing is necessary and appropriate."

The Advisory Committee made its recommendations to the Court that the Court adopt specific rules of ethics for mediator conduct and a procedure for enforcing compliance with the rules.

While the Court was considering the Advisory Committee's recommendations, the Court was also aware of the work of the Texas Mediator Credentialing Association (TMCA) in addressing mediator qualifications and ethics through credentialing. After meetings of TMCA representatives with Chief Justice Tom Phillips, Justice Priscilla Owens, and members of the Advisory Committee, the Court decided not to implement and enforce rules for mediator ethics or to credential mediators, but adopted as aspirational the Ethical Guidelines for Mediators published by the Alternative Dispute Resolution Section of the State Bar of Texas in 1994.

On June 13, 2005, the Texas Supreme Court wrote in Misc. Docket No. 05-9107 ("Approval of Ethical Guidelines for Mediators"):

> "Thus the Court promulgates and adopts the attached Ethical Guidelines for Mediators. These rules are aspirational and voluntary. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence."

The Ethical Guidelines for Mediators published by the Alternative Dispute Resolution Section of the State Bar of Texas in 1994 (those adopted by the Supreme Court) were adopted by the Texas Mediator Credentialing Association in 2003 as mandatory rules of ethics for mediators who are credentialed by TMCA. TMCA began issuing credentials to mediators in 2004.

The Texas Supreme Court amended its 2005 Ethical Guidelines for Mediators on April 11, 2011, in Misc. Docket No. 11-9062, by approving three changes recommended by the State Bar of Texas Alternative Dispute Resolution Section Council. The Texas Supreme Court reaffirmed the aspirational nature of the Ethical Guidelines. Those amendments are mandatory rules of ethics for mediators who are credentialed by TMCA.

TMCA is a Texas nonprofit, non-governmental corporation with a Sec. 501(c)(6) designation under the U.S. Internal Revenue Code that issues credentials to mediators who meet specific training, experience, and continuing education requirements. In addition to adhering to TMCA's Standards of Practice and Code of Ethics, Credentialed mediators must also agree to follow TMCA's Grievance Rules and Procedures.

TMCA is uniquely appropriate to issue credentials to mediators, in that its nine-member Board of Directors is composed of the representatives of major mediation organizations (the Texas Dispute Resolution Centers funded through the ADR Act, the Texas Association of Mediators, the ADR Section of the State Bar of Texas, the Association of Attorney Mediators, and The University of Texas School of Law's Center for Public Policy Dispute Resolution) who are appointed by each such organization to the Board, and representatives of education, consumers, mediator trainers, and the judiciary who are nominated and elected to the Board by the organizational members of the Board.

The work of TMCA represents an historic collaboration by mediators and their leaders to take professional responsibility for the quality of mediators in Texas, and to provide to the Courts and the public credentials through which they might identify mediators who have accomplished and maintain specific levels of training and experience identified with each Credential level.

The work of the Supreme Court and the Texas Mediator Credentialing Association has provided significant support to counsel, their clients, and the trial and appellate Courts in selecting and appointing qualified mediators. Although credentials do not ensure quality, the enhanced ability to identify and select qualified mediators improves and protects the public's confidence in mediator competency, mediator ethics, and the administration of justice through Court-ordered mediation. More information about TMCA may be found at txmca.org.

## Definitions

For the purposes of credential designation requirements, the following definitions shall apply:

1. Annual – a calendar year that begins on the first day of January.
2. 40-hour Basic Mediation Training – completion of a minimum of 40 classroom hours of training pursuant to Chapter 154.052 (a) Texas Civil Practice and Remedies Code. For applications submitted after July 1, 2004, all applicants must also attest that the applicant's training meets or exceeds the standards of the Texas Mediation Trainers Roundtable.
3. Conducted mediation – a process during which the mediator communicates with the parties to a conflict either together or separately to identify with each known party the issues in dispute and possible solutions, and to encourage and facilitate communication, reconciliation, settlement, and understanding between the parties.
4. Mediation or hours of mediation – refers to "conducted mediation" as defined above.
5. Observation of a mediation – that the person observed all of the work of a mediator during a conducted mediation without having any other role in that mediation.
6. Training or continuing education – any training or continuing education approved by TMCA. Continuing education requirements are set forth below in the chart and are more specifically defined in the "Continuing Education Criteria" section.

| Credential Designation | CREDENTIALED DISTINGUISHED MEDIATOR | CREDENTIALED ADVANCED MEDIATOR | CREDENTIALED MEDIATOR | CANDIDATE FOR CREDENTIALED MEDIATOR |
|---|---|---|---|---|
| Application Fee | $150 | $125 | $100 | $50 |
| Training | The applicant must meet all training requirements for Credentialed Mediator and, in addition, must have completed an additional **40 hours advanced course work** in mediation theory, practice, or skills building. | The applicant must meet all training requirements for Credentialed Mediator and, in addition, must have completed an additional **20 hours advanced course work** in mediation theory, practice, or skills building. | The applicant must meet all training requirements for Credentialed Mediator. | The applicant must have completed a minimum of 40 classroom hours of mediation training pursuant to Chapter 154.052 (a) Texas Civil Practice and Remedies Code and the standards of the Texas Mediator Trainers Roundtable. |
| Experience | The applicant must have conducted a minimum of **200 mediations** or mediated for a minimum of **1000 hours** after completion of the applicant's 40-hour basic mediation training. Such mediation experience may include observation of a Credentialed mediator in five (5) mediations or for 30 hours in mediation. | The applicant must have conducted a minimum of **50 mediations** or mediated for a minimum of **300 hours** after the applicant's 40-hour basic mediation training. Such mediation experience may include observation of a Credentialed mediator in five (5) mediations or for 30 hours in mediation. | The applicant must have conducted a minimum of **20 mediations** or mediated for a minimum of **125 hours** after completion of the applicant's 40-hour basic mediation training. Such mediation experience may include observation of a Credentialed mediator in five (5) mediations or for 30 hours in mediation. | After completion of the applicant's 40-hour basic mediation training, the applicant who has completed **less than 20 mediations** or mediated **less than 125 hours** is eligible for the designation of Candidate for Credentialed Mediator. |
| Adherence to TMCA Standards, Rules, and Procedures | Regardless of Credential designation, an applicant must affirm that the applicant has read, understands, and will adhere to the TMCA Standards of Practice and Code of Ethics, as well as the TMCA Grievance Rules and Procedures. | | | |

