BASIC MEDIATION TRAINING

THE EMOTIONALITY OF CONFLICT

PAGE 41

The Emotionality of Conflict. Anyone who would serve as a mediator must understand a central truth about the negotiation process, and it is this: Strong emotions are not a side effect of conflict; they are often the central way in which disputants experience conflict.[43] When people have incompatible needs, positions, interests or goals, this often produces anger, fear, anxiety, guilt, shame and other strong feelings. Most disputes have both an objective and subjective element to those who are experiencing them. The subjective aspects of a dispute are frequently as — if not more — important to the disputants than the objective reality of the situation. Consider a real case example:

WHAT IS MEDIATION?

- Intervention
- Communication
- Empowerment
- Problem Solving
- Relationship
- Future
- Impartial
- Neutral
- Confidential
- Agreement
- Compliance
- Other?

ALTERNATIVE DISPUTE RESOLUTION

I. ALTERNATIVE DISPUTE RESOLUTION

TEXAS CIVIL PRACTICE & REMEDIES CODE

CHAPTER 152: ADR SYSTEMS ESTABLISHED BY COUNTIES

152.001. Definition
In this chapter, "alternative dispute resolution system" means an informal forum in which mediation, conciliation, or arbitration is used to resolve disputes among individuals, entities, and units of government, including those having an ongoing relationship such as relatives, neighbors, landlords and tenants, employees and employers, and merchants and consumers.

152.002. Establishment
(a) The commissioners court of a county by order may establish an alternative dispute resolution system for the peaceable and expeditious resolution of disputes.
(b) The commissioners court may do all necessary acts to make the alternative dispute resolution system effective, including:

(1) contracting with a private nonprofit corporation, a political subdivision, a public corporation, or a combination of these entities for the purpose of administering the system;
(2) making reasonable rules relating to the system, including rules specifying whether criminal cases may be referred to the system; and
(3) vesting management of the system in a committee selected by the county bar association.

(c) The actions of a committee authorized by Subsection (b)(3) are subject to the approval of the commissioners court.

152.003. Referral of Cases
(a) A judge of a district court, county court, statutory county court, probate court, or justice of the peace court in a county in which an alternative dispute resolution system has been established may, on motion of a party or on the judge's or justice's own motion, refer a civil or, if the system accepts criminal cases and on the request of an attorney representing the state, a criminal case to the system regardless of whether the defendant in the criminal case has been formally charged. Referral under this section does not prejudice the case.
(b) Before requesting a referral of a criminal case under this section, an attorney representing the state must obtain the consent of the victim and the defendant to the referral.
(c) A criminal case may not be referred to the system if the defendant is charged with or convicted of an offense listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure, or convicted of an offense, the judgment for which contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

152.004. Financing
(a) To establish and maintain an alternative dispute resolution system, the commissioners court may set a court cost in an amount not to exceed $15 to be taxed, collected, and paid

as other court costs in each civil case filed in a county or district court in the county, including a civil case relating to probate matters but not including:

(1) a suit for delinquent taxes;

(2) a condemnation proceeding under Chapter 21, Property Code; or

(3) a proceeding under Subtitle C, Title 7, Health and Safety Code.

(b) The county is not liable for the payment of a court cost under this section.

(c) The clerks of the courts in the county shall collect and pay the costs to the county treasurer or, if the county does not have a treasurer, to the county officer who performs the functions of the treasurer, who shall deposit the costs in a separate fund known as the alternative dispute resolution system fund. The fund shall be administered by the commissioners court and may only be used to establish and maintain the system. The system shall be operated at one or more convenient and accessible places in the county.

152.005. Additional Fee for Justice Courts

(a) To establish and maintain an alternative dispute resolution system, the commissioners court may, in addition to the court cost authorized under Section 152.004, set a court cost in an amount not to exceed $5 for civil cases filed in a justice court located in the county, but not including:

(1) a suit for delinquent taxes; or

(2) an eviction proceeding, including a forcible detainer, a forcible entry and detainer, or a writ of re-entry.

(b) A clerk of the court shall collect and pay the court cost in the manner prescribed by Section 152.004(c).

152.006. Fee for Alternative Dispute Resolution Centers

An entity described by Section 152.002(a) or (b)(1) that provides services for the resolution of disputes may collect a reasonable fee set by the commissioners court.

152.007. Participant Fee for Criminal Dispute Resolution

(a) An entity that provides services for the resolution of criminal disputes under this chapter may collect a reasonable fee set by the commissioners court from a person who receives the services, not to exceed $350, except that the fee may not be collected from an alleged victim of the crime.

(b) Fees collected under this section may be paid on a periodic basis or on a deferred payment schedule at the discretion of the judge, magistrate, or program director administering the pretrial victim-offender mediation program. The fees must be based on the defendant’s ability to pay.

CHAPTER 154: ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Subchapter A. General Provisions

154.001. Definitions
In this chapter:
(1) "Court" includes an appellate court, district court, constitutional county court, statutory county court, family law court, probate court, municipal court, or justice of the peace court.
(2) "Dispute resolution organization" means a private profit or nonprofit corporation, political subdivision, or public corporation, or a combination of these, that offers alternative dispute resolution services to the public.

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

154.003. Responsibility of Courts and Court Administrators
It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002.

Subchapter B. Alternative Dispute Resolution Procedures

154.021. Referral of Pending Disputes for Alternative Dispute Resolution Procedure
(a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:
(1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);
(2) a dispute resolution organization; or
(3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.
(b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.
(c) Except as provided by agreement of the parties, a court may not order mediation in an action that is subject to the Federal Arbitration Act (9 U.S.C. Sections 1-16).

154.022. Notification and Objection
(a) If a court determines that a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.
(b) Any party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral.
(c) If the court finds that there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.

154.023. Mediation
(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.
(b) A mediator may not impose his own judgment on the issues for that of the parties.
(c) Mediation includes victim-offender mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure.

154.024. Mini-Trial
(a) A mini-trial is conducted under an agreement of the parties.
(b) Each party and counsel for the party present the position of the party, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations.
(c) The impartial third party may issue an advisory opinion regarding the merits of the case.
(d) The advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement.

154.025. Moderated Settlement Conference
(a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.
(b) Each party and counsel for the party presents the position of the party before a panel of impartial third parties.
(c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.
(d) The advisory opinion is not binding on the parties.

154.026. Summary Jury Trial
(a) A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations.
(b) Each party and counsel for the party presents the position of the party before a panel of jurors.
(c) The number of jurors on the panel is six unless the parties agree otherwise.
(d) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.
(e) The advisory opinion is not binding on the parties.

154.027. Arbitration
(a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award.
(b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

154.028. Mediation Following Application for Expedited Foreclosure

(a) Authorizes a court, following receipt of an application for an expedited foreclosure proceeding under Rule 736.1, Texas Rules of Civil Procedure, to, in the court's discretion, conduct a hearing to determine whether to order mediation. Prohibits a court from ordering mediation without conducting a hearing. Authorizes the petitioner or respondent to request a hearing to determine whether mediation is necessary or whether an application is defective.

(b) Prohibits a hearing under Subsection (a) from being conducted before the expiration of the respondent's deadline to file a response.

(c) Authorizes a hearing under Subsection (a), subject to Subsection (d), to be conducted by telephone.

(d) Requires the court, not later than the 10th day before the date of a hearing under Subsection (a), to send notice of the hearing to the parties concerning whether the hearing will be conducted by telephone and, if applicable, instructions for contacting the court and attending the hearing by telephone.

(e) Requires the court, at a hearing under Subsection (a), to consider any objections to the referral of the case to mediation.

(f) Requires the mediation, if the court orders the case to mediation, to be conducted before the expiration of any deadline imposed by Rule 736, Texas Rules of Civil Procedure.

(g) Authorizes the court to appoint a mediator if the parties to a case that has been ordered to mediation are unable to agree on the appointment of a mediator. Requires the court, if a mediator is appointed by the court, to provide all parties with the name of the chosen mediator at the mediation hearing if the parties are unable to agree to a mediator at that hearing.

(h) Requires that a mediator's fee be divided equally between the parties.

(i) Authorizes the parties to agree to waive the mediation process.

(j) Requires that notice of any mediation hearing, if a party does not respond to an application filed under Rule 736, Texas Rules of Civil Procedure, before the deadline established by that rule, be made in accordance with Subsection (d), and requires the hearing to occur not later than the 15th day after the date the petitioner files a motion for default order under Rule 736.7, Texas Rules of Civil Procedure. Authorizes a petitioner to file a motion to cancel a hearing, and authorizes the court to grant the motion if the petitioner submits an affidavit stating that the respondent received actual notice and did not reply before the deadline.

(k) Provides that, if a respondent fails to attend a mediation hearing after notice in accordance with Subsection (d), the court is prohibited from ordering mediation, and is required to grant or deny the petitioner's motion for default order under Rule 736.7, Texas Rules of Civil Procedure.

(l) Requires that any mediation, if a respondent attends a hearing and mediation is ordered, take place not later than the 29th day after the date the petitioner filed a motion for default order.

(m) Prohibits the Supreme Court of Texas, notwithstanding Section 22.004 (Rules of Civil Procedure), Government Code, from amending or adopting rules in conflict with this section.

Subchapter C. Impartial Third Parties

154.051. Appointment of Impartial Third Parties
(a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under Section 154.021, the court may appoint an impartial third party to facilitate the procedure.
(b) The court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter.
(c) The court may appoint more than one third party under this section.

