

**CHECK YOUR HOLSTER AT THE BAR: MEDIATING WATER
DISPUTES PURSUANT TO HOUSE BILL 1763**

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Regional Water Planning: Status and Challenges - State Perspective, Texas Water Law 2003, Texas Water Law Institute, September 2003.

Overview of the Regional Water Planning Process, Diving Into Texas Water Law, State Bar of Texas, February 1999.

Water Marketing and Transfers, Texas Water Law Conference, CLE International, November 1997.

Implementing SB 1: Rules on State, Regional and Local Planning, SB 1: A New Chapter in Texas Water Law, Texas Water Law Institute, October 1997.

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MEDIATING WATER DISPUTES: ETHICAL ISSUES

I. INTRODUCTION¹

Mediation. Arbitration! Consensus Building!! Facilitated Policy Dialogue!!! Samoan Circle!?!? What are these terms? What is a lawyer to do?

Law school may not have taught you about alternative dispute resolution (ADR), but the odds that you will sit with a client in a mediation are much greater than the odds that you will sit with a client in a courtroom. Many state district courts now require parties to try mediation before a matter can proceed to trial.² In the administrative dispute process, an administrative law judge from the State Office of Administrative Hearings (SOAH) can refer contested cases to mediation prior to setting a hearing.³

As water lawyers, you may represent clients in water deals, permit applications before the Texas Commission on Environmental Quality (TCEQ) or a groundwater conservation district (GCD), or in litigation over plans gone afoul. You also may be contemplating ADR clauses in transactional documents or considering ADR as a settlement mechanism. Moreover, ADR extends beyond litigation and transactional law; it can be a tool for reaching consensus in community and land use planning by cities, counties, and potentially by GCDs and regional water planning groups.

In Texas, water planning and groundwater permitting are a matter of regional and local control; as a result, the legislature has created a remarkable number of new governmental entities responsible for these tasks. Texas leaders recognize that ADR needs to be a tool for these governmental entities to facilitate the resolution of disputes related to permits, development of infrastructure, and planning.

The mission of CPPDR is to promote the appropriate use of ADR by Texas governmental and public interest entities and to provide ADR education, research, and services to the state and local government, the University of Texas community, and the public. We have stepped forward as an ADR resource for the

legislature and the state agencies and GCDs involved in water permitting and planning.

This presentation will examine several ethical issues associated with a lawyer's involvement in an ADR process. These issues include identifying qualified neutrals, understanding confidentiality laws, and understanding the lawyer's unique ethical obligations when assisting a client in an ADR procedure. Before diving into those topics, this paper discusses specific changes in law from the 2005 legislative session that either encourage or mandate the use of mediation in the water arena, and describes the basic concepts of ADR, the appropriate utilization of ADR by lawyers, and the laws authorizing ADR in Texas.

II. ADR IN THE WATER ARENA.

In House Bill 1763 passed in the 2005 Regular Session, the Texas legislature directed GCDs within groundwater management areas (GMA) to jointly identify management goals that will control the permitting of groundwater by those districts. Under the act, representatives of each GCD must meet at least annually to conduct joint planning, including the determination by 2010 of the desired future condition of the aquifers in the GMA. Once established, the desired future condition is submitted to the Texas Water Development Board (TWDB), which then provides each GCD with the amount of "managed available groundwater" based on the desired future condition. Permitting is based on this figure, and GCDs and regional water planning groups are required to use these estimates of managed available groundwater in their future planning. By using the same number for planning, conflicts which currently arise between GCDs' groundwater management plans and the regional water plans mandated by Water Code Section 16.053 will be diminished, if not eliminated.⁴

The immediate challenges for GCDs under the revised joint planning provisions will be to determine how to make choices on the desired future condition: how to work together as districts to develop appropriate regional goals; and how to involve the public and stakeholders in this process. This will include the integration of policy and science. Many consensus building tools are available to assist GCDs in the process.

Once a GMA has made a decision on its desired future condition, that decision will be used by GCDs in

¹ This paper is a minor update, with the author's permission, to the paper by Margaret M. Menicucci entitled "Let's Work It Out: Understanding ADR Processes and a Lawyer's Ethical Obligations When Participating in ADR," presented at this conference held February 13-14, 2003. The current author appreciates the research and drafting assistance of U.T. Law School intern Adina Owen in the revisions.

² Bexar Co. Civ. Dist. Ct. Loc. R. 9(a); Dallas Co. Civ. Dist. Ct. Loc. R. 2.07(b); Tarrant Co. Civ. Dist. Ct. Loc. R. 3.01.

³ TEX. GOV'T. CODE ANN. § 2003.042 (Vernon 2005).

⁴ Amendments to TEX. WATER CODE § 36.1071((e)(4) removed prior language that required GCDs to address water supply needs in a manner that is consistent with the applicable regional water plan. Under the changes, GCDs are merely required to consider the water supply needs and water management strategies in the adopted state water plan.

revisions to their groundwater management plans. These plans are submitted to the TWDB for approval.⁵ If TWDB does not approve the groundwater management plan, the GCD may request mediation from the Center for Public Policy Dispute Resolution at the University of Texas School of Law (CPPDR) or another ADR system. If mediation is not successful, the district may appeal TWDB's decision to Travis County District Court.⁶

Once a groundwater management plan is approved, a regional water planning group or person with a legal interest in groundwater in a district may file a petition with TWDB alleging a conflict between the approved groundwater management plan and the state water plan. If TWDB finds a conflict exists, it provides technical assistance to and facilitates coordination between the petitioner and district to resolve the conflict. If the conflict is not resolved within 45 days of filing the petition, the district and petitioner may mediate the conflict, including seeking assistance from CPPDR or another ADR system. If mediation is unsuccessful, TWDB is directed to resolve the conflict not later than 60 days after the mediation is complete. If the GCD disagrees with TWDB's decision, it may appeal to Travis County district court.⁷

Similarly, GCDs may petition TWDB alleging that a conflict exists between the approved groundwater management plan and the state water plan. TWDB and the parties use a process to resolve the conflict, but mediation between the GCD and regional water planning group is mandatory. The mediation may occur through CPPDR or other ADR system. The TWDB is directed to resolve the conflict if mediation is unsuccessful, and may direct either the GCD or regional water planning group to modify its plan. If the GCD disagrees with TWDB's decision, it may appeal the decision to Travis County district court.⁸

III. A PRIMER ON ADR: CONCEPTS, APPROPRIATE USE, AND TEXAS STATUTES

A. Basic ADR Concepts

The methods for resolving disputes are on a continuum. At one end of the continuum, parties resolve disputes informally and independently, without the use of a third-party. These dispute resolution methods include direct negotiations and settlement conferences. At the other end of the continuum, a neutral third-party, such as a judge, administrative hearings officer, or an arbitration panel authorized to make a binding decision, resolves the dispute for parties after hearing their cases. *ADR* is a term used to describe processes in the middle of the continuum, which are used in place of formal, adversarial means of resolving conflict. When used for public policy matters, ADR is frequently called *consensus building*.

ADR processes generally involve the use of a neutral third-party who works with parties to help them reach consensus on mutually acceptable resolutions. These processes range from coaching negotiators to mediation to conducting non-binding arbitration. Parties usually participate in these "alternative" processes on a "voluntary" basis,⁹ and retain the ultimate responsibility for resolving the matter.

Typically, ADR processes are categorized as facilitative or evaluative. In facilitative ADR processes, such as mediation, the neutral facilitates negotiations between parties without expressing an opinion about the issues. In evaluative ADR processes (those closer on the continuum to judicial resolution of conflict), the neutral is hired to provide findings or opinions on factual or legal matters. One example of an evaluative process is non-binding arbitration. Evaluative neutrals generally have specialized expertise related to the substance of the conflict.¹⁰

Both facilitative and evaluative ADR processes can be beneficial anytime during the life of a conflict. For example, facilitative processes such as negotiated rulemaking or policy dialogue can be helpful in

⁵ Texas Water Code Ann. § 36.1072 (Vernon 2005). TWDB approval is based on whether the plans have the elements required by law. TWDB does not substitute its judgment on decisions made by the GCDs in adopting the plans. One legal requirement for the plans, however, would be to use the managed available groundwater based on the GMA desired future condition.

⁶ *Id.* at. § 36.1072(f) (Vernon 2005).