**TMCA CREDENTIAL RENEWAL/MAINTENANCE**
**To maintain a TMCA Credential, a Credential holder must meet the following requirements on an annual basis:**

| Credential Designation | CREDENTIALED DISTINGUISHED MEDIATOR | CREDENTIALED ADVANCED MEDIATOR | CREDENTIALED MEDIATOR | CANDIDATE FOR CREDENTIALED MEDIATOR |
|---|---|---|---|---|
| Renewal Fee | $150 | $125 | $100 | $50 |
| Annual Experience | Conduct a minimum of **25 mediations** or mediate for a minimum of **150 hours** each year. | Conduct a minimum of **10 mediations** or mediate for a minimum of **60 hours** each year. | Conduct a minimum of **three (3) mediations** or mediate for a minimum of **15 hours** each year. | N/A |
| Continuing Education | For all designations, a Credential holder must complete **15 hours of continuing education** each year of which at least 10 must relate to the practice of mediation. Of such hours, at least three (3) must consist of mediation ethics, up to four (4) may be self-study, up to five (5) may be as an instructor of mediation training, and up to five (5) may consist of substantive courses which include education in a subject matter area involved in the cases mediated. See "Continuing Education Criteria" below for details. | | | |
| Other | Make him/herself available to the courts and/or to the public to conduct five (5) pro bono mediations each year. | Make him/herself available to the courts and/or to the public to conduct two (2) pro bono mediations each year. | N/A | Candidate status may be maintained for a maximum of four (4) years to allow the candidate time to complete the requirements for TMCA Credentialed Mediator. |

## Volunteer Mediator

A volunteer mediator is defined as a pro bono mediator who receives NO compensation or consideration of any kind in the form of, but not limited to, fees, salary, trading, barter, gift, exchange of goods or services, benefits, perquisites, tokens, or cash. A mediator that meets this definition and signs the certification as a volunteer mediator is entitled to pay a reduced application fee of $25.00 and reduced renewal fees of $25 for any Credential designation.

## Continuing Education Criteria

For purposes of TMCA continuing education, the definition of mediation is a process during which the mediator communicates with the parties to a conflict either together or separately to identify with each known party the issues in dispute and possible solutions, and to encourage and facilitate communication, reconciliation, settlement, and understanding between the parties.

A minimum of 15 continuing education hours is required annually to renew a TMCA Credential.

At least 10 of the 15 annual continuing education hours required must relate to the practice of mediation, including the study of mediation, negotiation, conflict management techniques or theory, or conflict-related topics from communications, psychology, or other related disciplines. Of such hours, at least three (3) must consist of ethics topics, up to four (4) may be self-study, and up to five (5) may be as an instructor of mediation training. Arbitration does not count as a mediation-related topic.

Up to five (5) of the 15 annual continuing education hours required may consist of substantive courses which include education in a subject matter area involved in the cases mediated. The subject matter education must be provided through an organization recognized by practitioners in the subject matter area for providing such training and that issues certificates of completion of the training.

In a course that includes a mediation component, only the portion of the course relating the topic specifically to mediation is to be counted as continuing education hours or hours as an instructor of mediation training.

As an instructor of mediation training, such training:

- must have an interactive component
- must have student involvement—making presentations, writing papers, etc.
- cannot involve only listening to presentations; the participants must be engaged in the course in some way

One hour of training or continuing education must consist of 60 minutes.

The initial 40-Hour Basic Mediation Training taken to satisfy the training required to become Credentialed cannot also count as continuing education.

*Continuing Education:*

- Presentations at conferences, professional association meetings, and symposiums, will count to the extent they are related to mediation.
- Conference sessions related to ethics count only if the mediator attends that session.
- Webcasts and web conferences related to mediation count as continuing education.
- Self-study hours may be acquired by reading mediation-related content or observing videos, listening to audio tapes, or researching and writing articles related to the practice of mediation.
- For hours as an instructor of mediation training, the mediator may only count hours he/she is actively making presentations or coaching practice mediations.

**Policy on Applicants for a TMCA Credential Who Currently Reside Outside Texas:**

TMCA encourages all mediators who will or do mediate in Texas to become Credentialed. An applicant seeking a Credential from TMCA and who currently resides outside Texas must meet all the current requirements for the designation for which he or she is applying. In addition, out-of-state residents must also meet at least one of the following criteria in order to be granted a Credential:

1. During the past year have conducted at least two (2) mediations in Texas and plan to continue conducting mediations in Texas though may have no plans to move to Texas; or

2. Plan to move to Texas within the next year and can show some evidence of the planned move and plan to conduct mediations in Texas; or

3. Have an appointment or contract to mediate one or more cases in Texas and can provide substantiating documentation.

# PROTECTION OF THE QUALITY OF MEDIATION THROUGH ENFORCEMENT OF ETHICAL STANDARDS

The quality of mediation in Texas is promoted and protected through the issuance of Texas Mediator Credentialing Association ("TMCA") credentials to mediators who meet training and experience requirements. All mediators who are issued a TMCA credential must comply with the "Texas Mediator Credentialing Association Standards of Practice and Code of Ethics" ("TMCA Ethical Standards") and must submit to a grievance procedure to ensure such compliance. The TMCA Ethical Standards are derived from the Texas Supreme Court's "Ethical Guidelines for Mediators" (the "Guidelines") originally adopted on June 13, 2005, and amended as of June 1, 2011. The TMCA Ethical Standards are almost identical to the Texas Supreme Court's Guidelines; generally, the word "should" (permissive) in the Guidelines is replaced with the word "shall" (mandatory) in the TMCA Ethical Standards. The TMCA Ethical Standards and the grievance procedure may be found at www.txmca.org.

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 05- 9107

APPROVAL OF ETHICAL GUIDELINES FOR MEDIATORS

The Supreme Court of Texas has long recognized the need for oversight of the quality of mediation in Texas. During the initial public debate of the issue, some mediation practitioners proposed adopting ethical rules of mediators to enhance the quality of Texas mediation and mediators. Others advocated mediation licensing or credentialing.

The Court determined that, at minimum, ethical rules should be implemented and enforced. Thus, the Court created the Advisory Committee on Court-Annexed Mediations to formulate mediation ethics rules that address, among other things, the avoidance and disclosure of conflicts of interest and the timely disclosure of fees.[1] The Court also instructed the Advisory Committee to study whether further oversight, such as licensing or credentialing, was warranted.

