

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 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.

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, Claude 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.

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.

ETHICAL GUIDELINES FOR MEDIATORS

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 anyway. 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 conduct more than one mediation at a time 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 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 Guidelines # 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 bylaw.

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 a mediation.

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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 counselor 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.