⁷ *Id.* at §36.1072(g). TWDB may require a revision of the approved groundwater management plan if it finds such action is necessary to resolve the conflict.

⁸ *Id.* at §16.053 (p) – (p-3).

⁹ For example, parties may choose to participate in mediation during litigation. Parties also may, through a contract, agree to use mediation or arbitration to resolve a potential dispute. There currently is much debate, however, over whether these clauses are truly voluntary in certain contexts—in particular, in consumer contracts. See Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191 (2001).

¹⁰ For a thorough discussion of facilitative and evaluative processes consult the website for the Resolve Center for Environmental and Public Policy Dispute Resolution, www.resolve.org/tools/concepts.html.

developing potentially controversial rules or policy. Facilitative ADR processes also are effective after a conflict has hardened, as in litigation, because they encourage parties to negotiate over interests and explore options for mutual gain. Evaluative ADR processes may also be used by parties during litigation in order to obtain a neutral determination on their legal or factual positions, which ultimately may facilitate settlement.

Set forth below is a list of general definitions of certain facilitative and evaluative ADR processes. The italicized language under a term is the definition as it appears in the Texas ADR Procedures Act.

1. Facilitative Processes

Mediation: a process in which a trained, impartial third-party assists two or more disputants to negotiate an acceptable settlement of contested issues. The mediator has no independent authority to impose any decision, but works with the disputants to structure and apply a process to help them reach agreement.¹¹

*Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.*¹²

Note: in the public policy context, mediation may also be called “Consensus Building.”

Consensus Building: a process for clarifying and developing unanimous or overwhelming agreement on complex, potentially controversial public policy issues via joint ownership of the process, inclusive participation, common definition of the problem, full exploration of interests and options, and consensual decisions. In a consensus process, the participants seek to reach decisions without voting, and try to find outcomes with which everyone can agree.¹³

Facilitation: a neutral third-party conducts a meeting in a way that encourages open discussion of issues, full exploration of options, and consensual choice of action.¹⁴

Ombuds: a third-party selected by an institution independently or impartially investigates complaints brought by employees, clients, or constituents.¹⁵

Negotiated Rulemaking: an alternative to traditional procedures for drafting proposed regulations that brings together representatives of the agency and the various affected interests to negotiate the text of a proposed agency regulation or policy with the aid of a neutral mediator or facilitator.¹⁶

Policy Dialogue: a process that brings together representatives of groups with divergent views or interests to explore and identify the collective views of participants in the process. The goals of a policy dialogue include opening discussion, improving communication and mutual understanding, exploring the issues in controversy to see if participants’ different viewpoints can be distilled into general recommendations, and trying to reach agreement on a proposed policy standard or guidelines. Policy dialogues usually do not seek to achieve a full specific agreement. Rather these dialogues may be used to assess the potential for developing a consensus resolution at some later time or to develop general, non-binding recommendations to give to a policy making body.¹⁷

2. Evaluative Processes

Mini-trial: a structured negotiation procedure in which disputants make their cases in informal, highly abbreviated presentations to senior representatives from each party with authority to settle the case. Following the presentations, the representatives attempt to negotiate a settlement.¹⁸

A mini-trial is conducted under an agreement of parties. Each party and counsel for the party present the position of the party, either before the selected representatives for each party or before an impartial third-party, to define the issues and develop a basis for realistic settlement negotiations. The advisory opinion is

¹¹ A Guide to Dispute Resolution Processes, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 445, 446 (Phyllis Bernard & Bryant Garth eds., American Bar Association Section on Dispute Resolution 2002) [hereinafter *Guide to Dispute Resolution*].

¹² TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (Vernon 2005).

¹³ CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 6-7 (Lawrence Susskind, Sarah McKearnan, & Jennifer Thomas-Larmer eds., 1999).

¹⁴ *Id.* at 7.

¹⁵ *Guide to Dispute Resolution*, *supra* note 6, at 447.

¹⁶ CENTER FOR PUBLIC POLICY DISPUTE RESOLUTION, COMMENTARY ON THE GOVERNMENTAL DISPUTE RESOLUTION ACT AND THE NEGOTIATED RULEMAKING ACT 45 (2005).

¹⁷ U.S. Institute of Environmental Conflict Resolution, Glossary of Terms Relating to Environmental Conflict Resolution and Alternative Dispute Resolution, http://www.ecr.gov/ecr_glossary.htm.

¹⁸ *Guide to Dispute Resolution*, *supra* note 6, at 446-47.

not binding on parties unless parties agree that it is binding and enter into a written settlement agreement.¹⁹

Early Neutral Evaluation: a neutral with substantive expertise hears informal presentations of the highlights of parties' cases and offers parties a non-binding, objective assessment of their cases' strengths and weaknesses.²⁰

Moderated Settlement Conference: a forum for case evaluation and realistic settlement negotiations. Each party and counsel for the party present the position of the party before a panel of impartial third parties. The panel may issue an advisory opinion regarding the liability or damages of parties or both. The advisory opinion is not binding on parties.²¹

Summary Jury Trial: a forum for early case evaluation and development of realistic settlement negotiations. Each party and counsel for the party present the position of the party before a panel of jurors. The panel may issue an advisory opinion regarding the liability or damage of parties or both. The advisory opinion is not binding on parties.²²

Neutral Fact-Finding: a neutral third-party, selected by either the disputants or the court, investigates an issue and reports or testifies in court.²³

Private Judging: a neutral third-party (generally a former judge) hired by disputants hears the case and makes a decision in a manner similar to a judge; in certain jurisdictions, the decision may be appealable in the public courts.²⁴

Arbitration (binding and non-binding): a neutral third-party, often selected by the disputants, renders a binding or non-binding decision on the submitted issues after hearing evidence and argument.²⁵

Non-binding 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. If parties stipulate in advance, the award is binding and is enforceable in the same manner as a contract obligation. If parties do not stipulate in advance that the award is binding, the award is not

*binding and serves only as a basis for further settlement negotiations.*²⁶

B. Appropriate Use of ADR Procedures.

With a basic understanding of ADR concepts, a lawyer is equipped to begin exploring ADR processes with his or her own clients. ADR is a powerful tool in a wide range of circumstances; however, it is not per se the best process for all clients. Thus, a lawyer and his or her client must evaluate whether ADR is the most appropriate vehicle for resolving the client's conflicts and achieving the client's goals.

One of the benefits of using a neutral to assist in negotiations is that the neutral may help parties overcome procedural and psychological barriers to a good solution. For example, parties may assume that there is a "fixed pie"—that any benefit to one party is necessarily a detriment to the other. A third-party neutral may see possibilities that parties themselves do not, thereby potentially expanding the "pie."

Without a neutral, the risk exists that parties will negotiate over positions, without identifying real interests. A skilled neutral can help parties look beyond their predetermined, quasi-unmovable positions to the values and interests that underlie those positions. This process can, again, expand the "pie," or will at least help parties understand each other better—a necessary step toward reaching consensus.

Lastly, if parties come to distrust each other over the course of a conflict, a skilled neutral can ease the atmosphere of suspicion and hostility, facilitating discussion based on logical and fair criteria.

Matters more amenable to resolution through an ADR procedure are those in which:

- multiple issues must be resolved,
- parties do not seek to establish precedent,
- no single "right" solution exists,
- issues are complex and negotiable,
- party communications have broken down,
- failure to agree does not clearly benefit one party,
- confidentiality is important, and
- parties want or need to maintain an ongoing relationship.

ADR is less likely to be appropriate when:

- parties need precedent to clarify the law or guide future conduct,
- the resolution will substantially affect third parties not represented in the negotiations,
- a need to focus public attention on a "bad actor," exists,

¹⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 154.024 (Vernon 2005).

²⁰ *Guide to Dispute Resolution*, *supra* note 6, at 446.

²¹ TEX. CIV. PRAC. & REM. CODE ANN. § 154.025.

²² *Id.* § 154.026.

²³ *Guide to Dispute Resolution*, *supra* note 6, at 447.

²⁴ *Id.*

²⁵ *Id.* at 445-46.

²⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 154.027.

- ADR transaction costs exceed transaction costs for traditional methods of conflict resolution, and
- an emergency situation does not allow time for negotiation.

If a lawyer and client decide to participate in an ADR procedure, the lawyer's role changes from an advocate and counselor in an adversarial process to an advocate and counselor in a collaborative process. A lawyer's ethical obligations in a collaborative process are the subject of Section III of this paper.

