

# DALLAS BAR ASSOCIATION

## STANDARDS OF PRACTICE FOR MEDIATORS

### Preamble

These Standards of Practice are intended to promote public confidence in the mediation process and to be a guide for mediator conduct. They are not intended to be disciplinary rules or a code of conduct, but are intended to be ethical guidelines. Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly. These Standards of Practice are intended to apply in Dallas County to (1) all mediators conducting court annexed mediations and (2) all attorney-mediators conducting either court-annexed or voluntary mediations.

### Standards

1. **Mediation Defined.** Mediation is a private process in which an impartial person, a mediator, facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, and understanding. A mediator should not render a decision on the issues. 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 neither coerce nor make substantive decisions for a party. 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 between the mediator and the court or a party, 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 specific cases or matters.

*Comment (f).* A mediator should not mediate a dispute where another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

3. **Mediation Costs.** As early as practical, and before the mediation session begins, a mediator should explain all fees and other costs. 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.

4. **Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator should make full disclosure of any relationships with the parties or their counsel which may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party objects.

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

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.

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 process is allowed, and no rulings are made on the issues or the merits of the case; and (3) the mediation is privileged; any information revealed in the mediation is not subject to disclosure and may not be used as evidence against any participant in any judicial or administrative proceeding; the mediator reports 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 reset.

7. **Convening the Mediation.** 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 does not represent the pro se party.

8. **Confidentiality.** Information revealed in the mediation process is privileged and confidential, unless all parties agree otherwise, or as may be required by law.

*Comment (a).* Neither recordings nor transcripts should 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 or educational 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.*

*Comment (d).* In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, in a family law mediation, 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 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. Fairness.** A mediator should be fair in conducting the mediation.

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

**11. 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.

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

*Comment.* A mediator should explain to pro se parties the risks of proceeding without independent counsel to represent them.

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

*Comment.* It is inappropriate to act as a mediator in a matter in dispute either before or after the mediator has acted in or will act in a semi-judicial capacity. For example, attorney-mediators who have served as special masters in pending litigation should not subsequently serve as a mediator in the same case; likewise, attorney-mediators who have served as a mediator in pending litigation should not subsequently serve as a special master in the same case. Attorney-mediators who have served as a mediator in pending litigation should not subsequently serve as a guardian ad litem in the same case. However, in appropriate cases where an impasse has been declared, the mediator may, if requested by the parties, arbitrate the dispute.

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

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