The Committee began its work by gathering relevant materials from various organizations throughout the country, including organizations unrelated to the practice of law and the justice system. These voluminous materials were reviewed by individual members and subcommittees for presentation to the full Committee. The Committee met formally numerous times, and, as a result of this work, the Committee proposed several recommendations to the Court.

Ultimately, the Committee concluded that there currently was no consensus within the mediation profession in Texas as to whether the Supreme Court should become involved in credentialing and/or registration of mediators. Therefore, the committee

[1] Order Creating Advisory Committee on Court-Annexed Mediations, Misc. Docket No. 96-9125 (May 7, 1996). Members of the Committee were Tony Alvarado, Karl Bayer, Gary Condra, Herb Cook, Hon. Suzanne Covington, Clause Ducloux, Suzanne Duvall, John Estes, Hon. Frank Evans, Hon. Charles Gonzalez, Carol Hoffman, Dr. Lou Lasher, Bill Low, Hon. Tom McDonald, Hon. Margaret Mirabal, Lanelle Montgomery, William M. Morris, Hon. Jay Patterson, Ross Rommel, Michael J. Schless, Maxel "Bud" Silverberg, Rena Silverberg, Sid Stahl, Bruce Stratton, and Michael Wolf.

recommended that the Court take no action with regard to credentialing.

The Committee, however, concluded that there currently is consensus within the Texas mediation profession that the Court should promulgate ethical rules. Therefore, the committee recommended the Court adopt as its own aspirational guidelines those guidelines that the Alternative Dispute Resolution section of the State Bar of Texas has adopted.

The Court accepts this recommendation. The Court is committed to ensuring the continued quality of mediators and mediation services in Texas. Thus, the Court promulgates and adopts the attached Ethical Guidelines for Mediators.

These rules are aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

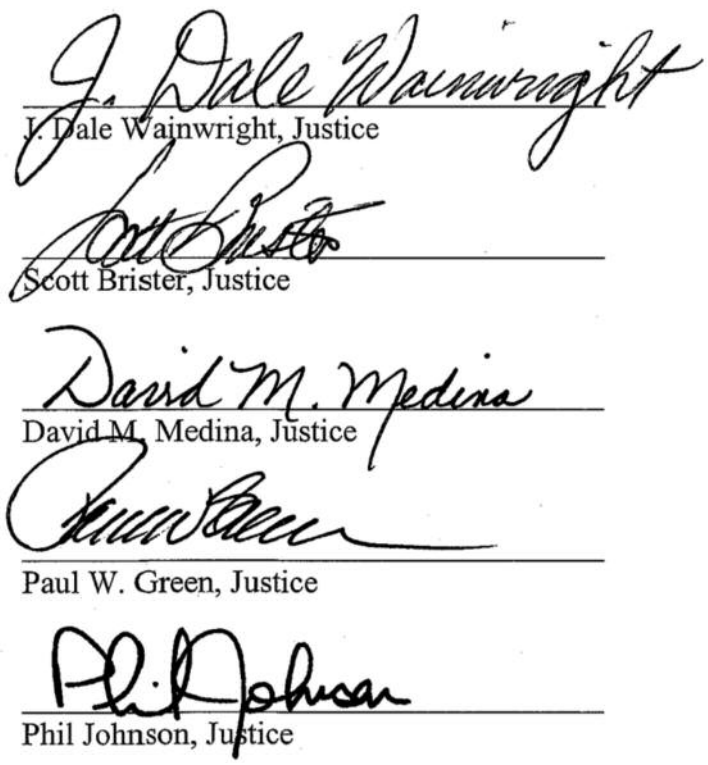
Moreover, counsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court. They are subject to the Texas Disciplinary Rules for Lawyers and any local rules or orders of the court regarding the mediation of pending cases. They should aspire during mediation to follow The Texas Lawyer's Creed---A Mandate for Professionalism. Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation.

In Chambers, this 15th day of June, 2005.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice



J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

*Names and signatures are reproduced from an original document.*

## PREAMBLE

These Ethical Guidelines are intended to promote public confidence in the mediation process and to be a general guide for mediator conduct. They are not intended to be disciplinary rules or a code of conduct. Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly. These Ethical Guidelines are intended to apply to mediators conducting mediations in connection with all civil, criminal, administrative and appellate matters, whether the mediation is pre-suit or court-annexed and whether the mediation is court-ordered or voluntary.

## GUIDELINES

**1. Mediation Defined.** Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

> **Comment.** A mediator's obligation is to assist the parties in reaching a voluntary settlement. The mediator should not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves.

**2. Mediator Conduct.** A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.

> **Comment (a).** A mediator should not use information obtained during the mediation for personal gain or advantage.
> **Comment (b).** The interests of the parties should always be placed above the personal interests of the mediator.
> **Comment (c).** A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.
> **Comment (d).** Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.
> **Comment (e).** A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

**3. Mediation Costs.** As early as practical, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator should perform mediation services at a reduced fee or without compensation.

> **Comment (a).** A mediator should avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.
> **Comment (b).** If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

**4. Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of

affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

**Comment (a).** A mediator should withdraw from a mediation if it is inappropriate to serve.
**Comment (b).** If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

**5. Mediator Qualifications.** A mediator should inform the participants of the mediator's qualifications and experience.

**Comment (a).** A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

**6. The Mediation Process.** A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.

**Comment (a).** A mediator should inform the parties about the mediation process no later than the opening session.
**Comment (b).** At a minimum, the mediator should inform the parties of the following: (1) the mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend.); (2) the mediation is informal (There are no court reporters present, no record is made of the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.); and (3) the mediation is confidential to the extent provided by law. (See, e.g., §§154.053 and 154.073, Tex. Civ. Prac. & Rem. Code.)

**7. Convening the Mediation.** Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator that they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

**Comment.** A mediator should not convene the mediation if the mediator has reason to believe that a *pro se* party fails to understand that the mediator is not providing legal representation for the *pro se* party. In connection with *pro se* parties, see also Guideline #9, 11 and 13 and associated comments below.

**8. Confidentiality.** A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.

**Comment (a).** A mediator should not permit recordings or transcripts to be made of mediation proceedings.
**Comment (b).** A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.
**Comment (c).** Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impasse, or that the mediation was either recessed or rescheduled.