C. Texas Statutes Authorizing ADR.

1. The Texas ADR Procedures Act.

In 1983, the Texas legislature passed the Alternative Dispute Resolution Systems and Financing Act ("DRC Act").²⁷ The DRC Act authorized counties to fund Dispute Resolution Centers ("DRCs") by charging a \$10 additional filing fee for law suits.²⁸ In its 2005 session, the Texas Legislature recognized the success and importance of DRCs by increasing their financial support, raising the \$10 filing fee cap to \$15;²⁹

The DRC Act also provided that judges in counties with DRCs could refer cases to the centers;³⁰ however, judges rarely exercised that option.³¹ Consequently, in 1987, the legislature passed the Texas ADR Procedures Act to further "encourage the peaceable resolution of disputes."³²

The Texas ADR Procedures Act expressly encourages judges to use ADR, while the DRC Act simply authorizes the processes. Highlights of the Texas ADR Procedures Act include regulation of the referral of cases to ADR, establishment of minimum qualifications for third-party neutrals used in court-referred ADR, establishment of confidentiality standards for ADR processes, and clarification of the legal status

of settlement agreements drafted as a result of the ADR process.³³

Referral of Cases to ADR. Under the Texas ADR Procedures Act, courts may, either on their own motion or by motion of a party, refer a case to an ADR process defined in the Act.³⁴ Judges must notify parties of the referral. Parties may object to a referral, but a judge may overrule that objection.³⁵

Third-Party Neutral Qualifications and Immunity. The Texas ADR Procedures Act specifies the qualifications, standards, and duties of impartial third parties in the ADR process. The term "impartial third-party" includes all ADR neutrals.³⁶ The neutral must maintain confidentiality and refrain from compelling parties to settlement.³⁷ Neutrals acting as volunteers in an ADR forum are not subject to civil liability for an act or omission in the scope of their duties as a neutral.³⁸

Confidentiality of Oral and Written Communications. Confidentiality is necessary to the success of an ADR process. Participants must engage in full and open communication in order to identify interests and develop solutions. As a result, the Texas ADR Procedures Act provides important statutory confidentiality protections to oral and written communications that occur during an ADR process.

Section 154.053 of the Texas ADR Procedures Act establishes the standards and duties of third-party neutrals, and includes restrictions on disclosing confidential and certain other information obtained during the mediation. Specifically, a neutral may not disclose to other parties or to anyone else information given in confidence and communications related to the subject matter of the dispute, unless expressly authorized by the party providing that information.³⁹ Additionally, unless the parties agree otherwise, all matters, including the conduct and demeanor of the

²⁷ TEX. GOV'T. CODE ANN. § 152.002 (Vernon 1997).

²⁸ *Id.* §152.004.

²⁹ Tex. H.B. 282, 79th Leg., R.S., 2005 Tex. Gen. Laws 1192.

³⁰ TEX. GOV'T. CODE ANN § 152.003.

³¹ Alan Scott Rau, Edward F. Sherman, & Brian D. Shannon, *RAU & SHERMAN'S TEXAS ADR & ARBITRATION: STATUTES AND COMMENTARY 8* (West Group 2000) [hereinafter *Texas ADR & Arbitration*].

³² TEX. CIV. PRAC. & REM. CODE ANN § 154.002 (Vernon 2005).

³³ *Texas ADR & Arbitration*, *supra* note 26, at 8.

³⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 154.021. The definitions of ADR processes set forth in the Act are included above.

³⁵ *Id.* § 154.022.

³⁶ *See Texas ADR & Arbitration*, *supra* note 26, at 36.

³⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 154.053.

³⁸ *Id.* § 154.055.

³⁹ *Id.* § 154.053(c).

parties and their counsel during the settlement process, are confidential.⁴⁰

Section 154.073 contains the main confidentiality provisions, protecting from discovery or other disclosure most oral and written communications made during an ADR procedure. This section also describes exceptions to the general confidentiality provisions. These exceptions prevent parties from using a mediation to protect otherwise discoverable information; preserve the governance of the Public Information Act (formerly the Open Records Act) in agreements which a governmental body is a signatory; preserve the legal obligation to report information about abuse or neglect of children or the elderly; and provide an opportunity for courts to consider, *in camera*, the applicability of other legal disclosure requirements to the information provided in an ADR procedure.⁴¹ Section 154.073 is discussed in more detail in Section III.B.3 of this paper.

Enforceability of the Settlement Agreement. The Texas ADR Procedures Act gives written settlement agreements the same effect as written contracts.⁴² The court has the discretion to incorporate the terms of the agreement in the court's final decree disposing of the case, however, settlement agreements will be enforceable as contracts regardless of whether the terms of the agreement were incorporated into a judgment.⁴³

2. The Governmental Dispute Resolution Act.

Influenced by the success of ADR in the private dispute context and the increased use of ADR procedures by the federal government, the Texas legislature passed the Governmental Dispute Resolution Act ("GDR Act") in 1997. The GDR Act clarifies the authority of governmental bodies to use ADR and addresses legal and procedural matters unique to public entities participating in ADR.

The GDR Act begins by stating that it is the policy of Texas to resolve disputes "as fairly and expeditiously" as possible.⁴⁴ To further that goal, the GDR Act encourages all agencies to develop and use ADR procedures in their operations and programs when

appropriate.⁴⁵ A later amendment to the GDR Act expanded its applicability to all governmental bodies as that term is defined in the Public Information Act.⁴⁶ As a general rule, the GDR Act applies to any governmental entity that is subject to the Public Information Act, including organizations such as corporations, institutes, non-profits, or committees that are supported in whole or in part by public funds. The judiciary is expressly excluded from the definition of "governmental body" in the Public Information Act.⁴⁷

The same rules of third-party neutral qualification, immunity, standards, and duties set forth in the Texas ADR Procedures Act apply in the GDR Act.⁴⁸ Additionally, the GDR Act incorporates the definitions of ADR procedures described in the Texas ADR Procedures Act. The GDR Act also addresses ADR issues specific to governmental entities, including the effect of ADR on sovereign immunity, the due process rights of parties, the authority of agencies to pay for ADR procedures, the types of ADR procedures agencies may adopt, and the interface between the need for confidentiality in ADR processes and the doctrine of open government.

Sovereign immunity. The GDR Act does not waive the state's privilege of sovereign immunity from suit.⁴⁹ The Texas legislature clearly provided that the GDR statute makes no changes in existing law in the area of sovereign immunity: while the statute encourages use of ADR processes, it neither expands nor restricts any agencies' existing or future authority to waive or assert sovereign immunity.⁵⁰ Accordingly, an agency may use any ADR process it chooses under the GDR Act, but it must make its own analysis of existing law to determine (1) if and how sovereign immunity issues are relevant and (2) whether use of the ADR process it selects conforms with the agency's ability to assert or waive sovereign immunity.

Affect on Due Process Rights. The GDR Act makes clear that ADR procedures developed by governmental

⁴⁰ *Id.* § 154.053(b).

⁴¹ *Id.* § 154.073(c-f).

⁴² *Id.* § 154.071(a); *See also* *Compania Financiera Libano v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001).

⁴³ *Id.* § 154.071(b); *See also* *Compania Financiera Libano*, 53 S.W.3d at 367-68.

⁴⁴ TEX. GOV'T. CODE ANN. § 2009.002 (Vernon 2005).

⁴⁵ *Id.* TCEQ embraced this authority early by establishing an ADR program that assists parties in dispute resolution both before and after a matter is designated a contested case. TCEQ also works closely with SOAH on ADR matters. TCEQ provides an excellent explanation of its ADR program on its website at <http://www.tceq.state.tx.us/>.

⁴⁶ *Id.* § 2009.003(2), § 552.003.

⁴⁷ *Id.* § 552.003(b).

⁴⁸ *Id.* § 2009.053.

⁴⁹ *Id.* § 2009.005.