154.052. Qualifications of Impartial Third Party
(a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.
(b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law.
(c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.

154.053. Standards and Duties of Impartial Third Parties
(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.
(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.
(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.
(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

154.054. Compensation of Impartial Third Parties
(a) The court may set a reasonable fee for the services of an impartial third party appointed under this subchapter.
(b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

154.055. Qualified Immunity of Impartial Third Parties
(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.
(b) This section neither applies to nor is it intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty.

Subchapter D. Miscellaneous Provisions

154.071. Effect of Written Settlement Agreement
(a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
(b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.
(c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

154.072. Statistical Information on Disputes Referred
The Texas Supreme Court shall determine the need and method for statistical reporting of disputes referred by the courts to alternative dispute resolution procedures.

154.073. Confidentiality of Certain Records and Communications
(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.
(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.
(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or accepted from required disclosure in accordance with Chapter 552, Government Code.

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.
(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.
(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

Comparison of Possible Resolution Agreements©

Mediated Settlement Agreement (MSA)

Elements:

1. Bold face or capitalized letters or underlined stating agreement is not subject to revocation; and
2. Signed by each party to the agreement; and
3. Signed by the party's attorney, if any, present at time agreement is signed.

Exception to judgment:

1A. A party was a victim of family violence which impairs the party's ability to make decisions; **or**

1B. Agreement allows a person who is subject to registration as a sex offender or has a history or pattern of past or present physical or sexual abuse directed against any person to reside in same household as child or have unsupervised access; **and**

2. Not in child's best interest.

Party can object to mediation on the basis of family violence having been committed against the opposing party.

Does not matter if mediator is court- ordered or party initiated, after suit.

Texas Family Code Ann. §6.602 and §153.0071

In re Lee, 411 S.W.3d 445, 2013

In re Morris, 498 S.W.3d 624, 2017

Mediation Agreement

Elements:

1. If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
2. The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.

Tex. Civ. Prac. & Rem. Code §154.071

1. Limits duration of mediation without extension for twice amount of filing fee.
2. Completing 60 days before initial trial setting.

Tex. Rules of Civ Pro. Rule 169(d)(4)(A)

Not a confidential document if government body is involved.

Tex. Gov. Code §2009.054

In the Matter of the Marriage of Ames, 860 S.W.2d 590 (Tex. App.-Amarillo 1993, no writ).

Rule 11 (Rule 167)

Elements

1. An agreement between attorneys or parties;
2. In writing;
3. Signed;
4. Filed with papers as part of the record.
5. Pending lawsuit

Uses:

1. For narrow complex issues.
2. Resolve a lawsuit

An agreement referring only to facts. Enforceable as a contract and should be signed by each party.

Tex. Rules of Civ. Pro. Rule 11

"…does not apply to any offer made in mediation…"

Tex. Rules of Civ. Pro. Rule 167

Padilla v. LaFrance, 907 S.W.2d 454 (Tex. 1995).

San Antonio Rest Corp. v. Leal, 892 S.W.2d 855 (Tex. 1995).

Contract

Elements

1. Offer
2. Acceptance
3. Mutuality
4. Consideration
5. Written or oral
6. Competency and capacity

Restatement (Second) of Contracts §§ 15-81.

U.C.C. Art. 1

Office of Dispute Resolution for Lubbock County
P.O. Box 10536
916 Main, Suite 800
Lubbock, Texas 79408 (79401)
(806) 775-1720
odr@co.lubbock.tx.us

v. 05.14.18

Informal Settlement

Elements:

1. The agreement provides, in a prominently displayed statement that is in boldfaced type or in capital letters or underlined, that the agreement is not subject to revocation.
2. Signed by each party to the agreement; and
3. Signed by the party's attorney, if any, who is present at the time the agreement is signed.

Court must find that the terms are just and right for the agreement to be binding on the court.

Tex. Family Code Ann. §6.604

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1. "…may be revised or repudiated before rendition…"
2. Court finds:
   a. "just and right," then binding on the court
   b. not "just and right," then court may request parties to submit a revised agreement

Tex. Family Code Ann. §7.006

Parenting Plan

Elements:

1. Designates the conservator and indicates geographic area of child's primary residence or no geographic restriction;
2. Rights and duties of each parent re: child's physical care, support, and education;
3. Provisions to minimize disruption of the child's education, daily routine, and association with friends;
4. Allocates all of the remaining rights and duties of a parent;
5. Voluntarily and knowingly made by each parent;
6. Is in the best interest of the child.

Court shall render an order if parenting plan meets requirements and provides that the child's primary residence shall be within a specified geographic area or without regard to geographic restriction and in best interest of child.

Tex. Family Code Ann. §153.133 (JMC) / §153.007

Estates - Mediated Settlement Agreement

Contested Guardianship Proceeding - On written agreement of parties or court's own motion.

Elements:

1. Provides, in a prominently displayed statement that is in boldfaced type, in capital letters, or underlined, that the agreement is not subject to revocation by the parties;
2. Signed by each party to the agreement; and
3. Signed by the party's attorney, if any, who is present at the time the agreement is signed.

A court may decline to enter judgment if the court finds that the agreement is not in the ward's or the proposed ward's best interest.

Estates Code §1055.151

Federal Guidance Mediation Agreements

Elements

1. Agreement
2. Written
3. Provision for revision
4. Signed by all parties with capacity
5. Consideration given
6. Assent
7. Given to the court to be entered for judgment

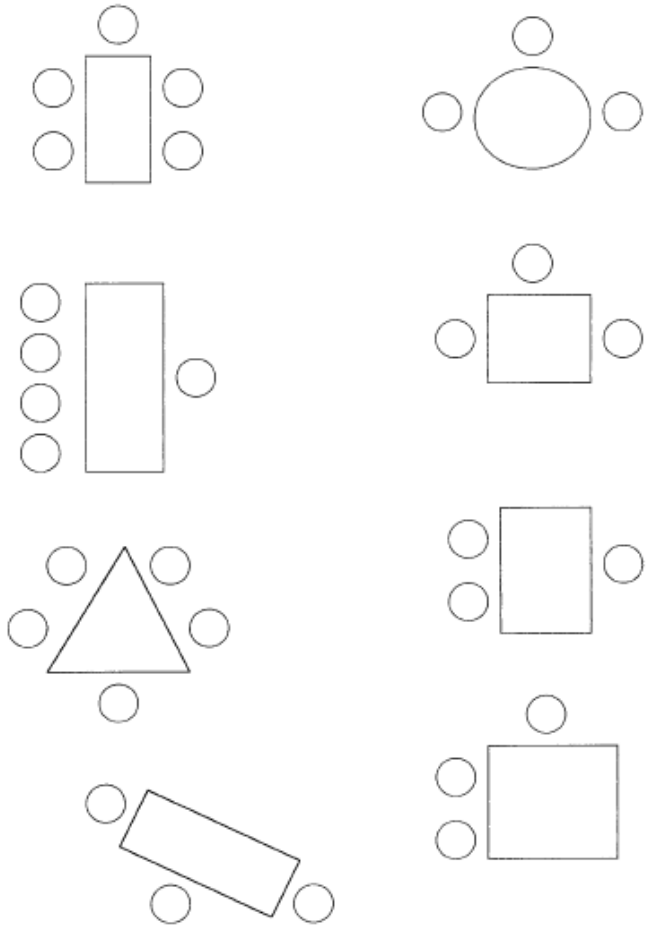
PHASE I CHECKLIST
PRELIMINARY ARRANGEMENTS

1. Pre-mediation activities:
    - *A. Contact with parties and /or attorneys – where is your allegiance*
    - *B. Pre-mediation submission/ information - what are you mediating*
    - *C. Ground rules – expectations*
    - *D. Cost*
    - *E. Conflicts*
    - *F. Site*
        - i. Camera
        - ii. Security
        - iii. Private
        - iv. Restrooms
        - v. Food
        - vi. Other
    - *G. Language*

PHASE I CHECKLIST
PRELIMINARY ARRANGEMENTS

2. Guests (your rule)
3. Setting up the room
4. Seating Arrangements:
    A. *Options for mediators*
    B. *Options for co-mediators*
    C. *Options for parties*
5. The Greetings:
    A. *Know who is there*
    B. *Mood Chart*

Possible Mediation Seating Arrangements



SCHEDULING ORDER

Cause No. 2018-123,456

Dean Stanzione	§	In the County Court at Law #3
v.	§	OF
Cryctal Spradley	§	Lubbock County, Texas

Court's Scheduling Order (Expedited Actions)

The Court ORDERS that the following deadlines apply. If no date is set by the court, or if an issue is not addressed by the Court, the event is to be governed by the Texas Rules of Civil Procedure.

to be set at pre-trial conference **TRIAL DATE:** The trial date will be set at the Pre-Trial conference.