**Comment (d).** In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties that disclosure is required and will be made.

**9. Impartiality.** A mediator should be impartial toward all parties.

Comment. If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

**10. Disclosure and Exchange of Information.** A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

**11. Professional Advice.** A mediator should not give legal or other professional advice to the parties.

**Comment (a).** In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process.
**Comment (b).** A mediator should explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

**12. No Judicial Action Taken.** A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.

**Comment.** It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator has had communications with one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem, or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believes nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity.

**13. Termination of Mediation Session.** A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

**14. Agreements in Writing.** A mediator should encourage the parties to reduce all settlement agreements to writing.

**15. Mediator's Relationship with the Judiciary.** A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.

Misc. Docket No. 05-**9107**

# IN THE SUPREME COURT OF TEXAS

**Misc. Docket No. 11- 9062**

**APPROVAL OF AMENDMENTS TO THE ETHICAL GUIDELINES FOR MEDIATORS**

ORDERED that:

1. The Supreme Court of Texas adopted the Ethical Guidelines for Mediators by Order dated June 13, 2005, in Misc. Docket No. 05-9107. The State Bar of Texas Alternative Dispute Resolution Section Council has proposed three changes to the Ethical Guidelines. The proposals were published for public comment, approved by the ADR Section Council, and presented to the Court for approval.

2. The following amendments to the Ethical Guidelines for Mediators are hereby approved:

   Section 2. Mediator Conduct.
   Comment (f). A mediator should not simultaneously conduct more than one mediation session unless all parties agree to do so.

   Section 4. Disclosure of Possible Conflicts.
   Prior to commencing the mediation, the mediator should make full disclosure of any interest the mediator has in the subject matter of the dispute and of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality.

   Section 10. Disclosure and Exchange of Information.
   Comment. A mediator should not knowingly misrepresent any material fact or circumstance in the course of mediation.

2. The Ethical Guidelines for Mediators are aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon

reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

3. These changes take effect June 1, 2011.

SIGNED AND ENTERED, this 11th day of April, 2011.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Dale Wainwright, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Eva M. Guzman, Justice

Debra H. Lehrmann, Justice





*Names and signatures are reproduced from an original document.*

## PREAMBLE

These Ethical Guidelines are intended to promote public confidence in the mediation process and to be a general guide for mediator conduct. They are not intended to be disciplinary rules or a code of conduct. Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly. These Ethical Guidelines are intended to apply to mediators conducting mediations in connection with all civil, criminal, administrative and appellate matters, whether the mediation is pre-suit or court-annexed and whether the mediation is court-ordered or voluntary.

## GUIDELINES

**1. Mediation Defined.** Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

> **Comment.** A mediator's obligation is to assist the parties in reaching a voluntary settlement. The mediator should not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves.

**2. Mediator Conduct.** A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.

> **Comment (a).** A mediator should not use information obtained during the mediation for personal gain or advantage.
>
> **Comment (b).** The interests of the parties should always be placed above the personal interests of the mediator.
>
> **Comment (c).** A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.
>
> **Comment (d).** Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.
>
> **Comment (e).** A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.
>
> **Comment (f).** A mediator should not simultaneously conduct more than one mediation session unless all parties agree to do so.

**3. Mediation Costs.** As early as practical, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator should perform mediation services at a reduced fee or without compensation.

> **Comment (a).** A mediator should avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.
>
> **Comment (b).** If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

**4. Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator should make full disclosure of any interest the mediator has in the subject matter of the dispute and of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

**Comment (a).** A mediator should withdraw from a mediation if it is inappropriate to serve.

**Comment (b).** If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

**5. Mediator Qualifications.** A mediator should inform the participants of the mediator's qualifications and experience.

**Comment (a).** A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

**6. The Mediation Process.** A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.

**Comment (a).** A mediator should inform the parties about the mediation process no later than the opening session.

**Comment (b).** At a minimum, the mediator should inform the parties of the following: (1) the mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend.); (2) the mediation is informal (There are no court reporters present, no record is made of the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.); and (3) the mediation is confidential to the extent provided by law. (See, e.g., §§154.053 and 154.073, Tex. Civ. Prac. & Rem. Code.)

**7. Convening the Mediation.** Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator that they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

**Comment.** A mediator should not convene the mediation if the mediator has reason to believe that a *pro se* party fails to understand that the mediator is not providing legal representation for the *pro se* party. In connection with *pro se* parties, see also Guideline #9, 11 and 13 and associated comments below.

**8. Confidentiality.** A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.

**Comment (a).** A mediator should not permit recordings or transcripts to be made of mediation proceedings.

**Comment (b).** A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.

**Comment (c).** Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impasse, or that the mediation was either recessed or rescheduled.

**Comment (d).** In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties that disclosure is required and will be made.

9. **Impartiality.** A mediator should be impartial toward all parties.

**Comment.** If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

10. **Disclosure and Exchange of Information.** A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

**Comment.** A mediator should not knowingly misrepresent any material fact or circumstance in the course of mediation.

11. **Professional Advice.** A mediator should not give legal or other professional advice to the parties.

**Comment (a).** In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process.

**Comment (b).** A mediator should explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

12. **No Judicial Action Taken.** A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.

**Comment.** It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator has had communications with one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem, or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believes nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity.

13. **Termination of Mediation Session.** A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

14. **Agreements in Writing.** A mediator should encourage the parties to reduce all settlement agreements to writing.

15. **Mediator's Relationship with the Judiciary.** A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.

CIVIL PRACTICE AND REMEDIES CODE

TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION

CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 154.001. DEFINITIONS. In this chapter:

(1) "Court" includes an appellate court, district court, constitutional county court, statutory county court, family law court, probate court, municipal court, or justice of the peace court.

(2) "Dispute resolution organization" means a private profit or nonprofit corporation, political subdivision, or public corporation, or a combination of these, that offers alternative dispute resolution services to the public.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Sec. 154.002. POLICY. It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Sec. 154.003. RESPONSIBILITY OF COURTS AND COURT ADMINISTRATORS. It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

SUBCHAPTER B. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Sec. 154.021. REFERRAL OF PENDING DISPUTES FOR ALTERNATIVE DISPUTE RESOLUTION PROCEDURE. (a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:

(1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);

(2) a dispute resolution organization; or

(3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens'

disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

(b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.