⁵⁰ *Texas ADR & Arbitration*, *supra* note 26, at 847.

bodies are supplemental in nature. These procedures do not limit other dispute resolution procedures available for use by a governmental body, such as negotiations or hearings.⁵¹ Nor may the GDR Act be applied in a manner that denies a person's rights under other federal, state or local law, including a right to a judicial or administrative hearing.⁵²

Agency Procedures and Budget. Under the GDR Act, state agencies that adopt ADR procedures into their operations must ensure that those procedures comply with the Texas ADR Procedures Act and, where applicable, the Administrative Procedures Act.⁵³ The Act also authorizes SOAH to issue guidelines to agencies about the use of ADR.⁵⁴

The GDR Act grants broad fiscal discretion to governmental bodies seeking to implement ADR initiatives. For example, Subsection 2009.004 (a) clarifies that governmental bodies have budgetary authority to pay for costs incurred in developing and using ADR processes and evaluating their performance. A non-exclusive list of possible expenditures—"reasonable fees for training, policy review, system design, evaluation, and the use of impartial third parties"—covers many foreseeable items, but others necessary to achieving the objective of the GDR Act are certain to arise and are authorized by this language.⁵⁵

Confidentiality. During the drafting of the GDR Act, concerns arose that the confidentiality provisions of the Texas ADR Procedures Act only applied to court-referred ADR procedures. To ensure that similar confidentiality protections would be available in ADR procedures involving or referred by governmental bodies, the GDR Act specifically incorporated the Texas ADR Procedures Act confidentiality provisions and added additional provisions appropriate to the use of ADR by governmental bodies.⁵⁶ The confidentiality provisions of the GDR Act will be discussed in depth at Section III.B.3 of this paper.

⁵¹ TEX. GOV'T. CODE ANN. § 2009.052(a) (Vernon 2005).

⁵² *Id.* § 2009.052(b).

⁵³ *Id.* § 2009.051(a).

⁵⁴ *Id.* § 2009.051(a). SOAH issued *Guidelines for the Use of Alternative Dispute Resolution by Texas State Agencies*, which is available at <http://www.soah.state.tx.us/AboutUs/ADR/index.htm> (last updated June 28, 2005).

⁵⁵ *Id.* § 2009.004(a)

⁵⁶ *Id.* § 2009.054(a).

3. The Texas Negotiated Rulemaking Act.

The Texas Negotiated Rulemaking Act (the "Texas NR Act") was a bi-partisan effort to formally advocate the appropriate use of negotiated rulemaking by Texas agencies.⁵⁷ Federal agencies have successfully used negotiated rulemaking since the 1980s. In fact, Texas agencies used negotiated rulemaking twice before the passage of the Texas NR Act in 1997.⁵⁸

The negotiated rulemaking process involves several steps. First, the agency appoints a "convener" to analyze the conflict at hand, to determine whether the conflict is an appropriate matter for the negotiated rulemaking process, and to identify the interested parties that should be included in the process. The convener then gives the agency a report summarizing her findings.⁵⁹ Based on the report, the agency forms a negotiated rulemaking committee of interested parties and appoints a neutral facilitator to assist the committee. The committee negotiates toward a consensus rule, which it presents to the agency in a final report.

IV. ETHICAL ISSUES FOR ATTORNEYS REPRESENTING CLIENTS IN ADR PROCEDURES.

A. Ethical Guidelines and Rules.

1. The Texas Lawyer's Creed

In 1989, the Texas Supreme Court and the Court of Criminal Appeals promulgated the Texas Lawyer's Creed, an aspirational statement regarding the standards for practicing law in Texas. The Texas Lawyer's Creed includes eleven commitments regarding the manner in which a lawyer works with a client.⁶⁰ Three of these commitments are relevant to advising clients in mediation:

- I will endeavor to achieve my client's lawful objectives in legal transactions and litigation as quickly and economically as possible[:];
- I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice[:];

⁵⁷ Center for Public Policy Dispute Resolution, *Commentary on the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act*, Public Resource Series No. 7at 53 (2002).

⁵⁸ *Id.*

⁵⁹ TEX. GOV'T. CODE ANN. § 2008.052(d) (Vernon 2005).

⁶⁰ State Bar of Texas, Texas Lawyer's Creed, http://www.texasbar.com/Content/ContentGroups/Bar_Groups/Foundations1/Texas_Bar_Foundation/TX_Lawyers_Creed.htm (last visited February 2, 2006).

- *I will advise my client regarding the availability of mediation, arbitration and other alternative methods of resolving and settling disputes.*⁶¹

2. The Texas Disciplinary Rules of Professional Conduct

The Texas Disciplinary Rules of Professional Conduct contain several provisions that are relevant to an attorney's role in advising clients about mediation, but no provision directly addresses a lawyer's role in mediation or other ADR procedures. The rules regarding the lawyer-client relationship discuss competence in representation and decision-making authority. Rules 1.01 and 1.02 state:

- Except in limited circumstances, a lawyer shall not accept or continue employment in a legal matter that the lawyer knows or should know is beyond the lawyer's competence; and
- A lawyer shall abide by a client's decisions concerning the objectives and general methods of representation.⁶²

Regarding competence, the commentary to Rule 1.01 explains that "Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client."⁶³ Competence could include appropriate knowledge of dispute resolution options and ways to meaningfully participate in those options. This interpretation of competence makes particular sense in light of the Lawyer's Creed provision directing attorneys to advise clients of alternative methods for resolving disputes.

The commentary to Rule 1.02 explains that both the lawyer and the client have authority and responsibility in the objectives and means of representation. The commentary also explains that the lawyer has broad discretion to determine the technical and legal tactics used, subject to the client's wishes, the expense to be incurred, and concern for third parties who might be affected.⁶⁴ The objective of economical and expeditious dispute resolution may require

consideration of ADR processes. The rule does not, however, require a lawyer to advise her client about ADR processes. In contrast, the ABA Ethics 2000 Commission, in developing proposed amendments to the ABA Model Rules of Professional Conduct, added a statement recommending that lawyers inform their clients of alternative dispute resolution options. As adopted by the ABA, Model Rule 2.1 states, "... when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."⁶⁵

Texas Rule 1.02(c) – (e) prohibits a lawyer from assisting or counseling a client to engage in conduct that the lawyer knows is criminal or fraudulent. If the lawyer has confidential information clearly establishing that the client is about to commit a crime or fraud, the lawyer should make reasonable efforts to dissuade the client. If the lawyer knows the crime or fraud has been committed, the lawyer should make reasonable efforts to persuade the client to take corrective action.⁶⁶ The question arises whether deliberate lying by the client in mediation constitutes fraud. Neither the commentary nor the Ethics Opinions specifically mention lying in mediation. However, several Ethics Opinions have classified lying as fraud, such as falsifying witnesses on a will,⁶⁷ and verifying false pleadings and statements.⁶⁸

When lawyers act as advocates in litigation, Rule 3.02 states:

In the course of litigation, the lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.⁶⁹

The commentary to Rule 3.02 recognizes that litigation can be costly and burdensome and that many delays in litigation may be reasonable. This rule prohibits *unreasonable* conduct, "*undertaken for the purpose of harassing or malicious injuring.*"⁷⁰ Mediation is intended to be a process that ultimately reduces the costs

⁶¹ *Id.* (emphasis added).

⁶² TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a) & 1.02(a)(1), *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G app. A (Vernon Supp. 1997).

⁶³ *Id.* at R. 1.01(a) cmt 1.

⁶⁴ *Id.* at R. 1.02 cmt 1.

⁶⁵ MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2002).

⁶⁶ TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(c)–(e).

⁶⁷ Tex. Prof'l Ethics, Op. 204 (1960).

⁶⁸ Tex. Comm. On Prof'l Ethics, Op. 405, 46 TEX. B.J. 722 (1983); Tex. Comm. on Prof'l Ethics, Op. 473, 55 TEX. B.J. 521 (1992).

⁶⁹ TEX. DISCIPLINARY R. PROF'L CONDUCT R. 3.02.

⁷⁰ *Id.* at R. 3.02 cmt. 5, 6 (emphasis added).

and burdens to parties; the abuse of this process, may unreasonably increase costs or create delay. Mediating in good faith, in contrast, may minimize the burden and delay even if the mediation did not resolve the case. The process, when well used, allows parties to identify and understand their interests and the interests of their opposition. A discussion of good faith follows in Section III.B.2 of this paper.