MAY 27, 2018 **JOINDER:** All parties must be added and served, whether by amendment or third party practice, by this date. THE PARTY CAUSING JOINDER SHALL PROVIDE A COPY OF THIS SCHEDULING ORDER AT THE TIME OF SERVICE. THIS DEADLINE DOES NOT INCLUDE RESPONSIBLE THIRD PARTIES. (2 MONTHS FROM DEFENDANT'S ANSWER DATE)

JUNE 25, 2018 **PLAINTIFF'S EXPERT WITNESSES:** Plaintiff shall list each expert's name, address, and topics of the witness' testimony by this date. Expert reports, if any, of testifying experts shall be furnished to the opposing party within 14 days following this deadline or within 14 days following receipt by the Plaintiff. Unless so provided the witness will not testify and this date will not be extended. (3 MONTHS FROM DEFENDANT'S ANSWER DATE)

JULY 25, 2018 **DEFENDANT'S EXPERT WITNESSES:** Defendant shall list each expert's name, address, and topics of the witness' testimony by this date. Expert reports, if any, of testifying experts shall be furnished to the opposing party within 14 days following this deadline or within 14 days following receipt by Defendant. Unless so provided the witness will not testify and this date will not be extended. (4 MONTHS FROM DEFENDANT'S ANSWER DATE)

AUGUST 26, 2018 **FACT WITNESSES:** A list including the name, address, phone number, and topic of testimony of each fact witness who may be called at trial must be provided by this date. Witnesses not provided as ordered will not be permitted to testify unless good cause is shown. (5 MONTHS FROM DEFENDANT'S ANSWER DATE)

SEPTEMBER 25, 2018 **DISCOVERY DEADLINE:** All discovery must be conducted during the discovery period and completed by this date.(180 DAYS FROM DEFENDANT'S ANSWER DATE)

OCTOBER 2, 2018 **DISPOSITIVE MOTIONS:** All motions, that if granted by the court would dispose of part or all of the case, shall be filed by this date. This deadline may not be extended without prior approval of the court. (7 DAYS AFTER DISCOVERY ENDS)

SEPTEMBER 25, 2018 **PLEADINGS:** All pleading amendments must be filed by this date. This order does not preclude prompt filing of pleadings directly responsive to any timely filed pleadings. (SAME DAY AS DISCOVERY ENDS)

DEFAULT DATE:

OCTOBER 25, 2018 9 AM **ALTERNATIVE DISPUTE RESOLUTION**: It is anticipated that the parties shall cooperate in an ADR procedure under the terms and conditions ordered by the Court, as limited by Rule 169, Texas Rules of Civil Procedure, where applicable. Should the parties agree to use a selected neutral for this case, mediation should be completed by the default date with a private mediator. Parties should notify the Office of Dispute Resolution for Lubbock County and the Court when a date is selected. The mediator shall report the outcome of the ADR procedure to the Court consistent with the provisions of the Tex. Civ. Prac. & Rem. Code Ann. Section 154.

If the parties do not agree or are unable to select a private mediator, the mediation will be conducted by the Office of Dispute Resolution (ODR) on the default mediation date at the time given. The parties may agree to participate in a different ADR procedure through the ODR or to mediate prior to the default date. However, mediation may not be held after this date or cancelled without mutual agreement of the parties and prior approval from the Court. Individuals with full authority to settle the case shall attend in person and participate in mediation. Contact the Office of Dispute Resolution for Lubbock County for more information or wait for correspondence from the Master of Dispute Resolution. The Master's letter will be transmitted within 30 days after issuance of this order.

IF YOU DO NOT APPEAR FOR MEDIATION BEFORE ODR, and/or YOU HAVE NOT CANCELLED AT LEAST 24 HOURS IN ADVANCE, you may be assessed $75.00 as court costs. Notify the court and the ODR IMMEDIATELY if the case settles.

NOVEMBER 20, 2018 **PRE-TRIAL EXCHANGE DEADLINE:** Counsel shall provide to the Court and all other counsel, the following: (1) requested jury charges, (2) motions in limine, (3) exhibit lists containing a description of each exhibit and exhibit number, (4) copies of all exhibits the party intends to offer at trial, marked with exhibit tags and numbers, and, (5) deposition excerpts (counsel shall identify each deposition counsel intends to offer at trial, either by video or otherwise, and designate by page and line number those portions of each deposition counsel intends to offer at trial). Counsel are ordered to confer prior to the Pre-Trial Management Conference, and shall attempt to reach agreements and stipulations with regard to matters addressed in the motions in limine,

admissibility of exhibits and objections to deposition excerpts. (5 DAYS PRIOR TO PRE-TRIAL MANAGEMENT CONFERENCE)

NOVEMBER 25, 2018 **PRE-TRIAL MANAGEMENT CONFERENCE:** The Court will rule on any pending motions, including motions in limine and objections to depositions excerpts, make preliminary rulings on admissibility of proposed exhibits, and make any other appropriate order which will aid the Court in trying the case as efficiently as possible. (8 MONTHS FROM DEFENDANT'S ANSWER DATE)

These trial events are set within a specific time frame to provide for a fair but efficient disposition of the case. Unless otherwise indicated, none of these events can be changed without the court's approval. The court has set specific dates and will be unwilling to change its Scheduling Order, especially as the case nears the trial date.

SIGNED AND ORDERED ON THIS _____ day of _____, 20__.

_____

JUDGE PRESIDING

***For this example, this case was filed on March 1, 2018. The defendant (unbelievably!), was served on the same date. His answer time will have passed on March 25, 2018. This date is the one we will use to determine everything else.

Cause No. 2018-123,456

Dean Stanzione	§	In the 237th District Court
v.	§	OF
Cryctal Spradley	§	Lubbock County, Texas

Court's Scheduling Order (Expedited Actions)

The Court ORDERS that the following deadlines apply. If no date is set by the court, or if an issue is not addressed by the Court, the event is to be governed by the Texas Rules of Civil Procedure.

JANUARY 27, 2019 **TRIAL DATE:** This case will be tried on this date. If the Court assigned to this case cannot reach the case on this date, it will be tried by a visiting judge or by one of the other Lubbock County District Judges. (10 MONTHS FROM DEFENDANT'S ANSWER DATE)

MAY 27, 2018 **JOINDER:** All parties must be added and served, whether by amendment or third party practice, by this date. THE PARTY CAUSING JOINDER SHALL PROVIDE A COPY OF THIS SCHEDULING ORDER AT THE TIME OF SERVICE. THIS DEADLINE DOES NOT INCLUDE RESPONSIBLE THIRD PARTIES. (2 MONTHS FROM DEFENDANT'S ANSWER DATE)

JULY 25, 2018 **PLAINTIFF'S EXPERT WITNESSES:** Plaintiff shall list each expert's name, address, and topics of the witness' testimony by this date. Expert reports, if any, of testifying experts shall be furnished to the opposing party within 14 days following this deadline or within 14 days following receipt by the Plaintiff. Unless so provided the witness will not testify and this date will not be extended. (4 MONTHS FROM DEFENDANT'S ANSWER DATE)

AUGUST 25, 2018 **DEFENDANT'S EXPERT WITNESSES:** Defendant shall list each expert's name, address, and topics of the witness' testimony by this date. Expert reports, if any, of testifying experts shall be furnished to the opposing party within 14 days following this deadline or within 14 days following receipt by Defendant. Unless so provided the witness will not testify and this date will not be extended. (5 MONTHS FROM DEFENDANT'S ANSWER DATE)

AUGUST 25, 2018 **FACT WITNESSES:** A list including the name, address, phone number, and topic of testimony of each fact witness who may be called at trial must be provided by this date. Witnesses not provided as ordered will not be permitted to testify unless good cause is shown. (5 MONTHS FROM DEFENDANT'S ANSWER DATE)

SEPTEMBER 25, 2018 **DISCOVERY DEADLINE:** All discovery must be conducted during the discovery period and completed by this date.(180 DAYS FROM DEFENDANT'S ANSWER DATE)

OCTOBER 2, 2018 **DISPOSITIVE MOTIONS:** All motions (other than a motion under Rule 91a), that if granted by the court would dispose of part or all of the case, shall be filed by this date. This deadline may not be extended without prior approval of the court. (7 DAYS AFTER DISCOVERY ENDS)

SEPTEMBER 25, 2018 **PLEADINGS:** All pleading amendments must be filed by this date. This order does not preclude prompt filing of pleadings directly responsive to any timely filed pleadings. (SAME DAY AS DISCOVERY ENDS)

DEFAULT DATE:

OCTOBER 25, 2018 @ 9 AM **ALTERNATIVE DISPUTE RESOLUTION:** It is anticipated that the parties shall cooperate in an ADR procedure under the terms and conditions ordered by the Court, as limited by Rule 169, Texas Rules of Civil Procedure, where applicable. Should the parties agree to use a selected neutral for this case, mediation should be completed by the default date with a private mediator. Parties should notify the Office of Dispute Resolution for Lubbock County and the Court when a date is selected. The mediator shall report the outcome of the ADR procedure to the Court consistent with the provisions of the Tex. Civ. Prac. & Rem. Code Ann. Section 154.

If the parties do not agree or are unable to select a private mediator, the mediation will be conducted by the Office of Dispute Resolution (ODR) on the default mediation date at the time given. The parties may agree to participate in a different ADR procedure through the ODR or to mediate prior to the default date. However, mediation may not be held after this date or cancelled without mutual agreement of the parties and prior approval from the Court. Individuals with full authority to settle the case shall attend in person and participate in mediation. Contact the Office of Dispute Resolution for Lubbock County for more information or wait for correspondence from the Master of Dispute Resolution. The Master's letter will be transmitted within 30 days after issuance of this order.

IF YOU DO NOT APPEAR FOR MEDIATION BEFORE ODR, and/or YOU HAVE NOT CANCELLED AT LEAST 24 HOURS IN ADVANCE, you may be assessed $75.00 as court costs. Notify the court and the ODR IMMEDIATELY if the case settles.

