



TEXAS MEDIATOR CREDENTIALING ASSOCIATION

STANDARDS of PRACTICE and CODE OF ETHICS

PREAMBLE

In April of 1994, the ADR Section of the State Bar of Texas (the "ADR Section") adopted Ethical Guidelines for Mediators (the "Guidelines"). The Guidelines have been widely accepted in Texas as the ethical standards of practice for mediators. The TMCA Board of Directors has adopted the Guidelines, with modifications, to make them mandatory rather than suggestive or permissive, as standards of practice and a code of ethics for TMCA credentialed mediators, to be known as and referred to as the "Texas Mediator Credentialing Association Standards of Practice and Code of Ethics". In 2005, the Supreme Court of Texas adopted the Guidelines and, in 2011, the Supreme Court of Texas adopted amendments to the Guidelines that had been suggested by the State Bar ADR Section. The TMCA Standards of Practice and Code of Ethics are identical to the Guidelines with a few exceptions: generally, the permissive word "should" in the Guidelines is replaced with the mandatory word "shall" in every place that the word "should" appears in the Guidelines and the amendments.

The exceptions to the above are as follows:

- In Rule 3, in the last sentence of the first paragraph, "shall perform" has been changed to "shall consider performing."
- In Rule 7, Comment, in the last sentence, the word "Guidelines" has been changed to "Rules."
- In Rule 8, Comment (c), the last sentence, "if agreed to by the parties or required by the court," has been inserted after "The mediator should report to the court,..."
- The Comments to the Rules are to be considered a part of the Rules and are intended to be as mandatory as the Rules themselves. There is no distinction between the Rules and the Comments.

The TMCA has adopted a grievance procedure to enforce the Standards of Practice and Code of Ethics.

STANDARDS OF PRACTICE AND CODE OF ETHICS

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 shall 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 shall not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves.

2. **Mediator Conduct.** A mediator shall 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 shall not use information obtained during the mediation for personal gain or advantage.

Comment (b). The interests of the parties shall always be placed above the personal interests of the mediator.

Comment (c). A mediator shall 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 shall not solicit a specific case or matter.

Comment (e). A mediator shall 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 shall 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 shall explain all fees and other expenses to be charged for the mediation. A mediator shall not charge a contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator shall consider performing mediation services at a reduced fee or without compensation.

Comment (a). A mediator shall 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 shall decline to serve so that the parties may obtain another mediator.

- 4. Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator shall make full disclosure of any interest the mediator has in the subject matter of the dispute and any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator shall 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 shall withdraw from 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 shall make full disclosure as soon as practicable.

- 5. Mediator Qualifications.** A mediator shall 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 shall withdraw from the mediation. Likewise, the mediator shall decline to serve if the mediator feels unqualified to do so.

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

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

Comment (b). At a minimum the mediator shall 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, Texas Civil Practice and Remedies Code.)

7. **Convening the Mediation.** Unless the parties agree otherwise, the mediator shall 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 shall 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 Rules #9, 11 and 13 and associated comments below.

8. **Confidentiality.** A mediator shall 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 shall not permit recordings or transcripts to be made of mediation proceedings.

Comment (b). A mediator shall maintain confidentiality in the storage and disposal of records and shall 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 shall not disclose to the other parties information given in confidence by the disclosing party and shall maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator shall report to the court, if agreed to by the parties or required by 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 shall advise the parties that disclosure is required and will be made.

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

Comment. If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator shall 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 shall encourage the disclosure of information and shall assist the parties in considering the benefits, risks, and the alternatives available to them.

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

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

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

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

12. **No Judicial Action Taken.** A person serving as a mediator generally shall 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 shall 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 shall 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 shall encourage the parties to reduce all settlement agreements to writing.

15. **Mediator's Relationship with the Judiciary.** A mediator shall 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.