Some commentators have suggested that the current legal ethics rules are inadequate for governing and guiding attorney conduct in collaborative processes such as mediation.⁷¹ Professor Kovach explains that current rules (model rules and individual state's rules) are based on the adversarial process, which attempts to determine truth, preserve rights, determine right and wrong, and punish a wrongdoer.⁷² The adversarial system encourages zealous positional conduct and negotiation, with the often-misplaced notion that parties are equally represented. Tolerance of adversarial behavior is evidenced in Rule 3.02, which may allow very obstructive and costly tactics if they are not clearly harassing or malicious. The mediation process, in contrast, focuses on determination of interests, creative problem solving, party empowerment, and process satisfaction.⁷³ Effective participation in the mediation process requires candid information disclosure that is useful for problem-solving, but may not be consistent with some litigation strategies. Modifying the disciplinary rules to require consideration of ADR processes and good faith participation could increase lawyers' effectiveness in collaborative processes.

3. Ethical Guidelines for Mediators

In 1994, the State Bar of Texas ADR Section adopted Ethical Guidelines for Mediators ("Ethical Guidelines").⁷⁴ The Ethical Guidelines were adopted by the Supreme Court of Texas on June 13, 2005 as aspirational standards.⁷⁵ In its order, the court noted that counsel representing parties in a mediation of a pending case remain officers of the court. As such, they should aspire to follow the Texas Lawyer's Creed during

mediation, and also will be subject to the Texas Disciplinary Rules for lawyers and any local rules and order of courts regarding mediation of pending cases.

Under the Ethical Guidelines, mediators are charged with the duty to protect the integrity and confidentiality of the mediation process.⁷⁶ This duty continues even after the conclusion of the mediation. The Ethical Guidelines also stress the importance of mediator impartiality.⁷⁷ In order to maintain impartiality, the mediator is strongly encouraged to disclose any conflicts of interest which may appear to affect the mediator's neutrality.⁷⁸ In addition, the mediator is discouraged from giving legal or professional advice to the parties.⁷⁹ The Ethical Guidelines also provide recommendations regarding mediator fees,⁸⁰ disclosure of mediator qualifications,⁸¹ appropriate circumstances for convening and terminating mediation,⁸² and the ability of a mediator to later serve in an adjudicative role relating to a mediated matter.⁸³

4. ABA Model Rules

The ABA Ethics 2000 Commission, in its recommendations for revising the Model Rules of Professional Conduct, recommended amending two rules relating to lawyers serving as third-party neutrals in ADR settings. As adopted, Model Rule 2.4 now requires lawyers serving as neutrals to clearly communicate their role to parties.⁸⁴ In particular, the lawyer/neutral must make clear to unrepresented parties that she is serving as a neutral and will not represent that party's interests in the mediation. The Commission's recommendation rejected, however, rule changes that would have prevented a lawyer/neutral from giving legal advice and assisting in drafting a settlement document. Current Model Rule 1.12, retitled

⁷¹ Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001).

⁷² *Id.* at 952.

⁷³ *Id.*

⁷⁴ A copy of the Ethical Guidelines is attached as Appendix 1 to this paper.

⁷⁵ Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (2005).

⁷⁶ Ethical Guideline 2.

⁷⁷ Ethical Guideline 9.

⁷⁸ Ethical Guideline 4.

⁷⁹ Ethical Guideline 11.

⁸⁰ Ethical Guideline 3.

⁸¹ Ethical Guideline 5.

⁸² Ethical Guidelines 7, 13.

⁸³ Ethical Guidelines 12.

⁸⁴ MODEL RULES OF PROF'L CONDUCT R. 2.4 (1983) (amended 2003).

“Former Judge, Arbitrator, Mediator or Other Third-Party Neutral,” clarifies conflict of interest provisions that apply to lawyers serving as mediators. This rule is discussed in more detail below.

Although there is no enforceable ethical obligation to advise your client of the availability of alternative means of resolving disputes, a competent lawyer, acting in good faith, will help her client analyze the many appropriate avenues to achieving that client’s objectives. Having an understanding of ADR processes and how to effectively participate in them, thus, becomes a component of adequately providing professional services.

B. Ethical Issues for Lawyers Participating in Mediation.

The remainder of this paper examines three mediation issues that have ethical implications related to the adequacy of a lawyer’s service to her client and the confidentiality required for effective mediation:

- Finding an appropriate third-party neutral for a mediation,
- Participating in the mediation in good faith, and
- Understanding the confidentiality requirements for mediations in Texas.

1. Finding an Appropriate Third-Party Neutral.

ADR processes, although potentially cost-effective, still require an investment of the client’s time and money. When a judge or hearings examiner refers a case to mediation, or when parties voluntarily seek mediation, the client will look to her attorney to identify an appropriate mediator. Advising clients on selecting a neutral relates to an attorney’s competence and adequacy of representation.

a. Who is a “qualified” mediator?

There is no legal guideline on what makes a mediator “qualified” to assist parties in resolving their dispute. One component of being a “qualified” mediator is having adequate understanding and experience in the mediation process. To date, there are no national requirements for mediator training or national credentials indicating proficiency with the process. Some mediators may nonetheless describe themselves as “certified” or “licensed,” in which case attorneys ought to seek the meaning of that certified or licensed status.

On the state level, the Texas ADR Procedures Act sets forth minimum training requirements for mediators that may accept court-referred matters. The Act requires a mediator to undergo a minimum of forty (40) classroom hours of dispute resolution training by a

court-approved training organization.⁸⁵ To mediate a court-referred family law matter, the mediator must undergo an additional twenty-four (24) hours of specialized training.⁸⁶ The GDR Act has incorporated by reference the Texas ADR Act training requirements for impartial third parties (mediators).⁸⁷ SOAH also has adopted these training requirements for mediation of contested administrative matters.⁸⁸

Mediator training in Texas is offered by the community (county-based) Dispute Resolution Centers, university dispute resolution centers like the Center for Public Policy Dispute Resolution at the University of Texas, the A.A. White Dispute Resolution Center at the University of Houston, the South Texas Center for Legal Responsibility at the South Texas College of Law, and various other organizations. The content of mediator training is voluntarily standardized by these various organizations through the Texas Mediator Trainer’s Roundtable.

Only a few states, including Texas, have addressed mediator licensing or credentialing. In 2001, a coalition of representatives of Texas mediator organizations created a non-profit organization called the Texas Mediator Credentialing Association (“TMCA”) to provide a voluntary mediator credentialing process. TMCA wants to provide the public with reliable information about the standards of practice for mediation and to promote mediation as a formal profession. TMCA has developed three different classifications of “credentialed” mediators based on the mediator’s training and experience.⁸⁹ TMCA is entirely voluntary and, consequently, cannot alone indicate whether a mediator is qualified. Mediators, including highly experienced ones, may choose not to participate in this program.

Another component of being “qualified” is understanding the substance of the conflict being addressed through mediation. In the mediation community a debate continues about whether a good mediator needs only process knowledge or needs some understanding of the substance. On one hand, if parties are to craft their agreement collaboratively, the mediator’s substantive knowledge of the area of the conflict could be irrelevant. On the other hand,

⁸⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(a) (Vernon 2005).

⁸⁶ *Id.* § 154.052 (b).

⁸⁷ TEX. GOV’T CODE ANN. § 2009.053 (Vernon 2005).

⁸⁸ *Id.* § 2009.053(d).

⁸⁹ <http://www.txmca.org/criteria.htm>

familiarity with the terminology of the conflict and the policy and legal issues surrounding the conflict may enhance the mediator's ability to keep parties from pursuing irrelevant issues and options, and to test parties' positions and options. When issues are especially complex, parties could consider retaining a team of mediators – one with process experience and one with expertise in the substance of the dispute.

Recognizing that substantive knowledge can be useful, the U.S. Institute of Environmental Conflict Resolution has developed a roster of Environmental Conflict Resolution Practitioners.⁹⁰ Individuals listed on the roster have practiced as environmental dispute resolution and consensus-building professionals and have met the entry criteria established by the Institute. This entry criteria includes having at least 200 hours of experience as the principal neutral or facilitator on environmental conflicts and meeting the Institute's case experience, training/teaching, and substantive knowledge requirements. For example, neutrals qualifying for the roster likely would have a graduate degree or graduate program certificate in law, environmental sciences or policy, engineering, planning, communications or conflict resolution.