JANUARY 22, 2019 **PRE-TRIAL EXCHANGE DEADLINE:** Counsel shall provide to the Court and all other counsel, the following: (1) requested jury charges, (2) motions in limine, (3) exhibit lists containing a description of each exhibit and exhibit number, (4) copies of all exhibits the party intends to offer at trial, marked with exhibit tags and numbers, and, (5) deposition excerpts (counsel shall identify each deposition counsel intends to offer at trial, either by video or otherwise, and

designate by page and line number those portions of each deposition counsel intends to offer at trial).

Counsel are ordered to confer prior to the Pre-Trial Management Conference, and shall attempt to reach agreements and stipulations with regard to matters addressed in the motions in limine, admissibility of exhibits and objections to deposition excerpts. (5 DAYS PRIOR TO TRIAL)

JANUARY 17, 2019 **PRE-TRIAL MANAGEMENT CONFERENCE:** The Court will rule on any pending motions, including motions in limine and objections to depositions excerpts, make preliminary rulings on admissibility of proposed exhibits, and make any other appropriate order which will aid the Court in trying the case as efficiently as possible. (10 DAYS PRIOR TO TRIAL DATE)

These trial events are set within a specific time frame to provide for a fair but efficient disposition of the case. Unless otherwise indicated, none of these events can be changed without the court's approval. The court has set specific dates and will be unwilling to change its Scheduling Order, especially as the case nears the trial date.

SIGNED AND ORDERED ON THIS _____ day of _____, 20__.

_____

JUDGE PRESIDING

***For this example, this case was filed on March 1, 2018. The defendant (unbelievably!), was served on the same date. His answer time will have passed on March 25, 2018. This date is the one we will use to determine everything else.

PHASE II CHECKLIST
THE INTRODUCTORY STATEMENT
(3-5 Minutes)

1. Welcome and Introduction
   - *Acknowledge willingness to participate*
   - *Acknowledge Attorney/Parties – Self Represented*
   - *Prepare for full disclosure*
2. Define mediation and purpose
3. Define your role
4. Mediation concepts: Future/confidential/empowerment/communication
5. Outline the mediation process – Create a picture
   - *Caucus/Private/Individual*
   - *Emphasize the importance of listening*
   - *Solutions not rebuttals*

PHASE II CHECKLIST
THE INTRODUCTORY STATEMENT
(3-5 Minutes)

6. Identify conflicts
7. Address referral source – if applicable
8. Possible Privacy Issues
9. Exceptions to Confidentiality
10. Check authority
11. Avoid and/or define jargon
12. Agreement/Outcomes
    - *Contract/Judgement*
13. Fit your personality
14. DO NOT read script
15. Observe for Non-Verbal

MEDIATOR’S OPENING STATEMENT

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The Mediator's Opening

What are some key components and objectives of a mediator's opening statement?

- **Introductions.** If the mediator has not already done so, she will want to introduce herself to the participants and have them introduce themselves to each other and to her. The mediator should not assume that everyone knows one another; there may be attorneys or others at the table who have not previously met.
- **Key Elements of the Process.** The mediator will want to describe the key elements of the process, explaining the reasons why things will be done, in understandable terms. This allows the participants, if they have not already done so, to make an informed decision whether (and how) to participate. It sometimes includes "ground rules" that all agree will govern the mediation. These can provide the participants with a sense of security and direction as the process moves forward.
- **The Mediator's Function.** Most mediators say something about their part in the mediation — what they will (and will not) do.
- **Touting the Benefits of Mediation.** Many mediators try to explain the potential advantages of the process, especially for first-time users and parties who have been mandated by the courts to participate. This is designed to instill optimism and increase their "buy-in" to the process.
- **Confirm the Presence and Bargaining Authority of Necessary Parties.** In appropriate cases, the mediator may want to confirm that all persons whose presence is necessary to settle the case are on hand and that they have authority to negotiate and resolve the matter.
- **Establishing a Positive Tone.** As an overarching goal, the mediator works to establish a positive tone for the discussions that will follow.

MEDIATION RULES

Office of Dispute Resolution
MEDIATION RULES

Mediation is a process whereby an impartial person helps the parties attempt to: reach an agreement about the item(s) in dispute, come to an understanding of the issue(s) being discussed, or accomplish reconciliation. The purpose of mediation is to aid the parties in developing their own agreement with respect to the issue(s) in dispute.

The Office of Dispute Resolution (ODR) conducts such mediation sessions according to the following rules:

1. **Confidentiality**
Communications in mediation are confidential and the mediator shall not disclose any communication made during the mediation to the court or anyone else. ***However, abuse, neglect, and exploitation of children, the elderly, and persons with disabilities are not confidential issues and must be reported. Further, certain federal matters may require disclosure.***
WARNING: Any confidential communications between the attorney and their client in the presence of a third party (e.g. relative, friend, advisor) regarding any matter related to the subject of the mediation may not be protected as confidential if determined to be a waiver of the attorney-client privilege and may be discoverable and admissible in any subsequent legal proceedings. This may include electronic communications.
WARNING: Communication between a parent and child during mediation may not be privileged. A communication with non-named parties, whether verbally or electronically, during the mediation may not be protected as confidential. The communication may also be discoverable and admissible in a subsequent legal proceeding.
WARNING: Anyone that comes into contact with health care treatment/information will be held accountable by state law. Communication about healthcare/treatment may not be repeated by party, attorney, or mediator without written consent.

2. **Participation and Disclosure**
Parties are expected to communicate openly, to share all information pertinent to the issue(s), and to follow instructions as directed by the mediator. Common courtesy shall be exercised toward all in attendance at the mediation.

3. **Legal/Financial Advice**
The mediator cannot provide legal or financial advice to either party. The mediator is neutral and will not advocate for either party. If the need for legal and/or financial advice arises during mediation, the parties will be encouraged to discuss such issues with an attorney and/or an accountant.

4. **Bankruptcy**
If you have a pending matter in a bankruptcy court, you affirm that your stay has been lifted and the court has approved the Office of Dispute Resolution to conduct your mediation.

5. **Taxing/Regulatory Agencies**
You acknowledge that your agreement is not binding upon taxing/regulatory agencies.

6. **Session Attendance**
Parties are expected to attend all mediation sessions scheduled by the mediator.

7. **Individual Meetings**
At times, the process of mediation requires the mediator to hold individual meetings with the parties. Such information shared during these meetings is confidential unless approval is given by the appropriate person(s) to share such information.
WARNING: Communication pertaining to a party's healthcare state or treatment may not be written/repeated without the party's consent.

8. **Communication between Sessions/Notice of Settlement**
If mediation is continued to another date, the mediator will not discuss the mediation with either party or any attorney in the case between mediation sessions. If the parties settle their dispute before reconvening the mediation, the parties or their attorneys will immediately inform the ODR of settlement.

9. **Safe Place**
Named parties are not allowed to carry weapons or wear law enforcement uniforms in mediation. No subpoenas, citations, writs or other process shall be served at or near the location of a mediation. Unless otherwise directed by the court, participants shall not be arrested during mediation.

10. **Reporting Outcome of Mediation**
If the parties or mediator terminate the mediation before an agreement is reached, the report to the court will reflect an Impasse. If the parties reach an agreement during mediation that resolves all or part of their dispute, the mediator may record a *Rule 11 and Mediation Agreement* that will state the terms of the agreement. The *Rule 11 and Mediation Agreement* will be given to the parties and their attorneys. Parties who attend mediation without counsel may sign the agreement at the mediation or may wait to sign the agreement until after their attorneys have reviewed and approved the agreement. Once signed, the *Rule 11 and Mediation Agreement* may be enforceable as a judgment. ***Before signing, and thereby executing, any agreement, parties have the right to have it independently reviewed by a lawyer.***

11. **Fees**
Parties and/or counsel acknowledge and accept responsibility for fees that may be incurred.

12. **Non-named Individuals**
Prior permission must be obtained from the Office of Dispute Resolution before any individuals who are not actual parties to the matter being mediated or their legal counsel may accompany a party to, or otherwise participate in, the mediation. Even if prior permission is granted, the Office of Dispute Resolution reserves the right to request any non-party to leave for the duration of the mediation. In order to assist the parties in reaching an agreement, it may be necessary for the mediator to interview other persons. If so, the mediator will discuss and inform everyone involved. Such discussions are confidential.

By signing this agreement, we are acknowledging the following information:

We agree to use our best efforts to participate in the mediation process in accordance with these rules, Chapter 154 of the *Texas Civil Practice and Remedies Code, Texas Family Code 153.0071, Texas Estates Code 1055.151,* and the Supreme Court's guidelines that "counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation."

We further acknowledge that we have read and understood the Mediation Rules this _____ day of _____, 20_____, and that the ODR has furnished us with a copy of these rules.

_____	_____
(Signature)	(Signature)
_____	_____
(Print Name)	(Print Name)
_____	_____
(Signature) Attorney	(Signature) Attorney
_____	_____
(Print Name) Attorney	(Print Name) Attorney

NEGOTIATION

A. Definitions
    2. *Issues*= Topic or subject of negotiations
    3. *Position*= One party's solution to an issue
    4. *Interest*= One party's concern about an issue

2. Interests

Often the position obscures what one really wants. Rather than focusing on stated positions, make the object to satisfy the interests of both parties (e.g. Two people in a room are arguing over whether the window should be open or closed. One wants fresh air and the other doesn't want a draft. A solution satisfying both of their interests would be to open a window in an adjoining room so that there would be fresh air but no draft.)