(c) Except as provided by agreement of the parties, a court may not order mediation in an action that is subject to the Federal Arbitration Act (9 U.S.C. Sections 1-16).

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Amended by: Acts 2009, 81st Leg., R.S., Ch. 621, Sec. 1, eff. June 19, 2009.

Sec. 154.022. NOTIFICATION AND OBJECTION. (a) If a court determines that a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.

(b) Any party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral.

(c) If the court finds that there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Sec. 154.023. MEDIATION. (a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

(b) A mediator may not impose his own judgment on the issues for that of the parties.

(c) Mediation includes victim-offender mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987. Amended by Acts 2001, 77th Leg., ch. 1034, Sec. 12, eff. Sept. 1, 2001.

Sec. 154.027. ARBITRATION. (a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award.

(b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

SUBCHAPTER C. IMPARTIAL THIRD PARTIES

Sec. 154.051. APPOINTMENT OF IMPARTIAL THIRD PARTIES. (a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under Section 154.021, the court may appoint an impartial third party to facilitate the procedure.

(b) The court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter.

(c) The court may appoint more than one third party under this section.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Sec. 154.052. QUALIFICATIONS OF IMPARTIAL THIRD PARTY. (a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.

(b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law.

(c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Sec. 154.053. STANDARDS AND DUTIES OF IMPARTIAL THIRD PARTIES. (a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987. Amended by Acts 1999, 76th Leg., ch. 1150, Sec. 29, eff. Sept. 1, 1999.

Sec. 154.054. COMPENSATION OF IMPARTIAL THIRD PARTIES. (a) The court may set a reasonable fee for the services of an impartial third party appointed under this subchapter.

(b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Sec. 154.055. QUALIFIED IMMUNITY OF IMPARTIAL THIRD PARTIES. (a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

(b) This section neither applies to nor is it intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty.

Added by Acts 1993, 73rd Leg., ch. 875, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER D. MISCELLANEOUS PROVISIONS

Sec. 154.071. EFFECT OF WRITTEN SETTLEMENT AGREEMENT. (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.

(c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987.

Sec. 154.073. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS. (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987. Amended by Acts 1999, 76th Leg., ch. 1150, Sec. 30, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1352, Sec. 6, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1034, Sec. 13, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1420, Sec. 21.001(6), 21.002(3), eff. Sept. 1, 2001.

FAMILY CODE
TITLE 1. THE MARRIAGE RELATIONSHIP
SUBTITLE C. DISSOLUTION OF MARRIAGE
CHAPTER 6. SUIT FOR DISSOLUTION OF MARRIAGE
SUBCHAPTER G. ALTERNATIVE DISPUTE RESOLUTION

Sec. 6.601. ARBITRATION PROCEDURES. (a) On written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must state whether the arbitration is binding or nonbinding.

(b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award.

Added by Acts 1997, 75th Leg., ch. 7, Sec. 1, eff. April 17, 1997.

Sec. 6.602. MEDIATION PROCEDURES. (a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.

(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.

(d) A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of a marriage to mediation on the basis of family violence having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation.

Added by Acts 1997, 75th Leg., ch. 7, Sec. 1, eff. April 17, 1997. Amended by Acts 1999, 76th Leg., ch. 178, Sec. 2, eff. Aug. 30, 1999; Acts 1999, 76th Leg., ch. 1351, Sec. 1, eff. Sept. 1, 1999.

Sec. 6.604. INFORMAL SETTLEMENT CONFERENCE. (a) The parties to a suit for dissolution of a marriage may agree to one or more informal settlement conferences and may agree that the settlement conferences may be conducted with or without the presence of the parties' attorneys, if any.

(b) A written settlement agreement reached at an informal settlement conference is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type or in 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 written settlement agreement meets the requirements of Subsection (b), a party is entitled to judgment on the settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(d) If the court finds that the terms of the written informal settlement agreement are just and right, those terms are binding on the court. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.

(e) If the court finds that the terms of the written informal settlement agreement are not just and right, the court may request the parties to submit a revised agreement or set the case for a contested hearing.

Added by Acts 2005, 79th Leg., Ch. 477, Sec. 3, eff. September 1, 2005.

FAMILY CODE
TITLE 5. THE PARENT-CHILD RELATIONSHIP AND THE SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

SUBTITLE B. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP
CHAPTER 153. CONSERVATORSHIP, POSSESSION, AND ACCESS
SUBCHAPTER A. GENERAL PROVISIONS

Sec. 153.0071. ALTERNATE DISPUTE RESOLUTION PROCEDURES. (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.

(b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child.

The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.

(c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.

(d) 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.

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

(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.

(f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. This subsection does not apply to suits filed under Chapter 262.

(g) The provisions for confidentiality of alternative dispute resolution procedures under Chapter 154, Civil Practice and Remedies Code, apply equally to the work of a parenting coordinator, as defined by Section 153.601, and to the parties and any other person who participates in the parenting coordination. This subsection does not affect the duty of a person to report abuse or neglect under Section 261.101.

Added by Acts 1995, 74th Leg., ch. 751, Sec. 27, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 937, Sec. 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 178, Sec. 7, eff. Aug. 30, 1999; Acts 1999, 76th Leg., ch. 1351, Sec. 2, eff. Sept. 1, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 916, Sec. 7, eff. June 18, 2005.

Acts 2007, 80th Leg., R.S., Ch. 1181, Sec. 2, eff. September 1, 2007.

Note: Section 154.052 (b) has been amended effective September 1, 2017, as follows:

(b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law, **including a minimum of four hours of family violence dynamics training developed in consultation with a statewide family violence advocacy organization.**" (emphasis added)

# COURT APPOINTMENT PROCEDURES AND REPORTING REQUIREMENTS

The 84th Texas Legislature passed two bills providing procedures and reporting requirements for court appointments, including the appointment of mediators. Senate Bill 1876 added Chapter 37 to the Government Code and mandates procedures for courts to follow when making appointments, and Senate Bill 1369 added reporting requirements regarding the appointment and payment of persons covered under Senate Bill 1876.

Among other things, the legislation also requires the registration of mediators, the posting of lists of mediators, appointment requirements, reporting of certain appointments to the Office of Court Administration, and posting of certain appointment information by the courts to which the legislation applies.