As a practical matter, some attorneys seek mediators who will “tell the client what is wrong or right with the case” and require mediator knowledge in the substance of the dispute. When the mediator goes beyond artful and rigorous reality testing of parties' positions, and begins to provide legal or other opinions on the dispute, many in the mediation community believe that conduct is inappropriate. In fact, the Texas ADR Procedures Act states that a mediator *may not impose his or her own judgment on the issues for that of parties*.⁹¹ Additionally, in the Ethical Guidelines recently adopted by the Supreme Court of Texas, Guideline 11 provides that a mediator *should not give legal or other professional advice to parties*.⁹²

Refraining from giving advice allows the mediator to remain neutral. In addition, if mediation is to be a consensus process in which parties voluntarily and collaboratively reach a solution, a mediator giving opinions may cause some parties to feel coerced into an agreement and may undermine that party's willingness to abide by the agreement. Therefore, a neutral should not coerce parties into a settlement, but instead should help build a safe, fair arena in which parties can discuss their interests and develop options toward resolution.

To the extent that parties and their attorneys truly want a third-party neutral to evaluate the dispute, specific ADR processes exist to accomplish this goal, including a *mini-trial*, *early neutral evaluation*, *moderated settlement conference*, *summary jury trial*, and *arbitration*, (as defined in Section II.A of this paper). If mediation is to be used for case evaluation, then full disclosure by all parties of the goal of the mediation as well as agreements about how the opinions and findings of the mediator will be used, should be accomplished before the process begins and clarified throughout the process, as needed. When these tasks are accomplished, then the “mediation” might look more like a moderated settlement conference or early neutral evaluation.

b. Conflicts of Interest

Impartiality is critical to a mediator's success. This neutrality encourages candid communication with the mediator and fosters trust in a process for negotiating contentious issues. Texas' Ethical Guideline 4 states that:

Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with 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.⁹³

If the mediator becomes aware of a conflict after the mediation begins, she should make full disclosure as soon as practicable and withdraw if it is inappropriate to serve.

The ABA Ethics 2000 Commission also addressed the issue of conflicts of interest for attorney mediators practicing in a law firm. Following the commission's recommendations, the ABA revised Model Rule 1.12 to clarify that lawyers acting as mediators may not represent “a client in any matter in which the lawyer is

advice to parties in an ADR process. The proposed Model Rules are silent on this issue.

⁹³ *Id.*

⁹⁰ The U.S. Institute of Environmental Conflict Resolution was created in 1998 under the federal Environmental Policy and Conflict Resolution Act. The organization assists parties in resolving environmental conflicts that involve federal agencies or interests. For more information on this organization, go to www.ecr.gov.

⁹¹ TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(b) (Vernon 2005).

⁹² State Bar of Texas Alternative Dispute Resolution Section, Ethical Guidelines for Mediators, <http://www.texasadr.org/ethicalguidelines.cfm>. In the revisions to the ABA Model Rules of Professional Conduct, the ABA Ethics 2000 Commission rejected a provision that would prevent lawyers acting as neutral from providing legal

participating personally and substantially . . . as a mediator or other third-party neutral” without informed consent by all parties confirmed in writing.⁹⁴ The amended rule allows the lawyer/mediator’s firm to “screen” the lawyer/mediator in order to allow other members of the firm to represent the client.⁹⁵

2. Participating in the Mediation in Good Faith.

In Texas, no statute requires that parties in a mediation negotiate in good faith. Appellate courts agree that the Texas ADR Procedures Act does not contain a provision authorizing courts to order parties to negotiate in good faith. The appellate courts vary, however, in upholding sanctions against parties that refused to participate in mediation.

In *Decker v. Lindsey*, the party resisting mediation had timely filed an objection to the judge’s mediation order.⁹⁶ The judge overruled this objection and directed parties to mediate and “to participate in the proceedings in good faith with the intention to settle, if at all possible.”⁹⁷ The appellate court found that the district court reasonably overruled the party’s motion to avoid the mediation, but vacated those portions of the court’s order requiring good faith negotiations.⁹⁸ The appellate court reasoned that the Texas ADR Procedures Act authorizes courts to compel disputants to sit down together in an ADR procedure, but “no one can compel parties to negotiate or settle a dispute unless they voluntarily and mutually agree to do so.”⁹⁹ The court also noted that the judge’s order to negotiate in good faith violated the “open courts” provision of the Texas Constitution, because it required good faith negotiations when parties had clearly indicated that they did not wish to negotiate, but instead wanted to proceed to trial.¹⁰⁰

A later court upheld sanctions against the Texas Department of Transportation for failing to participate in court-ordered mediation. In *Texas Department of Transportation v. Pirtle*, the agency told the court it would not mediate, but failed to object to a mediation

order.¹⁰¹ The agency then attended the mediation but refused to participate.

The appellate court found that the trial court did not abuse its discretion in levying sanctions when the agency did not exercise its statutory remedy of filing written objections to the mediation order and then refused to mediate in good faith.¹⁰² The court did not address whether levying the sanctions resulted in a violation of the “open courts” provision of the Texas Constitution.¹⁰³

In *Texas Parks and Wildlife Department v. Davis*, the appellate court reversed an order of sanctions that the district court had levied against the agency for failure to negotiate in good faith in a court-ordered mediation.¹⁰⁴ The appellate court declined to follow the *Pirtle* case because the agency filed objections to the mediation order (which were overruled), attended the mediation, and made an offer for settlement.¹⁰⁵

Although good faith participation in mediation may not be required by statute, courts may still recommend good faith participation, and parties may enter into agreements that they will mediate in good faith. Additionally, attempting to negotiate in good faith is consistent with the goals of the Texas Lawyer’s Creed. Having a mutual understanding of the meaning of “good faith” avoids conflict over the “good faith” commitment. Professor Kovach, in arguing for a statute or rule compelling “good faith” participation in mediation, identifies a constructive list of factors to be considered:

- Arriving at the mediation prepared with knowledge of the case, both in terms of the facts and possible solutions;
- Taking into account the interest of the other parties;
- Having all necessary decision-makers present at the mediation, not via telephone;
- Engaging in open and frank discussion about the case or matter in a way that might set out one’s position for the other to better know and understand;

⁹⁴ MODEL RULES OF PROF’L CONDUCT R. 1.12(a) (1983) (amended 2003).

⁹⁵ *Id.* at R. 1.12(c).

⁹⁶ 824 S.W.2d 247, 247 (Tex. App.—Houston [1st Dist.] 1992, no writ).

⁹⁷ *Id.*

⁹⁸ *Id.* at 251.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 977 S.W.2d 657 (Tex. App.—Fort Worth, 1998, no pet.).

¹⁰² *Id.* at 658. As sanctions, the trial court assessed against TXDOT all court costs, attorney’s fees and mediator fees incurred by Pirtle.

¹⁰³ Professor Shannon raises the question of whether TXDOT waived its constitutional rights when it failed to object to the mediation order. Brian G. Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 TEX. TECH. L. REV. 77, 107 (2000).

¹⁰⁴ 988 S.W.2d 370 (Tex. App.—Austin, 1999, no pet.).

¹⁰⁵ *Id.* at 375.

- Answering honestly when asked a specific and direct question;
- Not misleading the other side;
- Demonstrating a willingness to listen and attempting to understand the position and interests of the other parties;
- Being prepared not only to discuss the issues and interests of your client, but also to listen to the issues and interests of all other participants;
- Having a willingness to discuss your position in detail; and
- Explaining why a specific proposal is all that will be offered, or why one is refused.¹⁰⁶

These factors envision a mediation process in which parties examine their own case and their opponent's case in an open-minded and creative way, seeking solutions that make sense and may be different from the relief that could be provided in an adjudicative process. Using these factors, lawyers can prepare themselves and instruct their clients on conduct and strategies that will allow them to most effectively use the mediation process.

3. Confidentiality And Protections Against Testimony

a. Statutory Confidentiality Provisions.

Meaningful confidentiality provisions encourage parties to candidly discuss their case with the mediator and ultimately with the opposing party. The Texas ADR Procedures Act sets forth the core confidentiality provisions for mediations in Texas. These confidentiality provisions are considered amongst the broadest in the country.¹⁰⁷ The GDR Act expands on those provisions for mediations involving public policy matters.

Texas ADR Procedures Act § 154.053, governing the neutral's conduct, prohibits neutrals from disclosing to other parties or to anyone else information given in confidence and communications related to the subject matter of the dispute, unless expressly authorized by the party.¹⁰⁸ This confidentiality requirement applies both

during the mediation, regarding information obtained from a party during a private caucus, and after the mediation, regarding all confidential information obtained from parties.