Different Interests Defined:

a. ***Economics*:** profit, reducing future costs, reducing inefficiencies, developing new opportunities.
b. ***Moral and Psychological*:** integrity, principled behavior, fairness, self respect and esteem, freedom from anxiety and stress, adventure, excitement, peace of mind
c. ***Ego or Psychic*:** personal satisfaction, security, career, good performance, respect
d. ***Influence*:** reputation, authority, credibility, status, good will
e. ***Ideological*:** religious, political, social beliefs
f. ***Relationship*:** maintaining good relationships, developing or enhancing possibilities of fixture relationships, terminating detrimental relationships
g. ***Freedom of Action*:** preserving opportunities, avoiding constraints and imposed obligations, avoiding undesirable precedents
h. ***Efficiency or Security*:** protecting position, properties, investment, establish a good precedent — developing a settled and reliable procedure or process for resolving problems or issues.

Douglas N. Frenkel & James H. Stark, The Practice of Mediation, Second Edition (2012)

1. Recognized Patterns of Negotiators

Competitive	Problem Solving
Attempts to maximize tangible resource gains for own client within limits of current dispute.	Attempts to maximize returns for own client including any joint gains available.
Makes high initial demands, slow to concede.	Focuses on common interest of parties.
Uses threats and confrontation.	Tries to understand the merits objectively.
Manipulates people and the process.	Uses non-confrontational debating techniques.
Is not open to persuasion or substance.	Is open to persuasion on substance.
Is oriented to quantitative & competitive goals.	Is oriented to qualitative goals – a fair/wise/durable agreement that is efficiently negotiated.

MEDIATOR ORIENTATIONS, STRATEGIES, AND TECHNIQUES

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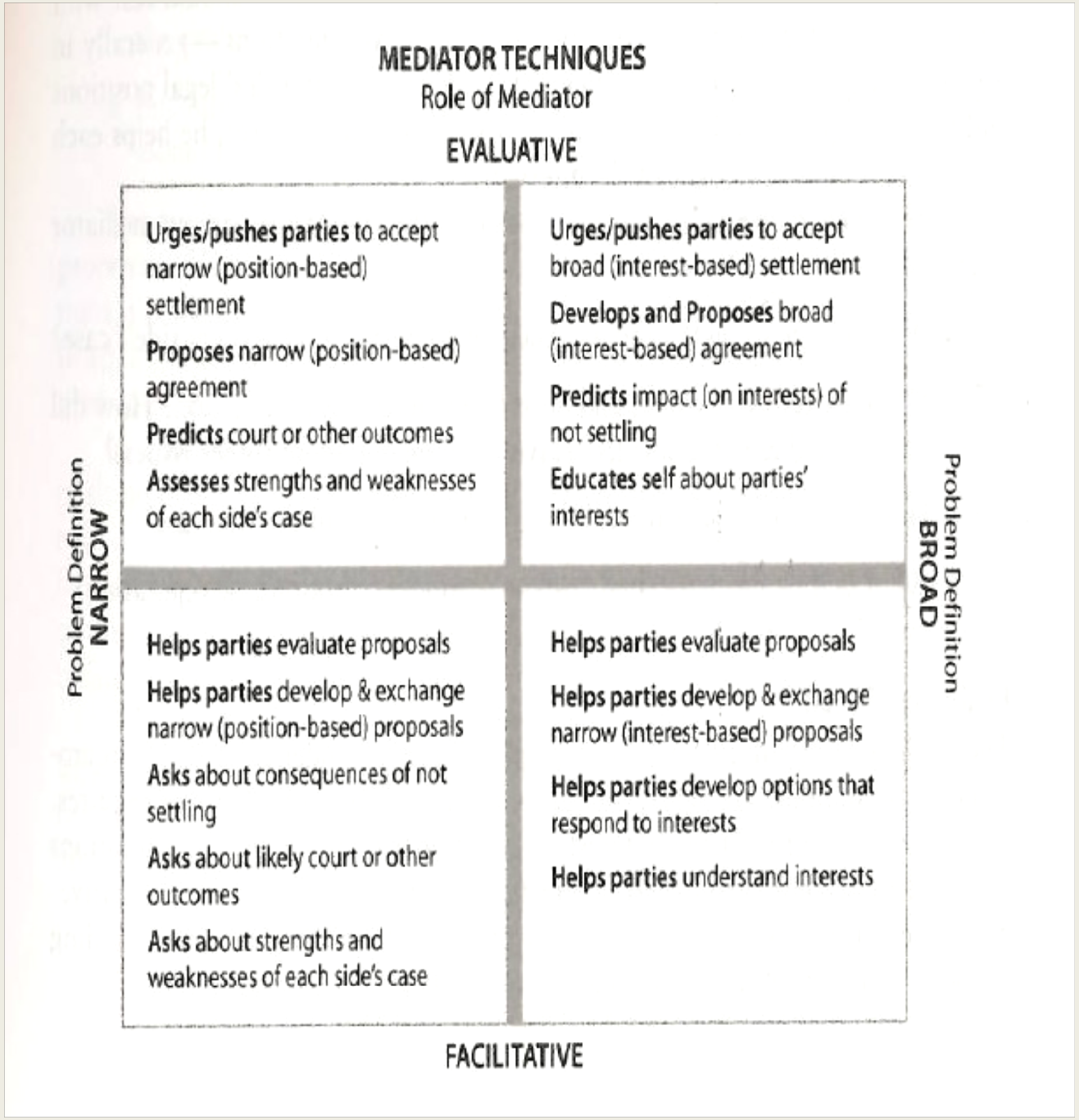
MEDIATOR TECHNIQUES
Role of Mediator
EVALUATIVE
Urges/pushes parties to accept narrow (position-based) settlement
Proposes narrow (position-based) agreement
Predicts court or other outcomes
Assesses strengths and weaknesses of each side's case
Urges/pushes parties to accept broad (interest-based) settlement
Develops and Proposes broad (interest-based) agreement
Predicts impact (on interests) of not settling
Educates self about parties' interests
Problem Definition NARROW
Problem Definition BROAD
Helps parties evaluate proposals
Helps parties develop & exchange narrow (position-based) proposals
Asks about consequences of not settling
Asks about likely court or other outcomes
Asks about strengths and weaknesses of each side's case
Helps parties evaluate proposals
Helps parties develop & exchange narrow (interest-based) proposals
Helps parties develop options that respond to interests
Helps parties understand interests
FACILITATIVE

VARIABLES IN DETERMINING THE RIGHT GOAL AND ROLE

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The Parties. The parties themselves often influence the process in crucial ways. Consider these variables:

- **What are the parties' goals? How do they or their representatives want to define the problem?** In many cases, the disputants will be malleable and will take their cues about the goals of mediation from the mediator. But a more common scenario will be a highly interactive one, with the mediator and disputants jointly setting or negotiating goals for the process. As we have suggested, many participants will enter mediation with a narrow adversarial view of the problem and the kind of solution they think is possible or acceptable. They may wish a speedy end to the matter or be unwilling to share enough information to make a broad, interests-based approach feasible. A party uncomfortable with feelings may be unwilling to participate in any process that seems too "therapeutic." The mediator may or may not be able to transform such dynamics. But whatever happens, defining the problem is not just up to the mediator. Rather, it is likely to be a dynamic and interactive process, with the parties exerting great influence.
- **Do the parties want a facilitative, evaluative or transformative mediator?** Have the parties chosen the mediator or was she appointed? Do they have an expectation as to how the mediator will carry out her role? Sometimes the parties or their representatives will want the mediator to play a purely facilitative role, sometimes they will seek evaluation, sometimes a transformative approach. (Often, they won't know or care.) Since much mediation is contractual, the mediator and the parties can often negotiate such questions in advance or change their preference during the process. Even where the mediator is appointed, role issues can be discussed and agreed to before or during the mediation process.
- **Can each party negotiate effectively without the mediator's input?** Do the parties both have access to factual or legal information relevant to the dispute? Do they have comparable bargaining abilities? Is there a realistic opportunity for them to obtain independent advice before going to trial if the case does not settle? Will the parties be able to function adequately in court in the event of no resolution? These sorts of factors may have an effect on the perceived need for an evaluation.
- **Are the parties sophisticated and/or represented by counsel?** This potentially cuts both ways. For some facilitative mediators, the fact that the parties are represented by counsel frees them from an arguable need to make evaluative statements about the law, the parties' risks or likely court outcomes. For other mediators, the fact that both parties are sophisticated about their rights and/or represented by counsel lessens the potential danger that they will be unduly influenced or coerced. In such cases, why not offer one's views? (Purely transformative practitioners would not provide an evaluation in any event.)

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- **How much hostility is there between the parties?** There is some empirical evidence that directive mediator approaches such as suggesting possible agreements are productive in producing settlements when hostility between the parties is low, but ineffective and even counterproductive when hostility between the parties is high.[56]

The Dispute. The characteristics of the dispute itself may render it more or less suitable for one kind of approach or another. For example:

- **Is this a single-issue or a divisible/multiple-issue problem?** Disputes defined in single-issue terms (*What price? How much in damages? What wage rate? Is the defendant guilty or not?*) tend to lend themselves to narrow problem definitions and to distributive bargaining. By contrast, potentially divisible issue or multi-issue problems ("*My price will be affected by your scheduling demands.*" "*I want both weekend and weekday time with our son.*" "*I'll take less in damages if you can pay me today in cash.*" "*Can we trade a lower wage rate for better health benefits or improved safety?*") are, by definition, more susceptible to interest-based trades.

- **How predictable is the outcome in the court or other alternative?** Is the underlying legal dispute governed by well-established, "black-letter" principles? Are there clear industry or community standards to guide the transaction? The more settled the norms that relate to the dispute or transaction and the more clearly those "rules" apply to the facts of the case, the more likely that the participants will focus on their rights, and the law, in the mediation process. This often makes interest-based bargaining more difficult and may increase the mediator's temptation to provide a legal evaluation.