The contents of the legislation are too voluminous to copy here. Therefore, the courts are referred to the legislation for guidance in making mediator and other appointments.

## Obligation to Mediate in Good Faith

*Compiled by Walter Wright*[1]

*Decker v. Lindsay*, 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, no writ). A trial court ordered parties to "proceed [to mediation] in a good faith effort to try to resolve [the] case." *Id*. at 248. The mediation rules attached to the court's order also required the parties to "commit to participate in the proceedings in good faith with the intention to settle, if at all possible." *Id*. at 249. The Deckers objected to the order, but the trial court overruled their objection. The appellate court held that Section 154.021 of the Texas Civil Practice and Remedies Code authorizes a trial court to order parties to mediation, but it does not authorize the court to require the parties to mediate in good faith.

*Gleason v. Lawson*, 850 S.W.2d 714 (Tex. App.—Corpus Christi 1993, no writ). The trial court assessed court costs against Gleason for her refusal to enter into good faith settlement negotiations, but the court had never ordered Gleason to negotiate. The court of appeals held the trial court could not use failure to negotiate as a reason for assessing court costs if the court had never ordered the parties to mediate or enter into other settlement negotiations.

*Hansen v. Sullivan*, 886 S.W.2d 467 (Tex. App.—Houston [1st Dist.] 1994, no writ). The plaintiff in a medical malpractice case filed a motion to require the parties to mediate, which the trial judge (Sullivan) granted. Hansen did not object to the mediation order. He claimed he attended mediation for over three hours, but the parties failed to reach an agreement and the mediator declared an impasse. Following the mediation, the plaintiff requested sanctions against Hansen for refusing to negotiate in good faith, which the trial court granted. The court of appeals found that Hansen had attended mediation and, citing *Decker*, held the trial court could not sanction Hansen for failing to negotiate in good faith.

*Texas Department of Transportation v. Pirtle*, 977 S.W.2d 657 (Tex. App.—Fort Worth 1998, pet. denied). The trial court ordered the parties to mediation. The Texas Department of Transportation, citing its policy of not settling disputed liability cases, did not object to the order, it did attend mediation, but it refused to negotiate. The trial court assessed court costs against the agency for failing to negotiate in good faith. Distinguishing this case's facts from the facts of *Decker*, *Gleason*, and *Hansen*, the court of appeals held, "it is not an abuse of discretion for a trial court to assess costs when a party does not file a written objection to a court's order to mediate, but nevertheless refuses to mediate in good faith." *Id*. at 658.

*Texas Parks and Wildlife Department v. Davis*, 988 S.W.2d 370 (Tex. App.—Austin 1999, no pet.). The trial court awarded court costs against the Texas Parks and Wildlife Department for failure to negotiate in good faith during court-ordered mediation. The agency had objected to the trial court's mediation order, but the court had overruled the objection. The appellate court found that the agency had attended mediation and had made an offer, so it could not be said the agency had not participated in mediation. The appellate court reversed the award of court costs against the agency.

*In re Daley*, 29 S.W.3d 915 (Tex. App.—Beaumont 2000, orig. proceeding). Daley, a representative of a non-party insurance company, admitted he was a mediation participant who attended on behalf of his employer. He had not objected to a mediation order that required participants to remain in attendance until the mediator declared the mediation concluded. He left the mediation before the mediator made such a declaration. The appellate court held Daley had voluntarily submitted himself to the trial court's jurisdiction in its administrative regulation of the mediation. Therefore, an objection to the court's order

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requiring attendance at the mediation, which Daley did not file until after the mediation took place, was to no avail.

*In re Acceptance Insurance Company*, 33 S.W. 3d 443 (Tex. App.—Fort Worth 2000, orig. proceeding). During the trial of a case involving personal injuries, the judge ordered a second mediation of the case; the order required the parties to negotiate with each other in good faith. The parties attended the second mediation, which did not result in a settlement agreement, then returned to trial. Following the trial, and over the strong objections of Acceptance Insurance Company (hereinafter "Acceptance"), the judge allowed an inquiry into whether Acceptance had negotiated in good faith during the second mediation. Conditionally granting the insurance company's request for mandamus relief, the Fort Worth Court of Appeals declared the trial court's order requiring a second mediation was void to the extent it required the parties to negotiate in good faith; therefore, the same court abused its discretion when it permitted an inquiry into whether the insurance company negotiated in good faith at the second mediation.

## Confidentiality

*Compiled by Sid Stahl[2] and Walter A. Wright*

*In re Acceptance Insurance Company*, 33 S.W. 3d 443 (Tex. App.—Fort Worth 2000, orig. proceeding). During the trial of a case involving personal injuries, the judge ordered a second mediation of the case. The order required Acceptance Insurance Company ("Acceptance") to send at least one representative to the mediation who had unlimited settlement authority. The parties and their representatives attended the second mediation, which did not result in a settlement agreement, then returned to trial. Following the trial, and over the strong objections of Acceptance, the judge allowed an inquiry into whether Acceptance complied with the court's order respecting the second mediation. Conditionally granting the insurance company's request for mandamus relief, the Fort Worth Court of Appeals declared the trial court violated Section 154.073 of the Texas Civil Practice and Remedies Code (hereinafter, "ADR Procedures Act") and abused its discretion when it required an Acceptance representative, who did have full settlement authority, to testify about her conduct at the mediation.

*In re Learjet, Inc.,* 59 S.W.3d 842 (Tex. App.—Texarkana 2001, orig. proceeding). Raytheon, a Learjet customer, sued Learjet for alleged failure to manufacture and deliver an aircraft in accordance with contract specifications. In preparation for a mediation, Learjet and its attorney prepared videotaped interviews of three of Learjet's current and former employees regarding the manufacture of the aircraft and its cooling system; Learjet had designated all three as testifying expert witnesses. Learjet later showed edited versions of the interviews during the mediation. Following the mediation, which did not result in a settlement, Raytheon requested the edited and unedited videotapes, but Learjet refused because it believed mediation confidentiality protected the videotapes under Section 154.073(a) of the ADR Procedures Act. The trial court ordered production of the videotapes, and Learjet requested mandamus relief from the Texarkana Court of Appeals. The appellate court denied the mandamus relief, finding the videotapes were "otherwise admissible" evidence explicitly excluded from confidentiality protection under Section 154.073(c) of the ADR Procedures Act. The court reasoned that Rule 192.3(e) of the Texas Rules of Civil Procedure requires a party to disclose, among other things, its testifying experts' mental impressions and opinions in connection with a case. Because the videotapes contained the type of information discoverable under the rule, Learjet could not protect them, even though it had prepared them for mediation and showed them during the mediation session.