Section 154.053(c) provides that all matters, including the conduct and demeanor of parties and their counsel during the settlement process, are confidential, and should not be disclosed unless parties agree otherwise.¹⁰⁹

Section 154.073 states that "communications relating to the subject matter of any civil or criminal dispute" made by the participants in ADR are confidential and may not be used as evidence in any judicial or administrative proceeding.¹¹⁰ Additionally, any record of the ADR procedure is confidential and neither the participants nor the neutral may be called to testify about that record.¹¹¹

The remainder of § 154.073 establishes the limits on the confidentiality protection. First, an oral communication or written material used in or made part of an ADR procedure is admissible or discoverable if it is admissible or discoverable independent of the ADR procedure.¹¹² This exception prevents parties from using the ADR confidentiality rules to withhold otherwise discoverable evidence. Second, a final written agreement to which a governmental body is a signatory that arises from an ADR procedure is subject to or excepted from disclosure in accordance with the provisions of the Public Information Act.¹¹³ Reflecting the concept that settlement agreements entered into by a governmental body should be available to the public under public information laws, this provision ensures that final agreements involving a governmental body will not be withheld from disclosure simply because they are the product of an ADR procedure. Instead, the Public Information Act governs the confidentiality of all or portions of these documents.

Third, when the confidentiality provisions of the Texas ADR Procedures Act conflicts with other legal requirements for disclosure, a court having jurisdiction over the proceeding may consider, *in camera*, whether the oral or written communications

¹⁰⁶ Kimberlee K. Kovach, *Good Faith in Mediation – Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 615 (1997).

¹⁰⁷ Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 542 (1997).

¹⁰⁸ TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (Vernon 2005). Consistent with the statute, the ADR Section's Ethical Guidelines (No. 4) provides that a mediator should not reveal privileged or confidential information made available in the mediation process unless the affected parties agree or the law requires disclosure.

¹⁰⁹ *Id.* § 154.053(c).

¹¹⁰ *Id.* § 154.073(a) (emphasis added). This confidentiality protection applies regardless of whether the ADR procedure is conducted before or after the institution of a formal judicial proceeding.

¹¹¹ *Id.* § 154.073(b).

¹¹² *Id.* § 154.073(c).

¹¹³ *Id.* § 154.073(d).

should be disclosed and whether that disclosure merits a protective order.¹¹⁴ Finally, § 154.073 makes clear that the legal duties under the Texas Family Code and the Human Resources Code to report abuse, neglect and exploitation, are not affected by the confidentiality provisions of the Texas ADR Procedures Act.¹¹⁵

The GDR Act incorporates by reference the confidentiality provisions found at §§ 154.053 and 154.073 of the ADR Procedures Act.¹¹⁶ The GDR Act then makes an interesting change to these confidentiality provisions in order to ensure that confidential information provided in an ADR procedure does not get disclosed through an inquiry outside of the formal discovery process, such as a Public Information Act inquiry. The GDR Act states that notwithstanding the Texas ADR Procedures Act provision that allows a court to review disclosure issues that arise from a conflict of law - - such as a conflict with the Public Information Act - - the following information shall be confidential:

- Communications and records of those communications that are relevant to the dispute and made between the impartial third-party and the disputants,
- Communications and records of those communications that are relevant to the dispute and made between the disputants, and
- The notes of the impartial third-party.¹¹⁷

Parties to the ADR procedure may, however, expressly consent to disclosing the confidential information.¹¹⁸

The GDR Act also makes clear that an impartial third-party may not be required to testify in any proceedings relating to or arising out of the matter in dispute.¹¹⁹ This testimonial protection adds to the Texas ADR Procedures Act protection against requiring the neutral or any participant in the ADR procedure to testify about the confidential information disclosed in the ADR procedure.¹²⁰ The testimonial protection for

neutrals likely was required because the GDR Act allows participants in the ADR procedure to consent to the disclosure of confidential information. Under the GDR Act, even if parties agreed to disclose confidential information, the neutral cannot be required to testify about it.

Finally, the GDR Act, like the Texas ADR Procedures Act, states that a final written agreement to which a governmental body is a signatory and that arises from an ADR procedure is subject to or excepted from disclosure in accordance with the provisions of the Public Information Act.¹²¹

b. Cases Discussing the Confidentiality Provisions.

Over the past decade, the courts have interpreted the statutory confidentiality provisions in a range of cases. These cases address (i) the effect of confidentiality on discovery of a party's good faith compliance with a mediation order, (ii) whether confidentiality applies to conduct associated with mediation, (iii) the limits of confidentiality when a party challenges a mediated settlement agreement based on duress, fraudulent inducement, or misrepresentation, (iv) the scope of confidentiality under the "offensive use" doctrine, and (v) confidentiality of mediation communication in new and independent tort actions arising from the mediation.

Effect on Discovery of Good Faith Compliance. In *Texas Parks and Wildlife v. Davis*, the appellate court stated: "[S]ection 154.073 [of the Texas ADR Procedures Act] requires that communications and records made in an ADR procedure remain confidential; consequently, the manner in which the participants negotiate should not be disclosed to the trial court."¹²² This statement suggests that the confidentiality protections afforded in the Texas ADR Procedures Act make it difficult to develop evidence of a party's bad faith participation. *Davis* involved a refusal to negotiate.

Conduct Associated with Mediation. Other cases have addressed whether the statutory confidentiality provisions apply to conduct associated with the mediation, such as attendance and preparation. In *In re Paul Daley*,¹²³ the appellate court addressed whether the statutory provisions apply to conduct associated with the mediation, such as attendance and preparation. The court determined that § 154.073 protects only

¹¹⁴ *Id.* § 154.073(e).

¹¹⁵ *Id.* § 154.073(f).

¹¹⁶ TEX. GOV'T. CODE ANN. § 2009.054(a) (Vernon 2005).

¹¹⁷ *Id.* § 2009.054(b).

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 2009.054(d).

¹²⁰ See TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(b) (Vernon 2005).

¹²¹ TEX. GOV'T. CODE ANN. § 2009.054(c). This provision was added as an amendment to both the Texas ADR Procedures Act and the GDR Act during the 1999 legislative session.

¹²² 988 S.W.2d at 375.

¹²³ 29 S.W.3d 915 (Tex. App. – Beaumont, 2000, no pet.).

communications relating to the subject matter of the dispute, not communications about whether a party attended the mediation and had the mediator's permission to leave.¹²⁴ This court took the position that the § 154.053(c) prohibition against disclosing information about the conduct and demeanor of all parties and their counsel during the settlement process does not apply when an individual prematurely leaves a mediation.¹²⁵ A different appellate court applied § 154.053(c) more broadly. In *In re Acceptance Insurance Company*, the court determined that evidence about a party's preparation in advance of the mediation related to the manner in which parties negotiated.¹²⁶ Based on the *Davis* case, this type of information should not be disclosed.¹²⁷

Challenges to Mediated Settlement Agreement based on Duress, Fraudulent Inducement, and Misrepresentation. Whether the courts will find an exception to the broad statutory confidentiality provisions when a party challenges a mediated settlement agreement based on claims of duress, fraudulent inducement, and misrepresentation remains unsettled. Two unreported cases (therefore without precedential value) come to conflicting results. In the unreported case of *Randle v. Mid Gulf*, Randle repudiated a mediated settlement agreement with Mid Gulf, and Mid Gulf sued for specific performance.¹²⁸ Randle argued that the mediated settlement agreement was void because he signed it under duress.¹²⁹ Randle claimed that, during the mediation, he experienced fatigue and chest pains, but the mediator told him he could not leave the session until a settlement was reached.¹³⁰ The court held that Mid Gulf could not sue

for specific performance on a mediated settlement agreement and simultaneously argue that the mediation communications are confidential as to Randle's duress.¹³¹ In another unreported case, *Vick v. Waits*, the court held that the Texas ADR Act does not provide an exception for claims of fraud.¹³² In *Vick*, a dispute arose out of a contract between the parties to construct an office building.¹³³ The parties entered into a mediated settlement agreement; however, several months later, Vick brought a claim for breach of the settlement agreement and fraudulent inducement.¹³⁴ All of the alleged misrepresentations were made during mediation.¹³⁵ The court found that § 154.073 expressly prohibits the use of any statements made during the mediation.¹³⁶ In deciding the claim of fraudulent inducement, the court refused to create an exception to the confidentiality provisions of the Texas ADR Act for the claim of fraud.¹³⁷

Application of the Offensive Use Doctrine. In *Alford v. Bryant*, Bryant brought a claim against her attorney, Alford, for legal malpractice arising out of a mediation.¹³⁸ All claims in the previous lawsuit were settled in mediation, except for attorney's fees and costs; a trial court determined that each party was responsible for its own attorney's fees and costs.¹³⁹ Bryant sued Alford, claiming Alford failed to disclose the risks and benefits of settlement, including that the trial court had the power to deny Bryant her attorney's fees.¹⁴⁰ Alford argued that she disclosed this information to Bryant during the mediation, and attempted to call the mediator

¹²⁴ *Id.* at 918.