- **Is this a "relational" dispute or one-time transaction?** Have any of the disputants had a past or ongoing relationship? Are those persons present at the mediation? Is there a possibility of future dealings? When the parties contemplate future interactions, they are more likely to be willing to explore each other's interests and be otherwise more open and cooperative—conditions conducive to the success of a facilitative approach. (Working on their ongoing relationship going forward might also argue for the transformative model.) When the parties are strangers and anticipate no future relationship, they are much more likely to take a narrow, settlement-oriented approach. Falling in the middle of the continuum are cases in which the parties in a dispute have had a past relationship but are ending it. While some disputants in this situation may be willing to explore their past relationship and try to clear the air, others may prefer to focus solely on getting the dispute settled as efficiently as possible.

- **What are the main barriers to a negotiated resolution?** Recall the emotional, strategic and cognitive reasons why negotiations fail. The mediator's interventions may depend on her diagnosis of the barriers that may be preventing

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the parties from bargaining more productively. For example, a reflexively evaluative mediator who always tells the parties what he thinks about the settlement value of the case misses the boat entirely if the principal barrier to settlement is the parties' bad feelings about some angry words exchanged between them in their last meeting. (Note: Many of these dispute barriers could also be seen as part of the "parties" variable described above.)

External Factors. Finally, the setting in which the mediator works and other external factors can have a dramatic impact on the type of mediation practiced:

- **Are there significant time constraints?** Is there a time limit, an imminent related event (a trial, a strike) or similar constraint that places a premium on efficiency? If the mediation is conducted in a courthouse, is there a big caseload? Does the mediator or do any of the participants have to be someplace else soon? As negotiation scholars Douglas Stone, Bruce Patton and Sheila Heen have written, real conversations cannot be conducted "on the fly."[57] Because broad problem-solving, exploration of feelings and relationship-building or repair take time, mediations conducted under time pressure tend to be more narrow in their focus.
- **What is the mediation "culture?"** Does the host court, agency or institution have a clear agenda regarding the definition of a "successful" mediation? Does the mediator feel a sense of obligation to that agenda? Are there statutes, court rules or contractual provisions that require or prohibit the use of a particular role approach?

This listing is only suggestive of the complex currents and crosscurrents that will be unique in each case. As should be apparent from the list, some of these variables do not fall neatly on one side or another of the debate over what approach a mediator ought to adopt. Furthermore, the unique combination of party, dispute and external factor variables presented in any particular case may point the mediator in differing directions.

To illustrate this, here are two different, essentially full-length mediations of the same consumer dispute (*Wilson v. DiLorenzo*). **Video Clips 3-A and 3-B.**

As you watch them, consider the following questions:

- How would you characterize the primary orientation of the male mediator? The female mediator? What were the most significant differences in their approaches? Be specific.
- What variables in this dispute made one or another mediator role preferable?
- How did their role conceptions affect their behaviors while conducting the mediation?
- Does each mediator adhere to his or her primary approach consistently throughout the mediation? If not, where did he or she deviate?

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- What did you like and not like about the way each mediator conducted the process? Be specific. Which mediator's approach did you prefer? Why? Would your views have similar or different if you had been one of the disputants?
- Did their differing approaches affect the kind of outcomes produced? If so, how? Why?

These themes will come further alive as we begin to examine the mediation process in action. Chapters 4 through 11 of this book explore, in detail and in varied settings, the skills of effective mediators throughout the stages of the mediation process. We begin where all good professional practice should: with the subject of planning.

PHASE III CHECKLIST
INITIAL STATEMENTS OF PARTIES

1. Be firm about not interrupting and respecting it yourself
2. Let speakers provide their perspective without darts
3. Ask appropriate questions
4. Initiating party usually speaks first
5. Limit speakers when necessary
6. If an attorney speaks for client, assess how to bring the client into the mediation
7. If only one attorney is present, change approach

PHASE III CHECKLIST
INITIAL STATEMENTS OF PARTIES

8. Four common denominators:
    a. *Poor communication*
    b. *Emotional entanglement*
    c. *Atmosphere of tension*
    d. *Mistrust of motives*
9. Want solutions not rebuttals-control
10. Watch/Listen for
    - *Negotiation Style*
    - *Organization*
    - *Emotion*
    - *Solution*
    - *Other*

THE CRITICAL IMPORTANCE OF GOOD LISTENING

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Kinds of Listening in Mediation. Good listening in mediation is all the more challenging because, as the process unfolds, effective mediators must listen and gather information for many different purposes. Because we will discuss this subject in greater detail in Chapter 7, here we emphasize six particularly critical kinds of listening in mediation:

- **For Content.** Like all interviewers, mediators must attend carefully to the factual content of the parties' narratives. ("*When did your neighbor put up the fence?*" "*How many cabinets have been delivered and installed?*" "*What was the last offer the defendant made?*")
- **For Empathy.** Effective mediators must also listen in a way that demonstrates empathy — a nonjudgmental understanding of each party's view of things.[28] This requires that the mediator put herself in a "believing" mode[29]

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in which she tries to put all skepticism out of her mind in order to understand and accept each person's perspectives. To the extent that those perspectives include strong emotions, listening for empathy requires paying close attention to those feelings, both those that are expressed verbally and those that are revealed nonverbally.

- **For Needs, Interests, Goals and Priorities.** Mediators must listen carefully to try to identify the parties' underlying interests, to get at the needs that explain why disputants are saying what they are saying or taking the positions they are taking. (*"She says she won't agree to let the kids visit dad during the week. Hmmm . . . I wonder if that's because she's concerned that they won't keep up with their homework . . . "*)
- **For Ultimate Negotiation Issues.** Mediators must listen carefully in order to identify the subjects to be negotiated if the matter is to be resolved, eventually to be able to help the parties create a workable agenda for the bargaining/problem-solving phase of the process. (*"So it seems that one topic is what kind of time-sharing plan will work for both of you. Might another be how you help the kids make transitions from one household to the other?"*)
- **For Evaluation.** Listening for evaluation means listening skeptically and doubtfully, with an eye to the possibility of providing helpful feedback later in the process.[30] It is the opposite of nonjudgmental, empathic listening. In legal cases, it can involve considering how each side's factual account and the admissible evidence line up against governing legal or other applicable norms in order to assess the parties' competing claims. It also means actively indulging one's doubts about how the parties' ideas and proposed solutions stack up against external realities (*"I understand why you're making that offer, but can you borrow enough to make it work?"*) Listening for evaluation comes naturally to most lawyer-mediators and can pay off in the later stages of mediation. But because it can interfere with other kinds of attention, it must be kept within proper boundaries in the early going.
- **For Diagnosis.** Finally, as Chapter 2 suggests, mediators listen for the purpose of discerning obstacles to settlement. Is a key barrier to negotiated resolution a lack of information on the part of one or more parties? Widely differing and overconfident assessments about the likely trial outcome? A counterproductive negotiating style? A misperception that the parties' interests are diametrically opposed? Listening for diagnosis helps the mediator determine what questions to ask and what statements to make throughout the mediation process and can sometimes produce surprising breakthroughs in the parties' conflict.

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§6.9 KEY COMMUNICATION ENHANCING INTERVENTIONS

In this section, we explore techniques that are useful in encouraging constructive communication during the initial stages of the process and throughout the entire mediation:

- Active Listening
- Pointing Out Agreements
- Productive Reframing
- Clarifying Meaning
- Coaching People to Express Their Anger Productively
- Stating and Enforcing Ground Rules

FEDERAL ALTERNATIVE DISPUTE RESOLUTION

REVIEW OF ADR STATUTES - FEDERAL

Federal Alternative Means of Dispute Resolution in the Administrative Process
5 USC 571 et seq. Administrative Dispute Resolution Act ("ADRA").

571. Definitions
For the purposes of this subchapter, the term--
(1) "agency" has the same meaning as in section 551(1) of this title;
(2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;
(3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination thereof;
(4) "award" means any decision by an arbitrator resolving the issues in controversy;
(5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;
(6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;
(7) "in confidence" means, with respect to information, that the information is provided--
    (A) with the expressed intent of the source that it not be disclosed; or
    (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
(8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--
    (A) between an agency and persons who would be substantially affected by the decision; or
    (B) between persons who would be substantially affected by the decision;
(9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;
(10) "party" means--
    (A) for a proceeding with named parties, the same as in section 551(3) of this title; and
    (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;
(11) "person" has the same meaning as in section 551(2) of this title; and
(12) "roster" means a list of persons qualified to provide services as neutrals.

TERMINATION DATE; SAVINGS PROVISION
Section 11 of Pub. L. 104-320 provided that: 'The authority of agencies to use dispute resolution proceedings under this Act (see Short Title note below) and the amendments made by this Act shall terminate on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation, until such proceedings terminate.'

SHORT TITLE
Section 1 of Pub L. 104-320 provided that: "This Act (enacting this subchapter, amending section 556 of this title, section 10 of Title 9, Arbitration, section 2672 of Title 28, Judiciary and Judicial Procedure, section 173 of Title 29, Labor, section 3711 of Title 31, Money and Finance, and sections 605 and 607 of Title 41, Public Contracts, and enacting provisions set out as notes under this section) may be cited as the 'Administrative Dispute Resolution Act'."