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*Avary v. Bank of America, N. A.*, 72 S.W.3d 779 (Tex. App.—Dallas 2002, pet. denied). Avary, guardian of the estates of two minor children, sued Bank of America, N.A. for breach of fiduciary duty as executor of a decedent's estate, negligence, fraud, and conspiracy, all of which allegedly occurred during a court-ordered mediation that resulted in a settlement agreement. Avary did not seek to set aside the mediated settlement agreement, but did allege that the bank had committed a new, independent tort during the mediation, for which she sought relief. The bank moved for a summary judgment against Avary, contending that all communications and other behavior that could support her tort claims occurred during the mediation and were thus protected by the confidentiality provisions of Section 154.073 of the ADR Procedures Act. The Dallas Court of Appeals focused on Section 154.073(e), which provides an exception when there is a conflict between the confidentiality provisions of the ADR Procedures Act and "other legal requirements for disclosure." The appellate court found that the trial court judge appropriately conducted an in *camera* hearing to determine whether the mediation communications should be disclosed, as there was a conflict between the ADR Procedure Act's broad confidentiality protections and the bank's duty of disclosure of material information to estate beneficiaries. The appellate court also determined that the trial judge correctly decided to allow limited discovery about what occurred during the mediation because he limited discovery to matters related to Avery's claims of an independent tort that occurred during the mediation and did not allow discovery that would permit Avery to reopen the issues that were the subject matter of the mediation.

*Alford v. Bryant*, 137 S.W.3d 916 (Tex. App.—Dallas 2004, pet. denied). The owner of a residence filed suit against her roofing contractor, and the case settled at mediation. Following the mediation, the client sued her attorney for legal malpractice, alleging the attorney had failed to disclose all the risks and benefits of settlement during the settlement negotiations. At the trial of the malpractice case, the attorney attempted to call the mediator to testify that the attorney had disclosed the risks and benefits of settlement during the mediation. The client objected to the mediator's testimony based upon Section 154.053 of the ADR Procedures Act, and the trial court sustained the objection. The Dallas Court of Appeals ruled that the mediator's testimony should have been allowed under the circumstances. The appellate court first noted that, as in *Avary*, the client's case did not attempt to set aside the mediated settlement agreement; rather, the malpractice case involved an independent tort that allegedly arose during mediation. The appellate court also found that the client's attempt to invoke mediation confidentiality in the malpractice case was an "offensive use" of confidentiality protections. Without deciding that the ADR Procedures Act creates a mediation privilege like the attorney-client privilege, the appellate court decided the doctrine of offensive use should apply to the confidentiality provisions of the ADR Procedures Act. Just as a client can waive attorney-client privilege, a party to mediation can waive mediation confidentiality. Applying the doctrine of offensive use to the facts of this case, the court ruled that the client had waived her right to confidentiality protections because (1) she sought affirmative relief from her former attorney; (2) the information the attorney sought from the mediator, if believed by a fact finder, would likely determine the outcome of the malpractice suit; and (3) the mediator's testimony was the primary means by which the attorney could obtain and present unbiased and critical evidence to the fact finder.

*In re Empire Pipeline Corporation*, 323 S.W.3d 308 (Tex. App.—Dallas 2010, orig. proceeding). Gunter sued Empire Pipeline Corporation and related entities (collectively, "Empire") for breach of a contract related to oil and gas exploration. The parties attended mediation and signed a mediated settlement

agreement. Approximately two months after the mediation, Gunter sought to set aside the agreement, alleging it was invalid and unenforceable. The trial court enforced the agreement, but the Dallas Court of Appeals reversed that decision because the trial court had enforced the agreement without proper pleadings, proceedings, or proof. While the appeal was pending, Gunter filed a separate suit requesting a declaratory judgment that Empire's tender of performance under the mediated settlement agreement was inadequate. In both the original, remanded suit and the declaratory judgment action, Gunter issued discovery requests that would have required Empire and its representatives to produce information and provide deposition testimony related to what occurred during the mediation. The trial court ordered Empire to comply with most of Gunter's discovery requests. Following a consolidation of the two cases, the Dallas Court of Appeals conditionally granted Empire's request for mandamus relief, finding the facts of this case were distinguishable from the facts of *Avary*, *Alford*, and *Knapp*, in that Gunter's discovery requests went directly to the subject matter of the original suit, did not involve any independent causes of action, and did not invoke any other exceptions to mediation confidentiality.

*Hydroscience Technologies, Inc. v. Hydroscience, Inc.*, 401 S.W.3d 783 (Tex. App.—Dallas 2013, pet. denied). In this case, one party to a mediation alleged that a mediated settlement agreement omitted an important term of the oral agreement the parties reached during mediation. After the parties signed the settlement agreement, they entered into a consent judgment that attached the agreement and adopted it as the judgment in the case. Years after the trial court signed the consent judgment, the party alleging an important omission from the settlement agreement sought an order requiring the other party to transfer stock to it as required under the term allegedly omitted from the agreement. As evidence that a term had been omitted, the party alleging the omission proposed to offer testimony about oral communications that took place during the mediation. The Dallas Court of Appeals, relying on its reasoning in the *Empire Pipeline* case, reasoned that allowing such testimony would undermine the purpose of mediation confidentiality, and it refused to allow the testimony.

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Note: This compilation of significant mediation case law is not comprehensive. It addresses the two most commonly reported areas of dispute in mediation. Other collections of mediation case law include (1) "The Law of Mediation in Texas" through 2006, prepared by L. Wayne Scott, Professor of Law and Director of Conflict Resolution Studies, St. Mary's University School of Law, which may be found through Westlaw at 37 STMLJ 325 or 37 St. Mary's L.J. 325 and (2) an excellent article addressing "Twenty Years of Confidentiality Under the Texas ADR Act" prepared by Brian Shannon, Charles B. Thornton Professor of Law (since 1988), Texas Tech University Faculty Athletics Representative and Former Associate Dean, Academic Affairs, Texas Tech University School of Law, which may be found in the State Bar of Texas Alternative Dispute Resolution Section newsletter "Alternative Resolutions" Special Edition 2007, Vol. 16, No 3-4, pp. 26-30, 53, or at http://www.texasadr.org/Portals/0/Newsletters/2007_special_edition2.pdf

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**MEDIATION ORDER**

This case is appropriate for mediation pursuant to Section 154.001 et seq. of the Texas Civil Practice and Remedies Code. (NAMED MEDIATOR) is appointed mediator in the above case and all counsel are directed to contact mediator to arrange the logistics of mediation within 7 days from the date of this Order. Any objection to this Order must be filed and served upon all parties and the mediator, and a hearing must be requested, within 10 days from the date of receipt of this Order; an objection that is neither timely filed nor ruled upon before the scheduled mediation may be waived.