¹²⁵ *Id.* In this case, the mediation order directed all individuals required for the mediation to stay until the mediator concluded the mediation. Daley represented the defendant's insurance company and had settlement authority. The court noted that he attended the mediation "voluntarily" and thus had to comply with the mediation order, but the court did not base its decision on that fact that Daley was neither a named party nor counsel.

¹²⁶ 33 S.W.3d 443, 452 (Tex. App.—Ft. Worth, 2000, pet. denied).

¹²⁷ *Id.*

¹²⁸ No. 14-95-01292-CV, 1996 Tex. App. LEXIS 3451, at *1-2 (Tex. App. Aug. 8, 1996).

¹²⁹ *Id.* at *3.

¹³⁰ *Id.* at *4.

¹³¹ *Id.*

¹³² No. 05-00-01122-CV, 2002 Tex. App. LEXIS 3982, at *11 (Tex. App. June 4, 2002).

¹³³ *Id.* at *2.

¹³⁴ *Id.* at *2-3.

¹³⁵ *Id.* at *8.

¹³⁶ *Id.* (citing *Smith v. Smith*, 154 F.R.D. 661, 669 (N.D. Tex. 1994).)

¹³⁷ *Id.* at *11.

¹³⁸ 137 S.W.3d 916, 918 (Tex. App.—Dallas 2004, pet. denied).

¹³⁹ *Id.* at *2-3.

¹⁴⁰ *Id.* at *3.

as a witness of the disclosure.¹⁴¹ Although the mediator did not object, the trial court did not allow the mediator to testify based on the confidentiality provisions of the Texas ADR Act.¹⁴² On appeal, the court reversed and remanded.¹⁴³ The court concluded that Bryant waived mediation confidentiality due to her “offensive use” of the statutory confidentiality provisions.¹⁴⁴ Under the offensive use doctrine, a party cannot invoke the jurisdiction of the courts, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her.¹⁴⁵ In other words, “when a party uses privilege as a sword rather than a shield, she waives the privilege.”¹⁴⁶ The court held that, because the mediation confidentiality statutes are grounded on similar policy rationales, the offensive use doctrine should apply similarly to the mediation confidentiality statutes.¹⁴⁷

New & Independent Torts Arising from Mediation. In *Avary v. Bank of America*, a wrongful death dispute settled in mediation.¹⁴⁸ The beneficiaries of the estate sued Bank of America, the executor of the estate, for breach of fiduciary duty occurring during the mediation.¹⁴⁹ The original settling defendant was not a party to the subsequent proceedings.¹⁵⁰ The court held that where a claim is based on a new and independent tort committed in the course of a mediation proceeding, and the tort encompasses a duty to disclose, § 154.073 will not bar discovery of the claim where the trial judge found in light of the facts, circumstances, and context, disclosure was warranted.¹⁵¹

¹⁴¹ *Id.*

¹⁴² *Id.* at *4.

¹⁴³ *Id.* at *15.

¹⁴⁴ *Id.* at *11.

¹⁴⁵ *Id.* at *9 (citing *Ginsburg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107, 28 Tex. Sup. Ct. J. 281 (Tex. 1985)).

¹⁴⁶ *Id.* at *10 (quoting *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 590 (Tex. App.—Dallas 1994)).

¹⁴⁷ *Id.* at *13-14.

¹⁴⁸ 72 S.W.3d 779, 784-785 (Tex. App.—Dallas 2002, pet. denied).

¹⁴⁹ *Id.* at 784.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 803.

V. CONCLUSION.

During the course of a dispute, clients may voluntarily want to use an ADR procedure or may be required to participate in one by contract or as a result of a judicial or administrative order. Lawyers should seek to understand the distinctions among and benefits of these various ADR procedures in order to adequately advise clients about how to effectively participate.

Ethical issues arise in competently advising the client through the ADR process. First, the lawyer likely will have the job of identifying the appropriate neutral. Choosing a neutral will involve decisions about the neutral’s role—facilitative or evaluative—and the neutral’s process and substantive experience. Once in a mediation, lawyers will advise clients on how to participate in good faith and what information remains confidential. Texas law does not require that parties negotiate in good faith. As a cautionary matter, however, if the party has good reasons not to negotiate, a timely objection to the mediation order should be filed setting forth those reasons. This procedural step has previously helped parties avoid sanctions for failure to negotiate in good faith.

Texas law provides significant confidentiality protections for communications made during the mediation and for information about parties’ and counsel’s conduct and demeanor in the settlement process. When a governmental body is involved, confidentiality of communications during the process will be protected from inquiries under the Public Information Act, but agreements from the ADR Procedure to which a governmental body is a signatory will be subject to the provisions of the Public Information Act.

When appropriate, the use of a collaborative ADR procedure may help parties achieve workable solutions that cannot be obtained during a formal adversarial process. Additionally, collaborative processes provide opportunities for all affected parties to participate in the solution, improving the likelihood that parties will abide by the solution and continue to work together in the future.

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

¹Order 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.

Misc. No. 05- **9107**

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

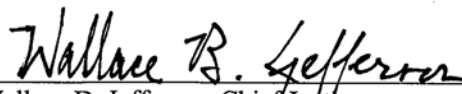
The Committee, however, concluded that there currently is consensus within the Texas mediation profession that the Court should promulgate ethical rules. Therefore, the committee recommended the Court adopt as its own aspirational guidelines those guidelines that the Alternative Dispute Resolution section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

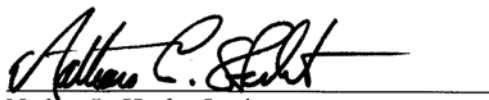
The Court accepts this recommendation. The Court is committed to ensuring the continued quality of mediators and mediation services in Texas. Thus, the Court promulgates and adopts the attached Ethical Guidelines for Mediators.

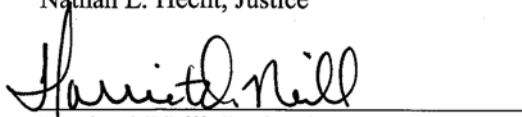
These rules are aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

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.

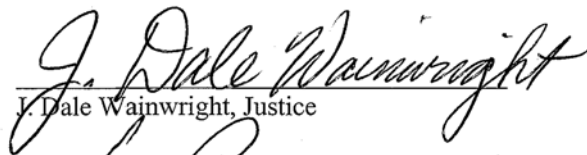
In Chambers, this 13th day of June, 2005.

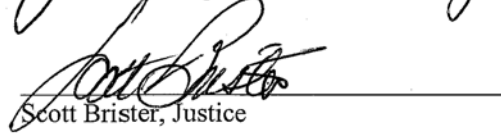

Wallace B. Jefferson, Chief Justice

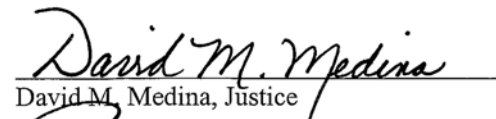

Nathan L. Hecht, Justice

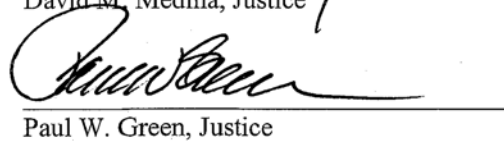

Harriet O'Neill, Justice

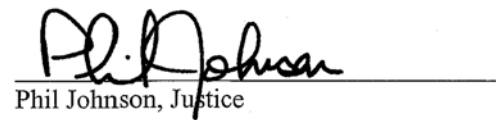
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J. Dale Wainwright, Justice


Scott Brister, Justice


David M. Medina, Justice


Paul W. Green, Justice


Phil Johnson, Justice

Misc. No. 05- **9107**

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 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 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 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.