CONGRESSIONAL FINDINGS
Section 2 of Pub. L. 104-320 provided that: "The Congress finds that-
(1) administrative procedure, as embodied in chapter 5 of title 5, United State Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
(2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;
(3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
(4) such alternative means can lead to more creative, efficient, and sensible outcomes;
(5) such alternative means may be used advantageously in a wide variety of administrative programs;
(6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;
(7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and
(8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public."

PROMOTION OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION
Section 3 of Pub. L. 104-320 provided that:
(a) Promulgation of Agency Policy. - Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall -
(1) consult with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service; and
(2) examine alternative means of resolving disputes in connection with-
(A) formal and informal adjudications;

(B) rulemakings;
(C) enforcement actions;
(D) issuing and revoking licenses or permits;
(E) contract administration;
(F) litigation brought by or against the agency; and
(G) other agency actions.

(b) Dispute Resolution Specialists. - The head of each agency shall designate a senior official to be the dispute resolution specialist of the agency. Such official shall be responsible for the implementation of-

(1) the provisions of this Act (see Short Title note above) and the amendments made by this Act; and

(2) the agency policy developed under subsection (a).

(c) Training. - Each agency shall provide for training on a regular basis for the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency developed under subsection (a). Such training should encompass the theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.

(d) Procedures for Grants and Contracts. -

(1) Each agency shall review each of its standard agreements for contracts, grants, and other assistance and shall determine whether to amend any such standard agreements to authorize and encourage the use of alternative means of dispute resolution.

(2) (A) Within 1 year after the date of the enactment of this Act (Nov. 15, 1990), the Federal Acquisition Regulation shall be amended, as necessary, to carry out this Act (see Short Title note above) and the amendments made by this Act.

(B)For purposes of this section, the term 'Federal Acquisition Regulation' means the single system of Government-wide procurement regulation referred to in section 6(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 405 (a). (For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104-52, set out as a note preceding section 591 of this title.)

USE OF NONATTORNEYS

Section 9 of Pub. L. 104-320 provided that:

(a) Representation of Parties. - Each agency, in developing a policy on the use of alternative means of dispute resolution under this act (see Short Title note above), shall develop a policy with regard to the representation by persons other than attorneys of parties in alternative dispute resolution proceedings and shall identify any of its administrative programs with numerous claims or disputes before the agency and determine -

(1) the extent to which individuals are represented or assisted by attorneys or by persons who are not attorneys; and

(2) whether the subject areas of the applicable proceedings or the procedures are so complex or specialized that only attorneys may adequately provide such representation or assistance.

(b) Representation and Assistance by Non-attorneys. – A person who is not an attorney may provide representation or assistance to any individual in a claim or dispute with an agency, if-

(1) such claim or dispute concerns an administrative program identified under subsection (a)

(2) such agency determines that the proceeding or procedure does not necessitate representation or assistance by an attorney under subsection (a) (2); and

(3) such person meets any requirement of the agency to provide representation or assistance in such a claim or dispute.

(c) Disqualification of Representation or Assistance. - Any agency that adopts regulations under subchapter IV of chapter 5 of title 5, United State Code, to permit representation or assistance by persons who are not attorneys shall review the rules of practice before such agency to -

(1) ensure that any rules pertaining to disqualification of attorneys from practicing before the agency shall also apply, as appropriate, to other persons who provide representation or assistance; and

(2) establish effective agency procedures for enforcing such rules of practice and for receiving complaints from affected persons.

572. General authority

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if--

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

573. Neutrals

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall--

(1) encourage and facilitate agency use of alternative means of dispute resolution; and

(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

574. Confidentiality

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless--

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or

dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

PHASE IV CHECKLIST
THE 2-WAY EXCHANGE

1. Move from the Initial Statements to an exchange or dialogue
2. Control calmly, even if it seems disjointed
3. One person speaks at a time. Limit interrupting speaker
4. Minimize notes and gather information (verbal and non-verbal)
5. Know your options for control
6. Private Session?
    a. *Issues*
    b. *Techniques*
    c. *Remember*
        - Confidential
        - Summarize

PHASE V CHECKLIST
ISSUES & PROBLEM CLARIFICATION

1. Listen carefully and pay attention to non-verbal communication
2. Ask open ended questions. Balance questions between the parties
3. Understand the situation
4. Equal understanding between parties
5. Be patient
6. Allow other issues to be discussed
7. Restate and Summarize
8. The Board
    - *What are Positions?*
    - *What are Interests?*
    - _____ *Solutions Fit Which?*

Do Not Assume

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Topical Questions Have Many Advantages over Chronological Questions. As noted, we generally favor a topical approach to information gathering in mediation over a detailed chronological approach. This preference arises not only from the practical difficulties of conducting detailed chronological questioning but also from the distinct nature of the mediator's role. As we have said, a mediator is not an advocate who must explore every nook and cranny of a client's case to investigate all possible claims and defenses. Nor is she a judge or arbitrator who must piece together the entire history of the dispute to decide what happened or who's right. Her primary purpose is very different: to unearth and develop information that will help the disputants achieve a resolution. This is best achieved by probing into certain categories of information that are present in most disputes and that have the potential of leading the parties to see the dispute differently or to find the seeds of possible solutions.

FLESHING OUT PARTIES' OWN STATEMENTS, IDEAS, AND FEELINGS

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"T-Funneling." When fleshing out details about a specific topic is important, the technique known as "T-Funneling," can be a very useful tool.[18] A T-Funneling probe is designed to explore a single topic thoroughly and systematically, starting with (multiple, if fruitful) open-ended questions (which tend to produce spontaneous but incomplete recall) and then proceeding to "drill down" by asking closed, mediator-generated questions (which can stimulate more specific memory) on selected and potentially important details suggested by the responses to open-ended questions before starting a new "T" on the next topic. It's called "T-Funneling" because it resembles a T and, like a funnel, starts broadly and ends narrowly:

Open Question ⟼ Open Question ⟼ Open Question ⟼ Open Question

Closed Question

Closed Question

Closed Question

Closed Question

A DETAILED CHRONOLOGY IS SELDOM NECESSARY

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A Detailed Chronology of the Entire Dispute Is Seldom Necessary, Generally Impractical and Often Counterproductive. In our experience, law-trained mediators tend to want to probe the past in great chronological detail. Chronological questions come naturally to these mediators, because this is the way stories are elicited in trial-type settings, and many of them are also (or have been) trial lawyers or judges. Many of these mediators adopt an evaluative approach, using the process to predict (and if possible to get to) the "right" outcome, as measured by the likely court resolution of contested past facts.

In our view, seeking a detailed chronology of the entire dispute is usually misguided, for at least five reasons:

- **It often isn't necessary.** While mediations often involve conflicting versions of past events, in many cases there will be no particular dispute about the *sequence* of those events. Suppose the central questions are: Did the residential tenant damage the bathroom tile or not, and what was the extent of the damage? In such a case, even a mediator with a highly evaluative orientation can assess and sow doubt about the dispute's potential legal outcome by probing *topically* rather than chronologically, such as, for example: "*How old was the tile?*" "*What kind of condition was it in at the beginning of this tenant's rental?*" "*What photographic evidence do you have, Mr. Landlord, of the broken tile?*"
- **There isn't sufficient time.** In many mediated disputes, the history of the dispute is protracted and complex. Sometimes there are a great many

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documents reflecting that history, which may or may not have been exchanged before the mediation began. Imagine that you are conducting a one-day EEOC mediation in an age discrimination case involving a manager terminated after ten years of employment. As a practical matter, could you feasibly develop a complete chronological history of the plaintiff's employment? Review all his performance evaluations over the past ten years and compare them to other similarly situated employees who were not fired? As we have said, a mediation is not a trial; even if you wanted to learn as much as possible about the history of the dispute, there are far too many other tasks to attend to.

- **It may create bad feelings.** Probing the history of a dispute in great chronological detail can rekindle angry feelings and stiffen commitments, jeopardizing the negotiations that will follow. It can make the mediation seem more like a trial (with the mediator playing inquisitor), in the process dampening candid and productive communication between the parties.
- **It makes it hard to take turns.** Information gathering in mediation is challenging because there are two (or more) parties, each anxious to be heard. Spending too much time developing the historical details of one side's narrative creates the risk that the other party—left to "cool his heels"—will begin to feel aggrieved.[14] To maintain the appearance of evenhandedness, the mediator must find effective ways for the parties to take turns speaking. A detailed chronological approach to information gathering—especially where the history of the dispute is complex—makes it hard to do this.
- **The parties may not want or value it.** In many situations in which disputes are voluntarily submitted to mediation instead of to arbitration or a full-blown trial, the parties are, in effect, saying that they place a higher value on other features of the mediation process and what it can achieve.

PHASE VI CHECKLIST GENERATING OPTIONS

1. Generate options one issue at a time
2. Help parties to “brainstorm” to get several options
3. Restate Problem from Position and Interest
4. Identify other options
5. Offer options
6. Start with an issue that will likely result in success
7. Review possible consequences

Do Not Assume

PHASE VII CHECKLIST
THE AGREEMENT

1. Who, What, When, Where, and How
2. Be specific when writing agreement
3. Keep agreement balanced
4. Positive Language
5. Avoid judgmental expressions
6. Provide for the future
7. Reality test the agreement
8. Do not record agreement without permission

PHASE VII CHECKLIST
THE AGREEMENT

9. Agreement must be signed
10. Changes to agreement must be initialed
11. Avoid ambiguous words
12. Enforceable/Unenforceable
    a. *Consent*
    b. *Completeness*
    c. *Duress*
    d. *Illegal*
    e. *Statutory Compliance*
13. Report to Court

MEDIATION AGREEMENT

Start Time: _____ o'clock ___.m.
Cause No.: _____

End Time: _____ o'clock ___. m.
Referring Court: _____

Office of Dispute Resolution
RULE 11 & MEDIATION AGREEMENT
(Non-Family Law Case)
v. 03.22.17

On the _____ day of _____, 20 _____, the matter of:

_____ (π) v. _____ (Δ)

_____ (π) v. _____ (Δ)

was heard before Mediator(s): _____, _____.