Mediation is a mandatory but non-binding settlement conference, conducted with the assistance of the mediator. Mediation is private, confidential and privileged from process and discovery. After mediation, the court will be advised by the mediator, parties and counsel, only that the case did or did not settle. The mediator shall not be a witness nor may the mediator's records be subpoenaed or used as evidence. No subpoenas, citations, writs, or other process shall be served at or near the location of any mediation session, upon any person entering, leaving or attending any mediation session.

The mediator will negotiate a reasonable fee with the parties which shall be divided and borne equally by the parties unless agreed otherwise, paid by the parties directly to the mediator, and taxed as costs. If the parties do not agree upon the fee requested by the mediator, the court will set a reasonable fee, which shall be taxed as costs. Each party and their counsel will be bound by the rules for mediation printed on the reverse hereof, and shall complete the information forms as are furnished by the mediator.

Named parties shall be present during the entire mediation process and each corporate party must be represented by an executive officer with authority to negotiate a settlement. Counsel, the parties and the mediator shall agree upon a mediation date within 20 days from the date of this order. If no date can be agreed upon within the 20 day period, the mediator shall select a date for the mediation and all parties shall appear as directed by the mediator.

The date scheduled by the mediator is incorporated in this Order as the date upon which the mediation shall occur. In any event, the mediation shall be conducted no later than _____.

Failure or refusal to attend the mediation as scheduled may result in the imposition of sanctions, as permitted by law, which may include dismissal or default judgment. Failure to mediate will not be considered cause for continuance of the trial date. Referral to mediation is neither a substitute for nor a cause for delay of trial, and the case will be tried if not settled.

A report regarding the outcome of the mediation session is to be mailed by the mediator to the court, with a copy to the ADR Coordinator, immediately after the mediation session.

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Presiding Judge

cc: Counsel of Record
Mediator

Note regarding form and use of Mediation Orders: The form of mediation order used by Texas courts can and does vary depending on the court, jurisdiction, legislation, and local rules. The form of Mediation Order provided in this *Benchbook* is a form that has been used in several Texas jurisdictions and is provided here for general guidance and is not appropriate for all cases.

1. Definition of Mediation. Mediation is a process during which an impartial, neutral person, the Mediator, facilitates communication between the parties in a dispute to assist reconciliation, settlement or understanding among them. The Mediator may suggest ways of resolving the dispute, but may not impose his or her own judgment on the issues for that of the parties.

2. Conditions Precedent to Serving as Mediator. The Mediator shall not serve as Mediator in any dispute in which he or she has any financial or personal interest in the result of mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties. In the event that the parties disagree as to whether the Mediator shall serve, the Mediator shall not serve.

3. Authority of the Mediator. The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate voluntary resolution of the dispute by the parties. The Mediator is authorized to conduct joint and separate meetings with the parties and to offer suggestions to assist the parties to achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expense of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine.

4. Parties Responsible for Negotiating Their Own Settlement. The parties understand that the Mediator will not and cannot impose a settlement in their case and agree that they are responsible for negotiating a settlement acceptable to them. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. The Mediator does not warrant or represent that settlement will result from the mediation process.

5. Authority of Representatives. Each party representative agrees that he or she has authority to settle the dispute involved in the mediation and that all persons necessary to the decision to settle shall be present at the mediation. The names and addresses of such persons shall be communicated in writing to all parties and the Mediator.

6. Time and Place of Mediation. The Mediator shall coordinate or fix the time of each mediation session. The mediation shall be held at the office of the Mediator or at any other convenient location agreeable to the Mediator and the parties, as the Mediator shall determine.

7. Identification of Matters in Dispute. Prior to the first scheduled mediation session, each party shall use his or her best efforts to provide the Mediator and all attorneys of record with an Information Sheet and Request for Mediation on the form provided by the Mediator, setting forth its position with regard to the issues that need to be resolved. At or before the first session, the parties will be expected to produce all information reasonably required for the Mediator to understand the issues presented. The Mediator may require any party to supplement such information.

8. Privacy. Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator.

9. Confidentiality. Confidential information disclosed to a Mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the Mediator. All records, reports or other documents received by a Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to produce or divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum. Any party that violates this agreement shall pay all fees and expenses of the Mediator and other parties, including reasonable attorneys' fees, incurred in opposing the efforts to request or compel testimony or records from the Mediator.

10. No Stenographic, Audio, Video Tape or Other Electronic Recording. There shall be no stenographic, tape recording, video recording or other electronic recording of any portion of the mediation session.

11. No Service of Process at or Near the Site of the Mediation Session. No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any mediation session or upon any person entering, attending or leaving the session.

12. Termination of Mediation. The mediation shall be concluded: a) by the execution of a settlement agreement by the parties; b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; or c) by a written or verbal declaration of a party or parties to the effect that the mediation proceedings are terminated.

13. Interpretation and Application of Rules. The Mediator shall interpret and apply these rules.

14. Fees and Expenses. The Mediator's fee, if agreed upon prior to mediation, shall be paid in advance of each mediation day. If applicable, the expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including fees and expenses of the Mediator, and the expenses of any witness and the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree otherwise.

*Reproduced from Dallas County's Rules for Mediation*

# NOTES

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TEXAS MEDIATOR CREDENTIALING ASSOCIATION

# Why Use a Credentialed Mediator?

- Meets a prescribed set of performance standards
- Agrees to conform to published ethical standards and grievance process
- Meets specific educational requirements with mandatory mediation-oriented continuing education

## Qualifications And Credentials Matter

*Insist on mediators who are credentialed by the Texas Mediator Credentialing Association*

**Texas Mediator Credentialing Association**

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