This Mediation is:

- ☐ New
- ☐ A continuation of a previous mediation, the last session having been held on the _____ day of _____, 20_____.
- ☐ Court Ordered
- ☐ Requested by the parties.

THE PARTIES AGREE AS FOLLOWS:

1. _____ agrees to pay, and _____ agrees to accept, the sum of $_____ (_____ dollars) as full and final settlement of all claims in connection with this matter, such sum to be tendered by _____ no later than _____ on the _____ day of _____, 20_____.

2. Court Costs:
   - ☐ Each party shall bear its own costs.
   - ☐ Shall be paid by: _____.

3. (If applicable): _____ agrees to prepare/provide:
   - ☐ Settlement, Compromise Agreement, and Release of all Claims.
   - ☐ Dismissal or Nonsuit (circle one) with or without (circle one) prejudice, and _____ will file the Dismissal or Nonsuit with the court.
   - ☐ Other: _____.

4. ☐ **All disputes related to this agreement shall be referred to mediation at the Office of Dispute Resolution for Lubbock County before requesting enforcement or modification of the terms and conditions through litigation, except in an emergency.**

5. Additional Terms or types of agreements include:

_____

_____

_____

_____

_____

_____

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_____

_____

_____

_____

OTHER RESULTS:

☐ The Mediation is continued to a future date:

- ☐ on _____, 20_____. OR
- ☐ Date to be advised by _____ on or before the _____ day of _____, 20_____.

☐ Plaintiff has served in the military.

☐ Defendant has served in the military.

MEDIATION FEES

Total amount of $_____ .

☐ Divided equally between the parties OR ☐ Paid in full by: _____

_____ responsible for: $_____ Signature: _____
(participant name)

_____ responsible for: $_____ Signature: _____
(participant name)

_____ responsible for: $_____ Signature: _____
(participant name)

_____ responsible for: $_____ Signature: _____
(participant name)

Please note: A $50 administrative fee for non-family litigation cases will be assessed in addition to the mediation fees. In addition, travel expenses may be billed to the parties.

BY THE SIGNATURES BELOW, WE ACKNOWLEDGE THAT THIS MEDIATION WAS CONDUCTED IN ACCORDANCE WITH THE *TEXAS CIVIL PRACTICE AND REMEDIES CODE* AND OTHER APPLICABLE STATE LAW(S), AND THAT THE MEDIATOR IS NOT AN ADVOCATE FOR EITHER PARTY. **WE ALSO ACKNOWLEDGE THAT WE ARE FREELY ENTERING INTO THIS AGREEMENT, AND THAT THERE WAS NO DURESS OR UNDUE INFLUENCE BY THE MEDIATOR OR ANY ATTORNEY OR PARTY DURING THIS MEDIATION.**

WE FURTHER ACKNOWLEDGE THAT THE MEDIATOR ASSISTED IN THE PREPARATION OF THIS RECORD OF OUR AGREEMENT AT OUR REQUEST. WE UNDERSTAND THESE TERMS AND ACKNOWLEDGE THAT WE VOLUNTARILY RESOLVED AND/OR CLARIFIED THE ISSUE(S) IN DISPUTE AND HOLD THE MEDIATOR HARMLESS FOR OUR AGREEMENT. PURSUANT TO THE *TEXAS CIVIL PRACTICE AND REMEDIES CODE*, THIS MEDIATION IS CONFIDENTIAL. ALL RECORDS, REPORTS, OR OTHER DOCUMENTS RECEIVED BY THIS MEDIATOR AND ADMINISTRATIVE ENTITY (ODR) ARE CONFIDENTIAL AND SHALL BE DESTROYED BY THE OFFICE OF DISPUTE RESOLUTION.

FURTHERMORE, WE AGREE THAT ANY PARTY VIOLATING THE CONFIDENTIALITY REQUIREMENTS OF STATE LAW, LOCAL RULES IN THE ABOVE-STYLED CASE, AND ANY ORDER REFERRING THIS CASE TO MEDIATION MAY BE REQUIRED TO PAY ALL FEES AND EXPENSES OF THE MEDIATOR AND/OR THE OFFICE OF DISPUTE RESOLUTION, INCLUDING REASONABLE ATTORNEY'S FEES INCURRED IN OPPOSING THAT PARTY'S EFFORTS TO COMPEL TESTIMONY OR PRODUCTION OF RECORDS IN CONNECTION WITH THIS MEDIATION.

THE SIGNATURES BELOW AFFIRM THIS IS A WRITTEN SETTLEMENT AGREEMENT AS CONTEMPLATED BY SECTION 154.071 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE AND RULE 11 OF THE TEXAS RULES OF CIVIL PROCEDURE.

WE RECOMMEND YOU CONSULT WITH AN ATTORNEY BEFORE SIGNING THIS DOCUMENT.

PARTIES/AUTHORIZED REPRESENTATIVES: (**Authorized Representatives**: Please specify role.)	**ATTORNEYS:**
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print

Office of Dispute Resolution
916 Main, Suite 800, P.O. Box 10536
Lubbock, Texas 79408-3536
(806) 775-1720, (866) 329-3522

AGREEMENT UNDER RULE 169

Office of Dispute Resolution
AGREEMENT UNDER RULE 169
v. 05.07.13

In the matter of:

_____ (π) v. _____ (Δ)
_____ (π) v. _____ (Δ)

THE PARTIES AGREE to engage in mediation (or other ADR procedure) other than that provided for under *Texas Rules of Civil Procedure* Rule 169(d)(4)(A).

Specifically, the parties agree: (initial after each relevant agreement)

- ☐ To extend the ADR procedure beyond a half-day in duration. _____ _____
- ☐ To incur a cost for the ADR procedure that exceeds twice the amount of the filing fees. _____ _____
- ☐ To complete the ADR procedure later than 60 days before the initial trial setting. _____ _____

WE RECOMMEND YOU CONSULT WITH AN ATTORNEY BEFORE SIGNING THIS DOCUMENT.

PARTIES:	**ATTORNEYS:**
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print

Office of Dispute Resolution
916 Main, Suite 800, P.O. Box 10536
Lubbock, Texas 79408-3536
(806) 775-1720, (866) 329-3522
fax: (806) 775-7929

MEDIATION STATUS REPORT

Office of Dispute Resolution

MEDIATION STATUS REPORT

v. 12.22.14

Date: _____

Cause No.: _____ Judge: _____

_____ vs. _____

ITIO: _____

Referral Date: _____ Mediation Date: _____

Attorney: _____ Attorney: _____

RESULTS

_____ Agreement reached (CIRCLE ONE: Family or Non-Family)
☐ Rule 11

_____ Impasse

_____ Continued to the following date: _____

_____ Mediation not held

BY OUR SIGNATURES BELOW, WE ACKNOWLEDGE THAT THIS REPORT ACCURATELY REFLECTS THE OUTCOME OF OUR MEDIATION AND AGREE TO THE PAYMENT OF COSTS FOR THIS MEDIATION.

PARTIES:	ATTORNEYS:
_____ Signature	_____ Signature
_____ Print	_____ Print
_____ Signature	_____ Signature
_____ Print	_____ Print

916 Main, Suite 800, Lubbock, Texas - P.O. Box 10536, Lubbock, Texas 79408
Local: 806 775-1720 Toll Free: 866 329-3522 Fax: 806 775-7929
e-mail: odr@co.lubbock.tx.us website: www.co.lubbock.tx.us

MEDIATION FEES

Total amount of $_____ .

☐ Divided equally between the parties OR ☐ Paid in full by: _____

_____ responsible for: $_____ Signature: _____
(participant name)

_____ responsible for: $_____ Signature: _____
(participant name)

_____ responsible for: $_____ Signature: _____
(participant name)

_____ responsible for: $_____ Signature: _____
(participant name)

Please note: A $50 administrative fee for non-family litigation cases will be assessed in addition to the mediation fees.

Office of Dispute Resolution

v. 09.14.11

Date: _____

Reference Number: _____ **Referral Date:** _____

Initiating Party: _____ **Responding Party:** _____

Mediation Results:

_____Agreement reached

_____Agreement reached (with terms)

_____Partial agreement reached

_____No agreement reached

Panel Results:

_____ Both Parties accepted Panel recommendation

_____ At least one party rejected the Panel's recommendation

Other:

_____ IP does not wish to pursue

_____ Mediation not held

_____ Unable to contact IP

_____ Unable to contact RP

_____**Terms of the agreement were not met**

BY OUR SIGNATURES BELOW, WE ACKNOWLEDGE THAT THIS REPORT ACCURATELY REFLECTS THE OUTCOME OF OUR ADR PROCESS.

_____ Signature

_____ Print

_____ Signature

_____ Print

_____ Signature

_____ Print

_____ Signature

_____ Print

ETHICAL GUIDELINES

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 simultaneously conduct more than one mediation session unless all parties agree to do so.

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

> **Comment (a).** A mediator should avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.

Comment (b). If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

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

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

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

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

Comment. A 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.

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

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

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